

BOLI ORDERS

Final Orders Issued By The Commissioner
Of The Oregon Bureau of Labor and Industries

VOLUME 14

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W. W. GREGG

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BOLI ORDERS

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INTRODUCTORY NOTE

This fourteenth volume of BOLI ORDERS contains all of the Final Orders of the Commissioner of the Oregon Bureau of Labor and Industries that were issued between January 5, 1995, and February 9, 1996.

Each Final Order is reported in full text under the official title of the order. Preceding each Final Order is a synopsis, which provides immediate identification of the subject matter of the case and of the primary rulings contained in the order. In the caption of each case the charged party is referred to as the "Respondent." Within the body of some cases the charged party is referred to as the "Employer," the "Contractor," or the "Applicant."

A complete table of the Final Orders in this volume begins on page v. For each Final Order the table shows the page at which the order begins in this volume.

The Bureau of Labor and Industries Digest of Final Orders contains an outline of classifications for BOLI ORDERS. Case holdings and points of Wage and Hour and of Civil Rights law are arranged under classification numbers. The Digest contains a table of the Final Orders and a subject index for the complete set of BOLI ORDERS volumes.

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**In the Matter of
JESUS Q. GUZMAN,
Respondent.**

(3)(a), (l), and (4); 839-15-140(1)(c);
839-15-520(4); and 839-33-095.

Case Number 20-95
Amended Final Order^{*} of Hearings
Referee Warner W. Gregg
Issued January 5, 1995.

SYNOPSIS

Respondent, a licensed farm labor contractor with forestation endorsement, obtained the license after providing proof of his ability to pay the wages of up to 20 workers (\$10,000) during the license period; thereafter he employed over 60 workers, which required additional proof of his ability to pay wages (\$60,000). Respondent thereafter entered into a Consent Order with the Commissioner wherein he admitted his failure to provide new proof of his financial ability, and agreed to pay a \$1,000 civil penalty; the Commissioner agreed to forego further action to revoke his license. Respondent breached his agreement by paying the civil penalty with a bad check. Based on the previous violations and the breach of the Consent Order, the Hearings Referee revoked Respondent's farm labor contractor license and prohibited him from reapplying for a license for a period of three years. ORS 658.415(3)(a) and (c); 658.440(1)(d); 658.445; OAR 839-15-520

The above-entitled contested case came on regularly for hearing before Warner W. Gregg, designated as Hearings Referee by Mary Wendy Roberts, then Commissioner of the Bureau of Labor and Industries of the State of Oregon. That designation was confirmed by Jack Roberts, current Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held on December 22, 1994, in the conference room of the offices of the Bureau of Labor and Industries, 3865 Wolverine NE, Suite E-1, Salem, Oregon. The Bureau of Labor and Industries (the Agency) was represented by Judith Bracanovich, an employee of the Agency. Jesus Q. Guzman (Respondent), although served with the notice of the hearing, did not attend and was not represented by counsel. The Agency called no witnesses, but submitted into evidence portions of its file in order to establish a prima facie case.

Having fully considered the entire record in this matter, I, Warner W. Gregg, Hearings Referee and designee of the Commissioner of the Bureau of Labor and Industries, make the following Findings of Fact (Procedural and on the Merits), Conclusions of Law, Opinion, and Order."

* The original Order was issued January 3, 1995, but inadvertently dated 1994.

** Under OAR 839-33-000 to 839-33-095, *Expedited Contested Case Hearing Rules for Certain Licensing Matters* (Expedited Rules), the Commissioner of the Bureau of Labor and Industries grants authority to the Hearings Referee to issue a Final Order following hearing. OAR 839-33-095(1).

**FINDINGS OF FACT –
PROCEDURAL**

1) On October 27, 1994, the Agency issued a Notice of Proposed Revocation of Farm/Forest Labor Contractor License ("Notice of Revocation") to Respondent. The Notice of Revocation was served on Respondent at his record address by first class U.S. mail and informed Respondent that the Commissioner proposed to revoke Respondent's farm/forest labor contractor license pursuant to ORS 658.445(1), (2) and (3). The Notice of Revocation cited the following bases for the Agency's action:

"1. Respondent's farm/forest labor contractor license was renewed on or about January 26, 1994, for a period of one year; at the time of renewal, Respondent represented that he would employ no more than 20 workers during the current license year and was granted the license upon proof of financial ability to pay wages in the amount of \$10,000. On or about April 6, 1994, Respondent was employing between 73 and 78 workers on three forestation contracts, requiring proof of financial ability to pay wages in the amount of \$60,000, in violation of ORS 658.415(3). That violation, the change in conditions under which the license was issued, and Respondent's unfit character, competence, or reliability warranted revocation of the subject license pursuant to ORS 658.445 and OAR 839-15-520 (3)(l).

"2. Respondent executed a Consent Order on May 3, 1994, admitting the above violations of

ORS Chapter 658 and agreed to perform certain conditions, one being the payment of the sum of \$1,000 to the Commissioner as and for civil penalty, in consideration of the Commissioner foregoing further revocation action on the above violations. Respondent failed to pay said sum in lawful tender, thus breaching the Consent Order in violation of ORS 658.440(1)(d). That violation warranted revocation of the subject license pursuant to ORS 658.445 and OAR 839-15-520(3)(a)."

That mailing was not returned.

2) On October 27, 1994, the Agency sent the Hearings Unit a request for a hearing date, and on November 3, 1994, the Hearings Unit sent the Notice of Revocation to Respondent at his record address by first class U.S. mail, together with a Notice of Hearing setting forth the time and place of the hearing together with the following: a) a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413; and b) a complete copy of Oregon Administrative Rules (OAR) 839-33-000 to 839-33-095, regarding the contested case process. That mailing was not returned.

3) On November 30, 1994, the Agency filed a motion for hearing in writing, with supporting documents, reciting that the Agency's evidence was exclusively documentary and matters of official record, that any presentation by Respondent would be merely explanatory, addressing the penalty, could be presented in writing and that no monetary civil penalty was sought, and that a written hearing would

obviate travel to Salem for the Referee and the Case Presenter. The Agency's motion was served on Respondent at his record address by first class U.S. mail and was not returned.

4) The Expedited Rules do not specify a time for response to motions. In accordance with other hearings rules of this forum, the Hearings Referee allowed Respondent seven days within which to respond to the Agency's motion. No response was received and on December 19, 1994, the Hearings Referee ruled as follows in pertinent part, after observing that the Expedited Rules neither provide for nor prohibit a written hearing:

"However, the purpose of the [Expedited Rules] is to provide a rapid opportunity for the Agency to take licensing action while still affording applicants and licensees an opportunity to be heard. A hearing in writing does not seem compatible with that purpose unless there is compelling reason for the procedure. Travel between Portland and Salem, absent extreme weather or other travel conditions, does not appear compelling.

"The Agency's motion is denied and the hearing scheduled for 9:30 a.m., Thursday, December 22, 1994, will convene as scheduled ***"

A copy of the Hearings Referee's ruling was served on Respondent at his record address by first class U.S. mail.

5) At the commencement of the hearing, Respondent was not in attendance. The Hearings Referee, having heard nothing from Respondent

concerning delay or non-attendance, delayed the hearing for 30 minutes and then took evidence to establish a prima facie case in support of the Notice of Revocation, pursuant to OAR 839-33-085, after finding Respondent in default. The Hearings Referee found that Respondent had received the Notice of Contested Case Rights and Procedures as well as the Notice of Revocation and the Notice of Hearing.

6) Pursuant to ORS 183.415(7), the Agency was orally advised by the Hearings Referee of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

FINDINGS OF FACT – THE MERITS

1) On January 26, 1994, Respondent's license as a farm labor contractor, with forestation endorsement, was renewed by the Agency.

2) In April 1994, the Agency served Respondent with a Notice of Proposed Revocation of Farm/Forest Labor Contractor License (Notice). The Notice alleged that the basis for the Agency action was that at the time of license renewal, Respondent represented that he would employ no more than 20 workers during the license year and that as a result the license was granted upon proof of financial ability to pay wages in the amount of \$10,000, and that as of early April, Respondent was employing over 70 workers on three separate forestation contracts, requiring proof of financial ability to pay wages in the amount of \$60,000, in violation of ORS 658.415(3). The Agency further alleged that this violation and the changed conditions under which the license was issued warranted

revocation of the license. The Notice provided for Respondent's right to a contested case hearing.

3) Respondent retained counsel and in early May 1994 entered into a Consent Order with the Commissioner wherein Respondent waived his right to contested case hearing, admitted employing a total of 68 workers on three forestation contracts requiring proof of ability to pay wages of \$60,000 while he had maintained proof of ability to pay wages in the amount of \$10,000, violating ORS 658.415(3). Respondent obtained proof of ability to pay wages of \$60,000 and agreed to pay civil penalty in the amount of \$1,000 in lieu of revocation of his farm/forest labor contractor license and tender his check in that amount payable to the Agency, and promised to comply with ORS chapter 658 and rules adopted thereunder. In consideration of Respondent's compliance with the Consent Order, the statutes and rules, the Commissioner agreed to forego further action on the Notice.

4) As part of the implementation of the Consent Order, Respondent tendered his check in the amount of \$1,000 to Compliance Specialist Raul Pena on April 28, 1994. Pena gave Respondent a receipt therefore.

5) On June 2, 1994, Respondent's said check was dishonored by the payor bank due to insufficient funds and returned to the Agency unpaid. It has not since been redeemed or re-deposited.

CONCLUSIONS OF LAW

1) ORS 658.415(3) provides, in pertinent part:

"Each applicant shall submit with the application and shall continually maintain thereafter, until excused, proof of financial ability to promptly pay the wages of employees and other obligations specified in this section. The proof required *** shall be in the form of a corporate surety bond *** , an irrevocable letter of credit *** , a cash deposit or a deposit the equivalent of cash. * * * The amount of the bond *** or of the letter of credit shall be based on the maximum number of employees the contractor employs at any time during the year. The bond or letter of credit shall be:

"(a) \$10,000 if the contractor employs no more than 20 employees;

"(c) \$60,000 if the contractor employs 51 to 100 employees[.]"

ORS 658.440(1) provides, in part:

"Each person acting as a farm labor contractor shall:

"(d) Comply with the terms and provisions of all legal and valid agreements or contracts entered into in the contractor's capacity as a farm labor contractor.

OAR 839-15-520(3) provides, in pertinent part:

"The following actions of a Farm or Forest Labor Contractor license applicant or licensee *** demonstrate that the applicant's or licensee's character, reliability or competence make the applicant or licensee unfit to act as a Farm or Forest Labor Contractor:

"(a) Violations of any section of ORS 658.405 to 658.485;

"(l) Failure to maintain the bond or cash deposit as required by ORS 658.405 to 658.485."

Respondent's admitted failure to maintain the required bond or letter of credit in 1994 violated ORS 658.415(3).

2) Respondent's failure to pay the agreed upon civil penalty in lawful tender, in lieu of further revocation action in May, 1994, breached the Consent Order and violated ORS 658.440(1)(d).

3) ORS 658.445 provides:

"The Commissioner of the Bureau of Labor and Industries may revoke *** a license to act as a labor contractor upon the commissioner's own motion *** , if:

"(1) The licensee or agent has violated or failed to comply with any provision of ORS 658.405 to 658.503 and 658.830 and ORS 658.991(2) and (3); or

"(2) The conditions under which the license was issued have changed or no longer exist; or

"(3) The licensee's character, reliability or competence makes a licensee unfit to act as a farm labor contractor."

Respondent violated or failed to comply with portions of ORS 658.405 to 658.503; the conditions under which Respondent's license was issued no longer exist; the violation of ORS 658.415(3) and 658.440(1) demonstrate that Respondent's character, reliability, and competence make him unfit to act as a farm labor contractor. The Commissioner, or designee, is

authorized to revoke Respondent's farm labor contractor license under the facts and circumstances of this record, and the revocation imposed in the Order below is a proper exercise of that authority.

OPINION

Respondent defaulted by not attending the hearing. The Agency established that a) Respondent had failed to properly maintain sufficient surety and, b) Respondent, in an attempted disposition of that violation, failed to comply with his agreement to pay an agreed upon civil penalty. The tender of an insufficient funds check can in no way be considered as compliance with the promise to pay the civil penalty. The Commissioner had accepted that promise and agreed to forego revocation action based on future compliance, but the consideration for the Commissioner's promise failed when Respondent breached his agreement with the dishonored check. Accordingly, the Agency was free to renew enforcement action on the surety violation.

The latter violation, coupled with Respondent's demonstrated unfitness to act as a farm labor contractor, fully justifies the revocation action in the Order below. Pursuant to OAR 839-15-140(1)(c) and 839-15-520(4), where a farm labor contractor license has been revoked, the Commissioner will not issue the contractor license for a period of three years from the date of the revocation.

AMENDED ORDER

NOW, THEREFORE, as authorized by ORS 658.405 to 658.503 and OAR 839-33-095, for the Commis-

sioner of the Bureau of Labor and Industries I hereby revoke the license of JESUS Q. GUZMAN to act as a farm labor contractor with forestation endorsement, effective on the date of this Amended Final Order. JESUS Q. GUZMAN is prevented from reapplying for a license for a period of three years from the date of this revocation, in accordance with ORS 658.415(1)(c) and OAR 839-15-520(4).

**In the Matter of
TOLYA MENEYEV,
dba Fox Forestry, Respondent.**

Case Number 76-94

Final Order of the Commissioner

Jack Roberts

Issued February 1, 1995.

SYNOPSIS

Respondent, acting in his capacity as a farm labor contractor with forestation indorsement, failed to submit certified true copies of payroll records to the Commissioner at least once every 35 days from the date work began on two federal forestation contracts, and substantially underreported the number of workers on one certified payroll record that was submitted. The Commissioner found two violations of ORS 658.417(3) with aggravating circumstances. Respondent knowingly failed to provide workers' compensation insurance for his employees performing

manual forestation labor, in violation of ORS 658.417(4), with aggravating circumstances. Respondent failed to comply with the terms and provisions of a legal and valid contract entered into with the federal government in his capacity as a forest labor contractor, in violation of ORS 658.440(1)(d). The Commissioner assessed civil penalties of \$4,000 against Respondent, pursuant to ORS 658.453(1). ORS 658.440(1)(d); 658.417(3), (4); 658.453(1); OAR 839-15-508(1)(f), (2)(b) and (c); and 839-15-512(1), (2).

The above-entitled contested case came on regularly for hearing before Linda Lohr, designated as Hearings Referee by Mary Wendy Roberts, then Commissioner of the Bureau of Labor and Industries of the State of Oregon. That designation was confirmed by Jack Roberts, current Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held on September 27, 1994, in the conference room of the Bureau of Labor and Industries Office, 3865 Wolverine Street NE, Building E-1, Salem, Oregon. The Bureau of Labor and Industries (the Agency) was represented by Alan McCullough, an employee of the Agency. Tolya Meneyev (Respondent) was present throughout the hearing and was not represented by counsel.

The Agency called the following witnesses (in alphabetical order): Lesley Laing, Administrative Specialist, Farm Labor Unit, Wage and Hour Division, Bureau of Labor and Industries; and Gabriel Silva, Compliance Specialist, Farm Labor Unit, Wage and Hour Division, Bureau of Labor and

Industries. The Respondent called himself as his only witness.

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

**FINDINGS OF FACT –
PROCEDURAL**

1) On January 27, 1994, the Agency issued a Notice of Intent to Revoke Farm Labor Contractor License and to Assess Civil Penalties (Notice of Intent) to Respondent. The Notice of Intent informed Respondent that the Agency intended to revoke Respondent's license pursuant to ORS 658.445 and to assess civil penalties against him in the amount of \$5,500, pursuant to ORS 658.453. The notice cited the following bases for the Agency's action: (1) Respondent's failure to provide certified true copies of all payroll records to the Commissioner for forestation work done by all workers employed and paid directly by Respondent on a Bureau of Land Management (BLM) contract, number 1422H952-C-3-3011 (# 3011), in violation of ORS 658.417(3); (2) Respondent's failure to provide certified true copies of all payroll records to the Commissioner for forestation work done by all workers employed and paid directly by Respondent on a US Forest Service (USFS) contract, number 53-04KK-3-39 (# 3-39), in violation of ORS 658.417(3); (3) Respondent's failure to provide workers' compensation insurance for each of his forestation workers performing manual labor

upon USFS contract #3-39, in violation of ORS 658.417(4); and, Respondent's failure to comply with the terms and provisions of a valid agreement between Respondent and a contracting agency while acting in his capacity as a farm labor contractor, in violation of ORS 658.440(1)(d).

2) On February 8, 1994, the Notice of Intent was personally served on Respondent by the Marion County Sheriff.

3) By a letter dated March 2, 1994, Respondent requested a hearing on the Agency's intended action.

4) On April 21, 1994, after an extension of time to file an answer, Respondent filed a timely answer to the charges. In his answer, Respondent denied the allegations.

5) On May 31, 1994, the Agency requested a hearing from the Hearings Unit.

6) On July 8, 1994, the Hearings Unit issued to Respondent and the Agency a Notice of Hearing, which set forth the time and place of the requested hearing and the designated Hearings Referee. With the hearing notice, the Hearings Unit sent to Respondent a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413, and a complete copy of the Agency's administrative rules regarding the contested case process – OAR 839-50-000 through 839-50-420.

7) On September 6, 1994, the Agency filed a motion for summary judgment, with supporting documents. In accordance with OAR 839-50-150, Respondent had seven days within which to respond to the Agency's

motion. No response was received and the Hearings Referee deferred ruling on the motion until the commencement of hearing.

8) On September 14, 1994, the Hearings Referee issued a discovery order to the participants directing them each to submit a summary of the case, including a list of the witnesses to be called, and the identification and description of any physical evidence to be offered into evidence, together with a copy of any such document or evidence, according to the provisions of OAR 839-50-210(1). The summaries were due by September 20, 1994. The order advised the participants of the sanctions, pursuant to OAR 839-50-200(8), for failure to submit the summary.

9) The Agency submitted a case summary on September 21, 1994. Respondent did not file a case summary.

10) At the start of the hearing Respondent said that he had received and read the Notice of Contested Case Rights and Procedures and had no questions about it.

11) Pursuant to ORS 183.415(7), the Agency and Respondent were verbally advised by the Hearings Referee of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

12) Prior to the evidentiary portion of the hearing, the Hearings Referee granted partial summary judgment on the Agency's motion. Pursuant to OAR 839-50-150(4)(c), the Hearings Referee's ruling is set forth below.

13) On October 4, 1994, the Hearings Referee reopened the contested

case record to accept additional evidence regarding the status of Respondent's farm/forest labor contractor license. The Forum granted the Agency and Respondent until October 14, 1994, to submit additional evidence.

14) On October 11, 1994, the Agency submitted a letter, which the Hearings Referee received into the record, notifying the Hearings Referee that Respondent's license expired on January 31, 1994. The Agency withdrew that portion of the Notice of Intent seeking to revoke Respondent's farm/forest labor contractor license. Respondent did not submit evidence of his license status.

15) The hearing record closed on October 14, 1994.

16) A Proposed Order, which included an Exceptions Notice, was issued in this matter on December 12, 1994. Exceptions were due in the Hearings Unit by December 22, 1994. The Hearings Unit received no exceptions to the Proposed Order.

RULING ON MOTION FOR SUMMARY JUDGMENT

Pursuant to OAR 839-50-150(4), the Agency filed a motion for summary judgment on the allegations and relief requested in its Notice of Intent. It asserted that no genuine issue of fact existed and the Agency was entitled to judgment as a matter of law as to the alleged violations.

The Hearings Referee hereby grants summary judgment on the allegations in paragraphs III and IV of the Agency's Notice of Intent as follows:

Paragraph III: The Agency alleged that Respondent failed to provide

workers' compensation insurance coverage to his forestation workers performing manual labor between July 23 and August 17, 1993, in violation of ORS 658.417(4). The uncontroverted evidence shows that Respondent, while acting in his capacity as a farm labor contractor between July 23 and August 17, 1993, employed as many as forty workers on USFS contract #3-39 without providing workers' compensation coverage. Respondent was fined \$1,000 by the Workers' Compensation Division for his failure to provide the coverage and he did not appeal the penalty. Based on the credible evidence, and there being no facts in dispute, I find that Respondent violated ORS 658.417(4). Summary judgment on the Agency's suggested civil penalty is denied because Respondent is allowed, pursuant to OAR 839-15-510 (1), an opportunity to present mitigating evidence for the purpose of reducing the amount of the civil penalty to be imposed.

Paragraph IV: The Agency alleged that Respondent failed to comply with the terms and provisions of a valid contract between Respondent and the USFS, in violation of ORS 658.440 (1)(d). The uncontroverted evidence shows that Respondent, in his capacity as a farm labor contractor, entered into a timber thinning contract with the USFS, and then failed to show up at the prework meetings and failed to proceed with the work within the requisite time period. For those reasons, the USFS terminated the contract for default, and Respondent neither appealed the action nor did he file an alternative action. Based on the credible evidence, I find that Respondent

violated ORS 658.440(1)(d). For the same reasons cited in Paragraph III above, summary judgment on the Agency's suggested civil penalty is denied.

Summary judgment on the remaining violations alleged in paragraphs I and II, and on the issues pertaining to license revocation and the Agency's suggested civil penalties, is denied.

FINDINGS OF FACT - THE MERITS

1) Respondent was licensed by the Commissioner of the Bureau of Labor and Industries as a farm labor contractor with forestation indorsement in 1991. To get his license he had to pass a test, which asked many questions concerning farm labor contractor duties and responsibilities. Respondent knew farm labor contractors with forest indorsement have to file certified payroll records at least every thirty five days. Respondent knew farm labor contractors with a forest indorsement must provide workers' compensation insurance for their employees. The last license issued to Respondent expired on January 31, 1994.

2) At times material herein, Respondent did business as Fox Forestry and was a sole proprietor.

3) Between on or about January 6 and on or about February 15, 1993, Respondent performed the activities of a forest labor contractor pursuant to a contract between Respondent and the BLM, contract # 3011.

4) On January 26, 1993, Respondent and crew began work on contract # 3011. The crew numbers varied from day to day ranging from six workers on one day to as many as 24 workers on three of the days worked.

Respondent was present on the job site on at least 10 of the 20 days worked. Work was completed on February 15, 1993.

5) Respondent paid his workers directly on contract # 3011.

6) At times material, Lesley Laing was the custodian of all certified payroll records filed with the Farm Labor Unit (FLU) of the Agency.

7) On May 7, 1993, FLU received Respondent's certified payroll record for work performed up to February 17, 1993, on contract # 3011. The submission was postmarked May 4, 1993. The payroll record reported the hours and pay rates of only three workers. The minimum number of workers noted on the job site and recorded in the government's daily diaries between the date work began and the date the contract was completed was six workers observed on January 29, 1993.

8) The payroll record received on May 7, 1993, was the only payroll submission received by FLU from Respondent for contract # 3011.

9) Thirty five days after January 26, 1993, was March 2, 1993.

10) In mid-July of 1993, Respondent began a tree shading project in the Malheur Forest pursuant to a contract between Respondent and the USFS, contract # 3-39. The crew numbers varied from day to day with as many as 40 workers on the work site on July 28, 1993, and 38 workers on July 29, 1993. Respondent was on the work site on those days as well as others during the life of the contract. Work was completed on the contract on about August 17, 1993.

11) On July 27, 1993, Respondent and the Agency were notified by SAIF Corporation that, due to default, Respondent's workers' compensation coverage was canceled effective July 22, 1993. On August 2, 1992, the Agency advised Respondent by mail that he faced possible license revocation or the assessment of civil penalties unless the Agency received evidence of Respondent's reinstatement or procurement of new workers' compensation coverage by August 9, 1993. Respondent did not respond to the Agency's August 2, 1992, letter.

12) On August 30, 1993, the Department of Consumer and Business Services, Workers Compensation Division of the State of Oregon, issued a Proposed and Final Order Declaring Noncompliance and Assessing A Civil Penalty against Respondent for employing subject workers on a forestation contract (tree shading) on the Malheur National Forest, contract # 3-39, between July 23 and August 17, 1993, without workers' compensation coverage. Respondent was fined a civil penalty of \$1,000. Respondent did not appeal the Order and it became final on October 25, 1993.

13) As of August 24, 1994, Respondent has submitted no certified payroll records for contract # 3-39.

14) On December 15, 1992, Respondent, in his capacity as a farm labor contractor, entered into a timber thinning contract with the USFS, contract # 53-04P5-3-3083 (# 3083). On July 19, 1993, the contract was terminated for default based on Respondent's failure to make three separate prework meetings and failure to proceed with work within five days of

receipt of the Notice to Proceed on the contract. Respondent did not appeal the termination for default and his 90 day right to appeal has since expired. Although he had one year to do so, Respondent did not file an alternative action with the U.S. Claims Court.

15) In 1992, Respondent was awarded two reforestation contracts: USFS contract # 52-04T1-2-30 (# 2-30) on March 26, and BLM contract # 1422H952-C-2-2087 (# 2087) on April 29. Respondent performed work on both contracts. With regard to contract # 2-30, Respondent, on September 2, 1992, submitted a certified payroll report for payroll period June 30 through July 10, 1992. The payroll report was signed and dated on July 13, 1992. On September 22, 1992, the Agency advised Respondent of his obligation as a reforestation contractor on contract # 2087 to submit certified payroll reports at least once every 35 days. On October 29, 1992, the Agency advised Respondent of the same with regard to contract # 2-30. Other than the September 2, 1992, submission, Respondent submitted no other payroll reports in 1992.

16) Respondent has resided at 805 Elana Way, Woodburn, Oregon, since 1990. As of the hearing date, Respondent still resides and receives mail at that residence.

17) Respondent is no longer in the farm labor contracting business.

18) Respondent's testimony was not entirely credible. Although he did not deny any of the Agency's allegations, he testified he did not know of the requirement to file certified payroll records at least once every 35 days and that he was not aware his workers'

compensation policy had been canceled until after his contract was completed. When confronted by the Agency with documentary evidence contradicting his testimony, he claimed a memory loss and admitted he "probably" received the documents in the mail. His testimony was inconsistent and evasive at best; therefore, he was not believed where his testimony was controverted by other credible evidence.

ULTIMATE FINDINGS OF FACT

1) During all material times, Respondent was a licensed farm labor contractor with forestation indorsement, as defined by ORS 658.405, doing business in the State of Oregon as Fox Forestry, a sole proprietorship.

2) Between on or about January 26 and February 15, 1993, Respondent provided crews to perform forestation labor on BLM contract # 3011. Respondent did not timely provide the Commissioner of the Bureau of Labor and Industries with certified true copies of all payroll records for work done as a farm labor contractor when he paid employees directly. The payroll record submitted underreported the number of workers on the contract.

3) Between in or around mid-July of 1993, and on about August 17, 1993, Respondent provided crews to perform forestation labor on USFS, contract # 3-39. Respondent failed to provide the Commissioner of the Bureau of Labor and Industries with certified true copies of any payroll records for work done as a farm labor contractor when he was to pay employees directly.

4) Respondent failed to provide workers' compensation insurance for workers he employed to perform forestation labor between July 23, 1993, and August 17, 1993, on USFS, contract # 3-39.

5) Respondent failed to comply with the terms and provisions of the contract he entered into with the USFS, contract # 53-04P5-3-3083, by defaulting on the contract and causing its termination on July 19, 1992.

CONCLUSIONS OF LAW

1) The Commissioner of the Bureau of Labor and Industries of the State of Oregon has jurisdiction over the subject matter and of the person herein. ORS 648.405 to 658.485.

2) ORS 658.417 provides in part:

"In addition to the regulation otherwise imposed upon farm labor contractors pursuant to ORS 658.405 to 658.503 and 658.830, a person who acts as a farm labor contractor with regard to the forestation or reforestation of lands shall:

"(3) Provide to the Commissioner of the Bureau of Labor and Industries a certified true copy of all payroll records for work done as a farm labor contractor when the contractor pays employees directly. The records shall be submitted in such form and at such times and shall contain such information as the commissioner, by rule, may prescribe."

OAR 839-15-300 provides in part:

"(1) Forest Labor Contractors engaged in the forestation or reforestation of lands must, unless

otherwise exempt, submit a certified true copy of all payroll records to the Wage and Hour Division when the contractor or contractor's agent pays employees directly.

"(2) The certified true copy of payroll records shall be submitted at least once every 35 days starting from the time work first began on the forestation or reforestation of lands. More frequent submissions may be made.

"(3) The certified true copy of payroll records may be submitted on Form WH-141. This form is available to any interested person. Any person may copy this form or use a similar form provided such form contains all the elements of Form WH-141."

Respondent violated ORS 658.417(3) and OAR 839-15-300 by failing to submit within 35 days of beginning work on BLM contract # 3011 certified true copies of all payroll records for forestation work done as a farm labor contractor, where he paid employees directly, and underreported workers on the payroll he did submit.

3) Respondent violated ORS 658.417(3) and OAR 839-15-300 by failing to submit at any time on USFS contract # 3-39 certified true copies of all payroll records for forestation work done as a farm labor contractor, where he paid employees directly.

4) ORS 658.440(1) provides in part:

"Each person acting as a farm labor contractor shall:

"(d) Comply with the terms and provisions of all legal and valid

agreements or contracts entered into in the contractor's capacity as a farm labor contractor."

Respondent violated ORS 658.440(1)(d) by failing to comply with a legal and valid agreement he entered into with the federal government, USFS contract # 3083, in his capacity as a farm labor contractor.

5) ORS 658.417(4) provides in part:

"In addition to the regulation otherwise imposed upon farm labor contractors pursuant to ORS 658.405 to 658.503 and 658.830, a person who acts as a farm labor contractor with regard to the forestation or reforestation of lands shall:

"(4) Provide workers' compensation insurance for each individual who performs manual labor in forestation or reforestation activities regardless of the business form of the contractor and regardless of any contractual relationship which may be alleged to exist between the contractor and the workers notwithstanding any provision of ORS chapter 656, unless workers' compensation is otherwise provided."

Respondent violated ORS 658.417(4) by failing to provide workers' compensation insurance for each worker he employed to perform manual labor in forestation activities between July 22 and August 17, 1993 on USFS contract # 3-39.

6) ORS 658.453(1) provides in part:

"In addition to any other penalty provided by law, the Commissioner of the Bureau of Labor and Industries may assess a civil penalty not to exceed \$2,000 for each violation by:

"(c) A farm labor contractor who fails to comply with ORS 658.440(1) ***

"(e) A farm labor contractor who fails to comply with ORS 658.417(1) *** (3) or (4)."

OAR 839-15-508 provides in part:

"(1) Pursuant to ORS 658.453, the Commissioner may impose a civil penalty for violations of any of the following statutes:

"(f) Failing to comply with contracts or agreements entered into as a contractor in violation of ORS 658.440(1)(d).

"(2) In the case of Forest Labor Contractors, in addition to any other penalties, a civil penalty may be imposed for each of the following violations:

"(b) Failing to provide certified true copies of payroll records in violation of ORS 658.417(3).

"(c) Failing to provide Workers' Compensation insurance in violation of ORS 658.417(4)."

OAR 839-15-512 provides in part:

"(1) The civil penalty for any one violation shall not exceed \$2,000. The actual amount of the

civil penalty will depend on all the facts and on any mitigating and aggravating circumstances.

"(2) Repeated violations of the statutes for which a civil penalty may be imposed are considered to be of such magnitude and seriousness that a minimum of \$500 for each repeated violation will be imposed when the Commissioner determines to impose a civil penalty."

The Commissioner is authorized to impose a civil penalty for each of the violations, including repeated violations, found in paragraphs 2 through 5 of these Conclusions of Law.

OPINION

Summary Judgment

The Forum granted summary judgment on one violation of ORS 658.417(4) and on one violation of ORS 658.440(1)(d) based upon the Agency's allegations in its Notice of Intent and upon the uncontroverted evidence submitted with the Agency's motion for summary judgment. There was no issue of fact regarding those allegations to be decided at hearing, only the nature and extent of the imposition of civil penalties.

The Commissioner may assess a civil penalty not to exceed \$2,000 for each of the violations. ORS 658.453(1)(c) and (e); OAR 839-15-508(1)(f) and (2)(c). The Commissioner may consider mitigating and aggravating circumstances when determining the amount of any penalty to be imposed. OAR 839-15-510(1). It is the responsibility of the Respondent to provide the Commissioner with any mitigating evi-

dence. OAR 839-15-510(2). No mitigating evidence was presented.

The Forum finds that the magnitude and seriousness of Respondent's failure to provide workers' compensation insurance for his workers for almost a month in 1993 warrants the maximum civil penalty allowable. First, Respondent knew he was required to provide coverage and was notified by SAIF Corporation and the Agency as early as July 27, 1993, that he had no coverage for his workers and that his license was in jeopardy. His crew worked until about August 17, 1993. Respondent's claim that it wasn't until after his contract was completed that he became aware of his lack of coverage is not believable. This type of violation is particularly serious because it frustrates the Commissioner's ability to implement the law's requirements, and the requirement of providing workers' compensation insurance is fundamental for the protection of this state's workers. The Agency requested and this Forum hereby assesses a \$2,000 civil penalty for Respondent's violation of ORS 658.417(4).

The Agency presented no evidence of aggravating circumstances with regard to Respondent's failure to comply with the terms and provisions of the contract he had with the USFS. Other than the violations found herein, Respondent has no history of prior violations of statutes or rules. The Forum finds the magnitude and seriousness of this violation moderate.

Accordingly, the Forum assesses \$500 civil penalty for Respondent's violation of ORS 658.440(1)(d). *Cf., In the Matter of Francis Kau*, 7 BOLI 45 (1987) (\$500 for one violation of ORS

658.440(1)(d), regarding a USFS contract, included aggravating circumstances).

Failure to Provide Certified True Copies of Payroll Records

Oregon law requires forest labor contractors to submit to the Commissioner certified payroll records when the contractor pays the workers directly. The records must be submitted in such form and at such times and shall contain such information as the Commissioner, by rule, prescribes. ORS 658.417(3). The Commissioner has adopted a rule requiring certified payroll records to be submitted "at least once every 35 days starting from the time work first began on the forestation or reforestation of lands. More frequent submissions may be made." OAR 839-15-300(2). The Commissioner has construed this rule to require a contractor to submit these records at least once every 35 days from the time the contractor begins work on each contract. *In the Matter of Jon Paauwe*, 5 BOLI 168, 172 (1986).

Credible evidence established that Respondent began work on BLM contract, # 3011 on January 26, 1993. Respondent's only submission of payroll records for that contract was on May 7, 1993. The payroll records were due no later than March 2, 1993. Respondent was 65 days late with his submission. The evidence also established that, though Respondent began work on USFS contract # 3-39 in mid-July of 1993, and worked crews of substantial numbers until about August 17, 1993, no payroll records were ever submitted for that particular contract.

With regard to his failure to submit certified payroll records, Respondent

claimed he was not familiar with the requirements or how often payroll records were to be submitted. Such ignorance does not mitigate the violation. *Francis Kau, supra*. Moreover, he acknowledges that in order to become licensed he took and passed his farm/forest labor contractor test in 1991. The Forum takes official notice that not only must applicants for licenses pass a comprehensive test, but they also receive copies of the pertinent statutes and rules, and swear on the application that they will conduct their farm labor contractor business in accordance with those regulations. Even more compelling, Respondent was reminded twice by the Agency in 1992 of his specific obligation to file certified payroll records within 35 days of beginning work on forestation contracts. Accordingly, I cannot believe that Respondent was not aware of the payroll submission requirements. I find that Respondent's claim, in light of the contrary evidence, aggravates the violations.

Based on the credible evidence that Respondent did not provide certified payroll records to the Commissioner within the time required, the Forum finds two violations of ORS 658.417(3) with aggravating circumstances.

The Agency proposed to assess enhanced civil penalties for Respondent's violations. The Commissioner may assess a civil penalty not to exceed \$2,000 for each of the violations. ORS 658.453(1)(e); OAR 839-15-508(1)(2)(b). No mitigating evidence was presented. OAR 839-15-510(2).

Accordingly, because of the aggravating circumstances found herein and

the repeat violation, the Forum is imposing a civil penalty of \$500 for the first violation of ORS 658.417(3), for filing 65 days late on one contract, and \$1,000 for the repeat violation for failing to file certified payroll records at all on the second contract, for a total of \$1,500. See, *In the Matter of Jeffy Bolden*, 13 BOLI 292 (1994). See generally, *In the Matter of Cristobal Lumbreras*, 11 BOLI 167 (1993), and *In the Matter of Andres Ivanov*, 11 BOLI 253 (1993).

License Revocation

Because the Agency withdrew its proposal to revoke Respondent's farm labor contractor license, this Order does not reach the issue of whether Respondent's violations of various provisions of ORS 658.405 to 658.503 demonstrate that his character, competence, or reliability make him unfit to act as a farm labor contractor.

ORDER

NOW, THEREFORE, as authorized by ORS 658.453, TOLYA ME-NEYEV, dba Fox Forestry, is hereby ordered to deliver to the Bureau of Labor and Industries, Business Office Ste 1010, 800 NE Oregon Street # 32, Portland, Oregon 97232-2109, a certified check payable to the BUREAU OF LABOR AND INDUSTRIES in the amount of FOUR THOUSAND DOLLARS (\$4,000), plus any interest thereon, which accrues at the annual rate of nine per cent, between a date ten days after the issuance of this Order and the date Respondent complies with this Order. This assessment is the sum of the following civil penalties against Respondent:

(1) ONE THOUSAND FIVE HUNDRED DOLLARS (\$1,500) for two violations of ORS 658.417(3);

(2) TWO THOUSAND DOLLARS (\$2,000) for one violation of ORS 658.417(4); and,

(3) FIVE HUNDRED DOLLARS (\$500) for one violation of ORS 658.440(1)(d).

=====

**In the Matter of
KENNETH S. WILLIAMS,
dba Computer Processing Unlimited,
Respondent.**

Case Number 18-95

Final Order of the Commissioner

Jack Roberts

Issued February 23, 1995.

SYNOPSIS

Respondent sexually harassed Complainant in violation of ORS 659.030(1)(b) where, over a seven month period, he subjected her to unwelcome comments of a sexual nature on a daily basis and unwelcome touching of a sexual nature. The Commissioner awarded Complainant \$20,000 for emotional distress. ORS 659.030(1)(b); 659.040(1); OAR 839-03-025(1); 839-07-550(3); and 839-07-555(1).

The above-entitled contested case came on regularly for hearing before Alan McCullough, designated as

FINDINGS OF FACT – PROCEDURAL

1) On November 15, 1993, Complainant filed a verified complaint with the Civil Rights Division of the Agency. She alleged that Respondent had discriminated against her on the basis of sex, in that Respondent had sexually harassed her to such an extent that she was forced to quit.

2) After investigation, the Agency issued an Administrative Determination finding substantial evidence of unlawful employment practices, under ORS 659.030, by Respondent.

3) On October 24, 1994, the Agency prepared and duly served on Respondent Specific Charges which alleged that he discriminated against Complainant because of her sex, in violation of ORS 659.030(1)(b).

4) With the Specific Charges, the Agency served on Respondent the following: a) a Notice of Hearing setting forth the time and place of the hearing in this matter; b) a Notice of Contested Case Rights and procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case process; and d) a separate copy of the specific administrative rule regarding responsive pleadings.

5) On December 16, 1994, the Hearings Referee issued a discovery order to the participants directing them each to submit a summary of the case, including a list of the witnesses to be called, and the identification and description of any physical evidence to be offered into evidence, together with a copy of any such document or

Hearings Referee by Mary Wendy Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. That designation was confirmed by Jack Roberts, current Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held on January 5, 1995, in the conference room of the offices of the Bureau of Labor and Industries, 200 SE Hailey Avenue, Ste #308, Pendleton, Oregon. The Bureau of Labor and Industries (the Agency) was represented by Judith Bracanovich, an employee of the Agency. Toni Emerson (Complainant) was present throughout the hearing and was not represented by counsel. Kenneth S. Williams (Respondent) was also present throughout the hearing, but had previously been ruled in default and was not allowed to actively participate in the hearing.

The Agency called the following witnesses (in alphabetical order): Belinda Cooley, a former employee of Respondent; Rose Emerson, sister-in-law of Complainant; Theresa Maria Krough, a friend of Complainant; Susan Moxley, Senior Investigator, Civil Rights Division, Bureau of Labor and Industries; and Robert Skoubo, a former coworker of Complainant.

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

evidence, according to the provisions of OAR 839-50-200 and 839-50-210. The summaries were due by December 30, 1994. The order advised the participants of the sanctions, pursuant to OAR 839-50-200(8), for failure to submit the summary.

6) On December 27, 1994, the Agency submitted a timely summary. The Respondent failed to submit one.

7) On December 27, 1994, the Agency filed a Motion for Order of Default on the basis that Respondent had failed to file a timely answer.

8) On December 28, 1994, the Hearings Referee issued a Notice of Default.

9) On December 30, 1994, Respondent faxed an 8-page written response to the Notice of Default seeking relief from default and a postponement of the hearing.

10) On January 3, 1995, the Agency submitted a response to Respondent's request for relief from default and for postponement.

11) On January 3, 1995, the Hearings Referee issued a ruling on Respondent's request for relief from default and motion for postponement in which Respondent's request for relief from default and motion for postponement were both denied. That same day, a copy of the ruling was faxed to Respondent and the Agency Case Presenter.

12) At the time and place set forth in the Notice of Hearing for this matter, the Respondent appeared and was advised by the Hearings Referee that he had been held in default and would not be allowed to actively participate in the hearing in any way, but would be

allowed to attend the hearing as a spectator. Respondent chose to remain as a spectator and was present in that capacity during the entire hearing.

13) Pursuant to ORS 183.415(7), the Agency was verbally advised by the Hearings Referee of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

14) After the hearing was concluded and the record closed, the Hearings Referee advised the Respondent, in response to Respondent's question, that Respondent could file exceptions to the Proposed Order through an attorney, but that they would not be considered by the Commissioner when the Final Order was prepared. This conversation took place in the presence of the Agency Case Presenter.

15) A Proposed Order in this matter was issued and mailed on February 1, 1995, to all parties listed a certificate of mailing. The Proposed Order included an Exceptions Notice which stated any and all exceptions must be filed within 10 days of the issuance of that order. No exceptions were received from either party in this case.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent was a person doing business as Computer Processing Unlimited in Hermiston, Oregon.

2) Complainant is female.

3) Complainant was employed by Respondent as office manager on or about September 14, 1992. Her job duties included answering the telephone, doing the books, and inside

office sales. Respondent was Complainant's immediate supervisor.

4) On Complainant's third day of work, Respondent called her into his office and said "Wow, a pair of legs. Take your shoes off, I want to see if your legs are as long as they look without your heels." Complainant was "dumbfounded" and left "speechless" by this remark.

5) Throughout the remainder of Complainant's employment, except for a one to two week period in February 1993, Respondent made comments on a daily basis to Complainant about her legs. Examples of comments made by Respondent were "Wow, look at those legs" and "What a pair of legs." Complainant did not like these comments and found them offensive. When Complainant asked Respondent to stop making the comments, he laughed at her.

6) The computer password initially assigned to Complainant was "Bradlee" (phonetic). Approximately one month after Complainant was hired, she arrived at work one day and was unable to access her computer. When she brought this to Respondent's attention, he told her that he had changed her password to "legs". This angered and aggravated Complainant and she asked Respondent to change it back. Respondent refused to do so. Complainant's computer password, which she had to use daily each time she accessed Respondent's computer, remained "legs" during the remainder of her employment with Respondent.

7) Shortly after Complainant was hired, Respondent started asking her out for drinks after work on the pretext

that they would be meeting business "colleagues," stating it was "very important" to her job that she be there. However, no "colleagues" ever showed up. Complainant continued meeting Respondent for drinks for the purported "business meetings" but started bringing friends with her. Respondent became angry at this and began calling her a "bitch." Thereafter, when Respondent and Complainant were in the office together and Respondent wanted Complainant's attention, he would routinely call her on the phone and, instead of addressing Complainant by name, would say "Bitch, get in here." This occurred on a daily basis throughout the remainder of Complainant's employment, except for a one to two week period in February 1993. Complainant felt hurt, angry, and degraded over these comments and asked Respondent to stop on at least two occasions. Respondent's response was to laugh and retort "Dana liked it."

8) Respondent also referred to Complainant as "bimbette," "wench," "toots," and "concubine" when he wanted her attention. These comments occurred regularly. These comments angered Complainant to the point where she tried to "choke" Respondent once by putting her hands around his throat, as well as shoving him once or twice.

9) In early November 1992, Respondent asked Complainant to accompany him on an overnight business trip to Portland, indicating their respective spouses were not invited, and that he wanted her to cook his dinner for him and be waiting in bed for him. Complainant refused and

Respondent became angry with her. Respondent's proposal made it clear to Complainant that Respondent wanted her "to be something other than his office manager." Complainant experienced disbelief and anger over this. These feelings were aggravated by Complainant's financial circumstances, which put Complainant in the position of having to keep working for Respondent until she could find another job. Because of Respondent's ongoing sexual behavior towards her, Complainant had already begun looking for another job and continued that job search the entire time she worked for Respondent.

10) By the time Respondent asked Complainant to go to Portland with him, Respondent's behavior was causing Complainant to lose sleep and have "worse" headaches. It was hard for Complainant to get up and go to work.

11) At Christmas time 1992, Respondent gave Complainant a shirt and a male co-worker a book for presents. When Complainant wore the shirt to work, Respondent told her he hadn't bought it for her "to wear at work," he'd bought it "to see" Complainant "wear it in bed." This comment angered Complainant. She felt terrible, angry, and degraded and "would have liked to see him (Respondent) dead."

12) Complainant's sister-in-law, Rose Emerson, visited Complainant in Respondent's office about once a week. In January 1993, Respondent queried, in the presence of Complainant and Emerson, "I wonder which one of us in this room is the horniest," in response to their inquiry as to how much

Emerson should be charged for a fax she was sending to Canada on Respondent's fax machine. Complainant felt embarrassed over this comment and was in disbelief that Respondent had actually made the remark.

13) In February 1993, Complainant and Rose Emerson had lunch with Complainant's child support attorney, Dan Hill, who was also a friend of Respondent's. Complainant told Hill about Respondent's sexual behavior towards her and asked him to talk to Respondent about it. When she returned to Respondent's office after lunch, Respondent told her he would like to touch her "tush" (phonetic). When Complainant responded that would not be a good idea, Respondent then said "You know, it would be worth a sexual harassment charge just to reach out and grab your firm little ass." Complainant felt like hitting Respondent and told him if he did "he'd pick himself off the floor." Complainant experienced feelings of anger, hate, and disgust over Respondent's comments and began trying to avoid him.

14) Shortly after this incident, Dan Hill spoke with Respondent. Respondent then called Complainant into his office, instructing her to close the door, which she did despite her fears. Respondent told her he'd talked to a mutual friend and was hurt and couldn't believe she'd talked to someone about him, adding that things in the office were supposed "to stay in this office."

15) Respondent's behavior stopped for one to two weeks. During that time, it was very tense in the office. As a result of Respondent's behavior and the office atmosphere, Complainant was unable to sleep at nights, had

headaches on an almost daily basis, and was short-tempered at home. Although Complainant confided in Rose Emerson and Theresa Krough about her problems with Respondent, she was afraid to tell her husband because she feared he would physically retaliate against Respondent. She became very angry if anyone commented on her appearance. Although she usually talked to her sons about "everything", she stopped talking to them. She also stopped talking to her husband. Complainant was unable to wear a dress to go out and felt as though people were judging her by her looks. Complainant's behavior created a strained relationship at home between herself and her family.

16) Approximately one to two weeks after Respondent talked to her about his discussion with their "mutual friend", Respondent began addressing Complainant as "bimbette" and "toots" again on a daily basis. On one occasion when Rose Emerson was in the office, Respondent stated to them "What a pair of bimbettes". Respondent also "played" with Emerson's hair. This shocked and embarrassed Complainant and Emerson.

17) Respondent continued to invite Complainant out for drinks. When Complainant told him she was taking medication for a sleep disorder and allergies and she couldn't drink alcohol or would have to stop taking the medication, he told her to stop taking it and get drunk with him so he could have "his way" with her. Respondent became angry when she refused to drink with him. This occurred on several occasions before Complainant submitted her notice of resignation.

18) On another occasion, Respondent put his hands on Complainant's waist. Complainant turned around, shoved him, and called him a "shithead".

19) On numerous occasions during her employment with Respondent, Respondent looked at Complainant and told her he had "S.R.S." Respondent told her this was an acronym for "sperm retention syndrome". Complainant found this disgusting. Respondent also made this comment on several occasions when Complainant and Rose Emerson were both present in Respondent's office.

20) On March 24, 1993, Complainant "snapped and couldn't deal with it anymore." Knowing that she had some settlement money coming in from a worker's compensation claim and that child support payments would be coming to her soon, Complainant submitted her written resignation. Her resignation stated, in part, "This resignation is a direct result of my having to endure unwanted, unneeded sexual advances and harassment and the duress caused throughout my employment with CPU."

21) On March 25, 1993, Respondent told Complainant he was "shocked" Complainant had turned in her resignation and that he would not accept her resignation for the reasons given in her resignation letter. Later that day, he again asked her out for drinks.

22) On March 30, 1993, Complainant's next to last day of work, Respondent again asked Complainant to go out with him and get drunk so he could have "his way" with her.

23) While still employed by Respondent, Complainant called Theresa Krough, a municipal judge for the City of Umatilla and a friend of Complainant's for six years, at work and complained on different occasions that Respondent had told her "You've got nice long legs; I wish you could wrap them around me; You've got a nice ass;" and that Respondent had invited her to accompany her on a trip and that her husband wasn't welcome.

24) During her employment with Respondent, Complainant complained frequently to Rose Emerson over Respondent's comments about her body, calling her on an a daily basis during her last month of employment with Respondent. Complainant told Emerson that she had talked to Respondent about his behavior on two occasions. Emerson herself visited Complainant at least once a week in Respondent's office. On each visit, Respondent commented at least once, in Complainant and Emerson's presence, about Complainant's legs. In response to these comments, Emerson observed Complainant "giving him (Ken) a glare that probably should have froze the arctic over."

25) As a result of Respondent's behavior, Complainant has suffered mental distress in a number of ways since her termination. Those ways include depression, anxiety, sleep disorder, migraine headaches for which she has needed shots, feeling offended if any man calls her names, the inability to wear skirts or dresses for a long time, distrust of men, feeling offended if anyone comments on her looks, loss of self-esteem, uncertainty about her work ability, frustration, and agitation

whenever she talks about it. Complainant still suffers from some of these effects.

26) While testifying, Complainant was on the point of tears or actually crying much of the time. On several occasions, she was visibly shaking. When not testifying and seated by the Agency Case Presenter, she twisted her body in such a manner as to avoid looking at the Respondent. It was apparent that Complainant felt extreme discomfort in the Respondent's presence.

27) Belinda Cooley, a female, was employed by Respondent from August 1993 through January 1994 in the same capacity as Complainant. While she worked for Respondent, Respondent asked her out for a drink, told her she was a "sweater girl", a comment that Cooley took as referring to her breasts, and told her if he was awarded a \$75,000 bid they would have to get a motel and celebrate.

ULTIMATE FINDINGS OF FACT

1) During times material herein, Respondent was an employer in the State of Oregon who engaged or utilized the personal services of one or more employees subject to the provisions of ORS 659.010 to 659.435.

2) Complainant was employed by Respondent from on or about September 14, 1992, until March 31, 1993.

3) Complainant is female.

4) Respondent engaged in a course of verbal and physical conduct of a sexual nature towards Complainant because of her sex while she worked for Respondent.

5) Respondent's conduct was unwelcome to Complainant.

6) Respondent's conduct had the purpose or effect of unreasonably interfering with Complainant's work performance and creating an intimidating, hostile and offensive work environment for Complainant.

7) Complainant suffered severe mental distress as a result of Respondent's conduct, characterized by feelings of anger, shock, dislike of work, mental aggravation, fear, entrapment, degradation, embarrassment, disbelief, disgust, an inability to tolerate people commenting on her appearance, anxiety, loss of self-esteem, frustration, uncertainty about her job skills, loss of sleep, severe headaches, stress at home caused by her loss of ability to communicate with her sons and husband, anxiety over wearing a dress or skirt, and depression.

CONCLUSIONS OF LAW

1) At all times material, Respondent was an employer subject to the provisions of ORS 659.010 to 659.110.

2) The Commissioner of the Bureau of Labor and Industries of the State of Oregon has jurisdiction over the persons and subject matter herein.

3) ORS 659.030(1) provides, in part:

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

"* * *

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

OAR 839-07-550 provides, in part:

"Harassment on the basis of sex is a violation of ORS 659.030. It is discrimination related to or because of an individual's gender. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when such conduct is directed toward an individual because of that individual's gender and:

"* * *

"(3) Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."

OAR 839-07-555(1) provides, in part:

"An employer * * * is responsible for its acts * * * with respect to sexual harassment * * *."

Respondent violated ORS 659.030 (1)(b).

4) Pursuant to ORS 659.060 and by the terms of 659.010, the Commissioner of the Bureau of Labor and Industries has the authority to issue a Cease and Desist Order requiring Respondent to refrain from any action that would jeopardize the rights of individuals protected by ORS 659.010 to 659.110, to perform any act or series of acts reasonably calculated to carry out the purposes of said statutes, to eliminate the effects of an unlawful practice found, and to protect the rights of others similarly situated. The amounts awarded in the Order below are a proper exercise of that authority.

OPINION

Default

Respondent was found in default, pursuant to OAR 839-50-330(1)(a), for failing to file a timely answer to the Specific Charges. In default situations, the Agency must present a prima facie case in support of the Specific Charges and to establish damages. ORS 183.415(6); OAR 839-50-330(2). In default cases, the Respondent is not allowed to present any evidence, examine witnesses, or otherwise participate in the hearing. *In the Matter of Metco Manufacturing, Inc.*, 7 BOLI 55 (1987), *aff'd Metco Manufacturing, Inc. v. Bureau of Labor and Industries*, 93 Or App 317, 761 P2d 1362 (1988).

Prima Facie Case

To present a prima facie case of a violation of ORS 659.030(1)(b) for sexual harassment based on the existence of an intimidating, hostile, or offensive working environment, the Agency must present evidence on the following elements:

1. The Respondent is an employer as defined by statute;
2. The Complainant was employed by Respondent;
3. The Complainant is a member of a protected class (sex);
4. The Respondent, or Respondent's agent, supervisory employee, employee, or non-employee in the workplace made unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature, directed at Complainant because of Complainant's sex;

5. The conduct had the purpose or effect of unreasonably interfering with Complainant's work performance or creating an intimidating, hostile, or offensive working environment, or submission to such conduct was made an explicit or implicit term or condition of employment;

6. If the conduct of a sexual nature was directed at Complainant by Respondent's agent, supervisory employee, employee, or non-employee in the workplace, the Respondent knew or should have known of the conduct;

7. The Complainant was harmed by the conduct. OAR 839-05-010(1); 839-07-550.

The Agency has established a prima facie case. The credible testimony of Agency witnesses, together with documentary evidence submitted, was accepted and relied upon herein. The evidence presented satisfied all the aforementioned elements of a prima facie case.

Continuing Violation

Complainant seeks damages for Respondent's unlawful conduct during her entire period of employment with Respondent. That employment commenced in mid-September 1992 and ended on March 31, 1993. Respondent's unlawful conduct began on Complainant's third day of employment, on or about September 17, 1992, and continued through March 30, 1993.

ORS 659.040(1) provides that a complaint based on an alleged violation or violations of ORS 659.030:

"shall be filed no later than one year after the alleged unlawful employment practice."

OAR 839-03-025(1) interprets the statutory one-year statute of limitations in the following language:

"Except as provided in section (2) of this rule, a complaint must be filed with the Division within one year of the alleged unlawful practice. If the alleged unlawful practice is of a continuing nature, the right to file a complaint exists so long as the complaint is filed within one year from any date of occurrence. Example: a woman alleges that she has been paid less for doing the same work as a man employed by the same employer. This pay difference occurred from January 15, 1980 through December 31, 1980. She may file a complaint as early as January 15, 1980 and as late as December 31, 1981, because the alleged practice has continued over a certain period of time. * * *"

Based on the literal language of the statute, as interpreted by administrative rule, the Commissioner has the authority to accept complaints and investigate, hold hearings on, and award damages for any alleged unlawful practice that is of a "continuing nature," so long as the complaint is filed "within one year of any date of occurrence."

In this case, the complaint was filed on November 15, 1993. The final unlawful act occurred on March 30, 1993. (Finding of Fact 22 – The Merits). There is no question that the complaint was filed "within one year of any date of occurrence." The only issue is whether the unlawful acts prior to

November 15, 1992, were of a "continuing nature" such that damages may be awarded.

The issue of "continuing violation" has not been litigated previously in this Forum. However, it has been litigated extensively in related actions in federal court. While federal case law interpreting federal statutes and regulations that are similar to Oregon's laws are not binding on the Forum, they are instructive and may be adopted as precedent in Oregon cases. *In the Matter of C & V, Inc.*, 3 BOLI 152, 160 (1982). In cases where this issue has arisen, federal courts have held that, where there is an ongoing, continuous series of discriminatory acts, they may be challenged in their entirety as long as one of those discriminatory acts falls within the limitations period. *Havens Realty Corp. v. Coleman*, 455 US 377, 380-81 (1982); *Sosa v. Hiraoka*, 920 F2d 1451, 1455-56 (9th Cir 1990); *Haithcock v. Frank*, 958 F2d 671 (6th Cir 1992). Whether or not discriminatory acts are "continuing" can be shown "by demonstrating a series of related acts against a single individual." *Green v. Los Angeles County Superintendent of Schools*, 883 F2d 1472, 1480 (9th Cir 1989); *Sosa*, at 1455. The Forum adopts the definition of "continuing" as set forth in *Green* and *Sosa* as precedent in this matter.

In this case, there is no doubt that the Agency established "a series of related acts against a single individual" that were discriminatory. The Agency also established that Complainant filed her complaint within one year from the date of any occurrence. Therefore, the Forum concludes that the Agency established a continuing violation and

that Complainant is eligible for an award of damages encompassing the entire duration of her employment with Respondent.

Nature of the Harassment and Damages

Respondent's sexual conduct towards Complainant began on her third day of employment and continued on a daily basis throughout her employment with Respondent. This conduct was unwelcome to Complainant. It unreasonably interfered with her work performance and created an intimidating, hostile, and offensive work environment.

Complainant repeatedly asked Respondent to stop the behavior, even asking her attorney, a mutual friend, to intervene. Respondent completely disregarded Complainant's requests. His attitude was most clearly demonstrated in his statement to Complainant that it would be "worth a sexual harassment charge" to grab Complainant's "firm little ass" and in two sexual propositions he made to her after she submitted her written resignation stating that Respondent's sexual conduct was the primary reason for her resignation.

The distress Complainant experienced as a result of Respondent's sexual conduct was further aggravated because of financial circumstances that made it virtually impossible for her to quit. This caused her to feel trapped and to start looking for other work soon after she was hired. Although Respondent was not the cause of Complainant's financial circumstances, it has long been held by this Forum that "Respondents must take Complainants as they find them." *In the Matter of Loyal*

Order of Moose, 13 BOLI 1, 12 (1994). Accordingly, Complainant may be compensated for the aggravated distress that resulted when the stress brought on by her financial circumstances was magnified by the stress caused by Respondent's sexual harassment.

The duration, frequency, and severity of the sexual harassment and extent of undisputed emotional distress experienced by Complainant are substantial. The Forum finds that the Agency's claim for \$20,000 damages for emotional distress is appropriate and is granted.

The Forum notes that the facts of this case as presented would support a substantially larger award of damages than pled for by the Agency and that the Forum would grant this larger award, were it in the Forum's power to do so. However, the Forum lacks the discretion to grant an award of damages greater than that sought by the Agency in its Specific Charges or subsequent amendments. *In the Matter of 60 Minute Tune*, 9 BOLI 191, 204 (1991), *aff'd without opinion, Nida v. Bureau of Labor and Industries*, 119 Or App 508, 852 P2d 974 (1993). The Forum also notes that in a default situation, the charging document sets the limit on the relief which the Forum can consider. Therefore, even if the Agency had desired to do so, it lacked the ability, once the default was granted, to amend the Specific Charges to plead for greater damages to conform to the evidence presented at the hearing. *In the Matter of Jack Mongeon*, 6 BOLI 194, 201-02 (1987); *In the Matter of Salem Construction Company, Inc.*, 12 BOLI 78, 79 (1993).

ORDER

NOW, THEREFORE, as authorized by ORS 659.060(3) and 659.010(2) and in order to eliminate the effects of the unlawful practice found as well as to protect the lawful interest of others similarly situated, the Respondent, KENNETH S. WILLIAMS, is hereby ordered to:

1) Deliver to the Business Office of the Portland Office of the Bureau of Labor and Industries a certified check, payable to the Bureau of Labor and Industries in trust for TONI EMERSON, in the amount of TWENTY THOUSAND DOLLARS (\$20,000), representing compensatory damages for the mental and emotional distress suffered by TONI EMERSON as a result of Respondent's unlawful practice found herein, PLUS interest at the legal rate from the date of this Order until Respondent complies herewith, and

2) Cease and desist from discriminating against any employee based upon the employee's sex.

In the Matter of JUAN J. GONZALEZ, Respondent.

Case Number 12-95
Final Order of the Commissioner
Jack Roberts
Issued February 27, 1995.

SYNOPSIS

Respondent, an unlicensed farm labor contractor, was paid on a commission basis for supplying workers to four farms. In four prior proceedings, the four farmers were assessed civil penalties for using an unlicensed contractor (Respondent) and did not oppose the assessment. Respondent admitted to the Agency that he supplied the workers as alleged while he was unlicensed. The Commissioner granted the Agency's motion for summary judgment and assessed progressive civil penalties totaling \$5,500 against Respondent. ORS 658.405; 658.410; 658.415; 658.453(1); OAR 839-15-125; 839-15-505; 839-15-508; and 839-15-512.

The above-entitled contested case came on regularly before Warner W. Gregg, designated as Hearings Referee by Mary Wendy Roberts, then Commissioner of the Bureau of Labor and Industries of the State of Oregon. That designation was confirmed by Jack Roberts, current Commissioner of the Bureau of Labor and Industries of the State of Oregon. The Bureau of Labor and Industries (the Agency) was represented by Judith Bracanovich, an employee of the Agency. Juan J.

Gonzalez (Respondent),* was served with a Notice of Intent to Assess Civil Penalties and requested a contested case hearing. He was not represented by counsel.

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

FINDINGS OF FACT – PROCEDURAL

1) On August 10, 1994, the Agency issued a "Notice of Intent to Assess Civil Penalties" (Notice of Intent) to Respondent. The notice informed Respondent that the Agency intended to assess civil penalties against him in the amount of \$5,500, pursuant to ORS 658.453. The notice cited the following bases for the Agency's intended actions:

"Acting As A Farm Labor Contractor Without A Valid License. (Four Violations) Between in or around April, 1992, and in or around October, 1992, Contractor, for an agreed remuneration or rate of pay, recruited, solicited and supplied workers to farmers in Vale, Oregon: Jim Mizuta; Kamo Farms, Inc.; Steve R. Koda and William Koda, dba Koda Farms; and T & F Kuwahara Bros., Inc. At all times material, Contractor did not possess a valid farm labor contractor license, in violation of ORS

658.410, ORS 658.415 and OAR 839-15-125. Civil Penalty of \$5,500.00"

The Notice of Intent was served on Respondent on August 13, 1994.

2) By letter dated August 21 and received August 29, 1994, Respondent requested a hearing on the Agency's intended action, stating:

"I Juan J. Gonzalez would like to request for a hearing. This hearing concerns me not being licensed to contract labor work. My request for a hearing must be held here in Ontario, Oregon, any time of the month. Preferably [sic] in the afternoon 3:30 thru 5:00 p.m.

"Sincerely,
"Juan J. Gonzalez
"740 NW 3rd St
"Ontario, Oregon 97914

"Unlicensed farm labor contractor is not factual. I dinie [sic] it."

4) The Agency requested a hearing from the Hearings Unit and on October 11, 1994, the Hearings Unit issued to the participants a "Notice of Hearing," which set forth the time and place of the requested hearing and the designated Hearings Referee. With the hearing notice, the Hearings Unit sent to Respondent a "Notice of Contested Case Rights and Procedures" (Notice of Rights) containing the information required by ORS 183.413, and a complete copy of the Agency's administrative rules regarding the contested case process – OAR

839-50-000 through 839-50-420. The hearing notice, the Notice of Rights and the rules were served on Respondent by US mail at the address where he received service of the Notice of Intent and from whence he filed his hearing request and answer, and none of this mailing was returned undelivered.

5) On November 15, 1994, the Agency filed two motions, one to amend its Notice of Intent and the second for Summary Judgment. On November 16, 1994, the Agency filed a motion for a telephone hearing, setting forth the reasons therefor, including the Agency's assumption its earlier summary judgment motion would either eliminate the need for hearing or reduce the issues. The Agency served copies of all three motions on Respondent by US mail at the address where he received service of the Notice of Intent and from whence he filed his hearing request and answer, and none of this mailing was returned undelivered.

6) Under OAR 839-50-150, Respondent had seven days from November 15 in which to respond to the Agency's motions of that date and seven days from November 16 in which to respond to the telephone hearing motion. No response to any of the Agency's motions was received.

7) On November 28, 1994, the Agency filed a supplement to its motion for summary judgment, with additional documents.

8) On November 28, the Hearings Referee ruled as follows on the Agency's motion to amend, after noting that no objection to the motion had been received:

"It appearing that the requested amendment will not prejudice Respondent, the Agency's motion to amend is granted and the Notice of Intent is hereby amended as requested and the words 'recruited, solicited and' appearing at lines 14-15 are hereby stricken from the document."

9) Also on November 28, 1994, the Hearings Referee ruled on the Agency's motion for summary judgment, after noting that no response to the motion had been received. The Referee cited OAR 839-50-150(4), dealing with summary judgment, which provides in part:

"(a) * * * The motion may be based on any of the following conditions:

" * * * "

"(B) No genuine issue as to any material fact exists and the participant is entitled to a judgment as a matter of law, as to all or any part of the proceedings * * * ."

Reciting that the motion was accompanied by documents and affidavits establishing that Respondent had admitted to an Agency representative that he had worked as a farm labor contractor in 1992 when he did not have a farm labor contractor license, further establishing that Respondent had been paid by four different farms for supplying workers as a farm labor contractor to each of them in 1992, that the Agency's licensing unit had no record of Respondent being licensed in 1992, and that all four farmers to whom Respondent had supplied workers had been assessed civil penalties for failing to verify Respondent's status

* The Agency's charging document, the Notice of Intent, refers to Mr. Gonzalez as "Contractor." As is customary for this forum, this Order uses the term "Respondent" to identify the party charged.

** "Participant" or "participants" includes both the Respondent and the Agency. OAR 839-50-020(13).

as to a license in 1992 when he supplied the workers to them, the Referee concluded:

"The sole issue is whether Respondent supplied workers for farm work and thus acted as a farm labor contractor while he was unlicensed. There is irrefutable evidence that he did so, and the Agency is entitled to judgment as a matter of law. In accordance with OAR 839-50-150(4)(c), this ruling will be set forth in the Proposed Order to be issued herein.

"Because there remains nothing to be determined at hearing other than the penalty, and the Agency has requested minimum, mandatory penalties, the hearing scheduled for December 14, 1994, is not necessary and is hereby canceled. Respondent shall have ten days from the date of this ruling to object to, challenge or otherwise oppose this ruling. Thereafter, within 30 days of the expiration of that time, the Hearings Referee will issue a Proposed Order encompassing this ruling."

10) The ruling of November 28 canceling the December 14 hearing made the Agency motion for telephone hearing moot.

11) The Hearings Unit served a copy of the Hearings Referee's rulings of November 28 on Respondent by US mail at the address where he received service of the Notice of Intent and from whence he filed his hearing request and answer, and none of this mailing was returned undelivered. No objection, challenge or other opposition to the ruling has thereafter been received by the Hearings Unit. By the terms of

the Referee's ruling of November 28, 1994, the record herein closed December 8, 1994.

12) Based upon the record herein, the forum finds that Respondent received the Notice of Intent, the Notice of Rights, the Notice of Hearing, the Agency's various motions and the Hearings Referee's rulings thereon.

13) The Proposed Order herein, which included an Exceptions Notice, was issued on January 24, 1995. Exceptions, if any, were due by February 3, 1995. No exceptions were received.

FINDINGS OF FACT – THE MERITS

1) During all times material herein, Respondent was an individual residing in or near Ontario, Oregon. During the calendar year 1992, Respondent was not a licensed farm labor contractor.

2) In the months of April, May, June, August, and September 1992, Respondent supplied workers to Kamo Farms, Inc., of Vale, Oregon, to perform labor in the production of farm products. Kamo Farms, Inc., did not pay these workers directly, but provided payment to Respondent, who was to pay the workers. The payments to Respondent in each instance included a commission as compensation for supplying the workers, based upon pounds of crops harvested or upon a percentage of the collective hourly compensation of the crews he supplied, depending on the type of labor performed.

3) In September 1994, Kamo Farms, Inc., was assessed a civil penalty by the Agency of \$500 by default for using an unlicensed contractor, Respondent herein, in violation of ORS 658.437(2).

4) In the months of May, June, July, August, and September 1992, Respondent supplied workers to Jim Mizuta, of Vale, Oregon, to perform labor in the production of farm products. Jim Mizuta did not pay these workers directly, but provided payment to Respondent, who was to pay the workers. The payments to Respondent in each instance included a commission as compensation for supplying the workers, based upon pounds of crops harvested, upon a percentage of the collective hourly compensation of the crews he supplied, or upon the acreage harvested or cultivated, depending on the type of labor performed.

5) In September 1994, Jim Mizuta paid a civil penalty of \$500 assessed by the Agency for using an unlicensed contractor, Respondent herein, in violation of ORS 658.437(2).

6) In the months of May, June, July, August, September, and October 1992, Respondent supplied workers to Steve Koda, dba Koda Farms, of Vale, Oregon, to perform labor in the production of farm products. Steve Koda did not pay these workers directly, but provided payment to Respondent, who was to pay the workers. The payments to Respondent in each instance included a commission as compensation for supplying the workers, based upon a percentage of the collective hourly compensation of the crews he supplied.

7) In November 1994, Steve Koda, dba Koda Farms, paid a civil penalty of \$500 assessed by the Agency for using an unlicensed contractor, Respondent herein, in violation of ORS 658.437(2).

8) In the months of May, June, July, August, and September 1992, Respondent supplied workers to T & F Kuwahara Bros., Inc., of Vale, Oregon, to perform labor in the production of farm products. T & F Kuwahara Bros., Inc. did not pay these workers directly, but provided payment to Respondent, who was to pay the workers. The payments to Respondent in each instance included a commission as compensation for supplying the workers, based upon pounds of crops harvested, upon a percentage of the collective hourly compensation of the crews he supplied, or upon the acreage harvested or cultivated, depending on the type of labor performed.

9) In August 1994, T & F Kuwahara Bros., Inc. paid a civil penalty of \$500 assessed by the Agency for using an unlicensed contractor, Respondent herein, in violation of ORS 658.437(2).

CONCLUSIONS OF LAW

1) The Commissioner of the Bureau of Labor and Industries of the State of Oregon has jurisdiction over the subject matter and of the persons herein. ORS 648.405 to 658.503.

2) ORS 658.405 provides in part:

"As used in ORS 658.405 to 658.503 * * * unless the context requires otherwise:

"(1) 'Farm labor contractor' means any person who, for an agreed remuneration or rate of pay, * * * supplies or employs workers to perform labor for another to work in forestation or reforestation of lands, * * * or the production or harvesting of farm products; or who * * * supplies or

employs workers on behalf of an employer engaged in those activities; ***"

As a person supplying workers to perform labor in the production of farm products, Respondent was acting as a farm labor contractor in the State of Oregon and was and is subject to the provisions of ORS 658.405 to 658.503.

3) ORS 658.410(1) provides in part:

"[N]o person shall act as a farm labor contractor without a valid license *** issued to the person by the Commissioner of the Bureau of Labor and Industries. ****"

ORS 658.415(1) provides in part:

"No person shall act as a farm labor contractor unless the person has first been licensed by the commissioner pursuant to ORS 658.405 to 658.503 ****"

OAR 839-15-125 provides in part:

"No person may perform the activities of a Farm *** Labor Contractor without first obtaining a temporary permit or license issued by the Bureau. ****"

By supplying workers to Kamo Farms, Inc., beginning April 29, 1992, and continuing thereafter for a commission as compensation for supplying the workers, Respondent acted as a farm labor contractor without a license therefor and thereby violated ORS 658.410, 658.415, and OAR 839-15-125.

4) By supplying workers to T & F Kuwahara Bros., Inc., beginning May 1, 1992, and continuing thereafter for a commission as compensation for supplying the workers, Respondent acted as a farm labor contractor without a license therefor and thereby violated

ORS 658.410, 658.415, and OAR 839-15-125.

5) By supplying workers to Jim Mizuta beginning May 15, 1992, and continuing thereafter for a commission as compensation for supplying the workers, Respondent acted as a farm labor contractor without a license therefor and thereby violated ORS 658.410, 658.415, and OAR 839-15-125.

6) By supplying workers to Steve Koda, dba Koda Farms, beginning May 19, 1992, and continuing thereafter for a commission as compensation for supplying the workers, Respondent acted as a farm labor contractor without a license therefor and thereby violated ORS 658.410, 658.415, and OAR 839-15-125.

7) ORS 658.453(1) provides in part:

"In addition to any other penalty provided by law, the Commissioner of the Bureau of Labor and Industries may assess a civil penalty not to exceed \$2,000 for each violation by:

"(a) A farm labor contractor who, without the license required by ORS 658.405 to 658.503 and 658.830, *** supplies or employs a worker."

OAR 839-15-505 provides in part:

"(2) 'Violation' means a transgression of any statute or rule, or any part thereof and includes both acts and omissions."

OAR 839-15-508 provides in part:

"(1) Pursuant to ORS 658.453, the Commissioner may impose a civil penalty for violations of any of the following statutes:

"(a) Acting as a farm *** labor contractor without a license in violation of ORS 658.410;"

OAR 839-15-512 provides in part:

"(1) The civil penalty for any one violation shall not exceed \$2,000. The actual amount of the civil penalty will depend on all the facts and on any mitigating and aggravating circumstances.

"(3) When the Commissioner determines to impose a civil penalty for acting as a farm *** labor contractor without a valid license, the minimum civil penalty shall be as follows:

"(a) \$500 for the first offense;

"(b) \$1,000 for the second offense;

"(c) \$2,000 for the third and each subsequent offense."

Under the facts and circumstances of this record, and in accordance with ORS 658.453 and related portions of ORS 658.405 to 658.503 and of Oregon Administrative Rules, the Commissioner of the Bureau of Labor and Industries has the authority to impose civil penalty for each violation found herein, as follows:

For acting as a farm labor contractor without a license therefor April 29, 1992, and thereafter in connection with Kamo Farms, Inc., \$500;

For acting as a farm labor contractor without a license therefor May 1, 1992, and thereafter in connection with T & F Kuwahara Bros., Inc., \$1,000;

For acting as a farm labor contractor without a license therefor May 15,

1992, and thereafter in connection with Jim Mizuta, \$2,000; and

For acting as a farm labor contractor without a license therefor May 19, 1992, and thereafter in connection with Steve Koda, dba Koda Farms, \$2,000.

OPINION

The forum granted the Agency's motion for summary judgment because the evidence of Respondent's statutory violations was uncontroverted. The undisputed facts were that Respondent, from April to October 1992, supplied workers to four separate farming enterprises, collecting commissions in each instance based on the farm labor performed by the workers supplied. By the records of the Agency and by Respondent's own admission to the Agency, Respondent did not have a farm labor contractor license at any time in 1992. The record confirms that each of the farm enterprises involved was itself assessed a civil penalty for failing to verify that Respondent was a properly licensed farm labor contractor. None of them contested the assessment.

The Commissioner's rules provide that a civil penalty may be imposed for each violation of acting as a farm labor contractor without a license. Further, there are minimum penalties provided by those rules, which, if the Commissioner determines to assess a penalty, must be imposed. The first offense carries a minimum penalty of \$500, the second a minimum penalty of \$1,000, and each subsequent offense a minimum penalty of \$2,000. Such a scheme assures that accidental or isolated offenses are not treated as seriously as the repeated and apparently

deliberate violations which occurred in this case.

ORDER

NOW, THEREFORE, as authorized by ORS 658.453, Juan J. Gonzalez is hereby ordered to deliver to the Bureau of Labor and Industries, Business Office Ste 1010, 800 NE Oregon Street # 32, Portland, Oregon 97232-2109, a certified check payable to the BUREAU OF LABOR AND INDUSTRIES in the amount of FIVE THOUSAND FIVE HUNDRED DOLLARS (\$5,500), plus any interest thereon which accrues at the annual rate of nine percent between a date ten days after the date of the Final Order herein and the date Respondent complies therewith. This assessment is for civil penalties against Respondent of Five Thousand Five Hundred Dollars for four violations of ORS 658.410(1).

In the Matter of
ROBERT ARREOLA,
aka Roberto Arreola, dba Arreola Enterprises, Inc., Respondent.

Case Number 17-95
Final Order of the Commissioner
Jack Roberts
Issued March 2, 1995.

SYNOPSIS

Where Respondent submitted an answer to the Order of Determination, requested a hearing, and failed to

appear at the hearing, the Commissioner found Respondent in default of the charges set forth in the charging document. The Commissioner found that the Agency made a prima facie case supporting the Agency's Order of Determination on the record, that Claimant was an employee of Respondent, and that Respondent failed to pay Claimant at the agreed rate all wages due upon Claimant's termination by mutual agreement, in violation of ORS 652.140(1) and OAR 839-20-030 (overtime wages). Respondent's failure to pay was willful, and the Commissioner ordered Respondent to pay civil penalty wages, pursuant to ORS 652.150.

The above-entitled contested case came on regularly for hearing before Linda Lohr, designated as Hearings Referee by Mary Wendy Roberts, then Commissioner of the Bureau of Labor and Industries for the State of Oregon. That designation was confirmed by Jack Roberts, current Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on December 2, 1994, in the conference room of the Bureau of Labor and Industries office, 3865 Wolverine NE, Suite E-1, Salem, Oregon. The Bureau of Labor and Industries (the Agency) was represented by Judith Bracanovich, an employee of the Agency. Luis Efrain Hernandez Garcia (Claimant) was present throughout the hearing and not represented by counsel. Robert Arreola, aka Roberto Arreola (Respondent), after being duly notified of the time and place of this hearing, failed to appear in person or through a representative.

The Agency called the following witnesses: Luis Efrain Hernandez Garcia, Claimant; Leticia Piette, Office Specialist, Wage and Hour Division; and Raul Pena, Compliance Specialist, Wage and Hour Division.

Monica Hay, appointed as interpreter by the Forum pursuant to ORS 183.418(3)(b) and OAR 839-50-300, under proper affirmation, translated for Claimant, who could not readily communicate in the English language, but could do so in the Spanish language.

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

RULING ON MOTION

At the beginning of the hearing, the Agency moved for three technical amendments to the Order of Determination: (1) to amend the monetary figure to read \$1,721.14, instead of \$1,721.13; (2) to amend the date from which interest accrues from February 1, 1993, to November 1, 1993; and (3) to amend Respondent's name to include the name Respondent goes by throughout the evidence: "Robert Arreola, aka Roberto Arreola, dba Arreola Enterprises, Inc." This motion was made to correct clerical errors and for clarity and is hereby granted.

FINDINGS OF FACT – PROCEDURAL

1) On September 29, 1993, Claimant filed a wage claim with the Agency. He alleged that he had been employed by Respondent and that Respondent

failed to pay wages earned and due to him.

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

3) Claimant's wage claim was brought within the statute of limitations (six years).

4) On May 20, 1994, the Commissioner of the Bureau of Labor and Industries, through the Marion County Sheriff, served on Respondent at 954 Norway NE, Salem, Oregon, Order of Determination Number 93-251 (Determination 93-251) based upon the wage claim filed by Claimant and the Agency's investigation. Determination 93-251 found that Respondent owed a total of \$1,721.14 in wages and \$1,912.20 in civil penalty wages. Determination 93-251 required that, within 20 days, Respondent either pay these sums in trust to the Agency or request an administrative hearing and submit an answer to the charges.

5) On May 25, 1994, Respondent filed an answer to Determination 93-25. Respondent's answer contained a request for a contested case hearing and denied that Respondent owed Claimant the amount of unpaid wages determined by the Agency, and further set forth the affirmative defense that Respondent was not Claimant's employer during the alleged period of employment.

6) On October 14, 1994, the Agency sent the Hearings Unit a request for a hearing date. The Hearings Unit issued a Notice of Hearing to Respondent at 954 Norway NE,

Salem, Oregon 97303, to the Agency, and to the Claimant indicating the time and place of the hearing. Together with the Notice of Hearing, the Forum sent a document entitled "Notice of Contested Case Rights and Procedures" containing the information required by ORS 183.413, and a copy of the Forum's contested case hearings rules, OAR 839-50-000 to 839-50-420.

7) On November 15 and 16, 1994, the Hearings Referee issued a discovery order and an amended discovery order, respectively, to the participants directing them each to submit a summary of the case, including a list of the witnesses to be called, and the identification and description of any physical evidence to be offered into evidence, together with a copy of any such document or evidence, according to the provisions of OAR 839-50-210(1). The November 15 discovery order was amended to require that the summaries be submitted no later than November 23, 1994. The order advised the participants of the sanctions, pursuant to OAR 839-50-200(8), for failure to submit the summary. The Agency submitted a timely summary. Both discovery orders were directed to Respondent at 954 Norway NE, Salem, Oregon 97303. Respondent did not file a summary. On November 30, 1994, the Agency submitted an addendum to its case summary.

8) At the time and place set forth in the Notice of Hearing for this matter, the Respondent did not appear or contact the Agency or the Hearings Unit. Pursuant to OAR 839-50-330(2), the Hearings Referee allowed Respondent 30 minutes to appear at the hearing. At the end of that time, Respondent

had still not appeared or contacted the Agency or the Hearings Unit. The Hearings Referee then found Respondent in default as to the Order of Determination, pursuant to OAR 839-50-330(2), for failure to attend the hearing, and continued with the hearing.

9) Pursuant to ORS 183.415(7), the Hearings Referee explained the issues involved in the hearing, the matters to be proved or disproved, and the procedures governing the conduct of the hearing.

10) A Proposed Order, which included an Exceptions Notice, was issued in this matter on January 13, 1995. Exceptions were due in the Hearings Unit by January 23, 1995. The Hearings Unit received no exceptions to the Proposed Order from Respondent. On January 20, 1995, Claimant Luis Efrain Hernandez Garcia advised the Hearings Unit of an error in his name which occurred each time it was referenced in the Proposed Order. This Order corrects the error in those references in the Proposed Order.

FINDINGS OF FACT – THE MERITS

1) During all times material herein, Respondent, a person, did business as Arreola Enterprises, Inc., a yard maintenance business located in Salem, Oregon. He employed one or more persons in the State of Oregon. Respondent is not registered with the Secretary of State's office as a corporation or under an assumed business name.

2) From June 21 until September 6, 1993, Respondent employed Claimant to perform yard maintenance work for Respondent's clients. Respondent

recruited workers at a local mission and offered other people jobs at the time Claimant was hired. Claimant was hired for an indefinite period. Respondent bid on jobs for homeowners and was paid directly by the homeowners by cash or check made out to Respondent. Respondent furnished all of the equipment and supplies Claimant used on the job. Respondent determined the number of hours Claimant worked and how the work was to be performed. Claimant and other employees were paid on an hourly basis. Claimant was not allowed to hire his own employees. Claimant did not expect nor did he receive profits from Respondent's business. Claimant worked for only the Respondent during all times material herein. He derived no benefits other than wages from his work for Respondent. Claimant's duties included cutting grass and trees, lifting and unloading dirt and rocks, and clearing walkways of branches and leaves.

3) Respondent and Claimant had an oral agreement at the outset that Claimant would perform the yard work for \$6.25 per hour.

4) Claimant did not keep notes of the hours he worked until July 9, 1993, when Respondent began owing Claimant his wages. Between July 11 and July 23, 1993, Claimant did not work because of a skin rash. He filed a wage claim with the Agency on October 4, 1993, for the period between July 24 and September 6, 1993. Claimant recorded only the number of hours he worked after July 9, 1993, on a claim calendar provided by the Agency at the time he filed his wage claim. He was not paid for any of the

hours he recorded on the Agency calendar.

5) Claimant attempted to collect his wages in July, August, and September. After telling Claimant on July 31 that he would be paid shortly, Respondent, on August 1, told Claimant that he used Claimant's wages for beer and betting. On August 11, Respondent told Claimant he couldn't pay him because he was paying a lawyer for legal problems between Respondent and his wife. Between August 18 and August 31, Respondent was incarcerated and pledged his car to effect a \$500 bail. He told Claimant that in order to get paid, Claimant needed to continue working so that Respondent could pay the bail and get his car back. Claimant continued to work until he was told by Respondent on September 6, 1993, that he would not be paid for any of the work he performed.

6) At all times material, Leticia Piete was an Office Specialist with the Wage and Hour Division of the Agency. Her duties include greeting the public and taking messages for the compliance specialists in the Salem office. On October 18, 1993, Respondent appeared in the Salem office to discuss the Claimant's wage claim with Raul Pena, who was not available that day. Respondent stated he could not write very well and requested that Piete write a note to Pena. He told Piete that Claimant had worked for him, and that all wages had been paid. He also told Piete that he had no documents to support his statement that the wages were paid because he paid Claimant in cash.

7) At all times material, Raul Pena was a Compliance Specialist with the

Wage and Hour Division of the Agency. He is fluent in spoken and written Spanish and English. He was assigned to investigate the wage claim against Respondent. He conducted his investigation in concert with Twyla Knowles, who was investigating Respondent on behalf of the Workers' Compensation Division regarding a workers' compensation claim filed by Claimant. Respondent told Knowles during Knowles's investigation that he does yard maintenance in the Salem area, occasionally uses others to assist him, and admitted employing Claimant. The Workers' Compensation Division issued a Proposed and Final Order which determined that Respondent was a subject noncomplying employer between June 21 and September 7, 1993. Respondent requested a hearing on the order, but failed to appear on the hearing date and the case was ultimately dismissed.

8) Pena personally received the wage claim involved herein. He reviewed the wage claim form, assignment of wages form, and work calendar filled out by Claimant. Those documents reveal the following information, which is accepted as fact. Between July 24 and September 6, 1993, Claimant worked a total of 254 hours in 27 days. Of those hours, 211 hours were "straight time hours," that is, hours worked up to 40 per work week. The remaining 43 hours were "over-

time hours," that is, hours worked in excess of 40 hours per work week.

9) Pursuant to ORS 653.261 and OAR 839-20-030 (Payment of Overtime Wages) and Agency policy, Claimant's total earnings for the period between July 24 and September 6, 1993, were \$1,721.66*. The total reflects the sum of the following:

211 hours @ \$6.25 per hour =	\$1,318.75
43 hours at the overtime rate of \$9.37 (one and one-half times the \$6.25 agreed rate) =	<u>402.91</u>
TOTAL EARNED	\$1,721.66

10) By mutual agreement, Claimant's last day of work was on September 6, 1993.

11) Civil penalty wages were computed according to Agency policy as follows: \$1,721.66 (the total wages earned) divided by 27 (the number of days worked during the claim period) equals \$63.76 (the average daily rate of pay). This figure of \$63.76 is multiplied by 30 (the number of days for which civil penalty wages continued to accrue) for a total of \$1,913.00,** rounded to the nearest dollar per Agency policy.

12) Respondent did not allege in his answer an affirmative defense of financial inability to pay the wages due at the time they accrued, nor did he provide any such evidence for the record.

13) Testimony of Claimant was found to be credible. He had the facts

* The Agency's figures show a total of \$1,721.14. There was a 52 cent mathematical error in the straight time calculation.

** The Agency's figures show a total of \$1,912.20, based on an average daily wage of \$63.74. The mathematical error in the wage calculation changes the average daily wage to \$63.76, which, when multiplied by 30, results in a total of \$1,913.00 in civil penalty wages, rounded to the nearest dollar per Agency policy.

CONCLUSIONS OF LAW

1) During all times material herein, Respondent was an employer and Claimant was an employee subject to the provisions of ORS 652.110 to 652.200 and 652.310 to 652.405.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and the Respondents herein. ORS 652.310 to 652.405.

3) ORS 652.140(1) provides:

"Whenever an employer discharges an employee, or where such employment is terminated by mutual agreement, all wages earned and unpaid at the time of such discharge shall become due and payable immediately; ****"

Respondent violated ORS 652.140(1) by failing to pay Claimant all wages earned and unpaid immediately upon his termination by mutual agreement on September 6, 1993.

4) ORS 652.150 provides:

"If an employer willfully fails to pay any wages or compensation of any employee whose employment ceases, as provided in ORS 652.140 and 652.145, then, as a penalty for such nonpayment, the wages or compensation of such employee shall continue from the due date thereof at the same rate until paid or until action therefor is commenced; provided, that in no case shall such wages or compensation continue for more than 30 days from the due date; and provided further, the employer may avoid liability for the penalty by showing financial inability to pay

readily at his command and his statements were supported by documentary records. There is no reason to determine the testimony of the Claimant to be anything except reliable and credible.

ULTIMATE FINDINGS OF FACT

1) During all times material herein, Respondent was a person who employed one or more persons in the State of Oregon.

2) Respondent employed Claimant.

3) During the wage claim period between July 24 and September 6, 1993, Respondent and Claimant had an oral agreement whereby Claimant's rate of pay was \$6.25 per hour.

4) Claimant terminated employment with Respondent by mutual agreement on September 6, 1993.

5) During the wage claim period, Claimant worked 27 days and earned \$1,721.66 in wages. Claimant was not paid anything for the hours he worked between July 24 and September 6, 1993. Respondent owes Claimant \$1,721.66 in earned and unpaid wages.

6) Respondent willfully failed to pay Claimant all wages earned and unpaid immediately upon his mutual termination on September 6, 1993. More than 30 days have elapsed from the due date of those wages.

7) Claimant's average daily rate for the wage claim period of employment was \$63.76 (\$1,721.66 earned divided by 27 days equals \$63.76 average rate per day). Civil penalty wages, computed pursuant to ORS 652.150 and Agency policy, equal \$1,913 (Claimant's average daily rate, \$63.76, continuing for 30 days).

the wages or compensation at the time they accrued."

Respondent is liable for a civil penalty under ORS 652.150 for willfully failing to pay all wages or compensation to Claimant when due as provided in ORS 652.140.

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

OPINION

Default

The Respondent failed to appear at the hearing, and thus defaulted to the charges set forth in the Order of Determination. In a default situation, pursuant to ORS 183.415(5) and (6), the task of this Forum is to determine if a prima facie case supporting the Agency's Order of Determination has been made on the record. See *In the Matter of Judith Wilson*, 5 BOLI 219, 226 (1986); *In the Matter of John Cowdrey*, 5 BOLI 291, 298 (1986); *In the Matter of Art Farbee*, 5 BOLI 268, 276 (1986). See also OAR 839-50-330(2).

Where a respondent submits an answer to a charging document, the Forum may admit the answer into evidence during a hearing and may consider the answer's contents when making findings of fact. Where a respondent fails to appear at hearing, the Forum may review the answer to determine whether the respondent has set forth any evidence or defense to

the charges. *In the Matter of Richard Niquette*, 5 BOLI 53, (1986); *In the Matter of Jack Mongeon*, 6 BOLI 194, 201 (1987). In a default case where the respondent's total contribution to the record is his or her request for a hearing and an answer that contains nothing other than unsworn and unsubstantiated assertions, those assertions are overcome wherever they are controverted by other credible evidence on the record. *Mongeon*, at 201. The Agency has established a prima facie case. A preponderance of the credible evidence on the whole record shows that Respondent employed Claimant during the period of the wage claim, and willfully failed to pay him all wages, earned and payable, when due. That evidence, which establishes that Respondent owes Claimant \$1,721.66, was credible, persuasive, and the best evidence available, given Respondent's failure to appear at the hearing. Respondent's unsworn and unsubstantiated assertion in his answer that he did not employ Claimant was effectively controverted and overcome by the credible evidence on the record. It is not the burden of the Agency or the Forum, however, to disprove Respondent's defense. *In the Matter of Ebony Express, Inc.*, 7 BOLI 91, 96 (1988).

The record establishes that Respondent has violated ORS 652.140 as alleged and that he owes Claimant civil penalty wages pursuant to ORS 652.150.

Wages and Civil Penalty

The evidence on the record establishes that Respondent owes Claimant \$1,721.66 in earned, unpaid, due, and payable wages, and \$1,913 in penalty

**In the Matter of
KATHERINE SUE HOFFMAN,
dba Katy-Did Wedding and Flower
Company, Respondent.**

Case Number 37-95

Final Order of the Commissioner

Jack Roberts

Issued April 19, 1995.

SYNOPSIS

Respondent submitted an answer to the Order of Determination and requested a hearing but failed to appear at the hearing; the Hearings Referee found Respondent in default as to the charges set forth in the charging document. The Agency made a prima facie case that Claimant was an employee of Respondent and that Respondent willfully failed to pay Claimant, at the agreed rate, all wages due and owing within five working days of termination, in violation of ORS 652.140(2). The Commissioner ordered Respondent to pay the wages due and civil penalty wages, pursuant to ORS 652.150, plus interest.

The above-entitled contested case came on regularly for hearing before Alan E McCullough, designated as Hearings Referee by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on February 16, 1995, in Room 1004 of the Portland State Office Building, 800 NE Oregon Street, Portland, Oregon. Additional testimony was taken from the Claimant by telephone on February 24, 1995, pursuant to the reopening of the record

wages. In a default case, the charging document sets the limit on the issues and relief which the Forum can consider. *In the Matter of 60 Minute Tune*, 9 BOLI 191, 204 (1991); *Ebony Express*, at 97; *Mongeon*, at 201. Thus, the Forum has accepted the Agency's wage calculations for \$1,721.14. Also, the Forum has used \$1,912, the amount of penalty wages (rounded to the nearest dollar) stated in the Order of Determination, rather than the amount which results from the Forum's calculations.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent Robert Arreola, aka Roberto Arreola, dba Arreola Enterprises, Inc., to deliver to the Business Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2109, the following:

1) A certified check payable to the Bureau of Labor and Industries in trust for Luis Efrain Hernandez Garcia in the amount of THREE THOUSAND SIX HUNDRED THIRTY THREE DOLLARS AND THIRTY FOUR CENTS (\$3,633.34), representing \$1,721.14 in gross earned, unpaid, due, and payable wages, less legal deductions previously taken by the Respondent, and \$1,912 in penalty wages, PLUS

2) Interest at the rate of nine percent per year on the sum of \$1,721.14 from October 1, 1993, until paid, PLUS

3) Interest at the rate of nine percent per year on the sum of \$1,912 from November 1, 1993, until paid.

by the Hearings Referee. The Bureau of Labor and Industries (the Agency) was represented by Douglas A. McKean, an employee of the Agency. Janelle E. Bloomberg (Claimant) was present throughout the hearing. Katherine Sue Hoffman (Respondent) did not make an appearance at the hearing.

The Agency called the following witnesses (in alphabetical order): Janelle E. Bloomberg, Claimant, and Margaret E. Trotman, Compliance Specialist, Bureau of Labor and Industries.

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

FINDINGS OF FACT – PROCEDURAL

1) On April 29, 1994, Claimant filed a wage claim with the Agency in which she alleged that she had been employed by Respondent and that Respondent had failed to pay wages earned and due to her. Claimant dated the wage claim April 25, 1994.

2) At the same time that she filed the wage claim, Claimant assigned to the Commissioner of Labor and Industries, in trust for Claimant, all wages due from Respondent. Claimant dated her assignment March 25, 1994, but actually signed it on April 25, 1994, the same day that she signed her wage claim.

3) On October 7, 1994, the Commissioner of the Bureau of Labor and Industries served on Respondent an

Order of Determination based upon the wage claim filed by Claimant and the Agency's investigation. The Order of Determination found that Respondent owed Claimant a total of \$175 in wages and \$875 in civil penalty wages. The Order of Determination required that, within 20 days, Respondent either pay these sums in trust to the Agency, or request an administrative hearing and submit an answer to the charges.

4) On November 1, 1994, Respondent filed an answer to the Order of Determination. Respondent's answer denied that Claimant had ever been an employee of Respondent and requested a contested case hearing.

5) On January 9, 1995, the Agency sent the Hearings Unit a request for a hearing date. The Hearings Unit issued a Notice of Hearing to the Respondent, the Agency, and the Claimant indicating the time and place of the hearing. Together with the Notice of Hearing, the Forum sent a document entitled "Notice of Contested Case Rights and Procedures" containing the information required by ORS 183.413, and a copy of the Forum's contested case hearing rules, OAR 839-50-000 to 839-50-420.

6) On January 25, 1995, the Agency requested a Discovery Order pursuant to OAR 839-50-200(4) requiring the Respondent to produce certain documents. The Hearings Referee found that the Agency had requested relevant documents, and sent a ruling by FAX and first class mail that same day requiring Respondent to respond in writing by January 30, 1995, to the Agency's request or, in the alternative, to provide the Agency with the

documents requested in the Agency's letter dated January 10, 1995.

7) On January 30, 1995, the Hearings Referee issued a discovery order to the participants directing them each to submit a summary of the case, including a list of the witnesses to be called, and the identification and description of any physical evidence, according to the provisions of OAR 839-50-210(1). The summaries were due by February 9, 1995. The order advised the participants of the sanctions, pursuant to OAR 839-50-200(8), for failure to submit the summary. The Agency submitted a timely summary.

8) On January 31, 1995, having received no response from the Respondent regarding the Agency's January 25, 1995, request for a discovery order, the Hearings Referee issued a second discovery order requiring Respondent to produce to the Agency, no later than February 9, 1995, copies of all documents requested in the Agency's January 10, 1995, request for production. These documents were specifically enumerated in the discovery order and the sanctions for failure to comply were stated again.

9) On February 15, 1995, the Respondent telephoned the Hearings Unit and left a voice mail message stating she could not get off work to attend the hearing and would like to reschedule the hearing. The Respondent left her answering service number. The Hearings Referee tried to reach the Respondent at her answering service number several times during the day but was unsuccessful in making contact with either the Respondent or her answering service.

10) On February 15, 1995, the Agency case presenter telephoned the hearings referee and stated the Agency's opposition to the postponement based on its untimely nature and the Agency's readiness to proceed.

11) On February 15, 1995, the Hearings Referee orally informed the Agency case presenter and Hearings Unit Coordinator that Respondent's request for a postponement was denied.

12) On February 16, 1995, at 7:45 a.m., the Hearings Unit Coordinator succeeded in leaving a message with Respondent's answering service informing the Respondent that her request for a postponement was denied.

13) On February 16, 1995, at 8:43 a.m., the Respondent telephoned the Hearings Unit Coordinator and indicated that she could not be present at the hearing.

14) At the start of the hearing, the Hearings Referee declared the Respondent to be in default, based on her representation that she would not be present at the hearing.

15) Pursuant to ORS 183.415(7), the Hearings Referee explained the issues involved in the hearing, the matters to be proved or disproved, and the procedures governing the conduct of the hearing.

16) At 9:30 a.m., 30 minutes after the hearing was scheduled to begin, the Respondent had still not made an appearance. At that time, the Hearings Referee confirmed that Respondent was in default.

17) On February 24, 1995, the Hearings Referee reopened the record to admit two exhibits and to hear additional testimony from the Claimant with

regard to the wage assignment to the Commissioner.

18) The Proposed Order, which included an Exceptions Notice, was issued on March 7, 1995. Exceptions, if any, were to be filed by March 17, 1995. No exceptions were received.

FINDINGS OF FACT – THE MERITS

1) During all times material herein, the Respondent, a person, did business as Katy-Did Wedding and Flower Company ("Katy-Did") at 7843 SW Capitol Highway, Portland, Oregon, utilizing the personal services of one or more persons in the State of Oregon.

2) On or about March 22, 1994, Respondent hired Claimant to work at Katy-Did for an indefinite period.

3) At the time of hire, Respondent and Claimant entered into an oral agreement that Respondent would pay Claimant \$5.00 an hour for all work performed for Respondent.

4) Claimant worked the following dates for Respondent: March 22, 23, 24, 25, 26, and 31, 1994. Claimant logged her hours worked in her personal calendar. Claimant worked a total of 35 hours.

5) While she worked for Respondent, Claimant opened the shop and cleaned and organized it at Respondent's direction, using Respondent's equipment and supplies, while Respondent was away teaching during the day. Claimant was Respondent's only employee during her period of employment with Respondent.

6) Claimant did not have a partnership agreement with Respondent and had no right to share in the profits or liability for any losses the business might incur.

7) On March 31, 1994, Claimant quit without notice.

8) To date, Respondent has not paid Claimant any compensation for her work performed during the period of the claim.

9) In April 1994, Respondent sent Claimant a "Thank You" card in which she wrote, in part:

"Janelle, Thank you so much for your time and help. I'll be sending you a check in May. Sorry it has taken so long."

10) Margaret Trotman, Compliance Specialist for the Agency, investigated Claimant's wage claim. During her investigation, she contacted Respondent by telephone. During their conversation, Respondent told Trotman that she owed Claimant two days' wages and that she would be sending money in the mail. Respondent did not deny that she had employed Claimant.

11) Civil penalty wages were computed, in accordance with Agency policy, on the Wage Transcription and Computation Sheet as follows: \$175 (the total wages earned) divided by six (the number of days worked during the claim period) equals \$29.17 (the average daily rate of pay). This figure of \$29.17 is multiplied by 30 (the number of days for which civil penalty wages continued to accrue) for a total of \$875, when rounded to the nearest dollar.

ULTIMATE FINDINGS OF FACT

1) During all times material herein, the Respondent, a person, did business as Katy-Did Wedding and Flower Company at 7843 SW Capitol Highway, Portland, Oregon, utilizing the personal services of one or more persons in the State of Oregon.

2) Respondent employed Claimant from March 22 to 31, 1994, during which time Claimant earned \$175 at an agreed rate of \$5.00 an hour.

3) During the period of the wage claim, Claimant was not an independent contractor. Claimant was hired for an indefinite period. Respondent furnished all the equipment and supplies Claimant used on the job. Respondent directed how Claimant was to perform her duties. Claimant had no right to share in the profits or any liability for any losses in Respondent's business.

4) On March 31, 1994, Claimant quit her employment with Respondent without notice.

5) Respondent has not paid Claimant any compensation for her work during the period of the claim.

6) Respondent willfully failed to pay Claimant all wages within five days, excluding Saturdays, Sundays and holidays, after she quit, and more than 30 days have elapsed from the date her wages were due.

7) During the period March 22 to March 31, 1994, Claimant worked six days. Claimant's average daily wage for this period of employment was \$29.17 (\$175 earned divided by six days equals \$29.17 average rate per day). Civil penalty wages, computed pursuant to ORS 652.150 and Agency policy, equal \$875, when rounded to the nearest dollar (Claimant's average daily rate, \$29.17, continuing for 30 days).

CONCLUSIONS OF LAW

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

Respondent herein. ORS 652.310 to 652.405.

2) Prior to the commencement of the contested case hearing, Respondent received notice of her rights as required by ORS 183.413(2). The Hearings Referee complied with ORS 183.415(7) by explaining the information described therein to the participants present at the start of the hearing.

3) ORS 652.310 provides in part:

"(1) 'Employer' means any person who in this state, directly * * * engages personal services of one or more employees * * *."

"(2) 'Employee' means any individual who * * * renders personal services * * * in this state to an employer who pays or agrees to pay such individual at a fixed rate, based on the time spent in the performance of such services * * *"

During all times material herein, Respondent employed Claimant as an employee and was subject to the provisions of ORS 652.110 to 652.200 and 652.310 to 652.405. Respondent was required to pay Claimant at the fixed rate of \$5.00 an hour.

4) ORS 652.140(2) provides:

"When an employee who does not have a contract for a definite period quits employment, all wages earned and unpaid at the time of quitting become due and payable immediately if the employee has give to the employer not less than 48 hours notice, excluding Saturdays, Sundays and holidays, of intention to quit employment. If notice is not given to the employer, the wages shall be due and

payable within five days, excluding Saturdays, Sundays and holidays, after the employee has quit, or at the next regularly scheduled payday after the employee has quit, whichever event first occurs."

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

5) ORS 652.150 provides:

"If an employer willfully fails to pay any wages or compensation of any employee whose employment ceases, as provided in ORS 652.140 and 652.145, then, as a penalty for such nonpayment, the wages or compensation of such employee shall continue from the due date thereof at the same rate until paid or until action therefor is commenced provided, that in no case shall such wages or compensation continue for more than 30 days from the due date; and provided further, the employer may avoid liability for the penalty by showing financial inability to pay the wages or compensation at the time they accrued."

Respondent is liable for a civil penalty under ORS 652.150 for willfully failing to pay all wages or compensation at the time they accrued.

6) Under the facts and circumstances of this record, and according to the law applicable to this matter, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondent to pay Claimant her earned, unpaid, due, and payable

wages and the civil penalty wages, plus interest on both sums until paid. ORS 652.332.

OPINION

Respondent's Default

The Respondent filed an answer and request for hearing, but failed to appear at the hearing and was found to be in default. OAR 839-50-330 (1)(b). In a default situation, the Forum's task is to determine if a prima facie case supporting the Agency's Order of Determination has been made on the record. ORS 183.415(5) and (6); OAR 839-50-330(2); *In the Matter of S.B.I., Inc.*, 12 BOLI 102, 109 (1993); *In the Matter of Mark Vetter*, 11 BOLI 25, 30 (1992).

Where a Respondent submits an answer to a charging document, the Forum may admit the answer into evidence during a hearing and may consider the answer's contents when making findings of fact. *In the Matter of Tom's TV & VCR Repair*, 12 BOLI 110, 116 (1993); *In the Matter of Sealing Technology, Inc.*, 11 BOLI 241, 250 (1993). However, where the answer contains only unsworn and unsubstantiated assertions, those assertions are overcome wherever they are controverted by credible evidence on the record. *Tom's TV*, at 116; *Sealing Technology*, at 250.

The Agency established a prima facie case. A preponderance of credible evidence on the whole record showed Respondent employed Claimant during the period of the wage claim and willfully failed to pay her all the wages, earned and payable, when due. Credible, persuasive evidence established that Respondent owes

Claimant Bloomberg \$175. Respondent's unsworn and unsubstantiated assertion in her answer that she did not employ Claimant was controverted and overcome by the credible evidence on the record.

Penalty Wages

An award of penalty wages turns on the issue of willfulness. Willfulness does not imply or require blame, malice, wrong, perversion, or moral delinquency, but only requires that that which is done or omitted is intentionally done with knowledge of what is being done, and that the actor or omittor be a free agent. *Sabin v. Willamette Western Corp.*, 279 Or 1083, 557 P2d 1344 (1976); *State ex rel Nilsen v. Johnson et ux*, 233 Or 103, 377 P2d 331 (1962). Respondent, as an employer, had a duty to know the amount of wages due her employee. *McGinnis v. Keen*, 189 Or 445, 221 P2d 907 (1950); *In the Matter of Jack Coke*, 3 BOLI 238, 242 (1983). The evidence established that Respondent knew she had paid Claimant nothing at the time Claimant quit, that Respondent intentionally failed to pay Claimant any wages, and that Respondent acted voluntarily and as a free agent. Accordingly, Respondent must be deemed to have acted willfully. Respondent did not allege or present any evidence in support of any affirmative defense of financial inability to pay when the wages came due, and is therefore liable for civil penalty wages under ORS 652.150.

Pursuant to Agency policy, civil penalty wages due under ORS 652.150 are rounded to the nearest dollar. *In the Matter of Waylon & Willes, Inc.*, 7 BOLI 68, 72 (1988). In this

case, civil penalty wages amount to \$875.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders KATHERINE SUE HOFFMAN, dba KATY-DID WEDDING AND FLOWER COMPANY, to deliver to the Business Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2109, the following:

- 1) A certified check payable to the Bureau of Labor and Industries IN TRUST FOR JANELLE E. BLOOMBERG in the amount of ONE THOUSAND FIFTY DOLLARS (\$1,050), representing \$175 in gross earned, unpaid, due, and payable wages and \$875 in penalty wages, PLUS
- 2) Interest at the rate of nine percent per year on the sum of \$175 from April 8, 1994, until paid, PLUS
- 3) Interest at the rate of nine percent per year on the sum of \$875 from May 8, 1994, until paid.

In the Matter of
ANASTAS SHARABARIN
 and Marfa Sharabarin, Respondents.

Case Number 42-95

Final order of the Commissioner

Jack Roberts

Issued April 19, 1995.

SYNOPSIS

The Commissioner granted summary judgment to the Agency, finding that Respondents operated an unregistered farm-worker camp in violation of ORS 658.750(1). The Agency and Respondent stipulated to the assessment of a \$1,000 civil penalty against Respondent, pursuant to ORS 658.850(1).

The above-entitled contested case was scheduled for hearing on March 2, 1995, before Alan E McCullough, designated as Hearings Referee by Jack Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The Bureau of Labor and Industries (the Agency) was represented by Judith Bracanovich, an employee of the Agency. Anastas and Marfa Sharabarin (Respondents) were represented by John H. Beckfield, Attorney at Law. The Agency moved for summary judgment on the merits, which was granted. Prior to the date set for hearing, the Agency and Respondent stipulated as the civil penalties that would be assessed and the hearing was canceled. Having fully considered the entire record in this matter, I, Jack Roberts, Commissioner of the Bureau of Labor and Industries, make the

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

**FINDINGS OF FACT –
 PROCEDURAL**

1) On December 22, 1994, the Agency issued a "Notice of Intent to Assess Civil Penalties" (Notice of Intent) to Respondents. The notice informed Respondents that the Agency intended to assess civil penalties against them in the amount of \$2,000, pursuant to ORS 658.850. The notice cited the following basis for the Agency's intended action:

"Failure to Register a Farm-Worker Camp With the Commissioner. Between on or about July 22, 1993 and August 9, 1994, on property owned by Operators at 12373 Dominic Road, Mount Angel, Oregon, Operators were operating a farm-worker camp without having first registered said camp with the Commissioner, in violation of ORS 658.750(1) and OAR 839-14-065. **AGGRAVATING CIRCUMSTANCES:** Camp Operators knew or should have known of the violation; failure to take all necessary steps to correct or prevent violations. Civil Penalty in the amount of \$2,000."

The Notice of Intent was served on Respondents on December 23, 1994.

2) Respondents' attorney filed an answer and request for hearing on January 12, 1995, in which Respondents denied that they operated a farm-worker camp at 12373 Dominic Road, Mount Angel, Oregon.

3) The Agency sent the Hearings Unit a request for a hearing date. On February 1, 1995, the Hearings Unit issued a Notice of Hearing to the Respondents and Agency indicating the time and place of the hearing. Together with the Notice of Hearing, the Forum sent a document entitled "Notice of Contested Case Rights and Procedures" containing the information required by ORS 183.413, and a copy of the Forum's contested case hearing rules, OAR 8939-50-000 to 839-50-240.

4) On February 2, 1995, the Agency filed a motion to amend the Notice of Intent, in which the Agency sought to substitute "29851 S. Highway 213, Molalla" for "12373 Dominic Road, Mt. Angel". Later that same day, the Agency filed a substituted motion to amend the Notice of Intent, which sought to substitute "29855 S. Highway 213, Molalla" for "12373 Dominic Road, Mount Angel".

5) On February 10, 1995, the Agency filed a second motion to amend Notice of Intent and a motion for summary judgment.

6) On February 15, 1995, Respondents filed timely objections to the Agency's second motion to amend the Notice of Intent and motion for summary judgment. Respondents also asked that the Forum provide Russian and Spanish interpreters at the hearing.

7) On February 16, 1995, Respondents filed a request for a discovery order requiring the Agency to disclose the names and addresses of witnesses expected to testify at the hearing.

8) On February 16, 1995 the Agency filed a reply to Respondent's response to the Agency's motion for summary judgment and objections to the second motion to amend the Notice of Intent. The Agency indicated it had already arranged for a Spanish interpreter and had no objection to a Russian interpreter.

9) On February 21, 1995, the Hearings Referee issued a discovery order to the Agency and Respondents directing them each to submit a summary of the case, including a list of the witnesses to be called, and the identification and description of any physical evidence, according to the provisions of OAR 839-50-200 and 839-50-210. Witness lists were due on February 23, 1995, and identification and description of any physical evidence were due on February 27, 1995. The order advised the participants of the sanctions, pursuant to OAR 839-50-200(8), for failure to submit the summary.

10) On February 21, 1995, in response to the discovery order, Respondents' attorney's legal assistant advised the Hearings Referee that Respondents' attorney was out-of-state on a trip that had been scheduled for quite some time.

11) On February 23, 1995, the Hearings Referee issued a ruling on the Agency's motions to amend the Notice of Intent and the Agency's motion for summary judgment. The Hearings Referee granted all of the Agency's motions to amend and also granted the Agency's motion for summary judgment. The Referee also advised that the hearing would be held strictly to determine the amount of civil penalties to be assessed.

12) On February 23, 1995, the Agency advised the Hearings Referee that it intended to call no witnesses at the hearing and that it intended to rely on argument and evidence already admitted in the record in support of civil penalties.

13) On February 28, 1995, the Agency provided the Hearings Referee with a stipulation signed by Respondents' attorney and the Agency Case Presenter agreeing that \$1,000 was an appropriate civil penalty to be assessed against Respondents.

14) On March 1, 1995, the Hearings Referee sent a notice to Respondents and the Agency canceling the hearing set for March 2, 1995, based on the award of summary judgment to the Agency and the stipulation as to amount of civil penalties entered into between Respondents and the Agency.

15) Based upon the record herein, the Forum finds that Respondents receive the Notice of Intent, the Notice of Rights, the Notice of Hearing, the Agency's various motions and the Hearings Referee's rulings thereon.

16) The Proposed Order, which included an Exceptions Notice, was issued on March 10, 1995. Exceptions, if any, were to be filed by March 20, 1995. No exceptions were received.

FINDINGS OF FACT – THE MERITS

1) During all times material herein, Respondents owned property at 29855 S. Highway 213, Molalla, Oregon, that was utilized as farmland.

2) Between July 22 and August 8, 1994, Respondents housed 10 adults and 5 children in two separate build-

ings at 29855 S. Highway 213, Molalla, Oregon.

3) On July 22, 1994, Agency Field Representative Vasily Shimanovsky visited 29855 S. Highway 213, Molalla, Oregon, in the company of Tomas Schwabe, OR-OSHA inspector. Shimanovsky was informed by Federico Vargas, one of the adults living at that address, that he and the other tenants worked on Respondents' farm as a condition of living in Respondents' housing.

4) On August 8, 1994, Federico Vargas and his wife visited the Agency's Salem office and spoke with Raul Pena, Agency Compliance Specialist. Vargas and his wife told Pena that they were living on property owned by Anastas Sharabarin and picking caneberries for Sharabarin. Vargas and his wife complained that they were not being paid minimum wage, that Sharabarin deducted rent from their wages, and that OR-OSHA had conducted an inspection of their housing during the previous week. Vargas also provided Pena with two receipts dated August 5, 1994, and a third dated August 8, 1994, reflecting pounds of blackberries picked for Respondents. Anastas Sharabarin's name and home address was imprinted on the top of each receipt and the receipts were imprinted with numbers 1116, 8429, and 5357, respectively. Vargas and his wife also told Pena that they and the other farm workers living at 29855 S. Highway 213, Molalla, Oregon, had been told by the Sharabarins they would have to move the next day because OR-OSHA wanted "the camp closed."

5) On August 26, 1994, OR-OSHA issued a citation to Respondents assessing \$53,050 in civil penalties for safety and health violations connected with Respondents' operation of a farm-worker camp at 29855 S. Highway 213, Molalla, Oregon.

6) During all times material herein, no farm-worker camps were registered at the Bureau of Labor and Industries to Respondents.

ULTIMATE FINDINGS OF FACT

1) Between July 22 and August 8, 1994, Respondents, two natural persons, operated a farm-worker camp at 29855 S. Highway 213, Molalla, Oregon.

2) Between July 22 and August 8, 1994, Respondents' farm-worker camp at 29855 S. Highway 213, Molalla, Oregon, was not registered by Respondents with the Bureau.

CONCLUSIONS OF LAW

1) The Commissioner of the Bureau and Industries of the State of Oregon has jurisdiction over the subject matter and of the persons herein. ORS 658.705 to 658.991.

2) ORS 658.705 provides, in part:

"(7) 'Farm-worker camp' means any place or area of land where sleeping places, manufactured structures or other housing is provided by a farmer, farm labor contractor, employer or any other person in connection with the recruitment or employment of workers to work in the production and harvesting of farm crops or in the reforestation of lands, as described in ORS 658.405. 'Farm-worker camp does not include:

"(a) A single, isolated dwelling occupied solely by members of the same family, or by five or fewer unrelated individuals; * * *

* * *

"(8) 'Farm-worker camp operator' means any person who operates a farm-worker camp."

ORS 658.750 provides, in part:

"(1) Every farm-worker camp operator shall register with the bureau each farm-worker camp operated by the operator."

"(2) The bureau shall establish, by rule, procedures for annual registration of farmworker camps."

OAR 839-14-065 provides:

"All farm worker camps must be registered with the Bureau in accordance with these rules. Farm worker camp operators who are otherwise exempt from obtaining the required indorsement must, nevertheless register the farm worker camp."

OAR 839-14-095 provides the following steps for a farm-worker camp operator to obtain a camp registration:

"(1) File a completed application on forms supplied by the Bureau with Wage and Hour Division, Licensing Unit, 800 NE Oregon # 32, Portland, Oregon 97232.

"(2) Obtain and file a pre-occupancy inspection report if appropriate as part of the application.

"(3) Pay the appropriate fees.

"(4) The camp registration will be issued upon completion of all registration requirements.

"(5) The registration will be valid for one year and will expire

on the last day of the month in which it was issued."

Respondents violated ORS 658.750 (1).

3) ORS 658.850(1) provides:

"In addition to any other penalty provided by law, the commissioner may assess a civil penalty not to exceed \$2,000 for each violation of any provision of ORS 658.715 to 658.850."

OAR 839-14-420 provides, in part:

"Pursuant to ORS 658.850, the Commissioner may impose a civil penalty for any of the following violations:

"(6) Failing to register each farm worker camp by the farm worker camp operator in violation of ORS 658.750."

OAR 839-14-440 provides, in part:

"(1) The civil penalty for any one violation shall not exceed \$2,000. The actual amount of the civil penalty will depend on all the facts and on any mitigating and aggravating circumstances.

"(3) When the Commissioner determines to impose a civil penalty for acting as a farm worker camp operator without a valid license indorsement or a farm worker camp is being operated without a valid registration certificate, the minimum civil penalty shall be as follows:

"(a) \$500 for the first offense;

"(b) \$1,000 for the second offense;

"(c) \$2,000 for the third and each subsequent offense."

Under the facts and circumstances of this record and according to the law applicable in this matter, the Commissioner of the Bureau of Labor and Industries has the authority to and may assess civil penalties against Respondent, as well as approve stipulations between the parties as to the appropriate amount of civil penalties. The approval of the stipulation as to the amount of civil penalties between the parties is an appropriate exercise of that authority.

OPINION

Summary Judgment

The Agency moved for summary judgment on the merits, offering documents, business records, an affidavit, and business records in support of the motion. The evidence presented by the Agency was sufficient to establish a prima facie case. It clearly showed that Respondents housed more than five farm workers in two separate dwellings located on Respondents' property, that Respondents employed these farm workers in harvesting Respondents' crops, and that Respondents failed to register their camp with the Bureau as required by ORS 658.750(1). Based on Respondents' failure to raise a genuine issue of fact in response to the Agency's motion, summary judgment was granted.

When considering a motion for summary judgment, this Forum will draw all inferences of fact from the record against the participant filing the motion and in favor of the participant opposing the motion. *In the Matter of Efrain Corona*, 11 BOLI 44 (1992), *aff'd*

without opinion, Corona v. Bureau of Labor and Industries, 124 Or App 211, 861 P2d 1046 (1993). Once the Agency presented evidence establishing a prima facie case, it was incumbent on Respondents to present evidence that, at a minimum, created an inference that there was a genuine issue of fact in the evidence presented by the Agency in support of its prima facie case. However, Respondents presented no actual evidence, instead relying on argument that the credibility of Agency witnesses, if cross-examined, was suspect, and that the form of the evidence presented by the Agency, i.e., as business records unsupported by affidavit, was too unreliable to support the Agency's motion.

The standard used by this Forum in determining whether or not to admit evidence is whether it is "of the type commonly relied upon by reasonably prudent persons in the conduct of their serious affairs." OAR 839-50-260(1). Although the witnesses who created the business records would certainly be subject to cross-examination at a contested case hearing, there is no question that the records themselves would be admissible in this Forum. Without presenting some evidence to show what genuine issues of fact cross-examination might raise, a mere assertion that issues would be raised is insufficient to create an inference of unreliability in the evidence sufficient to overcome the Agency's motion for summary judgment.

As for Respondents' objection on the basis that there are no affidavits to support the statements contained in the business records, evidence need not be presented in affidavit form to be

considered sufficiently reliable to support a motion for summary judgment. *Johnson v. Johnson*, 302 Or 382, 387, 730 P2d 1221 (1986).

Respondents' denial also fails to raise a genuine issue of fact sufficient to overcome the Agency's motion. An adverse party may not rest upon the mere denials of the opposing party's pleadings, but must come forward with its evidence to show that there are genuine issues of fact. *Hickey v. Settlementier*, 318 Or 196, 203, 865 P2d 372 (1993); *Northwest Administrators, Inc. v. Woodburn Truck Line, Inc.*, 61 Or App 299, 657 P2d 714 (1983). As stated earlier, Respondents presented no actual evidence to show there was a genuine issue of fact.

In evaluating the Agency's evidence and Respondents' argument and denial in a light most favorable to Respondents, Respondents failed to raise a genuine issue of fact sufficient to overcome the Agency's motion for summary judgment. The ruling granting the Agency summary judgment on the merits is confirmed.

Civil Penalty

Pursuant to ORS 183.415(5), the Agency and Respondents determined the issue of the appropriate amount of civil penalty by stipulating to a penalty of \$1,000.

ORDER

NOW, THEREFORE, as authorized by ORS 658.850, Anastas and Marfa Sharabarin are hereby ordered to deliver to the Bureau of Labor and Industries, Business Office Ste 1010, 800 NE Oregon Street #32, Portland, Oregon 97232-2109, a certified check payable to the BUREAU OF LABOR

AND INDUSTRIES in the amount of ONE THOUSAND DOLLARS (\$1,000), plus any interest thereon which accrues at the annual rate of nine percent between a date ten days after the date of the Final Order herein and the date Respondents comply therewith. This assessment is for civil penalties against Respondents of ONE THOUSAND DOLLARS for one violation of ORS 658.750(1).

**In the Matter of
ASHLANDERS SENIOR
FOSTER CARE, INC.,
Respondent.**

Case Number 68-93
Final Order of the Commissioner
Jack Roberts
Issued April 28, 1995.

SYNOPSIS

Where Claimant was on duty over 40 hours per week and was paid a salary, and Respondent failed to keep any reliable, contemporaneous record of the hours Claimant worked, the Commissioner accepted Claimant's representation of hours worked where they appeared verified, and found that Claimant was paid less than minimum wage plus overtime for those hours. Finding that Claimant's presence was required and that there was no written agreement to deduct meals and lodging, the Commissioner rejected

Respondent's claim of offset, found that Respondent had willfully failed to pay earned wages when due, and ordered Respondent to pay the wages due plus penalty wages and interest. ORS 652.140(2); 652.150; 652.310; 652.320; 652.330; 652.610; 653.010 (3), (4), (10), (11), (12); 653.025; 653.035; 653.055(1), (2); 653.261(1); OAR 839-20-004(12), (14), (16), (20); 839-20-010; 839-20-025; 839-20-030; 839-20-040; 839-20-041(1), (2); 839-20-042; 839-20-050; 839-20-080; 839-20-082.

The above-entitled contested case came on regularly for hearing before Warner W. Gregg, designated as Hearings Referee by Mary Wendy Roberts, then Commissioner of the Bureau of Labor and Industries of the State of Oregon. That designation was confirmed by Jack Roberts, current Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held on November 4, 1993, and November 29, 1994, in room number 4 of the offices of the State of Oregon Employment Department, 119 N Oakdale Avenue, Medford, Oregon. The Bureau of Labor and Industries (the Agency) was represented by Alan McCullough, an employee of the Agency. Ashlanders Senior Foster Care, Inc., a corporation (Respondent), was represented by Raymond R. Smith, Attorney at Law, Medford. James Goguen, president of the corporation, was present throughout the hearing. Phillip Charles Stevens (Claimant) was present throughout the hearing and was not represented by counsel.

The Agency called as witnesses Claimant, Respondent's president James A. Goguen, Respondent's former employee Phyllis Swope (by telephone), and State of Oregon Senior Services Division employee Cindy Hooper. Respondent called as witnesses Mr. Goguen and Respondent's employee Vanessa Malbeck.

Having fully considered the entire record in this matter, I, Jack Roberts, Commissioner of the Bureau of Labor and Industries, 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 or about December 13, 1991, Claimant filed a wage claim with the Agency. He alleged that he had been employed by Respondent, who had failed to pay all wages earned and due to him.

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

3) On December 10, 1992, through the Jackson County Sheriff, the Agency served on Respondent Order of Determination No. 92-119 (Determination Order)* based upon the wage claim filed by Claimant and the Agency's investigation. The Determ-

ination Order found that Respondent owed Claimant \$3,990 straight time wages and \$5,418.80 overtime wages computed at minimum wage of \$4.75 per hour on a total of 1,600 hours worked, 760 of which were worked over 40 hours in a workweek, less the sum of \$2,725, leaving a total of \$6,683.80 unpaid. The Determination Order found further that the failure to pay was willful and that there was due and owing the sum of \$2,220 in civil penalty wages.

4) The Determination Order required that, within 20 days, Respondent either pay these sums in trust to the Agency or request an administrative hearing and submit a written answer to the charge.

5) On December 21, 1992, the Agency received from Respondent's original counsel a written answer to the Determination Order and a request for hearing. The answer admitted that Claimant had been employed by Respondent at the times alleged," denied that Claimant had worked the total hours claimed, denied that Claimant was owed further wages or that Respondent willfully failed to pay wages, and alleged as an affirmative defense, in the event that wages were found to be due, Respondent's financial inability to pay wages at the time they accrued. Respondent alleged the further affirmative defense and counterclaim that Claimant chose to reside at the

* The original Determination Order recited that the employer was "Ashlander Senior Foster Care Home, Inc., aka Ashland Sr. Foster Care, Inc., aka Ashland Senior Foster Care, Inc., aka Ashland Foster Care." Service of that order was made on James Goguen as representative of the employer.

** Respondent's answer also alleged that the Agency's action was improperly brought and not brought in the name of the true employer. (See Finding of Fact -- Procedural 17, *infra*.)

work site in housing and accommodations provided by Respondent for which Claimant had paid no remuneration.

6) The Agency requested a hearing date, and on August 11, 1993, the Hearings Unit issued a Notice of Hearing setting forth the time and place of the hearing, which was served on Respondent and its counsel together with the following: a) a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413; and b) a complete copy of Oregon Administrative Rules (OAR) 839-50-000 to 839-50-420, regarding the contested case process.

7) On October 19, 1993, the Forum received the Agency's request for a discovery order encompassing items requested by the Agency from Respondent's original counsel on October 4, 1993, but not received. On October 21, the Hearings Referee issued a discovery order including the requested items and requiring both participants to submit a Summary of the Case pursuant to OAR 839-50-200 and 839-50-210.

8) On October 27, 1993, the Forum received Respondent's motion to continue (postpone) the hearing scheduled for November 4, 1993. The motion was supported by the affidavit of substituted counsel, notarized on October 22, 1993, which recited that he had recently been substituted as the result of the suspension from legal practice of Respondent's original counsel, that affiant had only recently received the file, that Respondent was

being required by the Internal Revenue Service to provide documents for an audit, and that discovery in this case would be delayed. Respondent requested continuing the hearing for at least 90 days to provide for completion of discovery including deposing Claimant, for completion of Respondent's tax audit, and for preparation for defense of this case. The cover letter enclosed with the motion was dated October 22, 1993, by Respondent counsel's office.

9) On October 28, 1993, the Forum received a stipulation for substitution of attorneys signed by the president of Respondent and by substituted counsel, and signed and dated by original counsel on October 1, 1993. The cover letter enclosed with the stipulation was dated October 26, 1993, by Respondent counsel's office.

10) Also on October 28, the Forum received by fax* (and dated October 29) the Agency's response to the motion to continue. The Agency opposed the postponement, stating that, without waiving its discovery request, the Agency was prepared to proceed even without the requested documents and without deposing Respondent's president. The Agency questioned the timeliness of the request for deposition of Claimant, averred the Agency's compliance with Respondent's previous request for documents and with the Forum's October 21 case summary order, and pointed out that postponement would delay the hearing until at least February 1994. The Agency transmitted its case summary by regular US mail on October 28.

11) Also on October 28, the Forum received by fax (dated October 27) the Agency's motion to amend the Determination Order to reflect "Ashlanders Senior Foster Care, Inc." as a proper Respondent.

12) On October 29, 1993, the Hearings Referee ruled as follows:

"On October 27, 1993, the Hearings Unit received Respondent counsel's motion for a continuance (postponement) in this matter from its present setting on November 4, 1993, to after February 1, 1994. Counsel's affidavit accompanying the motion recites his recent retention, the competing demands on Respondent for pertinent documents by the Internal Revenue Service and a resultant inability to complete pre-hearing discovery and preparation. By fax on October 28, the Agency advised that it opposes a postponement.

"Postponements are generally granted where counsel has a previously assigned conflicting trial or hearing or where the Agency agrees to a set-over. The rules of the Forum provide that inability to complete discovery is not an automatic ground for postponement. In addition, the Hearings Referee does not find that Respondent's motion is timely, and the Agency is prepared to proceed. The Forum is unwilling to delay this matter until February, 1994. Accordingly, Respondent's motion is denied and we will proceed as scheduled on November 4, 1993.

"The Hearings Referee recognizes that Respondent may be at

some disadvantage due to the IRS audit. Accordingly, following the presentation of available evidence at hearing, the Hearings Referee will entertain a motion to leave the record open until mid-December for submission of any documents, the absence of which might prejudice Respondent.

"The Hearings Referee will take up the matter of the Agency's motion to amend its Determination Order, received October 28, at the commencement of the hearing on November 4."

13) On November 2, 1993, the Forum received by fax Respondent counsel's request for an order allowing Claimant to be deposed prior to the hearing herein.

14) The hearing was convened as scheduled on November 4, 1993. Respondent again moved for continuance based upon the recent retention of counsel and the unavailability of Respondent's pertinent records due to the IRS audit. The Hearings Referee stated his concern with the timeliness of Respondent's original continuance request, indicating that the problem with preparation was not all due to the substitution of counsel. The referee reiterated his prior ruling that the hearing would proceed, subject to Respondent's motion, and that should it appear that Respondent would be prejudiced thereby, relevant documents could be submitted at a later date when available. The referee also indicated he would consider hearing other testimony at a later date, either by telephone or upon a reconvenement, but that it was his intention to

* Where the findings recite the transmittal or receipt of material by fax, the original was also received or transmitted by regular US mail, generally at a later date.

complete as much of the hearing as possible.

15) At the commencement of the hearing on November 4, Respondent's counsel stated that Respondent had received the Notice of Contested Case Rights and Procedures and had no questions about it.

16) At the commencement of the hearing on November 4, pursuant to ORS 183.415(7), Respondent and the Agency were orally advised by the Hearings Referee of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

17) At the commencement of the hearing on November 4, the Hearings Referee allowed the Agency's motion to amend the Agency's Determination Order to name as Respondent "Ashlanders Senior Foster Care, Inc." Respondent did not object and asked that all other names be stricken. The referee so ordered.

18) During the hearing, about midday, an emergency arose requiring Mr. Goguen's absence from the hearing. He had not yet testified on behalf of Respondent corporation, and the Agency's case had also not been completed. When the Hearings Referee sought to set a reconvenement for the following day, Respondent's counsel advised of a conflict with an appearance in federal court in Eugene. The Hearings Referee adjourned the proceedings, subject to a reconvenement at a future date.

19) On November 9, 1993, the Hearings Referee ruled as follows:

"RULING ON RESPONDENT MOTION FOR CONTINUANCE

"This matter was convened as scheduled on November 4, 1993, in conference room #4 of the Oregon State Employment Department offices, Medford. Testimony was given by Claimant, by witness Cindy Hoepfer, and by Respondent's president, James A. Goguen on the Agency's case. Due to the unexpected and unforeseen necessity for Mr. Goguen to be absent for the remainder of November 4 to provide transportation and services to one of Respondent's nursing home patients and due further to the commitment of Respondent's counsel in federal court on November 5, it became apparent that the hearing could not be concluded as originally planned. Accordingly, the Hearings Referee adjourned the hearing on condition that it be concluded at a later date mutually available to the Agency, to Respondent, and to the Hearings Referee.

"Based on the representations of the participants, Thursday, February 17, 1994, is available for reconvenement. If this is in error, please advise the Hearings Referee immediately. You will be advised as to the location when space has been obtained. Participants should complete all discovery and be prepared on February 17 to continue the hearing into the following day or until concluded. Each participant will submit a case summary as previously ordered.

"At the convenement of November 4, the Hearings Referee allowed the Agency's motion to

amend its Determination Order. At that time, the Referee also ruled that the case title be changed to reflect only the corporation as Respondent. The Hearings Referee hereby reconsiders and confirms that ruling."

20) On January 26, 1994, the Hearings Unit received the Agency's motion for an order of default against Respondent. The motion and accompanying documentation alleged that the Forum's rules require that corporations be represented at hearing by a member in good standing of the Oregon State Bar, that at the time of the November 4 hearing, Respondent's counsel at hearing was not so qualified, having been suspended by the Bar effective November 2, 1993. Copies of the Agency's motion were served by regular US mail on February 1, 1994 on:

Allen Drescher, Registered Agent for Ashlanders Senior Foster Care, Inc., 300 E Main, Ashland, Oregon 97520, and

James A. Goguen, President and Secretary of Ashlanders Senior Foster Care, Inc., 300 E Main, Ashland, Oregon 97520

21) On February 7, 1994, the Hearings Referee ruled as follows:

"RULING ON AGENCY MOTION FOR DEFAULT

"As recited in the Hearings Referee's ruling of November 9, 1993, continuing the hearing in this matter to February 17, 1994, this matter was convened as scheduled on November 4, 1993, in conference room # 4 of the Oregon State Employment Department offices,

Medford. Testimony was taken on the Agency's case and thereafter the Hearings Referee adjourned the hearing, to be concluded at a later date. Thereafter, on November 9, 1993, this matter was continued to February 17, 1994.

"On January 26, 1994, the Agency moved for an order of default against Respondent herein. In support of its motion, the Agency submitted documentation establishing that Respondent's attorney at the convenement of the hearing of November 4, 1993, was not a member in good standing of the Oregon State Bar, having been suspended from the practice of law for a period of 60 days commencing November 2, 1993.

"Respondent is a corporation and must be represented in this Forum by counsel in a contested case proceeding. OAR 839-50-110(1), ORS 9.320. Counsel means an attorney who is a member of and in good standing with the Oregon State Bar. OAR 839-50-020(7). On November 4, 1993, Respondent's attorney did not meet the definition of the rule. As a corporation, Respondent could only appear through counsel. Accordingly, Respondent did not appear within the meaning of the statute and rules on November 4, 1993, and is hereby ruled in default.

"Pursuant to OAR 839-50-340, a party in default has 10 days from the issuance of a notice of default in which to establish good cause for relief from default. Good cause is defined in OAR 839-50-020(9).

"RULING POSTPONING
HEARING

"It appearing that Respondent corporation is in default herein, the hearing scheduled for February 17, 1994, in Medford is hereby postponed, to be reset at the motion of the Agency with concurrence of the Forum."

22) On February 8, 1994, the Hearings Unit received from Attorney Smith Respondent's response to the motion for default, dated February 3, 1994. On February 22, 1994, the Hearings Unit received from Attorney Smith Respondent's motion for relief from default, dated February 16, 1994. Each submission requested oral argument. On February 23, the Hearings Unit received counsel's supplement to those submissions, and on March 21 received counsel's March 15 inquiry as to status.

23) On May 6, 1994, the Hearings Referee denied Respondent's request for oral argument and requested the Agency's response to Respondent's motion for relief.

24) On May 19, 1994, the Forum received the Agency's response to Respondent's motion for relief, and on May 27, the Forum received Respondent's reply to the Agency.

25) On July 25, 1994, the Hearings Referee ruled, in pertinent part, as follows, after a recitation of the history of the matter as outlined in Findings of Fact - Procedural 14 through 24 above:

"The Agency's submissions establish that [Respondent's attorney] was suspended from the practice of law for a period of 60 days

commencing November 2, 1993. Accordingly, at the convenement of the hearing of November 4, 1993, he was not a member in good standing of the Oregon State Bar. Respondent is a corporation. In this Forum, a corporation must be represented by counsel in a contested case proceeding. OAR 839-50-110(1), ORS 9.320. *In the Matter of Cristobal Lumbreras*, 11 BOLI 167 (1993); *In the Matter of Glenn Walters Nursery, Inc.*, 11 BOLI 32 (1992); *In the Matter of Z and M Landscaping, Inc.*, 10 BOLI 174 (1992); *In the Matter of Allied Computerized Credit & Collections, Inc.*, 9 BOLI 206 (1991); *In the Matter of Coos-Bend, Inc.*, 9 BOLI 221 (1991); *In the Matter of Strategic Investments of Oregon, Inc.*, 8 BOLI 227 (1990). "Counsel" is defined in OAR 839-50-020(7) as an attorney who is a member of and in good standing with the Oregon State Bar. On the date of hearing, [Respondent's attorney] did not meet the definition of the rule. A corporation can only appear through counsel. Accordingly, Respondent did not appear within the meaning of the statute and rules on November 4, 1993. Respondent was in default as a matter of law.

"Normally, a party in default is precluded from presenting evidence and is similarly unable to contest the Agency's offered documents or cross-examine the Agency's witnesses. *In the Matter 60 Minute Tune*, 9 BOLI 191 (1991), *affirmed without opinion, Nida v. Bureau of Labor and Industries*, 119 Or App

174, 822 P2d 974 (1993); *In the Matter of City of Umatilla*, 9 BOLI 91 (1990), *aff'd without opinion, City of Umatilla v. Bureau of Labor and Industries*, 110 Or 151, 821 P2d 1134 (1991); *In the Matter of Metco Manufacturing, Inc.*, 7 BOLI 55 (1987), *aff'd, Metco Manufacturing, Inc. v. Bureau of Labor and Industries*, 93 Or App 317, 761 P2d 1362 (1988). This case is unique. Respondent here was able to object to Agency exhibits and cross-examine Agency witnesses. Nonetheless, if Respondent remains in default, no defense may be presented and there would be no need for further hearing.

"In seeking relief from default, Respondent argues through counsel, as well as by affidavit of Respondent's president, that Respondent was unaware of counsel's disciplinary proceeding. Respondent argues further and asserts that the corporation was unaware of [the attorney]'s disqualification because [he] was himself unaware of it. *** [The] disciplinary matter was heard on July 19, 1993, *** and the trial panel's decision was dated September 27, 1993. A copy of that decision was mailed *** by the *** Bar's Disciplinary Counsel on

October 18, 1993. *** where such a proceeding results in a sanction of reprimand or of suspension from practice of 60 days or less, and there is no request for Supreme Court review, that sanction becomes final and effective on the 15th day following such a mailing. *** the sanction was effective

November 2, 1993, two days prior to the hearing in this case. *** [Respondent's attorney]'s attorney *** avers that through [that attorney's] inadvertence *** [Respondent's attorney] was not personally notified of the trial panel decision until about 5:00 p.m. on November 4. While at first blush it seems incredible that neither *** paid more heed to [Respondent's attorney]'s status, there is no evidence on this record that the recitation of events supplied in support of Respondent's motion for relief are untrue.

"Respondent argues that the Agency was not prejudiced by counsel's disqualification and the technical default. But 'A showing of prejudice to the Agency and/or the Forum is not an element in determining that a party is in default. ***' fn 4, *Metco Manufacturing v. Bureau of Labor and Industries, supra*. Respondent also argues that there is 'good cause' under the Forum's rules to relieve the default. Respondent argues that counsel's appearing on the corporation's behalf after disqualification was a circumstance over which Respondent had no control (having no knowledge of counsel's status) and/or was an excusable mistake of fact. The Commissioner, citing a number of cases wherein default was upheld, together with some in which relief from default was granted, has previously stated:

"The "good cause" standard enunciated throughout these cases is that the "excusable mistake or circumstances over

which the party had no control" means that there must be a superseding or intervening event which prevents timely compliance.' *City of Umatilla, supra*.

"The Commissioner has expanded upon the 'excusable mistake' portion of the rule to the effect that if a party mistakenly acts or fails to act due to being misled by facts or circumstances which would mislead a reasonable person under similar circumstances, then the mistaken act or failure is excusable. *60 Minute Tune, supra*.

"Respondent corporation's only element of control was in the selection of counsel. The responsible corporate officer could have reasonably believed that counsel selected was in good standing. Under the circumstances presented, counsel himself might have so concluded. In bringing counsel's disqualification to the Forum's attention, the Agency Case Presenter was performing his advocative function. In ruling that Respondent was in default, the Hearings Referee was following the letter of the rules of the Forum. Under the facts and circumstances of this case, the Hearings Referee now reconsiders his ruling, which he has authority to do as the Commissioner's designee. *60 Minute Tune, supra; In the Matter of Fred Meyer, Inc., 12 BOLI 47 (1993)*.

"The Forum has relieved default where a superseding or intervening event has contributed to the default. *Glenn Walters Nursery, Inc., supra*. There being no showing that Respondent or counsel

was aware of *** [the] disability on November 4, that is the situation here. Recognizing that a portion of the hearing evidence was taken while Respondent was technically in default, the Hearings Referee nevertheless hereby grants relief from default under the unique procedural facts of this case and will proceed to hear the remainder of this matter on the merits at a time and place to be determined."

The letter ruling concluded by offering a choice of available dates for reconvenement and by dealing with outstanding discovery matters. The referee's ruling relieving Respondent of default is confirmed.

26) On August 19, 1994, the Hearings Referee set the reconvenement on September 22, 1994, and on September 9, the referee notified the participants of the location. On September 19, by fax, counsel for Respondent submitted medical information regarding his physical disability from working, and on September 20, the referee again continued the hearing to November 29, 1994.

27) Because of the long time period between the initial portion of the hearing and the reconvenement, the Hearings Referee on his own motion caused the earlier testimony to be transcribed and furnished the participants with copies of that transcript for use on November 29.

28) The hearing reconvened on November 29, 1994, in the same location as previously, and the taking of evidence was completed.

29) The Proposed Order, which included an Exceptions Notice, was

issued on March 10, 1995. Exceptions, if any, were to be filed by March 20, 1995. No exceptions were received.

FINDINGS OF FACT – THE MERITS

1) During times material herein, Respondent was a corporation operating adult foster care homes in or near Ashland, Oregon. James A. Goguen was president and secretary of Respondent corporation. Respondent corporation owned the furniture and equipment used to operate the homes and leased the real property, i.e., the houses, from Goguen. Respondent engaged or utilized the personal service of one or more employees in operating the homes.

2) Respondent Ashlanders Senior Foster Care, Inc., as a provider of adult foster care, was subject to the jurisdiction, for licensing and regulation purposes, of the Senior and Disabled Services Division (SSD) of the Department of Human Resources of the State of Oregon.

3) Prior to his employment by Respondent, Claimant had completed some college level education and had been trained as a nurse assistant. He had experience as a caregiver for a private client and several years' experience as a resident manager in a care home.

4) Respondent hired Claimant as a caregiver at 368 Kent Street, Ashland, (Kent Street house) in April 1991. He recalled his pay as approximately \$500 per month, received in the form

of a check every two weeks plus cash each week. He worked five to five and one-half days a week.

5) Claimant's duties at Kent Street included nursing tasks such as diabetic injections and dispensing other medications, assisting residents with hygiene, moving those who were not ambulatory, cooking for that house and the house next to it, cleaning, and yard work. There were about five residents. In addition to dispensing medications to clients, Claimant's work day included, beginning at 7:30 a.m., preparing breakfast and assisting the clients to the table, assisting those needing assistance with personal hygiene, and other needs. He could eat with the clients or later. He then cleaned up the kitchen and straightened out the bedrooms, and then until lunch he was available for individuals as needed. He prepared lunch, dispensed medications, assisted residents with lunch, and ate with them or later. After cleaning up lunch dishes and assisting residents as needed, he would do needed laundry. Next, he would begin to prepare dinner about 4 p.m. and serve it about 5 or 5:30. He would assist residents with dinner and eat his own. He would do dinner clean up about 6 p.m. and thereafter begin assisting residents who needed it with getting ready for bed. He would dispense night medications at 8 p.m. Claimant took his meals during his shift, eating the same fare he prepared for the residents. He ate when he could, between assisting residents with eating and

* At hearing, Complainant testified to recalling beginning employment in March 1991. However, the claim calendar he prepared in December 1991 with the aid of the Agency begins in April. Such records as Respondent acknowledged also began in April.

getting to the table. He did not take a meal break or sit down to eat.

6) When he was hired, Claimant spoke with Goguen and with an employee named Jim who performed some supervisory functions at Kent Street. While Claimant worked at Kent Street, Jim "sloughed off" duty hours, creating hardships for Claimant and other caregivers. There was sometimes a written schedule, which Jim changed for his own convenience. Claimant was on duty as caregiver from 7:30 a.m. to 8 p.m. As often as three nights a week, Jim, the person supervising the facility, would assign Claimant as night monitor, which involved overseeing the condition and safety of the residents from about 8 p.m. to 8 a.m. The night monitor usually lay down on a couch in the living room of the Kent Street house and was not free to leave the premises.

7) At Kent Street, Claimant lived in a small structure on the property apart from the house. He lived there because his level of income did not allow him to maintain separate quarters. It was about 100 square feet, had three windows, no water or toilet, an unheated waterbed, a couch, two loveseats, and a bureau. There was no closet. Electricity to run a small electric heater and a single light was provided by an extension cord from elsewhere on the property.

8) Claimant began working as resident manager of another of Respondent's facilities at 168 Nevada Street, Ashland (Nevada Street house), on the last day of April 1991. His duties were similar to those at Kent Street, but with the added responsibility of scheduling the other caregivers and

monitoring the medication charts and paperwork and dealing with family members of clients. He again cleaned and cared for the house interior and the yard.

9) Claimant's workday at Nevada Street began about 7:30 a.m. with the preparation and serving of breakfast. As before, serving included getting the residents to the table. He prepared and served the noon meal and later served a supper at about 5 p.m. He changed linen, assisted clients with walking or reading, planned the next meal and noted any special diets, and maintained the grounds. It was 6 p.m. or after when the table was cleared.

10) At Nevada Street, Claimant's pay changed to \$600 per month, by his recollection. He continued receiving weekly amounts of cash in addition to checks twice a month. He lived on the premises in the attached garage portion, which had been converted into a room, sheet-rocked and carpeted. It had an outside entry and access to a half bath. One wall was taken up by freezers storing foods for the facility. He understood that state law required that a resident manager live on premises. He took his meals at Nevada Street in the same manner as at Kent Street.

11) A document signed by Claimant and two other employees of Respondent in April 1991 and denominated "CONDITION OF WORK FOR HIRE" reads, in part:

"Pay rates and salaries remain the same for employees living on the foster home premise as well as for those employees that chose to live out-side of the senior foster home premise."

There was no written agreement as to dollar amount of compensation or the hours or days of duty expected.

12) Other than a calculation made after the fact based on the medication records, Respondent produced no other record of Claimant's hours of employment. Respondent made no contemporaneous records of the hours Claimant worked. Goguen recalled discussions with Claimant involving client problems and employee problems. Jim Dixon functioned as Claimant's supervisor at Kent Street; Goguen was Claimant's immediate supervisor at Nevada Street.

13) During times material, Cindy Hoepfer had been employed since 1988 by SSD. In 1991, she was in foster home licensing for Jackson County and had licensing oversight for SSD over Respondent's facilities.

14) At times material, ORS 443.725 required that an adult foster care home have a certified resident manager, provider, or substitute caregiver on duty 24 hours a day. The statute outlined certain minimum requirements for substitute caregivers left in charge in the absence of the provider or resident manager. In its administrative rules, SSD had a provision for a written request from the provider to allow a shift caregiver to be present where there was no resident manager living in the foster home.

15) During times material, Respondent was operating under a standard form contract with SSD to care for and medicate clients in each of Respondent's foster homes. The use of a substitute caregiver would allow the provider or resident manager time off. A search of SSD records for April

through August 1991 failed to locate a written request from Respondent to use a substitute caregiver in place of the resident manager at Nevada Street.

16) At Nevada Street, there was sometimes a relief person who came on duty in the evening as night monitor. The night monitor at Nevada Street was on duty from 7 p.m. to 7 a.m. Claimant was then free to leave for the evening unless the relief person was physically unable to assist some client alone and would need Claimant. Often, there was no relief person, and Claimant would function as night monitor.

17) Claimant repeatedly asked Goguen to schedule the caregivers so that Claimant could know what time and assistance he had available. Sometimes a relief person simply did not show up. Claimant was then expected to cover. Some of the relief persons were untrained or otherwise undependable. In the context of not always having a relief show up, Claimant mentioned to Goguen his long hours and about the uncertainty of his days off. Claimant did not keep a time-card at Kent Street or at Nevada Street. Neither Goguen or "the other Jim" kept a record of Claimant's hours, to Claimant's knowledge.

18) Phyllis Swope worked for Respondent in 1991. She worked at the Kent Street, Nevada Street, and East Main locations. In July and August, she sometimes worked as night monitor at Nevada Street, relieving Claimant between 7 p.m. and 7 a.m. As night monitor, Swope was there to be sure the clients were "OK." When she acted as night monitor, she sometimes

called upon Claimant for assistance in lifting one particular client because Swope could not lift due to a bad back.

19) Claimant, as resident manager at Nevada Street, could leave the premises when there was a relief caregiver on duty. He did so only rarely when Swope was on duty, although he was free to leave while she was there.

20) Swope was unable to recall how often she worked as relief caregiver at Nevada Street. She initialed the Nevada Street medication logs when she gave medication on her duty nights there. If she worked days during this time, it would have been only at Kent Street, and she would not have initialed any Nevada Street medication log except between 7 p.m. and 7 a.m. Her initials on the nighttime Nevada Street medication log would indicate she had worked that night. She used the printed initials "PS," but because Claimant's initials were the same, she sometimes used the single initial "P". Generally, it was the practice for each caregiver marking a particular log to indicate at the bottom of the page the identity of each set of initials appearing on that page.

21) Claimant's last day of employment for Respondent was August 22, 1991. When he applied for unemployment compensation shortly thereafter, Claimant used the figure \$2,725 as his earnings from Respondent. He calculated that from his recollection of his salary rate rather than from any actual records such as paycheck stubs. He used that figure on his wage claim with the Agency, also.

22) When he filed his wage claim with the Agency in December 1991, Claimant prepared a calendar

reflecting his recollection at that time of the hours he had worked for Respondent from April through August of that year. He was told by the Agency that he could only claim a maximum of 16 hours worked per day.

23) Vanessa Malbeck began working for Respondent in October 1991, after Claimant quit. She worked as a caregiver and resident manager and had previously worked for SSD as a caregiver. She was employed by Respondent at the time of hearing. When she worked for SSD, she was paid a flat salary of \$100 per week for Saturday morning through Monday morning for a non-ambulatory individual patient. The salary included room and board. At Respondent, she was paid \$40 per day, including room and board, and worked approximately five days a week. She began working at Nevada Street in 1994, having worked at Kent Street and Main Street. She lived on the premises and stated that she worked about 7:30 a.m. to 8 p.m. She described her duties as being the same as those described by Claimant. She was not free to leave during her shift. There were as much as three hours each day that she had no specific duties, but saw to any needs arising among the residents. The number of residents varied from two to five. She started as a caregiver and became a resident manager. She was paid by the day, in addition to room and board, and lived on the premises throughout her employment by Respondent.

24) The testimony of James Goguen was not altogether credible. He testified that Claimant was paid a salary of \$750 per month, on the 1st

and the 15th of the month, for what Goguen represented as from four to four and one-half days per week. Claimant resided on the premises, but that was not a requirement. The revised W-2 form issued by Respondent for 1991 shows Claimant's gross earnings as \$3,350. Goguen explained the discrepancy between earnings originally reported to State of Oregon Employment for Claimant as being due to Respondent paying Claimant partly by check and partly in cash and that this also necessitated revising the W-2 form, based on \$750 per month.* In 1992, Goguen gave the Agency Compliance Specialist a document he had created when asked for information on Claimant. It included what Goguen described at hearing as an approximation of Claimant's work time and a listing of his pay. Overall, it showed more days worked by Claimant than the document created for the hearing. Goguen stated that he estimated the earlier record based on four days on, three days off, and that he had not thought at that time to use the medication records which he asserted at hearing verified Claimant's presence. Goguen said there was a verbal agreement that Claimant got \$750 per month plus room and board, which Goguen evaluated at \$615 per month, or \$20.50 per day. In reaching this figure, he stated he used \$325 per month for a one-room rental in Ashland and \$10.50 per day for food. The figure was not necessarily related to what was charged client residents. Claimant resided

there even when not on duty. On this basis, Goguen believed Claimant had been fully compensated for his employment with Respondent. Goguen estimated that Claimant had about three hours during the average day during which he had no duties and could watch television, visit with residents, or do other things on his own. He stated he was unaware that Claimant worked extra time beyond that used in Goguen's (various) calculations and denied that Claimant had notified him about performing extra duties, about working beyond assigned hours, or about frequent no shows by relief caregivers.

Goguen submitted a calculation purporting to show that the value of the room and board, plus the salary, more than offset the hours worked, at minimum wage (\$4.75 per hour), including overtime. The calculation acknowledged a working day averaging 14 hours for April 1991 and a working day averaging 12½ hours for May, June, July, and August 1991. He stated further that he "probably would" have paid Claimant more if Claimant had lived away from the facility. He then revised this to "possibly." At hearing, Goguen submitted a document which he had compiled from the medication charts, showing the days that Claimant had initialed the charts. According to Goguen, because there were always clients in each home where Claimant worked who were given daily medication, Claimant's initials on the

* The twice monthly checks plus weekly cash may have accounted for Claimant's confusion as to the exact amount of his pay. Because Claimant and Respondent agree as to how payment was made and Respondent had some documentation, the Forum has found that the monthly salary was initially \$600 and was increased to \$750.

medication chart for a particular date showed that Claimant had worked for Respondent on that date. He suggested that conversely, because medication was among Claimant's daily duties, if there was not a record on a particular date that Claimant administered medication on that date, Claimant did not work on that date. The dates on the document covered April 1 to August 31, 1991. Goguen acknowledged, using the medication chart data, that Claimant worked 11 days in April, 14½ days in May, 17 days in June, 17 days in July, and 12 days in August. Goguen stated that the medication records in evidence were contemporaneous records, made on the dates noted on them, and were among the records that Respondent is required by SSD to maintain. He recalled that there were about three residents at Nevada Street in August 1991, one of whom was Albert Wolber. He stated that his initials, as well as those of Claimant, appeared on the medication record of Albert Wolber, for August 22, 23, and 24, 1991. But Claimant's last day of work was August 22, and Albert B. Wolber, a 76-year-old white male residing in a foster home at 168 Nevada Street, Ashland, died in Ashland on July 24, 1991. Goguen offered no explanation for the Wolber chart and was evasive in other responses. Based upon the foregoing inconsistencies and outright discrepancies, the Forum has accepted only those portions of Goguen's testimony which appeared to be verified by other, credible evidence or which were not material to the issues in this proceeding.

25) The testimony of Claimant was generally credible. While he was sometimes imprecise as to exact dates and rates of pay, his testimony was straightforward and was generally corroborated by the record as a whole. There was no credible evidence disputing the days and hours he claimed, and the Forum has no reason to consider his testimony other than credible.

26) Claimant questioned the medication records presented by Respondent, stating that the initials thereon in some instances were not his and that the initials of Swope and Carol Hadley were suspect, in that neither worked a regular day shift at the time. Swope came occasionally as night monitor, usually from 7 p.m. to 7 a.m. Hadley's job was to bathe clients, and she usually was not there full days, or for several days in a row, or for "a 12 hour stint," although she may sometimes have done a relief shift.

27) At times material, the minimum wage in Oregon was \$4.75 an hour.

28) Claimant worked 160 hours straight time and 136 hours overtime in the four weeks ending in April 1991; he worked 160 hours straight time and 124 hours overtime in the four weeks ending in May 1991; he worked 200 hours straight time and 158 hours overtime in the five weeks ending in June 1991; he worked 160 hours straight time and 196 hours overtime in the four weeks ending in July 1991; and he worked 160 hours straight time and 114 hours overtime in the four weeks in August 1991 up through August 22, 1991. He worked a total of 126 days.

29) Claimant worked a total of 840 straight time hours and 728 overtime

hours from April 1 to August 22, 1991, inclusive. Claimant's earnings, on the basis of minimum wage, were \$9,272 including overtime $(840 \times \$4.75) + (728 \times 1\frac{1}{2} \times \$4.75) = \$4,085 + \$5,187 = \$9,272$. At the time he terminated his employment, \$5,922 of that amount remained unpaid $(\$9,272 - \$3,350 = \$5,922)$.

30) Respondent paid obligations of the business while Claimant was employed and thereafter up through the time of hearing.

31) The average daily rate from which penalty wages are calculated is the result of dividing the total number of days worked by the employee into the total amount earned by the employee during the period. The penalty wage is then determined by multiplying the average daily rate by the number of days, up to 30, that wages remain unpaid.

32) The average daily rate based on \$9,272 earned in 126 working days was \$73.59. \$73.59 multiplied by 30 equals \$2,208, rounded to the nearest dollar per Agency policy.

ULTIMATE FINDINGS OF FACT

1) During times material herein, and particularly from April through August 1991, Respondent was an employer in this state.

2) Claimant was employed by Respondent from April 1 through August 22, 1991. He worked as a caregiver in April at Respondent's Kent Street house and as a caregiver-resident manager for the balance of his employment at Nevada Street house.

3) Claimant lived on the premises where he worked and took his meals there if he wished to do so. There was

no written or oral agreement regarding the value of his meals or living facilities.

4) Claimant was paid at the rate of \$600 per month in April and \$750 per month for the balance of his employment by Respondent. He received a paycheck on the 1st and 15th of each month and some cash each week. He was paid a total of \$3,350.

5) The state minimum wage during 1991 was \$4.75 per hour.

6) From April 1 through August 22, 1991, Claimant averaged nearly 12½ hours per day, six days per week, in Respondent's employ. He worked 840 straight time hours and 728 overtime hours, earning a total of \$9,272 on the basis of minimum wage. At termination on August 22, 1991, \$5,922 of that amount remained unpaid.

7) When Claimant quit his employment, Respondent, although financially able to do so, willfully failed to pay him \$5,922 within five days and willfully failed to pay him \$5,922 for 30 days after that.

8) The average daily rate for Claimant was \$73.59. Penalty wages equal \$2,208.

CONCLUSIONS OF LAW

1) At times material, ORS 653.010 provided, in part:

" * * *

"(3) 'Employ' includes to suffer or permit to work; * * *.

"(4) 'Employer' means any person who employs another person * * *."

" * * *

"(10) 'Salary' means no less than the wage set pursuant to ORS 653.025, multiplied by 2,080

hours per year, then divided by 12 months.

"(11) 'Wages' means compensation due to an employee by reason of employment, payable in legal tender of the United States or check on banks convertible to cash on demand at full face value, subject to such deductions, charges or allowances as are permitted in ORS 653.035.

"(12) 'Work time' includes both time worked and time of authorized attendance."

At times material, ORS 652.310 provided, in part:

"(1) 'Employer' means any person who in this state, directly or through an agent, engages personal services of one or more employees ***.

"(2) 'Employee' means any individual who otherwise than as a copartner of the employer or as an independent contractor renders personal services wholly or partly in this state to an employer who pays or agrees to pay such individual at a fixed rate, based on the time spent in the performance of such services or on the number of operations accomplished, or quantity produced or handled."

At times material, ORS 652.320(9) provided:

"'Wage claim' means an employee's claim against an employer for compensation for the employee's own personal services, and includes any wages, compensation, damages or civil penalties provided by law to em-

ployees in connection with a claim for unpaid wages."

At times material, ORS 652.330 provided, in part:

"(1) The commissioner shall enforce ORS 652.310 to 652.405 and to that end may:

"(a) Investigate and *** adjust *** wage claims ***

"(b) Take assignments *** of wage claims *** from the assigning employees *** [and] sue employers on wage claims *** thus assigned ***

"(d) In any case where a civil action may be brought under this chapter for the collection of a wage claim, provide for an administrative proceeding to determine the validity and enforce collection of the claim."

At times material, ORS 652.332 provided, in part:

"(1) In any case when the commissioner has received a wage claim complaint which the commissioner could seek to collect through court action, the commissioner may instead elect to seek collection of such claim through administrative proceedings in the manner provided in this section, *** Upon making such election, the commissioner shall serve upon the employer and the wage claimant an order of determination directing the employer to pay to the commissioner the amount of the wage claim and any penalty amounts under ORS *** 652.150 and 653.055(1) determined to be owed the wage claimant."

During all times material herein,* Respondent was an employer and Claimant was an employee subject to the provisions of ORS 652.010 to 652.750 and 653.010 to 653.261, and the Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and the Respondent herein.

2) At times material, ORS 653.261(1) provided:

"The commissioner may issue rules prescribing such minimum conditions of employment, excluding minimum wages, in any occupation as may be necessary for the preservation of the health of employees. Such rules may include, but are not limited to, minimum meal periods and rest periods, and maximum hours of work, but not less than eight hours per day or 40 hours per week; however, after 40 hours of work in one week overtime may be paid, but in no case at a rate higher than one and one-half times the regular rate of pay of such employees ***."

At times material, OAR 839-20-040 provided, in part:

"(2) Work requested or required is considered work time. Work not requested, but suffered or permitted is considered work time.

"(4) It is the duty of the employer to exercise control and see that the work is not performed if it

does not want the work to be performed. The mere promulgation of a policy against such work is not enough."

At times material, OAR 839-20-041 provided, in part:

"(1) On duty (engaged to wait): Where waiting is an integral part of the job, i.e., when the time spent waiting belongs to and is controlled by the employer and the employee is unable to use the time effectively for his/her own purposes that employee will be considered as engaged to wait. All time spent in inactivity where an employee is engaged to wait will be considered as part of hours worked.

"(2) Off duty (waiting to be engaged): Periods during which an employee is completely relieved from duty and which are long enough to enable him/her to use the time effectively for his/her own purposes are not hours worked. He/she is not completely relieved from duty and cannot use the time effectively for his/her own purposes unless he/she is told in advance that he/she may leave the job and that he/she will not have to commence work until a specified hour has arrived. Whether the time is long enough to enable him/her to use the time effectively for his/her own purposes depends upon all of the facts and circumstances of the case."

At times material, OAR 839-20-042 provided, in part:

* The facts herein arose in mid-1991, prior to the effective dates of any amendments to Oregon Revised Statutes and Oregon Administrative Rules resulting from the 1991 and 1993 legislative sessions. The statutes and rules quoted are as they appeared at that time.

"Under certain conditions an employee is considered to be working even though some of his/her time is spent in sleeping or in certain other activities:

"(1) Less than 24 hours duty: An employee who is required to be on duty for less than 24 hours is working even though he/she is permitted to sleep or engage in other activities when not busy.

"(2) Duty of 24 hours or more: Where an employee is required to be on duty for 24 hours or more, the employer and the employee may agree to exclude bona fide meal periods and a bona fide regularly scheduled sleeping period of not more than 8 hours from hours worked, provided adequate sleeping facilities are furnished by the employer and the employee can usually enjoy an uninterrupted sleep period. If sleeping period is of more than 8 hours, only 8 hours will be credited. Where no expressed or implied agreement to the contrary is present, the 8 hours of sleeping time and lunch period constitute hours worked:

"(a) Interruptions of sleep. If the sleeping period is interrupted by a call to duty, the interruption must be counted as hours worked. If the period is interrupted to such an extent that the employee cannot get a reasonable sleep period, the entire period must be counted;

"(b) For purposes of this rule a reasonable night's sleep is considered sleep time of not less than 5 continuous hours.

"(3) Employees residing on the employer's premises ***: An employee who resides on his/her employer's premises on a permanent basis or for extended periods of time is not considered as working all the time he/she is on the premises. Ordinarily, he/she may engage in normal private pursuits and thus have enough time for eating, sleeping, entertaining, and other periods of complete freedom from all duties when he/she may leave the premises for purposes of his/her own. To determine the exact hours worked, any reasonable agreement of the parties which takes into consideration all of the pertinent facts will be accepted.

At times material, OAR 839-20-050 provided that the employer designate appropriate meal and rest periods, of specified length, but allows flexibility where the needs of clients or the nature of the work preclude the regular scheduling of such time. The time which Claimant spent between April 1 and August 22, 1991, on Respondent's premises while Respondent's employee, including meal periods, less sleep time and actual time away from the premises, was work time.

3) At times material, OAR 839-20-080 provided, in part:

"(1) Every employer regulated under ORS 653.010 to 653.261 shall maintain and preserve payroll or other records containing the following information and data with respect to each employee to whom the law applies:

[(a) through (d), identifying personal data on each employee]

"(e) Time of day and day of week on which the employee's workweek begins ***,

"(f) Regular hourly rate of pay for any workweek in which overtime compensation is due, ***

"(g) Hours worked each workday and total hours worked each workweek ***

"(h) Total daily or weekly straight-time earnings or wages due for hours worked *** exclusive of premium overtime compensation,

"(i) Total premium pay for overtime hours. ***

"(j) Total additions to or deductions from wages paid each pay period including employee purchase orders or wage assignments. *** [including] the dates, amounts, and nature of the items ***

"(k) Total wages paid each pay period,

"(l) Date of payment and the pay period covered by payment."

At times material, OAR 839-20-082 provided, in part:

"(1) In addition to keeping other records required by these rules, an employer *** who furnishes such lodging, meals, other facilities or services to employees as an addition to wages, shall maintain and preserve records substantiating the fair market value of furnishing each class of facility. Separate records of the fair market value of each item furnished to an employee need not be kept. The requirements may be met by keeping combined records of the

fair market value in each class of facility, such as housing, fuel, or merchandise ***. Such records shall include itemized accounts showing the nature and amount of any expenditures entering into the computation of the fair market value, as defined in these rules.

"(2) If additions to or deductions from wages paid so affect the total cash wages due in any workweek (even though the employee actually is paid on other than a workweek basis) as to result in the employee receiving less in cash than the applicable minimum hourly wage, or if the employee works in excess of the applicable maximum hours standard and any addition to the wages paid are a part of wages, or any deductions made are claimed as allowable deductions, the employer shall maintain records showing on a workweek basis those additions to or deductions from wages."

Respondent was obligated to create and maintain contemporaneous records of Claimant's hours and days of work and to provide to Claimant each payday an itemized accounting of his earnings and allowable deductions.

4) At times material, ORS 653.025 required that:

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

"***
"(3) For calendar years after December 31, 1990, \$4.75."

At times material, OAR 839-20-010 provided:

"(1) Employees shall be paid no less than the applicable minimum wage for all hours worked, which includes 'work time' as defined in ORS 653.010(12). If in any pay period the combined wages of the employee are less than the applicable minimum wage, the employer shall pay, in addition to sums already earned, no less than the difference between the amounts earned and the minimum wage as prescribed by the appropriate statute or administrative rule."

At times material, OAR 839-20-030(1) provided, in part:

" * * * all work performed in excess of 40 hours per week must be paid for at the rate of not less than one and one-half times the regular rate of pay when computed * * * pursuant to ORS 653.261(1)."

Respondent was obligated to pay Claimant a minimum wage of \$4.75 an hour for hours worked up to 40 hours per week, and not less than one and one-half times \$4.75 for hours worked over 40 hours per week.

5) At times material, ORS 653.035 provided, in part:

"(1) Employers may deduct from the minimum wage to be paid employees under ORS 653.025 * * * the fair market value of lodging, meals or other facilities or services furnished by the employer for the private benefit of the employee."

At times material, OAR 839-20-004 provided, in part:

"(12) 'Fair Market Value' means an amount not to exceed the retail price customarily paid by the general public for the same or similar meals, lodging or other facilities or services provided to the employee by the employer.

* * * *

"(14) 'Hours Worked' means all hours for which an employee is employed by and required to give to his/her employer and includes all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed work place and all the time the employee is suffered or permitted to work. 'Hours worked' includes 'work time' as defined in ORS 653.010(12).

* * * *

"(16) 'Minimum Wage' means the rate of pay prescribed in ORS 653.025 * * *

* * * *

"(20) 'Salary' and 'Salary basis' means a predetermined amount paid for each pay period of one week or longer (but not to exceed one month) regardless of the number of days or hours worked and in no instance shall be any amount less than required to be paid pursuant to ORS 653.025. * * *"

At times material, OAR 839-20-025 provided, in part:

"(1) The fair market value of meals, lodging and other facilities or services furnished by the employer to the employee for the private benefit of the employee may

be deducted from the minimum wage.

"(2) Full settlement of sums owed to the employer by the employee because of meals, lodging and other facilities or services furnished by the employer shall be made on each regular payday.

"(3) The deductions referred to in (1) above may be made only if the employee actually receives meals, lodging or other facilities or services and only if the meals, lodging or other facilities or services are furnished by the employer for the private benefit of the employee.

"(4) As used in this rule, meals, lodging or other facilities or services furnished by the employer as a condition of employment shall not be considered to be for the private benefit of the employee."

At times material, ORS 652.610 provided that an employer must furnish the employee an itemized statement each regular payday showing the amount and purpose of deductions made during the pay period at the time wages are paid. That statute continued as follows:

"(3) No employer may withhold, deduct or divert any portion of an employee's wages unless:

"(a) The employer is required to do so by law:

"(b) The deductions are authorized in writing by the employee, are for the employee's benefit, and are recorded in the employer's books;

"(c) The employee has voluntarily signed an authorization for a

deduction for any other item, provided that the ultimate recipient of the money withheld is not the employer, and that such deduction is recorded in the employer's books; or

"(d) The deduction is authorized by a collective bargaining agreement to which the employer is a party.

"(4) Nothing in this section shall be construed as prohibiting the withholding of amounts authorized in writing by the employee * * * where such is not otherwise prohibited by law; nor shall this section diminish or enlarge the right of any person to assert and enforce a lawful setoff or counterclaim or to attach, take, reach or apply an employee's compensation on due legal process."

Under the facts and circumstances of this record, where there was no agreement as to the value or deductibility of any meals or lodging furnished to Claimant, and no written agreement authorizing Respondent's deduction from Claimant's wages of the purported cost of meals and lodging, such a deduction would have been a violation of ORS 652.610 and constituted a failure to pay wages earned.

6) At times material, OAR 839-20-030 provided, in part:

"(1) * * * all work performed in excess of forty (40) hours per week must be paid for at the rate of pay not less than one and one half times the regular rate of pay * * *

"(2) Definitions:

"(a) 'Work Week' means any seven (7) consecutive 24 hour periods as determined by the employer. * * * For purposes of overtime computation, each work week stands alone.

"(b) 'Regular Rate', for the purposes of overtime computation means a regular hourly rate, but in no case shall the regular hourly rate be less than the applicable statutory minimum wage rate. In the absence of an express agreement between the employer and the employee which specifies the regular hourly rate, the regular hourly rate is determined by dividing the total remuneration for employment in any work week *** by the total number of hours actually worked in that work week for which the remuneration was paid. ***

"(3) Methods of determining Amount of Overtime Payment Under Different Compensation Agreements:

"(g) Fixed Salary for Periods Other Than Work Week: Where a salary covers a period longer than a work week, such as a month, it must be reduced to its work week equivalent. A monthly salary is subject to translation to its equivalent weekly wage by multiplying by 12 (the number of months) and dividing by 52 (the number of weeks). A semi-monthly salary is translated into its equivalent weekly wage by multiplying by 24 and dividing by 52. Once the weekly wage is arrived at, the regular rate of pay and the amount

of any overtime pay is determined as provided by this rule."

At times material, ORS 652.140(2) provided:

"When any such employee, not having a contract for a definite period, shall quit employment, all wages earned and unpaid at the time of quitting shall become due and payable immediately if the employee has given to the employer not less than 48 hours' notice, excluding Saturdays, Sundays and holidays, of intention to quit employment. If such notice is not given, such wages shall be due and payable 48 hours, excluding Saturdays, Sundays and holidays, after the employee has so quit employment."

Respondent's failure to pay Claimant all wages earned and unpaid at a minimum wage of \$4.75 an hour for hours worked up to 40 hours per week and not less than one and one-half times \$4.75 an hour for hours worked in excess of 40 hours per week within 48 hours, excluding Saturdays, Sundays, and holidays, after Claimant terminated employment violated ORS 652.140(2).

7) At times material, ORS 652.150 provided:

"If an employer willfully fails to pay any wages or compensation of any employee whose employment ceases, as provided in ORS 652.140, then, as a penalty for such nonpayment, the wages or compensation of such employee shall continue from the due date thereof at the same rate until paid or until action therefor is commenced; provided, that in no case

shall such wages or compensation continue for more than 30 days; and provided further, the employer may avoid liability for the penalty by showing financial inability to pay the wages or compensation at the time they accrued."

At times material, ORS 653.055 provided, in part:

"(1) Any employer who pays an employee less than the wages to which the employee is entitled under ORS 653.010 to 653.261 is liable to the employee affected:

"(a) For the full amount of the wages, less any amount actually paid to the employee by the employer;

"(c) For civil penalties provided in ORS 652.150.

"(2) Any agreement between an employee and an employer to work at less than the wage rate required by ORS 653.010 to 653.261 is no defense to an action under subsection (1) of this section.

"(3) The commissioner has the same powers and duties in connection with a wage claim based on ORS 653.010 to 653.261 as the commissioner has under ORS 652.310 to 652.445 ***."

Respondent is liable for a civil penalty under ORS 652.150 for willfully failing to pay all wages, including overtime wages, to Claimant when due as provided in ORS 652.140.

8) Under the facts and circumstances of this record, and in accordance with ORS 652.332, the Commissioner of the Bureau of Labor

and Industries has the authority to order Respondent to pay Claimant his earned, unpaid, due, and payable wages and the civil penalty wages, plus interest on both sums until paid.

OPINION

Claimant worked for Respondent first as a caregiver and then as a resident manager-caregiver in Respondent's adult foster care homes. In each instance, he lived on the premises where his services were performed and took his meals with the residents. Respondent paid Claimant on a salary basis, first at \$600 per month and then at \$750 per month. In determining whether Claimant was entitled to overtime compensation, the finder of fact must decide whether there was a reasonable agreement between the employer and the employee establishing what was considered "hours worked." *Baxter v. M.J.B. Investors*, 128 Or App 338, 876 P2d 331 (1994). The Forum has concluded that no such agreement existed. There was no written agreement as to the number of hours per day or days per workweek that Claimant was expected to work for the stated salary. There was apparently no unwritten agreement between Respondent and Claimant either, since the evidence failed to disclose any "meeting of the minds" between Respondent's owner and Claimant as to the hours or days of duty.

Claimant and Respondent did agree on what Claimant's basic duties were. There was some question regarding non-caregiver work, such as yard maintenance and the like. The Forum has resolved this in favor of Claimant, in that he was present at the

job site, generally unable to use the time for his own private purposes, and was accomplishing work for Respondent's benefit which Respondent suffered him to do.

At the limited salary scale involved, even the "four to four and one-half" day week testified to by Goguen, at the admitted 12-hour day he acknowledged, resulted in payment of less than minimum wage. For instance, using the computation method spelled out in the Agency's rules, \$600 per month results in \$3.46 per hour for a 40-hour week, and \$750 per month results in \$4.33 per hour for a 40-hour week. At minimum wage of \$4.75, 40 hours translates to \$190 per week, or approximately \$825 per month.

1. Work Time

"Employ" is defined as including to suffer or permit to work. ORS 653.010 (3). Work time is all time an employee is required to be on the employer's premises, on duty, or at a prescribed work place. There is no requirement on the part of the employee for mental or physical exertion. Work time includes time spent waiting to perform work for the benefit and at the request of the employer. Unless an employee is specifically relieved from duty for a time period sufficiently long for the employee to use for his or her own purposes, the employer must compensate the employee for time spent waiting. OAR 839-20-041. *In the Matter of Dan's Ukiah Service*, 8 BOLI 96, 106 (1989); *In the Matter of La Estrellita, Inc.*, 12 BOLI 232, 243-44 (1994); *In the Matter of Martin's Mercantile*, 12 BOLI 262, 274 (1994). Claimant testified that he performed his daily duties at Kent Street and at Nevada Street

and, in addition, on many occasions functioned as night monitor at both sites. There was no reliable contrary evidence. The preponderance of the reliable evidence was that he worked the hours claimed. The claim calendar which he created for the Agency a few months after he quit was infinitely more reliable than Respondent's attempt to reconstruct a non-existent record.

In wage claim cases such as this, the Forum has long followed policies derived from *Anderson v. Mt. Clemens Pottery Co.*, 328 US 680 (1946). The Supreme Court stated therein that the employee has the "burden of proving that he performed work for which he was not properly compensated." In setting forth the proper standard for the employee to meet in carrying his burden of proof, the court analyzed the situation as follows:

"An employee who brings suit under [the Fair Labor Standards Act] for unpaid minimum wages or unpaid overtime compensation, together with liquidated damages, has the burden of proving that he performed work for which he was not properly compensated. The remedial nature of this statute and the great public policy which it embodies, however, militate against making that burden an impossible hurdle for the employee. Due regard must be given to the fact that it is the employer who has the duty under [the statute] to keep proper records of wages, hours and other conditions and practices of employment and who is in position to know and to produce the most probative facts concerning the nature and amount of work

performed. Employees seldom keep such records themselves; even if they do, the records may be and frequently are untrustworthy. It is in this setting that a proper and fair standard must be erected for the employee to meet in carrying out his burden of proof.

"When the employer has kept proper and accurate records, the employee may easily discharge his burden by securing the production of those records. But where the employer's records are inaccurate or inadequate and the employee cannot offer convincing substitutes, a more difficult problem arises. The solution, however, is not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work. Such a result would place a premium on an employer's failure to keep proper records in conformity with his statutory duty; it would allow the employer to keep the benefits of an employee's labors without paying due compensation as contemplated by the Fair Labor Standards Act. In such a situation we hold that an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the

reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate." 328 US at 686-88.

As in the quoted federal case, Oregon law requires that the employer maintain particular payroll records. Respondent kept no such records. Thus, the employee, or in this case the Agency, has the burden of proving that the employee "performed work for which he was improperly compensated." The burden of proving the amount and extent of that work can be met by producing sufficient evidence from which a just and reasonable inference may be drawn. This Forum has previously accepted, and will accept, the testimony of a claimant as sufficient evidence to prove such work was performed and from which to draw an inference of the extent of that work, where that testimony is credible. See *In the Matter of Sheila Wood*, 5 BOLI 240, 254 (1986); *Dan's Ukiah Service*, at 106. Here, Claimant's testimony and other evidence was credible. The Forum concludes that Claimant was improperly compensated, and the Forum may rely on the evidence produced by the Agency regarding the number of hours worked. Respondent did not produce persuasive "evidence to negative the reasonableness of the inference to be drawn from the employee's evidence." *Mt. Clemens Pottery Co.*, 328 US at 686-88.

Respondent attempted to suggest (1) that Claimant did not work as many days as he claimed, and (2) that

Claimant was not working all of the time he was present at the job site. But there was no credible evidence that Claimant was at Kent Street or Nevada Street less days than claimed, that he had independent time off on the days that he worked, or that he was consistently relieved of duty at night. Credible evidence based on the whole record established that Respondent paid Claimant at a rate less than \$4.75 per hour for all hours worked. Respondent quite simply produced no reliable evidence to refute the number of hours Claimant claimed.

Respondent introduced portions of the medication records from Nevada Street in an attempt to construct a record of Claimant's hours. The methodology proved unreliable when it appeared that those records were grossly in error as to at least one resident who could not have been medicated as claimed. It was clear to the Forum that not only was there no contemporaneous record of actual work, but no record of any scheduled work. Goguen attempted when dealing with the Agency to construct a record based on "four to four and one-half days per week," but that, too, was not reliable. The Forum has found that the Claimant's claim calendar was the more accurate reflection of Claimant's work time.

2. Minimum Wage and Overtime

Respondent did not assert and the Hearings Referee did not find any exemption or exclusion from the coverage of the Minimum Wage Law, ORS 653.010 to 653.261, or the Wage and Hour Laws, ORS chapter 652, for Respondent or Claimant.

ORS 653.025 prohibits employers from paying their workers at a rate less than \$4.75 for each hour of work time. ORS 653.055(1) provides that

"Any employer who pays an employee less than the [minimum wage and overtime] is liable to the employee affected:

"(a) For the full amount of the wages, less any amount actually paid to the employee by the employer;

" * * * and

"(c) For civil penalties provided in ORS 652.150."

ORS 653.055(2) states that

"Any agreement between an employee and an employer to work at less than the [minimum wage and overtime] is no defense to an action under subsection (1) of this section."

In other words, Claimant could not agree to accept less than minimum wage, whether as a "salary" or otherwise. The agreement to pay at a fixed rate includes the statutory requirement to pay a minimum wage. *Martin's Mercantile, supra; In the Matter of Crystal Heart Books Co.*, 12 BOLI 33, 44 (1993).

OAR 839-20-030 provides that all work performed in excess of 40 hours per week must be paid for at the rate of not less than one and one-half times the regular rate of pay. Respondent was obligated by law to pay Claimant one and one-half times the regular hourly rate, in this case the minimum wage rate, for all hours worked in excess of 40 hours in a week.

3. Set-off

Respondent's answer and presentation suggested that Claimant was furnished room and board and attempted to place a value on the meals and lodging which, taken together with the wages actually paid to Claimant, afforded Claimant minimum wage and overtime in conformity with Oregon law. That defense fails. There was no agreement that the meals and lodging were part of the remuneration. The only thing Claimant signed suggested otherwise: that his pay was the same whether he lived on the premises or not. Respondent did not provide an itemized contemporaneous accounting each payday as to the value of the meals and lodging. Under the circumstances, Claimant's presence during meals and at night was for the employer's benefit and not for the employee's private benefit.

4. Computation of Penalty Wages

Respondent presented no evidence that it was unable to pay Claimant in full when he quit. Inability to pay is an affirmative defense subject to proof. The facts found were that the business continued after Claimant quit, and Respondent paid its other employees and other obligations at that time and thereafter.

The meaning of "willfully fails to pay any wages," as used in ORS 652.150, has been repeatedly held not to imply or require blame, malice, wrong, perversion, or moral delinquency. The language simply means conduct done of free will. Respondent intended to pay Claimant in the manner that it did. It is not necessary that there be evidence of a manifest intent to violate the law. It is enough that what was done

by the employer was done of free will. *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976). That case has been followed in numerous orders of this Forum. Respondent had a duty to know the wages due its employee. *McGinnis v. Keen*, 189 Or 445, 221 P2d 907 (1950); *In the Matter of Jack Coke*, 3 BOLI 238, 242 (1983); *In the Matter of Box/Office Delivery*, 12 BOLI 141 (1994). Respondent's failure to pay Claimant all wages when due in accordance with statute rendered Respondent liable for penalty wages.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders ASHLANDERS SENIOR FOSTER CARE, INC. to deliver to the Business Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2109, the following:

1) A certified check payable to the Bureau of Labor and Industries IN TRUST FOR PHILLIP C. STEVENS in the amount of EIGHT THOUSAND ONE HUNDRED THIRTY DOLLARS (\$8,130), representing \$5,922 in gross earned, unpaid, due, and payable wages, and \$2,208 in penalty wages, PLUS

2) Interest at the rate of nine percent per year on the sum of \$5,922 from August 27, 1991, until paid, PLUS

3) Interest at the rate of nine percent per year on the sum of \$2,208 from September 26, 1991, until paid.

**In the Matter of
PORTLAND CUSTOM
INTERIORS, INC.,
and Edward R. Romayor,
Respondents.**

Case Number 74-94

Final Order of the Commissioner

Jack Roberts

Issued April 28, 1995.

SYNOPSIS

Where the scheduled hearing was canceled when Respondent agreed to sign a Consent Order requiring payment of certain wages and liquidated damages by dates certain, and agreed to voluntary debarment from public works contracts for a three year period, and where Respondent thereafter failed to sign the order or pay the wages, the Commissioner issued this final order based on the disposition agreed to and for the sums and acts specified. ORS 279.361; OAR 839-50-240(9); 839-50-220(4) and (5).

The above-entitled contested case came on regularly for hearing on August 24, 1994, in room 1004 of the State Office Building, 800 NE Oregon Street, Portland, Oregon, before Warner W. Gregg, designated as Hearings Referee by Mary Wendy Roberts, then Commissioner of the Bureau of Labor and Industries of the State of Oregon. That designation was confirmed by Jack Roberts, current Commissioner of the Bureau of Labor and Industries of the State of Oregon. Linda Lohr, Case Presenter with the Bureau of

Labor and Industries (the Agency) represented the Agency, and Antonio Porras, Jr., Attorney at Law, Portland, represented Respondents Portland Custom Interiors, Inc., a corporation (Respondent Custom), and Edward R. Romayor, its president (Respondent Romayor), in this Forum and in correspondence with the Hearings Referee. Respondent Romayor was present.

Having fully considered the entire record in this matter, I, Jack Roberts, Commissioner of the Bureau of Labor and Industries, make the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1) On October 8, 1993, through the Sheriff of Multnomah County, Oregon, the Agency served on Respondent Custom its Order of Determination Number 93-133. The order found that Respondent Custom owed to certain wage claimants and former employees unpaid wages from employment on two separate public works contracts between December 1992 and March 1993, together with liquidated damages.

2) The Agency's Order of Determination provided that Respondent Custom could, within 20 days, file an answer to the order and request a contested case hearing in connection therewith. On October 25, 1993, Respondent Custom, through counsel, filed an answer to the Order of Determination and a request for hearing.

3) The Agency thereafter served its amended Order of Determination on counsel on April 14, 1994.

4) In February 1994, through the Sheriff of Multnomah County, the

Agency served on both Respondents its Notice of Intent to Make Placement on List of Ineligibles (Notice of Intent), which recited the Agency's intent to place Respondents on a list of contractors ineligible to receive public works contracts for a period of three years from publication. The Agency based its intended action on Respondents' alleged intentional failure to pay prevailing wage on two separate public works projects between December 1992 and March 1993.

5) The Agency's Notice of Intent provided that Respondents could, within 20 days, file an answer to the notice and request a contested case hearing in connection therewith.

6) On or about March 1, 1994, Respondents, through counsel, filed an answer to the Notice of Intent and a request for hearing, and on or about May 4, 1994, Respondents, through counsel, filed an answer to the amended Order of Determination and a request for hearing.

7) On June 7, 1994, the Agency requested that the Forum set a date for the contested case hearing, and on July 8, the Forum issued its Notice of Hearing, which was served on Respondents, through counsel, together with the following: a) a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413; and b) a complete copy of Oregon Administrative Rules (OAR) 839-50-000 to 839-50-420, regarding the contested case process.

8) On July 15, 1994, counsel for Respondent requested a delay from 9 a.m. to 1 p.m. for the convenement of the August 9 hearing, citing a docketing conflict. On July 27, the Hearings

Referee reset the hearing to 1:30 p.m., August 9, and asked the participants to file case summaries by August 1. The participants substantially complied with the case summary order.

9) On August 5, 1994, the Agency requested a postponement of the hearing due to the unforeseen unavailability of its principal witness. On August 8, following a series of telephone communications with counsel and the Case Presenter, the Hearings Referee reset the hearing to 9 a.m., August 24, and ordered that subpoenas previously served would be in effect for August 24. Thereafter, the Referee on his own motion delayed commencement of the hearing to 11 a.m. that date. On August 22, 1994, the Agency completed its case summary submission.

10) At the commencement of the hearing, counsel for Respondents stated that Respondents had received a Notice of Contested Case Rights and Procedures and had no questions about it.

11) At the commencement of the hearing, pursuant to ORS 183.415(7), Respondents and the Agency were orally advised by the Hearings Referee of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

12) On August 24, based upon the participants' desire to explore a disposition short of formal hearing, the Hearings Referee adjourned until 1 p.m. with the understanding that if settlement was still a possibility at that time, the Hearings Referee would mediate any unresolved issues and would hear the case, should such mediation fail. The participants stipulated to that procedure.

13) Upon reconvenement on August 24, the Agency announced the following disposition of the case, to which counsel for Respondents, in the presence of Respondent Romayor, agreed:

As an alternative to further hearing, the participants agreed to a Consent Order providing as follows:

1. Respondent Romayor shall pay to the Agency, on or before September 10, 1994, for distribution to designated wage claimants the sum of \$362.98;

2. Respondent Romayor shall pay to the Agency as liquidated damages the sum of \$1,790.76, said sum to be paid in installments of not less than \$149.76 a month, beginning September 25, 1994.

3. Respondents Romayor and Portland Custom Interiors, Inc. agree to the placement of their respective names on the Agency list of ineligible pursuant to ORS 279.361 for a period of three years from the date of publication, constituting a voluntary debarment from receiving public works contracts or subcontracts.

4. The sum of \$362.98 may be reduced pursuant to counsel providing the Agency satisfactory evidence of a prior payment to an employee, but such reduction shall not affect the amount of liquidated damages.

5. The Consent Order shall be submitted by September 10, 1994.

14) On August 24, 1994, the Hearings Referee approved the settlement outlined in Finding of Fact 13 and

canceled the hearing. The Hearings Referee admitted as exhibits all of the described pleadings and correspondence, which, together with the record of the proceedings of August 24, constitute the entire record herein.

16) On March 7, 1995, the Agency advised the Forum that Respondents did not enter into the agreed upon Consent Order by September 10, 1994, or at any time thereafter, and did not make the agreed upon payments. The Agency, with notice to Respondents' counsel, requested that a final order be issued pursuant to OAR 839-50-220(5).

17) The Proposed Order, which contained an Exceptions Notice, was issued March 29, 1995. Exceptions were due by April 8, 1995. No exceptions were received.

CONCLUSIONS OF LAW

1) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the persons and subject matter herein pursuant to ORS 279.342 to 279.365.

2) OAR 839-50-220 provides, in part:

"(4) Where a case is settled within ten days before or on the date set for hearing, the terms of the settlement shall be placed on the record, unless fully executed settlement documents are submitted on or before the date set for hearing.

"(5) Where settlement terms are placed on the record because settlement documents are incomplete, * * * fully executed settlement documents must be submitted to the hearings unit

within ten days after the date set for hearing. Where a party fails to submit the settlement documentation within ten days after the date set for hearing, the terms of the settlement set forth on the record shall constitute the basis for a final order."

OAR 839-50-240 provides, in part:

"The commissioner designates as hearings referees those employees who are employed by the agency as hearings officers, * * *. The commissioner delegates to such designee the authority to:

" * * *

"(9) Decide procedural matters, but not grant motions for summary judgment or other motions by a party which involve final determination of the proceeding, but to issue a proposed order as provided for in these rules."

Respondent's failure to submit settlement documents or cooperate in the preparation and execution of settlement documents within 10 days after the hearing date, or by such date as modified by the oral order of the Hearings Referee on the record, allows the terms of settlement as placed on the record to form the basis for a final order as proposed herein.

3) Under the facts and circumstances of this record, and in accordance with ORS 279.361 and 652.332, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondent to pay the wages and liquidated damages agreed to, plus interest on both sums until paid, and to place Respondents on a list of those individuals, corporations, part-

nerships, or associations ineligible to receive public works contracts or subcontracts.

ORDER

NOW, THEREFORE, as authorized by ORS 279.361 and 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders that:

1) PORTLAND CUSTOM INTERIORS, INC. and EDWARD R. ROMAYOR deliver to the Business Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2109, the following:

a) A certified check payable to the Bureau of Labor and Industries in the amount of TWO THOUSAND ONE HUNDRED FIFTY-THREE DOLLARS AND SEVENTY-FOUR CENTS (\$2,153.74), representing \$362.98 in gross earned, unpaid, due, and payable wages, and \$1,790.76 in liquidated damages, PLUS

b) Interest at the rate of nine percent per year on the sum of \$362.98 from September 10, 1994, until paid, PLUS

c) Interest at the rate of nine percent per year on the sum of \$1,790.76 from September 25, 1994, until paid, AND

2) PORTLAND CUSTOM INTERIORS, INC. and EDWARD R. ROMAYOR be placed on the written list maintained by the Commissioner of firms ineligible to receive public works contracts or subcontracts and that they and any firm, corporation, partnership, or association in which PORTLAND CUSTOM INTERIORS, INC. or EDWARD R. ROMAYOR has a financial interest shall remain ineligible to receive public works contracts or

subcontracts for a period of three years from the date of first publication of their names on said list.

**In the Matter of
SOAPY'S, INC.,
Respondent.**

Case Number 23-95
Final Order of the Commissioner
Jack Roberts
Issued April 28, 1995.

SYNOPSIS

Where Complainant was sexually harassed by Respondent's customer, Complainant ejected the customer, and the customer was readmitted by Respondent's manager, who told Complainant to "live with it," Respondent failed to take immediate and appropriate corrective action regarding the harassment. The Forum found Respondent employer liable for Complainant's resulting emotional distress. ORS 659.030(1)(b); OAR 839-07-550 (1), (3); 839-07-555(1), (3); 845-06-047.

The above-entitled contested case came on regularly for hearing before Warner W. Gregg, designated as Hearings Referee by Jack Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held on January 12,

1995, in room 1004 of the offices of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon. The Bureau of Labor and Industries (the Agency) was represented by Judith Bracanovich, an employee of the Agency. Soapy's, Inc., a corporation (Respondent), was previously held in default and did not appear. Sharon Cornett (Complainant) was present throughout the hearing and not represented by counsel.

The Agency called the following witnesses: Complainant, Complainant's former co-worker Rebecca Garrett, and former Agency Civil Rights Division Senior Investigator Rosemary Kirwin-Alvord.

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

**FINDINGS OF FACT –
PROCEDURAL**

1) On September 29, 1993, Complainant filed a verified complaint with the Agency alleging that she was the victim of the unlawful employment practices of Respondent.

2) After investigation and review, the Agency issued an Administrative Determination finding substantial evidence supporting the allegations of the complaint.

3) The Agency initiated conciliation efforts between Complainant and Respondent, conciliation failed, and on December 1, 1994, the Agency prepared for service on Respondent

Specific Charges, alleging that Respondent discriminated against Complainant in her employment based on her sex, in violation of ORS 659.030(1)(b).

4) With the Specific Charges, the Agency served on Respondent the following: a) Notice of Hearing setting forth the time and place of the hearing; b) a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of Oregon Administrative Rules (OAR) regarding the contested case process; and d) a separate copy of the specific administrative rule regarding responsive pleadings.

5) A copy of those charges, together with items "a" through "d" of Procedural Finding 4 above, were sent by US Post Office certified mail, postage prepaid, respectively as Articles Numbered P671 244 852, P671 244 853, and P671 244 851, to the last known address (supplied by the Agency) of the following, pursuant to OAR 839-50-030:

Craig Desmarias, Registered Agent
Soapy's, Inc.
7320 SE Lake Rd.
Milwaukie, Oregon 97222;
Craig Desmarias, President
Soapy's, Inc.
7320 SE Lake Rd.
Milwaukie, Oregon 97222;
Craig Desmarias, Owner
Soapy's, Inc.
10335 SE Foster Rd.
Portland, Oregon 97266

6) Both the Notice of Contested Case Rights and Procedures (item "b" in Procedural Finding 4) and the Bureau of Labor and Industries

Contested Case Hearings Rules (item "d" in Procedural Finding 4), at OAR 839-50-130(1), provide that an answer must be filed within 20 days of the receipt of the charging document.

7) On December 23, 1994, the Agency filed a motion for order of default, pursuant to OAR 839-50-130(1) and 839-50-040, setting forth that Respondent had failed to answer the Specific Charges within the time limitation required by the Forum's rules. The motion was supported by the following:

a) US Post Office Domestic Return Receipt, Certified Mail, PS Form 3811, December 1991, Article Number P671 244 852 showing delivery to the following addressee on December 2, 1994, per agent signature:

Craig Desmarias, Registered Agent
Soapy's, Inc.
7320 SE Lake Rd.
Milwaukie, Oregon 97222

b) US Post Office Domestic Return Receipt, Certified Mail, PS Form 3811, December 1991, Article Number P671 244 853 showing delivery to the following addressee on December 2, 1994, per agent signature:

Craig Desmarias, President
Soapy's, Inc.
7320 SE Lake Rd.
Milwaukie, Oregon 97222

c) US Post Office Domestic Return Receipt, Certified Mail, PS Form 3811, December 1991, Article Number P671 244 851 showing delivery to the following addressee on December 2, 1994, per agent signature:

Craig Desmarias, Owner
Soapy's, Inc.

10335 SE Foster Rd.
Portland, Oregon 97266

8) On December 28, 1994, the Hearings Referee issued a ruling finding that Respondent had been served with the Specific Charges on December 2, 1994, that Respondent's answer thereto was due December 22, 1994, and that Respondent had failed to file an answer as required. The referee found that this constituted a default under OAR 839-50-330(1), issued a notice of default, and recited how Respondent might seek relief from default under OAR 839-50-340. A copy of the referee's ruling of December 28, 1994, was forwarded by regular US mail, postage prepaid, to the following:

Craig Desmarias, Registered
Agent and President
Soapy's, Inc.
7320 SE Lake Rd.
Milwaukie, Oregon 97222;
Craig Desmarias, Owner
Soapy's, Inc.
10335 SE Foster Rd.
Portland, Oregon 97266.

Neither of these mailings was returned.

9) On December 30, 1994, the Agency filed its Summary of the Case, pursuant to the Forum's rules.

10) At the commencement of the hearing, the Hearings Referee found that Respondent had received the Notice of Contested Case Rights and Procedures. Pursuant to ORS 183.415(7), Complainant and the Agency were orally advised by the Hearings Referee of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

11) The Proposed Order, which contained as Exceptions Notice, was issued March 28, 1995. Exceptions were due by April 7, 1995. No exceptions were received.

FINDINGS OF FACT – THE MERITS

1) During times material herein, Respondent Soapy's, Inc., was a domestic corporation engaged in the operation of liquor and entertainment establishments within this state and utilized the personal services of one or more employees, reserving the right to control the means by which said services were performed.

2) Complainant, a female, began working for Respondent in December 1992 as a bartender. She worked all shifts for Respondent at its location at SE 103rd and Foster Road, Portland, between that date and April 9, 1993, when she resigned. She described the establishment as a "strip bar," that is, a place serving alcoholic beverages where nude dancing was a featured entertainment.

3) As a purveyor of alcoholic beverages in Oregon, Respondent was, at times material, a licensee of and subject to the statutes and rules administered by the Oregon Liquor Control Commission (OLCC).

4) Complainant's direct supervisor at Respondent's SE 103rd and Foster location was Steve Zbindin, bar manager. Craig Desmarias was known to Complainant as being the owner of Respondent.

5) A large, overweight, bald white male in his late 30's named "Dennis" (last name unknown) was a daily customer beginning in about January 1993. He sometimes was there

throughout the day. He daily referred to the dancers as "bitches," "cunts," and "whores" within Complainant's hearing. He called Complainant "cunt" or "bitch" on an almost daily basis.

6) Complainant was hurt, embarrassed, and humiliated by the name-calling.

7) Dennis told other employees of Respondent of his sexual interest in Complainant. He stated he was in love with her and that it was her fault. His interest in her was unwelcome to Complainant. On at least two occasions, Dennis followed Complainant home after work, in the early morning hours. This scared her.

8) Rebecca Garrett worked as a bartender for Respondent at SE 103rd and Foster from late March through late May 1993. She sometimes relieved Complainant and at other times visited the bar while Complainant was working. She recalled the customer named Dennis.

9) Dennis sometimes kept up a running commentary on the dancers. It was always derogatory, he complained about their clothes and their dancing. He called them "bitch," "slut," and "cunt," and made other lewd remarks about their activities. Other than name-calling, he rarely made lewd comments about Complainant or other female bartenders.

10) Garrett noted that Complainant's reaction to Dennis was fear. She was afraid of being attacked. Garrett lived near Complainant and was aware that Dennis had followed Complainant home.

11) Many bars in Oregon keep an "86" list (which Respondent didn't

have), a logbook, and an OLCC incident report, which was used to record incidents which might be the basis for legal action in the future.

12) Complainant was very offended by Dennis's attentions to her, by his comments about her, and by his comments about other females.

13) On several occasions, based on Dennis's offensive language, Complainant escorted him out of the bar and told him he was "86'd," meaning that he was not to return that day or in the future. Generally, when a customer is "86'd," the customer is not readmitted thereafter. Other bartenders and management usually honor and enforce such an action by a bartender. In each instance involving Dennis, she reported her action to Zbindin and noted it in the bar logbook. In each instance, at least five in all, Zbindin let Dennis back in the next day.

14) Dennis spent little or no money. He drank ice water throughout the day.

15) Complainant told Zbindin she was afraid of Dennis. He did not seem to care. He told Complainant and other female employees to "dress sexy" and criticized them when they didn't as well as when they did. Complainant felt females were exploited and that the atmosphere was hostile to women. Zbindin felt that females were to be seen and not heard, referring to women as "dumb bitches," and he expected the female employees to tolerate customers, regardless of customer behavior. The name-calling and other activities by Dennis and his readmittance against Complainant's wishes contributed to the hostile atmosphere and made Complainant very uncomfortable.

16) In early April 1993, Dennis sent roses to Complainant at work. The card accompanying the flowers stated that he was very much in love with Complainant and that it was her fault, that she provoked it.

17) The flowers were there when Complainant arrived at work. Dennis was also present. Complainant picked up the flowers and the card and set them in front of Dennis. She told him that she couldn't accept them, that she wasn't interested in him, that she didn't understand his purpose, and that she couldn't accept anything from him.

18) Complainant then wrote a note to Dennis and explained that she was not interested in him, that she did not like him, and that she did not appreciate him being in the bar while she was working.

19) Dennis showed Complainant's note to Steve Zbindin, her manager. Zbindin told her that she was too hard on Dennis and that she had better learn to "live with it." She felt that Zbindin's reaction was very unfair, which she explained to Zbindin, stating that she was very uncomfortable having Dennis around her. She was hurt by Zbindin's reaction, that he wouldn't back up her decision.

20) On or about April 9, at closing around 2 a.m., Complainant was stocking beer in the cooler, which was located in a back room near the end of the bar. Dennis came into the back room, grabbed her and pushed her against the wall, and told her that he was in love with her and that it was her fault. She pushed him away, kneed him, and immediately called her boss.

21) Permanent expulsion of Dennis would have eliminated the disruption and discomfort he caused.

22) Complainant was very afraid of Dennis. There were at the most only three other people in the place when Dennis came into the back room. Complainant did not know what he was capable of and feared rape. Dennis was an angry man who had spoken of bringing in a gun and blowing everyone in the bar away. He was over six feet tall and weighed over 300 pounds.

23) When Zbindin arrived, he told Complainant she was overreacting, that she would have to live with the situation. He was mad at Complainant.

24) Garrett relieved Complainant on the day just before Complainant quit, when Dennis had sent flowers to Complainant. Complainant was still on the premises, and Garrett overheard Dennis mumbling about Complainant being a bitch, that she wouldn't talk to him and it was driving him crazy. He told Garrett that he loved Complainant. Garrett saw the note that was with the flowers, in which he said he loved Complainant. He asked Garrett to talk to Complainant, to get her to talk to him.

25) After the grabbing incident, Complainant called Garrett to tell her Dennis was "86'd," but when Garrett worked the following day, Dennis was on the premises. Bartenders usually honor an "86" by another bartender. Very occasionally, an agreement is reached where the customer is unwellcome only on the shift of the bartender who barred the customer. When Garrett asked Zbindin why Dennis was present, he said he thought Dennis

should be able to come in, that Complainant had overreacted. She confirmed that Dennis sent Complainant roses and a note which Complainant did not accept. Zbindin had to know about the roses, as they were near his office. When Complainant reported by telephone that Dennis had grabbed her and wouldn't let go, she was in tears, frightened, and "really shaken up."

26) Zbindin told Garrett that he would ignore any "86" order of Complainant in regard to Dennis because he didn't think Dennis should have to stay out.

27) The bar was not a pleasant place to work. Women were "objects"; the manager was "always putting dancers and bartenders down." Bartenders were told to "dress sexy" and were encouraged to be dancers. Frank was the person who scheduled the dancers. He and Zbindin called the dancers "bitch" and "garbage." Frank and Zbindin, in one instance, interviewed dancers in a small office just after they finished their dance shift, while the dancers were still nude.

28) Complainant could not lock Dennis out, even after hours. Zbindin had the only key to the dead bolt lock. It was necessary for Complainant, or whoever was closing, to wait for Zbindin to come lock up. On occasion, she waited from closing at 2 a.m. until as late as 6 a.m.

29) Complainant believed that the repeated direction that she "live with it" in regard to Dennis meant that she must accept anything he did as a term or condition of working there. The fact that she received no support in dealing with him caused her to feel hurt and

devalued. She felt her job would be endangered by protesting.

30) In addition to Steve Zbindin, Complainant also had some dealings with Larry Owens, who claimed to be an owner of the bar. She spoke to him about Dennis and was told that it was the bar business, that if she couldn't accept it she could "hit the road."

31) The combination of dealing with Dennis and the lack of back-up caused Complainant to be sick to her stomach "a lot" and feel "stressed out." She started to suffer insomnia out of fear brought on by the work situation.

32) After she left Respondent's employ, Complainant still suffered from the combination of the behavior she had encountered from Dennis and the failure of Zbindin to support her. This affected her dealings with subsequent employers, in that she feared going to authority with work problems because she might get a negative response. She was afraid that any kindness she exhibited might be interpreted as a "come-on." She became unable to accept constructive criticism unemotionally. She eventually sought counseling.

33) At times material, Rosemary Kirwin-Alvord was a Senior Investigator with the Agency. Between February and August 1994, she investigated the complaint of Complainant against Respondent, including obtaining corporate information, interviewing witnesses, and writing an Administrative Determination. During the Agency investigation, she interviewed witnesses and made a summary of relevant information. The final summary of the interview was not verbatim, but included those items she believed to be important. Statements which had bearing

directly on the issues in the case were recorded as accurately as memory would allow. The summary was usually compiled the same day. The form of the questions asked were not always preserved, and the length of the summary did not always reflect the length of the conversation it memorialized.

34) One of the witnesses interviewed was Tammy Tangen. Tangen confirmed that Dennis used the language attributed to him elsewhere in these findings and that Complainant threw Dennis out several times and he always returned. Dennis drank ice water and never tipped.

35) Tangen was told by Frank: "The bigger your boobs, the bigger tips you'll get." Frank worked for a dancer booking agency owned by Larry Owens, whom Tangen understood was formerly the owner of Respondent.

36) Kirwin-Alvord's investigation found that Respondent's owner at times material was Craig Desmarias, who is listed by the Oregon Corporation Division as president and registered agent of Respondent. Respondent's owner was advised of the result of the Agency investigation.

ULTIMATE FINDINGS OF FACT

1) During times material herein, Respondent operated a liquor and entertainment establishment at SE 103rd and Foster Road, Portland, which engaged or utilized the personal service of one or more employees. Respondent's establishment was subject to the statutes and rules administered by OLCC.

2) Complainant, a female, worked for Respondent as a bartender from December 1992 to on or about April 9, 1993. Steve Zbindin was Respondent's bar manager and Complainant's direct supervisor.

3) The work atmosphere at Respondent's establishment was hostile to women employees. They were treated as objects, exploited, verbally ridiculed, and shown disrespect by management.

4) While Complainant worked there, one of Respondent's customers engaged in a continuing course of verbal and physical conduct of a sexual nature toward Complainant because of her sex.

5) The customer's conduct was unwelcome to Complainant. She was hurt, embarrassed, humiliated, and very offended. She was very afraid and feared rape. She told the manager of her fears.

6) Complainant repeatedly attempted to permanently eject the customer, and the manager allowed the customer to return, telling Complainant that she should "live with it" and that she was overreacting.

7) Management expected female employees to tolerate customer behavior and would not support her decision to eject the customer. She felt that her job would be endangered by further protest and that she must accept the customer's behavior as a term or condition of working there.

8) Respondent took no action to correct or modify the customer's behavior. His conduct toward Complainant and his readmittance against her wishes contributed to the hostile

atmosphere. Permanent expulsion of the customer would have eliminated the disruption and discomfort he caused.

9) The customer's ongoing behavior toward her and the lack of back-up from management combined to cause Complainant severe and long-lasting emotional distress.

CONCLUSIONS OF LAW

1) ORS 659.010 provides, in part:

"As used in ORS 659.010 to 659.110 *** unless the context requires otherwise:

"(6) 'Employer' means any person *** who in this state *** engages or utilizes the personal service of one or more employees reserving the right to control the means by which such service is performed.

"(12) 'Person' includes one or more *** corporations ***."

Respondent was an employer subject to ORS 659.010 to 659.110 at all times material herein.

2) ORS 659.040 (1) provides:

"Any person claiming to be aggrieved by an alleged unlawful employment practice, may *** make, sign and file with the commissioner a verified complaint in writing which shall state the name and address of the *** employer *** alleged to have committed the unlawful employment practice complained of *** no later than one year after the alleged unlawful employment practice."

Under ORS 659.010 to 659.110, the Commissioner of the Bureau of Labor

and Industries has jurisdiction of the persons and subject matter herein.

3) The actions, inactions, statements, and motivations of Steve Zbindin, Larry Owens, and "Frank" are properly imputed to Respondent herein.

4) ORS 659.030 provides, in part:

"(1) For the purposes of ORS 659.010 to 659.110 * * *, it is an unlawful employment practice:

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

OAR 839-07-550 provides, in part:

"Harassment on the basis of sex is a violation of ORS 659.030. It is discrimination related to or because of an individual's gender. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when such conduct is directed toward an individual because of that individual's gender and:

"(1) Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment; or

"(3) Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."

The activities of Respondent's customer Dennis consisted of unwelcome sexual advances and unwelcome verbal and physical conduct of a sexual nature directed toward Complainant because of her sex and constituted sexual harassment.

5) The activities of Respondent's customer in sexually harassing Complainant created an intimidating, hostile, and offensive working environment, contrary to OAR 839-07-550.

6) An administrative rule of the OLCC, OAR 845-06-047, defines disorderly activities as those "that harass, threaten or physically harm another person" and defines lewd activities as those "that contain lustful, lascivious or lecherous behavior;" the rule requires that a liquor licensee evict a patron that is known to have "engaged in *** lewd [or] disorderly *** activities ***."

7) OAR 839-07-555 provides, in part:

"(1) An employer * * * is responsible for its acts and those of its agents and supervisory employees with respect to sexual harassment * * *

" * * *

"(3) An employer may be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer, its agents, or supervisory employees knew or should have known of the conduct and failed to take immediate and appropriate corrective action. In reviewing these cases [the Agency] will consider the extent of the employer's control and any

other legal responsibility which the employer may have with respect to the conduct of such non-employees."

The failure and refusal of Respondent's management to take immediate and appropriate, or any, action to eliminate the sexually harassing activities of its customer Dennis made Respondent responsible for the continued sexual harassment of Complainant by the customer in the workplace and made that continued sexual harassment of Complainant an explicit term or condition of Complainant's employment, in violation of ORS 659.030(1)(b).

8) Pursuant to ORS 659.060(3) and by the terms of ORS 659.010(2), the Commissioner of the Bureau of Labor and Industries has the authority to issue a Cease and Desist Order requiring Respondent to perform an act or series of acts in order to eliminate the effects of an unlawful practice and to protect the rights of others similarly situated. The amount awarded in the Order below is a proper exercise of that authority.

OPINION

Default and the Prima Facie Case

Despite timely service upon the registered agent of Respondent corporation, upon a corporate officer, and upon the reputed owner of the corporation, Respondent failed to answer the Specific Charges and was held in default. OAR 839-50-330(1)(a). In a default situation, the Agency must present a prima facie case in support of the Specific Charges and establish damages. ORS 183.415(6); OAR 839-50-330(2). The Agency meets that burden by submitting credible

witness testimony and documentary evidence acceptable to the Forum. *In the Matter of Metco Manufacturing, Inc.*, 7 BOLI 55, 66 (1987), *aff'd*, *Metco Manufacturing, Inc. v. Bureau of Labor and Industries*, 93 Or App 317, 761 P2d 1362 (1988).

The Forum has consistently held that a prima facie case of an unlawful employment practice is established where there is proof acceptable to the Forum that:

1. Respondent is a respondent as defined by statute.
2. The Complainant is a member of a protected class.
3. The Complainant was harmed by an action of Respondent.
4. The Respondent's action was taken because of the Complainant's membership in the protected class.

OAR 839-05-010(1); *In the Matter of Rj's All American Restaurant*, 12 BOLI 24 (1993); *In the Matter of Palomino Cafe and Lounge, Inc.*, 8 BOLI 32 (1989); *In the Matter of Colonial Motor Inn*, 8 BOLI 45 (1989).

Where the unlawful employment practice charged is sexual harassment, these elements are established where the Forum finds a preponderance of evidence showing:

1. The Respondent is an employer defined by statute;
2. The Complainant was employed by Respondent;
3. The Complainant is a member of a protected class (sex);
4. The Respondent, or respondent's agent, supervisory employee, employee, or non-

employee in the workplace made unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature, directed at Complainant because of Complainant's sex;

5. The conduct had the purpose or effect of unreasonably interfering with Complainant's work performance or creating an intimidating, hostile, or offensive working environment, or submission to such conduct was made an explicit or implicit term or condition of employment;

6. If the conduct was directed at Complainant by Respondent's agent, supervisory employee, employee, or non-employee in the workplace, the Respondent knew or should have known of the conduct;

7. The Complainant was harmed by the conduct.

OAR 839-05-010(1); 839-07-550; *In the Matter of Kenneth Williams*, 14 BOLI 16, 24 (1995).

The Agency, through credible witnesses and documentary evidence relied upon by the Forum, has satisfied the elements and established a prima facie case.

Respondent's harmful action complained of and proved in this case was its failure to take immediate and appropriate corrective action to eliminate the sexually harassing activities of its customer toward its employee. This case illustrates the necessity for OAR 839-07-555(3). Not only should an employee be protected in the workplace from sexual harassment by the

employer, its agents, and supervisors, but also from similar activity by non-employees, where the employer has some control over the conduct or presence of the offending non-employee. While some employers may have only limited means of controlling customer actions, Respondent was both authorized and required to evict Dennis for his harassing, threatening activity, but failed to do so. Respondent similarly failed to take any other action which would have alleviated or eliminated the sexually harassing conduct directed toward Complainant. As a consequence, Respondent is liable for the effects of discrimination. Sexual harassment is sex discrimination. *Holien v. Sears, Roebuck & Co.*, 298 Or 76, 689 P2d 1292 (1984).

Damages

The effect of Respondent's failure to act was the perpetuation of the unwelcome offensive working conditions that resulted in severe emotional distress for Complainant. That distress, as well as its cause, continued for as long as she worked for Respondent. While the immediate cause ceased when the employment ceased, the emotional upset continued thereafter and affected her subsequent employment and relationships. Dennis's interest, name-calling, and lewd comments were unwelcome; Complainant was hurt, embarrassed, humiliated, offended, and very afraid. She feared rape and, in fact, was physically assaulted, causing her to be badly shaken, frightened, and in tears. Dennis's actions and the reaction of Respondent's management caused her to feel devalued, to suffer stomach upset, to feel stress, and suffer insomnia.

It affected her employment, making her suspicious of authority, unable to accept criticism, and in need of counseling. Her emotional upset in this regard continued to the time of hearing. There was no evidence of any other factors affecting her emotional well-being.

This Forum is authorized to eliminate the effects of any unlawful practice found. The effects described herein were significant and long term. While this was not a situation in which an individual employer or manager treated the employee in a harassing manner, it was a situation in which the employer ignored, and seemingly denied, its responsibility to its employee by failing to acknowledge her lawful concerns and by allowing a customer to degrade and harass her sexually. The Forum is awarding \$15,000 to compensate Complainant for her emotional distress.

ORDER

NOW, THEREFORE, as authorized by ORS 659.060(3) and 659.010(2), and in order to eliminate the effects of the unlawful practices found, Respondent SOAPY'S, INC. is hereby ordered to:

1) Deliver to the Business Office of the Bureau of Labor and Industries, State Office Building, Ste 1010, 800 NE Oregon Street, #32, Portland, Oregon 97232-2162, a certified check, payable to the Bureau of Labor and Industries in trust for SHARON CORNETT, in the amount of:

a) FIFTEEN THOUSAND DOLLARS (\$15,000), representing compensatory damages for the mental and emotional distress suffered by

SHARON CORNETT, as a result of Respondent's unlawful practice found herein, PLUS

b) Interest at the legal rate on the sum of \$15,000 from the date of this Final Order until Respondent complies herewith, and

2) Cease and desist from failing to take immediate and appropriate corrective action to eliminate discriminatory conduct in the workplace directed toward any employee based upon that employee's sex.

In the Matter of LOCATING, INC., Respondent.

Case Number 09-95

Final Order of the Commissioner

Jack Roberts

Issued May 17, 1995.

SYNOPSIS

Respondent willfully failed to pay Claimant all wages due upon termination, in violation of ORS 653.261(1), OAR 839-20-030 (overtime wages), and ORS 652.140(2). The Commissioner ordered Respondent to pay the wages owed plus civil penalty wages, pursuant to ORS 652.150, and interest. ORS 652.140(2); 652.150; 653.045; 653.055(1), (2); 653.261(1); and OAR 839-20-030(1).

The above-entitled contested case came on regularly for hearing before Linda Lohr, designated as Hearings Referee by Mary Wendy Roberts, then Commissioner of the Bureau of Labor and Industries for the State of Oregon. That designation was confirmed by Jack Roberts, current Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on October 12, 1994, in the conference room of the Bureau of Labor and Industries, 3865 Wolverine NE, Suite E-1, Salem, Oregon. The Bureau of Labor and Industries (the Agency) was represented by Judith Bracanovich, an employee of the Agency. Robin DeForest (Claimant) was present throughout the hearing. Locating, Inc. (Respondent) was represented by Lee A. Knottnerus, Attorney at Law. David Brown, the Respondent's president, was present throughout the hearing.

The Agency called the following witnesses: Claimant Robin DeForest, by telephone, Margaret Pargeter, an Administrative Specialist II with the Wage and Hour Division of the Agency; by telephone, Susan Dix, an Administrative Specialist with the Wage and Hour Division of the Agency; and Agency Compliance Specialist Pamela Hanson Stark.

Respondent called the following witnesses: David Brown, Respondent's president; Bill Patterson, Respondent's area representative; and Al Church, Respondent's lead locator.

Having fully considered the entire record in this matter, I, Jack Roberts, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact (Procedural

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

FINDINGS OF FACT – PROCEDURAL

1) On November 19, 1993, Claimant filed a wage claim with the Agency. He alleged that he had been employed by Respondent and that Respondent failed to pay all wages earned and due to him.

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

3) On May 13, 1994, the Commissioner of the Bureau of Labor and Industries served on Respondent an Order of Determination based upon the wage claim filed by Claimant and the Agency's investigation. The Order of Determination found that Respondent owed a total of \$618.77 in wages and \$2,176.80 in civil penalty wages. The Order of Determination required that, within 20 days, Respondent either pay these sums in trust to the Agency or request an administrative hearing and submit an answer to the charge.

4) On May 20, 1994, Respondent, through its attorney, filed an answer to Order of Determination. Respondent's answer contained a request for a contested case hearing. Respondent's answer admitted that Claimant had been employed by Respondent at the times alleged, admitted that Claimant worked the hours claimed, admitted that Claimant was paid \$12,295.40, denied that Claimant was owed additional wages, and affirmatively alleged that Claimant was timely paid all

regular and overtime wages to which he was entitled, that Respondent's pay practices are in compliance with all state and federal laws, that Claimant was paid according to Respondent's established pay practices, that Respondent's pay practices were established in compliance with OAR 839-20-030(3)(f), that the Agency has failed, in whole or in part, to state a claim for which relief can be granted, and that failure to pay any monetary sum to Claimant was based on Respondent's reasonable, bona fide belief that no such sum was owed.

5) On September 12, 1994, at the Agency's request, the Hearings Unit issued a Notice of Hearing to the Respondent, the Agency, and the Claimant indicating the time and place of the hearing, together with the following: a) a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413; and b) a complete copy of Oregon Administrative Rules (OAR) 839-50-000 to 839-50-420, regarding the contested case process.

9) On September 26, 1994, the Hearings Referee issued a discovery order to the participants directing them each to submit a Summary of the Case according to the provisions of OAR 839-50-210(1). The Agency and Respondent each submitted a timely summary.

10) During a pre-hearing conference, Respondent and the Agency stipulated to certain facts, which were read into the record by the Hearings Referee at the beginning of the hearing.

11) At the start of the hearing, Respondent's attorney said she had

reviewed the Notice of Contested Case Rights and Procedures and had no questions about it.

12) Pursuant to ORS 183.415(7), the Hearings Referee explained the issues involved in the hearing, the matters to be proved or disproved, and the procedures governing the conduct of the hearing.

13) The Proposed Order, which included an Exceptions Notice, was issued on March 15, 1995. Exceptions were required to be filed by March 25, 1995. After a timely request for an extension of time with which to file exceptions, Respondent timely submitted exceptions, which are addressed in the Findings of Fact and Opinion sections of this Final Order.

FINDINGS OF FACT – THE MERITS

1) During all times material herein, Respondent was an Oregon corporation engaged in the business of locating underground utilities for utility companies. Respondent employed one or more persons in the State of Oregon.

2) From on or about March 10, 1993, to on or about October 29, 1993, Respondent employed Claimant as a line locator.

3) Claimant's duties included locating, detecting, and marking underground utility lines for customers. Claimant worked out of Respondent's Salem office until he was transferred to Respondent's Albany location on or about July 28, 1993.

4) Respondent and Claimant entered into an oral agreement that Claimant would begin performing work at a regular rate of \$7.50 per hour. On or about August 31, 1993, Claimant's

regular rate was increased to \$7.90 per hour, effective retroactively to June 14, 1993. In his August 31, 1993, paycheck he received an additional \$173.80 reflecting the 40 cents per hour increase for the 434.5 hours he worked between June 14, 1993, and the end of August.

5) Paychecks were issued every other Tuesday for a two-week pay period running Monday through Sunday. Employees recorded the number of hours worked each day and days taken as vacation, holidays, or for illness on a weekly time sheet. Hours for the preceding day were recorded each day beginning on Monday and ending on Sunday. Claimant recorded his hours on a time sheet posted in the Salem office. After Claimant's transfer to Albany, his hours were occasionally transferred to the time sheet by someone other than Claimant. He also noted his hours on his calendar at home. When Claimant filed his wage claim, he relied on his calendar in listing the dates and hours he worked for Respondent.

6) Most of Claimant's hours recorded on the timesheets, with the exception of the totals, are in Claimant's handwriting and correspond with the hours Claimant marked on the calendar provided by the Agency when he filed his wage claim. Those that are not in Claimant's handwriting either correspond directly with the hours Claimant marked on the Agency calendar or, on two of the timesheets, include additional hours he failed to note. Claimant's totals for each week on the Agency calendar follow a Sunday through Saturday workweek and do not always correspond with the totals

on the timesheets he filled out at work, which follow a Monday through Sunday workweek. Claimant did not know and, other than providing timesheets which began on Monday and ended on Sunday, Respondent did not articulate specifically to Claimant what seven-day period constituted Claimant's workweek.

7) The timesheets for the workweeks ending October 10, 1993, and October 17, 1993, contain arithmetical errors. The hours for each of the weeks actually total 50 and 54, respectively, rather than the 48 hours indicated on both timesheets. The hours Claimant recorded, including the overtime hours, are consistent with, if not identical to, those summarized in Respondent's payroll schedule for Claimant.

8) Respondent's compensation policy was summarized in a memorandum from "DAVID B. BROWN" to "ALL EMPLOYEES" in August 1991, and explained in pertinent part as follows:

"COMPENSATION

"Employees, other than office personnel and supervisors, are paid a fixed weekly salary for all hours worked in the workweek. The weekly salary is your 'straight time' compensation regardless of whether you work more or less than 40 hours in any workweek.

"State and federal law require that you receive overtime pay for hours work [sic] in excess of 40 hours in any workweek. The law requires you receive overtime pay of one-half of your regular hourly rate of pay for hours worked in excess of 40 in any workweek. Your

regular hourly rate of pay is determined by dividing your weekly salary by the total hours worked in the workweek.

"A. Required Overtime Pay.

"In order to determine your overtime pay, take one-half of your regular hourly rate of pay for the workweek and multiply it by the number of hours worked in excess of 40 in the workweek. Your regular hourly rate of pay is determined by dividing your weekly salary by the total hours worked in the workweek.

"B. Additional Overtime Pay Premium.

"You will always receive, at a minimum, overtime pay based on the above method of calculating overtime. Locating, Inc. has voluntarily chosen, however, to pay you a premium for overtime by utilizing the hourly pay rate determined by dividing 40 hours per work week into the amount of your fixed weekly salary and paying you this full rate for each overtime hour. This overtime premium always will exceed the overtime pay required by state and federal law.

"Example -- Salary \$300/week

Hours	Resulting Regular Rate A	Federal /State Over-time B	Locating Inc. Over-time premium C	Total Gross Pay-check D
30	\$10.00	--	--	\$300.00
40	\$7.50	--	--	\$300.00
45	\$6.67	\$16.70	\$37.50	\$337.50
50	\$6.00	\$30.00	\$75.00	\$375.00

A = Weekly Salary divided by hours worked.

B = 1/2 Regular Rate x hours worked.

C = Regular Rate at 40 hours x hours in excess of 40.

D = Weekly salary plus Locating, Inc. overtime premium (C).

"If you have any questions regarding your compensation, please contact your supervisor or our Office Manager."

9) When Claimant was hired, new employees were not shown the written compensation policy, nor was the policy explained to them. New employees, including Claimant, were told by Respondent when hired that their hourly rate depended on their experience level; those with no experience would receive \$7.50 per hour. Locators were told that they would be paid their hourly rate for 40 hours per week regardless of the number of hours worked up to 40 per week. Hours worked over 40 were to be paid at the regular hourly rate. A fixed salary was never mentioned to Claimant, nor was he ever paid a fixed salary. Claimant's regular rate did not vary from week to week; it remained \$7.50 per hour until June 14, 1993, and, thereafter, remained \$7.90 per hour until he quit on October 30, 1993.

10) For the weeks ending July 11, September 12, and October 24, 1993, Claimant worked less than 40 hours and was paid his straight time pay only for the hours he actually worked. At no time during his employment did he receive pay for a 40-hour workweek when he worked less than a full schedule of hours.

11) Bill Patterson was Respondent's area representative in charge of hiring, firing, and training. He hired Claimant and does not remember what he discussed with Claimant regarding Claimant's pay. He tells new hires that their base rate, if they have no experience, will be \$7.50 per hour and that they are guaranteed a 40-hour workweek whether or not they work the hours. He does not review or mention the Respondent's 1991 written compensation policy with new hires.

12) Jennifer Brown was Respondent's president's daughter and Respondent's payroll clerk at times material. Her responsibilities included receiving the hours worked from the different staffed offices throughout the four states in which Respondent works, summarizing and entering the hours into the computer, and generating the paychecks. She also prepared the tax forms and the quarterlies based on the payroll schedules. She was not involved in creating the compensation policy. She advised the Agency's Compliance Specialist that Claimant was an hourly, not a salaried, employee.

13) Between March 10 and October 29, 1993, Claimant worked a total of 1,561 hours in 180 days. Of the total hours worked, 1,294.5 were "straight time" hours, that is, hours

worked up to 40 per workweek. The remaining 266.5 hours were "overtime" hours, that is, hours worked in excess of 40 hours per workweek.

14) Pursuant to OAR 839-20-030 (Payment of Overtime Wages) and Agency policy, the Hearings Referee calculated Claimant's total earnings to be \$13,286.10. Claimant's hourly wage rate until June 14, 1993, was \$7.50 per hour. Claimant's overtime rate of pay was \$11.25 per hour (one and one-half times his hourly rate of \$7.50). Claimant's hourly wage rate increased to \$7.90 per hour as of June 14, 1993, and his overtime rate of pay increased to \$11.85 per hour (one and one-half times his hourly rate of \$7.90). Claimant's total earnings reflect the sum of the following:

545 hours at \$7.50 per hour	\$4,087.50
111.5 hours at \$11.25 per hour	1,254.40
749.5 hours at \$7.90	5,921.05
155 hours at \$11.85	1,836.75
Holiday Pay May 31, 1993 (8 hours @ 7.50/hr)	60.00
Holiday Pay July 5, 1993 (8 hours @ 7.90/hr)	63.20
Holiday Pay September 6, 1993 (8 hours @ 7.90/hr)	<u>63.20</u>
TOTAL EARNED	\$13,286.10

15) During the wage claim period March 10 to October 29, 1993, Respondent paid Claimant \$12,295.40 for all of the hours he worked including pay for three holidays. He was paid at the straight time rate of \$7.50 per hour until on or about August 31, 1993, when he received a retroactive increase to \$7.90 per hour. All hours, including the three holidays, May 31, July 5, and September 6, 1993, were paid at the straight time rates even

when the hours worked were less than 40 per week.

16) Claimant quit without notice on October 30, 1993.

17) Civil penalty wages, computed in accordance with Agency policy, are as follows: \$13,099.70 (the total wages earned, minus the holiday pay) divided by 180 (the number of days worked during the claim period) equals \$72.78 (the average daily rate of pay). This figure of \$72.78 is multiplied by 30 (the number of days for which civil penalty wages continued to accrue) for a total of \$2,183.40, rounded to \$2,183 pursuant to Agency policy.

18) The Hearings Referee carefully observed the demeanor of each witness. The testimony of Claimant was credible. He had the facts readily at his command, and his statements were entirely supported by documentary evidence. There is no reason to determine the testimony of the Claimant to be anything except reliable and credible.

19) The testimony of Al Church was not entirely credible. His ongoing employment relationship with Respondent alone is not enough to discredit his testimony. However, on key points, his testimony was inconsistent and contradicted credible witness testimony. For instance, he testified that he knew Claimant was paid on a salary basis, yet he told Agency representative, Susan Dix, prior to hearing, that he had no idea how Claimant was paid. He also testified at one point that during the winter months work was slow and even though Church was "high man" for the week with a total of 16 hours he was paid for 40 hours. Later in his testimony, however, he

stated he was upset with Respondent because he was forced to work too many hours during the winter season. He testified that he was an avid skier and he preferred to work fewer hours during the ski season, but couldn't because of his workload. His testimony was not believed where it was controverted by other credible evidence.

20) David Brown's testimony was not reliable or credible. His testimony was inconsistent on important points and was contradicted by Claimant's testimony and the documentary evidence. His testimony regarding the compensation policy was evasive and never addressed the fixed salary issue except to emphasize the guaranteed 40-hour workweek, which the documentary evidence and Claimant's testimony controverted. His testimony was given little weight whenever it conflicted with credible evidence on the record.

21) The testimony of the other witnesses was entirely credible. The Hearings Referee observed the demeanor of each and found each to be credible.

ULTIMATE FINDINGS OF FACT

1) During all times material herein, Respondent was a corporation doing business in the State of Oregon and employed one or more persons in the operation of that business.

2) Respondent employed Claimant as a line locator from March 10 to October 29, 1993.

3) During the wage claim period, March 10 to October 29, 1993, Respondent and Claimant had an oral agreement whereby Claimant's rate of pay was \$7.50 per hour for hours worked, and 40 hours per week was

guaranteed at the \$7.50 rate. Hours in excess of 40 per week were compensated at the straight time rate. Claimant's rate after June 14, 1993, was \$7.90 per hour.

4) Claimant was paid every other Tuesday. His workweek ran Monday through Sunday.

5) Claimant quit without notice on October 30, 1993.

6) Claimant worked 1,561 hours in 180 days.

7) Claimant earned \$13,286.10 in wages. Respondent paid him a total of \$12,295.40. Respondent owes Claimant \$990.70 in earned and unpaid compensation.

8) Respondent willfully failed to pay Claimant \$990.70 in earned, due, and payable wages. Respondent has not paid Claimant the wages owed and more than 30 days have elapsed from the due date of those wages.

9) Claimant's average daily rate for the wage claim period of employment was \$72.78 (\$13,099.70 earned, minus the holiday pay, divided by 180 days equals \$72.78 average rate per day). Civil penalty wages, computed pursuant to ORS 652.150 and Agency policy, equal \$2,183 (Claimant's average daily rate, \$72.78, continuing for 30 days).

10) There was no clear mutual understanding between Claimant and Respondent that Claimant would be paid a fixed salary for the hours worked each week, whatever their number; Claimant was not paid a fixed salary; and Claimant's regular rate did not vary from week to week. Respondent did not provide any such evidence for the record at the hearing.

CONCLUSIONS OF LAW

1) During all times material herein, Respondent was an employer and Claimant was an employee subject to the provisions of ORS 652.110 to 652.200 and 652.310 to 652.405.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and the Respondents herein. ORS 652.310 to 652.405.

3) ORS 653.261(1) provides:

"The commissioner may issue rules prescribing such minimum conditions of employment, excluding minimum wages, in any occupation as may be necessary for the preservation of the health of employees. Such rules may include, but are not limited to, minimum meal periods and rest periods, and maximum hours of work, but not less than eight hours per day or 40 hours per week; however, after 40 hours of work in one week overtime may be paid, but in no case at a rate higher than one and one-half times the regular rate of pay of such employees when computed without benefit of commissions, overrides, spiffs and similar benefits."

OAR 839-20-030(1) provides, in part:

"[A]ll work performed in excess of 40 hours per week must be paid for at the rate of not less than one and one-half times the regular rate of pay when computed without benefit of commissions, overrides, spiffs, bonuses, tips or similar benefits pursuant to ORS 653.261(1)."

OAR 839-20-030(3)(f) provides, in part:

"An employee employed on a fixed salary basis may have hours of work which vary from work week to work week and the salary may be paid to the employee pursuant to an understanding with the employer that such employee will receive such fixed amount of compensation for whatever hours the employee is called upon to work in a work week, whether few or many. Where there is a clear mutual understanding of the parties that the fixed salary is compensation for the hours worked each work week, whatever their number, such a salary arrangement is permitted if the amount of the salary is sufficient to provide compensation to the employee at a rate not less than the applicable statutory minimum wage rate for every hour worked in those work weeks in which the number of hours worked is the greatest, and if the employee receives overtime compensation, in addition to such salary, for all hours worked in excess of 40, at a rate not less than one-half the regular rate of pay.

"Since under such an arrangement, the number of hours actually worked will fluctuate from work week to work week, the regular rate of the employee will vary from week to week and is determined by dividing the number of hours worked in the work week into the amount of the salary to obtain the applicable regular hourly rate for any given work week. Payment for overtime hours worked in

excess of 40 hours in such workweek at one-half such hourly rate in addition to the salary satisfies the requirements of this rule because such hours have already been compensated at the regular rate, under the salary arrangement."

Respondent and Claimant had no clear mutual understanding that Claimant would receive a fixed amount of compensation for whatever hours Claimant worked, and, in fact, Respondent did not pay Claimant on a salary basis; therefore, Respondent did not meet the requirements of the fluctuating workweek method of calculating overtime. Here, Respondent was obligated by law to pay Claimant one and one-half times his regular hourly rate, in this case \$7.50 and subsequent to June 14, 1993, \$7.90 for all hours worked in excess of 40 hours in a week. Respondent failed to so pay Claimant.

4) ORS 652.140(2) provides:

"When an employee who does not have a contract for a definite period quits employment, all wages earned and unpaid at the time of quitting become due and payable immediately if the employee has given to the employer not less than 48 hours' notice, excluding Saturdays, Sundays and holidays, of intention to quit employment. If notice is not given to the employer, the wages shall be due and payable within five days, excluding Saturdays, Sundays and holidays, after the employee has quit, or at the next regularly scheduled payday after the employee has quit, whichever event first occurs.

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

5) ORS 652.150 provides:

"If an employer willfully fails to pay any wages or compensation of any employee whose employment ceases, as provided in ORS 652.140 and 652.145, then, as a penalty for such nonpayment, the wages or compensation of such employee shall continue from the due date thereof at the same rate until paid or until action therefor is commenced; provided, that in no case shall such wages or compensation continue for more than 30 days from the due date; and provided further, the employer may avoid liability for the penalty by showing financial inability to pay the wages or compensation at the time they accrued."

Respondent's compensation plan did not meet the requirements of OAR 839-20-030(3)(f). Respondent is liable for a civil penalty under ORS 652.150 for willfully failing to pay all wages or compensation to Claimant when due, as provided in ORS 652.140.

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

OPINION

The facts regarding the number of hours Claimant worked, the amount Claimant was paid, and the rate at which Claimant was paid are not disputed. The issue is whether Claimant's agreement with Respondent complied with the requirements of OAR 839-20-030(3)(f), which allows for a compensation agreement based upon an agreed fixed salary for fluctuating hours.

Respondent argues that Claimant was paid pursuant to Respondent's compensation policy and that the policy complies with the fluctuating workweek method of calculating overtime. Respondent's policy states that "employees, other than office personnel and supervisors, are paid a fixed weekly salary for all hours worked in the work week." Regardless of whether or not the policy complies with OAR 839-20-030(3)(f), Respondent's method of paying Claimant did not conform to either Respondent's written policy or to the rule's requirements.

Under the fluctuating workweek method of calculating overtime, the figured hourly rate of a salaried employee, i.e., one who is guaranteed a certain amount of money even if he or she works fewer than 40 hours in a week, is allowed to vary from week to week, depending on how many hours the employee works. To calculate the hourly rate for any given week, the employee's weekly salary is divided by the total number of hours the employee worked that week. The employee's overtime compensation is then figured to be one-half this rate multiplied by the number of hours worked in excess of 40. The employee has already been

compensated for the straight time pay for the overtime hours when his or her weekly salary was divided by the total number of weekly hours, and the extra one-half time compensation gives the employee the required time and one-half pay for each hour worked over 40.

Under this method, the hourly rate will vary with the number of hours worked over 40. In fact, the more overtime an employee works, the lower the hourly rate. The offset for the employee, however, is that the employee is salaried, and if fewer than 40 hours are worked in a workweek, the employee still receives the salary.

The keystone of this method of overtime payment is the guarantee of a salary. "Salary" is defined in OAR 839-20-004 as "a predetermined amount paid for each pay period of one week or longer * * * regardless of the number of days or hours worked * * *." Contrary to Respondent's assertion that Claimant's "salary" was a guaranteed 40-hour workweek at the rate of \$7.50 per hour, the credible evidence on the record, provided in part by Respondent, demonstrates that the only thing guaranteed Claimant was a sum that equaled the total number of hours he worked multiplied by his agreed rate of \$7.50 and, later, \$7.90 per hour, i.e., a straight time calculation. Claimant's check stubs and Respondent's payroll schedule both record Claimant's "regular rate" as \$7.50 per hour with a "retro raise" of 40 cents per hour in August, effective June 14, 1993. Claimant's credible testimony that, when hired, he was promised \$7.50 per hour is corroborated by the person who hired Claimant, Bill Patterson, and though

Patterson "couldn't remember" what he told Claimant at the time of hire, he testified that he tells all new hires that the "base rate" is \$7.50 per hour for those with no experience. Even Respondent's bookkeeper and payroll clerk, the one in charge of recording hours worked and calculating and issuing payroll checks, understood that Claimant was an hourly, not a salaried, employee, and so conveyed that information to the Agency Compliance Specialist.

Definitive evidence of Claimant's hourly status is found in comparing the timesheets provided by Respondent with Claimant's check stubs and Respondent's payroll schedule. Those documents reveal Claimant was never paid for a full 40 hours when he worked fewer than 40 hours per week.

The following charts (page 108) compare Respondent's documented method of overtime compensation with what Claimant's wages would have been under a true fluctuating workweek method and with what Claimant is actually owed as an hourly employee. The pay period between July 5 and July 18, 1993, is used by way of illustration.

Chart 1 depicts what Claimant was actually paid by Respondent and the method of overtime compensation

used based on the evidence in the record.

Chart 2 depicts the amount Claimant would have earned under the fixed salary/fluctuating workweek method.*

Chart 3 depicts the method Respondent is required to use for an hourly employee.

In comparing the varied methods of compensation, it is evident that Respondent paid \$16.25 more than that required by the fixed salary/fluctuating workweek method. Respondent, however, saved \$35.63 by paying on a straight time basis rather than time and one-half for the overtime hours worked. Respondent's plan, while purporting to be more generous than required by OAR 839-20-030(f), avoids the paperwork involved in determining varying weekly regular rates of pay. The method of determining the amount of overtime due under the rule is limited, however, and is allowable only where all of the legal prerequisites for the use of the fluctuating workweek method of overtime payment are present. In Claimant's case, he received the same rate of pay for his overtime hours that he received for his nonovertime hours. The rule is not an exemption from paying one and one-half times the regular rate of pay for all hours over 40 worked. If an employee is being paid for his overtime hours at a

* The fixed salary of \$300 was derived by multiplying \$7.50 by the "guaranteed" 40 hour workweek. Respondent never articulated to Claimant a fixed salary amount, and the evidence shows that during the investigation, Respondent failed to provide payroll records or information supporting its contention that Claimant was a salaried employee. Moreover, at no time during the hearing and nowhere in the documents was there a reference to a fixed salary. As illustrated above, Claimant was neither paid on a fixed salary basis, nor paid for 40-hour weeks where the weeks fell short of 40 hours as "guaranteed" by Respondent.

CHART 1

COMPENSATION BASED ON STRAIGHT TIME CALCULATION USED BY RESPONDENT

Work Week	Hours Worked	Regular Rate	Overtime Rate	Amount Paid
July 5 to 11	36.5	\$7.50	\$7.50	\$273.75
July 12 to 18	49.5	\$7.50	\$7.50	\$371.25
Holiday Pay				\$60.00
TOTAL PAY =				\$705.00

CHART 2

COMPENSATION BASED ON AN AGREED FIXED SALARY FOR FLUCTUATING HOURS

Work Week	Hours Worked	Regular Rate	Half Time Rate	Amount Paid
July 5 to 11	36.5	\$300.00		\$300.00
July 12 to 18	49.5	\$6.06	\$3.03	\$328.75
Holiday Pay				\$60.00
TOTAL PAY =				\$688.75

CHART 3

COMPENSATION BASED ON AN HOURLY RATE

Work Week	Hours Worked	Regular Rate	Overtime Rate	Amount Paid
July 5 to 11	36.5	\$7.50	\$11.25	\$273.75
July 12 to 18	49.5	\$7.50	\$11.25	\$406.88
Holiday Pay				\$60.00
TOTAL PAY =				\$740.63

rate no greater than that which he or she receives for nonovertime hours, compliance with the requirements of OAR 839-20-030 cannot be rested on any application of the fluctuating workweek formula.

Finally, an additional hallmark of the fixed salary/fluctuating workweek method is the necessity for a clear mutual understanding between employer and employee. Unless the employee clearly understands that the salary covers whatever hours the job may demand in a particular workweek and the employer pays the salary even though the workweek is one in which a full schedule of hours is not worked, the fluctuating workweek method may not be used. The only understanding

between Respondent and Claimant was that Claimant would receive a beginning base rate of \$7.50 per hour, which was subsequently increased. And, although it was agreed that Claimant was guaranteed pay for a 40-hour workweek whether he worked it or not, he was never, in fact, paid for a 40-hour workweek for the weeks he worked less than 40 hours.

The Commissioner has held that where an employer and employee enter into an agreement whereby the employee will receive straight time wages for overtime hours worked, such agreement is no defense to an administrative action to collect earned, due, and payable wages. *In the Matter Ken Taylor*, 11 BOLI 139 (1992). Claimant

and Respondent had such an agreement.

OAR 839-20-030 provides that all work performed in excess of 40 hours per week must be paid for at the rate of not less than one and one-half the regular rate of pay. Respondent is obligated by law to pay Claimant one and one-half times his regular hourly rate for all hours worked in excess of 40 hours in a week.

Penalty Wages

Awarding penalty wages turns on the issue of willfulness. Willfulness does not imply or require blame, malice, wrong, perversion, or moral delinquency, but only requires that that which is done or omitted is intentionally done with knowledge of what is being done and that the actor or omittor be a free agent. *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976). Respondent, as an employer, had a duty to know the amount of wages due to its employee. *McGinnis v. Keen*, 189 Or 445, 221 P2d 907 (1950); *In the Matter of Jack Coke*, 3 BOLI 238, 242 (1983). Here, evidence established that Respondent was aware of the overtime requirements and was aware of the requirements of the method of overtime compensation permitted by OAR 839-20-030(3)(f). Respondent failed to comply with the requirements and, indeed, did not comply with its own self-styled compensation method. Evidence showed that Respondent acted voluntarily and was a free agent. Respondent must be deemed to have acted willfully under this test and thus is liable for penalty wages under ORS 652.150.

Pursuant to Agency policy, civil penalty wages due under ORS

652.150 are rounded to the nearest dollar. *In the Matter of Wayton & Willes, Inc.*, 7 BOLI 68, 72 (1988).

Respondent's Exceptions

Respondent's exceptions question the Hearings Referee's interpretation and application of the wage and hour laws to the facts in this case and reiterate the substance of its defenses at hearing; namely, that Claimant was paid pursuant to a lawful compensation policy based on the fluctuating hours provision of the Oregon Administrative Rules and that, although Respondent's policy "differed slightly" from the rule's provisions, the difference provided a "greater benefit to employees" by paying more than one-half the regular rate for all overtime hours. Respondent, in its exceptions, admits that Claimant was not paid one and one-half his regular rate of pay for hours worked over 40 in a workweek and contends that as long as Claimant was paid more than one-half his regular rate of pay for those hours, Respondent was paying more than required under state law. Respondent also takes exception to the award of penalty wages.

Respondent is simply wrong in its interpretation of the state's overtime requirements. OAR 839-20-030, which is consistent with state and federal law, requires that all work performed in excess of 40 hours per week must be paid for at the rate of not less than one and one-half times the regular rate of pay, regardless of the basis on which compensation is paid. The rule provides seven possible methods for calculating the regular rate and determining the amount of overtime payments due under different compensation agreements. OAR 839-20-030

(3). The point Respondent misses entirely is that all of these methods, including the method for compensation based upon an agreed fixed salary for fluctuating hours, if complied with, satisfy the requirement that overtime hours be paid at a rate no less than one and one-half times the regular rate of pay. Contrary to Respondent's assertion otherwise, none of the rule's methods permit paying overtime hours at one-half the regular rate unless, of course, all of the hours worked, including the overtime hours, have been paid at the regular rate. In its exceptions, Respondent states that

"Locating's policy differs from the language of the rule by using a higher regular rate than is required by law *** [I]n other words, Locating pays 1/40th of the weekly salary for each hour of overtime, regardless of the number of hours actually worked during the week. The regular rate does not fluctuate. Claimant's regular rate remained \$7.50 (or \$7.90) regardless of the number of hours worked in a week."

By guaranteeing a higher regular rate, Respondent no longer has the benefits it might derive from calculating Claimant's regular rate under the fluctuating workweek method sanctioned by the rule. Indeed, Respondent's method is clearly not the same as the fluctuating workweek method. Respondent is obligated to pay time and one-half on whatever it determines is Claimant's regular rate, and all of the evidence, and by Respondent's own admission, Claimant's regular rate was guaranteed at \$7.50 (or \$7.90) per hour. Respondent is correct with regard to its

ability to pay more than the law requires. The law requires at a minimum one and one-half times the regular rate of pay, regardless of how the regular rate is determined. Respondent did not pay more than one and one-half times the regular rate of pay it guaranteed Claimant; in fact, it did not pay the minimum overtime required. The difference between what Claimant was paid and what he was owed for overtime at the guaranteed rate is \$990.70.

Notwithstanding that Respondent's method differed from the fluctuating workweek method by guaranteeing a fixed regular rate, Respondent's method did not meet the salary requirement as well. In spite of Respondent's assertions to the contrary, there is no evidence in the record to support Respondent's affirmative defense that Claimant was taking unpaid vacation during the periods he worked less than 40 hours in a workweek. There is sufficient evidence, however, that Claimant was never paid a fixed salary for short workweeks.

With regard to the award of penalty wages, the Forum found that Respondent paid Claimant less overtime than was owed. That Respondent failed to apprehend the correct interpretation and application of the law, and based its actions upon its incorrect application, does not exempt it from a determination that it willfully failed to pay overtime. Willful, under ORS 652.150, "simply means conduct done of free will." A.G. Letter Opinion No. Op. 6056 (September 26, 1986); *In the Matter of Central Pacific Freight Lines, Inc.*, 7 BOLI 272, 280 (1989); *In the Matter of Dan's Ukiah Service*, 8 BOLI 96, 108 (1989); *In the Matter William Sama*, 11

BOLI 20, 24 (1992); *In the Matter of Mark Vetter* 11 BOLI 25, 31 (1992). Respondent knew what it was paying, intended to pay as it did, and was a free agent. A financially able employer is liable for a penalty when he or she willfully does or fails to do any act which results in failure to meet its statutory obligation.

The Hearings Referee reviewed again the exhibits offered by Respondent at hearing to support the lawfulness of its compensation policy and to show that Respondent did not act willfully in violating wage and hour law. Neither document is relevant to this proceeding. The opinions of the State of Washington's Department of Labor and the Employment Appeals Board as to the lawfulness of Respondent's compensation scheme do not excuse Respondent's obligation to know and comply with the state's overtime requirements.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent Locating, Inc. to deliver to the Business Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2109, the following:

1) A certified check payable to the Bureau of Labor and Industries IN TRUST FOR Robin DeForest in the amount of THREE THOUSAND ONE HUNDRED AND SEVENTY-THREE DOLLARS AND SEVENTY CENTS (\$3,173.70), representing \$990.70 in gross earned, unpaid, due, and payable wages, and \$2,183 in penalty wages, plus

2) Interest at the rate of nine percent per year on the sum of \$990.70 from November 4, 1993, until paid, plus

3) Interest at the rate of nine percent interest on the sum of \$2,183 from December 3, 1993, until paid.

**In the Matter of
DALE BRYANT,
dba Satellite Connection, and dba
Satellite Wholesale City,
Respondent.**

Case Number 62-94
Final Order of the Commissioner
Jack Roberts
Issued June 21, 1995.

SYNOPSIS

The scheduled hearing was canceled when Respondent agreed to sign a Consent Order requiring payment of a civil penalty for having installed and serviced satellite dishes when he did not possess a service dealer or technician license in violation of ORS 702.050(1) and 702.070, and advertised that he was in the business of repairing consumer entertainment equipment when he was not licensed under ORS 702.090. When Respondent thereafter failed to sign the Consent Order or to pay the agreed penalty, the Commissioner entered this Final Order based on the disposition agreed to and for the sums and acts

specified. ORS 702.050(1); 702.070; 702.090; OAR 839-50-220(5); 839-50-240(9).

The above-entitled contested case came on regularly for hearing on August 18, 1994, before Warner W. Gregg, designated as Hearings Referee by Mary Wendy Roberts, then Commissioner of the Bureau of Labor and Industries of the State of Oregon. That designation was confirmed by Jack Roberts, current Commissioner of the Bureau of Labor and Industries of the State of Oregon. Linda Lohr, Case Presenter with the Bureau of Labor and Industries (the Agency), represented the Agency, and Dale Bryant, dba Satellite Connection and Satellite Wholesale City (Respondent), represented himself in a telephone conference call with the Hearings Referee occurring at approximately 9 a.m. on August 18, 1994, and in correspondence with the Hearings Referee.

Having fully considered the entire record in this matter, I, Jack Roberts, Commissioner of the Bureau of Labor and Industries, make the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1) On February 16, 1994, the Agency issued its Notice of Intent to Assess a Civil Penalty (Notice of Intent). The Notice of Intent attempted to allege that:

1. "From in or about May, 1993 and continuing, [Respondent] has been installing and

servicing satellite dishes, when at all material times, [Respondent] did not possess a service dealer license provided for by ORS 702.090, for that type of consumer electronic entertainment equipment, in violation of ORS 702.050(1). Civil Penalty of \$500.00."

2. "From in or about May, 1993 and continuing, [Respondent] was installing and performing service upon satellite dishes, when at all material times, [Respondent] did not possess a technician license provided for by ORS 702.100, for that type of consumer electronic entertainment equipment, in violation of ORS 702.070."

3. "From on or about July, 1993 and continuing, [Respondent], unlicensed under ORS 702.090, has been representing through an advertisement in the yellow pages of the Elgin telephone book, in newspaper advertisements in 'The Wallowa County Chieftain' and 'The Nickel,' that he was in the business of servicing consumer electronic entertainment equipment, in violation of ORS 702.050(3). Civil Penalty of \$500.00."

2) On February 16, 1994, the Agency deposited with the US Postal Service the Notice of Intent as certified mail article number P-480 147-232, with postage thereon prepaid for delivery to Dale Bryant, Box 821, Elgin, Oregon 97827. Thereafter, the return

receipt for certified mail article P-480 147-232 was returned to the Agency signed "Dale Bryant, 2-18-94."

3) The Notice of Intent provided that Respondent, within 20 days, file an answer to the notice and request a contested case hearing in connection therewith. On March 9, 1994, Respondent filed an answer to the Notice of Intent wherein he denied the installation and repair alleged, stated the advertisements were in error, and asked for a contested case hearing.

4) On March 21, 1994, the Agency moved to amend its original Notice of Intent, which had included, in error, another service dealer's name. On April 13, 1994, the Hearings Referee granted the Agency's motion and directed that a copy of the amended notice be served on Respondent together with a Notice of Hearing setting the matter for August 11, 1994, in LaGrande. Thereafter, the amended Notice of Intent and Notice of Hearing, issued April 14, 1994, were served on Respondent by regular US mail.

5) On July 6, 1994, the Hearings Referee reset the hearing to August 18, 1994, and transmitted notice of the change to the Agency and Respondent by regular US mail. In the same ruling, the Hearings Referee ruled that the hearing would be held by telephone unless either the Agency or Respondent objected by August 4, 1994. No objections were received.

6) On August 18, 1994, the Hearings Referee spoke with the Agency Case Presenter and Respondent by telephone conference call at approximately 9 a.m. That conversation was preserved on tape as part of the record herein. Both the Agency and

Respondent acknowledged that the case was settled as follows:

"Respondent having come into compliance with the CEEES statutes and regulations in May, 1994, it was agreed that Respondent would pay one half the total civil penalty of \$1,000 sought for the violations set forth in this case, that is, \$500, and would enter into a Consent Order agreeing to remain in compliance with the law. Respondent affirmatively acknowledged those settlement terms."

The Hearings Referee thereupon approved the settlement outlined and canceled the hearing, directing that the necessary documents be filed with the Forum by September 1, 1994. The Hearings Referee admitted as exhibits all of the described pleadings and correspondence, which, together with the record of the proceedings of August 18, constitute the entire record herein.

7) On March 27, 1995, the Forum asked the Agency of the status of this case, and on March 29, 1995, the Agency wrote to Respondent at PO Box 821, Elgin Oregon 97827, by certified US mail, article number Z 777 258 162, demanding that he comply with the terms of the agreement of August 18, 1994, no later than April 7, 1995. The Agency's letter stated that the Agency would seek an order in this matter based on the settlement if Respondent did not comply.

8) On April 18, 1995, the Agency filed a return receipt for certified mail article number Z 777 258 162, addressee Dale Bryant, showing delivery on March 31, 1995, to Respondent's agent. The Agency Case Presenter stated that Respondent had failed to

* The original Notice of Intent erroneously included allegations against a second service dealer not related to Respondent Bryant. That error was corrected in the amended Notice of Intent. See Finding of Fact 4.

respond to the Agency's March 29 demand that Respondent sign the consent order and pay the agreed upon civil penalty of \$500 by cashier's check by April 7. The Agency requested an order under OAR 839-50-220(5) and 839-50-240(9) based upon the record of August 18, 1994.

9) The Proposed Order, which included an Exceptions Notice, was issued May 17, 1995. Exceptions were due by May 27, 1995. No exceptions were received. Thereafter, Respondent tendered a cashier's check in the penalty amount payable to the Bureau of Labor and Industries to the Fiscal Services Office of the Bureau.

CONCLUSIONS OF LAW

1) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the persons and subject matter herein pursuant to ORS 702.010 to 702.995.

2) OAR 839-50-220 provides, in part:

"(4) Where a case is settled within ten days before or on the date set for hearing, the terms of the settlement shall be placed on the record, unless fully executed settlement documents are submitted on or before the date set for hearing.

"(5) Where settlement terms are placed on the record because settlement documents are incomplete, * * * fully executed settlement documents must be submitted to the hearings unit within ten days after the date set for hearing. Where a party fails to submit the settlement documentation within ten days after the date

set for hearing, the terms of the settlement set forth on the record shall constitute the basis for a final order.

OAR 839-50-240 provides, in part:

"The commissioner designates as hearings referees those employees who are employed by the agency as hearings officers * * *. The commissioner delegates to such designee the authority to:

" * * *

"(9) Decide procedural matters, but not grant motions for summary judgment or other motions by a party which involve final determination of the proceeding, but to issue a proposed order as provided for in these rules."

Respondent's failure to submit settlement documents or cooperate in the preparation and execution of settlement documents within 10 days after the hearing date, or by such date as modified by the oral order of the Hearings Referee on the record, allows the terms of settlement as placed on the record to form the basis for a final order herein.

3) Under the facts and circumstances of this record, and in accordance with ORS 702.995, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondent to pay the penalty agreed to, plus interest, on such sum until paid.

ORDER

NOW, THEREFORE, as authorized by ORS 702.995, DALE BRYANT, dba Satellite Connection and Satellite Wholesale City, is hereby ordered to and has delivered to the

Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2109, a certified check payable to the BUREAU OF LABOR AND INDUSTRIES in the amount of FIVE HUNDRED DOLLARS (\$500), representing the civil penalty assessed herein.

In the Matter of EARTH SCIENCE TECHNOLOGY, INC., Respondent.

Case Number 35-95

Final Order of the Commissioner

Jack Roberts

Issued July 18, 1995.

SYNOPSIS

Where Complainant in good faith brought a civil proceeding against Respondent through the Department of Environmental Quality by reporting Respondent's unlawful activities, and was discharged shortly thereafter, the Commissioner held that Respondent violated Oregon's "whistleblower" law, and awarded Complainant \$20,700 in back pay and \$30,000 for mental suffering. ORS 659.550(1).

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Hearings Referee by Jack Roberts,

Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held on March 30, 1995, in room 1004 of the offices of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon. The Bureau of Labor and Industries (the Agency) was represented at all stages of the hearing, including the submission of a post-hearing statement of Agency policy and the filing of exceptions, by Judith Bracanovich, an employee of the Agency. Earth Sciences Technology, Inc., a corporation (Respondent), was previously held in default and did not appear. Jerome Barr (Complainant) was present throughout the hearing and was not represented by counsel.

The Agency called the following witnesses (in alphabetical order): Complainant; Complainant's former supervisor, Sandra Duffee; Complainant's former co-worker, Francis ("Frank") Nichols; and Agency Civil Rights Division Senior Investigator Jerry Weller.

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

FINDINGS OF FACT - PROCEDURAL

1) On July 18, 1994, Complainant filed a verified complaint with the Civil Rights Division of the Agency alleging he was the victim of the unlawful employment practices of Respondent.

2) After investigation, the Agency issued an Administrative Determination

finding substantial evidence of an unlawful employment practice in violation of ORS 659.550 by Respondent.

3) On January 3, 1995, the Agency prepared Specific Charges that were duly served by certified mail on Respondent's registered agent in Oregon and on Jack Sheehy, Respondent's secretary/treasurer and majority shareholder, at Respondent's corporate headquarters in California.

4) With the Specific Charges, the Agency served on Respondent the following: a) a Notice of Hearing setting forth the time and place of the hearing in this matter; b) a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case process; and d) a separate copy of the specific administrative rule regarding responsive pleadings.

5) A copy of the Specific Charges, together with items "a" through "d" of Procedural Finding of Fact 4 above, was sent by US Post Office certified mail, postage prepaid, respectively as Articles Numbered P 375 922 843 and P 375 922 845, to the following addresses (supplied by the Agency) pursuant to OAR 839-50-030:

Earth Sciences Technology, Inc.
Attn: Jack Sheehy
1232 Monte Vista Avenue
Unit 7
Upland, California 91786

Earth Sciences Technology, Inc.
Attn: Sandra Duffee (or current mgr.)
8196 SW Hall Blvd., #210
Beaverton, Oregon 97005

6) Both the Notice of Contested Case Rights and Procedures (item "b" in Procedural Finding 4) and the Bureau of Labor and Industries Contested Case Hearings Rules (item "d" in Procedural Finding 4), at OAR 839-50-130(1), provide that an answer must be filed within 20 days of the receipt of the charging document.

7) On February 13, 1995, the Agency filed a motion for order of default, pursuant to OAR 839-50-130(1) and 839-50-040, setting forth that Respondent had failed to answer the Specific Charges within the time limitation required by the Forum's rules. The motion was supported by the following:

a) US Post Office Domestic Return Receipt, Certified Mail, PS Form 3811, December 1991, Article Number P 375 922 843 showing delivery to the following addressee with no date of delivery noted (but date stamped as received by the Agency from the US Post Office on January 23, 1995), per agent signature:

Earth Sciences Technology, Inc.
Attn: Jack Sheehy
1232 Monte Vista Ave, Unit 7
Upland, California 91786

b) US Post Office Domestic Return Receipt, Certified Mail, PS Form 3811, December 1991, Article Number P 375 922 843 showing delivery to the following addressee on January 18, 1995, per agent signature:

Earth Sciences Technology, Inc.
Attn: Sandra Duffee (or current mgr.)
8196 SW Hall Blvd., #210
Beaverton, Oregon 97005

8) On February 13, 1995, the Agency moved for an order of default

based on Respondent's failure to file a timely answer.

9) On February 16, 1995, Douglas McKean, Hearings Referee, issued a ruling finding that Respondent had been served with the Specific Charges no later than January 23, 1995, and that Respondent had failed to file an answer as required within twenty (20) days of receipt of the Specific Charges. The Referee found that this constituted a default under OAR 839-50-330(1)(a), issued a notice of default, and recited how Respondent might seek relief from default under OAR 839-50-340.

10) On February 24, 1995, John P. Manning, counsel for Respondent, filed a request for relief from default, in which he requested relief on the grounds that Respondent no longer had an office or registered agent in Oregon and Respondent's employee who signed for receipt of the Specific Charges had not brought the charges to the attention of Sheehy.

11) On February 27, 1995, the Agency filed a response to Respondent's request for relief from default opposing Respondent's request. In its response, the Agency provided documentary evidence from the Corporations Division of the State of Oregon showing that Respondent was still an active corporation in Oregon at the time of service and that, although the name of Respondent's registered agent had changed from Sandra Duffee to Richard Sambolin, the address for Respondent's registered agent in Oregon remained the same. The Agency also provided documentary evidence from the Corporations Division that the current active address of Respondent's corporate headquarters

was the same Upland, California address that the Specific Charges were mailed to. This evidence was un rebutted by Respondent.

12) On February 27, 1995, Douglas McKean, Hearings Referee, issued a ruling on Respondent's request for relief from default in which Respondent's request was denied.

13) On March 8, 1995, the Agency filed a motion for an earlier hearing date.

14) On March 8, 1995, the Agency's motion for an earlier hearing date was granted and the Hearings Referee was changed from Douglas McKean to Alan McCullough.

15) On March 23, 1995, the Agency filed a summary of the case.

16) At the commencement of the hearing, the Agency and Complainant were orally advised by the Hearings Referee of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

17) On April 3, 1995, the Agency requested that the record be reopened in order for the Agency to submit a statement of Agency policy concerning the interpretation of ORS 659.550(1), and to augment the theory upon which the case was submitted.

18) On April 5, 1995, the Agency's request to reopen the record was granted. The Hearings Referee also requested that the Agency submit evidence showing the date of DEQ's initial contact with the Respondent in response to the Complainant's March 1, 1994, complaint to DEQ.

19) On April 11, 1995, the Agency submitted a cover letter and statement

of Agency policy in response to the Referee's April 5, 1995, ruling. The statement of Agency policy provided a detailed description of the legislative history behind ORS 659.550, including references to tape recordings of testimony given in connection with the enactment of the statute and supporting documentation consisting of copies of House Bill 3435, a listing of the legislative records in the Oregon State Archives pertaining to House Bill 3435, House Amendments to House Bill 3435, A-Engrossed House Bill 3435, and Enrolled House Bill 3435. The statement of Agency policy also contained the Agency's interpretation of the legislature's intent in adopting the terms "brought a civil proceeding."

20) The Proposed Order, which included an Exceptions Notice, was issued on May 15, 1995. Exceptions, if any, were to be filed by May 26, 1995.

21) On May 22, 1995, the Agency requested an extension of time in which to file exceptions. On May 22, 1995, the Agency was granted an extension until June 5, 1995, in which to file exceptions.

22) On May 30, 1995, the Agency timely filed exceptions to the Proposed Order.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent was a foreign corporation doing business within the state of Oregon and engaged or utilized the personal services of one or more employees, reserving the right to control the means by which such services were performed.

2) Complainant began working for Respondent in February 1993 as a

tank tester out of Respondent's Beaverton, Oregon office. Complainant was interviewed by Jack Sheehy, Respondent's secretary/treasurer and majority shareholder. Complainant was then called by Sandra Duffee, Respondent's marketing and office manager in Beaverton, and told he was hired.

3) Respondent's business is testing underground storage tanks for contamination leakage. Respondent's employees perform "tank tightness" tests to determine if such leakage is occurring.

4) Complainant's immediate supervisor throughout his employment with Respondent was Sandra Duffee, who worked out of the same office as Complainant. Duffee reported directly to Jack Sheehy, who was located at Respondent's corporate headquarters in Upland, California.

5) Respondent employed one other tank tester, Francis ("Frank") Nichols, in Oregon during Complainant's employment with Respondent. Nichols worked out of the same office as Complainant and was also supervised by Duffee.

6) Underground storage tank testing in Oregon of the type performed by Respondent is regulated by the Oregon Department of Environmental Quality (DEQ), which has promulgated administrative rules specifying the manner in which underground storage tank testing must be performed. The US Environmental Protection Agency (EPA) and OR/OSHA have also promulgated administrative rules governing this activity.

7) On August 11, 1991, Respondent obtained Underground Storage Tank Service Provider License No. 10531 from the DEQ authorizing Respondent to perform underground storage tank testing in Oregon.

8) Respondent used Jim Richards, formerly employed as a tank tester with Respondent, to train Complainant and Nichols in how to test underground storage tanks.

9) On June 3, 1993, Complainant obtained Underground Storage Tank Supervisor's License No. 13510 from the DEQ, which authorized him to perform tank tightness tests in Oregon.

10) On June 4, 1993, Nichols obtained Underground Storage Tank Supervisor's License No. 13512 from the DEQ, which authorized him to perform tank tightness tests in Oregon.

11) After obtaining their licenses, Complainant and Nichols worked mostly alone and only occasionally together while performing tank tightness tests for Respondent. In performing the tests, Complainant and Nichols used the testing equipment provided to them by Respondent and the methods which Richards had taught them.

12) In January and February 1994, Respondent sent Complainant and Nichols to school for two one-week training sessions at Horner Creative Products, the company that manufactured the testing equipment used by Complainant and Nichols to perform tank tightness tests.

13) While attending the training sessions, Complainant and Nichols became aware that Respondent's testing procedures differed from the protocol recommended by Horner and that

those procedures violated applicable regulations established by the EPA, DEQ, and OR/OSHA.

14) Complainant believed that he was personally subject to a penalty of 10 years in jail and a \$10,000 fine for violating these regulations.

15) Shortly after Complainant returned from the February 1994 training session, he told both Duffee and Sheehy what he had learned and that Respondent's procedures and equipment did not conform to manufacturer's protocol and violated applicable governmental regulations. Complainant asked that the procedures be corrected and that he be provided with proper equipment. Sheehy told Complainant he would not provide the requested equipment. This statement and request by Complainant were discussed between Duffee and Sheehy. Subsequently, Complainant made several complaints to Sheehy and Duffee that Respondent's testing procedures did not conform to manufacturer's protocol and were unlawful.

16) On March 1, 1994, Complainant told both Sheehy and Duffee that he would report Respondent to DEQ and the EPA if Respondent didn't bring their testing procedures into compliance with manufacturer's protocol and the law.

17) Sheehy declined to change Respondent's testing procedures.

18) On March 1, 1994, Complainant telephoned DEQ and complained that Respondent had been doing tank tightness tests for the last year that did not conform to manufacturer's protocol.

19) On March 8, 1994, Complainant told Duffee that he had made a complaint to DEQ about Respondent's improper testing procedures. Complainant had already told Nichols that he had lodged a complaint with DEQ.

20) Prior to March 15, 1994, Complainant told Nichols that he had told Duffee and Sheehy that he would turn Respondent in to DEQ if Respondent failed to make the changes he asked for by March 15, 1994.

21) On March 9, 1994, Complainant tore ligaments in his left ankle while working for Respondent. Complainant was physically unable to return to work from the time of his ankle injury until May 19, 1994, on which date he was released to return to work.

22) On March 15, 1994, Sheehy contacted Duffee and asked her to tell Complainant that he was terminated due to lack of work. Duffee advised Sheehy not to terminate Complainant.

23) On March 15, 1994, Duffee told Complainant he was fired. Duffee gave Complainant a typewritten note that read as follows:

"March 15, 1994

"As of this date, Jerry Barr has been asked to turn in the company vehicle and all equipment in his possession that is owned by Earth Science Technology. The direction for his termination was given by the company owner, Jack Sheehy, so he could come to Oregon and remove the truck and equipment by tomorrow's date, March 16, 1994. It is Jack Sheehy's statement that Jerry Barr has been terminated due to lack of work.

"(signed)

"Sandra L. Duffee

"(Agent)"

24) The DEQ did not contact Respondent between March 1 and March 15, 1994, in response to Complainant's March 1, 1994, complaint.

25) Complainant did not inform Sheehy that Complainant had actually carried out his threat of reporting Respondent to DEQ.

26) Complainant was a good employee and conscientious in the manner in which he performed his work.

27) Complainant averaged 40 hours of work per week while employed by Respondent.

28) Following Complainant's discharge, Respondent had enough work to justify continuing Complainant's employment.

29) For the six weeks following Complainant's discharge, Nichols worked an average of 25 overtime hours per week. This was a marked increase from the number of hours that Nichols had worked prior to Complainant's discharge. Nichols had previously worked overtime only on an occasional basis.

30) On May 13, 1994, Nichols determined that a new piece of testing equipment provided by Respondent was potentially explosive, just like the piece of equipment it replaced. Nichols contacted Duffee and told her to cancel all job orders requiring use of that equipment because it was unsafe.

31) On May 17, 1994, Nichols filed a complaint with OR/OSHA over the unsafe equipment. OR/OSHA responded by telephoning Duffee and

Sheehy and instructing them to stop using that equipment.

32) On May 18, 1994, Sheehy called Duffee and instructed her to fire Nichols. In response, Duffee called Nichols and told him Sheehy had instructed her to fire him.

33) Nichols subsequently filed a complaint with the Civil Rights Division of the Bureau of Labor and Industries alleging Respondent had discharged him in retaliation for his May 17, 1994, complaint to OR/OSHA. Nichols' case is presently being litigated in court.

34) On June 30, 1994, Duffee voluntarily terminated her employment with Respondent due to Sheehy's refusal to conform Respondent's testing procedures to manufacturer's protocol.

35) In October 1994, the DEQ served Respondent with a Notice of Intent to Revoke Respondent's Underground Storage Tank Provider license and assess civil penalties in the amount of \$480,000.

36) The DEQ's civil proceeding against Respondent was initiated by Complainant's March 1, 1994, complaint to DEQ.

37) Complainant earned \$11.50 per hour and worked an average of 40 hours per week while employed by Respondent. Complainant was unable to work from March 9 until May 19, 1994. Complainant has diligently sought work since May 19, 1994, but had not found work as of the date of the hearing. Complainant has been unable to obtain employment in the same field because other employers perceive that Respondent's problems with DEQ were a result of Complainant's faulty workmanship.

38) Complainant was a loyal employee who devoted himself to his work and was taken totally by surprise and shocked at his discharge. As a result of his discharge, he experienced intense feelings of hurt, resentment, anger, and devastation. He felt that he had been left "out to hang" and that Respondent had treated him "like garbage." After his termination, he encountered significant financial difficulties because of his dramatic drop in income. These difficulties and the shock of his discharge caused him stress and headaches, which in turn generated fights between himself, his mother, a semi-invalid with whom he lived, and his son, who lives with him every other week. He was unable to sleep after his termination because of the stress caused by his financial difficulties and the nature of his discharge, and was still experiencing sleep difficulties at the time of the hearing. Although his anger was gone, he still had feelings of resentment and hurt stemming from his discharge as of the date of the hearing.

ULTIMATE FINDINGS OF FACT

1) During times material herein, Respondent was an employer in the State of Oregon that engaged or utilized the personal services of one or more employees.

2) Complainant was employed by Respondent from February 1993 until March 15, 1994.

3) On March 1, 1994, Complainant in good faith made a complaint to DEQ that prompted DEQ to bring a civil proceeding against Respondent.

4) Respondent discharged Complainant on March 15, 1994.

5) Respondent discharged Complainant because Respondent believed that Complainant had made a complaint to DEQ about Respondent's unlawful activities.

6) Complainant suffered lost wages and mental distress as a result of his discharge from employment by Respondent.

CONCLUSIONS OF LAW

1) At all times material, Respondent was an employer subject to the provisions of ORS 659.010 to 659.110.

2) The Commissioner of the Bureau of Labor and Industries of the State of Oregon has jurisdiction over the persons and subject matter herein.

3) ORS 659.550(1) provides, in part:

"It is an unlawful employment practice for an employer to discharge *** or *** retaliate against an employee *** for the reason that the employee * * * has in good faith brought a civil proceeding against an employer ***."

Respondent violated ORS 659.550(1).

4) Pursuant to ORS 659.550(1) and 659.060 and by the terms of ORS 659.010, the Commissioner of the Bureau of Labor and Industries has the authority to issue a Cease and Desist Order requiring Respondent: to refrain from any action that would jeopardize the rights of individuals protected by ORS 659.550(1), to perform any act or series of acts reasonably calculated to carry out the purposes of said statutes, to eliminate the effects of an unlawful practice found, and to protect the rights of others similarly situated.

OPINION

Respondent was found in default, pursuant to OAR 839-50-330(1)(a), for failing to file a timely answer to the Specific Charges. In default cases, the Respondent is not allowed to present any evidence, examine witnesses, or otherwise participate in the hearing. *In the Matter of Metco Manufacturing, Inc.*, 7 BOLI 55 (1987), *aff'd, Metco Manufacturing, Inc. v. Bureau of Labor and Industries*, 93 Or App 317, 761 P2d 1362 (1988). However, the Agency must still present a prima facie case in support of the Specific Charges to prevail. ORS 183.415(6); OAR 839-50-330(2).

A prima facie case in this matter consists of the following elements:

1) The Respondent is an employer as defined by statute;

2) The Complainant was employed by Respondent;

3) The Complainant, in good faith, brought a civil proceeding against Respondent;

4) The Complainant was discharged by Respondent;

5) The Respondent's action was taken because of the civil proceeding brought by Complainant against Respondent. OAR 839-05-010(1); ORS 659.550(1).

The Agency clearly established the first, second, and fourth elements of its prima facie case by means of witness testimony.

The third element requires an interpretation of the statutory language. ORS 659.550(1) requires that an employee must have "in good faith brought a civil proceeding against an employer." Complainant's testimony

of his awareness that Respondent's activities were unlawful establishes that his complaint to DEQ was made in "good faith." In question is whether his complaint to DEQ against Respondent, his employer, constitutes having "brought a civil proceeding."

The Agency submitted a statement of Agency policy on April 11, 1995, that outlined in detail the legislative history behind the enactment of ORS 659.550(1), provided supporting exhibits, and gave the Agency's interpretation of the legislative intent behind the terms "brought a civil proceeding." The following summation of legislative history and intent is derived from that statement of Agency policy. (Text contained within quotation marks reflect direct quotations from that statement.) The Agency expanded on its interpretation of legislative intent in its exceptions to the Proposed Order.

ORS 659.550(1) was originally brought before the House Labor Committee as House Bill 3435, "where it received public hearings on April 15, 1991, and May 3, 1991." In its original form, it prohibited discrimination against an employee because of having "in good faith brought a civil action against an employer."

"The tape recording of the testimony and comments of committee members on April 15, 1991, makes clear the intent to protect workers who complained to or cooperated with law enforcement agencies, including agencies supervising the certification or licensure of the employer. Discussion was had identifying the need to amend the language of the bill to reflect this intent by substituting the

words 'civil proceeding' for 'civil action', showing the concern of Rep. Rijkjin, chief sponsor of the bill, and committee members that the words 'civil action' connoted only matters brought or initiated in civil court, whereas it was the intent of the bill's sponsors to include matters brought or initiated in administrative forums as well."

"On May 15, 1991, the House Labor Committee held its work session on HB 3435. The staff review of the effect of the bill, orally given to committee members prior to their vote, included the statement that the bill created an unlawful employment practice for discrimination against an employee for cooperating in filing complaints or for furthering criminal prosecution or civil prosecution against the employer for criminal activity or illegal civil activity. At this time, the amendment was formally made to the bill substituting the words 'civil proceeding' for 'civil action'; the intent to include administrative proceedings was again reiterated. The bill, as amended, was reported out to the floor as A-Engrossed House Bill 3435. The bill passed the House in this form and was referred to the Senate Labor Committee for action."

"The Senate Labor Committee acted on A-Engrossed House Bill 3435 on June 5, 1991. In her testimony before the committee, Rep. Rijkjin again stressed the sponsors' intent that a worker be protected when cooperating with civil or criminal law enforcement in any way and cited the example of a

terminated worker who had been involved in a police investigation [as a] witness, [but] had not brought charges [or] begun the proceedings".

"A-Engrossed House Bill 3435 was reported out to the floor, where it passed and became Enrolled House Bill 3435. * * * Enrolled House Bill 3435 was subsequently codified at ORS 659.550."

Based on this legislative history, the forum concludes that the language "brought a civil proceeding" was intended to encompass good faith complaints made by employees against their employers that result in an administrative agency bringing a civil proceeding against that employer. Therefore, the evidence presented by the Agency establishing that Complainant in good faith made a complaint against Respondent to DEQ, which in turn brought an administrative action against Respondent, satisfies the third element of the Agency's prima facie case.

The fifth element of the Agency's prima facie case requires a showing of causal connection between Complainant's protected class status and Respondent's adverse action directed at Complainant, and turns on Respondent's awareness of Complainant's having brought a civil proceeding. A review of the facts shows that Complainant told both Sheehy and Duffee that he intended to report Respondent to DEQ if Respondent failed to correct their unlawful testing procedures by March 15, 1994, that Complainant repeated his complaints, that Respondent's testing procedures were

unlawful, and that Respondent failed to correct those procedures by March 15, 1994. It is reasonable to conclude that Sheehy, the director of a multistate operation, was aware of the enormous potential financial liability to Respondent if Complainant filed a complaint with DEQ, and that this formed the basis for a retaliatory animus on Sheehy's part. Evidence that Nichols, Complainant's co-worker, was discharged after reporting Respondent to OR/OSHA in May 1994 bolsters this conclusion. The undisputed pretextual nature of Sheehy's reason for discharging Complainant -- lack of work -- and the fact that Complainant was discharged on the very day he promised to report Respondent to DEQ further tend to show a causal connection between Complainant's complaint to DEQ and Complainant's discharge.

This forum has previously held that "Proof includes both facts and inferences." *In the Matter of City of Umatilla*, 9 BOLI 91 (1990), *aff'd*, *City of Umatilla v. Bureau of Labor and Industries*, 110 Or App 151, 821 P2d 1134 (1991). Based on the above evidence, this forum believes it is reasonable to infer that Complainant was terminated on March 15, 1994, because Sheehy believed Complainant had reported Respondent to DEQ.

In this case of first impression, the question remains as to whether or not Respondent's discharge of Complainant based on Respondent's belief that Complainant had reported Respondent to DEQ is enough to satisfy the causal connection requirement. The statute prohibits an employer from discharging an employee because the employee "has in good faith brought a civil

proceeding against an employer." ORS 659.550 is a remedial statute, and remedial statutes are to be construed broadly so as to effectuate the purposes of the statute. Previously, this forum has held that retaliation "is a particularly insidious form of discrimination. The public interest is furthered *** by having employees come forward with complaints of violations of the law without fear of retribution." *In the Matter of G & T Flagging Service, Inc.*, 9 BOLI 67 (1990). This forum has also held that there is a public interest in discouraging retaliation to insure the free flow of information to law enforcement agencies. *In the Matter of Richard Niquette*, 5 BOLI 53 (1986).

Based on the public policy considerations previously expressed by this forum in interpreting retaliation statutes and the apparent intent of the legislature that workers be protected when cooperating, in good faith, with civil or criminal law enforcement in any way, this forum concludes that Respondent's discharge of Complainant based on Respondent's belief that Complainant had reported Respondent to DEQ meets the causal connection requirement and satisfies the fifth element of the Agency's prima facie case.

Damages

In its Specific Charges, the Agency sought back pay in the amount of \$50,000, and damages for mental suffering in the amount of \$30,000. At the hearing, the Agency moved to amend its charges to reduce the amount of back pay sought to \$21,160. This amendment was granted.

Back Pay

Testimony by Complainant established that his average number of hours worked while employed by Respondent was 40 hours, and that he earned \$11.50 per hour. Complainant also testified that he was unable to work from March 9 until May 19, 1994, that he diligently sought work after his termination, and that he was still unemployed as of the date of the hearing. \$11.50/hr. x 40 hrs./wk. = \$460/wk. gross weekly wages earned by Complainant. \$21,160 divided by \$460 = 46 weeks, encompassing the period from May 19, 1994, to April 7, 1995. The duration of a back pay award extends only up to the date of the hearing, which was March 30, 1995. Consequently, Complainant's back pay award must be reduced by one week's wages, or by \$460. \$21,160 - \$460 = \$20,700, the amount of back pay Complainant is entitled to.

Mental Suffering

Complainant testified that he considered himself to have been a very loyal employee who had given his "life to the company", that he was surprised and shocked at his discharge, and that he felt he had been treated "like garbage." He experienced intense feelings of hurt, resentment, anger, and devastation over his discharge. After his discharge, he encountered significant financial difficulties because of his dramatic drop in income. He was unable to obtain employment in the same field because other employers perceived that Respondent's problems with DEQ were a result of Complainant's faulty workmanship, and was still unemployed at the time of the hearing, despite having diligently sought work.

His financial difficulties and the shock of his discharge caused him stress and headaches, which in turn generated fights between himself, his mother, a semi-invalid with whom he lived, and his son, who lives with him every other week. He lost sleep because of the stress caused by his discharge and was still experiencing sleep difficulties at the time of the hearing. Although his anger was gone, he still had feelings of resentment and hurt stemming from his discharge at the time of the hearing.

These elements of mental suffering are all compensable. Taken together, they establish that Complainant has experienced significant mental suffering as a direct result of Respondent's action. Based on the duration, extent, and types of mental suffering experienced by Complainant, an award of \$30,000 represents an appropriate award of damages to compensate Complainant for his mental suffering.

ORDER

NOW, THEREFORE, as authorized by ORS 659.060(3) and 659.010(2), and in order to eliminate the effects of the unlawful practice found, EARTH SCIENCE TECHNOLOGY, INC. is hereby ordered to:

1) Deliver to the Fiscal Services Office of the Portland office of the Bureau of Labor and Industries a certified check, payable to the Bureau of Labor and Industries in trust for Jerome L. Barr, in the amount of:

a) TWENTY THOUSAND SEVEN HUNDRED DOLLARS (\$20,700), representing wages Complainant lost between May 19, 1994, and March 30,

1995, as a result of Respondent's unlawful practice found herein; PLUS

b) INTEREST AT THE ANNUAL RATE OF NINE PERCENT (9%) on said wages from July 1, 1994, until paid, computed and compounded annually; PLUS

c) THIRTY THOUSAND DOLLARS (\$30,000), representing compensatory damages for the mental suffering Complainant experienced as a result of Respondent's unlawful employment practice found herein; PLUS

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

2) Cease and desist from discriminating against any employee because that employee in good faith brings a civil proceeding against Respondent.

In the Matter of GREGORY LISOFF and Efrosinia Lisoff, Respondents.

Case Number 43-95

Final Order of the Commissioner

Jack Roberts

Issued July 31, 1995.

SYNOPSIS

Respondents, a mother and son, operated a farm-worker camp for two months, housing between 20 and 25 workers on the mother's farm. By failing to register the camp with the Bureau, they violated ORS 658.750(1). After considering aggravating and mitigating circumstances, the Commissioner imposed a \$500 civil penalty for the first offense. ORS 658.705; 658.750(1); 658.850(1); OAR 839-14-065; 839-14-420; 839-14-430; 839-14-440; 839-50-150(4).

The above-entitled contested case came on regularly for hearing before Douglas A. McKean, designated as Hearings Referee by Jack Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was conducted in writing.

The Bureau of Labor and Industries (the Agency) was represented by Judith Bracanovich, an employee of the Agency. Gregory and Efrosinia Lisoff (Respondents) represented themselves.

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

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

FINDINGS OF FACT – PROCEDURAL

1) On December 22, 1994, the Agency issued a "Notice of Intent to Assess Civil Penalties" (Notice of Intent) to Respondents. As later amended, the Notice of Intent alleged that during June and July 1994, on property owned by Efrosinia Lisoff at 12244 Dimmick Lane NE, Woodburn, Oregon, Respondents operated a farm-worker camp without having first registered the camp with the Commissioner, in violation of ORS 658.750(1) and OAR 839-14-065. As aggravating circumstances, the Agency alleged that Respondents knew or should have known of the violation, and failed to take all necessary steps to correct or prevent the violation. The Agency requested a \$2,000 civil penalty. The Notice of Intent was served on Respondent Gregory Lisoff on December 23, 1994, and on Respondent Efrosinia Lisoff on December 24, 1994.

2) By a letter dated January 12, 1995, Respondents requested a hearing and filed an answer. As translated by Gregory Lisoff, the answer signed by Efrosinia Lisoff stated:

"My husband usually takes care of these business matters. However [due] to a serious illness he passed away in May 1994. I wasn't aware I was in any violation with this Agency. My son, Greg, works for me taking care of the fields."

3) The Agency requested a hearing from the Hearings Unit, and on February 1, 1995, the Forum issued a

"Notice of Hearing," which set forth the time and place of the requested hearing and the designated Hearing Referee. With the hearing notice, the Forum sent to Respondents a "Notice of Contested Case Rights and Procedures" containing the information required by ORS 183.413, and a complete copy of the Agency's administrative rules regarding the contested case process, OAR 839-50-000 through 839-50-420.

4) On March 2, 1995, Respondents requested that the hearing be conducted in writing. The Agency had no objection, and the Hearings Referee granted the request.

5) On March 3, 1995, the Agency filed a motion for summary judgment. Respondents filed no response, and on March 28, 1995, the Hearings Referee granted the motion. The referee decided that no genuine issue as to any material fact existed, and the Agency was entitled to judgment as a matter of law, pursuant to OAR 839-50-150(4)(a)(A). That decision was set forth in the Proposed Order, pursuant to OAR 839-50-150(4)(c).

6) At the direction of the Hearings Referee, Respondents and the Agency filed written arguments and exhibits concerning an appropriate civil penalty, using the criteria set out in OAR 839-14-430 and 839-14-440.

FINDINGS OF FACT – THE MERITS

1) During all times material herein, Respondent Efrosinia Lisoff was the registered owner of a farm at 12244 Dimmick Lane NE, Woodburn, Oregon. Her husband, Timofei Lisoff, died in May 1994. Until his death, Timofei Lisoff was in charge of operating the

farm. Efrosinia Lisoff's son, Respondent Gregory Lisoff, helped run the farm.

2) On August 18, 1993, the Agency sent Timofei Lisoff a letter directing him to register a farm-worker camp. The Agency enclosed a registration packet. Neither Timofei Lisoff nor Respondents replied.

3) On March 14, 1994, Agency Compliance Specialist Raul Pena contacted Gregory Lisoff at the farm, and questioned him about the camp. When Pena asked Lisoff why "they" had not responded to the August 1993 letter, Lisoff said they did not know if they would open the camp because he needed to make some improvements. Later he said he thought "they" would open the camp, and said he would contact the Agency's Licensing Unit to obtain a farm-worker camp registration packet. On May 23, the Agency again sent a letter and registration packet to Timofei Lisoff.

4) After Timofei Lisoff's death in May 1994, the farm operation was in turmoil, and Gregory Lisoff was overburdened with work. He stopped the "remodeling for the hispanic workers" "because we were getting into the harvest season." Workers begged Efrosinia Lisoff for a place to sleep temporarily.

5) In June and July 1994, during the strawberry harvest season, Respondents operated a farm-worker camp on the farm. Around 20 to 25 workers employed in the harvest of farm crops were housed in a shop, in trailers, and in vehicles.

6) At no time during 1994 or any other year did Respondent Efrosinia

Lisoff, Respondent Gregory Lisoff, or the late Timofei Lisoff have the farm-worker camp registered with the Bureau of Labor and Industries.

CONCLUSIONS OF LAW

1) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and of the persons herein. ORS 648.705 to 658.850.

2) ORS 658.750(1) provides:

"Every farm-worker camp operator shall register with the bureau each farm-worker camp operated by the operator."

OAR 839-14-065 provides:

"All farm-worker camps must be registered with the Bureau in accordance with these rules. Farm-worker camp operators who are otherwise exempt from obtaining the required indorsement, must, nevertheless register the farm-worker camp."

ORS 658.705 provides in part:

"(2) 'Bureau' means the Bureau of Labor and Industries.

"(7) 'Farm-worker camp' means any place or area of land where sleeping places, manufactured structures or other housing is provided by a farmer, farm labor contractor, employer or any other person in connection with the recruitment or employment of workers to work in the production and harvesting of farm crops or in the reforestation or lands, as described in ORS 658.405. 'Farm-worker camp' does not include:

"(a) A single, isolated dwelling occupied solely by members of the same family, or by five or fewer unrelated individuals; or

"(b) A hotel or motel which provides housing with the same characteristics on a commercial basis to the general public on the same terms and conditions as housing is provided to such workers.

"(8) 'Farm-worker camp operator' means any person who operates a farm-worker camp."

OAR 839-14-035(8) provides:

"'Farm-worker camp operator' means any person who operates a farm-worker camp. In determining who is a farm-worker camp operator, the Bureau will consider the farm-worker camp operator to be the person who, as a practical matter, exercises the ultimate right to determine terms and conditions of occupancy of the camp and who controls its maintenance and operation."

Respondents were farm-worker camp operators. By failing to register with the Bureau the farm-worker camp they operated, Respondents violated ORS 658.750(1).

3) ORS 658.850(1) provides:

"In addition to any other penalty provided by law, the commissioner may assess a civil penalty not to exceed \$2,000 for each violation of any provision of ORS 658.715 to 658.850."

OAR 839-14-420 provides in part:

"Pursuant to ORS 658.850, the Commissioner may impose a civil

penalty for any of the following violations:

"* * *

"(6) Failing to register each farm-worker camp operated by the farm-worker camp operator in violation of ORS 658.750[.]"

OAR 839-14-430 provides in part:

"(1) The Commissioner may consider the following mitigating and aggravating circumstances when determining the amount of any civil penalty to be imposed, and shall cite those the Commissioner finds to be appropriate:

"(a) The history of the farm-worker camp operator or other person in taking all necessary measures to prevent or correct violations of statutes or rules;

"(b) Prior violations, if any, of statutes or rules;

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

"(d) Whether the farm-worker camp operator or other person knew or should have known of the violation.

"(2) It shall be the responsibility of the farm-worker camp operator or other person to provide the Commissioner any mitigating evidence concerning the amount of the civil penalty to be imposed.

"* * *

"(4) Notwithstanding any other section of this rule, the Commissioner shall consider all mitigating circumstances presented by the farm-worker camp operator or other person for the purpose of re-

ducing the amount of the civil penalty to be imposed."

OAR 839-14-440 provides in part:

"(1) The civil penalty for any one violation shall not exceed \$2,000. The actual amount of the civil penalty will depend on all the facts and on any mitigating and aggravating circumstances.

"* * *

"(3) When the Commissioner determines to impose a civil penalty * * * [because] a farm-worker camp is being operated without a valid registration certificate, the minimum civil penalty shall be as follows:

"(a) \$500 for the first offense;

"(b) \$1,000 for the second offense;

"(c) \$2,000 for the third and each subsequent offense."

Under the facts and circumstances of this record, and according to the law applicable in this matter, the Commissioner of the Bureau of Labor and Industries has the authority to and may assess civil penalties against Respondents. The assessment of the civil penalty specified in the Order below is an appropriate exercise of that authority.

OPINION

1. Summary Judgment

Pursuant to OAR 839-50-150(4), the Agency filed a motion for summary judgment on its amended Notice of Intent. It asserted that no genuine issue as to any material fact existed, and the Agency was entitled to judgment as a matter of law as to the alleged violation. The Hearings Referee granted

that motion. Subsection (c) of OAR 839-50-150(4) provides that, when the Hearings Referee grants the motion, the decision shall be set forth in the proposed order. This order has been issued according to that procedure.

2. Failure to Register Farm-worker Camp

The evidence was undisputed that Efrosinia Lisoff owned and operated a farm in Woodburn, and that her son, Gregory Lisoff, helped operate that farm. ORS 658.715(1)(b). Respondents admitted that they operated a farm-worker camp in June and July 1994, in connection with the harvesting of farm crops. The evidence was undisputed that Respondents did not register the camp with the Bureau. These facts compel the conclusion that Respondents violated ORS 658.750(1).

3. Civil Penalty

In its Notice of Intent, the Agency proposed to assess a \$2,000 civil penalty for the violation of ORS 658.750(1). In its written argument, the Agency requested a \$1,000 civil penalty, after taking into consideration the aggravating and mitigating circumstances.

The Commissioner may assess a civil penalty not to exceed \$2,000 for this violation. ORS 658.850(1); OAR 839-14-420(6). The Commissioner may consider mitigating and aggravating circumstances when determining the amount of any penalty to be imposed. OAR 839-14-430(1). It is the Respondents' responsibility to provide the Commissioner with any mitigating evidence. OAR 839-14-430(2). The minimum civil penalty for this violation is \$500. OAR 839-14-440(3)(a).

The Forum finds three aggravating circumstances here. First, Respondents either knew or should have known of the requirement to register the camp before they operated it, and Gregory Lisoff knowingly operated it in violation of the statute. OAR 839-14-430(1)(d).

Second, Respondents failed to take all necessary measures to prevent the violation. OAR 839-14-430(1)(a). Gregory Lisoff argued that his father

"had been the person in charge at all times up to the time he passed away. He came from old traditional values in Russia and never discussed any of his business with my mother. We don't know anything about his dealings with this Agency in the past."

However, in March 1994 Gregory clearly knew of the requirement to register farm-worker camps, and the Agency sent a new registration packet (albeit addressed to Timofei Lisoff) in May, before Respondents operated the camp in June and July. They (or at least Gregory) had knowledge of the law's requirements and had the registration forms in time to prevent the violation.

Third, this violation is serious because it frustrates the Commissioner's ability to implement the law's requirements and enforce the statutes designed to protect the state's farm workers.

In mitigation, Respondents present several issues. First, the death of Timofei Lisoff in May 1994, just the month before the camp at issue here was operated, caused obvious turmoil

for Respondents, not only in operating the farm, but emotionally and financially. The Forum gives this great weight. Second, Efrosinia Lisoff was not involved in Timofei's business, which I accept to include much of the farm operation. This mitigates the weight given to the issue of whether she knew or should have known of the violation. Third, she does not read or write English. This is relevant to appreciating her level of understanding of the registration packet sent to Timofei in late May. Fourth, any history of the Respondents failing to take preventative or corrective action before the death of Timofei is heavily mitigated by the fact that he was in charge at all times before his death. Fifth, Greg Lisoff was overburdened with work after Timofei's death, and operating the farm-worker camp was something he apparently abandoned, once the harvest season began. He stopped the remodeling work he had begun of the workers' quarters. After workers begged Efrosinia Lisoff for a place to sleep, she allowed them to use a shop area and three trailers; some workers slept in cars parked on the farm. She thought she was doing the right thing for the workers. Sixth, Respondents have no previous violations, and have apologized for committing this violation. Gregory Lisoff has asked for a consultant from OR-OSHA to visit with him in order to "do the right thing this time."

Considering all of the aggravating and mitigating circumstances, the Forum finds that the minimum civil penalty of \$500 for this violation is appropriate and consistent with previous orders of the Commissioner. See, for example, *In the Matter of Javier*

Garcia, 13 BOLI 93, 113 (1994) (respondent operated three unregistered farm-worker camps in violation of ORS 658.750(1) and 658.755(3)(a), with aggravating circumstances, and the Commissioner imposed a \$500 civil penalty for the first camp, \$1,000 for the second camp, and \$2,000 for the third camp); and *In the Matter of Jose Rodriguez*, 11 BOLI 110, 122-23, 127 (1992) (respondent operated two unregistered farm-worker camps in violation of ORS 658.750(1) and 658.755(3)(a), with aggravating circumstances, and the Commissioner imposed a \$500 civil penalty for the first camp and \$1,000 for the second camp).

ORDER

NOW, THEREFORE, as authorized by ORS 658.850, **Gregory Lisoff and Efrosinia Lisoff** are hereby ordered to deliver to the Bureau of Labor and Industries, Fiscal Services Office, Suite 1010, 800 NE Oregon Street # 32, Portland, Oregon 97232-2162, a certified check payable to the BUREAU OF LABOR AND INDUSTRIES in the amount of **FIVE HUNDRED DOLLARS (\$500)**, plus any interest thereon, which accrues at the annual rate of nine percent, between a date ten days after the issuance of the Final Order and the date Respondents comply with this Order. This assessment is a civil penalty against Respondents for one violation of ORS 658.750(1).

**In the Matter of
DANDELION ENTERPRISES, INC.,
dba The Dandelion, and Rebecca S.
Bell, Respondents.**

Case Number 21-95
Final Order of the Commissioner
Jack Roberts
Issued August 10, 1995.

SYNOPSIS

Respondent's manager, who knew Complainant was gay, discharged him after he called in sick because the manager assumed he had AIDS, in violation of ORS 659.425(1)(c). The manager aided and abetted the corporation's unlawful employment practice, in violation of ORS 659.030(1)(g). Respondents were liable for Complainant's resulting emotional distress. ORS 659.030(1)(g); 659.400(1), (2)(c)(C), (3); 659.410; 659.425(1)(c); PCC 23.01.030; 23.01.050; 23.01.080.

The above-entitled contested case came on regularly for hearing before Warner W. Gregg, designated as Hearings Referee by Jack Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held on January 26, 1995, in room 1004 of the offices of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon. The Bureau of Labor and Industries (the Agency) was represented by Judith Bracanovich, an employee of the Agency. Dandelion Enterprises, Inc., a corporation (Respondent Dandelion),

was previously held in default and did not appear. Rebecca S. Bell (Respondent Bell), was previously held in default and did not appear. Rory G. "Gil" Gerard (Complainant) was present throughout the hearing with his counsel, Marc A. Abrams, Attorney at Law.*

The Agency called the following witnesses: Complainant; Complainant's former co-workers Robin Chappell, Jessica Hollyfield, and Scott Parrish; and Agency Senior Investigator David Wright.

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

FINDINGS OF FACT – PROCEDURAL

1) On January 28, 1994, Complainant filed a verified complaint with the Agency alleging that he was the victim of the unlawful employment practices of Respondent Dandelion under Portland city ordinance and under state law when its manager, Respondent Bell, discharged him due to his sexual orientation, due to a perceived disability, and due to his utilizing the workers' compensation system.

2) At all times material, the City of Portland and the Agency were parties to an intergovernmental agreement for enforcement of Portland City Code Chapter 23.01 by the Agency.

* In this forum, the function of Complainant's private counsel is advisory. OAR 839-50-120.

3) After investigation and review, the Agency issued an Administrative Determination finding substantial evidence supporting the allegations of the complaint.

4) The Agency initiated conciliation efforts between Complainant and Respondent Dandelion, conciliation failed, and on November 2, 1994, the Agency prepared for service on both Respondents Specific Charges, alleging that Respondent Dandelion discriminated against Complainant in his employment based on his sexual orientation in violation of Portland City Code 23.01.050(B), based on a perceived disability in violation of ORS 659.425 (1)(c), and based upon his utilizing the procedures provided in ORS 656.001 to 656.794 in violation of ORS 659.410, and that Respondent Bell aided and abetted Respondent Dandelion in these unlawful employment practices in violation of PCC 23.01.050(B) and ORS 659.030(1)(g).

5) With the Specific Charges, the Agency served on each Respondent the following: a) Notice of Hearing setting forth the time and place of the hearing; b) a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of Oregon administrative rules (OAR) regarding the contested case process; and d) a separate copy of the specific administrative rule regarding responsive pleadings.

6) A copy of those charges, together with items (a) through (d) of Procedural Finding 5 above, were sent by US Post Office certified mail, postage prepaid, as Article Number P671 244 841, to the last known address (supplied by the Agency) of

Respondent Dandelion's registered agent pursuant to OAR 839-50-030:

Paul A. Kerley, Registered Agent
Attorney at Law
530 Center Street NE, Suite 310
Salem, Oregon 97301

and received for in that office on November 7, 1994.

7) A copy of those charges, together with items (a) through (d) of Procedural Finding 5 above, were personally served on Respondent Bell by Transerv Legal Process Service, Portland, at 150 N 1st Street, Hillsboro, Oregon, on November 4, 1994.

8) Both the Notice of Contested Case Rights and Procedures (item b in Procedural Finding 5) and the Bureau of Labor and Industries Contested Case Hearings Rules (item d in Procedural Finding 5), at OAR 839-50-130 (1), provide that an answer must be filed within 20 days of the receipt of the charging document.

9) On December 6, 1994, the Agency filed a motion for order of default, pursuant to OAR 839-50-130(1) and 839-50-040, setting forth that Respondents had failed to answer the Specific Charges within the time limitation required by the Forum's rules. The motion was supported by the following:

a) US Post Office Domestic Return Receipt, Certified Mail, PS Form 3811, December 1991, Article Number P671 244 841 showing delivery to the following addressee on November 7, 1994, per agent signature:

Paul A. Kerley
Attorney at Law
530 Center Street NE, Suite 310
Salem, Oregon 97301

b) Certificate Proof of Service signed by Ronald J. Mathers, Transerv Legal Process Service, Portland, attesting to personal service of the Notice of Hearing on Rebecca Bell by personal delivery upon her at 150 N 1st Street, Hillsboro, Oregon on November 4, 1994.

10) On December 12, 1994, the Hearings Referee issued a ruling finding that Respondents Dandelion and Bell had been served with the Specific Charges on November 7, 1994, and November 4, 1994, respectively, and that each had failed to timely file an answer within twenty days of service. The Referee found that this constituted a default under OAR 839-50-330(1), issued a notice of default, and recited how Respondents might seek relief from default under OAR 839-50-340. A copy of the Referee's ruling of December 12, 1994, was forwarded by regular US Mail, postage prepaid, to the following:

Paul A. Kerley
Attorney at Law
530 Center Street NE, Suite 310
Salem, Oregon 97301

Rebecca S. Bell
c/o Law Office of Gregg Austin
522 SW Fifth Avenue, Suite 905
Portland, Oregon 97204

Neither of these mailings was returned.

11) On December 14, 1994, Respondent Bell, through counsel, filed a motion and affidavit asking to set aside the default and tendered an answer. On December 14, 1994, the Hearings Unit received the Agency's request that the hearing set for December 20, 1994, be postponed, citing a docket conflict.

12) On December 15, 1994, the Hearings Referee acknowledged the appearance of counsel and filing of the motion to set aside the default of Respondent Bell. Also on December 15, the Hearings Referee granted postponement of the hearing pending a ruling on Respondent Bell's motion for relief from default. A copy of the Referee's ruling on postponement was forwarded by regular US Mail, postage prepaid, to the following:

Paul A. Kerley
Attorney at Law
530 Center Street NE, Suite 310
Salem, Oregon 97301

Stephen J. Doyle
Attorney at Law
Suite 920, Spalding Building
319 SW Washington Street
Portland, Oregon 97204

A copy of the Referee's ruling on postponement was forwarded by fax to the following: Paul A. Kerley, fax # 244-3730; Stephen J. Doyle, fax # 228-6032.

13) On January 3, 1995, the Hearings Unit received, marked "undeliverable as addressed, return to sender," the mailing to Paul A. Kerley containing the Referee's ruling on postponement.

14) On January 10, 1995, in a ruling addressed to the Agency and Respondent Bell's counsel, the Hearings Referee denied Respondent Bell's motion to set aside the default, relying on *Metco Manufacturing, Inc. v. Bureau of Labor and Industries*, 93 Or App 317, 761 P2d 1362 (1988), and finding specifically that "The reason set forth * * * for Respondent Bell's failure to file an answer does not satisfy the requirements * * * in the applicable rules."

The Hearings Referee reset the hearing for January 26, 1995.

15) On January 10, 1995, in a separate ruling, the Forum advised the Agency and counsel for Respondent Bell of a change in Hearings Referee from Linda Lohr to Warner W. Gregg.

16) On January 17, 1995, the Agency filed a summary of the case.

17) At the commencement of the hearing, the Agency moved to amend the Specific Charges to allege that Respondent Dandelion employed six or more employees, rather than one or more. The Hearings Referee allowed the amendment.

18) At the commencement of the hearing, the Hearings Referee found that both Respondents had received the Notice of Contested Case Rights and Procedures. Pursuant to ORS 183.415(7), Complainant and the Agency were orally advised by the Hearings Referee of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

19) At the close of the hearing, the Hearings Referee directed the Agency to provide a copy for the record of the agreement between the Agency and the City of Portland for the enforcement of Portland City Code (PCC) Chapter 23.01. Later on January 24, 1995, the agreement as amended was admitted into the record.

20) The Proposed Order, which included an exceptions notice, was issued on May 5, 1995. Exceptions were due by May 15. Respondent Bell, through counsel, timely sought an extension of that date and was granted until May 29. Respondent Bell timely

filed exceptions to which the Agency responded. Those exceptions are dealt with in the Opinion section of this order.

FINDINGS OF FACT – THE MERITS

1) During times material herein, Respondent Dandelion was a domestic corporation engaged in the operation of eating and drinking establishments within this state and utilized the personal services of six or more employees, reserving the right to control the means by which said services were performed.

2) During times material herein, Respondent Bell was secretary of Respondent Dandelion and had a 30 per cent ownership interest therein. Paul A. Kerley was the majority shareholder and an officer.

3) Complainant is a homosexual male who, in the fall of 1993, was a student at Western Culinary Institute, about three quarters through his program. A graduate of Western Culinary Institute is qualified for chef positions, having had background in all aspects of the restaurant industry. When he needed a job to continue schooling, Complainant "networked" with other students and friends and learned of an opportunity with Respondent Dandelion.

4) Complainant began working for Respondent Dandelion at 1033 NW 16th Avenue, within the City of Portland, on or about October 23, 1993, as a cook. That location was known as "The Dandelion," an assumed business name of Respondent Dandelion. Respondent Dandelion employed as many as 27 persons in Oregon at times material.

5) Shortly after he started at the Dandelion, Complainant became the day "co-manager" of the restaurant, the kitchen, the apartments upstairs, and the house next door. Raejean Dietz (phonetic) was the night "co-manager".

6) Respondent Bell was Respondent Dandelion's operations manager and the direct supervisor of Complainant and Dietz. She was on the premises almost daily.

7) Complainant's duties included ordering of food and non-alcoholic beverages, meeting with vendors and contractors, signing checks for supplies, calling for repairs and meeting with the Fire Bureau and other agencies. He worked generally from 7:30 a.m. to 7:30 p.m., seven days a week. His pay was \$350 per week.

8) Complainant is an openly gay male who chooses not to conceal his sexual orientation. He did not conceal his orientation from management or staff at the Dandelion. Respondent Bell was aware of Complainant's sexual orientation. Complainant's boyfriend visited him at work.

9) As a purveyor of alcoholic beverages in Oregon, Respondent Dandelion was at times material a licensee of and subject to the statutes and rules administered by the Oregon Liquor Control Commission (OLCC).

10) According to Respondent Bell's books at the time, the Dandelion had a tremendous food expense. OLCC required a 50-50 food to liquor expense ratio. Overspending on staff and food supplies which was unmatched by food revenue put the liquor license in jeopardy. Complainant was asked to

revise the menu. He reorganized the kitchen, trimmed staff, and changed suppliers.

11) Respondent Bell expressed satisfaction with Complainant's performance during the period of November to mid-December 1993. She stressed that he was doing well handling an untrained staff.

12) On or about December 15, Respondent Bell came in very upset, called Complainant into the office, and told him that she believed that her male live-in companion was HIV positive. She was concerned that she, too, was infected and that her children would lose her. She quizzed Complainant as to how she could learn the result of her companion's HIV test, since he would not tell her. She asked how to learn the result from her companion's doctor without her companion knowing.

13) At first, Complainant was concerned about the two hour conversation because Respondent Bell seemed so upset and distraught. By evening, he had become upset that Respondent Bell had asked him about HIV; he believed it was because he is gay. Complainant thought that she believed him to be more knowledgeable about HIV and AIDS because he is gay. He had encountered this stereotypical thought in others. Respondent Bell had mentioned a friend who was gay and HIV positive in a previous conversation. Complainant became more doubtful of Respondent Bell's motive when she revealed wedding plans a week after the December 15 conversation.

14) Complainant was not infected with HIV and has twice tested negative for the virus, in July 1992 and February

1994.* He did not tell Respondent Bell in the December conversation with her or at any time that he was HIV positive. Complainant had never been absent due to illness prior to the December 15 discussion with Respondent Bell. He had, on occasion, mentioned that he was tired as a result of working 12 hour days.

15) Complainant contracted the flu and missed work on December 19 and December 20, 1993. On December 19, he called Respondent Bell's home to report his absence and left a message with her "nanny," whom he asked to give the message to Respondent Bell. On December 20, he left word for Respondent Bell with the bartender, who acted as lead person in the event of Complainant's absence. He also spoke with Respondent Bell later that day. He missed a staff meeting on December 20 as a result of this illness. He returned to work on December 21.

16) Robin Chappell was employed by Respondent Dandelion as a cook or chef from early December 1993 to about June 1994. He was previously acquainted with Complainant when both worked at the Copper Penny. Complainant told him about the opening and became his immediate supervisor. Respondent Bell supervised both.

17) Around December 20, in the bar after Chappell got off duty, Respondent Bell told him about Complainant being sick, that she didn't know what she was going to make of it or do with Complainant, because she was concerned about his health and

the kind of health problem that he had. She said that she was worried that other people (i.e., customers) might find out what his illness was and they might not like to come to the Dandelion. From her comments, it was clear to Chappell that Respondent Bell was saying that Complainant was HIV positive. Chappell was surprised and told Respondent Bell that anyone with knowledge of HIV/AIDS knows that it cannot be transmitted by handling food, that it is a sexually transmitted disease. Respondent Bell made no attempt to deny that she was speaking about HIV.

18) On December 26, Complainant visited a friend, Sherry McAdams, who dragged him in to her kitchen and asked him if he was HIV positive. He responded in the negative. McAdams stated that she had been told by Complainant's co-worker, Robin Chappell, that Complainant was HIV positive and was sick. Chappell had come to McAdams's home extremely upset because Respondent Bell had told him that "Gil" was sick and that Respondent Bell would have to make some decisions about whether or not to keep Complainant employed at the Dandelion by the first of the year, that she was concerned that if customers learned that someone in the kitchen was ill, she would lose business. There is an unjustified fear that food handlers infected with HIV can spread the virus through the food.

19) Based on his conversation with Respondent Bell, Chappell was concerned that Complainant might be HIV

positive. He attempted unsuccessfully to telephone Complainant. He saw Complainant about a week after his conversation with Respondent Bell. Complainant had in the meantime hurt his back. Chappell asked Complainant about HIV infection and reported the substance of the conversation to Complainant, who denied infection and was shocked that Respondent Bell would have such a conversation.

20) Scott Parrish met Complainant in July 1993 when both were attending the Western Culinary Institute. They had several classes together. In early November 1993, Parrish began working at the Dandelion as a part time cook with Complainant as his supervisor.

21) On a daily basis, Complainant would load two 35 gallon plastic garbage cans into his truck and go to a Dandelion Pub on the east side of Portland and load the cans with ice. He would then haul the ice back to the 16th Avenue Dandelion. Parrish estimated that they weighed around 200 pounds apiece. It took two people to move them.

22) Complainant worked on December 27. He did not see Respondent Bell that day. After opening and getting staff started, he went to the Dandelion on Grand (another Respondent Dandelion location at the time) to get ice because there was not a working ice machine at NW 16th. On that day, there was no one at the Grand location to assist him. He loaded a 35 gallon container of ice onto a truck and injured his back. When he returned to the Dandelion, he told his co-workers of his injury and needed their help in unloading the ice. He spoke with

Respondent Bell around 4:30 p.m. after having left her several messages earlier and told her of the injury. He worked until 7:30 p.m.

23) On December 28, Complainant opened as usual. Because he was having trouble with his back in standing and walking, he went to Good Samaritan Hospital Emergency about 12:30 p.m. A Dr. McDonald advised two days bed rest and prescribed muscle relaxants. He told Complainant to return December 30.

24) From the hospital, Complainant returned to the Dandelion on December 28 and informed bartender Jessica Hollyfield, as lead person, of the doctor's order for bed rest and medication. He asked her to tell Respondent Bell when Bell called in at 4:30. He filled out a workers' compensation accident form for Wausau Insurance, attached it with the hospital visit information to a note to call him, and left the documents in Respondent Bell's "hot file" box on her office door. He then went home.

25) Jessica Hollyfield worked as a waitress at the Dandelion in September 1993 and then as a bartender until May 1994. She worked with Complainant, who was first kitchen manager and then day manager. Respondent Bell was overall manager. Complainant worked up to 18 hours a day, seven days a week. He was a dedicated employee who did his job well. Complainant told Hollyfield when his doctor took him off work for two days due to his injured back. He told her he was going home to rest and asked that she tell Respondent Bell where he was and why. Hollyfield did not see Respondent Bell at the time, but left written messages in the

* While under oath in this proceeding, Complainant affirmatively waived any right of confidentiality he might possess regarding the results of the mentioned tests.

mailbox on the door of Respondent Bell's office. Respondent Bell told Hollyfield that Complainant was "sick" in such a way as to cause her to believe, through Respondent Bell's voice, facial expression and "body language," that Respondent Bell was suggesting it was due to HIV infection.

26) In the evening of December 28, Respondent Bell called Complainant at home and asked why he wasn't at work. He explained that he had left her copies of the emergency room visit and the doctor's orders that he be on bed rest for two days. She became angry and told him if he didn't want to work he should just turn in his keys. She hung up. Complainant called back several times and finally reached Respondent Bell. He again explained the doctor's orders that he not return to work for two days. She said "If you're not going to work, you can just turn in your keys right now." He again pointed out that he was on bed rest for two days and she said "Well, as soon as you get off bed rest, you bring those keys in to me." Complainant asked "Are you firing me?" and Respondent Bell said "Yes." She further stated that Complainant had missed work without calling in.

27) Complainant had never missed work except for December 19 and 20, when he called in both days.

28) At times material, Chappell, Hollyfield, and Parrish were all aware, as were all others working at the Dandelion, that Complainant is gay. Complainant was very open about his sexual orientation, and his boyfriend visited him at work.

29) Parrish and two other Dandelion employees were students at

Western Culinary Institute and knew of Complainant's sexual orientation. Parrish left the Dandelion around December 22, 1993. Around January 10, 1994, he was told by Penny Burroughs, one of the co-worker students at Western Culinary Institute, that there was a rumor at the Dandelion that Complainant had AIDS.

30) Before coming west in 1989, Complainant spent about ten years in Washington, D.C., where he lost many friends to AIDS. He came to Portland to start again, and took a construction job for a while in Seattle before enrolling at Western Culinary Institute as he had originally intended. He was eligible for and received unemployment benefits from that employment.

31) He applied at Western Culinary Institute in December 1992 and began there in May 1993. He ceased attending Western Culinary Institute after he began working at the Dandelion. Respondent Bell's remarks about his being ill presumably due to AIDS were particularly devastating to him because of his prior experience with the result of HIV infection. The erroneous supposition that HIV can be spread by mere casual contact and that it is a gay disease was particularly damaging to Complainant because he is openly homosexual; he found it extremely difficult to find replacement employment, particularly in the restaurant industry.

32) Complainant's workers' compensation claim was accepted as a disabling injury on March 31, 1994. Complainant was told by the insurance company that Respondent had delayed its report to the insurer.

33) According to the Oregon Spine Center, Complainant's back continued

to bother him from December 1993 to November 1994, imposing physical limitations which affected the type of employment he could accept. It continued to bother him up to the time of hearing.

34) Complainant had no income following his discharge, due to loss of employment and the delayed workers' compensation claim, until March 1994. He was evicted from his apartment. He stored those belongings he could move himself; he had to leave some behind. He couldn't find other housing, although he inquired at over 50 locations, because of the eviction. Respondent resisted his unemployment claim by stating that he was fired for absenteeism. He then drew unemployment for a short time before the old claim was exhausted.

35) Complainant sold his construction tools at discounted prices. He sold his art work and CD collections and stereo in order to live. He could not obtain food stamps. He became very anxious, depressed, and frustrated. He was angry and confused and felt betrayed. He was frightened that he had no savings, no earnings, and no tools. He suffered sleeplessness, was often reduced to tears, and developed a nervous appetite, causing severe weight fluctuation.

36) The suggestion that Complainant was HIV positive spread among his acquaintances; disclaimers were generally unavailing. The suspicion interfered with his friendships with Sherry McAdams and with Robin Chappell. The rumor reached the Western Culinary Institute, and he felt he could not return there. Even though the virus is not transmitted through normal

foodhandling, there is fear in the industry that somehow an infected person is a food handling risk.

37) Dishwasher and similar restaurant jobs appear in newspaper classified ads; the jobs requiring skill and experience such as cooks and chefs are more commonly learned of by word of mouth. Complainant's experience with Respondent led him to believe that employers would be unwilling to have an HIV positive employee, or one whom they thought was HIV positive. Complainant was unable to transfer many of his credits to schools elsewhere, and the Western Culinary Institute was gone as a resource for networking into chef positions.

38) Although the stress he was experiencing caused muscle spasms in his back and his neurosurgeon recommended that he seek psychiatric therapy, the workers' compensation carrier would not pay for such treatment and Complainant could not afford to pay for it.

39) Complainant drew workers' compensation time loss disability due to his back injury until the end of 1994. Meanwhile, the Respondent Dandelion went out of business on NW 16th in May 1994.

40) At times material, David Wright was a Senior Investigator with the Agency who was assigned to the investigation of Complainant's complaint. His investigation verified Respondent Dandelion's corporate status, Complainant's claim for on-the-job injury on December 27, 1993, and the number of employees, including Complainant, employed by Respondent Dandelion in October through December 1993. Following completion of his investigation,

he wrote an Administrative Determination, which was sent to Respondent Dandelion, to Respondent Dandelion's manager, and to Complainant on May 11, 1994. The Determination found substantial evidence supporting the complaint.

ULTIMATE FINDINGS OF FACT

1) During times material herein, Respondent Dandelion was a domestic corporation utilizing the personal services of six or more employees within the City of Portland, Oregon, and reserving the right to control the means by which said services were performed.

2) During times material herein, Respondent Bell had a 30 per cent ownership interest in Respondent Dandelion. She was operations manager of Respondent Dandelion's facility at 1033 NW 16th Avenue, Portland, and Complainant's immediate supervisor.

3) Complainant, an openly homosexual male, was employed at Respondent Dandelion's 16th Avenue location on October 23, 1993. All of Respondent Dandelion's employees, including Respondent Bell, were aware of Complainant's sexual orientation.

4) On December 27, Complainant sustained an on-the-job injury. On the 28th, his doctor placed him on two days bed rest. He left work on the 28th after reporting this to Respondents.

5) Complainant was not HIV positive at times material.

6) Respondent Bell discharged Complainant on December 28, alleging that he had failed to notify her of his absences from work or of the reason for his absences.

7) Respondent Bell did not discharge Complainant because he was homosexual.

8) Respondent Bell did not discharge Complainant because he had sought treatment or time loss compensation under Oregon's workers' compensation law.

9) Respondent Bell assumed Complainant was HIV positive, thus regarding him as having a physical impairment that substantially limits major life activity, and discharged Complainant because of perceived HIV infection.

10) Complainant's discharge by Respondents caused him extreme and prolonged emotional and mental distress.

CONCLUSIONS OF LAW

1) Oregon Revised Statutes (ORS) 659.010 provides, in part:

"As used in ORS 659.010 to 659.110, 659.400 to 659.460 * * * unless the context requires otherwise:

" * * *"

"(6) 'Employer' means any person * * * who in this state * * * engages or utilizes the personal service of one or more employees reserving the right to control the means by which such service is performed.

" * * *"

"(12) 'Person' includes one or more individuals * * * [or] corporations * * *."

"(13) 'Respondent' includes any person or entity against whom a charge of unlawful practices is filed with the commissioner or

whose name has been added to such complaint pursuant to ORS 659.050(1)."

Portland City Code (PCC) 23.01.030 provides:

"A. 'Sexual Orientation' – actual or supposed male or female homosexuality, heterosexuality or bisexuality.

"B. * * *

"C. All other terms used in this ordinance are to be defined as in Oregon Revised Statutes Chapter 659."

Respondent Dandelion was an employer subject to ORS 659.010 to 659.110 and 659.400 to 659.435 and subject to PCC Chapter 23.01 at all times material herein.

2) PCC 23.01.050 provides, in part:

"A. It shall be unlawful to discriminate in employment on the basis of an individual's race, religion, color, sex, national origin, marital status, age if the individual is 18 years of age or older, or disability, by committing any of the acts made unlawful under the provisions of ORS 659.030 and 659.425.

"B. In addition, it shall be unlawful to discriminate in employment on the basis of an individual's sexual orientation, * * * by committing against any such individual any of the acts already made unlawful under ORS 659.030 when committed against the categories of persons listed therein."

ORS 659.030 provides, in part:

"(1) For the purposes of ORS 659.010 to 659.110, * * * 659.400 to 659.460 * * * it is an unlawful employment practice:

"(a) For an employer, because of an individual's race, religion, color, sex, national origin, marital status or age if the individual is 18 years of age or older * * * to bar or discharge from employment such individual. * * *"

" * * *"

"(g) For any person, whether an employer or an employee, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under ORS 659.010 to 659.110, 659.400 to 659.460 * * * or to attempt to do so."

By aiding, abetting, and compelling Respondent Dandelion to commit the practices found herein, Rebecca Bell is a respondent subject to ORS 659.010 to 659.110 and 659.400 to 659.435 and subject to PCC Chapter 23.01 at all times material herein.

3) ORS 659.400 provides, in part:

"As used in ORS 659.400 to 659.460, unless the context requires otherwise:

"(1) 'Disabled person' means a person who has a physical or mental impairment which substantially limits one or more major life activities, has a record of such an impairment or is regarded as having such an impairment.

"(2) As used in subsection (1) of this section:

" * * *"

"(c) 'Is regarded as having an impairment' means that the individual:

"(C) Has no physical or mental impairment but is treated by an employer or supervisor as having an impairment.

"(3) 'Employer' means any person who employs six or more persons ***"

ORS 659.410 provides, in part:

"(1) It is an unlawful employment practice for an employer to discriminate against a worker with respect to *** tenure *** because the worker has applied for benefits or invoked or utilized the procedures provided for in ORS chapter 656 ***."

ORS 659.425 provides, in part:

"(1) For the purpose of ORS 659.400 to 659.460, it is an unlawful employment practice for any employer to *** bar or discharge from employment *** because:

"(c) An individual is regarded as having a physical or mental impairment."

ORS 659.435 provides, in part:

"Any person claiming to be aggrieved by an unlawful employment practice may file a complaint under ORS 659.040 ***. The Commissioner *** shall have the same enforcement powers, and *** the complainant shall be entitled to the same remedies, *** as in the case of any other complaint filed under ORS 659.040 ***."

ORS 659.040(1) provides:

"Any person claiming to be aggrieved by an alleged unlawful employment practice, may *** make, sign and file with the commissioner a verified complaint in writing which shall state the name and address of the *** employer *** alleged to have committed the unlawful employment practice complained of *** no later than one year after the alleged unlawful employment practice."

PCC 23.01.080 provides, in part:

"A. Enforcement of all or any part of this Chapter shall be governed by the procedures established in ORS Chapter 659, ***"

"B. Any person claiming to be aggrieved by an unlawful employment practice under this Chapter may file a complaint with the Commissioner of the Bureau of Labor and Industries under procedures established in ORS 659.040, ***"

"C. The Commissioner may then proceed and shall have the same enforcement powers under this Chapter, and if the complaint is found to be justified the complainant shall be entitled to the same remedies, under ORS 659.050 to 659.085 as in the case of any other complaint filed under ORS 659.040 ***."

Under ORS 659.010 to 659.110, 659.400 to 659.435 and PCC 23.01.080, the Commissioner of the Bureau of Labor and Industries has jurisdiction of the persons and subject matter herein.

4) The actions, inactions, statements and motivations of Respondent

Bell are properly imputed to Respondent Dandelion herein.

5) Respondent Bell aided and abetted the unlawful practices of Respondent Dandelion herein.

6) Respondents did not violate PCC 23.01.050.

7) Respondents did not violate ORS 659.410.

8) By treating Complainant, who had no physical or mental impairment and discharging him because of such impairment, Respondents violated ORS 659.425(1)(c).

9) Pursuant to ORS 659.060(3) and by the terms of ORS 659.010(2), the Commissioner of the Bureau of Labor and Industries has the authority to issue a Cease and Desist Order requiring Respondents to perform an act or series of acts in order to eliminate the effects of an unlawful practice and to protect the rights of others similarly situated. The amount awarded in the Order below is a proper exercise of that authority.

OPINION

Default and the Prima Facie Case

Following service of the Specific Charges upon the registered agent of Respondent corporation, upon an attorney for Respondent Bell, and upon the reputed owners and corporate officers of the corporation, Respondents failed to timely answer the Specific Charges and were held in default. OAR 839-50-330(1)(a). Where a respondent defaults, the Agency must present a prima facie case in support of the Specific Charges and to establish damages. ORS 183.415(6); OAR 839-50-330(2). The Agency meets

that burden by submitting credible witness testimony and documentary evidence acceptable to the Forum. *In the Matter of Metco Manufacturing, Inc.*, 7 BOLI 55, 66 (1987), *aff'd*, *Metco Manufacturing, Inc. v. Bureau of Labor and Industries*, 93 Or App 317, 761 P2d 1362 (1988).

The Forum has consistently held that a prima facie case of an unlawful employment practice is established where there is proof acceptable to the Forum that:

1. Respondent is a Respondent as defined by statute.
2. The Complainant is a member of a protected class.
3. The Complainant was harmed by an action of Respondent.
4. The Respondent's action was taken because of the Complainant's membership in the protected class.

OAR 839-05-010(1); *In the Matter of Soapy's, Inc.*, 14 BOLI 86 (1995); *In the Matter of RJ's All American Restaurant*, 12 BOLI 24 (1993); *In the Matter of Palomino Cafe and Lounge, Inc.*, 8 BOLI 32 (1989); *In the Matter of Colonial Motor Inn*, 8 BOLI 45 (1989).

Here the unlawful employment practices charged were unlawful discharge on the basis of sexual orientation, contrary to City of Portland ordinance, on the basis of retaliation for utilizing state workers' compensation procedures, contrary to state statute, and on the basis of disability. The Forum finds, by a preponderance of evidence, that:

1. Respondent Dandelion was an employer as defined by statute; Respondent Bell aided, abetted,

and compelled Respondent Dandelion's actions.

2. Complainant was employed by Respondent and

(a) Complainant was a male homosexual protected under PCC 23.01.050;

(b) Complainant was treated by Respondents as having a physical impairment as defined by statute when no such impairment existed, and was protected under ORS 659.425;

(c) Complainant was a worker who had applied for benefits under ORS chapter 656 and was protected under ORS 659.410.

3. Complainant suffered severe emotional and economic distress resulting from Respondents' action in discharging him from employment.

4. (a) Respondents did not discharge Complainant because of his sexual orientation;

(b) Respondents did not discharge Complainant because he had applied for benefits under ORS chapter 656;

(c) Respondents discharged Complainant because they regarded him as having a physical impairment, within the meaning of the statute.

The Agency, through credible witnesses and documentary evidence relied upon by the Forum, has satisfied the elements and established a prima facie case as to the unlawful discharge on the basis of disability.

Respondent Dandelion employed Complainant, an openly homosexual

male at its 16th Avenue location, within the City of Portland, in October 1993. Respondent Bell, who was operations manager and Complainant's immediate supervisor, was aware of Complainant's sexual orientation. Complainant became day manager and did well at the job.

Complainant was absent from work due to flu on December 19 and 20 and sustained an on-the-job injury on December 27. On the 28th, after his doctor placed him on two days bed rest, Complainant left work.

Complainant reported his absences to Respondent Bell each day. During Complainant's absence due to the flu and again when he left work due to the injury, Respondent Bell expressed concern to his co-workers suggesting that he was missing work due to HIV infection and that she would have to terminate his employment. Respondent Bell had discussed the alleged HIV infection of her friend with Complainant because Complainant is homosexual. Respondent Bell discharged Complainant on December 28, alleging that he had failed to notify her of his absences or of the reason for his absences. Complainant was not HIV infected, but Respondent Bell assumed Complainant was HIV infected and discharged Complainant because of HIV infection.

Respondents were aware that Complainant was gay when he was hired, yet he was given managerial responsibility and commended for his work. While it might be inferred that Respondent Bell assumed that Complainant was HIV infected because he was gay, it was the presumed disability itself which triggered the discharge.

Respondent did not discharge Complainant because he was gay and did not violate PCC 23.01.050.

There was no evidence in the record, other than the occurrence of injury, to suggest that Respondent Bell fired Complainant because he invoked the workers' compensation system. Respondent did not discharge Complainant because he had sought treatment or time loss compensation under Oregon's workers' compensation law.

Respondents' Liability

This case was heard under state law, ORS chapter 659. The City of Portland has authorized enforcement by the Bureau of Labor and Industries of its city civil rights ordinance, which prohibits discriminatory employment practice on the basis of sexual orientation. That aspect of this case was processed in the same manner as if it were a violation of ORS chapter 659. That is the provision of the ordinance and of the intergovernmental agreement between the City and the Agency. The Forum has used the same procedures and evaluation of evidence as if the violation under PCC 23.01.050 was a violation of ORS chapter 659. The Forum has found that Complainant's homosexuality was not a reason for his discharge.

HIV infection is a physical impairment that substantially limits one or more major life activities, and a person so infected is a disabled person as a matter of law. *In the Matter of Glenn Walters Nursery, Inc.*, 11 BOLI 32 (1992); *In the Matter of Casa Toltec*, 8 BOLI 149 (1989). ORS 659.425 makes it an unlawful employment practice to discharge an individual because the individual is regarded as

having a physical impairment; by definition, regarded as having an impairment includes an individual with no impairment who is treated by an employer as having an impairment. Complainant was not HIV positive, but Respondents' erroneous belief that Complainant was HIV infected was the reason for his discharge. Thus, the Forum has found that Respondents violated ORS 659.425(1)(c).

Damages

Respondents' harmful actions complained of and proved in this case resulted in extreme, prolonged emotional distress for Complainant. Termination of employment was sudden and unexpected. Complainant's situation changed dramatically from one of productive activity to one of stagnation. He was without immediate economic resource and was forced to sell his assets. The uncertainty of unemployment was compounded by the knowledge that Respondent's unlawful reason for discharge had damaged his future opportunity for jobs in the field in which he had been working. This, combined with the shock and humiliation of the discharge, made him angry, confused, anxious, depressed, frightened, and frustrated. He suffered sleeplessness and a nervous appetite.

The anxiety and uncertainty connected with the loss of employment income is compensable. The effect of an unexpected termination attributable to an unlawful practice and the resulting specter of unemployment and its uncertainties are also compensable. *In the Matter of 60 Minute Tune*, 9 BOLI 191, 204 (1991), *aff'd without opinion*, *Nida v. Bureau of Labor and Industries*, 119 Or App 508, 852 P2d 974

(1993). Emotional distress or mental suffering which is demonstrated by a preponderance of evidence to be among the effects of a discriminatory termination is compensable. *In the Matter of Sierra Vista Care Center*, 9 BOLI 281, 303 (1991), *aff'd*, *Colson v. Bureau of Labor and Industries*, 113 Or App 106, 831 P2d 706 (1992); *In the Matter of Arkad Enterprises, Inc.*, 8 BOLI 263 (1990), *aff'd*, *Arkad Enterprises, Inc. v. Bureau of Labor and Industries*, 107 Or App 384, 812 P2d 427 (1991).

ORS 659.010(2) authorizes the Commissioner to "eliminate the effects of an unlawful practice found." Those effects can include both wage loss and mental suffering. No wage loss has been computed because Complainant was covered by time loss compensation until Respondent Dandelion ceased operating. The Forum is awarding \$30,000 for mental suffering.

Respondent Bell's Exceptions

Respondent Bell obtained counsel following the hearing and filed exceptions to the Referee's Proposed Order. The Agency filed a response. On occasion this forum has chosen to consider exceptions to a proposed order filed by a defaulting respondent.* But in *Metco Manufacturing, Inc. v. Bureau of Labor and Industries*, 93 Or App 317, 761 P2d 1362 (1988), the Court of Appeals said:

"Failure to respond timely to a charging instrument results in the admission of any factual matters alleged and the waiver of any

affirmative defenses. [citing forum rule in a footnote] By failing to respond, petitioner lost its right to address by any means, including cross-examination, issues raised in that instrument." 761 P2d at 1365. (Emphasis supplied.)

And where that respondent raised an affirmative defense for the first time in its exceptions to the proposed order, the court stated:

"Petitioner also waived its right to raise that issue when it defaulted[.]" *Id.*

Since *Metco*, this forum has consistently denied a defaulting respondent the opportunity to present evidence or cross-examine witnesses at hearing. *In the Matter of City of Umatilla*, 9 BOLI 91 (1990), *aff'd without opinion*, *City of Umatilla v. Bureau of Labor and Industries*, 110 Or App 151, 821 P2d 1134 (1991), and *In the Matter of 60 Minute Tune*, 9 BOLI 191 (1991), *aff'd without opinion*, *Nida v. Bureau of Labor and Industries*, 119 Or App 508, 852 P2d 947 (1993), are two examples of more than half a dozen such cases. Most recently, in *In the Matter of Kenneth Williams*, 14 BOLI 16 (1995), the defaulting respondent attended but was precluded from participation in the hearing except as a spectator. At the close of the hearing, in response to that respondent's inquiry, respondent was told:

"that Respondent could file exceptions to the Proposed Order through an attorney, but that they would not be considered by the

* See, for example, *In the Matter of City of Umatilla*, 9 BOLI 91 (1990), *aff'd without opinion*, *City of Umatilla v. Bureau of Labor and Industries*, 110 Or App 151, 821 P2d 1134 (1991); *In the Matter of Peggy's Cafe*, 7 BOLI 281 (1989).

**In the Matter of
FIDEL HERNANDEZ
and Pacific Rim Contractors, Inc.,
Respondents.**

Case Number 24-95

Final Order of the Commissioner

Jack Roberts

Issued August 10, 1995.

SYNOPSIS

The scheduled hearing was canceled when Respondent agreed to sign a Consent Order requiring payment of civil penalties for failure to pay 13 employees, failure to comply with contracts entered into as a forest labor contractor, failure to pay workers' compensation insurance premiums in violation of agreement, and failure to file required certified payroll records. Respondent agreed not to reapply for a farm/forest labor contractor license for a period of three years from the implementation of the Consent Order. When Respondent thereafter failed to endorse the order or pay the agreed penalties, the Commissioner entered an order based on the disposition agreed to and for the sums and acts specified. ORS 658.417(3); 658.440(1)(c), (d); 658.445(3); OAR 839-50-220(5); 839-50-240(9).

The above-entitled contested case came on regularly for hearing on March 30, 1995, before Warner W. Gregg, designated as Hearings Referee by Jack Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. Linda Lohr, Case Presenter with the Bureau of Labor

Commissioner when the Final Order was prepared."

That position is consistent with the Court of Appeals opinion in *Metco*, and will also govern this case, since I have ratified the Hearings Referee's denial of relief from default. Respondent Bell's exceptions are part of the record, but are not considered in this Final Order.

ORDER

NOW, THEREFORE, as authorized by ORS 659.060(3) and 659.010(2), and in order to eliminate the effects of the unlawful practices found, Respondents DANDELION ENTERPRISES, INC. and REBECCA S. BELL are hereby ordered to:

1) Deliver to the Fiscal Services Office of the Bureau of Labor and Industries, State Office Building, Ste 1010, 800 NE Oregon Street, # 32, Portland, Oregon 97232-2162, a certified check, payable to the Bureau of Labor and Industries in trust for RORY G. GERARD in the amount of:

a) THIRTY THOUSAND DOLLARS (\$30,000), representing compensatory damages for the mental and emotional distress suffered by RORY G. GERARD, as a result of Respondents' unlawful practice found herein, plus

b) Interest at the legal rate on the sum of \$30,000 from the date of this Final Order until Respondents comply herewith, and

2) Cease and desist from unlawful discriminatory conduct in the workplace directed toward any employee based upon that employee's actual or assumed physical or mental impairment.

and Industries (the Agency) represented the Agency, and Thomas J. Wettlaufer, Attorney at Law, Salem, represented Fidel Hernandez (Respondent Hernandez) and Pacific Rim Contractors, Inc., a corporation (Respondent Pacific Rim) in correspondence with the Forum and in a telephone conference call with the Hearings Referee and the Agency Case presenter occurring at approximately 9:30 a.m. on March 30, 1995.

Having fully considered the entire record in this matter, I, Jack Roberts, Commissioner of the Bureau of Labor and Industries, make the following Findings of Fact, Conclusions of Law, and Order.

FINDINGS OF FACT

1) On September 19, 1994, the Agency issued its Notice of Intent to Revoke Farm Labor Contractor's License and To Assess Civil Penalties (Notice of Intent). The Notice of Intent notified Respondents that the Commissioner intended to revoke their farm labor contractor license pursuant to ORS 658.445 and further intended to assess civil penalties based upon allegations that:

"I. In 1994, while licensed and acting as a farm labor contractor with a forestation indorsement, [Respondents] failed to pay wages when due that had been entrusted to [Respondents] for that purpose to the following thirteen (13) employees: Jesus Adame, Omar Carballo, Rafael Salinas, Julio Sierra, Exiquio Aguilar, Joaquin Aguilar, Abelino Asneros, Pedro Carbajal

O., David Guillen, Martin Jimenez, Trodoro Luna, Jose Reyes, and Jacinto Tellez. The magnitude and seriousness of these violations are aggravated by the willful and repeated nature of the violations and other violations alleged in this Notice. CIVIL PENALTY OF \$26,000. (13 VIOLATIONS)

"II. On April 22, 1994, [Respondents were] awarded Contract No. 52-04KK-4-50 in the amount of \$71,505.00 for tree shading on USFS' land. [Respondents] commenced work on said contract on or about May 4, 1994. On July 20, 1994 the USFS terminated said contract with [Respondents] based on [Respondents'] failure to prosecute the work in a timely fashion. On May 27, 1994, [Respondents were] awarded Contract No. 52-0385-4-3068 in the amount of \$9,374 for hand tree thinning on USFS land. [Respondents] commenced work on said contract on or about June 7, 1994. On July 14, 1994, the USFS terminated said contract based on [Respondents'] abandonment of the contract. The magnitude and seriousness of these violations are aggravated by the [Respondents'] repeat violation, [Respondents'] knowledge of the violations, and the other violations alleged in this Notice. CIVIL PENALTY OF \$4,000. (TWO VIOLATIONS)

"III. [Respondents], while acting in [Respondents'] capacity as a farm labor contractor, failed to pay worker's [sic] compensation

premiums when due in the amount of \$6,381.15 due July 7, 1994 to Associated Oregon Industries Compwise, constituting a failure to comply with the terms and conditions of a legal and valid agreement entered into in [Respondents'] capacity as a farm labor contractor. The magnitude and seriousness of this violation is [aggravated] by the willful nature of the violation and the other violations alleged in this Notice. CIVIL PENALTY OF \$2,000. (ONE VIOLATION)

"IV. While performing work as a farm labor contractor with a forestation indorsement in 1994, [Respondents] failed to provide certified true copies of all payroll records (CPRs) for work done as a farm/forest labor contractor at least once every 35 days starting from the time work first began on the forestation or reforestation of lands for the following four contracts, in that said payroll records were either incomplete or not submitted at all:

"(1) USFS Contract #52-04R4-4-3211 (\$40,767) for spring tree planting. Incomplete CPRs submitted;

"(2) USFS Contract #52-04KK-4-55 (\$51,921) for thinning and hand piling. No CPRs submitted;

"(3) USFS Contract #53-04KK-4-50 (\$71,505) for tree shading. No CPRs submitted;

"(4) USFS Contract #02-04KK-4-80 (\$12,519) for tree planting. No CPRs submitted.

"The magnitude and seriousness of these violations are aggravated by the willful and repeated nature of the violations and other violations alleged in this Notice. CIVIL PENALTY OF \$8,000. (FOUR VIOLATIONS)

"V. Paragraphs I-IV of this Notice allege failures to comply with ORS 658.440(1)(c), ORS 658.440(1)(d), and ORS 658.417(3). Each of these alleged failures to comply is grounds for revocation of a farm labor contractor's license.

"VI. The following actions of [Respondents] demonstrate that [Respondents'] character, reliability or competence make [Respondents'] unfit to act as a Farm or Forest Labor Contractor:

"(1) [Respondents'] defaults on two USFS contracts as set forth in Paragraph II of this Notice, which constitute willful violations of the terms and conditions of a work agreement or contract (OAR 839-15-520(3)(c));

"(2) [Respondents'] failure to provide certified true copies of all payroll records as set forth in Paragraph IV of this Notice, which constitutes repeated failure to file or furnish all forms and other information required by ORS 658.405 to 658.485 (OAR 839-15-520(3)(f));

"(3) [Respondents'] failure to make workers's [sic] compensation payments when due as set forth in Paragraph III of this Notice (OAR 839-15-520(3)(j));

"(4) On July 8 and 27, 1994 Amwest Surety Insurance Company, [Respondents'] bonding

* "USFS" refers to the United States Forest Service, Department of Agriculture.

agent, paid out a total of \$2,399.22 for wage claims brought against [Respondents], temporarily lowering [Respondents] bond to \$7,600.78, a lower bond than the \$10,000 required by ORS 658.405 to 658.485. (OAR 839-15-530 (3)(f))."

2) On September 21, 1994, the Notice of Intent was served on Respondent Hernandez by delivering a copy thereof to a person over the age of 14 years residing at Respondent Hernandez's usual place of abode through the Sheriff of Marion County, Oregon. On September 25, 1994, the Agency deposited with the US Postal Service the Notice of Intent as certified mail article number P-001 894 744, with postage thereon prepaid for delivery to Fidel Hernandez, Pacific Rim Contractors, Inc., 823 Manbrin Street, Keizer, Oregon 97303. Thereafter, the return receipt for certified mail article P-001 894 744 was returned to the Agency signed "Marbella Tovar, September 27, 1994."

3) The Notice of Intent provided that Respondents, within 60 days, file an answer to the Notice and request a contested case hearing in connection therewith. On October 24, 1994, the Hearings Unit received from Respondents' counsel an answer and request for hearing dated October 21, 1994. Respondents through counsel denied the allegations of the Notice of Intent.

4) On November 14, 1994, the Agency requested a hearing date from the Hearings Unit and on November 30, 1994, the Forum issued a Notice of Hearing setting the matter for February 2, 1995, in Salem. Thereafter, Respondents' counsel requested a

postponement because of conflict with a prior proceeding in another forum. The Agency did not object to the postponement.

5) On January 11, 1995, the Hearings Referee reset the hearing to March 30, 1995, in Salem.

6) On March 30, 1995, the Hearings Referee spoke with the Agency Case Presenter and Respondents' counsel by telephone conference call at approximately 9:30 a.m. That conversation was preserved on tape as part of the record herein. Both the Agency and Respondents acknowledged that the case was settled as follows:

Respondents agreed to enter into a Consent Order admitting the violations alleged in the Notice of Intent, further agreed to suspend activities as a farm labor contractor in Oregon for a period of three years and not to apply for a farm labor contractor license during said time, and further agreed to pay the sum of \$15,000 as and for a civil penalty for the admitted violations, said sum to be paid on the following schedule, to the Wage and Hour Division of the Agency: \$3,000 no later than April 7, 1995; \$2,000 no later than May 1, 1995; \$5,000 no later than July 1, 1995; and \$5,000 no later than October 1, 1995.

The Agency acknowledged that the license which existed at the time of the issuance of the Notice of Intent had expired, and that Respondents' agreement was not to reapply for three years.

Respondents' counsel affirmatively acknowledged the settlement terms.

The Hearings Referee thereupon approved the settlement outlined and canceled the hearing. The necessary documents were to be filed with the Forum within 10 days, pursuant to OAR 839-50-220. The Hearings Referee admitted as exhibits all of the described pleadings and correspondence, which, together with the tape record of the proceedings of March 30, constitute the entire record herein.

7) On April 3, 1995, the Agency wrote to Respondents' counsel, enclosing the drafted Consent Order and payment agreement for signatures on behalf of Respondents and requested the first scheduled payment.

8) On May 16, 1995, with copies to Respondents' counsel, the Agency advised the Hearings Referee of its April 3 letter and of an extension of one week (to April 14) granted to Respondents to submit the first installment. The Agency Case Presenter stated that Respondents had failed to respond further to the Agency's April 3 letter and had failed to sign the consent order or pay the agreed upon installments timely or at all. The Agency requested an Order under OAR 839-50-220(5) and 839-50-240(9) based upon the record of March 30, 1995.

9) The Consent Order which Respondents agreed to sign contained the following provision:

"The undersigned acknowledges that any failure to abide by this agreement, including, but not limited to, failure to pay any one installment by its due date or the

return of any one installment for insufficient funds, will nullify this agreement and that, in such case, the Commissioner of the Bureau of Labor and Industries will proceed to collect all monies due on the Consent Order, Case No. 77-94 in any lawful manner necessary to effect such collection."

10) The Proposed Order, which included an Exceptions Notice, was issued on June 13, 1995. Exceptions, if any, were to be filed by June 23, 1995. No exceptions were received.

CONCLUSIONS OF LAW

1) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the persons and subject matter herein pursuant to ORS 658.405 to 658.485.

2) OAR 839-50-220 provides, in part:

"(4) Where a case is settled within ten days before or on the date set for hearing, the terms of the settlement shall be placed on the record, unless fully executed settlement documents are submitted on or before the date set for hearing.

"(5) Where settlement terms are placed on the record because settlement documents are incomplete, * * * fully executed settlement documents must be submitted to the hearings unit within ten days after the date set for hearing. Where a party fails to submit the settlement documentation within ten days after the date set for hearing, the terms of the settlement set forth on the record

shall constitute the basis for a final order."

OAR 839-50-240 provides, in part:

"The commissioner designates as hearings referees those employees who are employed by the agency as hearings officers, ***. The commissioner delegates to such designee the authority to:

"***"

"(9) Decide procedural matters, but not grant motions for summary judgment or other motions by a party which involve final determination of the proceeding, but to issue a proposed order as provided for in these rules. ***"

Respondents' failure to submit settlement documents within ten days after the hearing date, or by such date as modified by the extension granted by the Agency, and Respondents' failure to comply with the substance of the settlement, allows the terms of settlement as placed on the record to form the basis for a final order.

3) Under the facts and circumstances of this record, and in accordance with ORS 658.453, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondent to pay the penalty agreed to, plus interest on such sum until paid.

ORDER

NOW, THEREFORE, as authorized by ORS 658.453, the Commissioner of the Bureau of Labor and Industries hereby orders that Fidel Hernandez and Pacific Rim Contractors, Inc., a corporation, deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon

Street, Portland, Oregon 97232-2109, the following:

1) A certified check payable to the Bureau of Labor and Industries in the amount of FIFTEEN THOUSAND DOLLARS (\$15,000), representing civil penalty for violations of ORS chapter 658, PLUS

2) Interest at the rate of nine percent per year on the sum of \$15,000 from April 14, 1995, until paid.

AND IT IS FURTHER ORDERED that, in accordance with ORS 658.415 (1)(c) and OAR 839-15-520(4), Fidel Hernandez and Pacific Rim Contractors, Inc., a corporation, are hereby prevented from reapplying for a farm or forest labor contractor license for a period of three years from the date of the final order herein.

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**In the Matter of
GERALD BROWN,
dba Crystal Crane Hot Springs, and
Life Awareness Centers International,
dba Crystal Crane Hot Springs, Respondents.**

Case Number 50-95

Final Order of the Commissioner

Jack Roberts

Issued August 10, 1995.

SYNOPSIS

Respondent Brown failed to pay Claimants all wages due upon

termination, in violation of ORS 653.025(3) (minimum wages) and ORS 652.140(1). Respondent Brown's failure to pay the wages was willful, and the Commissioner ordered Respondent Brown to pay civil penalty wages, pursuant to ORS 652.150. The Commissioner found that Respondent Life Awareness Centers International (LACI) was a successor employer to Respondent Brown, and the Commissioner held Respondent LACI jointly and severally liable for the payment of the wages owed to Claimants. ORS 652.140(1), 652.150, 653.025(3), 653.055(2).

The above-entitled contested case came on regularly for hearing before Judith A. Bracanovich, designated as Hearings Referee by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on May 24, 1995, in the Conference Room of the State of Oregon Employment Department, 1007 SW Emkay Drive, Bend, Oregon.

The Bureau of Labor and Industries (the Agency) was represented by Alan McCullough, an employee of the Agency. Philip A. Blanton and Susan G. Tone (Claimants) were present throughout the hearing. Respondent Gerald Brown was present throughout the hearing and was not represented by counsel. Respondent Life Awareness Centers International (hereinafter LACI), after being duly notified of the time and place of hearing, failed to appear through counsel.*

The Agency called the following witnesses: Philip A. Blanton, Claimant; Susan G. Tone, Claimant; Rhoda Briggs, Compliance Specialist, Wage and Hour Division, Bureau of Labor and Industries; and Alan McCullough, Case Presenter, Bureau of Labor and Industries.

Respondent Brown called the following witnesses: Anne Davis, Vice President and Secretary of LACI, and himself.

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

FINDINGS OF FACT – PROCEDURAL

1) On August 10, 1994, Claimant Blanton filed a wage claim with the Agency. He alleged that he had been employed by Respondent Gerald Brown, dba Crystal Crane Hot Springs, and that Respondent Gerald Brown had failed to pay wages earned and due to him.

2) On August 11, 1994, Claimant Tone filed a wage claim with the Agency. She alleged that she had been employed by Respondent Gerald Brown, dba Crystal Crane Hot Springs, and that Respondent Gerald Brown had failed to pay wages earned and due to her.

3) At the same time they filed their wage claims, Claimants assigned to the Commissioner of Labor, in trust for

* Anne Davis, Vice President and Secretary of LACI, was present as an observer throughout the hearing.

Claimants, all wages due from their employer.

4) On November 26, 1994, the Commissioner of the Bureau of Labor and Industries served on Respondents Gerald Brown and Roxanna Brown, partners, dba Crystal Crane Hot Springs, an Order of Determination based upon the wage claims filed by Claimants and the Agency's investigation. The Order of Determination found that Respondents Gerald Brown and Roxanna Brown owed a combined total of \$342.77 in wages and \$1,838 in civil penalty wages. The Order of Determination required that, within 20 days, Respondent Gerald Brown and Roxanna Brown either pay these sums in trust to the Agency, or request an administrative hearing and submit an answer to the charges.

5) On January 4, 1995, Respondent Gerald Brown filed an answer to the Order of Determination. Respondent's answer also contained a request for a contested case hearing in this matter. Respondent Gerald Brown's answer alleged that the business had been sold to LACI in October 1994, and that LACI was responsible for all unpaid debts of Crystal Crane Hot Springs.

6) On March 29, 1995, the Agency sent the Hearings Unit a request for a hearing date. The Hearings Unit issued a Notice of Hearing to Respondent Gerald Brown, the Agency, and the Claimants indicating the time and place of the hearing. Together with the Notice of Hearing, the Forum sent a document entitled "Notice of Contested Case Rights and Procedures" containing the information required by ORS 183.413, and a copy of the Forum's

contested case hearings rules, OAR 839-50-000 to 839-50-420.

7) On April 11, 1995, the Agency submitted to the Hearings Unit a motion to amend Order of Determination No. 94-032. The proposed amendments reflected the addition of LACI as a Respondent and the deletion of Roxanna Brown as a Respondent. Respondents Gerald Brown and Roxanna Brown did not object to the amendments, and the Agency's motion was granted. The name of this case was changed to the caption appearing on this order.

8) On April 21, 1995, the Hearings Unit issued an Amended Notice of Hearing to Respondents Gerald Brown and LACI, the Agency, and the Claimants indicating the time and place of the hearing. Together with the Notice of Hearing, the Forum sent a document entitled "Notice of Contested Case Rights and Procedures" containing the information required by ORS 183.413, and a copy of the Forum's contested case hearings rules, OAR 839-50-000 to 839-50-420.

9) The Amended Notice of Hearing intended for Life Awareness Centers International was addressed to Ramon Hernan, Registered Agent, at the following addresses:

P.O. Box 727
Burns, OR 97720
29 W. Washington
Burns, OR 97720
19925 Ashwood Drive
Bend, OR 97702

Those Notices addressed to the Burns addresses were returned.

10) The principal office address of LACI, as registered with the

Corporations Division of the Office of Secretary of State, is 19925 Ashwood Drive, Bend, Oregon 97702.

11) The notice addressed to the Bend address was received by Anne Davis and forwarded to Ramon Hernan at his current address in Salem, Oregon, 2649 47th Avenue N., where the return receipt was signed on April 26, 1995.

12) On May 2, 1995, the Hearings Referee issued a discovery order to the participants directing them each to submit a summary of the case, including a list of the witnesses to be called, and the identification and description of any physical evidence to be offered into evidence, together with a copy of any such document or evidence, according to the provisions of OAR 839-50-210(1). The summaries were due by May 7, 1995. The order advised the participants of the sanctions, pursuant to OAR 839-50-200(8), for failure to submit the summary. The Agency submitted a timely summary. Respondents failed to submit summaries.

13) No answer to the Amended Order of Determination was received from LACI.

14) On May 22, 1995, Anne Davis, on behalf of LACI, telephoned the Hearings Referee and requested a postponement of the hearing, stating that LACI wanted to pay Claimants, but could not do so at this time because of a pending grand jury investigation into LACI and its president, Ramon Hernan, and because there were insufficient remaining members of the Board of Directors to issue a corporate check. The Hearings Referee denied this request, pursuant to OAR 839-50-110

(1), as Respondent LACI, a corporation, was required to be represented by an attorney and to appear through an attorney on all matters, including a motion for postponement, and because the proffered reason given for postponement did not constitute good cause for a postponement pursuant to OAR 839-50-150(5) and OAR 839-50-020(9).

15) At the time and place set forth in the Amended Notice of Hearing for this matter, Respondent LACI did not appear or contact the Agency or the Hearings Unit through an attorney. Pursuant to OAR 839-50-330(2), the Hearings Referee waited 30 minutes before finding Respondent in default as to the Amended Order of Determination, and proceeded with the hearing.

16) At the start of the hearing, Respondent Brown said he had reviewed the "Notice of Contested Case Rights and Procedures" and had no questions about it.

17) Pursuant to ORS 183.415(7), the Hearings Referee explained the issues involved in the hearing, the matters to be proved or disproved, and the procedures governing the conduct of the hearing.

18) The Proposed Order, which included an Exceptions Notice, was issued on July 6, 1995. Exceptions were required to be filed by July 17, 1995. No exceptions were received by the Hearings Unit.

FINDINGS OF FACT – THE MERITS

1) During all times material herein, Respondent Brown, a person, did business as Crystal Crane Hot Springs, a hot spring resort located in Crane,

Oregon. He employed one or more persons in the State of Oregon.

2) Life Awareness Centers International (LACI) is a non-profit corporation, incorporated in Oregon on September 19, 1994. During all times material herein, Ramon Hernan was its registered agent and president. On October 30, 1994, Respondent Brown transferred the real property and business assets associated with Crystal Crane Hot Springs to LACI, together with a condominium unrelated to the operation of Crystal Crane Hot Springs. Respondent LACI agreed to pay all accrued debts of Crystal Crane Hot Springs and agreed to pay Respondent Brown, in the future, \$50,000 for the personal property associated with that business. Between October 30, 1994, and the date of hearing herein, LACI continued to operate the Crystal Crane Hot Spring business under the same name, at the same location, using the same equipment, and providing the same services as it had previously been operated by Respondent Brown.

3) On or about March 2, 1994, Respondent Gerald Brown offered Claimants employment at Crystal Crane Hot Springs for 30 hours per week at the rate of five percent of that week's gate receipts. As a condition of employment, Claimants were required to live on the premises of the Crystal Crane Hot Springs resort.

4) On March 3, 1994, Claimants accepted the offer of employment and each entered into an oral employment agreement to perform 30 hours of work per week at the rate of five percent of that week's gate receipts.

5) Claimants moved from Portland to Crane on April 2, 1994. They commenced their employment at Crystal Crane Hot Springs on April 3, 1994.

6) Claimants were supervised by Crystal Crane Hot Springs' general manager, Bryce McCallester (phonetic). Bryce McCallester was employed by Respondent Brown.

7) From on or about April 3 through April 15, 1994, Respondent Brown employed Claimants as desk clerks, maintenance persons, and repair persons. Claimants had no ownership interest in the business. Claimants were hired for an indefinite period. Respondent Brown furnished all of the equipment and supplies Claimants used on the job. Respondent Brown, through his general manager, Bryce McCallester, detailed and controlled how Claimants were to perform their duties. Claimants were carried on Respondent Brown's books as employees. Claimants worked for only Respondent Brown during all times material herein. They derived no benefits other than wages from their work for Respondent.

8) Claimants filled out weekly time sheets and submitted them to their supervisor, Bryce McCallester.

9) Claimant Blanton's records and testimony, which are accepted as fact, reveal that during the period between April 3 and April 15, 1994, he worked 60 total hours in 11 days.

10) Claimant Tone's records and testimony, which are accepted as fact, reveal that during the period between April 3 and April 15, 1994, she worked 67 total hours in nine days.

11) At times material, the minimum wage in Oregon was \$4.75 per hour, pursuant to ORS 653.025(3).

12) Pursuant to ORS chapter 653 (Minimum Wages), the Agency calculated Claimant Blanton's total earnings to be \$285.00. The total reflects 60 hours at the rate of \$4.75 per hour.

13) Pursuant to ORS chapter 653 (Minimum Wages), the Agency calculated Claimant Tone's total earnings to be \$318.25. The total reflects 67 hours at the rate of \$4.75 per hour.

14) To date, Respondent Brown has paid Claimant Blanton \$165.65^{*}, leaving a balance due and owing of \$119.35.

15) To date, Respondent Brown has paid Claimant Tone \$90.65^{**}, leaving a balance due and owing of \$227.60.

16) Claimants were discharged on April 17, 1994, when they refused to continue to work for less than the minimum wage rate.

17) April 17, 1994 was a Sunday.

18) On or about August 28, 1994, Respondent Brown signed an Acknowledgment of Indebtedness of Wages, affirming his debt to Philip Blanton in the amount of \$192.86, for wages earned between April 3 and April 15, 1994.^{***}

19) On or about August 28, 1994, Respondent Brown signed an Acknowledgment of Indebtedness of Wages, affirming his debt to Susan Tone in the amount of \$224.91, for wages earned between April 3 and April 15, 1994.

20) With regard to Claimant Blanton, civil penalty wages, computed in accordance with Agency policy, are as follows: \$285.00 (the total wages earned) divided by 11 (the number of days worked during the claim period) equals \$25.91 (the average daily rate of pay). This figure of \$25.91 is multiplied by 30 (the number of days for which civil penalty wages continued to accrue) for a total of \$777.30, rounded to \$777 pursuant to Agency policy.

21) With regard to Claimant Tone, civil penalty wages, computed in accordance with Agency policy, are as follows: \$318.25 (the total wages earned) divided by nine (the number of days worked during the claim period) equals \$35.36 (the average daily rate of pay). This figure of \$35.36 is multiplied by 30 (the number of days for which civil penalty wages continued to accrue) for a total of \$1060.80, rounded to \$1061 pursuant to Agency policy.

22) Respondent Brown did not allege in his answer an affirmative

* The Agency's figures showed a total paid of \$167.86. The testimony and exhibits submitted established that the amount paid was \$165.65. The difference may be due to the crediting of calling card charges. No evidence, however, was submitted in regard to these or any other offsets.

** The Agency's figures showed a total paid of \$93.94. The testimony and exhibits submitted established that the amount paid was \$90.65. The difference may be due to the crediting of calling card charges. No evidence, however, was submitted in regard to these or any other offsets.

*** Since this Acknowledgment of Indebtedness of Wages was executed, Respondent Brown made a payment to Claimant Blanton in the amount of \$75.00.

defense of financial inability to pay the wages due at the time they accrued, nor did he provide any such evidence for the record. Respondent LACI provided no answer or affirmative defense.

23) At the time the wages of the Claimants herein became due and owing, Respondent had assets available with which Claimants could have been paid.

24) On June 1, 1995, the Malheur County grand jury was scheduled to hear evidence relating to activities of the president of LACI, including the possible embezzlement of assets of LACI.

ULTIMATE FINDINGS OF FACT

1) During all times material herein before October 30, 1994, Respondent Brown was a person doing business as Crystal Crane Hot Springs, in the State of Oregon, and employed one or more persons in the operation of that business.

2) From September 19, 1994, to the present, Respondent LACI was and is an Oregon non-profit corporation. From October 30, 1994, to the present, LACI has been engaged, in part, in the hot spring resort business, and has continuously employed one or more persons in the State of Oregon.

3) During the period of April 3 to April 15, 1994, Claimants were employees of Respondent Brown. Claimants were not copartners of Respondent Brown or independent contractors when they rendered personal services in this state to him in exchange for a fixed rate of pay.

4) Between April 3 and April 15, 1994, Respondent Brown suffered or

permitted Claimants to render personal services to him wholly in this state.

5) The state minimum wage during 1994 was \$4.75 per hour.

6) Claimants' last day worked was April 15, 1994, two days prior to the day Respondent Brown terminated Claimants' employment.

7) Claimant Blanton is owed \$119.35 in wages, which represents \$285 earned during the period April 3 to April 15, 1994, minus \$165.65 Respondent Brown paid Claimant for the period.

8) Claimant Tone is owed \$227.60 in wages, which represents \$318.25 earned during the period April 3 to April 15, 1994, minus \$90.65 Respondent Brown paid Claimant for the period.

9) Respondent Brown willfully failed to pay Claimants all wages immediately when employment was terminated, and more than 30 days have elapsed from the date Claimants' wages were due and payable.

10) During the period of his wage claim, Claimant Blanton worked 11 days. Claimant Blanton's average daily rate for the wage claim period of employment was \$25.91 (\$285 earned divided by 11 days equals \$25.91 average rate per day). Civil penalty wages, computed pursuant to ORS 652.150 and agency policy, equal \$777, when rounded to the nearest dollar (Claimant's average daily rate, \$25.91, continuing for 30 days).

11) During the period of her wage claim, Claimant Tone worked nine days. Claimant Tone's average daily rate for the wage claim period of employment was \$35.36 (\$318.25 earned divided by nine days equals \$35.36

average rate per day). Civil penalty wages, computed pursuant to ORS 652.150 and agency policy, equal \$1061, when rounded to the nearest dollar (Claimant's average daily rate, \$35.36, continuing for 30 days).

12) Respondent Brown made no showing that he was financially unable to pay Claimants' wages at the time they accrued.

13) Between October 30, 1994, the date of transfer of the assets and property of the Crystal Crane Hot Spring business from Gerald Brown to LACI, and the date of hearing, LACI continued to operate the business under the same name, at the same location, using the same equipment, and providing the same services as it had before. In sum, Respondent LACI was conducting essentially the same business that its predecessor, Respondent Brown, did.

14) Agency policy is not to hold "successor" employers liable for penalty wages under ORS 652.150.

CONCLUSIONS OF LAW

1) Prior to the commencement of the contested case hearing, the Forum informed Respondent Brown of his rights as required by ORS 183.413(2). The Hearings Referee complied with ORS 183.415(7) by explaining the information described therein to the participants at the start of the hearing.

2) ORS 653.010 provides in part:

"(3) 'Employ' includes to suffer or permit to work; ***.

"(4) 'Employer' means any person who employs another person ***"

ORS 652.310 provides in part:

"(1) 'Employer' means any person who in this state, directly or through an agent, engages personal services of one or more employees ***.

"2) 'Employee' means any individual who otherwise than as a co-partner of the employer or as an independent contractor renders personal services wholly or partly in this state to an employer who pays or agrees to pay such individual at a fixed rate, based on the time spent in the performance of such services or on the number of operations accomplished, or quantity produced or handled."

During all times material herein, Respondent Brown was an employer and Claimants were employees subject to the provisions of ORS 652.110 to 652.200, 652.310 to 652.405, and 653.010 to 653.261.

3) ORS 652.310(1) defines, in pertinent part, "employer" as "any person who *** engages personal services of one or more employees and includes any producer-promoter, and any successor to the business of any employer, or any lessee or purchaser of any employer's business property for the continuance of the same business, so far as such employer has not paid employees in full ***." Thus, an employer includes:

A) any producer-promoter; and

B) 1) any successor to the business of any employer, so far as such employer has not paid employees in full; or

2) any lessee or purchaser of any employer's business property for the continuance of the same

business, so far as such employer has not paid employees in full.

Respondent LACI is a "successor" within the meaning of ORS 652.310(1), and therefore subject to the provisions of ORS 652.110 to 652.200 and 652.310 to 652.405, and ORS chapter 653.

4) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and the Respondents herein. ORS 652.310 to 652.405.

5) ORS 653.025 requires that:

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

" * * *

"(3) For calendar years after December 31, 1990, \$4.75."

Respondent Brown was prohibited from employing or agreeing to employ Claimants at a wage rate lower than \$4.75 for each hour of work time. Respondent Brown violated ORS 653.025.

6) ORS 652.140 provides in part:

"(1) Whenever an employer discharges an employee, or where such employment is terminated by mutual agreement, all wages earned and unpaid at the time of such discharge shall become due and payable immediately."

" * * *

"(3) For the purpose of this section, if employment termination occurs on a Saturday, Sunday or holiday, payment of wages is

made "immediately" if made no later than the end of the first business day after the employment termination * * *."

Respondent Brown violated ORS 652.140(1) by failing to pay Claimants all wages earned and unpaid no later than Monday, April 18, 1995, which was the first business day after the termination of the employment of Claimants.

7) Respondent LACI, as a successor employer, may become liable for Respondent Brown's failure to pay Claimants all wages earned and unpaid immediately upon their termination from employment. ORS 652.140(1).

8) ORS 652.150 provides:

"If an employer willfully fails to pay any wages or compensation of any employee whose employment ceases, as provided in ORS 652.140 and 652.145, then, as a penalty for such nonpayment, the wages or compensation of such employee shall continue from the due date thereof at the same rate until paid or until action therefor is commenced; provided, that in no case shall such wages or compensation continue for more than 30 days from the due date; and provided further, the employer may avoid liability for the penalty by showing financial inability to pay the wages or compensation at the time they accrued."

Respondent Brown is liable for a civil penalty under ORS 652.150 for willfully failing to pay all wages or compensation to Claimants when due as provided in ORS 652.140.

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

10) Under the facts and circumstances of this record, and according to the law applicable to this matter, the Commissioner of the Bureau of Labor and Industries has the authority to order that Respondent LACI, jointly or severally with Respondent Brown, pay Claimants their earned, unpaid, due and payable wages, plus interest on that sum until paid. ORS 652.332.

OPINION

The sole issue in this case relates to the relative responsibilities of Respondents Brown and LACI for the payment of wages owed to Claimants. There is no dispute about the hours worked, the application of the minimum wage law to the work performed by Claimants, or the amount of wages owed to each Claimant. While there is no dispute about the employment relationship between Respondent Brown and Claimants, clarification of the basis therefore is called for in light of the specific wage agreement between Respondent Brown and Claimants.

Claimants Worked As Employees

This forum has previously accepted the definition of "employee" in ORS 652.310(2) for the purposes of ORS 652.140 and 652.150. See *In the Matter of Crystal Heart Books Co.*, 12 BOLI 33, 41 (1993) (*relying on Lamy v.*

Jack Jarvis & Co., 281 Or 307, 574 P2d 1107, 1111 (1978)).

"Employee" means any individual who otherwise than as a copartner of the employer or as an independent contractor renders personal services wholly or partly in this state to an employer who pays or agrees to pay such individual at a fixed rate * * *." ORS 652.310(2). For purposes of the definition of "employee" in ORS 652.310(2), an "employer who pays or agrees to pay an individual at a fixed rate" includes an employer who is required by law to pay a minimum wage to workers, but has failed to do so. *Crystal Heart Books Co.*, 12 BOLI at 44. Thus, the absence of an agreement to pay at a fixed rate or actual payment to a worker will not take the worker out of the definition of "employee," where a minimum wage law requires that worker to be paid a minimum wage. Here the law requires employers to pay employees at a fixed minimum wage rate, and that rate was \$4.75 per hour. ORS 653.025(3). The wage agreement to work at the rate of five percent of the gate receipts, when the actual sums paid resulted in a rate less than \$4.75 per hour, does not constitute a defense to the application of the minimum wage law to the work performed under the agreement (ORS 653.055(2)), and cannot be used to take the worker out of the definition of "employee". Claimants were Respondent Brown's employees despite the fact that Respondent did not pay them at the fixed minimum wage rate.

Responsibility of Respondent Brown

At the time of Claimants' employment at Crystal Crane Hot Springs, Respondent Brown owned the assets

of that business, including the real property upon which it was situated. Respondent Brown paid Claimants wages at a rate less than the mandatory minimum wage rate, and, as the owner of the business, benefited directly from the value of their uncompensated labor. As the actual employer of Claimants, Respondent Brown bears primary responsibility for the payment of Claimants' due and unpaid wages, unless that responsibility is shifted from him to another entity.

The uncontradicted evidence demonstrates that Respondent Brown transferred the assets of the Crystal Crane Hot Spring business, and the real property upon which it was located, to Respondent LACI, a non-profit corporation, on or about October 30, 1994. According to the testimony of Anne Davis, Vice President and Secretary of LACI, Respondent Brown was to receive \$50,000 from Respondent LACI, in exchange for personal property associated with the business. In addition, Respondent LACI agreed to assume the debts of the business, including the instant wage claims. It was the further testimony of Anne Davis that Respondent Brown also transferred a condominium to the corporation. While the date of this latter transfer was not specified, it could not have been before September 19, 1994, the date of incorporation of LACI.

On April 18, 1994, the date all wages owing to Claimants became due, Respondent Brown owned, at minimum, a parcel of real property and the assets of Crystal Crane Hot Springs, later valued at \$50,000, and a condominium. Clearly, Respondent

Brown had assets available from which the wages of these Claimants could have been paid, or against which assets funds could have been secured to pay these Claimants. Both transfers of property occurred more than 30 days after the wages owed Claimants became due and payable. The transfer of the business assets and land associated with Crystal Crane Hot Springs occurred approximately six months after the wages of Claimants became due, and two months after Respondent Brown executed an Acknowledgment of Indebtedness for the unpaid wages of each of the Claimants herein.

Respondent Brown was named as a party to this proceeding, and was personally present throughout the hearing. While Respondent Brown called both Anne Davis and himself as witnesses, he presented no evidence concerning his present ability to pay Claimants, relying, instead, on the presentation of evidence establishing LACI's agreement to pay these debts. The sole evidence relating to his current financial status came from Anne Davis, who testified that LACI was obligated to pay Respondent Brown \$50,000 for the transfer of the business assets of Crystal Crane Hot Springs.

Respondent LACI has been named as a successor in interest to Respondent Brown in the ownership and operation of Crystal Crane Hot Springs. The forum has found that Respondent LACI qualifies as a successor in interest to Respondent Brown concerning that business operation, pursuant to ORS 652.310(1). See Finding of Fact 2; Ultimate Finding of Fact 14; Conclusion of Law 3; and discussion of Responsibility of Respondent LACI, *infra*.

An important threshold issue presented by the particular facts of this case concerns the propriety of imposing the responsibility for the payment of wages upon a successor when the predecessor, the actual employer, is available and apparently able to provide relief.

In each of the previous wage claim cases decided by this forum in which responsibility has been imposed upon a successor in interest, the predecessor employer was unavailable, insolvent, or both. In 1987, the Commissioner imposed wage liability upon the successor employer (a reacquiring seller, following the default of the buyer on the agreement of sale) when the actual employer had abandoned the business and could not be found. *In the Matter of Anita's Flowers & Boutique*, 6 BOLI 258 (1987). In a Final Order issued in 1991, the Commissioner imposed liability for wages owed by the predecessor employer upon the successor (a reacquiring seller, following the default of the buyer on the agreement of sale), where the actual employer, a corporation, went out of business. *In the Matter of Tire Liquidators*, 10 BOLI 84 (1991). Finally, in a case involving unique facts not present herein, the Commissioner imposed joint liability upon the predecessor and successor employers as each was, successively, the actual employer of the Claimant. *In the Matter of Waylon & Willie, Inc.*, 7 BOLI 68 (1988). To date, there has been no instance in which the responsibility to pay wages owed by a predecessor has been imposed upon the successor employer when the predecessor is both available and presumptively able to pay the

wages owed, and was not also an actual employer of the claimant.

"Because the successor doctrine is derived from equitable principles, fairness is a prime consideration in its application." *Criswell v. Delta Airlines*, 868 F2d 1093, 1094 (9th Cir 1989).

Where, as here, the actual employer is available and has the apparent ability to pay the wage obligation incurred by him, and where the successor employer was at no time an actual employer of claimants, fairness dictates that liability for the wages owed rests first with the actual employer. There is no reason in such an instance to reach the liability of the successor employer unless there is a question whether the remedy which can be provided by the actual employer would fully recompense the Claimants. See discussion of the responsibility of Respondent LACI, *infra*.

The forum has determined that Respondent Brown is primarily responsible for the payment of Claimants' unpaid wages. Evidence was presented that Respondent LACI had agreed, as a condition of the property transfer, to take over the debts of the business, including these wage claims. Such an agreement may provide for the indemnification of Respondent Brown by LACI, but does not relieve Respondent Brown of his direct liability to these Claimants for their unpaid wages.

Responsibility of Respondent LACI

Default

Respondent LACI failed to file an answer or to appear through an attorney at the hearing herein, and thus

defaulted to the charges set forth in the Amended Order of Determination. In a default situation, pursuant to ORS 183.415(5) and (6), the task of this Forum is to determine if a prima facie case supporting the Agency's Amended Order of Determination has been made on the record. See *In the Matter of Judith Wilson*, 5 BOLI 219, 226 (1986); *In the Matter of Art Farbee*, 5 BOLI 268, 276 (1986); *In the Matter of John Cowdrey*, 5 BOLI 291, 298 (1986). See also OAR 839-50-330.

Respondent LACI Was An Employer

ORS 652.310(1) defines, in pertinent part, "Employer" as

"any person who * * * engages personal services of one or more employees and includes any producer-promoter, and any successor to the business of any employer, or any lessee or purchaser of any employer's business property for the continuance of the same business, so far as such employer has not paid employees in full."

Thus, an employer includes:

- A) any producer-promoter; and
- B) 1) any successor to the business of any employer, so far as such employer has not paid employees in full; or
- 2) any lessee or purchaser of any employer's business property for the continuance of the same business, so far as such employer has not paid employees in full.

As the language of the statute shows, a "successor" employer may be "any successor to the business of any

employer," or "any lessee or purchaser of any employer's business property for the continuance of the same business." That language clearly recognizes two kinds of "successor" employers. *Anita's Flowers*, 6 BOLI at 267.

To decide whether an employer is a "successor," the test is whether it conducts essentially the same business that the predecessor did. The elements to look for include: the name or identity of the business; its location; the lapse of time between the previous operation and the new operation; the same or substantially the same work force employed; the same product is manufactured or the same service is offered; and, the same machinery, equipment, or methods of production are used. Not every element needs to be present to find an employer to be a successor; the facts must be considered together to reach a decision. *Anita's Flowers*, 6 BOLI at 267-68; and see *N.L.R.B. v. Jefferies Lithograph Co.*, 752 F2d 459 (9th Cir 1985).

The Agency has established a prima facie case that Respondent LACI was a successor in interest to Respondent Brown in the operation of the Crystal Crane Hot Springs business. A preponderance of the credible evidence on the whole record revealed the following facts, all of which were undisputed. On October 30, 1994, Respondent Brown transferred the real property and business assets associated with Crystal Crane Hot Springs to LACI. Between October 30, 1994, and the date of hearing herein, LACI continued to operate the Crystal Crane Hot Spring business under the same name, at the same location, using the

same equipment, and providing the same services as it had previously been operated by Respondent Brown. The Forum concludes from those facts that Respondent LACI conducted essentially the same business that its predecessor, Respondent Brown, conducted. The Forum concludes, as a matter of law, that Respondent LACI is a "successor" within the meaning of ORS 652.310(1), and is therefore an employer subject to the provisions of ORS 652.110 to 652.200, 652.310 to 652.405, and ORS chapter 653. Because Respondent LACI was a successor employer to Respondent Brown, it may bear liability for the Claimants' wages to the extent that Respondent Brown may be unable to provide full remedy.

Joint and Several Liability

The purpose for the application of the successor doctrine in the wage claim context is, foremost, protection of employees. The buyer and seller, lessor and lessee, etc., of a business can protect their respective interests when negotiating a sale agreement, lease, or other business arrangement, by an indemnification clause in the acquisition agreement or by a lower purchase price. The employees are not parties to these negotiations and are in the least advantageous position to protect themselves when a change occurs in the employer's business. In importing and codifying the successor doctrine into the definition of "employer" in ORS 652.310, the legislature has made a determination that the objectives of the wage collection laws require that the prerogative of owners independently to rearrange their businesses, and even eliminate themselves as employers, be

balanced by some protection to the employees from a sudden change in the employment relationship. The ultimate issue is one of balancing the conflicting legitimate interests of the bona fide successor, the affected employee(s), and the public. By its adoption of the successor doctrine, the legislature has introduced into the balancing process an emphasis upon protection for victimized employees. In the balancing process attendant to the application of the successor doctrine, the legislative goal of protection of employees is subverted by leaving the employee without a remedy or with an incomplete remedy. See, e.g., *EEOC v. MacMillan Boedel Containers, Inc.*, 503 F2d 1086, 1091 (6th Cir 1974).

The particular facts of this case cast some doubt upon the ultimate ability of the actual employer to provide full remedy to these Claimants. While Respondent Brown appears to be owed a substantial sum from Respondent LACI in exchange for the transfer of his property, other evidence suggests that at least some of the assets of LACI may have been misappropriated, and assets may or may not be available to pay Respondent Brown the sum owed. Anne Davis testified that on June 1, 1995, the grand jury of Malheur County was to take up the possible embezzlement of certain corporate assets by the president of LACI. It is not known whether, following the criminal action, previously transferred property will be returned to Respondent Brown, or whether sufficient corporate assets will remain to pay the \$50,000 owed to Respondent Brown. It is unclear to the forum what interest, if any, Respondent Brown now has or

may come to have in the corporation following an accounting and distribution, if any. Presently, there appears to be an extraordinary entanglement of assets between Respondent Brown and LACI.

In order to effectuate the legislature's emphasis on protection of employees in relation to the collection of wages, and with due regard to the dealings and property transfers between Respondents Brown and LACI, the resulting entanglements and uncertainty of eventual property or asset distribution, the forum finds this an appropriate case to impose joint and several liability upon Respondent LACI for wages owed these Claimants.

This forum has, in the past, found cases interpreting and applying the successor doctrine in National Labor Relations Board (NLRB) cases instructive in interpreting and applying the successor doctrine in wage claim cases. See, e.g., *Anita's Flowers*; *Tire Liquidators*; *Wayton & Willies*. In *Golden State Bottling Co., Inc. v. N.L.R.B.*, 414 US 168 (1973), the Supreme Court, after noting that the successor company acquired the predecessor with notice of the unfair labor practice litigation and continued the business without substantial interruption or change in operations, upheld the NLRB's order requiring the successor to reinstate with back-pay an employee discharged by the predecessor company. Both companies were held jointly and severally liable for the back-pay award. In upholding the joint and several back-pay award, the court noted that joint and several liability more fully insured that the employee would be fully recompensed by

protecting the employee from, for example, subsequent insolvency of either the successor or predecessor employer. The court determined that the balance struck by the NLRB between the interests of the employers, employee, and the public, effectuated the purpose of national labor policy.

Here, Respondent LACI acquired the Crystal Crane Hot Springs business with knowledge of the wages owed to Claimants, and continued the business without substantial interruption or change in operations. Under all the circumstances present in this case, the burden to the successor of imposing joint liability for wages is slight when compared to the furtherance of the overriding legislative purpose of protecting employees from non-payment or incomplete payment of wages. Imposition of this responsibility does not work an unfair hardship on LACI as, at least as of the date of hearing, Respondent LACI was in possession of the real property and business assets of Crystal Crane Hot Springs and was operating that business.

In summary, where the actual employer is available and has the apparent ability to pay the wage obligation incurred by that employer, fairness dictates that the primary responsibility for the payment of the wages rest with that employer. Where, due to questionable transactions between the actual employer and a successor, entanglement of assets between the actual employer and a successor, pending legal proceedings which may, in effect, reverse the original transaction or material terms thereof, or, due to other circumstances giving rise to uncertainty about the actual employer's

ultimate ability to fully recompense the wage claimants, furtherance of the legislative emphasis on protection of the employee (in relation to the payment of wages) requires that liability for wages owed be placed also upon the successor. The forum finds this an appropriate case to impose joint and several liability upon both Respondents for wages owed these Claimants.

Penalty Wages

Awarding penalty wages turns on the issue of willfulness. Willfulness does not imply or require blame, malice, wrong, perversion, or moral delinquency, but only requires that which is done or omitted is intentionally done with knowledge of what is being done, and that the actor or omittor be a free agent. *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976). Respondent Brown, as an employer, had a duty to know the amount of wages due to his employees. *McGinnis v. Keen*, 189 Or 445, 221 P2d 907 (1950); *In the Matter of Jack Coke*, 3 BOLI 238, 242 (1983). Here, evidence established that Respondent Brown knew he was not paying Claimants the requisite minimum wage for their work, and intentionally failed to pay such wages. Evidence showed that Respondent Brown acted voluntarily, and was a free agent. Respondent must be deemed to have acted willfully under this test, and thus is liable for penalty wages under ORS 652.150.

Pursuant to Agency policy, civil penalty wages due under ORS 652.150 are rounded to the nearest dollar. *Wayton & Willies*, 7 BOLI at 72.

The Agency has a policy of not holding successor employers liable for

penalty wages under ORS 652.150. *Anita's Flowers*, 6 BOLI at 267. Accordingly, penalty wages will not be imposed upon Respondent LACI.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders GERALD BROWN, INDIVIDUALLY, AND LIFE AWARENESS CENTERS INTERNATIONAL, A CORPORATION, to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2109, the following:

A certified check payable to the Bureau of Labor and Industries IN TRUST FOR Philip Blanton in the amount of ONE HUNDRED NINETEEN DOLLARS AND THIRTY-FIVE CENTS (\$119.35), representing gross earned, unpaid, due, and payable wages; plus interest at the rate of nine percent per year on the sum of \$119.35 from May 1, 1994, until paid;

A certified check payable to the Bureau of Labor and Industries IN TRUST FOR Susan Tone in the amount of TWO HUNDRED TWENTY-SEVEN DOLLARS AND SIXTY CENTS (\$227.60), representing gross earned, unpaid, due, and payable wages; plus interest at the rate of nine percent per year on the sum of \$227.60 from May 1, 1994, until paid.

AND FURTHER, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders GERALD BROWN, INDIVIDUALLY, to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street,

Portland, Oregon 97232-2109, the following:

A certified check payable to the Bureau of Labor and Industries IN TRUST FOR Philip Blanton in the amount of SEVEN HUNDRED SEVENTY-SEVEN DOLLARS (\$777), in penalty wages; plus interest at the rate of nine percent per year from June 1, 1994, until paid;

A certified check payable to the Bureau of Labor and Industries IN TRUST FOR Susan Tone in the amount of ONE THOUSAND SIXTY ONE DOLLARS (\$1061), in penalty wages; plus interest at the rate of nine percent per year from June 1, 1994, until paid.

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**In the Matter of
SUNNYSIDE ENTERPRISES OF
OREGON, INC., dba Sunnyside
Automotive & Towing, Respondent.**

Case Numbers 05-95 & 06-95
Final Order of the Commissioner
Jack Roberts
Issued August 11, 1995.

SYNOPSIS

Respondent failed to pay Claimants all wages due upon termination, in violation of ORS 653.261, OAR 839-20-030 (overtime wages), and ORS 652.140. Respondent's failure to pay the wages was willful, and the Commissioner ordered Respondent to pay civil penalty

wages pursuant to ORS 652.150, ORS 652.140; 652.150; 653.025(3); 653.045; 653.055(1), (2); 653.261(1); OAR 839-20-030(1).

The above-entitled contested case came on regularly for hearing before Linda Lohr, designated as Hearings Referee by Mary Wendy Roberts, then Commissioner of the Bureau of Labor and Industries for the State of Oregon. That designation was confirmed by Jack Roberts, current Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on October 27, 1994, in the conference room of the Bureau of Labor and Industries office, 3865 Wolverine NE, Suite E-1, Salem, Oregon.

The Bureau of Labor and Industries (the Agency) was represented by Alan McCullough, an employee of the Agency. Michael Ray Duncan (Claimant) was present throughout the hearing except when the other Claimants testified by telephone. David L. Bates, Barbara Anne Griffith, and Michael Arieta (Claimants) were not present at the hearing. Keno Kramp, Respondent's president, was present throughout the hearing. Sunnyside Enterprises of Oregon, Inc., dba Sunnyside Automotive and Towing (Respondent), was represented by Stephen A. Lipton, Attorney at Law.

The Agency called the following witnesses: Keno Kramp, Respondent's president; Michael Arieta, Claimant (by telephone); Michael Ray Duncan, Claimant; Barbara Anne Griffith, Claimant (by telephone); Brian Henson; Melissa Gruis; Betty Griffith, Claimant Griffith's mother.

Respondent called the following witnesses: Keno Kramp, Respondent's president; Arron Woodrum, Respondent's general manager and Kramp's ex-husband (by telephone).

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

**FINDINGS OF FACT –
PROCEDURAL**

1) On August 2, 1993, Claimant Michael Ray Duncan filed a wage claim with the Agency. He alleged that he had been employed by Respondent and that Respondent had failed to pay wages earned and due to him.

2) On October 5, 1993, Claimant David L. Bates filed a wage claim with the Agency. He alleged that he had been employed by Respondent and that Respondent had failed to pay wages earned and due to him.

3) On December 6, 1993, Claimant Barbara Anne Griffith filed a wage claim with the Agency. She alleged that she had been employed by Respondent and that Respondent had failed to pay wages earned and due to her.

4) On June 11, 1994, Claimant Michael Arieta filed a wage claim with the Agency. He alleged that he had been employed by Respondent and that Respondent had failed to pay wages earned and due to him.

5) At the same time they filed a wage claim, each Claimant assigned to the Commissioner of Labor, in trust

for Claimants, all wages due from Respondent.

6) On January 5, 1994, the Commissioner of the Bureau of Labor and Industries personally served on Keno Kramp, Respondent's president, an Order of Determination (Determination 93-186) naming Keno Kramp, dba Sunnyside Automotive & Towing (Respondent Kramp) as the employer, based upon the wage claims filed by Claimants Bates and Duncan and the Agency's investigation. Determination 93-186 found that Respondent Kramp owed a total of \$1,222.30 in wages and \$3,708.90 in civil penalty wages. Determination 93-186 required that, within 20 days, Respondent Kramp either pay the sums in trust to the Agency, or request an administrative hearing and submit an answer to the charges.

7) On January 24, 1994, Respondent Kramp, through her attorney, filed an answer to Determination 93-186. Respondent Kramp's answer also contained a request for a contested case hearing and denied that Respondent Kramp owed Claimants Bates and Duncan \$1,220.30 in unpaid wages.

8) On March 30, 1994, the Commissioner of the Bureau of Labor and Industries served on Respondent Sunnyside Enterprises of Oregon, Inc. (Respondent) an Order of Determination (Determination 93-237) based upon the wage claim filed by Claimant Griffith and the Agency's investigation. Determination 93-237 found that Respondent owed a total of \$1,342.50 in wages and \$2,179.50 in civil penalty wages. Determination 93-237 required that, within 20 days, Respondent either pay the sums in trust to the Agency, or

request an administrative hearing and submit an answer to the charges.

9) On April 18, 1994, Respondent, through its attorney, filed an answer to Determination 93-237. Respondent's answer contained a request for a contested case hearing, and denied that Respondent owed Claimant Griffith the amount of unpaid wages determined by the Agency.

10) On June 30, 1994, the Commissioner of the Bureau of Labor and Industries served on Respondent an Amended Order of Determination (Amended Determination 93-186) naming Respondent as the employer doing business as Sunnyside Automotive & Towing in Determination 93-186. No other part of Determination 93-186 was amended. Amended Determination 93-186 required an answer be filed within 20 days.

11) On July 20, 1994, the Agency sent the Hearings Unit a request for a hearing date. The Hearings Unit issued a Notice of Hearing to the Respondent, the Agency, and the Claimants indicating the time and place of the hearing. Together with the Notice of Hearing, the Forum sent a document entitled "Notice of Contested Case Rights and Procedures" containing the information required by ORS 183.413, and a copy of the Forum's contested case hearings rules, OAR 839-50-000 to 839-50-420.

12) On July 29, 1994, the Hearings Referee issued a discovery order to the participants directing them each to submit a summary of the case, including a list of the witnesses to be called, and the identification and description of any physical evidence to be offered into evidence, together with a copy of

any such document or evidence, according to the provisions of OAR 839-50-210(1). The summaries were due by August 15, 1994. The order advised the participants of the sanctions, pursuant to OAR 839-50-200(8), for failure to submit the summary.

13) On August 1, 1994, the Agency submitted to the Hearings Unit a second request for hearing and attached a third Order of Determination (Determination 93-283) issued on July 14, 1994, by the Commissioner of the Bureau of Labor and Industries based upon the wage claim filed by Claimant Arieta and the Agency's investigation. Determination 93-283 found that Respondent owed a total of \$755.38 in wages and \$1,192.00 in civil penalty wages. Determination 93-283 required that, within 20 days, Respondent either pay the sums in trust to the Agency, or request an administrative hearing and submit an answer to the charges. Included with the Agency's second request was Respondent's timely request for a contested case hearing and answer to Determination 93-283, which denied that Respondent owed Claimant Arieta the amount of unpaid wages determined by the Agency.

14) On August 1, 1994, the Hearings Unit received the Agency's motion for consolidation of the hearing regarding Determination No. 93-283 and the hearing regarding Determinations 93-186 and 93-237 (both designated as Case No. 04-95).

15) Respondent requested a postponement of the hearing and made a motion to sever the wage claims for hearing. On August 4, 1994, the Hearings Referee granted the request for postponement. An amended Notice of

Hearing was issued to the Respondent, the Agency, and the Claimant rescheduling the hearing for Case No. 04-95 to October 27, 1994, and reassigning the case to Hearings Referee Warner W. Gregg. The Hearings Referee advised the Agency of a time for filing its response to Respondent's motion to sever.

16) On August 8, 1994, the Hearings Unit issued a Notice of Hearing regarding Determination 93-283 (Case No. 06-95) to the Respondent, the Agency, and Claimant Arieta indicating that the time and place of the hearing was the same as for Case No. 04-95. Together with the Notice of Hearing, the Forum sent a document entitled "Notice of Contested Case Rights and Procedures" containing the information required by ORS 183.413, and a copy of the Forum's contested case hearings rules, OAR 839-50-000 to 839-50-420.

17) On August 19, 1994, the successor Hearings Referee denied the Respondent's motion to sever, noting that the cases involved common questions of law or fact and that "[i]n the interest of economy, the forum will hear them together, rather than as four separate hearings, and will issue a single order rather than several." Issued with the ruling was an amended discovery order requiring that the participants submit their case summaries by October 17, 1994. The Agency submitted a timely summary. Respondent did not submit a summary. On October 21 and 26, 1994, the Agency submitted addenda to its case summary.

18) On September 14, 1994, the Forum notified Respondent and the Agency that a new Hearings Referee,

Linda Lohr, was appointed to hear the contested case.

19) On September 21, 1994, the Agency made a request for a discovery order and included exhibits showing the Agency's attempts to obtain Respondents' records through an informal exchange of information. Respondent was given the opportunity to respond to the Agency's request by September 30, 1994. Respondent informed the Hearings Referee that the requested documents would be provided no later than October 3, 1994. On October 4, 1994, after notification from the Agency that discovery matters were not yet completed, the Hearings Referee granted the Agency's motion and issued a discovery order directing Respondent to provide, among other things, "[a]ny and all documents showing hours worked by [all Claimants]." Respondent was ordered to provide those records by October 7, 1994.

20) On October 19, 1994, the Agency requested a second discovery order for additional documents. The Agency's request was granted as a result of a conference call scheduled to resolve the discovery issues then pending before the Forum. Respondent was ordered to provide the Agency with those documents no later than October 24, 1994.

21) During a pre-hearing conference, Respondent and the Agency stipulated to the administrative exhibits, marked as "X" exhibits, which were summarized for the record by the Hearings Referee at the beginning of the hearing.

22) At the start of the hearing, Respondent's attorney said he had

reviewed the "Notice of Contested Case Rights and Procedures" and had no questions about it.

23) Pursuant to ORS 183.415(7), the Hearings Referee explained the issues involved in the hearing, the matters to be proved or disproved, and the procedures governing the conduct of the hearing.

24) At hearing, the Hearings Referee granted the Agency's motion to withdraw the charges pertaining to the wage claim of David Bates. The withdrawal was based on Bates' affidavit wherein he states that he was paid for all the hours he worked for Respondent.

25) During the hearing, the Agency moved to amend Determination 93-283 to conform to the evidence on the record by reducing the amount of wages due and owing to reflect credit for the amount paid to Claimant Arieta by Respondent during the wage claim period, May 1 through May 20, 1994. Respondent did not object to the amendment and, pursuant to OAR 839-50-140(2), the Hearings Referee granted the motion. The Agency also moved to amend Determination 93-283 to conform to the proof presented by including in the claim unpaid overtime for the period between January 11 and April 30, 1994. Respondent objected on the ground that such amendment was prejudicial to Respondent, that the evidence was speculative, and moved to strike the testimony in the record. Though Respondent's objection was well taken, the Hearings Referee granted the Agency's motion and allowed the testimony during hearing. The Forum, however, gave little weight to the

testimony, did not include it in any wage calculations, and used it for credibility purposes only.

26) On February 27, 1995, the Hearings Referee granted the Agency's post-hearing petition to reopen the record for additional evidence. The ruling was based on evidence presented by the Agency that an abrupt change of ownership in Respondent's business had taken place warranting additional discovery to determine a potential successor. In response to the Agency's motion to depose Respondent president, Keno Kramp, and a request for an order compelling Respondent to produce certain documents, the Forum issued discovery orders for the production of documents and to depose witness on March 13, 1995. On April 5, 1995, the Agency withdrew its motion to reopen the record, and on April 7, 1995, the Hearings Referee closed the record.

27) On June 29, 1995, the Hearings Unit issued a Proposed Order in this matter. Included in the Proposed Order was an Exceptions Notice that allowed ten (10) days for filing exceptions. The Hearings Unit received no exceptions.

FINDINGS OF FACT – THE MERITS

1) During all times material herein, Respondent was an Oregon corporation engaged in auto repair and towing. Respondent employed one or more persons in the State of Oregon. Keno Kramp was its registered agent and president. Kramp was the authorized representative for Respondent's assumed business name, Sunnyside Automotive and Towing.

2) From January 11 to on or about May 21, 1994, Respondent employed Claimant Arieta as a tow truck driver. Claimant Arieta's duties included towing vehicles and odd jobs around the service station.

3) Claimant Arieta was hired by Aaron Woodrum, Respondent's manager. Respondent and Claimant Arieta entered into an oral agreement that Claimant would perform work for \$800 per month working Monday through Friday, 8:00 a.m. until 5:00 p.m. Work performed between 5:00 p.m. and 8:00 a.m. and anytime on Saturday and Sunday was to be paid on a 15 percent commission basis. On about April 1, 1994, the base rate was increased to \$850 per month and the commission increased to 20 percent of the towing receipts.

4) Respondent did not keep a record of Claimant Arieta's hours. Claimant Arieta did not keep a record of his hours worked prior to May 1, 1994. He recorded the hours he worked between May 1 and May 21, 1994, on a sheet of paper after he suspected he was not being paid minimum wage. He did not record beginning or ending times, only the number of hours he worked per day from his memory. On or about May 15, 1994, he was advanced \$300 on his May wages. In addition, in May, he charged \$52.44 on items for purchase from his employer.

5) Each day at 5:00 p.m., after his regular work day, Claimant Arieta brought home one of the company towing trucks and was available by pager and telephone for dispatch to do road service. In addition to his regular eight hour work day as tow truck driver, he estimated that between

January 11 and April 30, 1994, he worked 20 hours per week doing after hours service calls. All towing and road service, whether done during the day shift or after hours, was recorded on towing invoices, which usually noted the date and time of the service and included the signature of the tow truck operator. The towing invoices provided by the Agency for the period between May 1 and May 20, 1994, show that Claimant Arieta performed seven after-hours service calls, three were performed on Sunday, May 1, 1994, and one at 7:15 p.m. on May 5, over and above the 40 hour work week for the first week of the claim period. Another service call was performed at 8:00 p.m. on May 10, another at 7:50 p.m. on May 11, and another one at 5:00 a.m. on May 13, 1994, over and above the 40 hours Claimant worked during the second week of the claim period. There were no towing invoices reflecting after-hours service calls for the third and final week of the claim period. Claimant Arieta, on his corresponding record of hours for the first two weeks of the claim period, reported seven hours of work for the after hours service calls, one hour per service call. Claimant Arieta claimed 19 additional after-hours work in excess of 40 per week which were not supported by the towing invoices or any other evidence in the record. The commissions on the after hours service calls total \$93.15, based on the agreed upon rate, which includes a 20 percent commission on all towing services performed after Claimant's regular 40 hour work week. For reasons set forth in paragraph #11 below, Claimant Arieta was credited only with the seven

overtime hours supported by the towing invoices.

6) Claimant Arieta's last day of work was May 20, 1994. Based on the towing invoices, which are accepted as fact, and Respondent's and Claimant Arieta's testimony that Claimant worked regularly 40 hours per week during the claim period, Claimant Arieta worked during the period between May 1 and May 20, 1994, 127 total hours in 16 days; of the total hours, seven were hours worked in excess of 40 hours per week. Claimant Arieta's fixed monthly salary, reduced to its work week equivalent (determined by multiplying the monthly salary by 12 months and dividing by 52 weeks), equals \$196.15. His regular rate of pay (determined by dividing the weekly rate by 40) is \$4.90 per hour. Based on the number of hours Claimant Arieta worked each week during the claim period, the agreed upon rate, which included the commissions he earned each of the weeks, did not fall below the minimum wage rate of \$4.75 per hour.

7) Pursuant to ORS 653.261 and OAR 839-20-030 Payment of Overtime Wages) and Agency Policy, Claimant Arieta's total earnings for the period between May 1 and May 20, 1994, were \$732.60. The total reflects the sum of the following:

120 hours @ \$4.90/hr	\$588.00
7 hours @ at the overtime rate of \$7.35 (one and one-half times the \$4.90 agreed rate)	51.45
Commissions @ 20%	<u>93.15</u>
TOTAL EARNED	\$732.60

8) Other than the stipulated deductions of \$352.44, Respondent did not pay Claimant Arieta for work

performed during the wage claim period.

9) Civil penalty wages were computed, in accordance with Agency policy, as follows: \$732.60 (the total wages earned) divided by 16 (the number of days worked during the wage claim period) equals \$45.80 (the average daily rate of pay). This figure of \$45.80 is multiplied by 30 (the number of days for which civil penalty wages continued to accrue) for a total of \$1,374.

10) Respondent did not provide any evidence for the record of a financial inability to pay Claimant Arieta's wages at the time they accrued.

11) Testimony of Claimant Arieta was not credible. His testimony was internally inconsistent on important points and was contradicted by credible documentary evidence. For example, he testified at various times that he averaged 20 hours per week in after hours service calls prior to May 1, 1994, and explained that the decline in after hours service calls during the wage claim period was due to the hiring of relief drivers in May. He had testified previously, however, that in the beginning of his employment other drivers "picked up calls" but toward the end of his employment he was the "sole" driver. Although his personal time record for May shows he averaged about nine hours of after hours service calls per week, his record is contradicted by the towing invoices, which show an average of only about two hours per week for that period. Moreover, his first attempt at recording his hours on the calendar provided by the Agency resulted in hours noted over and above those he said he

recorded contemporaneously with the wage claim period. His explanation was that at the time he filled out the Agency calendar, he "remembered" that he did some additional "night work" that he failed to record earlier on his contemporaneous record. His second attempt at the calendar reflected only those hours recorded on the sheet of paper submitted as his personal time record. Claimant's personal time record and his testimony in its entirety appeared to be no more than an attempt to take advantage of the dearth of Respondent's records and inflate the number of hours he says he worked. Accordingly, the Forum disbelieved his testimony except that which was corroborated by other credible evidence or where he and Respondent stipulated to certain facts. In some cases his testimony was not believed even when it was not controverted by other evidence.

12) On or about May 5, 1993, Respondent employed Claimant Duncan as a service station attendant. His duties included pumping gas and light mechanic duty. Beginning in June of 1993, his duties included "bringing in U-hauls" and driving tow trucks.

13) Claimant Duncan was hired by Aaron Woodrum, Respondent's manager. Woodrum was his immediate supervisor and determined the number of hours Claimant worked. Respondent and Claimant Duncan entered into an oral agreement that Claimant would perform work for \$6.00 per hour for all hours worked, including any hours in excess of 40 each work week. The hours in excess of 40 per week were paid in cash. On or about June

16, 1993, Claimant's pay was increased to \$7.00 per hour.

14) Respondent kept a record of Claimant Duncan's hours on weekly time cards. Claimant Duncan recorded his hours on the weekly time cards and kept personal time records on a daily basis at home. The hours on the weekly time cards were filled in by Claimant Duncan. Kramp totaled and noted the number of hours worked on each time card. The totals recorded on Claimant's time cards were not reflected on the payroll record and tax statement which was prepared by Kramp and provided with each pay check. When Claimant began tow truck driving duties in early June of 1993, his wages for hours in excess of 40 per week were paid on a commission basis. He continued on an hourly rate for a 40 hour work week.

15) When Claimant Duncan filed his wage claim, he relied on his time cards and personal records in listing the dates and hours he worked for Respondent on the calendar provided by the Agency. Claimant Duncan's records and testimony, which are accepted as fact, reveal that during the period between May 5 and June 22, 1993, he worked 439.5 total hours in 43 days; of the total hours, 147.5 were hours worked in excess of forty hours per week.

16) Pursuant to ORS 653.261 and OAR 839-20-030 (Payment of Overtime Wages) and Agency policy, Claimant Duncan's total earnings for the period between May 5 and June 22, 1993, were \$3,091.50. The total reflects the sum of the following:

* The Agency's charging document and transcription sheet contain

280 hours @ \$6.00 /hr	\$1,680.00
12 hours @ \$7.00 /hr	84.00
147.5 hours at the overtime rate of \$9.00 (one and one-half times the \$6.00 agreed rate)	<u>1,327.50</u>
TOTAL EARNED	\$3,091.50

17) Respondent paid Claimant Duncan \$2,440 for work performed during the period of the wage claim.

18) Claimant Duncan quit his employment on or about June 22, 1993. He received his final paycheck on July 26, 1993.

19) Civil penalty wages were computed, in accordance with Agency policy, on the Wage Transcription and Computation Sheet as follows: \$3,091.50 (the total wages earned) divided by 43 (the number of days worked during the claim period) equals \$71.90 (the average daily rate of pay). This figure of \$71.90 is multiplied by 30 (the number of days for which civil penalty wages continued to accrue) for a total of \$2,157.

20) Claimant Duncan's testimony was credible. He had the facts readily at hand and his statements were supported by documentary evidence and other credible witness testimony. There is no reason to believe his testimony is anything but reliable.

21) From May of 1993, to on or about November 28, 1993, Respondent employed Claimant Griffith as a receptionist. Claimant Griffith's duties included cashier work, answering the

computation errors which result in totals exceeding the total earnings computed by the Hearings Referee. Though all the calculations were based on the same number of hours and rate of pay, the totals differed. In Amended Determination 93-186 the difference in totals is \$108.29. The transcription sheet contains mathematical errors in the straight time and overtime calculations. The difference is \$30.00. The Forum amended the charging document to conform to the evidence. OAR 839-50-140(2)(c).

telephone, assisting customers with "U-haul" rentals, shopping for supplies, cleaning the office and light bookkeeping, which sometimes included recording employees' hours worked on time cards. Claimant frequently worked after 5:00 p.m. running errands for Respondent, which included shopping for supplies at a nearby Albertson's at least once a week as late as between 11:00 p.m. and midnight.

22) Claimant Griffith was hired by Aaron Woodrum, Respondent's manager. Respondent and Claimant Griffith entered into an oral agreement that Claimant would perform work for \$5.00 per hour, Monday through Friday and on Sundays. Respondent advised Claimant Griffith that her straight time hours would be paid by check and any overtime hours would be paid in cash.

23) Claimant Griffith recorded the hours she worked on time cards which were kept at work and she kept a personal record of her hours at home. Her practice was to record her hours daily, either in the evening before she left work or the following morning when she arrived at work.

24) When Claimant Griffith filed her wage claim, she relied on her time cards and personal records in listing the dates and hours she worked for Respondent on the calendar provided by the Agency. Claimant Griffith's records and testimony, which are accepted as fact, reveal that during the

period between August 16 and September 26, 1993, she worked 424 total hours in 35 days; of the total hours, 169 were hours worked in excess of forty hours per week.

25) Pursuant to ORS 653.261 and OAR 839-20-030 (Payment of Overtime Wages) and Agency policy, Claimant Griffith's total earnings for the period between August 16 and September 26, 1993, were \$2,542.50. The total reflects the sum of the following:

255 hours @ \$5.00 /hr	\$1,275.00
169 hours at the overtime rate of \$7.50 (one and one-half times the \$5.00 agreed rate)	<u>1,267.50</u>
TOTAL EARNED	\$2,542.50

26) Respondent paid Claimant Griffith \$1,200 for work performed during the period of the wage claim.

27) Claimant was terminated on or about September 26, 1993.

28) Civil penalty wages were computed, in accordance with Agency policy, on the Wage Transcription and Computation Sheet as follows: \$2,542.50 (the total wages earned) divided by 35 (the number of days worked during the claim period) equals \$72.64 (the average daily rate of pay). This figure of \$72.64 is multiplied by 30 (the number of days for which civil penalty wages continued to accrue) for a total of \$2,179. This figure is set forth in Determination No. 93-237.

29) Respondent did not allege in its answer an affirmative defense of financial inability to pay the wages due at the time they accrued; nor did it provide any such evidence for the record.

30) The testimony of Claimant Griffith was found to be credible. She had the facts readily at her command and

her statements were supported by documentary records and credible witness testimony. There is no reason to determine the testimony of Claimant Griffith to be anything except reliable and credible.

31) The testimony of Respondent's president, Keno Kramp, was not reliable or credible. Her testimony was inconsistent on important points, often contradicted by Claimants' testimony, and sometimes contradicted by Respondent's general manager, Arron Woodrum, who was also Kramp's ex-husband. For example, she testified initially that she provided the Agency with all the canceled checks indicating the amounts paid to each Claimant during the various claim periods. Later in her testimony, she declared that the canceled checks in the record were not complete and that there "may" still be a few outstanding. In addition, she testified that the time cards were destroyed by her after the hours were recorded on the payroll check stubs, yet time cards were produced by two Claimants at hearing with Kramp's handwriting identified on all of them. Kramp also testified that Claimant Griffith never went to Albertson's food store for supplies on behalf of Respondent. Yet, Albertson's employee, Brian Henson, the night closing manager, testified credibly that Claimant Griffith was in at least once a week late in the evening to purchase tobacco products, paper towels, baby formulas, cases of candy bars and cleaning products, all paid for with a check from Respondent. Accordingly, the Forum has disbelieved all of her testimony except that which was corroborated by other credible evidence.

32) The testimony of Arron Woodrum was not credible. In addition to the relationship bias, his testimony was consistently controverted by other credible witness testimony. In particular, he acknowledged that Claimant Griffith was on the work premises any where from one to four hours every night, and that she occasionally answered the telephones, but asserted that she was "hanging out" to avoid going home to her father. His testimony on that point and other details of his testimony was controverted by the credible testimony of Claimant Griffith, witness Melissa Gruis, and witness Betty Griffith. Accordingly, Woodrum's testimony was disbelieved except that which was corroborated by other credible evidence.

33) The testimony of all other witnesses was found to be credible and reliable.

ULTIMATE FINDINGS OF FACT

1) During all times material herein, Respondent was an Oregon corporation engaged in auto repair and towing, and employed one or more persons in the State of Oregon.

2) As shown in Chart 1, Respondent employed the Claimants (Claimant Arieta as a tow truck driver, Claimant Duncan as a service station attendant and tow truck driver, and Claimant Griffith as a receptionist) on the dates listed, during which each Claimant had the earnings listed, and were paid the amounts listed. Respondent owes to the respective Claimants the sums indicated.

3) Respondent willfully failed to pay the respective Claimants all wages within five days, excluding Saturdays, Sundays and holidays, after each Claimant ceased working, and more than 30 days have elapsed from the date the respective Claimant's wages were due.

4) Each Claimant's average daily rate for the wage claim period of employment was the total earned divided by the days worked. Civil penalty wages, computed pursuant to ORS 652.150 and agency policy, equal the amounts shown in Chart 2 for the respective Claimants, all of whom remained unpaid for over 30 days.

CHART 1

CLAIMANT	DATE	EARNED	PAID	OWED
Michael Arieta	5/1-5/20/94	\$732.60	\$352.44	\$380.16
Michael Duncan	5/5-6/22/93	\$3,091.50	\$2,440.00	\$651.50
Barbara Griffith	8/16-9/26/93	\$2,542.50	\$1,200.00	\$1,342.50

CHART 2

CLAIMANT	EARNINGS	+ DAYS	DAILY RATE	x 30	PENALTY
Michael Arieta	\$732.60	16	\$45.79	x 30	\$1,374
Michael Duncan	\$3,091.50	43	\$71.90	x 30	\$2,157
Barbara Griffith	\$2,542.50	35	\$72.64	x 30	\$2,179

5) There was no showing that Respondent was financially unable to pay Claimants' wages at the time they accrued.

CONCLUSIONS OF LAW

1) During all times material herein, Respondent was an employer and Claimants were employees subject to the provisions of ORS 652.110 to 652.200 and 652.310 to 652.405.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and the Respondents herein. ORS 652.310 to 652.405.

3) Prior to the commencement of the contested case hearing, the Forum informed Respondent of its rights as required by ORS 183.413(2). The Hearings Referee complied with ORS 183.415(7) by explaining the information described therein to the participants at the start of the hearing.

4) ORS 653.261(1) provides:

"The commissioner may issue rules prescribing such minimum conditions of employment, excluding minimum wages, in any occupation as may be necessary for the preservation of the health of employees. Such rules may include, but are not limited to, minimum meal periods and rest periods, and maximum hours of work, but not less than eight hours per day or 40 hours per week; however, after 40 hours of work in one week overtime may be paid, but in no case at a rate higher than one and one-half times the regular rate of pay of such employees when computed without benefit of

commissions, overrides, spiffs and similar benefits."

OAR 839-20-030(1) provides in part:

"[A]ll work performed in excess of 40 hours per week must be paid for at the rate of not less than one and one-half times the regular rate of pay when computed without benefit of commissions, overrides, spiffs, bonuses, tips or similar benefits pursuant to ORS 653.261(1)."

Respondent was obligated by law to pay Claimants one and one-half times their agreed upon regular rates for all hours worked in excess of 40 hours in a week. Respondent failed to so pay Claimants.

5) ORS 652.140(1) provides:

"Whenever an employer discharges an employee, or where such employment is terminated by mutual agreement, all wages earned and unpaid at the time of such discharge shall become due and payable immediately."

Respondent violated ORS 652.140(1) by failing to pay Claimant Griffith all wages earned and unpaid immediately upon terminating her from employment in November 1993.

6) ORS 652.140(2) provides:

"When an employee who does not have a contract for a definite period quits employment, all wages earned and unpaid at the time of quitting become due and payable immediately if the employee has given to the employer not less than 48 hours' notice, excluding Saturdays, Sundays and holidays, of intention to quit employment. If notice is not given to the employer,

the wages shall be due and payable within five days, excluding Saturdays, Sundays and holidays, after the employee has quit, or at the next regularly scheduled payday after the employee has quit, whichever event first occurs."

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

7) ORS 652.150 provides:

"If an employer willfully fails to pay any wages or compensation of any employee whose employment ceases, as provided in ORS 652.140 and 652.145, then, as a penalty for such nonpayment, the wages or compensation of such employee shall continue from the due date thereof at the same rate until paid or until action therefor is commenced; provided, that in no case shall such wages or compensation continue for more than 30 days from the due date; and provided further, the employer may avoid liability for the penalty by showing financial inability to pay the wages or compensation at the time they accrued."

Respondent is liable for a civil penalty under ORS 652.150 for willfully failing to pay all wages or compensation to each Claimant when due as provided in ORS 652.140.

8) Under the facts and circumstances of this record, and according to the law applicable to this matter, the Commissioner of the Bureau of Labor and Industries has the authority to

order Respondent to pay each Claimant his/her earned, unpaid, due and payable wages and the civil penalty wages, plus interest on both sums until paid. ORS 652.332.

OPINION

A preponderance of the credible evidence on the whole record showed that Respondent employed Claimants during the various periods of the wage claims, and willfully failed to pay them all wages, earned and payable, when due. The record establishes that Respondent has violated ORS 652.140 as alleged, and that it owes Claimants civil penalty wages pursuant to ORS 652.150.

Wages Due Claimants

That Respondent employed Claimants at an agreed upon rate of pay with each is not in dispute. The primary issue in this case is the number of hours Claimants worked for Respondent. ORS 653.045 requires employers to maintain payroll records. Where the Commissioner concludes that a claimant was employed and improperly compensated, it is incumbent upon the employer to produce all appropriate records to prove the precise amounts involved. Where the employer produces no records, or the employer's records are inaccurate or inadequate, the Forum may rely on the evidence produced by the Agency to show the amount and extent of claimant's work as a matter of just and reasonable inference, and may then award damages to the employee, even though the result be only approximate. *Anderson v. Mt. Clemens Pottery Company*, 328 U.S. 680 (1946).

This Forum has previously accepted, and will accept, the testimony of a claimant as sufficient evidence to prove such work was performed and from which to draw an inference of the extent of that work, where that testimony is credible. See, *In the Matter of Sheila Wood*, 5 BOLI 240, 253-54 (1986); *In the Matter of Dan's Ukiah Service*, 8 BOLI 96, 106 (1989). Here, in the case of Claimants Griffith and Duncan, testimony and other evidence was credible. In the case of Claimant Arieta there was uncontroverted documentary evidence and Respondent's own admission that wages were owed, but not paid, to Claimant Arieta. The Forum concludes that Claimants were improperly compensated for the hours each worked and the Forum may rely on the Agency's evidence regarding the number of hours worked by Claimants. Respondent did not produce persuasive "evidence to negate the reasonableness of the inference to be drawn from [each of] the employee's evidence." *Mt. Clemens Pottery Co.*, 328 U.S. at 687-88.

In the case of Claimant Griffith, Respondent's assertion that Claimant voluntarily stayed after her regular work hours on numerous occasions only to visit with Respondent and co-workers is controverted by credible testimony that Claimant was regularly asked to stay and run errands for Respondent, sometimes until 11:00 p.m. or midnight. "Employ" means to suffer or permit to work. ORS 653.010(1). Work time is all time an employee is required to be on the employer's premises, on duty, or at a prescribed work place. See ORS 653.010(12); OAR 839-20-040(2). There is no requirement on

the employee for mental or physical exertion. Work time includes time spent waiting to perform work for the benefit and at the request of the employer. Unless an employee is specifically relieved from duty and the time period is sufficiently long for the employee to use for his or her own purposes, the employer must compensate the employee for time spent waiting to perform work. See OAR 839-20-041; *Dan's Ukiah Service*, 8 BOLI at 106. In this case, Respondent routinely requested that Claimant remain at work after 5:00 p.m. to pick up dinner for the employees and run errands, including late evening shopping trips for supplies. Respondent suffered or permitted Claimant to remain at a prescribed work place and the time Claimant spent either waiting to work or working was compensable work time.

Respondent did not assert an exemption or exclusion from the coverage of the Wage and Hour Laws, ORS chapter 653, for Respondent or Claimants. In the case of Claimants Arieta and Duncan, however, there was some evidence in the record to suggest a possible exemption under federal law pursuant to OAR 839-20-125 (3)(a) because of their status as tow truck drivers. Such exemption, however, must be raised as an affirmative defense and Respondent did not raise it in its pleadings. Under OAR 839-50-130(2) any "failure of the party to raise an affirmative defense in the answer shall be deemed a waiver of such defense."

Civil Penalties

Awarding a civil penalty turns on the issue of willfulness. The Attorney General has advised the

Commissioner that willful, under ORS 652.150, "simply means conduct done of free will." A.G. Letter Opinion No. 6056 (9/26/86). "Willful" does not necessarily imply anything blamable, or any malice or wrong toward the other party, or perverseness or moral delinquency. *State ex rel Nilsen v. Johnston et ux*, 233 Or 103, 377 P2d 331 (1962). "A financially able employer is liable for a penalty when it has willfully done or failed to do any act which foreseeably would, and in fact did, result in its failure to meet its statutory wage obligations." A.G. Letter Opinion, above. The Respondent in this case must be deemed to have acted willfully under this test, and thus is liable for civil penalty wages under ORS 652.150.

Pursuant to Agency policy, civil penalty wages due under ORS 652.150 are rounded to the nearest dollar. *In the Matter of Waylon & Willes, Inc.*, 7 BOLI 68, 72 (1988).

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders Sunnyside Enterprises of Oregon, Inc., dba Sunnyside Automotive & Towing, to deliver to the Business Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2109, the following:

1) A certified check payable to the Bureau of Labor and Industries IN TRUST FOR MICHAEL ARIETA in the amount of ONE THOUSAND SEVEN HUNDRED FIFTY FOUR DOLLARS AND SIXTEEN CENTS (\$1,754.16), representing \$380.16 in gross earned, unpaid, due, and payable wages, and \$1,374 in penalty wages; plus interest

at the rate of nine percent per year on the sum of \$380.16 from May 25, 1994, until paid, and nine percent interest per year on the sum of \$1,374 from June 25, 1994, until paid; PLUS

2) A certified check payable to the Bureau of Labor and Industries IN TRUST FOR MICHAEL RAY DUNCAN in the amount of TWO THOUSAND EIGHT HUNDRED AND EIGHT DOLLARS AND FIFTY CENTS (\$2,808.50), representing \$651.50 in gross earned, unpaid, due, and payable wages, and \$2,157 in penalty wages; plus interest at the rate of nine percent per year on the sum of \$651.50 from June 27, 1993, until paid, and nine percent interest per year on the sum of \$2,157 from July 27, 1993, until paid; PLUS

3) A certified check payable to the Bureau of Labor and Industries IN TRUST FOR BARBARA ANNE GRIFFITH in the amount of THREE THOUSAND FIVE HUNDRED TWENTY ONE DOLLARS AND FIFTY CENTS (\$3,521.50), representing \$1,342.50 in gross earned, unpaid, due, and payable wages, and \$2,179 in penalty wages; plus interest at the rate of nine percent per year on the sum of \$1,342.50 from October 1, 1993, until paid, and nine percent interest per year on the sum of \$2,179 from November 1, 1993, until paid.

In the Matter of
ALEXANDER KUZNETSOV,
dba Highlanders Forestry/Hylanders
Forestry, Respondent.

Case Number 57-95

Final Order of Administrative Law Judge

Douglas A. McKean

Issued August 31, 1995.

SYNOPSIS

Where Respondent, a licensed farm labor contractor, bid on and performed a forestation contract with four unlicensed partners and bid on and performed another contract with three unlicensed partners, the forum found on summary judgment that Respondent violated ORS 658.440(3)(e) seven times by assisting unlicensed persons to act in violation of the farm labor contractor law. The forum found no violations of ORS 658.417(3) (requirement to file certified payroll reports) because no evidence showed that the Respondent paid employees directly for forestation work performed. Under the expedited contested case hearing rules in OAR chapter 839, division 33, the Administrative Law Judge assessed Respondent a civil penalty of \$3,500 pursuant to ORS 658.453(1), and revoked his farm labor contractor license pursuant to ORS 658.445, ORS 658.405; 658.410; 658.417(3); 658.440(3)(e); 658.445(1); 658.453(1), OAR 839-15-135(1)(b), (2); 839-15-300; 839-15-508; 839-15-512; 839-15-520(1)(e); 839-33-050(4).

The above-entitled contested case came before Douglas A. McKean,

designated as Administrative Law Judge by Jack Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon.

The Bureau of Labor and Industries (the Agency) was represented by Judith Bracanovich, an employee of the Agency. Alexander Kuznetsov (Respondent) represented himself.

Having fully considered the entire record in this matter, I, Douglas A. McKean, Administrative Law Judge of the Bureau of Labor and Industries, make the following Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) On January 13, 1995, the Agency issued a "Notice of Proposed Revocation of Farm Labor Contractor License and of Intent to Assess Civil Penalties" (Notice of Intent) to Respondent. The notice informed Respondent that the Agency: first, intended to revoke his farm labor contractor license, pursuant to ORS 658.445(1) or (3); and second, intended to assess civil penalties against him in the amount of \$15,750, pursuant to ORS 658.453. The notice cited the following bases for the Agency's intended actions: (1) assisting unlicensed persons to act as farm labor contractors, in violation of ORS 658.440(3)(e) (seven violations); and (2) failing to provide the Commissioner certified true copies of all payroll records for work performed in forestation on US Forest Service (USFS) contract number 52-04GG-3-3101 (hereinafter #3101), on USFS contract number 52-04U3-4-00008 (hereinafter #00008), on Bureau of Land

Management (BLM) contract number 1422H080-P4-1012 (hereinafter #1012), on USFS contract number 52-04T1-38 (hereinafter #38), and on USFS contract number 52-0467-4-5402 (hereinafter #5402), in violation of ORS 658.417(3) and OAR 839-15-300 (2) (12 violations). The notice was served on Respondent on January 31, 1995.

2) By a letter dated March 30, 1995, Respondent requested a hearing on the Agency's intended action, and answered the Notice of Intent. In his answer, Respondent denied "all charges and allegations on my activities as a contractor."

3) On June 15, 1995, the forum issued to Respondent and the Agency a "Notice of Hearing," which set forth the time and place of the requested hearing and the designated Administrative Law Judge. With the hearing notice, the forum sent to Respondent a "Notice of Contested Case Rights and Procedures" containing the information required by ORS 183.413, and a complete copy of the Oregon Administrative Rules (OAR) regarding the contested case process -- OAR 839-50-000 through 839-50-420.

4) On August 22, 1995, the Agency filed a motion for summary judgment and withdrew its allegation regarding Respondent's failure to provide certified payroll records (CPRs) on contract #5402, which was contained in paragraph seven of the Notice of Intent. The Administrative Law Judge (ALJ) wrote to Respondent on August 22, and gave him until August 29, 1995, to respond to the motion. The ALJ requested that Respondent "address the substance of your

defenses to the [alleged] violations, as well as circumstances which you believe should impact any penalties or sanction imposed," and gave Respondent until August 29 to request an extension of time to respond. Respondent filed no response, and on August 31, 1995, the Hearings Referee granted the motion in the form of this Final Order.

5) On August 28, 1995, the Agency wrote to the forum stating that it wished "to convert this matter to expedited procedures under [OAR chapter 839,] division 33. Accordingly, please issue a Final Order directly." A discussion of the conversion of this case from the process provided for in OAR chapter 839, division 50 (Contested Case Hearing Rules) to the process provided for in OAR chapter 839, division 33 (Expedited Contested Case Hearing Rules For Certain Licensing Matters) appears below in the Opinion section of this order, and is incorporated herein by this reference. In short, because the Agency could have unilaterally chosen the expedited procedure to begin with, because this case meets the criteria for an expedited contested case hearing, because Respondent has received no fewer procedural opportunities to raise claims and defenses than he would have had if the expedited hearing rules had been used throughout the proceeding, and because the ALJ has found no circumstances that make conversion to the expedited procedure inappropriate, the ALJ has applied the expedited contested case hearing rules provided in OAR 839-33-000 to 839-33-095 to this case. This Final Order has been issued according to those procedures.

6) In its August 28, 1995, letter, the Agency also requested that, in the event the forum denied summary judgment on any paragraph of the Notice of Intent for which summary judgment was sought, the ALJ dismiss that paragraph. For the reasons given in the Opinion below, the forum has denied summary judgment on paragraphs 3, 4, 5, and 6, and accordingly grants the Agency's request and dismisses those paragraphs.

FINDINGS OF FACT -- THE MERITS

1) From March 3 to August 31, 1993, Respondent, a natural person, was a licensed farm labor contractor with a special indorsement authorizing him to act as a farm labor contractor with regard to the forestation or reforestation of lands (forest indorsement). He was licensed as a sole proprietor doing business as Rhino Reforestation.

2) Before March 30, 1993, Respondent bid on USFS contract #3103. On April 26, 1993, the USFS awarded the contract to Respondent to perform tree thinning and whip cutting in the Deschutes National Forest in Oregon. Respondent bid for the contract as a partnership. The partners were Respondent, Yakov Kuznetsov, David Kuznetsov, Alexei Kuznetsov (Respondent's brother, also known as Alex), and Ivan Kuznetsov. Between May 13 and September 11, 1993, the partnership supplied workers to perform labor in the forestation or reforestation of lands on contract #3103. Respondent did not provide to the Commissioner of Labor a certified true copy of any payroll records for work he did as a farm labor contractor. No evidence shows that the workers who

performed the contract were Respondent's employees, or that he paid any employees directly.

3) Between March 3 and September 13, 1993, Yakov Kuznetsov, David Kuznetsov, Alexei Kuznetsov, and Ivan Kuznetsov were not licensed farm labor contractors.

4) From November 24, 1993, to August 31, 1994, Respondent was a licensed farm labor contractor with a forest indorsement. He was licensed as a sole proprietor doing business as Highlanders Forestry or Hylanders Forestry.

5) Around May 20, 1994, Respondent bid on BLM contract #1012. On May 31, 1994, the BLM awarded the contract to Respondent to perform precommercial thinning in the Santiam Resource Area in Oregon. Respondent bid for the contract as a partnership. The partners were Respondent, Yakov Kuznetsov, David Kuznetsov, and Ivan Kuznetsov. Between June 21 and July 20, 1994, the partnership supplied workers to perform labor in the forestation or reforestation of lands on contract #1012. Respondent did not provide to the Commissioner of Labor a certified true copy of any payroll records for work he did as a farm labor contractor. No evidence shows that the workers who performed the contract were Respondent's employees, or that he paid any employees directly.

6) Between May 20 and July 20, 1994, Yakov Kuznetsov, David Kuznetsov, and Ivan Kuznetsov were not licensed farm labor contractors.

7) On around May 9, 1994, the USFS awarded contract #00008 to Respondent for timber stand

improvement in the Winema National Forest in Oregon. In his bid application, Respondent indicated that he intended to employ between 10 and 50 employees, and that these employees were regularly on his payroll. A pre-work conference was held on May 10, 1994, with Respondent, David Kuznetsov, and several Forest Service representatives. A Notice to Proceed was issued to Respondent, effective May 10, 1994. No evidence shows that the contract was performed, or whether Respondent paid employees directly. Respondent filed no certified payroll reports with the Commissioner for work done on this contract as a farm labor contractor.

8) On around June 17, 1994, the USFS awarded contract #38 to Respondent for precommercial thinning in the Umpqua National Forest in Oregon. A pre-work conference was held on July 5, 1994, with David Kuznetsov and two Forest Service representatives. A Notice to Proceed was issued to Respondent, effective July 8, 1994. Respondent supplied workers to perform labor in the forestation or reforestation of lands on contract #38 until the end of November 1994. No evidence shows that Respondent paid employees directly. Respondent filed no certified payroll reports with the Commissioner for work done on this contract as a farm labor contractor.

9) From September 23, 1994, to August 31, 1995, Respondent was a licensed farm labor contractor with a forest indorsement, doing business as Highlanders Forestry or Hylanders Forestry.

ULTIMATE FINDINGS OF FACT

1) From March 3 to August 31, 1993, and from November 24, 1993, to August 31, 1994, and from September 23, 1994, to August 31, 1995, Respondent was licensed as a farm labor contractor with a forest indorsement.

2) Between March 3 and September 13, 1993, Respondent's partners Yakov Kuznetsov, David Kuznetsov, Alexei Kuznetsov, and Ivan Kuznetsov were not licensed farm labor contractors. Respondent assisted these four unlicensed persons to act as farm labor contractors, as defined in ORS 658.405.

3) Between May 20 and July 20, 1994, Respondent's partners Yakov Kuznetsov, David Kuznetsov, and Ivan Kuznetsov were not licensed farm labor contractors. Respondent assisted these three unlicensed persons to act as farm labor contractors, as defined in ORS 658.405.

4) Between May 13 and September 11, 1993, Respondent provided crews to perform reforestation labor on USFS contract #3103. He did not provide to the Commissioner at least once every 35 days certified true copies of all payroll records for work done as a farm labor contractor, however no evidence showed that Respondent paid employees directly.

5) On around May 9, 1994, the USFS awarded contract #00008 to Respondent to perform reforestation labor. He did not provide to the Commissioner at least once every 35 days certified true copies of all payroll records for work done as a farm labor contractor, however no evidence showed that the contract was

performed, or whether Respondent paid employees directly.

6) Between June 21 and July 20, 1994, Respondent provided crews to perform reforestation labor on BLM contract #1012. He did not provide to the Commissioner at least once every 35 days certified true copies of all payroll records for work done as a farm labor contractor, however no evidence showed that Respondent paid employees directly.

7) Between around July 8 and the end of November 1994, Respondent provided crews to perform reforestation labor on USFS contract #38. He did not provide to the Commissioner at least once every 35 days certified true copies of all payroll records for work done as a farm labor contractor, however no evidence showed that Respondent paid employees directly.

CONCLUSIONS OF LAW

1) The Commissioner of the Bureau of Labor and Industries of the State of Oregon has jurisdiction over the subject matter and of the person herein. ORS 648.407.

2) ORS 658.410 provides in part:

"(1) *** No person shall act as a farm labor contractor with regard to forestation or reforestation of lands unless the person possesses a valid farm labor contractor's license with the indorsement required by ORS 658.417(1). ***

"(2) Farm labor contractor licenses may be issued by the commissioner only as follows:

"(b) To two or more natural persons operating as a partnership ***"

OAR 839-15-135 provides in part:

"(1) A license may be issued only as follows:

"(b) To an individual proposing to operate as a partner in a partnership ***;

"(2) No license may be issued to an individual proposing to do business as a partner in a partnership unless all of the proposed partners are licensed."

As partners in Respondent's farm labor contractor business, Yakov Kuznetsov, David Kuznetsov, Alexei Kuznetsov, and Ivan Kuznetsov were required to be licensed.

3) ORS 658.440 provides in part:

"(3) No person acting as a farm labor contractor, or applying for a license to act as a farm labor contractor, shall:

"(e) Assist an unlicensed person to act in violation of ORS 658.405 to 658.503 and 658.830."

Respondent violated ORS 658.440 (3)(e) four times by assisting unlicensed persons Yakov Kuznetsov, David Kuznetsov, Alexei Kuznetsov, and Ivan Kuznetsov to act in violation of ORS 658.410 and 658.417(1) on USFS contract #3103. Respondent violated ORS 658.440(3)(e) three more times by assisting unlicensed persons Yakov Kuznetsov, David Kuznetsov, and Ivan Kuznetsov to act in violation of ORS 658.410 and 658.417(1) on BLM contract #1012.

4) ORS 658.417 provides in part:

"In addition to the regulation otherwise imposed upon farm labor contractors pursuant to ORS 658.405 to 658.503 and 658.830, a person who acts as a farm labor contractor with regard to the forestation or reforestation of lands shall:

"(3) Provide to the Commissioner of the Bureau of Labor and Industries a certified true copy of all payroll records for work done as a farm labor contractor when the contractor pays employees directly. The records shall be submitted in such form and at such times and shall contain such information as the commissioner, by rule, may prescribe."

OAR 839-15-300 provides in part:

"(1) Forest Labor Contractors engaged in the forestation or reforestation of lands must, unless otherwise exempt, submit a certified true copy of all payroll records to the Wage and Hour Division when the contractor or contractor's agent pays employees directly.

"(2) The certified true copy of payroll records shall be submitted at least once every 35 days starting from the time work first began on the forestation or reforestation of lands. More frequent submissions may be made.

"(3) The certified true copy of payroll records may be submitted on Form WH-141. This form is available to any interested person. Any person may copy this form or use a similar form provided such

form contains all the elements of Form WH-141."

Because no evidence shows that Respondent paid employees directly, the forum finds no violation of ORS 658.417(3) and OAR 839-15-300.

5) ORS 658.453(1) provides in part:

"In addition to any other penalty provided by law, the Commissioner of the Bureau of Labor and Industries may assess a civil penalty not to exceed \$2,000 for each violation by:

"(c) A farm labor contractor who fails to comply with ORS 658.440 *** (3)."

OAR 839-15-508 provides in part:

"(1) Pursuant to ORS 658.453, the Commissioner may impose a civil penalty for violations of any of the following statutes:

"(o) Assisting an unlicensed person to act as a contractor in violation of ORS 658.440(2)(e) [sic, now 658.440(3)(e)];"

OAR 839-15-512 provides in part:

"(1) The civil penalty for any one violation shall not exceed \$2,000. The actual amount of the civil penalty will depend on all the facts and on any mitigating and aggravating circumstances.

"(2) Repeated violations of the statutes for which a civil penalty may be imposed are considered to be of such magnitude and seriousness that a minimum of \$500 for each repeated violation will be imposed when the Commissioner

determines to impose a civil penalty."

Under the facts and circumstances of this record, and in accordance with ORS 658.453 and Oregon administrative rules, the Commissioner of the Bureau of Labor and Industries has the authority to impose a civil penalty for each violation found herein. The assessment of the civil penalty specified in the Order below is an appropriate exercise of that authority.

6) Pursuant to ORS 658.445(1), the Commissioner of the Bureau of Labor and Industries has the authority to and may revoke Respondent's license to act as a farm labor contractor if: "The licensee or agent has violated or failed to comply with any provision of ORS 658.405 to 658.503 and 658.830 and ORS 658.991(2) and (3)."

OAR 839-15-520 provides in part:

"(1) The following violations are considered to be of such magnitude and seriousness that the Commissioner may propose to *** revoke a license application:

"(e) Assisting an unlicensed person to act as a Farm or Forest Labor Contractor, ***"

Respondent has violated ORS 658.440(3)(e) seven times. Under the facts and circumstances of this record, and pursuant to the applicable law and rules, it is appropriate to revoke Respondent's license.

OPINION

1. Expedited Contested Case Hearing Procedure

This case was originally set for hearing according to the procedures

set out in OAR 839-50-000 to 839-50-420, which are the Bureau's regular contest case hearing rules. The Agency could have initially requested that the case be heard according to the procedures set out in OAR 839-33-000 to 839-33-095, which are the Bureau's expedited contested case hearing rules for certain licensing matters. According to OAR 839-33-005,

"(1) The purpose of OAR 839-33-000 to 839-33-095 is to give all persons involved in an expedited contested case hearing before the Bureau of Labor and Industries clear guidelines to follow and an understanding of what is expected of participants.

"(2) The major focus of these rules is to define the participants, provide a procedure to allow all participants to raise claims and defenses, assure that the facts and issues are properly presented and addressed, and provide for thorough and expeditious hearings.

"(3) In an effort to provide expedited hearings, OAR 839-33-000 to 839-33-095 establish time limitations which will be strictly followed. Waiver or extension of the set time limitations will be granted only under the limited circumstances as set forth in these rules."

In this case, the Agency has alleged that Respondent, who has been licensed for several years, committed multiple violations of the same sections of the statutes. It is a case in which the Agency seeks to revoke the contractor's license, and where that license will expire naturally in a very short time. The case involves a contractor who

has allegedly used his unlicensed relatives as partners or employees. Naturally, the Agency would prefer to see Respondent's license revoked, rather than simply expired, in order to avoid a possible future license denial action based on these allegations, and because a revocation would restrict Respondent's ability to become financially interested in a relative's farm labor contractor business. See ORS 658.415(1)(d) and OAR 839-15-140(4).

Both the division 50 procedure and the division 33 procedure provide for summary judgment. See OAR 839-50-150(4) and 839-33-050(4). Under either procedure, Respondent has received the same opportunity to oppose the summary judgment motion. The difference under the two procedures is that under division 50 the ALJ issues a proposed order, and a participant would have an opportunity to file exceptions to it, while under division 33 the ALJ issues a final order, and there is no opportunity for filing exceptions. Under either procedure, Respondent had the opportunity to present evidence on the merits of the allegations and evidence of mitigating circumstances, for consideration in determining the amount of civil penalties. Considering the two procedures and the stage this contested case is in, I find nothing inappropriate about using the expedited procedure, and therefore have applied the division 33 rules in deciding the motion for summary judgment and issuing the final order.

2. Summary Judgment

The Agency filed a motion for summary judgment on its Notice of Intent. OAR 839-50-150(4) and 839-33-050

(4). It asserted that no genuine issue of fact existed and the Agency was entitled to judgment as a matter of law as to the alleged violations. Respondent did not respond to the motion or present evidence for the record, and offered only a general denial in his answer to the allegations in the Notice of Intent. As discussed below, I have granted the motion with regard to the allegations that Respondent assisted unlicensed persons to act in violation of ORS 658.405 to 658.503, and denied the motion concerning the allegations that he failed to file certified payroll records. Subsection (c) of OAR 839-33-050(4) provides that, where the ALJ grants the motion, the decision shall be set forth in the final order. This order has been issued according to that procedure.

3. Respondent Assisted Unlicensed Persons to Act in Violation of the Law.

The uncontested facts are that in 1993 Respondent bid for and was awarded a USFS reforestation contract as a partner with Yakov Kuznetsov, David Kuznetsov, Alexei Kuznetsov, and Ivan Kuznetsov. Similarly, the evidence was undisputed that in 1994 Respondent bid for and was awarded a BLM reforestation contract as a partner with Yakov Kuznetsov, David Kuznetsov, and Ivan Kuznetsov.

One who bids or submits prices on contract offers for forestation or reforestation activities is a farm labor contractor. ORS 658.405(1). Farm labor contractors must be licensed, ORS 658.410, and a person who acts as a farm labor contractor with regard to the forestation or reforestation of lands shall obtain a special indorsement for

this from the Commissioner. ORS 658.417(1).

Each partner in a farm labor contractor business must be licensed. ORS 658.410(2)(b); OAR 839-15-135(1)(b), (2). Since none of the partners (except Respondent) on either contract bid was licensed, each partner acted in violation of ORS 658.405 to 658.503. By assisting his unlicensed partners to act in violation of the law, Respondent violated ORS 658.440(3)(e). The Agency is entitled to judgment as a matter of law that Respondent violated ORS 658.440(3)(e) seven times, once for each unlicensed partner on the two contracts.

4. Certified Payroll Records

The Agency alleged that Respondent failed to file certified payroll records (CPRs) with the Commissioner for work he performed as a farm labor contractor on several Forest Service and BLM forestation contracts. The Agency presented evidence in the form of government daily dairies and other contact reports to show that Respondent provided crews to perform those contracts (with one exception, where no evidence showed that the contract was performed).

The law requires a farm labor contractor to provide to the Commissioner a certified true copy of all payroll records for work done as a farm labor contractor "when the contractor pays employees directly." ORS 658.417(3). OAR 839-15-300 requires the same thing.

When considering a motion for summary judgment, the forum, as a general rule, will draw all inferences of fact from the record against the

participant filing the motion and in favor of the participant opposing the motion. *In the Matter of Efrain Corona*, 11 BOLI 44, 54 (1992), *aff'd without opinion*, *Corona v. Bureau of Labor and Industries*, 124 Or App 211, 861 P2d 1046 (1993). I have carefully reviewed the evidence in this case, and there is no evidence that the crew members, whether called the "crew" or "sawyers" or "workers" or "thinners", were Respondent's employees whom he paid directly. There is not a single reference to an "employee." I take official notice that it is becoming more common for farm labor contractors to use leased workers to perform their contracts. In such cases, the leasing employment agency is responsible to pay the workers' wages, taxes, workers' compensation insurance, etc. While an inference could be drawn that the workers referred to in the evidence were Respondent's employees, and a further inference could be drawn that he paid them directly, I decline to draw these inferences in favor of the Agency in order to grant its motion for summary judgment. Instead, the general rule guides me to draw the inferences against the Agency. Since I cannot find that Respondent paid employees directly, I cannot find that he had a duty to file CPRs or that he violated ORS 658.417(3).

5. Civil Penalties

The Agency proposed to assess \$15,750 in civil penalties for (1) Respondent's assisting unlicensed persons to act in violation of ORS chapter 658, constituting seven violations of ORS 658.440(3)(e); and (2) Respondent's repeated failure to file certified payroll records, in violation of ORS

658.417(3). Since I found no violation of ORS 658.417(3), this section of the Opinion addresses only the seven violations of ORS 658.440(3)(e).

The Commissioner may assess a civil penalty not to exceed \$2,000 for each of these violations. ORS 658.453(1)(e); OAR 839-15-508(1)(o). The Commissioner may consider mitigating and aggravating circumstances when determining the amount of any penalty to be imposed. OAR 839-15-510(1). It shall be the responsibility of the Respondent to provide the Commissioner with any mitigating evidence. OAR 839-15-510(2). No mitigating evidence was presented. A minimum penalty of \$500 will be imposed for repeated violations. OAR 839-15-512(2).

The Agency claimed as aggravating circumstances that Respondent knew or should have known of the violations, that the violations were repeated, and that he failed to take all necessary measures to prevent or correct the violations.

The forum finds several aggravating circumstances. First, the forum finds that, if he did not know, Respondent should have known that his farm labor contractor business partners were required to be licensed. He had been licensed for years, and the forum takes official notice that license applicants get copies of ORS chapter 658 and OAR chapter 839, division 15, when they apply and before they take a license examination. Respondent applied for a license renewal as a sole proprietor on August 5, 1993, while the first contract was being performed. Second, this type of violation is serious because licensing is at the heart of the Commissioner's ability to implement

the law's requirements, which are in place to protect the state's workers. Third, the violations are repeated, not only in the sense that on each of the two contracts several unlicensed partners were involved, but also in the sense that there were two contracts about a year apart, and Respondent was relicensed as a sole proprietor in between them. Fourth, the last point shows that Respondent had an opportunity to become relicensed as a partner, and to get his partners licensed, before bidding on the second contract, and thus the opportunity to prevent the last three violations. This Forum hereby assesses a \$500 civil penalty for the first and each repeated violation, for a total civil penalty of \$3,500.

6. License Revocation

The forum may revoke a license to act as a farm labor contractor if the licensee has violated or failed to comply with any provision of ORS 658.405 to 658.503. The violation of ORS 658.440(3)(e), assisting an unlicensed person to act as a farm labor contractor, is considered to be of such magnitude and seriousness that the Commissioner may revoke a license. OAR 839-15-520(1)(e). Based upon the whole record of this matter, revocation of Respondent's farm labor contractor license is appropriate.

Pursuant to ORS 658.415(1)(c), OAR 839-15-140(3), and 839-15-520(4), where a farm labor contractor license has been revoked, the Commissioner will not issue the contractor a license for a period of three years from the date of the revocation.

ORDER

NOW, THEREFORE, as authorized by ORS 658.405 to 658.503 and OAR 839-33-095, I hereby revoke the license of ALEXANDER KUZNETSOV to act as a farm labor contractor, effective on the date of this Final Order. ALEXANDER KUZNETSOV is prevented from reapplying for a license for a period of three years from the date of this revocation, in accordance with ORS 658.415(1)(c) and OAR 839-15-520(4).

AND FURTHER, as authorized by ORS 658.453, ALEXANDER KUZNETSOV is hereby ordered to deliver to the Bureau of Labor and Industries, Fiscal Services Office Suite 1010, 800 NE Oregon Street # 32, Portland, Oregon 97232-2162, a certified check payable to the BUREAU OF LABOR AND INDUSTRIES in the amount of THREE THOUSAND FIVE HUNDRED DOLLARS (\$3,500), plus any interest thereon that accrues at the annual rate of nine percent between a date ten days after the issuance of this Order and the date Mr. Kuznetsov complies with this Order. This assessment is the sum of civil penalties against Mr. Kuznetsov for seven violations of ORS 658.440(3)(e), at \$500 per violation.

In the Matter of JOSE DAVID CARMONA and Farwest Reforestation, Inc., Respondents.

Case Number 30-95
Final Order of the Commissioner
Jack Roberts
Issued October 19, 1995.

SYNOPSIS

Where the United States Forest Service defaulted a corporate farm labor contractor on its reforestation contract because of unsatisfactory performance, and where the Respondents (the corporation and its majority shareholder) claimed that their performance was satisfactory, but that they were being discriminated against by the USFS's representative, the Commissioner held that Respondents failed to prove their defenses and failed to comply with the terms and provisions of the USFS contract, which they had entered into in their capacity as farm labor contractors, in violation of ORS 658.440(1)(d). The Commissioner assessed a \$1,000 civil penalty against Respondents pursuant to ORS 658.453. ORS 658.440(1)(d), 658.453(1); OAR 839-15-508, 839-15-512.

The above-entitled contested case came on regularly for hearing before Douglas A. McKean, designated as Hearings Referee by Jack Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held on August 15, 1995, in Conference Room "A" of the

Labor and Industries Building, 350 Winter Street NE, Salem, Oregon.

The Bureau of Labor and Industries (the Agency) was represented by Judith Bracanovich, an employee of the Agency. Jose David Carmona (Respondent) and Farwest Reforestation, Inc. (Respondent Farwest) were represented by Robert J. Thorbeck, Attorney at Law. Mr. Carmona was present throughout the hearing on his own behalf and as Respondent Farwest's representative. The Agency called Robert Cunningham, a Contracting Officer for the United States Forest Service, as its witness. Respondents called Mr. Carmona as their witness.

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

FINDINGS OF FACT – PROCEDURAL

1) On September 19, 1994, the Agency issued a "Notice of Proposed Revocation of Farm/Forest Labor Contractor License and to Assess Civil Penalties" (Notice of Intent) to Respondents. The notice informed Respondents that the Agency intended to revoke Respondents' farm labor contractor license pursuant to ORS 658.445 and intended to assess a civil penalty against them in the amount of \$2,000 pursuant to ORS 658.453. The notice cited the following bases for the Agency's intended actions: (1) failure to submit and/or maintain proof of financial ability to pay wages in an amount based upon the maximum

number of employees, in violation of ORS 658.415(3); and (2) failure to comply with the terms and provisions of all legal and valid agreements entered into in the Respondents' capacity as farm labor contractors, in violation of ORS 658.440(1)(d). The notice was served on Respondents on September 28, 1994.

2) On November 28, 1994, Respondents filed an answer and a request for a hearing. Respondents generally denied the allegations in the Notice of Intent, and claimed that (1) any violations were not attributable to them, and (2) any violations were "attributable to violation by third parties of [Respondent's] civil rights and said parties' illegal racial discrimination."

3) On January 5, 1995, the Hearings Unit issued to Respondents and the Agency a Notice of Hearing. With the hearing notice, the forum sent to Respondents a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413, and a complete copy of the Agency's administrative rules regarding the contested case process – OAR 839-50-000 through 839-50-420.

4) On February 13, 1995, the Agency filed a motion to amend the Notice of Intent to correct a contract number. Respondents did not respond to the motion, and the Hearings Referee granted it.

5) On February 22, 1995, Respondents' counsel withdrew. On March 10, 1995, Respondents retained a new attorney, Robert Thorbeck.

6) On March 3, 1995, the Agency filed a motion for partial summary judgment. Respondents filed a response,

and on March 20, 1995, the Hearings Referee denied the motion. On March 22, 1995, the Agency requested an opportunity to reply to Respondents' response to the motion, and to file a statement of Agency policy. Respondents did not object, and the Hearings Referee granted that request. The Agency filed its reply and, as part of that reply, withdrew its allegation charging that Respondents failed to maintain proof of financial ability to pay wages (paragraph one of the Agency's Notice of Intent). The Agency's motion regarding its charge that Respondents failed to comply with the terms and provisions of their United States Forest Service (USFS) contract (paragraph two of its Notice), was based on two theories: (1) that no genuine issue of material fact existed, and the Agency was entitled to judgment as a matter of law; and (2) that on May 18, 1995, absent Respondents filing an appeal with the federal Board of Contract Appeals or the US Court of Claims, the doctrine of claim preclusion would preclude Respondents from raising the claim in this forum that they did not default on the USFS contract. Respondents responded to the Agency's reply. Later, the Agency requested that, if the motion were denied on its first theory, the matter be held in abeyance because the issue of whether Respondents breached their USFS contract was apparently going to be appealed, and this would make it premature to apply the doctrine of claim preclusion. After reconsidering the motion for summary judgment, on April 21, 1995, the Hearings Referee again denied it, finding that Respondents had raised genuine issues of material fact. The referee granted the Agency's request to hold

the matter in abeyance pending the outcome of the other litigation.

7) On March 6, 1995, the forum issued a discovery order to the participants, directing them each to file a summary of the case. Following a postponement of the hearing referred to below, the discovery order was renewed on July 18. The participants each filed timely summaries.

8) On March 15, 1995, the Agency notified the forum that Respondents' farm labor contractor license had expired on November 30, 1994. The Agency withdrew its request for revocation of the license.

9) On March 20, 1995, Respondents requested a postponement. The Agency did not object, and the Hearings Referee granted the motion.

10) On June 5, 1995, Respondents notified the forum that they had not perfected their appeals before the federal Board of Contract Appeals or the US Court of Claims. On June 13, 1995, the Agency withdrew that portion of its motion for summary judgment based on the doctrine of claim preclusion because, unlike issue preclusion (collateral estoppel),

"only the original parties and those in privity with them may invoke the doctrine of claim preclusion in a subsequent proceeding against an original party (or those in privity). Because there is not sufficient privity between the Agency and the USFS in connection with this matter, the Agency is unable to rely upon the doctrine of claim preclusion[.]"

The Agency requested that the case be returned to the docket for a hearing

date. On July 18, 1995, the forum re-assigned this matter from Hearings Referee Alan McCullough to Hearings Referee Douglas McKean, and set the case for hearing on August 15, 1995.

11) On July 19, 1995, the Agency renewed its motion for summary judgment on paragraph two of its notice on the basis that no genuine issue of material fact existed, and the Agency was entitled to judgment as a matter of law. The Agency supplemented its earlier motion with a copy of the contract between Respondents and the USFS. Respondents did not respond to the renewed motion. On August 3, the Hearings Referee declined to reconsider and denied the motion.

12) A pre-hearing conference was held before the hearing began on August 15, 1995, at which time the Agency and Respondents stipulated to certain facts and the receipt of certain exhibits. Those facts were read into the record by the Referee at the beginning of the hearing.

13) At the start of the hearing Respondents' attorney said that he had received and read the Notice of Contested Case Rights and Procedures and had no questions about it.

14) Pursuant to ORS 183.415(7), the Agency and Respondents were verbally advised by the Hearings Referee of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

15) The Hearings Referee left the record of the hearing open to receive certain contract inspection sheets. Those sheets and an exhibit comparing the information within them was

submitted. Respondents had no objection to them. The Hearings Referee received them and closed the record on August 20, 1995.

16) On September 15, 1995, the Hearings Unit issued a Proposed Order in this matter. Included in the Proposed Order was an Exceptions Notice that allowed ten (10) days for filing exceptions. The Hearings Unit received no exceptions.

FINDINGS OF FACT – THE MERITS

1) From January 10 to November 30, 1994, Respondent and Respondent Farwest were jointly licensed as farm labor contractors with a special indorsement issued by the Commissioner of the Bureau of Labor and Industries authorizing them to act as farm labor contractors with regard to the forestation or reforestation of lands (forest indorsement). Respondent was a majority shareholder and the president of Respondent Farwest, an Oregon corporation.

2) On March 1, 1994, Respondent Farwest made an offer on USFS contract 52-04M3-4-0004 (hereinafter contract #0004) for pine tree planting in the Wallowa-Whitman National Forest in Oregon. On March 8, 1994, the USFS awarded the \$227,584 contract to Respondent Farwest. It was a legal and valid contract entered into by Respondents in their capacity as farm labor contractors. The USFS Contracting Officer (CO) was Robert Cunningham. The Contracting Officer's Representative (COR) was Dan Brassard; he was the day-to-day administrator of the contract. In addition, three USFS inspectors (Joe Sciarrino, Jim Chandler, and Lori Smit) made inspections of Respondents' work on the contract.

3) Contract #0004 was 109 pages long, with seven attachments adding another 60 pages. Respondents received a copy of the contract. Included in its 12 main sections were the following terms and provisions:

C.8 SPACING AND SPOT SELECTION

A. Seedlings Spacing Requirements

1. Seedlings shall be planted to the boundary of all planting areas and around the perimeter of unplantable areas in spots distributed at intervals prescribed. For individual seedlings, the specified average spacing may be varied no more than 25 percent in any direction to find a suitable planting spot.

2. Where an unplantable spot is encountered, the planter shall plant in the closest plantable spot; however, average spacing shall be maintained.

C.9 PLANTING SPOT PREPARATION

B. A full benched or terraced scalp shall be constructed on slopes that exceed 30 percent unless otherwise specified on the Planting Data Sheets. The minimum bench width shall be the same dimension as the scalp size listed in the Planting Data Sheets; but shall not be greater than 24 inches. See Exhibit C.

C.10 PREPARING THE PLANTING HOLE

A. ***

1. ***

b. Should the initial attempt to drill a planting hole fail because of subsurface rocks, roots, or other obstacles, a second effort shall be made in a slightly different part of the same planting spot. If this effort also fails for similar reasons, a third attempt shall be made in another part of the planting spot. If the third effort also fails, the spot shall be abandoned as unplantable.

C.11 SEEDLING PLACEMENT

A. Bare Root Seedlings – The bareroot seedling shall be suspended near the center of the hole with roots in a near natural arrangement at a depth that, after filling, firming, and leveling, the soil comes to a point at or above the cotyledon scar of the tree. No portion of the roots shall be exposed. Roots shall not be doubled up, twisted, spiraled, or bunched. The root system shall be aligned with the axis of the planting hole with all roots extending downward. See Exhibit G.

E.2 INSPECTION OF SERVICES – FIXED-PRICE

(b) The Contractor shall provide and maintain an inspection system acceptable to the Government covering the services

under this contract. Complete records of all inspection work performed by the Contractor shall be maintained and made available to the Government during the contract performance and for as long afterwards as the contract requires.

(c) The Government has the right to inspect and test all services called for by the contract, to the extent practicable at all times and places during the term of the contract. The Government shall perform inspections and tests in a manner that will not unduly delay the work.

(e) If any of the services do not conform with contract requirements, the Government may require the Contractor to perform the services again in conformity with contract requirements, at no increase in contract amount. When the defects in services cannot be corrected by reperformance, the Government may (1) require the Contractor to take necessary action to ensure that future performance conforms to contract requirements and (2) reduce the contract price to reflect the reduced value of the services performed.

(f) If the Contractor fails to promptly perform the services again or to take the necessary action to ensure future performance in conformity with contract requirements, the Government may (1) by contract or otherwise, perform the services and charge to the Contractor any

cost incurred by the Government that is directly related to the performance of such services or (2) terminate the contract for default.

E.3 CONTRACTOR INSPECTION PROCEDURES

C. Inspection Results

1. Inspection shall be maintained concurrent with contract work. Contractor inspection results shall be available to the Contracting Officer at the completion of each planting day for the work completed that day. Completed Planting Inspection Sheets shall be turned in to the Contracting Officer within 24 hours upon completion of each sub item/unit and will remain a part of the permanent contract file.

3. By submission of the plot cards to the Government, the Contractor is considered to be certifying that the unit is:

- a. Satisfactorily completed.
- b. Tree handling was completed in accordance with the contract provisions ***
- c. Plot cards reflect the work accomplished.

E.4 UNSATISFACTORY PLANTING

A. If the percentage of planting quality for any subitem/unit falls below 80 percent the Contractor may be permitted to replant the subitem/unit in order to

achieve a higher planting quality percentage. Replanting will be subject to availability of seedling stock and shall be requested in writing by the Contractor. ***

C. Seedlings sampled on inspection plots which are not placed in the most favorable spot in accordance with the specifications shall be counted as unsatisfactory seedlings.

D. Only one replant will be permitted. ***

E.5 GOVERNMENT VERIFICATION

A. The Government will conduct verification inspections to determine compliance with specifications. *** Determination of the acceptability of the work performed will be based on these verification inspections and will be considered conclusive. ***

B. Government verification inspection will consist of observation of tree handling, site preparation, planting and inspections procedures, and examination of individual trees on sample plots. *** If Government full sample verification inspection results differ by more than 5 percentage points from the Contractor's inspection results, the Government's inspection will be used for payment.

F.2 EFFECTIVE PERIOD OF THE CONTRACT

The effective period of this contract is from April 11, 1994 through May 20, 1994.

F.3 PERIOD OF CONTRACT

A. Because tree survival and growth are dependent upon proper soil and weather conditions at the time of planting and because these conditions will only prevail for a limited length of time, it is imperative work be started promptly after conditions for planting become suitable. Work shall commence no later than three days after the effective date of the notice to proceed. *** The Contractor shall maintain progress at a rate which will assure completion within the contract time indicated below [Estimated Beginning Date: April 11, 1993 [sic] Contract Time: 40 calendar days].

B. If the Contractor's progress falls behind the work progress schedule for more than two days at the specified rate of progress or if the percentage of planting quality falls below 80 percent for more than 10 percent of the item acreage, the Contractor's right to proceed may be terminated if satisfactory planting quality or progress is not attained with the time specified in a written cure notice. Such notice may be in the form of a work order and shall allow no more than two working days for corrective action to be completed.

G.2 DESIGNATION OF CONTRACTING OFFICER'S REPRESENTATIVE

The Contracting Officer designates the Contracting Officer's Representative (COR). The COR is responsible for administering the performance of work under this contract. ***

H.9 CLEANING UP

The Contractor shall at all times keep the work area, including storage areas, free from accumulations of waste materials. Before completing the work, the Contractor shall remove from the work [area] and premises any rubbish * * *. Upon completing the work, the Contractor shall leave the work area in a clean, neat, and orderly condition satisfactory to the Contracting Officer.

H.14 NONPLANTING SUPERVISOR AND SINGLE WORKFORCE

A. Contractor shall provide a nonplanting supervisor, who shall have a copy of the contract at the planting site and at all times during the planting operations.

H.15 NONPLANTING, SUPERVISING QUALITY INSPECTOR

One nonplanting, nonsupervising tree planting quality inspector shall be designated by the Contractor to take planting inspection plots for the Contractor. Results of Contractor inspector's plot will be used by the Contractor to insure the planting crew's work is meeting the Government quality

standards set forth by this contract.

I.27 DEFAULT (FIXED-PRICE CONSTRUCTION)

(a) If the Contractor refuses or fails to prosecute the work or any separable part, with the diligence that will insure its completion within the time specified in this contract including any extension, or fails to complete the work within this time, the Government may, by written notice to the Contractor, terminate the right to proceed with the work * * * that has been delayed. ***

4) Under the contract, Respondents had 40 days to complete the planting. Beginning on April 12, 1994, Respondents supplied workers to perform labor in Oregon for the USFS in the forestation or reforestation of lands.

5) Throughout the Respondents' work on contract #0004, the USFS found that Respondents' work was not meeting contract specifications. Each day COR Brassard or a USFS inspector filled out a "Contract Daily Diary" to record information about the work on the contract; CO Cunningham reviewed all of these diaries. They noticed the following deficiencies:

a) At no time between April 12 and May 17, 1995, when the USFS "default terminated" the contract, was Respondents' work on schedule. Completing the planting work during the period of the contract was imperative because of the limited length of time in the year when the soil and weather conditions were suitable. Respondents did not

provide a sufficient number of workers to perform the contract on schedule. Even when Respondents brought in additional crews, they never met the work schedule. Crews often showed up late. Mechanical breakdowns of the augers and chain saws left planters standing around. Crews were not well supervised, and, as a result, parts of crews were left without work at times. The USFS believed that Respondents' failure to complete the work on schedule was not in compliance with contract Section F.3.

b) Trees were not planted according to contract specifications. For example, seedlings were planted with "J" roots (the holes were too shallow, and the root ends pointed up); seedlings were planted too high in the soil, planted in soil that was too loose, and planted with air pockets around the roots; there were inadequate scalps (the clearing of the planting spot of all limbs, logs, snow, bark, rotten wood, rocks, and other loose debris, and scalping the spot of ash, duff, sod, crowns of living plants, and roots to the moist mineral soil); there were missed plantable spots, missed holes, incorrectly spaced trees, and poor tree handling practices; planters did not follow quickly enough behind the auger operators, which allowed the soil to become too dry before the seedlings were planted; and the layout of work and the location of control points were disorganized, which resulted in missed areas. Cunningham believed that Respondents' planting work did not comply with the specifications in Section C of the contract.

c) Respondents' supervisors spent time performing planting work,

such as scalping and augering, in lieu of their supervisory responsibilities, contrary to contract provision H-14. On some occasions, Respondents used new, untrained crew members, and crews were very poorly supervised or not supervised at all.

d) Throughout the performance of the contract, Respondents failed to provide qualified inspectors, failed to properly inspect the planting work, failed to submit readable inspection sheets, and failed to timely (or at all, in some cases) submit their self-inspection sheets. In addition, the percentages and averages reported on Respondents' sheets were wrong, based on Respondents' own inspection numbers. Usually, the USFS inspects just enough of the work on a contract to make sure the contractor's inspections are reliable. In a comparison between the Respondents' inspection sheets and the USFS's inspection sheets covering the same ten units, Respondents reported higher planting quality percentages on nine of the ten units than did the USFS. The quality percentages reported in Respondents' inspection sheets differed, on average, by 11.9 percent above the results reported by USFS inspectors for the same units. For example, on a unit named Torch 3, Respondents listed their planting quality at 86 percent, while the government inspection listed it at 64 percent, a 22 percent difference. Of the 16 units for which government inspection sheets are available, seven units had planting quality below 80 percent, and nine units had quality above 80 percent. Respondents' inspectors spent time performing planting work in lieu of their

inspection responsibilities. After the USFS brought the problems with Respondents' inspectors to Respondent's attention, he used different inspectors; however, Respondents' inspections were still unreliable.

6) CO Cunningham and COR Brassard talked with and wrote to Respondent and his representatives regularly about these deficiencies, including the work schedule and the size of the workforce, the planting quality, and the inaccurate inspections and inspection sheets.

7) On April 15, after consulting with CO Cunningham, COR Brassard issued to Respondents a Notice of Noncompliance that warned Respondents that they were behind schedule and that by April 17 they would have used 15 percent of their time, but planted only 10 percent of the contract acres.

8) On April 18, with Cunningham's authorization, COR Brassard issued to Respondents a second Notice of Noncompliance, which warned Respondents that they were approximately 40 percent behind schedule and that they had 48 hours to correct the deficiency, pursuant to contract section F.4.B. Respondents did not correct the deficiency. The notice also reminded Respondents of the contract requirements for self-inspections and warned them that certain inspection sheets had not been turned in timely, under contract section E.3.C.1, and that a government verification inspection indicated that full contract payment would not be made, pursuant to section E.5. Finally, the notice reminded Respondents that they needed to provide a nonplanting supervisor and a

nonplanting inspector, and stated that Respondents supervisors and inspectors had been scalping, planting, augering, and performing chain saw maintenance, contrary to contract sections H.14 and H.15. When Brassard presented the notice to Respondent, "he had no problems with it [and] agreed that those deficiencies existed."

9) On April 19, the COR Brassard contacted CO Cunningham regarding Respondents' performance, and specifically their unsatisfactory self-inspections. Brassard and Cunningham agreed that Respondent should be defaulted on the contract, but that, because of the government's investment of time and money, they could not afford to stop work on the contract and default Respondents.

10) On April 20, Cunningham met Brassard at the work site. They reviewed Respondents' performance deficiencies and discussed alternatives and corrective actions. Cunningham and a USFS inspector looked at the planting quality. Cunningham issued the third Notice of Noncompliance to Respondent suspending work on the contract because Respondent had not delivered a performance bond as required by the contract. Respondent promptly delivered the bond. Cunningham also issued the fourth Notice of Noncompliance to Respondent, which stated:

"By end of work on 4/19/94 20% of contract time had been used with 12% of the work done. Ref page 26-27 F.3 Period of Contract B. Your right to proceed may be terminated and excess reprocurement cost will be charged to you. By close of work day 4/25/94

(Mon) you must demonstrate by work performed your ability to accomplish this project on time or I will stop work, default you and reprocure."

Cunningham also issued to Respondent a contract modification under contract sections E.2(e) and (f) and E.3.C.1, stating:

"You have demonstrated your continued inability to perform adequate self inspections. Cards are not accurate, not turned in on time, and may be falsified. Government must do 100% full inspections to determine correct percentage of work performed. As authorized by the above referenced clauses Gov[ernment] will reduce contract price by \$11.59/ac starting noon today (4/20/94) and will continue to deduct every day self inspections are unacceptable." (Emphasis original.)

11) On April 21, Respondents' crew showed up an hour late. Respondent explained to COR Brassard that 15 members of the previous day's crew had quit because of the long hours. Brassard showed the new crew members how to plant trees. They had worked for 20 minutes when they ran out of chain saw fuel and took a one-hour break. Brassard was concerned about the new crew members, because they wore tennis shoes and cowboy boots, which would be a problem if the weather turned cold. Later, Respondent brought out fuel and explained that the other crew members had not quit, but were taking a day off. Brassard contacted Cunningham, informed him of the events of that morning, and suggested that he may start

looking for other possible contractors in case Respondents' contract defaulted. Brassard also learned that Respondents were using an inspector named Trino Gusmas, after the USFS had told Respondent that the government would not accept Gusmas as a qualified inspector. After Brassard looked over Gusmas's inspection sheets, which were "significantly better than his last one," Brassard recommended that Gusmas be given another chance at fulfilling the inspector's role. That evening Brassard learned from a USFS inspector that the new crew was doing a decent job, but that seven members of Respondents' old crew had quit.

12) On Friday, April 22, Brassard talked with Respondent about subcontracting part of the job or modifying the contract to delete some acres in light of the current work progress (Respondents had used 27.5 percent of their time – 11 of 40 days – and had completed approximately 20 percent of the work – 200 of 1000 acres). Respondent said he expected to bring in a large crew to work over the weekend, and wanted to wait until Sunday night to let Brassard know. On Saturday and Sunday, Respondents had about 60 crew members working. On Monday, Respondent said he did not want to subcontract any part of the job. Upon reviewing some of Gusmas's inspection sheets, Brassard again found them unacceptable and recommended that Respondents should be liable for the government's inspection costs, according to the contract modification.

13) On May 1, 1994, Temporary Specialists, Inc., dba Able Leasing (Able), gave written notice to Respondents that the employee leasing

agreement between Able and Respondent Farwest would be terminated on June 1, 1994, because of Respondent Farwest's default on one section of their agreement. Able had been supplying workers to Respondents pursuant to the leasing agreement.

14) On May 2, COR Brassard and Respondent talked about the quality and quantity of Respondents' work. In order to improve these, Respondent agreed to (1) personally remain on site at all times for the remainder of the contract, (2) try to locate a subcontractor to take approximately 100 acres of the remaining work, and (3) bring in an additional 25 workers from another reforestation job he had in Payette, Idaho, to help catch up on the work.

15) On May 4, 1994, USFS inspectors Sciarrino, Chandler, and Smit were on Respondents' job site. Chandler and Smit reported to Sciarrino that "the plots were not good. The problems were J roots, missed holes [and] spacing." Walking over to Respondent, Sciarrino also noticed several areas with drilled holes without trees. When Sciarrino pointed these problems out to Respondent, he became agitated. Sciarrino explained the inspection procedure and how the plots to be inspected were picked randomly along a grid system. Respondent claimed the government inspectors were not doing the job right and were picking on him; he did not know why the inspectors were finding so many mistakes when he was watching his crew so closely. Sciarrino called COR Brassard, who told the inspectors to stop plot inspections until the unit was finished, but to continue their tree-handling inspections. Respondent told

Sciarrino that he found someone to subcontract with, and that CO Cunningham had approved the subcontractor.

16) On May 5, 1994, COR Brassard decided to perform only "cold inspections" as discussed with Respondent at a prework meeting. "Cold inspections" meant that the government would only inspect completed units on which Respondents had submitted inspection sheets. Brassard learned that Respondents did not have a "firm" subcontractor, and that the crews from Idaho had not shown up. Respondents had used 57.5 percent of their time for the contract, but had completed only 45 percent of the work. CO Cunningham authorized and Brassard issued to Respondent the fifth Notice of Non-compliance, which said:

"Planting quality – Thru 13 plots on Torch 22/23, quality is approximately 70%. Planting quality on Torch 3, 4C, and 5 was less than 80%. By the close of business on Saturday, May 7, 1994 planting quality on remaining units must be greater than 80%. (References cited below) G.7 Method of Payment, A.4 Page 32, E.2 Inspection of Services – Fixed Price (f) Page 19."

Two representatives from Able visited the site. Brassard gave them copies of the government's daily diaries for the contract.

17) On Friday, May 6, 1994, Respondents had around 50 workers on the job. One crew was having difficulty keeping its augers running, so a lot of planters were standing around. COR Brassard noticed many missed plantable spots. He decided that unless the

quality and/or quantity of the planting improved by Saturday, he would recommend to CO Cunningham that default procedures be initiated at the beginning of the next week. Cunningham arrived on the site and noticed that the augermen were making inadequate attempts to drill satisfactory holes. He and Brassard made tests in a 1/50 acre plot, where there were seven planted trees and seven scalped but unplanted spots. In each spot, the augermen should have made three attempts to drill a hole. Brassard was able to drill a hole in four of the seven spots. Cunningham and Brassard also watched Respondents' supervisor, who was supposed to be a non-working supervisor, perform scalping work while other workers stood and watched. Brassard brought these and other contract deficiencies to the supervisor's attention, including improperly benched or terraced scalps on slopes, and poor handling and care of seedlings.

18) On May 7, 1994, Respondent and a crew of 40 arrived an hour late. COR Brassard heard from a government inspector that the planting quality from the day before was around 70 percent. After he had already warned them about it twice that day, Brassard noticed that Respondents' crew was not "benching" the scalps on slopes over 30 degrees. A government inspector showed Respondents' inspector how to make a benched scalp, and it was obvious that Respondents' inspector had not been making satisfactory inspections because he had not known about benching. At lunch, Brassard took an illustration of bench scalping from contract #0004 to the

scalping crew and went over it with them. At the end of the day, Brassard learned from a government inspector that, in the 25 plots she inspected, the planting quality was around 60 percent. Brassard reported to CO Cunningham that planting quality for the unit would likely be below 80 percent, that Respondents had used 62.5 percent of their time, and accomplished 52 percent of the work, and that about half of Respondents' crew was returning to Idaho, so that he would have a smaller crew the next day. Cunningham told Brassard to suspend work, and tell Respondent that the contract was going to be terminated for default. Brassard wrote the sixth work order, entitled Suspension of Work, which said:

"You are to suspend work for the following reason(s): Planting quality thru 25 plots is less than 80% on Torch #22. Repeated failure to plant at the 80% level or above is grounds for termination for default. You will be contacted by C.O. Effective close of business May 7, 1994. Item Numbers: All remaining subitems. Type of Suspension: Total. DO NOT RESUME WORK UNTIL YOU ARE NOTIFIED TO DO SO IN WRITING."

Respondent refused to sign the work order when Brassard presented it to him. Respondent became agitated and accused Brassard of calling his crew members names, of telling the crew that Respondent was back at the motel watching TV and drinking beer while they "slaved away," and of failing to give him a copy of the fifth work order. Brassard denied the first two accusations, and gave Respondent a

copy of the fifth work order. Brassard reported these events to Cunningham.

19) On May 12, 1994, CO Cunningham wrote to Respondent Farwest that its performance throughout the contract had been unsatisfactory, especially the planting quality, which fell into the 50 percent range during the last two days they worked. He said that some areas were now too dry to plant, and those acres would be default terminated and reprocured the next year (1995). Respondent Farwest would be liable for those excess costs. He said that another week of potential planting weather had been lost "while I heard promises that a suitable subcontractor would be coming to work." Cunningham agreed not to "totally default terminate you if you get a suitable subcontractor to work for you." Cunningham said that if a subcontractor was not at a specified ranger station by 8:00 a.m. on May 14, ready to work with all necessary equipment, licenses, and qualified inspectors, he would default terminate Respondent Farwest. Also, if the subcontractor did not maintain an acceptable level of quality throughout the remainder of the contract, Respondent Farwest would be default terminated.

20) On Saturday, May 14, at 7:42 a.m., two vans of workers arrived at the ranger station that Cunningham had specified. Of the 20 workers, at least seven had been on Respondent's crew. CO Cunningham had said that he would not accept anyone from the old crew to work for the remainder of the contract. One worker, Eloy Perez, said he was the contractor's representative. When asked if he was the subcontractor, Perez said "no," that he

worked for Respondent. After COR Brassard conferred with three USFS officials, they all agreed that Respondents had not complied with CO Cunningham's May 12 letter, because no suitable subcontractor was on site. Brassard issued the seventh Work Order to Perez, which said that Respondents would be default terminated. Following this, Cunningham gave Respondents another chance to get a suitable subcontractor.

21) On Monday, May 16, a representative of Fremont Forest Systems, Inc. (Fremont) presented COR Brassard with a signed subcontract agreement between Respondents and Fremont, a copy of Fremont's farm labor contractor license, and a copy of its workers' compensation insurance coverage. CO Cunningham said he would approve Fremont as a subcontractor as long as the crew did not include workers from Respondents' old crew. Brassard accompanied Fremont's crew to a unit, and they started planting. Brassard issued Work Order number eight, which allowed Fremont to resume work on two units of contract #0004. Later, Brassard learned that Fremont's inspector had never inspected before, and that 12 of the 18 workers had previously worked for Respondents. Brassard recommended to Cunningham that (1) Fremont be required to finish two units (75 acres) by Sunday, May 22, 1994 (when the contract time expired), and then terminate the contract; (2) three units (94 acres) be reprocured the next year and that Respondents be liable of the costs of reprocurement; and (3) the USFS partially default the contract that day and reprocure the remaining 11 units (309

acres) with Cooper Contracting, with all excess costs charged to Respondent Farwest.

22) On May 17, 1994, the Fremont crew left the job, and its representative (Cristobal Lumbreras) said Fremont was not coming back because it could not make any money. CO Cunningham talked to Lumbreras, and then "default terminated" contract #0004 "for non-performance with respect to all bid items," under contract Section 1.27. Cunningham "determined that [Respondents'] default [was] inexcusable."

23) Respondent's testimony was unreliable and not credible. Respondent testified that he had no problem completing contract #0004, and that his inspectors were experienced and did an adequate, accurate job. No reliable evidence corroborated such testimony, and the great weight of credible evidence on the record contradicted it. Respondent asserted that a competitor, C & H Reforestation, resented that Respondents were awarded contract #0004, and that C & H had some influence over COR Brassard. Respondent alleged that the USFS inspectors were too critical; this caused him to slow down, to have to rework units, and to fall behind schedule. Respondent believed that Brassard was out to get him, meant for Respondents to default, and undermined Respondents' attempts to get a subcontractor. Respondents presented no evidence to support these allegations. The forum finds that Respondent's allegations are mere speculation, some of them are based on double hearsay, and they are not credible.

Respondent testified that Brassard complained about things that were

none of his business, such as when one of Respondents' inspectors was repairing augers instead of inspecting, and when the workers took breaks, and when the USFS got a complaint from a citizen regarding the crews' driving as they left work, and when crew members were littering. The forum finds that many of the things Respondent claimed were none of Brassard's business were indeed the USFS's business.

Respondent claimed that Brassard was racist because he was not Hispanic, he cussed at the workers rather than talking to a supervisor when there was a problem, he made a reference to "Watergate" (the 1972 burglary under the direction of government officials of the Democratic Party headquarters in Washington, D.C.), and he made a reference to Cinco de Mayo. The forum finds this allegation of racism, which is without supporting evidence, unfounded and unpersuasive. The forum requires more than vague testimony about the kinds of incidences referred to here to draw an inference of racism. Because I have found nearly all of Respondent's testimony unreliable, uncorroborated, and contradicted by credible evidence, and have found his allegations unfounded and unpersuasive, the forum has found Respondent's testimony not credible except where it was corroborated by other credible evidence in the record.

ULTIMATE FINDINGS OF FACT

1) During all material times herein, Respondents were jointly licensed as farm labor contractors with a forest endorsement by the Commissioner of the Bureau of Labor and Industries. Respondent was a majority shareholder

and the president of Respondent Farwest.

2) On around March 8, 1994, Respondents entered into a legal and valid USFS contract (number 52-04M3-4-0004) in their capacity as farm labor contractors. In the performance of that contract, Respondents supplied workers to perform labor in the forestation or reforestation of lands in Oregon.

3) Respondents failed to comply with the terms and provisions of USFS contract number 52-04M3-4-0004.

CONCLUSIONS OF LAW

1) The Commissioner of the Bureau of Labor and Industries of the State of Oregon has jurisdiction over the subject matter and of the persons herein. ORS 648.407.

2) ORS 658.405 provides in part:

"As used in ORS 658.405 to 658.503 and 658.830 and 658.991 (2) and (3), unless the context requires otherwise:

"(1) 'Farm labor contractor' means any person who, for an agreed remuneration or rate of pay, recruits, solicits, supplies or employs workers to perform labor for another to work in forestation or reforestation of lands, including but not limited to the planting, transplanting, tubing, precommercial thinning and thinning of trees * * *."

Respondents were acting as farm labor contractors on USFS contract #0004.

3) The actions, inactions, and statements of Respondent are properly imputed to Respondent Farwest. Respondents were jointly licensed as farm labor contractors under ORS 658.410(2)(c) and (d); as such, they

are jointly responsible for any violation of the farm labor contractors law, ORS 658.405 to 658.503, and jointly liable for any sanction imposed by the Commissioner for a violation.

4) ORS 658.440(1) provides in part:

"Each person acting as a farm labor contractor shall:

" * * * * *

"(d) Comply with the terms and provisions of all legal and valid agreements or contracts entered into in the contractor's capacity as a farm labor contractor."

Respondents violated ORS 658.440 (1)(d).

5) ORS 658.453(1) provides in part:

"In addition to any other penalty provided by law, the Commissioner of the Bureau of Labor and Industries may assess a civil penalty not to exceed \$2,000 for each violation by:

" * * * * *

"(c) A farm labor contractor who fails to comply with ORS 658.440(1)[.]"

OAR 839-15-508 provides in part:

"(1) Pursuant to ORS 658.453, the Commissioner may impose a civil penalty for violations of any of the following statutes:

" * * * * *

"(f) Failing to comply with contracts or agreements entered into as a contractor in violation of ORS 658.440(1)(d)[.]"

OAR 839-15-510 provides in part:

"(1) The Commissioner may consider the following mitigating and aggravating circumstances when determining the amount of any civil penalty to be imposed, and shall cite those the Commissioner finds to be appropriate:

"(a) The history of the contractor or other person in taking all necessary measures to prevent or correct violations of statutes or rules;

"(b) Prior violations, if any, of statutes or rules;

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

"(d) Whether the contractor or other person knew or should have known of the violation.

"(2) It shall be the responsibility of the contractor or other person to provide the Commissioner any mitigating evidence concerning the amount of the civil penalty to be imposed.

"(3) In arriving at the actual amount of the civil penalty, the Commissioner shall consider the amount of money or valuables, if any, taken from employees or subcontractors by the contractor or other person 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 or other person for the purpose of reducing the amount of the civil penalty to be imposed."

OAR 839-15-512(1) provides:

"The civil penalty for any one violation shall not exceed \$2,000.

The actual amount of the civil penalty will depend on all the facts and on any mitigating and aggravating circumstances."

Under the facts and circumstances of this record, and in accordance with ORS 658.453 and related portions of ORS 658.405 to 658.503 and Oregon Administrative Rules, the Commissioner of the Bureau of Labor and Industries has the authority to impose a civil penalty for the violation found herein. The assessment of the civil penalty specified in the Order below is an appropriate exercise of that authority.

OPINION

1. Joint Responsibility and Liability of the Corporation and Majority Shareholder.

As noted above in Conclusion of Law 3, the farm labor contractors law requires corporations to be licensed along with their majority shareholders. ORS 658.410(2)(c) and (d); OAR 839-15-135(1)(c) and (d). There is only one license issued, and the majority shareholder's license is a derivative of the corporation's license. To treat the majority shareholder separately from the corporation would defeat the apparent purpose of the statute. *In the Matter of Robert Gonzalez*, 12 BOLI 181, 198 (1994). This forum has held corporations and their majority shareholders jointly responsible for violations of the farm labor contractors law, and it has held them jointly liable for the sanctions that are imposed as a result of those violations. *See Gonzalez, supra*; *In the Matter of Victor Ovchinnikov*, 13 BOLI 123 (1994); *In the Matter of Alejandro Lumberras*, 12 BOLI 117 (1993); and *In the Matter of*

Cristobal Lumbreras, 11 BOLI 167 (1993). The forum has held likewise in this case.

2. Failure to Comply with the Terms and Provisions of a Legal and Valid Contract Entered into in Respondents' Capacity as Farm Labor Contractors.

The Agency alleged that, in violation of ORS 658.440(1)(d), Respondents failed to comply with the terms and provisions of a legal and valid USFS contract entered into in Respondents' capacity as farm labor contractors.

The credible evidence was overwhelming, and not contradicted by credible evidence, that Respondents failed to comply with the following terms and provisions of their USFS contract: Section C.8 by failing to plant the trees with the correct spacing, and by missing some areas entirely; Section C.9 by failing to properly construct benched or terraced scalps on slopes that exceeded 30 percent; Section C.10 by failing to make three attempts to drill a hole before abandoning a spot as unplantable; Section C.11 by planting seedlings with J roots, too high in the soil, in soil that was too loose, with air pockets around the roots, and in spots with unsatisfactory scalps; Section E.2 by failing to provide and maintain an inspection system acceptable to the government, failing to maintain complete records, and – after Respondents' services did not conform with contract requirements – failing to take the necessary action to ensure future performance that complied with contract requirements; Section E.3 by failing to perform inspections concurrent with the planting work and submit

satisfactory inspection sheets within 24 hours after completing each unit; Section E.4 by planting numerous units in such an unsatisfactory way that planting quality was below 80 percent; Section F.3 by failing to maintain work progress at a rate that would assure completion of the contract within the contract time; Section H.14 by failing to provide a nonplanting supervisor at all times; and Section H.15 by failing to provide a nonplanting, nonsupervising tree planting quality inspector at all times.

Respondent's accusations against COR Brassard and the inspectors, even if believed, do not affect the credible, first hand evidence presented by Bob Cunningham. He personally witnessed Respondents' performance that did not comply with the contract, and he personally made the decisions leading up to the government's termination of Respondents' contract for default.

With regard to Respondent's allegations about Mr. Brassard and C & H Reforestation, Respondent has asked the forum to believe that some conspiracy existed, and that it included the three government inspectors, in order to justify or excuse his failure to meet the contract's terms and provisions. Yet, aside from his testimony claiming this conspiracy existed and Brassard was out to get him, no evidence supported it. To the contrary, credible evidence shows that the USFS gave Respondent several chances to attain satisfactory performance and to avoid being defaulted. It is clear that, from the first day of work on the contract, Respondents did not have enough workers to keep up with the work

progress schedule, and throughout the contract they failed to provide satisfactory, trained inspectors. Workers quit because the hours were too long and replacement workers were not properly trained or equipped. Equipment failures left workers standing around, and Respondents' supervisors and inspectors ended up performing maintenance and planting duties. It is unreasonable on this record to find that such problems arose from some government conspiracy or prejudice on the part of a government official. In any event, as mentioned above, Respondents' theory would seem to only justify or excuse their failure to comply with the contract; no credible evidence suggests that they actually complied with all of the terms and provisions of the contract. Accordingly, the forum holds that Respondents failed to comply with the terms and provisions of a legal and valid contract entered into by them in their capacity as farm labor contractors, in violation of ORS 658.440(1)(d).

3. Civil Penalty

In its case summary, the Agency proposed to assess Respondents a civil penalty of \$1,000 for their violation of ORS 658.440(1)(d). The Commissioner may assess a civil penalty not to exceed \$2,000 for this violation. ORS 658.453(1)(c); OAR 839-15-508(1)(f). The Commissioner may consider mitigating and aggravating circumstances when determining the amount of any penalty to be imposed. OAR 839-15-510(1). It shall be the Respondents' responsibility to provide the Commissioner with any mitigating evidence. OAR 839-15-510(2). Considering Respondents' allegations of conspiracy and prejudice as evidence of mitigating

circumstances, the forum has found that evidence uncorroborated, unbelievable, and not credible.

The forum finds three aggravating circumstances. First, Respondents failed to take all necessary measures to prevent this violation. For example, Respondents had the opportunity early in the contract period, when it was clear they were steadily falling farther behind on their progress, to bring on a subcontractor to help. Indeed, the USFS began encouraging Respondent to do this after only 11 days into the contract. Second, this type of violation is serious because it not only frustrated the USFS's ability to meet its reforestation goals, but the resulting default affected Respondents' ability to pay the employee leasing company. Evidence suggested that the workers had to struggle and wait for their pay. Third, there is no question that Respondents knew that they were failing to comply with the terms and provisions of their contract – they were so notified verbally or in writing almost every day of the contract period. It is reasonable to conclude that they either knew or should have known that their failures violated the farm labor contractor law. The Agency requested and this forum hereby assesses a \$1,000 civil penalty for the violation.

ORDER

NOW, THEREFORE, as authorized by ORS 658.453, JOSE DAVID CARMONA and FARWEST REFORESTATION, INC. are hereby ordered to deliver to the Bureau of Labor and Industries, Fiscal Services Office Suite 1010, 800 NE Oregon Street # 32, Portland, Oregon 97232-2162, a certified check payable to the BUREAU OF

LABOR AND INDUSTRIES in the amount of ONE THOUSAND DOLLARS (\$1,000), plus any interest thereon that accrues at the annual rate of nine percent between a date ten days after the issuance of this Order and the date Respondents comply with this Order. This assessment is a civil penalty against Jose David Carmona and Farwest Reforestation, Inc. for one violation of ORS 658.440(1)(d).

=====

**In the Matter of
BILL MARTINEZ**

**and Pacifica West Enterprises, Inc.,
dba Pac-West Temporary Em-
ployment Services, Respondents.**

Case Number 22-95

Final Order of the Commissioner

Jack Roberts

Issued October 19, 1995

SYNOPSIS

The forum granted the Agency's motion for summary judgment where the uncontroverted facts showed that the individual Respondent had repeatedly failed to comply with the terms and conditions of contracts entered into in his capacity as a forest labor contractor and that he and the corporate Respondent had acted as forest labor contractors without a license. Pursuant to an agreement between the participants, the Commissioner assessed a civil penalty only for the violation that occurred after the individual

Respondent had declared bankruptcy, but considered all violations in denying a forest labor contractor license to both the individual Respondent and the corporate Respondent, based on their demonstration of character, competence and reliability. ORS 658.410(1); 658.417(1); 658.420; 658.440(1)(d); 658.453(1); OAR 839-15-145; 839-15-508; 839-15-512; 839-15-520.

The above-entitled contested case was scheduled for hearing on February 7, 1995, before Warner W. Gregg, designated as Hearings Referee by Jack Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was scheduled in the Bureau of Labor and Industries office, 3865 Wolverine NE, Suite E-1, Salem, Oregon. The Bureau of Labor and Industries (the Agency) was represented by Judith Bracanovich, an employee of the Agency. Bill Martinez (Respondent Martinez) and Pacifica West Enterprises, Inc., a corporation (Respondent Pacifica), were represented in this Forum and in correspondence with the Hearings Referee by Robert J. Gunn, Attorney at Law, Salem.

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

**FINDINGS OF FACT –
PROCEDURAL**

1) On September 9, 1994, the Agency issued a Notice of Proposed Denial of a Farm Labor Contractor

License Application and To Assess Civil Penalties ("Notice of Intent") to Respondents. The Notice of Intent informed Respondents that the Agency intended to deny the joint farm labor contractor license application of Respondent Martinez and Respondent Pacifica and further intended to assess civil penalties against Respondents in the total amount of \$10,000 sixty days after Respondents' receipt of the Notice. The Notice of Intent cited the following bases for the Agency's proposed actions:

"1. Between December 12, 1992 and December 14, 1992, within the state of Oregon, [Respondent] Martinez, fdba Evergreen Farm and Forestry Services, while licensed as a farm labor contractor, received the reforestation labor services of two (2) employees, Antonio Perez Martinez and Gilberto Garcia, *** under contracts of employment with said workers that required [Respondent] Martinez to pay for such labor at the rate of \$4.75 per hour and \$5.00 per hour, respectively. [Respondent] failed to pay all sums due said workers under the contracts of employment immediately upon the termination of employment, in violation of ORS 653.145 [sic] and ORS 658.440 (1)(c). Civil Penalty in the amount of \$1,000 for each violation, for a total of \$2,000. AGGRAVATION: [Respondent] knew or should have known of the violations, and multiple (repeated) violations.

"2. On or about December 16, 1992, [Respondent] Martinez, fdba Evergreen Farm and Forestry

Services, while licensed as a farm labor contractor, was defaulted on Purchase Order No. 102 02335, a seedling transplant contract with International Paper, performed at the Kellogg Forestry Nursery in Oakland, Oregon, for failure to comply with contract specifications and requirements. The contract specifications and requirements were provisions of a legal and valid contract between [Respondent] Martinez, fdba Evergreen Farm and Forestry Services, and International Paper, entered into by [Respondent] Martinez, fdba Evergreen Farm and Forestry Services, in his capacity as a farm labor contractor. The Contract non-compliance by [Respondent] Martinez, fdba Evergreen Farm and Forestry Services, constitutes a violation of ORS 658.440(1)(d). [Respondent] Martinez's failure to comply with the terms and conditions of a legal and valid agreement entered into in his capacity as a farm labor contractor demonstrates that the character, competence, and reliability of [Respondent] Martinez make him unfit to act as a farm labor contractor, pursuant to OAR 839-15-145(1)(b), 839-15-520(3)(a), (c). Civil Penalty in the amount of \$2,000. AGGRAVATION: [Respondent] knew or should have known of the violation: magnitude and seriousness of the violation.

"3. On or about August 12, 1993, [Respondent] Martinez, fdba Evergreen Farm and Forestry Services, while licensed as a farm labor contractor, was defaulted on

Contract No. 53-04KK-3-38A, a reforestation contract with the United States Forest Service, in the Prairie City Ranger District, State of Oregon, for failure to comply with contract specifications and requirements. The contract specifications and requirements were provisions of a legal and valid contract between [Respondent] Martinez, fdba Evergreen Farm and Forestry Services, and the United States Forest Service, entered into by [Respondent] Martinez, fdba Evergreen Farm and Forestry Services, in his capacity as a farm labor contractor. The contract non-compliance by [Respondent] Martinez, fdba Evergreen Farm and Forestry Services, constitutes a violation of ORS 659.440(1)(d). [Respondent] Martinez' failure to comply with the terms and conditions of a legal and valid agreement entered into in his capacity as a farm labor contractor demonstrates that the character, competence, and reliability of [Respondent] Martinez make him unfit to act as a farm labor contractor, pursuant to OAR 839-15-145 (1)(b), 839-15-520(2), and 839-15-520(3) (a), (c). Civil Penalty in the amount of \$2,000. AGGRAVATION: Repeated violation; [Respondent] knew or should have known of the violation; magnitude and seriousness of the violation.

"4. In late spring, 1993, [Respondent] Martinez, fdba Evergreen Farm and Forestry Services, while licensed as a farm labor contractor, was defaulted on Contract No. 53-04R4-3-4162, a reforestation

contract with the United States Forest Service, Detroit Ranger District, State of Oregon, for failure to comply with contract specifications and requirements. The contract specifications and requirements were provisions of a legal and valid contract between [Respondent] Martinez, fdba Evergreen Farm and Forestry Services, and the United States Forest Service, entered into by [Respondent] Martinez, fdba Evergreen Farm and Forestry Services, in his capacity as a farm labor contractor. The contract non-compliance by [Respondent] Martinez, fdba Evergreen Farm and Forestry Services, constitutes a violation of ORS 659.440(1)(d). [Respondent] Martinez' failure to comply with the terms and conditions of a legal and valid agreement entered into in his capacity as a farm labor contractor demonstrates that the character, competence, and reliability of [Respondent] Martinez make him unfit to act as a farm labor contractor, pursuant to OAR 839-15-145 (1)(b), 839-15-520(2), and 839-15-520(3) (a), (c). Civil Penalty in the amount of \$2,000. AGGRAVATION: Repeated violation; [Respondent] knew or should have known of the violation; magnitude and seriousness of the violation.

"5. Between March 1, 1994 and March 4, 1994, [Respondent] Martinez, and Pacifica West Enterprises, Inc., dba Pac-West Temporary Employment Services, supplied workers to labor upon a reforestation contract with Valley Land Fill of Corvallis, Oregon, performed

within the State of Oregon, when at all times material, [Respondents] did not possess a valid farm labor contractor license, in violation of ORS 658.410(1) and 658.417 (1). By acting as a farm labor contractor without a license, [Respondents] demonstrated that their character, competence and reliability makes them unfit to act as a farm labor contractor, pursuant to OAR 839-15-145, 839-15-520 (1)(k), and 839-15-520(3)(a). Civil Penalty in the amount of \$2,000. AGGRAVATION: Applicants knew or should have known of the violation; the magnitude and seriousness of the violations."

2) Respondent Martinez received the Notice of Intent by personal service on September 14, 1994.

3) On October 28, 1994, received by the Agency November 1, Respondents through counsel submitted their answer to the Notice of Intent which provided in part as follows:

"a. [Respondents] object to the proposed civil penalty or any part thereof.

"b. [Respondents] object to the proposed denial of the application for a farm labor contractor license.

"c. [Respondents] object to the form of the [Notice of Intent] upon the facts.

"d. [Respondents] request a contested case hearing on each and every issue waiving no objection [sic] and stipulating to no facts.

"e. [Respondents], through counsel Answer the allegations of fact in the [Notice of Intent] as follows:

"1. With respect to paragraph 1 of the [Notice of Intent] it is admitted that Evergreen Farm and Forestry, a corporation (not a party to the [Notice of Intent]) received very limited services from Antonio Perez Martinez and Gilberto Garcia but denies that they were employees and denies the rest and balance of the allegations.

"2. The allegations of paragraph 2 are denied.

"3. The allegations of paragraph 3 are denied.

"4. The allegations of paragraph 4 are denied.

"5. [Respondents] further allege by way of affirmative defense that the subject matter of wages was fully resolved in an adversary proceeding in the United States Bankruptcy Court as concerns Bill Martinez and Evergreen Farm and Forestry Service, Inc.

"6. [Respondents] allege as an affirmative defense that as to civil penalty, Bill Martinez has received a valid bankruptcy discharge and that any proceeding for money or civil damages against him upon the facts alleged are barred.

"Having fully answered, [Respondents] pray that the [Notice of Intent] be dismissed and that the applied for license be granted.

"Further, [Respondents] demand immediate release of the cash bond posted as a condition for approval of the application."

4) On November 1, 1994, the Agency sent the Hearings Unit a request for a hearing date, and on November 30, 1994, the Hearings Unit issued a Notice of Hearing setting forth the time and place of the hearing. The notice was served on Respondents together with the following: a) a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413; and b) a complete copy of Oregon Administrative Rules (OAR) 839-50-000 to 839-50-420, regarding the contested case process.

5) On January 11, 1995, the Hearings Unit issued a notice changing the assigned Hearings Referee from Alan McCullough to Warner W. Gregg.

6) On January 11, 1995, the Agency filed a motion for summary judgment, with supporting documents, as to paragraphs two through five of the Notice of Intent, reciting that there was no genuine issue of material fact as to the violations alleged in those paragraphs and that the Agency was entitled to judgment on the violations, exclusive of penalties, as a matter of law.

7) In accordance with OAR 839-50-150, Respondent had seven days within which to respond to the Agency's motion. No response was received and on January 23, 1995, the Agency requested a ruling, stating further that upon the granting of the summary judgment, the Agency would dismiss paragraph one of the Notice of Intent, leaving only the issue of penalties to be resolved at hearing. The Agency suggested that this might be accomplished in writing or by telephone.

8) On February 1, 1995, the Hearings Referee ruled as follows, in pertinent part:

"On January 11, 1995, the Agency filed a motion for summary judgment, with supporting documentation, as to Paragraphs 2. through 5. of the Notice of Proposed Denial of a Farm Labor Contractor License Application and To Assess Civil Penalties (Notice of Intent) herein. A copy of the motion was transmitted by the Agency to Respondents' counsel of record at his office address by regular US mail. Respondents' response, if any, to the motion was due by January 18, 1995. [OAR 839-50-150]. No response was received and on January 23, 1995, with copy to counsel, the Agency asked for a ruling.

"OAR 839-50-150(4), dealing with Summary Judgment, provides in part:

"(a) * * * The motion may be based on any of the following conditions:

"(A) * * *

"(B) No genuine issue as to any material fact exists and the participant is entitled to a judgment as a matter of law, as to all or any part of the proceedings * * *

"When considering a motion for summary judgment, this forum, as a general rule, will draw all inferences of fact from the record against the participant filing the motion for summary judgment and in favor of the participant opposing the motion. *In the Matter of Efrain Corona*, [11 BOLI 44] (1992);

affirmed without opinion, Corona v. Bureau of Labor and Industries, 124 Or App 211, 861 P2d 1046 (1993). The Agency's motion was accompanied by documents and affidavits which established those facts necessary for the movant to prevail. The Agency's motion for summary judgment as to paragraphs 2. through 5. of the Notice of Intent is granted. A more detailed ruling will be part of the Proposed Order herein.

"The Agency indicated in its January 23 letter that it would withdraw paragraph 1. of the Notice of Intent if the summary judgment motion was granted. Accordingly, paragraph 1. of the Notice of Intent is dismissed.

"The granting of summary judgment on four charges and dismissal of the fifth leaves only the question of sanction before the forum. Therefore, it will not be necessary to convene a hearing or call witnesses regarding the Agency's allegations or Respondent's denial thereof. The convenement scheduled for 9:30 a.m., Tuesday, February 7, 1995, in Salem is canceled and in lieu thereof, the Hearings Referee will place a conference call to the Case Presenter at her office and to Respondents' counsel at his office at 9:00 a.m. that date for the purpose of setting civil penalties.

"The Agency has moved to strike Respondent Martinez's affirmative defense regarding bankruptcy and has submitted evidence controverting that respondent's claim of personal discharge. We will

discuss a ruling on that motion and the disposition of the license application and civil penalties in the conference call."

9) On February 6, 1995, the Agency submitted information provided by counsel for Respondents to the effect that Respondent Bill Martinez had been discharged from debt in a chapter 7 proceeding in the United States Bankruptcy Court in Eugene on February 16, 1994, under the name "Ernest Bill Martinez." The Agency withdrew its motion against Respondent Martinez's affirmative defense number 6 as to paragraphs two through four of the Notice of Intent, and requested that the Forum deny the license application based on those paragraphs but forego imposition of civil penalty for those violations.

10) In its February 6, 1995, submission, the Agency also requested that the application denial be based on the violation established under paragraph five of the Notice of Intent and that the Forum impose a civil penalty of \$2,000 for that violation. The Agency represented that Respondent's counsel had agreed to this disposition and a copy of the Agency's February 6 letter was forwarded to counsel.

11) Respondents received a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413 at the time they received the notice of hearing.

12) The Proposed Order, which included an Exceptions Notice, was issued on June 13, 1995. Exceptions, if any, were to be filed by June 23, 1995. No exceptions were received.

FINDINGS OF FACT – THE MERITS

1) Respondent Martinez was a licensed farm labor contractor, with forestation endorsement, from November 7, 1991, to November 30, 1992, and from April 28 to November 30, 1993, during which times he did business as Evergreen Farm and Forestry Services.

2) Respondent Martinez, doing business as Evergreen Farm and Forestry Services, entered into a seedling lifting and transplanting contract in September 1992 with International Paper Kellogg Forest Tree Nursery, Oakland, Oregon, which contract was to be performed over two seasons.

3) International Paper defaulted Respondent Martinez for failure to meet the production requirements of the contract on December 16, 1992.

4) Lifting seedlings for transplant is forestation or reforestation of lands. The contract with International Paper Kellogg Forest Tree Nursery was entered into by Respondent Martinez in his capacity as a farm/forest labor contractor.

5) In April 1993, Respondent Martinez, as an individual proprietorship doing business as Evergreen Farm and Forestry Services, entered into tree netting contract number 53-04KK-3-38A ("38A") with the United States Forest Service (USFS) in the Prairie City Ranger District of the Malheur National Forest.

6) Respondent Martinez began work on 38A on June 1, 1993, for a duration of 30 calendar days. Respondent Martinez's performance was not timely, and Respondent Martinez was

allowed additional time to satisfactorily complete the contract.

7) USFS defaulted Respondent Martinez for failure to complete contract 38A in a timely acceptable manner on August 12, 1993.

8) Tree netting is forestation or reforestation of lands. The contract with USFS was entered into by Respondent Martinez in his capacity as a farm/forest labor contractor.

9) In March 1993, Respondent Martinez, as an individual proprietorship doing business as Evergreen Farm and Forestry Services, entered into tree planting contract number 53-04R4-3-4162 ("4162") with USFS in the Detroit Ranger District of the Willamette National Forest.

10) Respondent Martinez began work on 4162 on or about May 5, 1993, and, under an extension of time to complete granted by USFS, continued until June 24, 1993. At that time, Respondent Martinez had still failed to complete an \$8,000 portion of the \$94,000 contract. USFS determined not to default Respondent Martinez, but the contract remained uncompleted.

11) Tree planting is forestation or reforestation of lands. The contract with USFS was entered into by Respondent Martinez in his capacity as a farm/forest labor contractor.

12) From March 1 through March 4, 1994, Respondent Martinez and Respondent Pacifica West, doing business as Pac-West Temporary Services, supplied workers to plant trees for Valley Landfill of Corvallis, Oregon, on property owned by Valley Landfill.

13) Respondent Martinez was a licensed farm labor contractor, with forestation endorsement, until November 30, 1993. Respondent Pacifica West, with Respondent Martinez as principle owner, made a first application for a farm labor contractor license, with forestation endorsement, in June 1994. Neither of said Respondents were licensed as farm/forest labor contractors between March 1 and March 4, 1994.

14) On November 12, 1993, under his true name of "Ernest Bill Martinez," Respondent Martinez filed for bankruptcy for himself and Evergreen Farm and Forestry Services, Inc., a corporation of which he was president.

CONCLUSIONS OF LAW

1) ORS 658.440(1) provides, in part:

"Each person acting as a farm labor contractor shall:

"(d) Comply with the terms and provisions of all legal and valid agreements or contracts entered into in the contractor's capacity as a farm labor contractor."

By failing to complete the contract with International Paper, Respondent Martinez failed to comply with a legal and valid contract entered into in his capacity as a farm labor contractor, violating ORS 658.440(1)(d).

2) By failing to complete contract 38A with USFS, Respondent Martinez failed to comply with a legal and valid contract entered into in his capacity as a farm labor contractor, violating ORS 658.440(1)(d).

3) By failing to complete contract 4162 with USFS, Respondent

Martinez failed to comply with a legal and valid contract entered into in his capacity as a farm labor contractor, violating ORS 658.440(1)(d).

4) ORS 658.410(1) provides, in part:

"(1) *** No person shall act as a farm labor contractor with regard to the forestation or reforestation of lands unless the person possesses a valid farm labor contractor license with the indorsement required by ORS 658.417(1). ****"

ORS 658.417 provides, in part:

"In addition to the regulation otherwise imposed upon farm labor contractors pursuant to ORS 658.405 to 658.503 and 658.830, a person who acts as a farm labor contractor with regard to the forestation or reforestation of lands shall:

"(1) Obtain a special indorsement from the Commissioner of the Bureau of Labor and Industries on the license required by ORS 658.410 that authorizes the person to act as a farm labor contractor with regard to the forestation or reforestation of lands."

By supplying workers to engage in forestation or reforestation activities on the land of Valley Landfill in March 1994 without first obtaining a valid farm labor contractor license with special indorsement for the forestation or reforestation of lands, Respondents Martinez and Pacifica West, dba Pac-West Temporary Services, violated ORS 658.410(1) and 658.417(1).

5) ORS 658.453 provides, in part:

"(1) In addition to any other penalty provided by law, the

Commissioner of the Bureau of Labor and Industries may assess a civil penalty not to exceed \$2,000 for each violation by:

"*****"

"(e) A farm labor contractor who fails to comply with ORS 658.417(1),***"

The Commissioner of the Bureau of Labor and Industries is authorized to impose a civil penalty on Respondent Martinez and Respondent Pacifica for the violation found in paragraph 4 of these Conclusions of Law.

6) ORS 658.420 provides that the Commissioner of the Bureau of Labor and Industries shall issue a farm labor contractor license to an applicant therefor if the Commissioner is satisfied as to the applicant's character, competence and reliability.

OAR 839-15-145(1) provides, in part:

"The character, competence and reliability contemplated by ORS 658.405 to 658.475 and these rules includes, but is not limited to, consideration of:

"*****"

"(b) A person's reliability in adhering to the terms and conditions of any contract or agreement between the person and those with whom the person conducts business;

"*****"

"(g) Whether a person has violated any provision of ORS 658.405 to 658.485."

OAR 839-15-520 provides, in part:

"(1) The following violations are considered to be of such magni-

tude and seriousness that the Commissioner may propose to deny or refuse to renew a license application****:

"*****"

"(k) Acting as a farm or forest labor contractor without a license."

"*****"

"(3) The following actions of a Farm or Forest Labor Contractor license applicant or licensee or an agent of the license applicant or licensee demonstrate that the applicant's or the licensee's character, reliability or competence make the applicant or licensee unfit to act as a Farm or Forest Labor Contractor:

"(a) Violations of any section of ORS 658.405 to 658.485."

The Commissioner of the Bureau of Labor and Industries is authorized to deny the farm labor license application of Respondent Martinez based on the violations found in paragraphs 1 through 4 of these Conclusions of Law and of Respondent Pacifica for the violation found in paragraph 4 of these Conclusions of Law.

OPINION

The Hearings Referee allowed the Agency's pre-hearing motion for summary judgment. That ruling is confirmed. Respondents chose not to oppose the Agency's motion and did not controvert the evidence which the Agency submitted in support of its motion. The Agency's evidence established the violations enumerated in the Conclusions of Law.

The Agency asked that the Commissioner forego imposing a civil penalty for each violation occurring prior to

the filing of the bankruptcy petition, and Respondents' counsel agreed not to oppose the imposition of a civil penalty for the remaining violation. The Forum is treating the civil penalty portion of the proceeding as a negotiated settlement. Civil penalty will be imposed upon Respondent Martinez and on Respondent Pacifica for the violation in connection with Valley Landfill.

The described disposition of the civil penalties is not to be construed as any acknowledgment of the affirmative defense contained in the answer of Respondent Martinez describing the effect of his bankruptcy filing as "a valid bankruptcy discharge," or "that any proceeding for money or civil damages against him upon the facts alleged are barred." A petition in bankruptcy does not stay state administrative proceedings undertaken pursuant to the state's police or regulatory power. 11 USC §362(b)(4). A civil penalty so imposed and payable to the state is not dischargeable.

It appears clear that the character, competence, and reliability of Respondent Martinez, and of Respondent Pacifica of which he is the principle, is such that the Commissioner should deny their joint application for a farm labor contractor license.

ORDER

NOW, THEREFORE, as authorized by ORS 658.453, Respondents Ernest Bill Martinez and Pacifica West Enterprises, Inc., dba Pac-West Temporary Services, are hereby ordered to deliver to the Bureau of Labor and Industries, Fiscal Services Office Suite 1010, 800 N.E. Oregon Street # 32, Portland, Oregon 97232-2109, a certified check payable to the Bureau of

Labor and Industries in the amount of TWO THOUSAND DOLLARS (\$2,000), plus any interest thereon which accrues at the annual rate of nine percent, between a date ten days after the issuance of the Final Order herein and the date said Respondents comply therewith. This assessment is made as a civil penalty against said Respondents jointly and severally as civil penalty for violations of ORS 658.410(1) and 658.417(1).

And, further, the Commissioner of the Bureau of Labor and Industries hereby denies Bill Martinez, also known as Ernest Bill Martinez, and Pacifica West Enterprises, Inc., a corporation, a license to act as a farm or forest labor contractor, effective on the date of this Final Order. Bill Martinez, also known as Ernest Bill Martinez, and Pacifica West Enterprises, Inc., a corporation, are prevented from reapplying for a license for a period of three years from the date of denial, in accordance with ORS 658.415(1)(c) and OAR 839-15-520(4).

**In the Matter of
SAMUEL LOSHBAUGH,
dba Sam's Contracting,
Respondent.**

Case Number 52-95

Final Order of the Commissioner

Jack Roberts

Issued October 19, 1995

SYNOPSIS

Where respondent failed to pay all wages due and owing to claimant upon termination of employment, the Commissioner found that the failure to pay was willful and ordered respondent to pay the unpaid wages and civil penalty wages. The Commissioner rejected respondent's defense that claimant failed to submit his hours and that claimant owed respondent for the use of his equipment. ORS 652.140(2); 652.150; 652.332; 653.045; OAR 839-50-330(2).

The above-entitled contested case came on regularly for hearing before Warner W. Gregg, designated as Hearings Referee by Jack Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held on July 6, 1995, in the Chief Joseph conference room of the State of Oregon Employment Department, 1007 SW Emkay Drive, Bend, Oregon. The Bureau of Labor and Industries (the Agency) was represented by Alan McCullough, an employee of the Agency. Samuel Loshbaugh, dba Sam's Contracting (Respondent), did not attend and was not represented by counsel. Russell L.

McClain (Claimant) was present throughout the hearing and was not represented by counsel.

The Agency called as witnesses Claimant and Agency Compliance Specialist Rhoda Briggs. No evidence was presented on behalf of Respondent, who was in default through his non-attendance.

Having fully considered the entire record in this matter, I, Jack Roberts, Commissioner of the Bureau of Labor and Industries, 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 or about July 22, 1994, Claimant filed a wage claim with the Agency in which he alleged that he had been employed by Respondent, who had failed to pay all wages earned and due to him.

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

3) On October 28, 1994, through the Deschutes County Sheriff, the Agency personally served on Respondent at 219 NW 6th Street, Redmond, Oregon, Order of Determination No. 94-028 (Determination Order) based upon the wage claim filed by Claimant and the Agency's investigation. The Determination Order found that Respondent owed Claimant \$4,901.50 straight time and overtime wages computed at \$10.00 per hour on a total of 474.5 hours worked, 30.5 of which

were worked over 40 hours in a work-week, less the sum of \$2,400, leaving a total of \$2,501.50 unpaid. The Determination Order found further that the failure to pay was willful and that there was due and owing the sum of \$2,372 in civil penalty wages.

4) The Determination Order required that, within 20 days, Respondent either pay these sums in trust to the Agency, or request an administrative hearing and submit a written answer to the charge.

5) On November 18, 1994, by fax and on November 21, 1994, by mail, the Agency received from Respondent a written answer to the Determination Order and a request for hearing. The answer admitted that Claimant had been employed by Respondent at the times alleged and denied that Claimant was owed further wages, and alleged that Claimant had failed to submit time cards and had used Respondent's equipment on a job of his own for which Respondent was not paid. Respondent further denied that there was any basis for penalty wages and alleged that Claimant "needs to supply me with time cards and come to some sort of agreement with me for the use of my equipment."

6) The Agency requested a hearing date and on May 26, 1995, the Hearings Unit issued a Notice of Hearing setting forth the time and place of the hearing which was served on Respondent together with the following: a) a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413; and b) a complete copy of Oregon Administrative Rules (OAR) 839-50-000 to 839-50-420, regarding the contested

case process. The Notice of Hearing was served by regular U.S. mail, postage prepaid, addressed to Respondent at 219 NW 6th Street, Redmond, Oregon 97756, and was not returned undelivered.

7) At the commencement of the hearing at 9:15 a.m. on July 6, 1995, Respondent had not appeared in the hearing room and had not advised the Hearings Referee of any reason for tardiness or non-attendance. Because the Notice of Hearing and the attachments thereto were properly addressed to Respondent, mailed with postage prepaid and not returned undelivered, the Hearings Referee found that Respondent received the Notice of Contested Case Rights and Procedures.

8) Pursuant to ORS 183.415(7), Claimant and the Agency were orally advised by the Hearings Referee of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

9) During the hearing the Agency withdrew that portion of the Determination Order dealing with a second claimant, Christian Ziehr.

10) At the close of the hearing, the Hearings Referee ruled that Respondent was in default, having been properly served with notice of the hearing and thereafter having neither attended the hearing nor notified the Forum regarding his absence.

11) The Proposed Order, which included an Exceptions Notice, was issued on August 30, 1995. Exceptions, if any, were to be filed by September 9, 1995. No exceptions were received.

FINDINGS OF FACT – THE MERITS

1) During times material herein Respondent, an individual, operated a construction contracting business in and around Redmond, Oregon, engaging or utilizing the personal service of one or more employees.

2) Claimant began working for Respondent in October 1993. Respondent's business involved supplying crushed rock and Claimant operated a rock crusher, a front-end loader, and a cat. Respondent provided the equipment, set the work hours, and directed the work. Respondent agreed to pay Claimant \$10 an hour for up to 40 hours a week and \$15 an hour for overtime.

3) Respondent told Claimant to keep track of his own hours, which Claimant did on a daily basis. Claimant kept a record in his own daily diary of the time he worked. He also recorded the time on a time card which he handed in to Respondent.

4) Initially, Claimant was paid on the 10th and the 25th of the month for work done up to the 1st and 15th, respectively. Respondent paid Claimant regularly, in cash, up to about mid-April 1994, and did not supply Claimant with a list of itemized deductions. Thereafter, Respondent made partial payments on an irregular basis. Claimant was not aware of what records Respondent kept. Claimant received a total of \$2,400 up to the time he quit.

5) Claimant had in his possession copies of time cards for April 1 through June 28, 1994. They accurately reflect time Claimant worked for Respondent, except for nine hours on May 17 and

18, for which Claimant was paid by Respondent's customer Phil Petrie.

6) Respondent was often present on the various job sites from April through June and was aware that Claimant was recording his work time. When paydays became irregular, Claimant would only turn in the cards when he was sure of payment. In the past, Respondent had misplaced Claimant's time cards and Claimant had to reconstruct his hours. On May 17 and 18, Claimant did some rock moving and crushing for Petrie using Respondent's equipment at Respondent's direction and request.

7) Claimant last worked for Respondent on June 28. He quit because he was not being paid. On June 29, Respondent stated he was getting some money that day to pay Claimant. He did not contact Claimant after that date. Claimant then filed his wage claim.

8) Rhoda Briggs was a Compliance Specialist with the Agency at times material. As part of her job duties, she accepted and investigated Claimant's wage claim. On August 31, 1994, she sent Respondent a demand letter. Because she received no response, she had the Determination Order issued.

9) Briggs was aware of Respondent's answer to the Determination Order and on December 28, 1994, she forwarded copies of Claimant's time cards to Respondent. In her cover letter, she explained the Agency's understanding of the time Claimant spent working for Phil Petrie and Petrie's responsibility for the use of the equipment. When she received no response to her letter, Briggs followed

up with a telephone call to Respondent on January 11, 1995.

10) Briggs repeated the information contained in her December 28 letter. Respondent stated that he had not received the letter, and she gave him until January 19 to respond before she sent the file back to Portland to proceed with a hearing.

11) On January 18, 1995, Briggs received a response from Respondent wherein he admitted owing Claimant \$1,410.68 after deducting \$150 allegedly paid to Claimant by Petrie, after deducting \$297.50 for Claimant's alleged rental of equipment, and after deducting for tax withholding which he alleged had not been done previously.

12) On December 22, 1994, and again on January 31, 1995, Briggs spoke with Phil Petrie. In December, Petrie confirmed that while Respondent's equipment was on Petrie's property he had arranged with Respondent for the additional work eventually done by Claimant. Subsequently, Claimant had asked Petrie for the wages in connection with that work because Respondent had not paid Claimant. Petrie paid Claimant for nine straight-time hours. Petrie had asked Respondent to bill him for the additional work, but Respondent had not done so.

13) In January 1995, Petrie confirmed to Briggs that he had earlier in January paid Respondent all balances owed on their contract, including the extra work and equipment rental. Briggs wrote to Respondent on February 1, 1995, advising him that he could not deduct the \$297.50 for equipment

rental, but could deduct \$90 paid as wages to Claimant by Petrie. She listed the amount due from Respondent for Claimant's due and unpaid net wages as \$1,768.18.

14) Other than the nine hours that Complainant worked for Petrie, Respondent did not contest the accuracy of the hours claimed by Claimant. Briggs calculated the gross unpaid wages owed, using Claimant's records.

15) Briggs calculated the penalty wages due in accordance with Agency policy. The average daily rate (ADR) from which penalty wages are calculated is the result of dividing the total days worked by the employee into the total amount the employee earned for the period. The penalty wage is then determined by multiplying the ADR by the number of days, up to 30, that wages remain unpaid.

16) Claimant earned \$4,350 for 435 straight time hours at \$10 an hour, and \$457.50 for 30.5 overtime hours at \$15 an hour for a total of \$4,807.50, earned in 62 working days. \$4,807.50 divided by 62 equals \$77.54 ADR. 30 times \$77.54 equals \$2,326, rounded according to Agency policy, as penalty wages.

ULTIMATE FINDINGS OF FACT

1) During times material herein, Respondent was an employer in this state.

2) Claimant was employed by Respondent from October 1993 through June 1994 at \$10 an hour straight time and \$15 an hour overtime.

* Because Respondent did not appear and offer evidence that the deductions claimed for taxes withheld on Claimant's account were paid, Respondent's liability for unpaid wages as calculated below is for the gross amount.

3) From April 1 through June 28, 1994, Claimant worked a total of 435 straight time hours and 30.5 overtime hours, earning a total of \$4,807.50 in 62 working days.

4) When Claimant ceased employment, Respondent owed him \$4,807.50 less \$2,400 paid, or \$2,407.50. Claimant did not use Respondent's equipment on his own account.

5) When Claimant ceased employment, Respondent failed to pay him within 5 days for all wages earned and for 30 days thereafter.

6) The average daily rate for Claimant was \$77.54. Penalty wages equaled \$2,326.

CONCLUSIONS OF LAW

1) During all times material herein, Respondent was an employer and Claimant was an employee subject to the provisions of ORS 652.110 to 652.200 and 652.310 to 652.405.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and the Respondent herein. ORS 652.310 to 652.405.

3) ORS 652.140(2) provides:

"When an employee who does not have a contract for a definite period quits employment, all wages earned and unpaid at the time of quitting become due and payable immediately if the employee has given to the employer not less than 48 hours' notice, excluding Saturdays, Sundays and holidays, of intention to quit employment. If notice is not given to the employer, the wages shall be due and payable within five days,

excluding Saturdays, Sundays and holidays, after the employee has quit, or at the next regularly scheduled payday after the employee has quit, whichever event first occurs.

Respondent violated ORS 652.140(2) by failing to pay Claimant all wages earned and unpaid within five days, excluding Saturdays, Sundays and holidays, after Claimant terminated employment.

4) ORS 652.150 provides:

"If an employer willfully fails to pay any wages or compensation of any employee whose employment ceases, as provided in ORS 652.140 and 652.145, then, as a penalty for such nonpayment, the wages or compensation of such employee shall continue from the due date thereof at the same rate until paid or until action therefor is commenced; provided, that in no case shall such wages or compensation continue for more than 30 days from the due date; and provided further, the employer may avoid liability for the penalty by showing financial inability to pay the wages or compensation at the time they accrued."

Respondent is liable for a civil penalty under ORS 652.150 for willfully failing to pay all wages or compensation to Claimant when due as provided in ORS 652.140.

5) Under the facts and circumstances of this record, and in accordance with ORS 652.332, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondent to pay Claimant his

earned, unpaid, due, and payable wages and the civil penalty wages, plus interest on both sums until paid.

OPINION

1. Default

Respondent failed to appear at the hearing and thus defaulted to the charges set forth in the Order of Determination. In a default situation, pursuant to ORS 183.415(5) and (6), the task of this Forum is to determine if a prima facie case supporting the Agency's Order of Determination has been made on the record. See *In the Matter of John Cowdrey*, 5 BOLI 291, 298 (1986); *In the Matter of Art Farbee*, 5 BOLI 268, 276 (1986); *In the Matter of Judith Wilson*, 5 BOLI 219, 226 (1986); see also OAR 839-50-330(2).

Where a respondent submits an answer to a charging document, the Forum may admit the answer into evidence during a hearing and may consider the answer's contents when making findings of fact. Where a respondent fails to appear at hearing, the Forum may review the answer to determine whether the respondent has set forth any evidence or defense to the charges. *In the Matter of Jack Mongeon*, 6 BOLI 194 (1987); *In the Matter of Richard Niquette*, 5 BOLI 53 (1986). In a default situation where a respondent's total contribution to the record is a request for a hearing and an answer that contains nothing other than unsworn and unsubstantiated assertions, those assertions are overcome wherever they are controverted by other credible evidence on the record. *Mongeon, supra*.

The Agency has established a prima facie case. A preponderance of

credible evidence on the whole record showed that Respondent employed Claimant during the period of the wage claim and willfully failed to pay him all wages, earned and payable, when due. That evidence, which established that Respondent owed Claimant the amount in the Order below, was credible, persuasive, and the best evidence available, given the failure of Respondent to appear at the hearing. Having considered all the evidence on the record, the Forum finds that the prima facie case has not been contradicted or overcome.

2. Hours Worked

This forum has ruled repeatedly and frequently that it is the employer's duty to maintain an accurate record of an employee's time worked. ORS 653.045; *In the Matter of Godfather's Pizzeria, Inc.*, 2 BOLI 279, 296 (1982) (citing *Anderson v. Mt. Clemens Pottery Co.*, 328 US 680 (1946)). A purported delegation of that duty can certainly form no basis for failing to pay the employee all sums due upon termination of employment. The order below enforces the duty of the employer to pay what was really due, since that duty is absolute. *In the Matter of Handy Andy Towing, Inc.*, 12 BOLI 284, 294-95 (1994); *Garvin v. Timber Cutters, Inc.*, 61 Or App 497, 658 P2d 1164 (1983).

Where an employer produces no records, the forum may rely on the evidence produced by the agency by accepting the credible testimony of the claimant to prove the extent of the uncompensated work performed. *In the Matter of Martin's Mercantile*, 12 BOLI 262, 273-74 (1994); *Mt. Clemens Pottery, supra*.

3. Penalty Wages

Awarding penalty wages turns on the issue of willfulness. Willfulness does not imply or require blame, malice, wrong, perversion, or moral delinquency, but only requires that that which is done or omitted is intentionally done with knowledge of what is being done, and that the actor or omittor be a free agent. *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976). Respondent, as an employer, had a duty to know the amount of wages due to his employee. *McGinnis v. Keen*, 189 Or 445, 221 P2d 907 (1950); *In the Matter of Jack Coke*, 3 BOLI 238, 242 (1983). Evidence established that Respondent intentionally failed to pay wages. Evidence showed that he acted voluntarily and as a free agent. He must be deemed to have acted willfully under this test and thus is liable for penalty wages under ORS 652.150.

The record established that Respondent violated ORS 652.140 as alleged and owed Claimant the amount found as civil penalty wages pursuant to ORS 652.150. Pursuant to Agency policy, civil penalty wages due under ORS 652.150 were rounded to the nearest dollar. *In the Matter of Waylon & Willies, Inc.*, 7 BOLI 68, 72 (1988).

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders SAMUEL LOSHBAUGH, dba Sam's Contracting, to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2109, the following:

(1) A certified check payable to the Bureau of Labor and Industries IN TRUST FOR RUSSELL L. McCLAIN in the amount of FOUR THOUSAND SEVEN HUNDRED THIRTY-THREE DOLLARS AND FIFTY CENTS (\$4,733.50), representing \$2,407.50 in gross earned, unpaid, due, and payable wages, and \$2,326 in penalty wages, PLUS

(2) Interest at the rate of nine percent per year on the sum of \$2,407.50 from July 3, 1994, until paid, PLUS

(3) Interest at the rate of nine percent per year on the sum of \$2,326 from August 2, 1994, until paid.

**In the Matter of
MELVIN A. BABB,
Respondent.**

Case Number 58-95

Final Order of the Commissioner

Jack Roberts

Issued October 19, 1995.

SYNOPSIS

As a person to whom farm workers were provided, Respondent violated ORS 658.437(2) when he failed to examine and retain a copy of the farm labor contractor's license or permit prior to commencement of work. The Commissioner assessed a \$500 civil penalty. ORS 658.405(1)(a); 658.410(1); 658.437(2); 658.453(1)(f); OAR 839-15-004(4)(a); 839-15-130(4); 839-15-508(3); 839-15-510; 839-15-512(1).

The above-entitled contested case came on regularly for hearing before Warner W. Gregg, designated as Administrative Law Judge (ALJ) by Jack Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held on August 24, 1995, in conference room 1004 of the Portland State Office Building, 800 NE Oregon Street, Portland, Oregon. The Bureau of Labor and Industries (the Agency) was represented by Judith Bracanovich, an employee of the Agency. Respondent Melvin A. Babb (Respondent) was present throughout the hearing and was not represented by counsel.

The Agency called as witnesses Respondent and former Agency Farm Labor Unit Compliance Specialist Gabriel Silva (by telephone). Respondent called himself as his only witness.

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

FINDINGS OF FACT – PROCEDURAL

1) On February 22, 1995, the Agency issued a "Notice of Intent to Assess A Civil Penalty" (Notice of Intent) to Respondent. The Notice of Intent cited the following basis for this assessment:

"Using Unlicensed Farm Labor Contractors Without Complying with ORS 658.437(2). (One Violation) In or around November or December, 1993, prior to allowing

work to begin under an agreement between [Respondent] and unlicensed farm labor contractors, Odon Salinas Morfin, Paulo Salinas Martinez, and/or Guillermo Salinas Martinez ("Contractors") [Respondent] failed to verify the license status of Contractors by failing to examine or retain a copy of Contractors' farm labor contractor license or permit in violation of ORS 658.437(2). Civil Penalty of \$500.00"

The Notice of Intent was served on Respondent by the Clackamas County Sheriff on February 27, 1995.

2) By a letter dated March 15, 1995, and received by the Agency March 20, 1995, Respondent responded to the Notice of Intent as follows:

"I request for a contested case hearing in the above case. In or around November or December, 1993, I hired Paulo Salinas, an individual, to harvest my Christmas trees. Before any work began, I received a copy of his Social Security card, Drivers license, Resident alien card, and had him fill out a W-9. I paid him by check when the work was completed. In 1994 I sent him a 1099-misc. and filed it with the IRS. I did everything above-board, and feel I shouldn't be punished for making every effort to do it properly.

"ANSWER: I deny your factual allegations."

3) The Agency requested a hearing date from the Hearings Unit, and on June 15, 1995, the Forum issued to Respondent and the Agency (together,

"the participants") a "Notice of Hearing," which set forth the time and place of the requested hearing and the designated ALJ. With the hearing notice, the Forum sent to Respondent a "Notice of Contested Case Rights and Procedures," containing the information required by ORS 183.413, and a complete copy of the Agency's administrative rules regarding the contested case process – OAR 839-50-000 through 839-50-420.

4) On July 19, 1995, the Agency filed a motion for summary judgment, with supporting documentation, alleging there was no genuine issue of material fact as to the violation alleged in the Notice of Intent. On July 31, 1995, the Agency requested a ruling on its motion.

5) On August 3, 1995, the ALJ ruled as follows in pertinent part:

"It has long been the policy of this forum to grant summary judgment where there are no facts at issue. Respondent's answer admits contracting with Paulo Salinas in 1993 to harvest Christmas trees. But it is not clear from the Notice of Intent and answer, nor from the documents in support of the motion, that Paulo 'for an agreed remuneration or rate of pay' recruited, solicited, supplied or employed others, i.e., that he was not an employee (see, ORS 658.405, definition of 'farm labor contractor'). The allegation is that Respondent violated ORS 658.437(2) in November/ December 1993, in that he failed to verify the license status of Paulo Salinas * * * prior to

allowing work to begin under an agreement between Respondent and Salinas. The supporting documents establish that Salinas had no license and was paid \$4,148 by Respondent in 1993. Respondent's answer admits that he 'hired Paulo Salinas, an individual, to harvest my Christmas trees' in November-December 1993. Respondent further states that he obtained Salinas's social security number, drivers license, resident alien identification 'and had him fill out a W-9 [sic].' Respondent issued a '1099-misc' in the amount paid. There is no evidence that Respondent recruited, solicited, supplied or employed anyone in connection with the agreement. There is a suggestion, only, in Respondent's written responses to the Agency's letter dated November 28, 1994, as follows:

'4. Did the entity mentioned above' provide a crew(s) for shearing or harvesting Christmas trees in the 1993/ 1994 seasons? How many workers (approximately) were in the crew?'

"To which Respondent responded:

'Harvest was in 1993, number of workers unknown, shearing 1994 only'

"When considering a motion for summary judgment, this forum will draw all inferences of fact from the record against the participant seeking summary judgment and in favor of the participant opposing

the motion. *In the Matter of Efrain Corona*, 11 BOLI 44, 54 (1992), *aff'd without opinion, Corona v. Bureau of Labor and Industries*, 124 Or App 211, 861 P2d 1046 (1993). While Respondent herein did not oppose the Agency's summary judgment motion, it is still incumbent upon [the ALJ] to determine whether there is a genuine issue of fact which precludes summary judgment. Before Respondent can be guilty of violating ORS 658.437 (2) by failing to verify an individual's license status prior to that individual beginning work as a contractor, there must be evidence that the individual was acting as a contractor as defined by statute. Here, the Agency charged that Salinas was one of three persons so acting, but provides no evidence of such activity. Respondent admits only that [the contractor] agreed, by some means, to harvest trees and was paid for doing so. The inclusion with the motion of the evidence of other proceedings accusing other farmers of failing to verify licenses of the same three individuals, wherein those farmers, without hearing, paid the civil penalties sought, does not form an inference that Respondent was guilty of a violation. Neither does the mere suggestion that the individual with whom Respondent dealt might have employed workers in harvesting the trees.

"The Agency's motion is denied. The hearing * * * will proceed as scheduled."

6) The Agency and Respondent each timely filed a summary of the

case. Respondent's summary included the following requests:

"6. Request agency to provide any and all documents, notices, memos or letters involving Phil Ringle or any associated business name.

"7. I request any and all information of all parties that have been investigated or assessed, but have not paid their fine or no penalties were assessed, that have employed Paulo Salinas in the past."

7) On August 17, 1995, the Agency wrote to Respondent, forwarding:

"copies of the charging documents and associated Consent Orders concerning Phil Ringle and Emerald Christmas Trees, both related to contracting actions of the Salinas family which resulted in charges filed against the Salinas family, Emerald Christmas Trees, and several growers (including you)."

The Agency's letter stated further:

"Your request for 'all information of all parties * * * is overbroad, unduly burdensome, and has no relevance to the issues in this case. You may ask [the ALJ] to rule on your request if you wish to do so. Due to the short time remaining before the hearing, I would suggest that you ask [the ALJ] to hold a conference call to discuss the matter."

No conference call was requested by Respondent. At the commencement of the hearing, Respondent stated he would not press that issue.

* "The entity mentioned above" is "Paulo Salinas, Guillermo Salinas or Diamond Tree Trimming."

8) In a conference prior to the commencement of the hearing, the Agency and Respondent placed certain stipulations on the record. The stipulations are noted throughout the factual findings of this order.

9) At the commencement of the hearing, pursuant to ORS 183.415(7), the participants were advised by the ALJ of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

10) At the commencement of the hearing Respondent stated that he had received the Notice of Contested Case Rights and Procedures and had no questions about it.

11) The proposed order, containing an exceptions notice, was issued September 15, 1995. Exceptions were due September 25, 1995. No exceptions were received.

FINDINGS OF FACT – THE MERITS

1) During times material herein, Respondent owned acreage at 15600 S. Spangler Road, Oregon City, Clackamas County, Oregon. In 1993, he had five and one half acres of harvestable Christmas trees on the property. In November and December 1993, Respondent hired Paulo Salinas to harvest Christmas trees on Respondent's acreage.

2) At times material, Gabriel Silva was a Compliance Specialist in the Farm Labor Unit of the Wage and Hour Division of the Agency. Part of his duties were enforcement of the farm and forest labor laws of Oregon. He is fluent in both Spanish and English.

3) In 1994, Silva investigated the activities for 1993 and 1994 of Odon Salinas Morfin, Paulo Salinas Martinez, and Guillermo Salinas Martinez regarding allegations of supplying labor to Christmas tree growers, of maintaining an unregistered farm labor camp, and of failure to pay workers in Oregon.

4) Odon Salinas Morfin (hereinafter Odon Salinas) is the father of Paulo Salinas Martinez (hereinafter Paulo Salinas) and Guillermo Salinas Martinez (hereinafter Guillermo Salinas). None of the three had a farm labor contractor license or permit in 1993 or 1994. Paulo Salinas and Guillermo Salinas told Silva that they had thought of becoming licensed and had at one time begun the process, but had never completed it.

5) The United States Immigration and Naturalization Service (INS) and other agencies raided the Salinas household over allegations that workers were being held at the Salinas home under substandard conditions and that the workers were not being paid. The INS and other agencies confiscated such records as the Salinas family had as part of the raid. Those records became part of a criminal investigation of the labor camp and Silva did not have access to all of the records.

6) Walter Frocklodge represented Emerald Christmas Tree Company of Bellevue, Washington (Emerald), in making agreements with the Salinas family to supply crews to other Christmas tree growers in Oregon in 1993 and 1994. From Paulo and Guillermo Salinas, Silva learned that Respondent, Larry Tracy, Dennis Spath,

Gordon Schuler, Bob Koublon, William Tucker, and Jim and Phil Ringle were among the Christmas tree growers who agreed to have the Salinas family harvest or shear their trees in 1993 and 1994.

7) Emerald, described by Respondent as a Christmas tree broker, was a buyer of Christmas trees at times material. Frocklodge represented Emerald in agreeing to buy Respondent's Christmas tree harvest in 1993 at \$6.25 per tree. Frocklodge also agreed to \$1.60 harvest expense per tree and agreed to put Respondent in touch with Paulo Salinas, who would do the harvesting. Frocklodge described Paulo Salinas as a contractor they (Emerald) worked with.

8) Respondent did not ask Frocklodge if Emerald had an Oregon farm labor contractor license. Respondent did not ask if Frocklodge had an Oregon farm labor contractor license.

9) The harvesting of Christmas trees involves cutting, baling and loading the trees. Respondent tagged the trees to be harvested. Respondent did not cut, bale, or load the trees himself.

10) Respondent asked Paulo Salinas for identification before the harvesting work began. He made copies of Paulo Salinas's social security card, drivers license, and resident alien card, and had Salinas fill out an IRS form W-9 (Respondent modified an IRS W-4 for this purpose). Respondent did not ask Paulo Salinas for an Oregon farm labor contractor license.

11) Respondent verified with Paulo Salinas that the harvesting cost would be \$1.60 per tree. Respondent knew that Paulo Salinas would be using

workers to harvest the trees. After the harvest started, Respondent saw other workers besides Paulo Salinas on site in harvesting activities. Respondent did not know the exact number of workers used, and did not pay the individual workers directly.

12) Respondent paid Paulo Salinas as a non-employee independent contractor for the harvest of 2200 to 2300 Christmas trees. He issued an IRS 1099-misc to Paulo Salinas for 1993.

13) IRS form 1099 is used when growers pay independent contractors for work performed by the contractor's crew.

14) Neither Emerald nor Frocklodge had an Oregon farm labor contractor license in 1993 or 1994.

15) As a result of its investigation, in addition to taking enforcement action against Respondent, the Agency took enforcement action against other growers who failed to verify the license status of the Salinas group in 1993 and 1994. The Agency also took enforcement action against Odon, Paulo, and Guillermo Salinas for acting as unlicensed farm labor contractors, and against Emerald for acting as an unlicensed farm labor contractor and for assisting an unlicensed contractor.

16) The testimony of Respondent was inconsistent and contradictory and as a result not wholly credible. Respondent asserted in his answer to the Agency's Notice of Intent that "[b]efore any work began" he obtained identifying information from Paulo Salinas "and had him fill out a W-9." During the Agency's case in chief, Respondent testified that he made copies of Paulo

Salinas's social security card, drivers license, and resident alien card, and had Salinas fill out an IRS form W-9 before the work began. Respondent later testified that he did not get the W-9 and social security number for Salinas until the work was completed and he learned for the first time that he was to pay Salinas directly rather than have Emerald deduct the harvesting costs from the sale price. He asserted that the first time he knew he was not dealing with Emerald was after the harvest when Frocklodge told him to pay Salinas directly. He stated that he was then not certain whether Frocklodge had originally represented Salinas to be a contractor, but he had earlier asserted that he confirmed the harvesting cost of \$1.60 per tree with Paulo Salinas, not Emerald, before the work began. He acknowledged that he had never confirmed whether Salinas was Emerald's employee. In response to the ALJ's inquiry, he stated that the statements in his answer to the Notice of Intent and in his early testimony that he got the W-9 from Salinas before any work began was in error. Respondent stated further that he didn't know that he was obligated to check for a farm labor contractor license and that he was not familiar with "obscure ORS statutes." He expressed criticism of the Agency's failure to somehow put him and other farmers on notice before enforcing the requirement that farmers verify a contractor's license status. The forum has carefully noted Respondent's demeanor and evaluated the internal consistency of his statements and has found the description of the sequence of events contained in Respondent's later testimony to lack credibility.

ULTIMATE FINDINGS OF FACT

1) During all material times herein, Respondent was the owner of land whereon he engaged in the production and harvesting of Christmas trees in Oregon.

2) In November and December 1993, Respondent hired Paulo Salinas to harvest Christmas trees on Respondent's land for an agreed remuneration or rate of pay.

3) Paulo Salinas supplied and employed workers in the harvesting of Respondent's Christmas trees.

4) Upon completion of the harvest in 1993 Respondent issued a check to Paulo Salinas in the amount of \$4,148.80.

5) Paulo Salinas was not an employee of Respondent.

6) At no time prior to allowing work by the workers supplied by Paulo Salinas to begin did Respondent examine a farm labor contractor license or temporary permit for Paulo Salinas and retain a copy thereof.

CONCLUSIONS OF LAW

1) The Commissioner of the Bureau of Labor and Industries of the State of Oregon has jurisdiction over the subject matter and of the persons herein. ORS 648.405 to 658.503.

2) ORS 658.405 provides, in part:

"As used in ORS 658.405 to 658.503 and 658.830 and 658.991 (2) and (3), unless the context requires otherwise:

"(1) 'Farm labor contractor' means any person who, for an agreed remuneration or rate of pay, recruits, solicits, supplies or employs workers to perform labor

for another to work in *** the production or harvesting of farm products; or who recruits, solicits, supplies or employs workers on behalf of an employer engaged in those activities; * * * However, 'farm labor contractor' does not include:

"(a) Farmers, *** [or] their permanent employees, ****"

OAR 839-15-004 provides, in part:

"As used in these rules, unless the context requires otherwise:

"(4) 'Farm Labor Contractor' means:

"(a) Any person who, for an agreed remuneration or rate of pay, recruits, solicits, supplies or employs workers to perform labor for another in the production or harvesting of farm products; ****"

By supplying workers to perform labor for Respondent in harvesting farm products, Paulo Salinas acted as a farm labor contractor during times material.

3) ORS 658.410(1) provides, in part:

"*** no person shall act as a farm labor contractor without a valid license in the person's possession issued to the person by the Commissioner of the Bureau of Labor and Industries."

OAR 839-15-130 provides, in part:

"The following persons are not required to obtain a farm or forest labor contractor's license:

*** **

"(4) A permanent employee of a farmer *** so long as the employee is engaged solely in

activities which would not require the employer to be licensed if the employer were performing the activity."

Paulo Salinas was not exempt from the requirement to be licensed as a farm labor contractor during times material.

4) ORS 658.437 provides:

"(1) Prior to beginning work on any contract or other agreement the farm labor contractor shall:

"(a) Display the license or temporary permit to the person to whom workers are to be provided, or the person's agent; and

"(b) Provide the person to whom workers are to be provided, or the person's agent with a copy of the license or temporary permit.

"(2) Prior to allowing work to begin on any contract or agreement with a farm labor contractor, the person to whom workers are to be provided, or the person's agent shall:

"(a) Examine the license or temporary permit of the farm labor contractor; and

"(b) Retain a copy of the license or temporary permit provided by the farm labor contractor pursuant to paragraph (b) of subsection (1) of this section."

By failing to examine a farm labor contractor license or temporary permit for Paulo Salinas or to retain a copy thereof prior to the commencement of work by the workers he supplied, Respondent violated ORS 658.437(2) in November and December 1993.

5) ORS 658.453 provides, in part:

"(1) In addition to any other penalty provided by law, the Commissioner of the Bureau of Labor and Industries may assess a civil penalty not to exceed \$2,000 for each violation by:

"*****

"(f) Any person who uses an unlicensed farm labor contractor without complying with ORS 658.437."

OAR 839-15-508(3) provides:

"The Commissioner may impose a civil penalty on a person to whom workers are to be provided * * * when the person uses an unlicensed farm * * * labor contractor without having first:

"(a) examined the license or temporary permit of the farm * * * labor contractor; or

"(b) retained a copy of the license or temporary permit provided to the person by the farm * * * labor contractor, pursuant to ORS 658.453(1)(f)."

OAR 839-15-510 provides, in part:

"(1) The Commissioner may consider the following mitigating and aggravating circumstances when determining the amount of any civil penalty to be imposed, and shall cite those the Commissioner finds to be appropriate:

"(a) The history of the * * * person in taking all necessary measures to prevent or correct violations of statutes or rules;

"(b) Prior violations, if any, of statutes or rules;

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

"(d) Whether the * * * person knew or should have known of the violation.

"(2) It shall be the responsibility of the * * * person to provide the Commissioner any mitigating evidence concerning the amount of the civil penalty to be imposed."

OAR 839-15-512 provides, in part:

"(1) The civil penalty for any one violation shall not exceed \$2,000. The actual amount of the civil penalty will depend on all the facts and on any mitigating and aggravating circumstances."

Under the facts and circumstances of this record, and according to the law applicable in this matter, the Commissioner of the Bureau of Labor and Industries has the authority to and may assess civil penalties against Respondent. The assessment of the civil penalty specified in the Order below is an appropriate exercise of that authority.

OPINION

1. Failure to Examine and Retain Copy of Farm Labor Contractor License or Permit

ORS 658.437 imposes a duty upon a farmer such as Respondent to examine and retain a copy of the farm labor contractor license before allowing any person acting as a farm labor contractor to begin work. A person acts as a farm labor contractor if the person "recruits, solicits, supplies or employs" a worker for another for the purpose of producing or harvesting farm products. Paulo Salinas supplied workers for Respondent for the purpose of harvesting Christmas trees. Paulo Salinas was not Respondent's employee and in fact was treated by Respondent as an

independent contractor. The evidence showed by a preponderance that Paulo Salinas acted as a farm labor contractor.

Based upon Respondent's own testimony, he failed to examine or copy a farm labor license before work commenced. Respondent thus violated ORS 658.437(2). A farmer who complies with the statutory requirement will eliminate the risk of using an unlicensed contractor. Thus, it is immaterial whether the contractor actually has a farm labor contractor license and that is not an element of the violation charged. Where the person to whom the labor is to be provided fails to verify, in the manner prescribed, the license of the person acting as a farm labor contractor before work begins, the violation is complete.

This forum has previously observed that the requirement for farmers to verify a farm labor contractor's license status furthers an important statutory purpose:

"ORS 658.405 to 658.503 was enacted to protect workers from unlawful employer activity in farm and forest labor. [citation omitted] The statutory scheme was intended to protect migrant agricultural workers from unlicensed contractors. Allowing farmers to condone or encourage unlicensed recruitment for production or harvesting work would not accomplish the statutory purpose." *In the Matter of Boyd Yoder*, 12 BOLI 223 (1994), *aff'd without opinion*, *Yoder v. Bureau of Labor and Industries*, 136 Or App 627, 896 P2d 119 (1995).

2. Civil Penalty

The Commissioner may assess a civil penalty not to exceed \$2,000 for this violation, and may consider mitigating and aggravating circumstances when determining the amount of any penalty to be imposed. It was the responsibility of Respondent to provide any mitigating evidence. Respondent attempted to suggest that the Agency's enforcement efforts were uneven and somehow entrapping, but no actual mitigating evidence was presented. Respondent was not singled out for a sanction but rather was one violator among several accused as the result of an Agency investigation. Respondent's ignorance of, or ignoring of, a statute that has been in place since 1989¹ in no way constitutes mitigation. The Agency alleged no aggravating circumstances and the Forum finds none. The Agency requested and the Forum hereby assesses a first offense \$500 civil penalty for the violation.

ORDER

NOW, THEREFORE, as authorized by ORS 658.453, Respondent MELVIN A. BABB is hereby ordered to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, Suite 1010, 800 NE Oregon Street #32, Portland, Oregon 97232-2109, a certified check payable to the BUREAU OF LABOR AND INDUSTRIES in the amount of FIVE HUNDRED DOLLARS (\$500), representing the civil penalty assessed herein.

* See section 14, chapter 164, Oregon Laws 1989.

**In the Matter of
GARDNER CLEANERS, INC.,
dba Aloha Dry Cleaners and Laundry,
and Steven Jay Gardner, dba
Aloha Dry Cleaners and Laundry,
Respondents.**

Case Number 51-95
Final Order of the Commissioner
Jack Roberts
Issued November 15, 1995.

SYNOPSIS

Where Complainant was subjected to nearly two years of continuous racial harassment by Respondent Steven Jay Gardner (Complainant's immediate supervisor throughout his employment with Respondents and the owner of Aloha Dry Cleaners after Gardner Cleaners, Inc. was involuntarily dissolved), the Commissioner awarded Complainant \$30,000 for emotional distress attributable to the on-the-job harassment, held Respondent Steven Jay Gardner jointly liable as an aider and abettor with the corporate Respondent, and found Respondent Steven Jay Gardner individually liable for the harassment that occurred after the corporate dissolution and as a successor-in-interest to the corporation. ORS 659.010(2), (6); 659.030(1)(b), (1)(g); 659.060; OAR 839-05-010; 839-05-550(3).

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Hearings Referee by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The

hearing was held on June 13 and 14, 1995, in Room 1004, State Office Building, 800 NE Oregon Street, Portland, Oregon.

The Bureau of Labor and Industries (Agency) was represented by Linda Lohr, an employee of the Agency. Earnest L. Bailey (Complainant) was present throughout the hearing and was not represented by counsel.

Gardner Cleaners, Inc. and Steven Jay Gardner (Respondents) were represented by Dana Westenhaver, Attorney at Law. Steven Jay Gardner was present throughout the hearing as Respondents' representative.

The Agency called the following witnesses (in alphabetical order): Complainant Earnest Bailey; Janet Dondelinger, Complainant's roommate; and Pamela Krigbaum, Complainant's former co-worker.

Respondents called the following witnesses (in alphabetical order): Julie Brackett, a friend of Kimberly Sisson; Daniel Joseph Gardner, Respondent Gardner's brother; Steven Jay Gardner, Respondent; David R. Lyle, Washington County deputy sheriff; Judy Ann McGowne, Complainant's former co-worker; Kimberly Ann Sisson, Complainant's former co-worker; and William Boyd Taylor, repairman for Respondents' appliances.

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

**FINDINGS OF FACT –
PROCEDURAL**

1) On May 12, 1994, Complainant filed a verified complaint with the Agency alleging that he was the victim of the unlawful employment practices of the Respondents.

2) After investigation and review, the Agency issued an Administrative Determination finding substantial evidence supporting the allegations of the complaint.

3) On April 14, 1995, the Agency prepared and served Specific Charges on Respondent Gardner Cleaners, Inc., through the Secretary of State - Corporations Division, and on Respondent Steven Jay Gardner, alleging that Respondents had discriminated against Complainant in the terms and conditions of his employment in violation of ORS 659.030(1)(b).

4) With the Specific Charges, the Agency served on Respondents the following: a) a Notice of Hearing setting forth the time and place of the hearing in this matter; b) a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case process; and d) a separate copy of the specific administrative rule regarding responsive pleadings.

5) On May 5, 1995, Respondents' attorney requested an extension of time in which to file an answer and that the hearing be rescheduled. Respondents' request for an extension of time in which to respond was granted, but the request that the hearing be rescheduled was denied.

6) On May 17, 1995, Respondents filed a timely answer in which they denied the unlawful employment practices alleged.

7) Pursuant to OAR 839-50-210 and the Hearings Referee's order, the Agency and Respondents each filed a Case Summary.

8) At the start of the hearing, counsel for Respondents stated that Respondents had received the Notice of Contested Case Rights and Procedures with the Specific Charges and had no questions about it.

9) Pursuant to ORS 183.415(7), the Agency and Respondents were orally advised by the Hearings Referee of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

10) A Proposed Order, which included an exceptions notice, was issued on August 10, 1995.

11) On August 15, 1995, Respondents, through counsel, timely requested an extension of time in which to file exceptions. An extension was granted until September 1, 1995.

12) On August 22, 1995, the Hearings Unit received a letter from William B. Gaar, attorney at law, advising that he had been retained by Respondents to file exceptions to the Proposed Order. Mr. Gaar requested an extension of time in which to file exceptions and a certified copy of the hearings tapes. An extension was granted until September 30, 1995, and copies of the tapes were received by Mr. Gaar on August 31, 1995.

13) On September 20, 1995, Respondents, through counsel, requested

a 20-day extension for filing exceptions. This request was denied.

14) On October 2, 1995, Respondents, through counsel Gaar, timely filed exceptions to the Proposed Order.

FINDINGS OF FACT – THE MERITS

1) During times material herein, Respondent Gardner Cleaners, Inc. was an Oregon corporation engaged in the operation of a laundry, cleaning and garment service within this state under the assumed business name of Aloha Dry Cleaners & Laundry and utilized the personal services of one or more employees, reserving the right to control the means by which such services were performed. During times material herein, Respondent Steven Jay Gardner was president of Respondent Gardner Cleaners, Inc.

2) On September 17, 1993, Respondent Gardner Cleaners, Inc. was involuntarily dissolved. Subsequent to this involuntary dissolution, Respondent Steven Jay Gardner continued to operate Aloha Dry Cleaners & Laundry, and was an employer in Oregon utilizing the personal services of one or more employees, reserving the right to control the means by which such services were performed.

3) Respondent Steven Jay Gardner continued to operate Aloha Dry Cleaners & Laundry at the same location where Respondent Gardner Cleaners, Inc. had previously operated the same business. There was no lapse in time between the involuntary dissolution of Respondent Gardner Cleaners, Inc. and the commencement of Respondent Steven Jay Gardner's operation. Both Respondents employed the same work force. Both

Respondents provided the same service. Both Respondents used the same machinery, equipment, and methods of production.

4) Complainant, an African-American male, began working for Respondent Gardner Cleaners, Inc. in or around April 1992 as a presser. Complainant lived in Aloha at the time, then later moved to northeast Portland. Respondent Steven Jay Gardner (hereinafter referred to as "Gardner"), a Caucasian male, hired Complainant and was Complainant's direct supervisor during Complainant's entire tenure of employment with Respondents.

5) Complainant worked continuously for Respondents from April 1992 through April 6, 1994.

6) Complainant's co-workers, from the time he was hired until March 1994, were Gardner, his supervisor; Kimberly Ann Sisson, a Caucasian female; and Pamela Krigbaum, a Caucasian female. In March 1994, Krigbaum left because of medical problems and was replaced by Judy McGowne, a Caucasian female. Krigbaum and McGowne worked together for 2 to 3 weeks before Krigbaum left work to have surgery.

7) Respondent's business was divided into two parts, with a wall dividing them. One part was a laundromat, the other a dry cleaning business. Complainant, Gardner, and Complainant's co-workers worked on the dry cleaning side. The dry cleaning side was small, about 600 to 800 square feet, and open, with the only private space being an enclosed bathroom. Complainant, Sisson, and Gardner all worked along the same wall, with Krigbaum's work station located behind Complainant.

8) Gardner and Sisson became engaged to be married in July 1992, approximately 14 months after Gardner hired Sisson.

9) In mid-summer 1992, Gardner instructed Complainant to clean one of Respondent's machines, telling him, "This is what I hired you for, boy. Get your fat ass up here."

10) Throughout the remainder of Complainant's employment, Gardner made denigrating remarks to Complainant in the workplace 2 to 3 times per week on the average. Many of those remarks were directly related to Complainant's race/color, including the following:

a) Addressing Complainant as "boy";

b) Touching Complainant's hair and asking Complainant, "Do all you black people wear this greasy shit in your hair?";

c) Calling Complainant a "grease-bag";

d) Telling Complainant, "All black people are on welfare";

e) Inadvertently drinking out of Complainant's coffee cup, then remarking, when he learned it was Complainant's cup, "I've got this black shit all over my lips";

f) Asking Complainant, "Why are you black people always grabbing your crotch? To see if it's there or what?";

g) Calling Complainant a "black ass";

h) Referring to a rap music tape as "jungle bunny music";

i) Referring to Complainant's black predecessor as "the N who used to work here".

11) Sisson, in Gardner's presence, regularly addressed Complainant as "Fred". Gardner also regularly addressed Complainant as "Fred". Complainant objected to this to no avail and asked to be called by his given name. Complainant objected because he felt it was a slave name, in that Caucasian slave owners used to choose names for their black slaves.

12) While still employed by Respondents, Complainant complained to Janet Dondelinger, his girlfriend who had been living with him for four years as of the date of the hearing, about Gardner's racial comments, including Gardner's habit of calling him "Fred".

13) Gardner did not refer to Sisson or Krigbaum or Caucasian acquaintances who came into the shop by nicknames.

14) Throughout Complainant's employment with Respondents, Gardner also referred regularly to Complainant as a "fat ass" and also called him a "scumball".

15) In September 1993, Gardner brought a large Confederate flag into work and taped it to the wall in front of Sisson's work station, which was immediately adjacent to Complainant's work station. Gardner directed Complainant to salute the flag, which Complainant declined to do. Gardner's direction to Complainant was offensive to Complainant and he told Gardner this. Despite Complainant's objection, the flag remained on the wall for approximately 2 ½ weeks before it was taken down.

16) Complainant found Gardner's behavior, as cited in Findings 9 to 11 and 14 to 15, to be offensive.

Complainant told Gardner his behavior was offensive.

17) On one occasion, Complainant called Gardner a "white devil" during a conversation in which Complainant was talking to Gardner "about the Lord" and Gardner responded by grabbing his crotch and telling Complainant "fuck you."

18) During Complainant's tenure of employment with Respondents, Gardner engaged in the following behavior of a sexual nature in Complainant's presence:

a) Telling Complainant, "little girls are ready to have sex when they bleed";

b) Exposing his penis to Sisson;

c) Asking Complainant if black men "ate pussy" and commenting, "You don't know what you're missing, boy; you should go home and try it";

d) Pulling up Sisson's skirt and telling Complainant, "You want some of this, boy; you can't have none";

e) Shoving a pair of bloody women's underwear in Complainant's face;

f) Having sexual intercourse with Sisson in the bathroom in Respondent's work place on at least two occasions, which Complainant did not directly observe but was aware of when it was occurring.

19) Complainant found Gardner's behavior, as described in Finding 18, to be offensive. Complainant told Gardner it was offensive.

20) During Complainant's employment with Respondents, Complainant complimented female co-workers on their appearance and occasionally

flirted with women in the workplace. In response to Gardner's direct question, Complainant told Gardner that black men do not "eat pussy". Complainant bought Gardner and Sisson "love oil" for Gardner's birthday. During a discussion about sex with Gardner, Complainant told Gardner that he always used condoms while having sexual intercourse and that Gardner should do the same. On various occasions while operating the pants topper, Complainant commented on the smell coming from the women's pants he was pressing.

21) Gardner believed in creating a "lighthearted, open atmosphere" in his workplace and sought Complainant's advice about problems Gardner was having about his divorce and his relationship with Sisson. Gardner believed in allowing "open relationships" to develop at work, but stated that he has "the right to do certain things (sexual) in the workplace that others can't do." For example, Gardner stated it was all right for him to kiss Sisson in the workplace but he would not allow co-workers to stop work to kiss one another. Gardner testified that joking was an everyday occurrence in the workplace, that Complainant initiated much of the joking, and that the joking included himself and Complainant calling each other names. Gardner testified that Complainant called him names like "white ass", "white honkey", "white devil", "Loose Lee", (intended as a pun on "Bruce Lee"), "fat ass", and "shorty" on a daily basis. In contrast, Gardner testified that he only referred to Complainant's race on two occasions, both times using the words "black ass" and only referred to

Complainant as "Fred" occasionally. Gardner, Sisson, and McGowne all testified that Complainant's joking included grabbing his crotch, whereas Gardner never grabbed his. Gardner testified that Complainant's joking included implying that blacks had longer penises than whites, and Sisson testified that Complainant's joking included statements that Gardner had a small penis.

22) On April 6, 1994, Gardner approached Complainant from behind and put his finger in Complainant's shirt tab to get his attention. When Complainant turned, his shirt tab tore. Complainant became upset and grabbed Gardner's shirt by the lapels, tearing Gardner's shirt about 3 inches down the front. In response, Gardner isolated Complainant's thumbs and bent them back, breaking Complainant's right thumb and tearing the ligaments in both thumbs. Gardner then walked away, returned, and ripped the back of Complainant's shirt.

23) Complainant called the police immediately afterward and complained that Gardner had assaulted him.

24) Complainant quit working for Respondent that same day because of Gardner's actions.

25) As a direct result of Gardner's actions, Complainant underwent surgery on both thumbs and was unable to work for 6 to 7 weeks because of casts on both his hands. Complainant still has some mild impairment to his thumbs.

26) Gardner has had approximately 20 years martial arts training in Japanese front stance karate. Based on his skill level, he is aware of the

"mental and physical ramifications" of all his karate actions. He believes that aggressive actions from other persons directed at him always call "for a response in kind."

27) On one occasion, Gardner told Complainant he wanted to go to Complainant's health club in northeast Portland and "say the N word as loud as I can and kick some ass."

28) Complainant has no martial arts training.

29) The greater Portland area had a number of job openings for pressers at dry cleaners during Complainant's tenure of employment with Respondents.

30) After Complainant quit, he applied for unemployment benefits. In an administrative decision, the Employment Department allowed Complainant unemployment benefits on the basis that he had voluntarily quit because he had been injured on the job. However, Complainant did not collect unemployment benefits before finding another job for the reason that he was unable to work due to having casts on both hands.

31) After Complainant quit, he applied for workers' compensation benefits based on the injury to his thumbs. Complainant's case was dismissed, with prejudice, after an October 6, 1994, scheduled hearing at which Complainant and his counsel failed to appear. Complainant offered the explanation that he had not attended because he believed, based on his counsel's earlier statements, that the matter had already been concluded with a decision denying Complainant benefits and it would be fruitless to

appeal. Complainant also denied any awareness of receiving the Order of Dismissal issued by the Workers' Compensation Board dismissing his claim, although the Order of Dismissal shows that it was mailed to Complainant's address on November 4, 1994.

32) When Complainant was first hired, he tried to ignore Gardner's racial and sexual behavior. As time went on, Gardner's racial and sexual behavior bothered Complainant more until he no longer wanted to go to work in the morning. Starting in late 1992, he began coming home uncomfortable and upset and became impatient and stressed out as a result of Gardner's behavior. He became more upset as time went on, particularly after he became the sole support of his family in June 1993. He experienced sleep disturbances and depression. He has a history of a bleeding ulcer and his stomach began to act up again. Often, after work he was so stressed out and exhausted that he only wanted to go to bed until the next morning. He came to believe that Gardner saw him only in terms of his race or color. The primary topic of conversation between Complainant and Dondelinger became Complainant's job. He only stayed on with Respondent because he had put a lot of time and effort into the job, because it was only the second job in his life he had stayed at long enough to earn a vacation, and because he had experienced a lot of racial discrimination at jobs in the past and was determined to stick it out at Respondent's business. He became angry and experienced intense feelings of wanting to kill Gardner, particularly after Gardner injured his thumbs. In Complainant's

words, "All I could think about was going and blowing his head off." He no longer trusts people to the extent he did before working for Respondents. Since working for Respondents, he has formed the opinion that white people are "users". Because of the injury to his thumbs, he lost 6 to 7 weeks income, during which time he had to sell his car, which he had just finished paying for, his VCR, and other possessions to pay household bills. The effects of Gardner's racial and sexual behavior continued for months after Complainant's termination and still bother him to some extent.

33) Complainant's testimony was found to be credible except where controverted by credible witnesses or documentary evidence. Complainant testified with conviction and in a forthright manner. He looked directly at the hearings referee or at Gardner while testifying and recalled Gardner's comments almost verbatim. His testimony was internally consistent, except for his statement on cross examination that he had never put a tack on Sisson's car seat, and his later acknowledgment on rebuttal that he had put a tack on Sisson's car seat on one occasion. In several key areas, Complainant provided logical explanations for his testimony. Complainant's testimony that he did not receive a copy of the Workers' Compensation Board's Order of Dismissal was improbable; however, his explanation of why he did not attend the hearing was credible. His testimony about why he considered "Fred" to be a racially derogatory name, given Complainant's race and color and the history of race relations in this country, was credible. Finally, his

explanation of why he continued to work for Respondents, in the face of almost daily harassment, was credible. Complainant's testimony as to the nature of the racial statements made by Gardner was corroborated by Krigbaum, also found to be a credible witness by the hearings referee. Testimony of Krigbaum and Gardner established that Krigbaum was by far the most conservative and easily offended employee in Respondent's workplace, so it is likely that she would have recalled any offensive racial or sexual statements by Complainant. However, her testimony corroborated Complainant's testimony regarding the type of racial and sexual behavior engaged in by Complainant and Gardner, with the exception of her testimony that she saw Complainant "flirt" with a woman and that Complainant "probably" whistled at a woman. Testimony by Janet Dondelinger, who was found to be a credible witness by the hearings referee, also corroborated Complainant's testimony in important areas, most notably the effect which Gardner's behavior had on Complainant.

34) Janet Dondelinger's testimony was found to be credible in its entirety. Dondelinger testified with conviction in a forthright manner. She looked directly at the hearings referee while testifying in a direct and unhesitating manner. Although Dondelinger has an obvious bias based on her long-term relationship with Complainant and stands to share in any money Complainant collects as a result of this proceeding, there was nothing in the manner or substance of her testimony to indicate that she was not telling the truth.

35) Pamela Krigbaum's testimony was found credible in its entirety, with the exception of one internal inconsistency. Krigbaum's demeanor while testifying reflected extreme anxiety. The hearings referee credits this anxiety to an extreme reluctance to repeat the specific offensive language she heard Gardner use. This was corroborated by Krigbaum's own statement that she found it "very uncomfortable" for her to use "these words" and Gardner's testimony that Krigbaum is "older" and "very strait-laced". With one exception, her testimony was internally consistent, the exception being her testimony on direct examination that she heard Gardner call Complainant a "nigger," then stating on cross examination that she didn't recall a specific instance where Gardner called Complainant by that name. Krigbaum had no apparent bias in favor of Complainant or Respondent and gave testimony adverse to both. For example, she testified that she disliked working for Respondent due to the work atmosphere created by Gardner, that she saw Complainant flirt with a woman, that Complainant "probably" whistled at a woman, that she "might have heard" Complainant call Gardner a "white boy", and that she never saw Complainant or Respondent grab their crotches. Further supporting Krigbaum's credibility is the fact that she typed and signed a written statement consistent with her testimony at the hearing 10 days after Complainant quit, before Complainant filed his complaint with the Agency, and while the events were presumably fresher in her memory.

36) Steven Gardner's testimony was found credible only when it was

verified by other credible evidence or inferences in the whole record. During his testimony, he only looked at the hearings referee while testifying about his martial arts expertise and his physical altercation with Complainant. During cross examination, he was argumentative and evasive. His testimony contained several internal inconsistencies that were significant enough to cast doubt on the rest of his testimony. For example, he denied loaning money to anyone but Complainant and Corbett Skidmore, a former employee, then testified that he had loaned money to another employee in late 1993 or early 1994. He testified that he "assumed" a rap music tape that contained the word "nigger" was Complainant's tape, then testified that Complainant told him it was his tape. He testified that he immediately took the Confederate flag down when Complainant objected to it, but also testified that he took it down sometime after Complainant had objected to it because customers might also object, comparing it to religious texts the former owner had left on the premises that he removed because they might be offensive to customers. He testified that the police report regarding his physical altercation was accurate, but his testimony as to what occurred during that altercation differed significantly from the police report. For example, the police report states that he deliberately hooked his finger in Complainant's shirt loop, whereas at the hearing he testified that his finger became hooked in Complainant's shirt loop by accident. At the hearing, he testified that he returned to Complainant and ripped the back of his shirt, whereas the police report contains no mention

of this act. His statement to Deputy Lyle that he never isolated Complainant's thumbs, in light of the damage that Complainant suffered to his thumbs, was totally unbelievable. He denied having a racial animus towards African-Americans, but failed to rebut Complainant's testimony that he told Complainant he was going to go to Complainant's health club in northeast Portland, yell the "N" word as loud as he could, and "kick some ass." Finally, his testimony differed substantially from that given by Sisson, his primary witness, most notably on the subject of the extent of her drug abuse, casting doubt on both Respondent's and Sisson's testimony.

37) Kim Sisson's testimony was found credible only when it was verified by other credible evidence or inferences in the whole record. Sisson's demeanor was one of avoidance, in that she entirely avoided looking at the hearings referee during her lengthy testimony. She had an obvious bias, in that she is engaged to Respondent Gardner. Her testimony was riddled with internal inconsistencies. For example, she testified she never heard Respondent use racial language towards Complainant, then testified Respondent and Complainant called each other "boy". She testified she was a drug user for two years and went home to North Carolina in February 1994 to "get clean." She then testified that the second year she used drugs was her first year with Gardner, which would have been 1992-93 at the latest. She testified that she never showed Complainant the tattoo on her buttock, but stated that Complainant "knew I had one on my buttock because I had

my ex-husband's name on it" without explaining how Complainant knew that. She testified that she didn't recall what she told the police about the alleged assault on her by Gardner in February 1994, but then testified she told the police that Gardner had hit her. She also testified that she couldn't remember anything about the incident because she was so high on cocaine, but then proceeded to testify about many of the events in the incident. She testified that she felt guilty about her relationship with Gardner due to her husband being in prison, but then testified that she didn't feel guilty about being in love with Gardner. Other parts of her testimony were not corroborated by Respondents' own witnesses. For example, she testified that she did not witness the physical altercation between Complainant and Gardner and told Deputy Lyle the same thing, yet Gardner and McGowne both testified that Sisson witnessed the altercation. She testified that her drug usage during her relationship with Gardner was limited to using cocaine three times. In contrast, Gardner testified that Sisson was shooting up heroin and cocaine during this time period and that Washington County had a record of Sisson's drug habit. She testified that she never heard Gardner use racial language towards Complainant, yet Gardner himself testified that he referred to Complainant as a "black ass." She testified that the Confederate flag was on the wall for three days, yet Complainant, Gardner, and Krigbaum all testified it was up for two weeks. She testified that the flag was held up by scotch tape, whereas Gardner testified it was duct tape. She testified that Complainant didn't seem

offended by the flag; Gardner testified that Complainant objected to it. She testified that Gardner was wearing pants with a zipper when he exposed his penis to her; Gardner testified that he was wearing shorts without a zipper. She testified she was hired in March 1992, whereas Gardner testified she went to work for him in April 1991. Finally, she testified having lied to the police about Gardner's alleged assault on her, then subsequently recanting. She also clearly lied to Deputy Lyle when she told him she did not witness the altercation between Complainant and Gardner.

38) Judy McGowne's testimony was found credible when verified by other credible evidence or inferences in the whole record. It was also given less weight than Krigbaum's for the reason that Krigbaum had an opportunity to witness the alleged events for two years, whereas McGowne was only there for three weeks. Her testimony contained several internal inconsistencies. She testified that she saw Complainant grab his crotch once and that she never saw Gardner grab his crotch, then testified that she observed Complainant and Gardner "grabbing their crotches". Immediately afterwards, of her own volition, she denied that she had ever seen Gardner grab his crotch. She testified that the business was a fun place to work, but also testified that there was a lot of kidding in the shop that she wasn't comfortable with and she wasn't comfortable with the fights between Gardner and Sisson. She testified that there was lots of kidding and to several examples of it, saying it happened every day, but then testified she couldn't recall any

specifics of the kidding. She testified that she saw Complainant initiate jokes on Gardner, but then couldn't recall any examples.

39) Julie Brackett's testimony was found credible.

40) William Taylor's testimony was found credible where verified by other credible evidence or inferences in the whole record. Taylor's testimony was biased by his financial interest in the well being of Respondent's business. His testimony that he never heard Gardner use sexual language is rendered suspect based on the substantial amount of time he spent with Gardner and Gardner's own acknowledgment of having "sexual conversations about any females that happened to be walking by."

41) Daniel Gardner's testimony was found credible where verified by other credible evidence or inferences in the whole record. Gardner's testimony was biased by his familial relationship with Respondent Gardner. Like Taylor, the testimony in his affidavit that he never heard Respondent Gardner use sexual language is rendered suspect based on the substantial amount of time he spent with Respondent Gardner and Respondent Gardner's own acknowledgment of having "sexual conversations about any females that happened to be walking by."

ULTIMATE FINDINGS OF FACT

1) During times material herein, Respondent Gardner Cleaners, Inc., was an Oregon corporation engaged in the operation of a laundry, cleaning and garment service within this state under the assumed business name of

Aloha Dry Cleaners & Laundry and utilized the personal services of one or more employees, reserving the right to control the means by which such service was performed. During times material herein, Respondent Steven Jay Gardner was president of Respondent Gardner Cleaners, Inc. and Complainant's immediate supervisor.

2) On September 17, 1993, Respondent Gardner Cleaners, Inc., was involuntarily dissolved. Subsequent to this involuntary dissolution, Respondent Steven Jay Gardner continued to operate Aloha Dry Cleaners & Laundry, and was an employer in Oregon utilizing the personal services of one or more employees, reserving the right to control the means by which such service was performed.

3) Steven Jay Gardner is a successor-in-interest to Gardner Cleaners, Inc.

4) Complainant, an African-American male, was employed by Respondents at Aloha Dry Cleaners & Laundry from April 1992 until April 6, 1994.

5) While Complainant was employed by Respondents, Respondent Gardner engaged in a continuing course of verbal and physical conduct of a racial and sexual nature directed at Complainant because of his race or color.

6) Respondent Gardner's conduct was unwelcome to Complainant and created an offensive working environment for Complainant.

7) Complainant suffered mental distress as a result of Respondents' conduct.

CONCLUSIONS OF LAW

1) ORS 659.010 provides, in part:

"As used in ORS 659.010 to 659.110 * * * unless the context requires otherwise:

"* * * * *

"(6) 'Employer means any person * * * who in this state * * * engages or utilizes the personal service of one or more employees reserving the right to control the means by which such service is or will be performed.

"* * * * *

"(12) 'Person' includes one or more * * * corporations * * *"

Respondents Gardner Cleaners, Inc. and Steven Jay Gardner were employers subject to ORS 659.010 to 659.110 at all times material herein.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction of the persons and subject matter herein. ORS 659.010 to 659.110.

3) ORS 659.030(1) provides, in part:

"(1) For the purposes of ORS 659.010 to 659.110 * * *, it is an unlawful employment practice:

"* * * * *

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

The comments and behavior by Respondent Gardner described in Findings of Fact (The Merits) 9 to 11, 15, 18, and 22 constitute discrimination in terms and conditions of employment

on the basis of Complainant's race and color in violation of ORS 659.030 (1)(b).

4) ORS 659.030(1)(g) provides, in part:

"(1) For the purposes of ORS 659.010 to 659.110 * * *, it is an unlawful employment practice:

"* * * * *

"(g) For any person, whether an employer or an employee, to aid, abet * * * the doing of any acts forbidden under ORS 659.010 to 659.110 * * * or to attempt to do so."

Respondent Steven Jay Gardner aided and abetted Respondent Gardner Cleaners, Inc. in the commission of the unlawful employment practices in violation of ORS 659.030(1)(g).

5) Pursuant to ORS 659.060 and by the terms of ORS 659.010, the Commissioner of the Bureau of Labor and Industries has the authority to issue a Cease and Desist Order requiring Respondents: to refrain from any action that would jeopardize the rights of individuals protected by ORS 659.010 to 659.110, to perform any act or series of acts reasonably calculated to carry out the purposes of said statutes, to eliminate the effects of any unlawful practice found, and to protect the rights of others similarly situated. The amount awarded in the Order below is a proper exercise of that authority.

OPINION

Complainant alleges that Respondents subjected him to an intimidating, hostile, and offensive working environment because of his race or color and sex in violation of ORS 659.030(1)(b).

Discrimination Based on Race or Color

A prima facie case of racial harassment in this case contains the following elements:

- (1) The Respondent is an employer as defined by statute;
- (2) The Complainant was employed by Respondent;
- (3) The Complainant is a member of a protected class (race/color);
- (4) The Respondent, or Respondent's agent, supervisory employee, or non-employee in the workplace engaged in unwelcome conduct directed at Complainant because of Complainant's race/color;
- (5) The conduct had the purpose or effect of unreasonably interfering with Complainant's work performance or creating an intimidating, hostile, or offensive working environment;
- (6) The Complainant was harmed by the conduct.

OAR 839-05-010(1); *In the Matter of United Grocers, Inc.*, 7 BOLI 1 (1987).

In this case, the Agency presented a prima facie case through credible testimony by Complainant, Krigbaum, and Dondelinger that Respondent Gardner regularly directed comments and behavior towards Complainant based on his race/color, that these comments were unwelcome, that they created an intimidating, hostile, and offensive working environment for him, and that Complainant was harmed as a result. Some of this behavior was directed at Complainant's race/color and sex, e.g., asking Complainant if black men "ate pussy" and pulling up

Sisson's skirt and telling Complainant "you want some of this, boy; you can't have none."

Respondent presented three primary defenses. First, the vast majority of the alleged unlawful conduct never occurred. Second, most, if not all, of the conduct complained of was not directed at Complainant's race/color. Third, the conduct that was admitted was welcome.

Based on the hearing referee's determination that the Agency's witnesses were more credible than Respondents', the Forum concludes that the alleged unlawful conduct related to Complainant's race/color did in fact occur. (Findings of Facts – The Merits 9 to 11, 18, and 22).

Respondent's contention that comments like "boy" and "Fred" were not racially directed, but were race-neutral products of an open work environment, is clearly erroneous. The Commissioner has previously held that the word "boy" applied to a black employee "implies an inherent inferiority" because of race and constituted racial harassment. *In the Matter of Pioneer Building Specialties Co.*, 3 BOLI 123, 131-32 (1982), *affirmed without opinion, Pioneer Building Specialties Co. v. Bureau of Labor and Industries*, 63 Or App 871, 667 P2d 583 (1983). Complainant's perception that the nickname "Fred" was directed at him, over his objections, because he was black was well-founded based on the fact that Respondent did not refer to anyone else regularly by nickname. *United Grocers, supra*, at 38. Given the historical significance of the Confederate flag in race relations in this country, it is difficult to imagine how anyone could

post a Confederate flag on the wall immediately adjacent to a black person's work station, ask him to salute it daily in any manner, and not imagine that this action would be perceived as a racial insult. The vast majority of Respondent Gardner's alleged discriminatory conduct referred directly to Complainant's race or color, e.g., "Do all you black people wear this greasy shit in your hair?" Last, the April 6, 1994, incident. Although there were no comments by Respondent Gardner that directly link his behavior that day to Complainant's race or color, Gardner's inconsistent statements about the incident, coupled with his routine racial harassment and the deliberate infliction of a serious injury on Complainant, convince the Forum that it is reasonable to infer, given the totality of the circumstances, that Complainant's race or color played a key role in the incident, that is, that the harm would not have occurred had Complainant not been a black person. OAR 839-05-015; *In the Matter of City of Umatilla*, 9 BOLI 91, 104 (1990), *affirmed without opinion, City of Umatilla v. Bureau of Labor and Industries*, 110 Or App 151, 821 P2d 1134 (1991); *In the Matter of Yellow Freight System, Inc.*, 13 BOLI 201, 218 (1994).

Respondents' defense that Gardner's conduct was not unwelcome also fails. It hinges on testimony by Respondent witnesses that Gardner maintained and promoted an open work environment in which virtually no subject or behavior was taboo, and that Complainant actively participated in the maintenance of this environment by routinely referring to Gardner in racially derogatory terms, e.g., "white

honkey." The Forum disbelieves the testimony by Respondents' witnesses as to the extent of Complainant's participation in racial joking and notes the inherent imbalance of power between employer and employee in this type of environment that tends to make it difficult for an employee to counter an employer's inappropriate remarks without fear of damaging the employee's employment status. *In the Matter of Jerome Dusenberry*, 9 BOLI 173, 187 (1991); *In the Matter of Stop Inn Drive In*, 7 BOLI 97, 114 (1988).

Discrimination Based on Sex

The Agency has charged that Complainant was a victim of same sex sexual harassment from Respondent. As noted previously, some of the allegations relating to Complainant's sex also relate directly to Complainant's race and color.

This Forum recognizes that same sex sexual harassment may constitute unlawful discrimination under ORS 659.030(1)(b) in the hostile environment context. However, in this case Respondent Gardner's sex-related behavior is inextricably intertwined with his race-related behavior, where liability has already been established. The Forum is unable to draw a clear-cut distinction between the two for purposes of establishing liability and setting damages in this case, and therefore declines to embark upon untrodden areas of the law when it is not necessary to do so.

Continuing Violation

The Agency seeks damages for Respondents' unlawful conduct during the entire period in which it occurred, from midsummer 1992 until April 6,

1994. The Commissioner has the authority to award damages for any alleged unlawful practices that are of a "continuing nature," so long as the complaint is filed "within one year of any date of occurrence." The test for determining if the unlawful practices are of a "continuing nature" is whether or not they are shown to be "a series of related acts against a single individual that were discriminatory." *In the Matter of Kenneth Williams*, 14 BOLI 16, 25 (1995).

In this case, the Agency established that Respondent Gardner engaged in discriminatory harassment against Complainant on a routine basis, starting in mid-summer 1992 and ending on Complainant's last day of work on April 6, 1994. The specific acts of harassment were all related to Complainant's race/color and/or sex. Complainant filed his complaint with the Bureau on May 12, 1994, slightly more than a month after the last discriminatory act occurred.

Based on the foregoing, the Forum concludes that the Agency established a continuing violation and that Complainant is eligible for an award of damages for the time period extending from mid-summer 1992 through April 6, 1994.

Aiding and Abetting

The Agency alleges that Respondent Gardner aided and abetted Respondent Gardner Cleaners, Inc. in the commission of the alleged discriminatory acts. A review of the facts shows that, at all times material herein, Gardner was the president of Gardner Cleaners, Inc., as well as Complainant's immediate supervisor and the individual who committed the

discriminatory acts. The Commissioner has long held that corporate presidents are liable for aiding and abetting their Respondent corporations where the presidents were found to have personally sanctioned or engaged in the alleged discriminatory acts. *In the Matter of Salem Construction Company, Inc.*, 12 BOLI 78, 87-88, 90 (1993); *In the Matter of Allied Computerized Credit & Collections, Inc.*, 9 BOLI 206, 214, 218 (1991); *In the Matter of Sapp's Realty, Inc.*, 4 BOLI 232, 270-72 (1985); *In the Matter of N.H. Kneisel, Inc.*, 1 BOLI 28, 30, 38 (1976). Accordingly, the Forum finds Respondent Steven Jay Gardner aided and abetted Respondent Gardner Cleaners, Inc. in the commission of the alleged unlawful employment practices.

Successor-in-Interest

There are two Respondent employers in this case. The first in time is Gardner Cleaners, Inc., which ceased to exist on September 17, 1993, when it was involuntarily dissolved. The second is Steven Jay Gardner, who was the corporate president of Gardner Cleaners, Inc., and assumed ownership and control of Aloha Dry Cleaners & Laundry, Gardner Cleaners, Inc.'s business operation, upon Gardner Cleaners, Inc.'s involuntary dissolution. Whether or not Steven Jay Gardner is a successor-in-interest to Gardner Cleaners, Inc. relates directly to the issue of liability in this case.

The Commissioner has previously held that the test for determining whether or not an employer is considered a "successor" is an individualized determination, linked to the similarities between the predecessor and

successor entities. The elements to consider are the similarities of: the name or identity of the business; its location; the lapse of time between the previous operation and the new operation; the work force employed; the product or service which is provided; and the machinery, equipment, or methods of production used. *In the Matter of G & T Flagging Service, Inc.*, 9 BOLI 67, 77 (1990). Where a corporate Respondent was in an "involuntarily dissolved" status and the individual Respondents, who were the owners and operators of the business, continued operating the same business at the same location with the same work force under the same name, the Commissioner held that the individual Respondents were operating as a co-proprietorship and succeeded to the corporation's liability. *In the Matter of Palomino Cafe and Lounge, Inc.*, 8 BOLI 32, 43-44 (1989).

The facts in this case regarding successor liability are almost identical to those in *Palomino*, with the exception that Respondent's business is a laundromat/dry cleaners instead of a restaurant and that there is one sole proprietor instead of two. All six elements of the test articulated in *G & T Flagging* are satisfied. Consequently, the Forum finds that Respondent Steven Jay Gardner is a successor-in-interest to Respondent Gardner Cleaners, Inc.

Liability

Respondent Gardner Cleaners, Inc., as an employer, and Respondent Steven Jay Gardner, as an individual aider and abettor, are both liable for all discriminatory conduct perpetrated by Gardner from mid-summer 1992 until

September 17, 1993. As of September 17, 1993, Respondent Gardner Cleaners, Inc. involuntarily dissolved and became a defunct corporation. There was no evidence presented that there are any corporate assets or that the corporation has come back to life. From September 17, 1993, Respondent Gardner was, in effect, operating Aloha Dry Cleaners & Laundry as a sole proprietor and is individually liable for all of his discriminatory conduct after that date. Respondent Gardner is also individually liable, as a successor-in-interest, for the discriminatory practices of Respondent Gardner Cleaners, Inc.

Damages

Complainant experienced intense and prolonged mental suffering as a primary and direct result of Respondent Gardner's unlawful harassment. Added financial stress caused by Dondelinger's schooling was the only factor completely extrinsic to Complainant's workplace that contributed to his mental suffering.

Complainant's mental suffering manifested itself in a number of ways. He felt uncomfortable at work and had difficulty motivating himself to go to work in the morning. He had trouble sleeping and became depressed. His complaints about his job permeated his conversations at home with Dondelinger. His stomach ulcer began to bleed again. He was exhausted when he came home from work. He became angry, impatient, and stressed out from having to put up with Respondent Gardner's repeated racial and sexual harassment for nearly two years.

As a result of the injury to his thumbs, he experienced intense feelings of wanting to kill Respondent Gardner. He lost six to seven weeks' income due to his inability to work, during which time he had to sell his car, his VCR, and other possessions to pay the bills. In addition, he still has a mild impairment to both thumbs.

Because of Respondent Gardner's conduct, Complainant no longer trusts people to the extent he did before working for Respondents. Respondent Gardner's behavior has also given him a negative perception of white people in general.

These effects of Respondent Gardner's conduct on Complainant continued for months after his termination and still bother him, one year later, although to a lesser extent.

These elements of mental suffering are all compensable. In this case, the Agency sought \$50,000 in damages for mental suffering. Based on the duration, extent, and types of mental suffering experienced by Complainant, the Forum concludes that \$30,000 is an appropriate award of damages to compensate Complainant for his mental suffering caused by harassment based on his race and color.

Exceptions

Respondents filed exceptions to much of the Proposed Order. This section responds to those exceptions. In some places, the Final Order has been revised in response to issues raised in Respondents' exceptions.

1) Findings of Fact 9 and 10: These are based on a determination that Complainant was more credible

than Respondents' witnesses. This determination remains unchanged.

2) Finding of Fact 13: The irrelevant portion of Finding of Fact 13 has been deleted.

3) Finding of Fact 15: The ultimate issue here is that Respondent's action was related to Complainant's race and color and was offensive to him.

4) Finding of Fact 16: This Finding of Fact has been rewritten to more accurately reflect the testimony on which it was based.

5) Findings of Fact 17 and 18: These Findings of Fact are based on a credibility determination that remains unchanged.

6) Finding of Fact 19: This Finding of Fact has been rewritten to more accurately reflect the testimony on which it was based.

7) Findings of Fact 22 and 32: These findings are relevant because of the Forum's conclusion that the described behavior was based Complainant's race/color.

8) Findings of Fact 26 and 27: These Findings of Fact are relevant to show Respondent's state of mind during his physical altercation with Complainant.

9) Finding of Fact 33: The sentence regarding Complainant's "demeanor" at hearing has been deleted. Deputy Sheriff Lyle's statement was taken into account and is reflected in the first sentence of the Finding of Fact; however, this contradiction does not change the conclusion of the Forum that Complainant was more credible than Respondents' witnesses regarding the alleged discriminatory incidents.

10) Finding of Fact 34: This Finding of Fact has been changed to reflect Dondelinger's potential financial gain. Finding of Fact 33 notes that Dondelinger's testimony primarily related to the effects of Respondent's behavior on Complainant, as opposed to her observation of the actual behavior.

11) Finding of Fact 36: The referee is not prohibited from making and noting observations as to the demeanor of witnesses. The sentence alluding to an alleged arrest for assault has been deleted.

12) Finding of Fact 38: Krigbaum's anxiety was due to being compelled to repeat words uttered by Respondent that were extremely offensive to her. McGowne's nervousness, so far as the record reflects and the referee could ascertain, was the general nervousness that any witness feels when compelled to testify.

13) Finding of Fact 40: Taylor's testimony is discredited based primarily on the logical inconsistency described in sentence 3 of the Finding of Fact.

14) Finding of Fact 41: Gardner's testimony is discredited primarily on the logical inconsistency described in sentence 3 of the Finding of Fact.

Discrimination Based on Race or Color

The Forum disagrees with Respondents' opinion that Respondents' witnesses were more credible than Complainant's witnesses. The Forum disagrees with Respondents' conclusions about the legal significance of the behavior centered around the Confederate flag, the use of the name "Fred", and Respondent's use of the term "black ass".

Same Sex Harassment/Sexual Harassment Not Directed at Complainant

The Forum disagrees with Respondent's exception that same sex sexual harassment is not actionable under ORS 659.030. However, for reasons cited earlier in this Order, Respondent has been relieved of liability based on Complainant's allegations of sex harassment.

Respondent Unaware of any Sexual Harassment by Co-worker

The Forum has not found Respondent liable for any alleged sexual acts directed at Complainant by his co-worker Sisson.

Continuing Violation

Contrary to Respondent's argument, the Forum finds the record supports the conclusion that a continuing violation occurred.

Liability

The Forum has not held Respondent Gardner liable as an employer for unlawful acts committed prior to September 1993. Rather, Respondent Gardner is held individually liable for acts committed prior to September 1993 as an aider and abettor in violation of ORS 659.030(1)(g) and as a successor-in-interest.

Damages

Respondent is correct that punitive damages are not available as a means of relief in this Forum. The damages awarded by the Forum are not punitive. They are intended to compensate Complainant for his mental distress. This Forum has long held that the Commissioner is authorized to award damages for mental distress where the evidence support such an award. *In*

the Matter of Fred Meyer, Inc., 1 BOLI 84 (1978), *affirmed as to damages, Fred Meyer v. Bureau of Labor*, 39 Or App 253, 592 P2d 564, *rev den* 287 Or 129 (1979).

Amount of Damages

The Forum disagrees with Respondents' assessment of the facts and concludes that a \$30,000 award for mental distress is appropriate. Regarding Complainant's medical history, "Respondents must take Complainants as they find them." *In the Matter of Courtesy Express, Inc.*, 8 BOLI 139 (1989).

ORDER

NOW, THEREFORE, as authorized by ORS 659.060(3) and 659.010 (2), and in order to eliminate the effects of the unlawful practices found, Respondents Gardner Cleaners, Inc. and Steven Jay Gardner are hereby ordered to:

1) Deliver to the Fiscal Services Office of the Bureau of Labor and Industries, State Office Building, Ste. 1010, 800 NE Oregon Street, #32, Portland, Oregon 97232-2162, a certified check, payable to the Bureau of Labor and Industries in trust for EARNEST L. BAILEY, in the amount of:

a) THIRTY THOUSAND DOLLARS (\$30,000), representing compensatory damages for the mental and emotional distress suffered by EARNEST L. BAILEY, as a result of Respondents' unlawful practices found herein, PLUS

b) Interest at the legal rate on the sum of \$30,000 from the date of the Final Order herein until Respondents comply therewith, and

2) Cease and desist from discriminating against any employee because of that employee's race or color and sex.

**In the Matter of
JACK CRUM RANCHES, INC.,
Sunset Ranches, Inc., and Monty
Crum, dba M. C. Ranch,
Respondents.**

Case Number 47-95

Final Order of the Commissioner

Jack Roberts

Issued December 12, 1995.

SYNOPSIS

Respondents failed to pay to Claimant all wages due and owing upon termination of employment. The corporate employers failed to appear by counsel and defaulted. The Commissioner found that Respondents' failure to pay was willful and ordered payment of the unpaid wages and civil penalty wages. The Commissioner rejected Claimant's claim for fuel expenses, but ordered Respondent Monty Crum to reimburse Claimant for a repair expense. ORS 652.140(2); 652.150; 652.332; 653.045; OAR 839-50-110(1); 839-50-330.

The above-entitled contested case came on regularly for hearing before Warner W. Gregg, designated as Hearings Referee by Jack Roberts, Commissioner of the Bureau of Labor

and Industries of the State of Oregon. The hearing was held on May 3, 1995, in the conference room of the Bureau of Labor and Industries, 200 SE Hailey Avenue, Suite 308, Pendleton, Oregon. The Bureau of Labor and Industries (the Agency) was represented by Alan McCullough, an employee of the Agency. Respondent Jack Crum Ranches, Inc. (Respondent JC Ranches), a corporation, was not represented by counsel. Respondent Sunset Ranches, Inc. (Respondent Sunset), a corporation, was not represented by counsel. Respondent Monty L. Crum, dba MC Ranch (Respondent Crum), was present throughout the hearing, was not represented by counsel, and argued the evidence and cross-examined witnesses. Joe F. Marek (Claimant) was present throughout the hearing and was not represented by counsel.

The Agency called as witnesses Claimant; former State of Oregon Employment Department Employment Specialist Jim Didion; Agency Compliance Specialist Rhoda Briggs (by telephone); and Ellensburg Rodeo Association accountant Oliver Bivens (by telephone). Respondent Crum called as witnesses himself and Ralph Crum, secretary of Respondent JC Ranches and Respondent Sunset. Respondents JC Ranches and Sunset, who were in default for failure to appear by counsel, presented no evidence.

Having fully considered the entire record in this matter, I, Jack Roberts, Commissioner of the Bureau of Labor and Industries, make the following Ruling on Motion, Findings of Fact (Procedural and on the Merits), Ultimate

Findings of Fact, Conclusions of Law, Opinion, and Order.

RULING ON AGENCY MOTION TO AMEND

During the Agency's presentation, at the close of Claimant's testimony, the Agency moved to amend the Determination Order as to the number of days worked from 39 to 36, and as to the amount of wages allegedly unpaid from \$1,710 to \$1,410; the Agency also sought to add expense items to which Claimant testified: \$100 for truck fuel and \$54 for radiator repair material. The Hearings Referee took the Agency's motion under advisement.

Evidence admitted without objection into the record may be used as the basis for amendment of the charging document. *In the Matter of Clara Perez*, 11 BOLI 181, 183 (1993). Employee expenses, while not wages, are nonetheless recoverable with a wage claim where there is an agreement for reimbursement or the expenses are of a type normally reimbursed by the employer. *In the Matter of Sylvia Montes*, 11 BOLI 268, 278 (1993); *In the Matter of Central Pacific Freight Lines, Inc.*, 7 BOLI 272, 279 (1989). However, an Order of Determination sets the upper limit on the issues and relief which this forum may consider as to a defaulting party. *In the Matter of Secretarial Link*, 12 BOLI 58, 59 (1993); *In the Matter of Ebony Express*, 7 BOLI 91, 97 (1988); *In the Matter of Jack Mongeon*, 6 BOLI 194, 201-02 (1987). Accordingly, the Agency's motion to amend to conform to the evidence is allowed in part and denied in part as follows.

As to all three Respondents, because it reduces the amount sought as unpaid wages, the number of days

worked is amended to 36, the amount earned is amended to \$3,600, and the balance alleged as due and owing is amended to \$1,410. The amendment for expenses, of which the defaulting corporate Respondents had no notice, is denied as to Respondents Sunset and JC Ranches, and allowed as against Respondent Crum only, in the amount of \$154.

FINDINGS OF FACT – PROCEDURAL

1) On or about December 1, 1993, Claimant filed a wage claim with the Agency in which he alleged that he had been employed by Respondents, who had failed to pay all wages earned and due to him.

2) On June 7, 1994, Claimant assigned to the Commissioner of the Bureau of Labor and Industries, in trust for Claimant, all wages due from Respondents.

3) In July 1994, the Agency served Order of Determination No. 93-284 (Determination Order) by certified mail on Jack Crum, as registered agent for J. C. Ranches, Inc., PO Box 67, Lone, Oregon 97843, on Monty Crum as registered agent for Sunset Ranches, Inc., PO Box 67, Lone, Oregon 97843, and on Monty Crum as owner of MC Ranch, PO Box 67, Lone, Oregon 97843. The Determination Order was based upon the wage claim filed by Claimant and the Agency's investigation and found that Respondents owed Claimant \$3,900 in wages computed at \$100 per day for a total of 39 days, less the sum of \$2,190, leaving a total of \$1,710 unpaid. The Determination Order found further that the failure to pay was willful and that there

was due and owing the sum of \$3,000 in civil penalty wages.

4) The Determination Order required that, within 20 days, Respondents either pay these sums in trust to the Agency or request an administrative hearing and submit a written answer to the charge.

5) On August 22, 1994, by mail, the Agency received from Respondent Crum a written answer to the Determination Order and a request for hearing. The answer admitted that Claimant had been employed by Respondents for 31½ days at \$90 per day and denied that Claimant was owed further wages.

6) On March 22, 1995, at the Agency's request, the Hearings Unit issued a Notice of Hearing, setting forth the time and place of the hearing, which was served on each Respondent by regular U.S. mail, postage prepaid, as follows:

Jack Crum Ranches, Inc., Attn: Jack Crum, Reg. Agent, PO Box 67, Lone, Oregon 97843

Sunset Ranch, Inc., Attn: Monty Crum, Registered Agent, PO Box 121, Lone, Oregon 97843

Monty Crum, dba MC Ranch, PO Box 121, Lone Oregon 97843

7) Served on each Respondent with the Notice of hearing was the following: a) a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413; and b) a complete copy of Oregon Administrative Rules (OAR) 839-50-000 to 839-50-420, regarding the contested case process.

8) Section V. of the Determination Order contained the following, in part:

"The employers are entitled to a contested case hearing in connection with this Order of Determination. This hearing * * * will be conducted in accordance with ORS 652.310 to 652.405, ORS Chapter 183 and the Bureau's Administrative Rules pertaining to such hearings. NOTE: If an employer is a corporation, it must be represented by an attorney. * * *"

The notice of contested case rights and procedures contains the following, in part, in a box below the title of the document:

"2) IF YOU ARE A GOVERNMENT AGENCY, A CORPORATION, OR AN UNINCORPORATED ASSOCIATION, YOU MUST BE REPRESENTED BY AN ATTORNEY WHO IS A MEMBER OF THE OREGON STATE BAR IN GOOD STANDING. See No. 2 Below"

On the same page of that document is the following, in part:

"2) RIGHT TO AN ATTORNEY AND REPRESENTATION AT HEARING

"It is customary for the respondent to be represented by an attorney at the hearing. Whether a respondent is represented by an attorney generally depends upon the complexity of the case; however, all government agencies, corporations, and unincorporated associations must be represented by an attorney. OAR 839-50-110(1). * * * Any attorney appearing at the hearing on your behalf must be a member in good standing of the

Oregon State Bar. OAR 839-50-020(7)."

9) On April 3, 1995, the Agency wrote to Jack Crum, Registered Agent, Jack Crum Ranches, Inc., and Monty L. Crum, Registered Agent, Sunset Ranch, Inc., requesting documents regarding Claimant's claim and advising both corporations as follows:

"[B]ased on Oregon Revised Statutes and the administrative rules this hearing will be conducted under, all corporations **must be** represented by counsel, including the filing of an Answer and a request for hearing. Because I am unsure if you were aware of this fact when you filed a request for hearing, I have not sought to have you declared in default and have instead scheduled a hearing so that this matter can be heard on its merits. However, you are hereby put on notice that J.C. Ranch, Inc. and Sunset Ranches, Inc. **must be** represented by counsel in all communications of any kind with regard to the upcoming hearing and at the hearing itself, including your response to this letter. M.C. Ranch need not be represented by counsel. I have enclosed a copy of OAR 839-50-110 for your review." (Emphasis in original.)

10) On April 20, 1995, the Agency advised the Hearings Referee that it had not received the documents requested from Respondents and requested a discovery order for their production. On April 24, 1995, the Hearings Referee issued a discovery order requiring that the Agency and each Respondent file a summary of the case pursuant to OAR 839-50-200

and 839-50-210, and that Respondents particularly provide therein those documents previously requested by the Agency.

11) On April 25, 1995, the Agency filed a motion to amend the Determination Order substituting "Jack Crum Ranches, Inc." for "J.C. Ranch, Inc.," "Monty L. Crum, dba Monty Crum Ranch" or "Monty L. Crum dba M.C. Ranch" for "M.C. Ranch," and "Sunset Ranches, Inc." for "Sunset Ranches." That motion was granted at the commencement of the hearing.

12) The Hearings Unit received the Agency's case summary on April 27, 1995, and received Respondent Crum's case summary on May 1, 1995.

13) At the commencement of the hearing at 9 a.m. on May 3, 1995, Respondents JC Ranches and Sunset had not appeared by counsel and had not advised the Hearings Referee of any reason for non-appearance. The Hearings Referee ruled that Respondents JC Ranches and Sunset were in default, having been properly served with the Notice of Intent and having failed to file an answer through counsel or otherwise appear by counsel either prior to or at the hearing.

14) Because a Notice of Hearing and attachments thereto were properly addressed to Respondent JC Ranches and Respondent Sunset and were mailed with postage prepaid and not returned undelivered, the Hearings Referee finds that Respondents JC Ranches and Sunset each received the Notice of Contested Case Rights and Procedures.

15) Respondent Crum received the Notice of Contested Case Rights and Procedures and stated he had no questions about it.

16) Pursuant to ORS 183.415(7), Respondent Crum, Claimant and the Agency were orally advised by the Hearings Referee of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

17) At the close of the hearing, the Hearings Referee left the record open to allow Respondent Crum to submit an exhibit, which was received May 11, 1995. The record herein closed on May 11, 1995.

18) The Proposed Order, which included an Exceptions Notice, was issued on October 3, 1995. Exceptions, if any, were to be filed by October 13, 1995. No exceptions were received.

FINDINGS OF FACT – THE MERITS

1) At times material herein, Respondent Crum was the proprietor of Monty L. Crum Ranch (sometimes known as "MC Ranch"), with addresses of HCR 11, Box 86A, Prescott, Washington, and PO Box 121, Lone, Oregon. At times material herein, Respondent Sunset was an Oregon corporation engaged in agricultural production with an address of PO Box 121, Lone, Oregon. At times material herein, Respondent JC Ranches was an Oregon corporation engaged in agricultural production with an address of PO Box 67, Lone, Oregon. Respondent Crum, at PO Box 121, Lone, was president of Respondent Sunset, and Jack Crum, at PO Box 83, Lone, was president of Respondent JC Ranches. Ralph S.

Crum, at PO Box 67, Lone, was secretary of both corporations. In addition, Ralph S. and Lou B. Crum were apparent proprietors of "Crum Ranches," Lone, Oregon.

2) During times material herein Respondent Crum, an individual, and corporate Respondents JC Ranches and Sunset operated ranches in and around Lone, Oregon, and on land elsewhere in Oregon and southern Washington, as did the proprietorship "Crum Ranches," and each of said entities engaged or utilized the personal service of one or more employees.

3) At times material, Jim Didion worked for the State of Oregon Employment Department as an Employment Specialist. He was the veterans' representative and agricultural representative in the Department's Pendleton office. His duties included taking job orders from employers and making referrals of applicants to employers. In late August 1993, his department had a job order for a wheat combine* operator from Ralph Crum, PO Box 67, Lone, Oregon, 97843. The salary was stated at \$100 per day, which was more than normal. Didion knew that Lone was 70 miles west and south from Pendleton and that the Crum family also had operations in Clyde, Washington, east of Walla Walla and over 100 miles from Pendleton.

4) At times material, Claimant was an experienced combine operator. He had owned a ranch and his own combines in the Yakima valley of Washington and had worked at ranching since his youth in Idaho. He had a farm endorsed Oregon drivers license.

5) On or about August 30, 1993, Claimant spoke with Didion regarding the job order for a combine operator. Didion gave Claimant a job referral, instructing him to call Ralph Crum at (503) 422-7247, in order to get reporting instructions. Didion told Claimant that the pay was \$100 per day, mentioning that Respondents' operations were a long ways out (i.e., of Pendleton).

6) On the evening of August 30, Claimant called Ralph Crum and was instructed to report on the following day to Respondent Crum at a ranch location near Clyde, Washington. There was no discussion of salary. Claimant arrived at the Clyde location about noon on August 31. He gave Respondent Crum a copy of the Employment Department job referral.

7) Respondent Crum put the referral in a shirt pocket and he and Claimant discussed Claimant's experience. They did not discuss salary. Respondent had Claimant ride a combine with another operator for a short time and then assigned him to his own machine. Claimant worked the rest of that day on the combine.

8) Claimant operated the combine until about September 10, when he assisted in moving the combines to Lone. He continued working for Respondents driving truck in Oregon and Washington, hauling grain and livestock until on or about October 15, 1993, when the employment ceased.

9) Respondent Crum directed the harvest and ranching employment of his ranch, of Respondents Sunset and

* combine, n. a power-driven harvesting machine for cutting, threshing, and cleaning grain. *Webster's II New Riverside University Dictionary*, 1988.

JC Ranches, and of the proprietorship Crum Ranches. He was Claimant's direct supervisor. He kept days worked by each employee in a "time book." The entries were coded to indicate which entity was chargeable for the labor and also some indication of the location of the day's work. Entries were made generally either on or shortly after the day involved. Respondent Crum also required that each employee turn in a time slip for each pay period. Respondent Crum's record showed 30½ days worked by Claimant between August 31 and October 14, 1993.

10) During his employment with Respondents in 1993, Claimant marked on a calendar each day that he worked, where and generally what he did. He made the note for each day on or shortly after the day involved. Claimant's record showed 34 full days and two half days worked between August 31 and October 15, 1993.

11) Respondents caused the following checks to issue to Claimant for employment during the dates indicated, for a total of 30 days worked:

a) Check number 14128, dated September 13, 1993, issued by Crum Ranches to cover August 31 (½ day), September 1 and 2 (2 days), and September 3 (½ day) at \$90 per day (gross \$270, net \$228.34);

b) Check number 7238, dated September 13, 1993, issued by Respondent Crum to cover September 7, 8, and 9 (3 days), at \$90 per day (gross \$270, net \$228.34);

c) Check number 1213, dated September 13, 1993, issued by Respondent JC Ranches to cover ½ of

September 10, 11, and 13 (3 days), at \$90 per day (gross \$135, net \$121.67);

d) Check number 1163, dated September 13, 1993, issued by Respondent Sunset to cover ½ of September 10, 11, and 13 (3 days), at \$90 per day (gross \$135, net \$121.67);

e) Check number 1245, dated October 4, 1993, issued by Respondent JC Ranches together with check number 1244, dated October 2, 1993, issued by Respondent JC Ranches to cover ½ of September 20, 21, 22, 23, 24, 25, 27, 28, 29, and 30 (10 days), at \$90 per day (gross \$450, net \$303.56 plus \$50, total \$353.56);

f) Check number 1193, dated October 4, 1993, issued by Respondent Sunset to cover ½ of September 20, 21, 22, 23, 24, 25, 27, 28, 29, and 30 (10 days), at \$90 per day (gross \$450, net \$303.56 plus \$50 unrecorded by check, but included in W-2, total \$353.56);

g) Check number 7563, dated October 15, 1993, issued by Respondent Crum to cover October 4, 5, 6, 7, 8, 9, 11, and 13 (8 days), at \$60 per day (gross \$480, net \$374.28);

h) Check number 1254, dated October 19, 1993, issued by Respondent JC Ranches to cover ½ of October 1, 2, and 12 (3 days), at \$90 per day (gross \$135, net \$121.67);

i) Check number 1205, dated October 19, 1993, issued by Respondent Sunset to cover ½ of October 1, 2, and 12 (3 days), at \$90 per day (gross \$135, net \$121.67).

12) Check number 7564, dated October 15, 1993, was issued by Respondent Crum to Claimant in the amount of \$98.48 and noted "fuel." It

bore the endorsement "Joe Marek, PO Box 102 Adams Ore 566-3526." It was noted by the computer accounting system as being for fuel.

13) At times material, Claimant was the owner of an elaborate beaded horse trapping, consisting of beaded collar, bridle, saddlebags and fringes, which he valued at \$26,000. On occasion, for a fee, he rode a horse outfitted with the beaded trappings at events such as rodeos. In 1990, he led a group of Indians off a hill into the arena at the Ellensburg (Washington) Rodeo. While working for Respondents he showed pictures of the trappings to Respondent Crum.

14) Respondent Crum's time book credited Claimant with working September 3, but not on September 4, 5, or 6. Respondent Crum testified that the notation "Ellensburg [sic] Rodeo" and an arrow with "½ day" were written on the exhibit as he prepared a summary for hearing. The notation on his summary was "9-3 worked until lunch, combine plugged up, Joe went to lead Indians at some rodeo. Gone until Tuesday. 9-4, 5, 6 not at work." In addition, September 5 was a Sunday and none of the Crum family ranches worked on Sunday.

15) On September 5, 1993, at Clyde, Claimant had orders from "Bob," an employee of Respondents, to repair a truck with a gear out and to run the combine. "Shannon," another employee, also ran a combine that day. Respondent Crum was not there. Claimant's calendar showed that he worked full days on September 3, 4, 5 and 6, 1993. He had not participated in the Ellensburg Rodeo since 1990.

16) At times material, Oliver Lee Bivens was a partner in Bivens, Johnson & Wilson, Certified Public Accountants, Ellensburg, Washington. He had for several years acted as accountant for the Ellensburg Rodeo Association. He had a record of all checks issued by the Association. His record showed that a Maynard Linder led the Indians off the hill into the arena in 1993 and 1994. The 1993 rodeo was held September 3, 4, 5, and 6, and each year providers were normally paid either just before the rodeo, or at the time a service was rendered, and certainly within two weeks. Bivens had no record of any payment to Joe F. Marek in August or September 1993.

17) Claimant worked a full day at the Clyde site on September 3 and 4. He also worked there September 5 and 6. He worked a full day for Respondent Crum on October 14, and a half day on October 15.

18) On September 10, when Claimant helped move the combines from Clyde to Lone, there was a radiator leak on the combine driven by "Shane," an employee, which Respondent Crum wanted repaired before taking it to the Lone ranch. It was left in Hermiston with the driver. Respondent Crum intended to return and help Shane get it repaired.

19) On September 10, Claimant took some men back to Clyde and was asked by Respondent Crum to go through Hermiston and assist Shane. Claimant went to Clyde first and later learned in Hermiston that Shane was not repairing the radiator. Claimant and a man who had returned with him removed the radiator, took it to Claimant's home in Adams, Oregon, and

completed the repair. Claimant spent about \$54 of his own funds for repair materials.

20) On September 11, Claimant returned to Hermiston, met Shane, and reinstalled the combine radiator. Claimant's pickup was damaged in a dust storm while he was following Shane's repaired combine from Hermiston to lone.

21) On or about September 30, Claimant took a truckload of potatoes from the port of Morrow to the Washington ranch. He ran out of fuel near Athena, Oregon, and bought about \$100 worth of fuel for the truck with Respondent Crum's approval and the understanding that he would be reimbursed. The truck also had two flat tires that trip.

22) On or about September 11, Claimant gave the receipt for the radiator repair materials he had purchased to Respondent Crum. On or about October 1, Claimant gave the receipt for the fuel he had purchased to Respondent Crum. He did not recall ever being repaid for either item.

23) The various accounts of Respondents Crum, Sunset, and JC Ranches were preserved on a computer. In some instances, Respondents Sunset and JC Ranches operated as a joint venture and split the labor costs for certain dates. There was a notation on the computer of each payroll check issued and the deductions for state and federal taxes, social security, and Medicare. The actual checks, however, were hand written. The account of Crum Ranches (Ralph and Lou Crum) was not on the computer.

24) Claimant received W-2 forms from Respondents for 1993 showing gross earnings as follows: from "Jack Crum, Inc." (Respondent JC Ranches): \$720; from "Sunset Ranches" (Respondent Sunset): \$720; from Monty Crum (Respondent Crum): \$750. There was no evidence of a W-2 from Crum Ranches, which paid a gross of \$270. He did not receive a slip with each check detailing the deductions for state and federal taxes, social security, and Medicare.

25) Respondent Crum's testimony outlined 20 days at \$90 per day and 10½ days at \$60 per day. His time book seemed to reflect 22 days at \$90 per day and 8½ days at \$60 per day, and the paychecks show 22 days at \$90 and 8 days at \$60. The answer to the Determination Order submitted by Respondent Crum stated "We have him down for 31½ days at \$90.00 per day." According to those figures, Claimant's gross earnings were, respectively, \$2,430, \$2,490, \$2,460, and \$2,835.

26) According to Respondent Crum, Claimant and other employees had an option between \$90 per day plus board and room or \$100 per day, providing their own food and sleeping elsewhere. During the summer, breakfast was at the house between 6 and 6:30 a.m.; most of the crew met there and when finished with breakfast went to the field, beginning productive work by 7 a.m. Lunch was brought to the field around 1:00 p.m. The machines were run until 8 p.m. and then were serviced. The evening meal was put on the table by 9 p.m. Some of the crew showered before they ate, others came by the house and ate and then

showered. The evening meal was scattered as to time of attendance. Around October 1, because of early darkness and dew, wages and work time were rolled back. Work started after breakfast in the morning, lunch was at the house at noon, and dinner was at 6:30 p.m. Pay was rolled back to \$60 a day, plus board and room. In 1993, the employees were notified at breakfast (at lone) sometime around October 1 that pay would be on the basis of the shorter day.

27) Claimant was not aware of the reduction to \$60 a day until he received his last check from Respondent Crum on October 15.

28) Respondents did not pay Claimant for September 4, 5, and 6, or for ½ of September 3. Despite the notation in the time book that Claimant worked ½ day on October 14, Respondent Crum did not pay Claimant for October 14 or 15. Claimant and Respondent Crum were in substantial agreement as to the other days worked by Claimant for Respondents between August 31 and October 15, 1993. They were not in agreement as to the rate at which Claimant worked.

29) Rhoda Briggs was a Compliance Specialist with the Agency at times material. As part of her job duties, she investigated Claimant's wage claim, gathered documents and initiated correspondence. On April 25, 1994, she sent Respondents a demand letter. It was addressed to Monty Crum, President, Sunset Ranches, Inc., Jack Crum, President, Jack Crum Ranches, Inc., and Ralph Crum, Secretary, Sunset Ranches/Jack Crum Ranches, all at PO Box 67, lone, Or 97843. Because she

received no response, she telephoned Ralph Crum on May 31, 1994. He stated that he was involved with Sunset and Jack Crum Ranches, that Monty and Jack Crum are his sons, and that he was pretty sure that Claimant was paid in full. He stated that Monty owned another ranch where Claimant also worked. He referred Briggs to an accountant, from whom she received canceled checks and payroll information on June 17, 1994. The canceled checks were copies of those introduced by Respondent Crum at hearing except for the September 13 check from Crum Ranches. A cover letter from the accountant attempted to reconcile the checks to Claimant's earnings.

30) In August 1994, Briggs received a letter from Monty Crum in which he stated that the rate of pay was \$90 per day, and disputed the number of days worked by Claimant. In a letter to Monty Crum on September 30, 1994, Briggs asked for exact days and hours Claimant worked from Respondents' records. She received no reply.

31) In calculating the wages due, Briggs mistakenly counted days Claimant was off for the Pendleton Round Up as being days worked for a total of 39 days. An amended calculation was done in an attempt to correct that with a total of 38 days. Briggs calculated the penalty wages due in accordance with Agency policy. The average daily rate (ADR) from which penalty wages were calculated was the result of dividing the total days worked by the employee into the total amount the employee earned for the period. The penalty wage was then determined by

multiplying the ADR by the number of days, up to 30, that wages remain unpaid. She used \$100 per day as the ADR in her original calculation and on her amended calculation.

32) Overall, Claimant earned \$3,400 for 34 days at \$100 per day, and \$100 for two half days at \$100 per day, for a total of \$3,500, earned in 36 working days. Three of those days were charged to an employer, Crum Ranches, which was not a party to the Determination Order. Working for the Respondents, Claimant earned \$3,100 for 31 days at \$100 per day, and \$100 for two half days at \$100 per day, for a total of \$3,200 earned in 33 working days. Total earnings (\$3,200) divided by days worked (33) equals \$96.97 ADR. 30 times \$96.97 equals \$2,909, rounded according to Agency policy, as penalty wages.

ULTIMATE FINDINGS OF FACT

1) During times material herein Respondents, as well as Crum Ranches, were engaged in agricultural production and utilized the personal service of one or more employees in this state.

2) Claimant was employed by Respondents, and by Crum Ranches, during the period August 31 to October 15, 1993, at \$100 per day for each day worked.

3) From August 31 through October 15, 1993, Claimant worked 34 full days and two half days, earning a total of \$3,500 in 36 working days. Of this, he earned \$3,200 in 31 full days and two half days working for Respondents.

4) Respondents and Crum Ranches paid Claimant a total of

\$2,460. When Claimant ceased employment, Respondents and Crum Ranches owed him \$3,500 less \$2,460 paid, or \$1,040. Respondents owed \$1,010 of that amount. Crum Ranches was not a party to this proceeding.

5) During his employment, Claimant paid out \$54 in repairing Respondents' equipment, for which he was not reimbursed. He paid out \$98.48 for fuel for Respondents' equipment, for which he was reimbursed.

6) When Claimant ceased employment, Respondents failed to pay him for all wages earned within 5 days and for 30 days thereafter.

7) The average daily rate for Claimant was \$96.97. Penalty wages equaled \$2,909.

CONCLUSIONS OF LAW

1) During all times material herein, the proprietorship Crum Ranches and Respondents Crum, JC Ranches, and Sunset, were employers and Claimant was an employee subject to the provisions of ORS 652.110 to 652.200 and 652.310 to 652.405.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and the Respondents herein. ORS 652.310 to 652.405.

3) The actions, inactions, statements and motivations of Ralph Crum and of Respondent Crum as agent of Respondent JC Ranches, of Respondent Sunset and of Crum Ranches, are properly imputed to said Respondents and to Crum Ranches.

4) ORS 652.140(2) provides:

"When an employee who does not have a contract for a definite period quits employment, all

wages earned and unpaid at the time of quitting become due and payable immediately if the employee has given to the employer not less than 48 hours' notice, excluding Saturdays, Sundays and holidays, of intention to quit employment. If notice is not given to the employer, the wages shall be due and payable within five days, excluding Saturdays, Sundays and holidays, after the employee has quit, or at the next regularly scheduled payday after the employee has quit, whichever event first occurs."

Respondents violated ORS 652.140(2) by failing to pay Claimant all wages earned and unpaid within five days, excluding Saturdays, Sundays and holidays, after Claimant terminated employment.

5) ORS 652.150 provides:

"If an employer willfully fails to pay any wages or compensation of any employee whose employment ceases, as provided in ORS 652.140 and 652.145, then, as a penalty for such nonpayment, the wages or compensation of such employee shall continue from the due date thereof at the same rate until paid or until action therefor is commenced; provided, that in no case shall such wages or compensation continue for more than 30 days from the due date; and provided further, the employer may avoid liability for the penalty by showing financial inability to pay the wages or compensation at the time they accrued."

Respondents are liable for a civil penalty under ORS 652.150 for willfully

failing to pay all wages or compensation to Claimant when due as provided in ORS 652.140.

6) Under the facts and circumstances of this record, and in accordance with ORS 652.332, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondents to pay Claimant his earned, unpaid, due, and payable wages and the civil penalty wages, plus interest on both sums until paid. The Commissioner also has the authority to order Respondent Crum to pay Claimant his unreimbursed expenses plus interest until paid.

OPINION

1. Default

Respondent JC Ranches and Respondent Sunset, both corporations, failed to have an answer to the Order of Determination filed by counsel and failed to appear at the hearing represented by counsel, and thus defaulted to the charges set forth in the Order of Determination. In a default situation, pursuant to ORS 183.415(5) and (6), the task of this Forum is to determine if a prima facie case supporting the Agency's Order of Determination has been made on the record. See *In the Matter of John Cowdrey*, 5 BOLI 291, 298 (1986); *In the Matter of Art Farbee*, 5 BOLI 268, 276 (1986); *In the Matter of Judith Wilson*, 5 BOLI 219, 226 (1986); see also OAR 839-50-330(2).

Respondent Crum, an individual, answered the Order of Determination and appeared at the hearing. He cross-examined Agency witnesses and presented evidence on his own behalf. A preponderance of credible evidence on the whole record showed

that Respondents employed Claimant during the period of the wage claim and willfully failed to pay him all wages, earned and payable, when due. The evidence which established that Respondents owed Claimant the amounts in the Order below was credible and the best evidence available. Having considered all the evidence on the record, the Forum finds that the Agency has established a prima facie case as to the defaulting corporate Respondents that they employed Claimant and failed to fully compensate him when that employment ceased.

2. Days Worked

This forum has ruled repeatedly and frequently that it is the employer's duty to maintain an accurate record of an employee's time worked. ORS 653.045; *In the Matter of Ashlanders Senior Foster Care, Inc.*, 14 BOLI 54, 78-80 (1995), and *In the Matter of Godfather's Pizzeria, Inc.*, 2 BOLI 279, 296 (1982) (both citing *Anderson v. Mt. Clemens Pottery Co.*, 328 US 680 (1946)). Where the employer's records are inaccurate or incomplete, the trier of fact may rely upon credible evidence produced by the Agency regarding the time worked. (*Ashlanders, supra*).

In dealing with the Agency during the investigation of the claim, Respondents submitted information from their accountant which did not cover the entire period of employment. At hearing, Respondent Crum produced a time book and copies of checks paid to Claimant and testified to his recollection of Claimant's employment. That introduced an employing entity, Crum Ranches, which was not named in the Determination Order. Each of the

varying sources of information attributable to Respondents, including the answer submitted by Respondent Crum, resulted in differing amounts earned and paid. (See Findings of Fact 24, 25, 29) The Agency's case was more persuasive.

Claimant clearly did not participate in the 1993 Ellensburg Rodeo. His testimony as to work performed that week was detailed and credible (Findings of Fact 15, 16, 17). Similarly, evidence established that Claimant worked a full day on October 14 and a half day on October 15. On his final day, Claimant was told to go to the house and pick up his check. He did so that day. The checks from Respondent Crum were dated October 15.

3. Wage Rate

A job order was placed with the Oregon State Employment Department on behalf of Respondents and Crum Ranches by Ralph Crum in August 1993 for a combine operator. It specified \$100 per day. Claimant was referred by the Employment Department in accordance with that job order. There was no evidence that the terms of the order were modified between the parties before Claimant started working. Given the multiple sources of paychecks and the lack of a slip or stub detailing gross earnings and deductions, Claimant had no notice that the rate had been modified unilaterally from the job order rate until the substantial reduction he noted on his final check from Respondent Crum. Even his last checks from Respondents JC Ranches and Sunset were at the same rate as their other payments.

In a prior case where an employer placed a job order with the

Employment Division setting out the job title, description, hours, duration, location, requirements and compensation, this Forum found that the terms were sufficiently definite, clear and complete to constitute an offer. In that case, the Commissioner held that an employee's conduct in performing the job, where there was no evidence of modification of the compensation, constituted an acceptance of the offer forming an implied employment agreement with the wage rate being the one offered in the job order. *In the Matter of Box/Office Delivery*, 12 BOLI 141, 148-49 (1994). That is also the Forum's finding in this case. Whatever Respondents' collective subjective intent, Claimant accepted the offer of \$100 per day.

An employer must pay the employee all sums due upon termination of employment. The order below enforces the duty of each charged employer to pay what was really due, since that duty is absolute. *In the Matter of Handy Andy Towing, Inc.*, 12 BOLI 284, 294 (1994); *Garvin v. Timber Cutters, Inc.*, 61 Or App 497, 658 P2d 1164 (1983).

4. Penalty Wages

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

McGinnis v. Keen, 189 Or 445, 221 P2d 907 (1950); *In the Matter of Jack Coke*, 3 BOLI 238, 242 (1983). Evidence established that Respondents intentionally failed to pay all wages earned. Evidence showed that they acted voluntarily and as a free agents. They are deemed to have acted willfully under this test and thus are liable for penalty wages under ORS 652.150.

The record established that Respondents violated ORS 652.140 as alleged and owed Claimant the amount found as civil penalty wages pursuant to ORS 652.150. Pursuant to Agency policy, civil penalty wages due under ORS 652.150 were rounded to the nearest dollar. *In the Matter of Waylon & Willies, Inc.*, 7 BOLI 68, 72 (1988). The Agency brought its Determination Order against Respondents jointly, rather than as individual employers. While each employer underpaid Claimant, and each employer is thus liable for penalty wages, the Forum has treated them as one employer for purposes of penalty, which is found against them jointly.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders JACK CRUM RANCHES, INC., SUNSET RANCHES, INC., and MONTY CRUM, dba M.C. Ranch, to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2109, the following:

(1) A certified check payable to the Bureau of Labor and Industries IN TRUST FOR JOE F. MAREK in the

amount of THREE THOUSAND NINE HUNDRED NINETEEN DOLLARS (\$3,919), representing \$1010 in gross earned, unpaid, due, and payable wages, and \$2,909 in penalty wages, PLUS

(2) Interest at the rate of nine percent per year on the sum of \$1010 from October 20, 1993, until paid, PLUS

(3) Interest at the rate of nine percent per year on the sum of \$2,909 from November 19, 1993, until paid, AND

The Commissioner of the Bureau of Labor and Industries further orders MONTY CRUM, dba M.C. Ranch, to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2109, the following:

(1) A certified check payable to the Bureau of Labor and Industries IN TRUST FOR JOE F. MAREK in the amount of FIFTY-FOUR DOLLARS (\$54) representing unreimbursed expenses, PLUS

(2) Interest at the rate of nine percent per year on the sum of \$54 from October 20, 1993, until paid.

**In the Matter of
CHEUK TSUI
and Shuk Yee Tsui, dba China
House Restaurant, Respondents.**

Case Number 36-95
Final Order of the Commissioner
Jack Roberts
Issued January 2, 1996.

SYNOPSIS

Female Complainant was sexually harassed by one Respondent, a co-owner of the restaurant where Complainant was employed. The Forum found both employers liable for Complainant's resulting emotional distress. ORS 659.030(1)(b); OAR 839-07-550(1) and (3); 839-07-555(1) and (3).

The above-entitled contested case came on regularly for hearing before Warner W. Gregg, designated as Hearings Referee by Jack Roberts, Commissioner of the Bureau of Labor and Industries of the State of Oregon. The hearing was held on March 16, 1995, in Room 2 of the offices of the Employment Department, 465 Elrod Street, Coos Bay, Oregon. The Bureau of Labor and Industries (the Agency) was represented by Linda Lohr, an employee of the Agency. Chuek Tsui (pronounced "Choy") and Shuk Yee Tsui (Respondents) were present throughout the hearing and were represented by Frank J. Wong, Attorney at Law, Portland. Shawn Marie Horlacher (Complainant) was present throughout the hearing and was not represented by counsel.

The Agency called the following witnesses: Complainant; Complainant's friend Bertha Kremers; Complainant's step-mother Valerie C. (Chris) Gurney; Complainant's father Dennis Gurney; and Lewis Simpson.

Respondents called the following witnesses: Respondent Shuk Yee ("Suki") Tsui; Respondent Cheuk ("Chuck") Tsui; Respondents' current or former employees Melissa Dunlap Smith, Cheryl Hurt, and Trudy Simpson. Esther Tan, appointed by the Forum and under proper affirmation, acted as interpreter for Respondent Cheuk Tsui.

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

**FINDINGS OF FACT –
PROCEDURAL**

1) On December 13, 1993, Complainant filed a verified complaint with the Agency alleging that she was the victim of the unlawful employment practices of Respondents. After investigation and review, the Agency issued an Administrative Determination finding substantial evidence supporting the allegations of the complaint.

2) On January 6, 1995, the Agency prepared for service on Respondents Specific Charges, alleging that Respondents discriminated against Complainant in her employment based on her sex in violation of ORS 659.030(1)(b). With the Specific Charges, the Agency served on

Respondents the following: a) Notice of Hearing setting forth the time and place of the hearing; b) a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of Oregon Administrative Rules (OAR) regarding the contested case process; and d) a separate copy of the specific administrative rule regarding responsive pleadings.

3) A copy of those Charges, together with items "a" through "d" of Procedural Finding 2 above, were sent by US Post Office regular mail, postage prepaid, to the individual Respondents and their counsel on January 6, 1995. Both the Notice of Contested Case Rights and Procedures (item b) and the Bureau of Labor and Industries Contested Case Hearings Rules (item d) at OAR 839-50-130(1), provide that an answer must be filed within 20 days of the receipt of the charging document. On January 18 the Agency filed a motion to change the location of the hearing from Medford to Coos Bay, nearer the residence of the potential witnesses in the Coquille area.

4) On January 20, Respondents through counsel filed their answer and a motion to change the location of the hearing from Medford to Portland, citing a potential need for Respondents to have a Cantonese Chinese interpreter together with counsel's office location in Portland. In their answer, Respondents through counsel admitted certain allegations regarding their status as Complainant's employer and denied any unlawful employment practices or damages to Complainant based on Complainant's female sex.

5) On February 2, 1995, the Hearings Referee issued a ruling setting the hearing in Coos Bay, based on the location of Respondents. The ruling also asked Respondents' counsel to request an interpreter if one was necessary.

6) On March 2, 1995, the Hearings Referee issued a discovery order to the participants, directing them each to submit a Summary of the Case. The Agency timely filed a Summary of the Case. Respondents through counsel hand delivered a Summary of the Case and requested a Cantonese speaking interpreter.

7) In a conference prior to the commencement of the hearing, the Agency and Respondents' counsel placed certain stipulations on the record, and agreed to admitting certain exhibits into the record. The stipulations are noted throughout the factual findings of this order.

8) At the commencement of the hearing, counsel for Respondents stated that he had reviewed the Notice of Contested Case Rights and Procedures and had no questions about it.

9) At the commencement of the hearing, pursuant to ORS 183.415(7), the Hearings Referee orally advised the participants of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

10) The proposed order, containing an exceptions notice, was issued August 31, 1995. Exceptions were due September 10, 1995. Under a timely requested extension of time, Respondents filed exceptions postmarked October 2, 1995, which are dealt with

in the Opinion section of this Order. On September 25, 1995 David A. Engels, Attorney at Law, Aurora, was substituted as counsel of record for Respondents.

FINDINGS OF FACT – THE MERITS

1) During times material herein, Respondents Cheuk Tsui and Shuk Yee Tsui, husband and wife, had owned and operated the China House Restaurant in Coquille, Oregon, since 1979. They had three children, two boys and a girl, 12, 10, and 7 years of age, respectively. The Tsui's residence was in an apartment building next door to the restaurant at times material. The children usually ate at the restaurant; their food was prepared there, rather than at home. Respondent Shuk Yee Tsui acted as cashier while the restaurant was open. She did the hiring of waitresses, kept the books, and wrote the paychecks. She paid bonuses, decided pay raises, and scheduled the help. If there had been an occasion to discharge a waitress, she would be the one who did it.

2) Complainant, female, was employed as a waitress by Respondents from late 1990 to mid-September 1993, when she resigned. Complainant's co-workers as waitresses in 1993 were Trudy Simpson, Theresa Dunlap, and Cheryl Hurt. Respondents were known to their employees as "Chuck" (Respondent Cheuk Tsui) and "Suki" (Respondent Shuk Yee Tsui).

3) When Complainant began working for Respondents in 1990, she worked only on weekends. On occasion she provided care for their children and assisted "Suki" with shopping. She assisted them in collecting bad checks. Complainant and

Respondents became close friends. They knew she was dependent upon her earnings when her husband became unemployed. In September 1992, Complainant bought a new Ford Festiva, just after Respondents bought their new Ford van. She shared her financial concerns with them. At that time she would have done any favor for the two of them. With knowledge of both and as their friend, she rented "dirty" movies at their request. As a favor, after discussion with them, she obtained at their request a supposed aphrodisiac. Respondent Cheuk Tsui was always friendly and joked with Complainant. The waitresses wore dark skirts or shorts with a red top. His comment on the short skirts was "very sexy."

4) China House Restaurant was located in a remodeled residence. The kitchen and service areas were small and narrow. The dining area was small and could be serviced by just two waitresses. Respondent Cheuk Tsui was the only cook for meal preparation. Respondent Shuk Yee Tsui prepared soups and special dishes to be served later.

5) The waitresses washed the dishes and picked up; there were no busboys. The restaurant was open 11 a.m. to 9 p.m. Sunday through Friday, and 2 p.m. to 9 p.m. on Saturday. Respondents' children were usually with Respondent Shuk Yee Tsui, and she was "always" at the restaurant. Respondents individually ran back and forth to their home during the business day, but only for a few minutes at a time. Respondents got to work at around 9 a.m. and opened at 11 a.m. Waitresses arrived after 12 noon and

at the busiest time, between 5 p.m. and 9 p.m. Respondents' son William sometimes helped run the cash register.

6) Complainant was a "pretty good fast waitress." In 1991, Respondents gave Complainant a \$50 bonus because the restaurant closed while they went on vacation. They did not give one to Simpson, who had been there only a month. Complainant drew unemployment benefits while the restaurant was closed for vacation.

7) By 1992, Complainant was working five days a week as a waitress with Sunday and Monday off. She was paid \$4.75 per hour when she started, and was paid \$6.00 per hour when she quit.

8) Complainant seldom received extra money from Respondent Shuk Yee Tsui. Several times (she estimated as many as 10 to 15 times) she received \$20 to \$50 "on the side" from Respondent Cheuk Tsui. When Complainant said she couldn't accept it, "Chuck" told her she was a "hard worker," "special worker," "very good worker." He handed her the money each time and told her not to say anything to anyone. He took the money from his wife's purse without his wife's knowledge. Until June 1993, "Chuck" never asked anything from Complainant in return.

9) Normally, Respondents paid the waitresses by check on a regular payday. Both Respondents owned the business, and Complainant treated each of them as a boss, doing whatever was requested. Complainant was told by Trudy Simpson that she also received cash from "Chuck," as a "good worker."

10) Respondent Shuk Yee Tsui did not hand out cash except \$10 or so at Chinese New Year as "lucky money." Respondent Shuk Yee Tsui gave things like t-shirts, cookies, and food items, but not extra cash for being a good worker.

11) On June 13, 1993, while Respondent Shuk Yee Tsui was away from the restaurant, Respondent Cheuk Tsui handed Complainant \$100. When Complainant said she couldn't take it, he said "No, no, no – for you – you very good worker." She said "that's a lot," and he responded "No big deal, no big deal." Then he asked Complainant if she wanted to be his "special friend."

12) Complainant told Respondent Cheuk Tsui "Chuck, you and Suki and the kids are all my special friends, all of you." He replied, "No, no, no – you no understand. I mean special friend, lover on the side." He went on to tell Complainant that when he worked in Medford, at Kim's Restaurant, he had a lover on the side there. He said that was "Chinese way."

13) Complainant didn't want "to be rude. He is my boss." She told Respondent Cheuk Tsui that she couldn't do that, that both she and he were married, that "Suki" was there all the time and "Suki" would know. He said, "Oh, no, no – You not understand. I no tell Suki – you no tell your husband. They no know – five minutes in my van after work or when you get done tanning in the evening." When Respondent Cheuk Tsui suggested money for sex, Complainant "froze and felt numb."

14) Complainant left the kitchen and cleaned off some tables. She

returned to the kitchen. Respondent Cheuk Tsui called her over, put his arm around her and squeezed her breast, saying "just this, for now." That was the first time he had touched her.

15) On the same day, Respondent Cheuk Tsui came up to Complainant near the coffee machine, leaned against her and said "I love your boobies."

16) Up to that day, Complainant believed she was a very good waitress. She had worked hard at her job and was friendly with Respondents' family. She took care of their children. She could joke with her customers and enjoyed them; she had regular customers. She poured herself into her job.

17) Shortly after the day he touched Complainant, Respondent Cheuk Tsui gave her a tiny vial which he said contained "rosemary oil." He said, "this is for you, don't wear at work, don't put on your skin, make you horny, no let Suki know."

18) After June 13, Complainant attempted to avoid being alone with Respondent Cheuk Tsui. She would not go to the storeroom if he was there. She felt she needed "Suki" or the children present to feel safe. The children were there much of that time between 5 p.m. to 9 p.m., but there were opportunities for Respondent Cheuk Tsui to be alone with her. The kitchen and storeroom areas were small and Respondent Cheuk Tsui often brushed against her. Once he asked her if marijuana made her "last longer."

19) After June 13, when Complainant went to the service window to pick up an order and "Suki" was not

around, Respondent Cheuk Tsui would say "\$100. \$100." Complainant would act as if she didn't understand, because she wanted it to stop. The last such comment by Respondent Cheuk Tsui was "\$200. \$200. I no have the money here right now – later." This happened on about June 30, 1993.

20) In late June, Complainant needed a draw for her daughter's early July birthday. Respondent Cheuk Tsui said "Why ask Suki, you ask me." Complainant knew why and began to cry. He later attempted to apologize. He had no money then. "Suki" gave Complainant a \$60 draw. The next Sunday, Respondent Cheuk Tsui said "I no care no more."

21) When Respondent Cheuk Tsui appeared to realize that Complainant was not interested and was avoiding him, he "mocked" her at work, mimicking her thanks for orders. She felt that both Respondents were treating her coldly and differently. In her perception, they didn't laugh and joke as before, although Complainant was sure at that time that "Suki" didn't know what Respondent Cheuk Tsui had done. Complainant had not told "Suki" for fear of her job and because she didn't want to cause problems. She then consulted a paralegal to find a solution. When she told him about offers of money and the change in treatment, he told her to go to the Agency. She didn't want to quit her employment, but she knew that she wouldn't be able to stay after the Agency sent notice of a complaint.

22) Bertha Joanne Kremers had lived in Coquille for eight years and had been acquainted with Complainant

for five years. They are close friends. She had been a customer of China House every two months or so until Complainant quit and was acquainted with Respondents. She knew Trudy Simpson and Melissa Dunlap, because both worked with Complainant. Complainant was a friendly, outgoing waitress who tried to please her customers. She appeared popular and did not flirt with males. She loved her job.

23) About the end of June, Complainant told Kremers that Respondent Cheuk Tsui had grabbed her breast and offered her money "and stuff" for sex. Kremers was surprised. She noted that Complainant appeared upset and told her she hoped it stopped and everything would be OK. Complainant thought maybe it had happened to others, but was not sure. Kremers noted that Complainant became withdrawn and felt badly. Her attitude toward the job deteriorated shortly before she quit, beginning about mid-June. She was less talkative, didn't appear to care as much and felt terrible about herself. She told Kremers she felt trapped. Kremers knew that Complainant filed a complaint with the Agency before she quit.

24) Valerie (Chris) Gurney, Complainant's step-mother, ate at Respondents' restaurant while Complainant, a popular, efficient waitress, worked there. Complainant reported to her in the summer of 1993 that Respondent Cheuk Tsui had proposed sex for money. Complainant was very upset; she wanted to work and needed the money. She feared for her job. Complainant was afraid her husband would find out because he might retaliate

physically against Respondent Cheuk Tsui.

25) Dennis Gurney, Complainant's father, had lived in the Coquille area over 25 years and was a customer at Respondents' restaurant when Complainant worked there. Complainant was a popular, efficient waitress who liked her job. In mid-1993, before Complainant quit, she spoke with him at the restaurant and at his home about her job. She told him that Respondent Cheuk Tsui had touched her and made a sexual comment. She was upset. Gurney remembered that Complainant said Respondent Cheuk Tsui had touched her and made a comment of a sexual nature; he did not recall that she reported Tsui had offered her money.

26) Melissa Dunlap (now by marriage, Smith) first worked as a waitress for Respondents in the summer of 1989. She again worked there from early 1992 to the end of June 1994, when she quit to get married and moved out to Lyons, Oregon. She would work there again if she lived in Coquille. She worked with Complainant for Respondents in 1993. They worked together only on Saturday nights. Of her own knowledge, Dunlap only saw Complainant joke with customers that Complainant knew.

27) Dunlap found that Complainant was "outgoing, bouncy, very friendly, not shy at all;" "very outgoing, flirtatious, very friendly;" "very friendly to everybody."

28) Dunlap first learned of Complainant's allegations a few days before Complainant quit. She did not remember exactly what Complainant told her, but she recalled something about the

perfume or the oil, about "Chuck" giving Complainant money or asking Complainant if she wanted money, and that "Chuck" had made remarks about "sleeping together." Complainant was not her bouncy self. Dunlap disbelieved Complainant's description of "Chuck's" intent but believed that a touching incident occurred.

29) Complainant asked Melissa Dunlap if "Chuck" had given her money on the side. She said no. Complainant told Dunlap that "Chuck" had given both her and Trudy money on the side, told her about consulting the paralegal, and about things that had happened to her at work.

30) Dunlap told the Agency investigator that Complainant quit because Respondent Cheuk Tsui had offered money for sex. Complainant told Dunlap that Respondent Cheuk Tsui said the oil would make Complainant "horny."

31) When Complainant told Dunlap of her experiences with Respondent Cheuk Tsui, Dunlap told Complainant that she had heard that Bobbie McAdams, a former waitress, had said the same thing. Dunlap knew McAdams as a customer.

32) Complainant had asked Dunlap about McAdams because the paralegal had said if it happened to Complainant, it may have happened before to others. Complainant found McAdams and asked her about Respondent Cheuk Tsui. McAdams told Complainant that Respondent Cheuk Tsui made passes at her all the time and that was why she quit. McAdams said that Respondent Cheuk Tsui had come to her apartment building at night

after working hours looking for her, but she was not home.

33) Dunlap described Respondent Cheuk Tsui as "withdrawn, shy, always pretty much kept to himself." In the total of about three years she worked there, Dunlap did not have conversation with Respondent Cheuk Tsui very often, and then usually because she initiated the conversation. He generally was reading a Chinese newspaper when not cooking. Dunlap did not work again with Complainant after Complainant told her about "Chuck." She did not notice that Respondents were rude and cold toward Complainant in June 1993, before Complainant quit.

34) Dunlap told Complainant that "Suki" had asked her why Complainant intended to quit and Dunlap said she didn't know. Complainant felt that "Suki" had a right to know and around September 15, when she picked up her paycheck at the restaurant from Respondent Cheuk Tsui, she asked for "Suki," who was at home. Complainant observed that Respondent Cheuk Tsui was shaking.

35) Complainant went to Respondents' home and told "Suki" about what "Chuck" had done, and why she couldn't stay. Complainant stated she was sorry, it had nothing to do with "Suki". "Suki" appeared shaken and said she would call "Chuck" and see if this was true. Respondent Cheuk Tsui came over and asked what was the matter. Complainant told him she had told "Suki" everything "Chuck" had done to Complainant, everything he'd said, his touching Complainant's breasts and telling her he loved her boobies, and "five minutes in your van after work."

He said "oh, no -- 5 minutes in van after work, show you all the knobs in my new van." She reminded him that she had driven the van right after it was purchased and she knew where all the knobs were and knew how the seats could be removed for hauling. In regard to Complainant confronting him about touching her breasts, he said "oh, that kitchen's so small. I think you no understand. You know I no speak English very well."

36) Respondent Shuk Yee Tsui was not aware of Complainant's allegation until Complainant quit. She had seen nothing unusual. When Complainant picked up her paycheck, which Respondent Shuk Yee Tsui recalled was on a Wednesday, about September 15, 1993, she came to Respondents' house, "told all kinds of stuff; I say, I don't think so." "She say 'oh, your husband touch me'" and Respondent Shuk Yee Tsui said "I don't think so." Respondent Shuk Yee Tsui stated that she was always there working and could hear what happened. She believed that she would leave for only a few minutes, but her three children could still hear and her husband had no opportunity to do those things. She insisted that he was in her presence "most of the time." She stated that when Complainant worked from 5 p.m. to 9 p.m. Wednesday through Sunday, "my kids always here", i.e., at the restaurant. She did not believe that he could give employees money without her knowing it, and cited the example of the money given to Trudy Simpson.

37) Respondent Shuk Yee Tsui was upset when Complainant came in to talk about quitting and accused

Respondent Cheuk Tsui of harassing her. "I just mad, you know - I can't believe she say that, you know." When she called Respondent Cheuk Tsui to the house, he denied that Complainant's allegations happened. She does not use perfume and stated she was not familiar with rosemary oil. She stated that she gave Complainant a "very small bottle" of a rose perfume which she had received as a gift from a baby sitter, but it was not the small vial admitted into evidence.

38) Both Dunlap and Complainant went to a tanning salon run by Complainant's mother-in-law. Complainant went after work; Dunlap went during the day. They both applied "stickers" to portions of their skin to create untanned areas. Complainant had such a "sticker mark" on her upper chest. Complainant compared her tan line with that of Dunlap at work, in the kitchen, with the other waitresses and both Respondents looking on.

39) Respondent Shuk Yee Tsui described Complainant as "overly friendly," but stated she received no customer complaints about Complainant's behavior. She thought that Complainant showed and compared her tan line "a lot" and was in this manner immodest regarding her "boobies."

40) Respondent Cheuk Tsui was 46 years of age at time of hearing and had been in the United States since 1978. Cantonese Chinese is his first language. He denied that he asked Complainant to be his "special friend" or become his lover, and he denied touching her breast or telling her that if she needed money, she should come to him. He denied comments or offensive remarks to Complainant about her

private life. He denied giving Complainant any perfume and particularly denied giving her the bottle in evidence, but suggested that his wife may have. He denied any knowledge of rosemary oil or telling Complainant of its supposed effect.

41) Respondent Cheuk Tsui gave Complainant an extra \$20 on Mother's Day, about 1992, when she was scheduled to work from 12 noon to 2 p.m. and stayed later at his request due to a particularly busy afternoon. It was a gift above her wages for "working hard for the restaurant." He denied that Complainant asked him for an advance on June 30, 1993, or ever, stating that his wife took care of that sort of request. He denied seeing her cry at that time. He was aware that a relative of Complainant owned a tanning salon in Coquille. When he purchased a new van in late 1992, he showed the car to Complainant and her children. His children were also present. All looked inside and Complainant remarked on the new car smell. Respondent had ridden in Complainant's car, when his own was under repair. He was never alone with her in any vehicle. He stated that he never suggested to Complainant that they spend five minutes in the back of his van. He denied that he was rude to or mocked Complainant beginning in June 1993.

42) Respondent Cheuk Tsui only occasionally wrote checks to employees. Respondent Shuk Yee Tsui wrote most of the checks.

43) Dunlap jointly signed a letter with Trudy Simpson at Respondent Shuk Yee Tsui's request. It was in Simpson's handwriting. Each stated that she contributed jointly to the

statements in the letter. The touching mentioned was because of the small kitchen and was not seen by either of them as offensive. Neither Dunlap nor Simpson was ever touched by Respondent Cheuk Tsui. Neither saw him touch Complainant.

44) Cheryl Hurt worked as a waitress for Respondents from 1991 to 1993. She quit due to an old injury. She described China House as a family restaurant with Respondents' children on the premises and shrines to oriental gods consisting of offerings of fruit and incense. She saw "Chuck" as the boss, with "Suki" as manager running the place by invoking "Chuck's" male authority. "Chuck was not good at English." Hurt accompanied him to the doctor to translate. In 1993, she worked four days a week before she quit. Her daughter worked there until late 1994.

45) Hurt learned of Complainant's allegations from Respondent Shuk Yee Tsui a week or so after Complainant quit. In October 1993, she wrote a letter, also signed by her daughter, to the effect that they had not experienced sexual overtures from Respondent Cheuk Tsui and suggesting that the touching may have been due to the close quarters and been misunderstood. She was acquainted with Complainant, but never discussed the situation with her. She did not work with Complainant often. She did not recall Complainant acting inappropriately. She frequently visits China House and sometimes receives free meals as exchange for her assistance at the doctor and with taxes, telephone problems, and paper work needing an English speaker.

46) Trudy Diane Simpson had been acquainted with Complainant approximately nine years. Simpson was not working for Respondents in the summer of 1993 when Complainant stopped by her house very upset and told Simpson that Respondent Cheuk Tsui had touched Complainant on the breast. Simpson did not recall being told of an offer of money for sex, but Complainant appeared offended. According to Simpson, Complainant had been drinking and was crying. Simpson remembered the mention of perfumed oil from a later conversation.

47) Simpson worked for Respondents from June 1991 to January 1993, when she quit voluntarily. She returned in August 1993, when she learned from Complainant that her old shift would be open. This was after Complainant had told her about the allegation against Respondent Cheuk Tsui. Respondent Cheuk Tsui did not make any advances toward Simpson after she returned. He had given her extra cash, \$40, once, when she had been unable to work and could not take her children to the county fair. There were no conditions connected with the money. Simpson did not testify about any other instance of Respondent Cheuk Tsui giving her money, or any in which he said it was for being a "good worker."

48) Simpson worked with Complainant on Friday nights. She was never offended by Respondent Cheuk Tsui's behavior and saw no behavior toward Complainant that was offensive. She was still employed by Respondents at the time of the hearing.

49) The actions of Respondent Cheuk Tsui caused problems for

Complainant with her spouse in that she did not want to be touched; she could only feel Respondent Cheuk Tsui's hands and hear his remarks; she felt demeaned. She felt that because she was happy and outgoing that there were those who thought she would accept money for sex. Complainant thought that Respondent Cheuk Tsui would stop if she ignored it. Her attitude toward her job and her customers deteriorated and she was mean to her children. She admitted that she joked with customers she knew well, but she knew of no complaints about her service or behavior. She denied receiving perfume from Respondent Shuk Yee Tsui. At the time of the hearing, Complainant still felt hurt by Respondents and thought that Respondents avoided her.

50) Complainant's unemployment benefits were denied when Respondents reported her reason for quitting as a higher paying position. She abandoned her appeal when she learned that Respondents would have an attorney. She did not want to say anything by phone that would be against her interests. Complainant was re-employed within three weeks or so of quitting China House.

51) The testimony of Respondent Cheuk Tsui was not entirely credible. It was clear to the Forum that he understood English much better than he spoke it. He denied asking Complainant to be his "special friend," then acknowledged that he used the term "special friend" in speaking to Complainant, and stated that he meant someone close, like family. He suggested to the Agency investigator that Complainant had misinterpreted the

term. He stated he gave Simpson money (\$20) once for her kids to go to the fair, "a very long time ago," that he gave Complainant money once for extra work, but other evidence suggested more frequent payments to each. He stated that his touching of Complainant was accidental, when he brushed against her in the small, crowded kitchen. The Forum has found credible only those portions of his testimony which were uncontroverted or were verified by other credible evidence.

52) Melissa Dunlap's testimony was not entirely credible as she attempted to shade it favorably for Respondents. She characterized Respondent Cheuk Tsui as quiet and non-aggressive, and attempted to discredit Complainant as being "overly friendly" with him and male customers, and as telling off-color jokes. She then acknowledged that Complainant was friendly with both men and women. She co-authored a letter with Trudy Simpson suggesting that Complainant's allegations were based on the cramped quarters and misunderstanding. The letter also suggested that Complainant frequently embarrassed them and patrons who complained, although Respondent Shuk Yee Tsui testified there were no complaints regarding Complainant's behavior. The Forum has found credible only those portions of Dunlap's testimony which were uncontroverted or were verified by other credible evidence.

53) Trudy Simpson's testimony was not altogether credible as she, too, attempted to shade it favorably for Respondents. She described Complainant as an "upbeat, friendly person," but joined Dunlap in the joint letter in

characterizing Complainant as "overly friendly" and generating patron complaints. She suggested in her testimony that Complainant had a drinking problem and a difficult marriage, and that Complainant had a special male customer with whom she was friendly. She finally testified that Complainant's friendliness was to both men and women. In addition to the letter with Dunlap, Simpson wrote two other statements, in September 1994 and January 1995. The letter with Dunlap and the September letter were requested by Respondent Shuk Yee Tsui. Simpson wrote the January 1995 letter voluntarily "to show my support" and stated that it was written after Simpson had seen the specific charges and was "aware of the controversy [*sic*] concerning money being given to employees." The letter states that she received gifts from Respondents "from time to time, ranging anywhere from a souvenir [*sic*] picked for me on a trip, and on rare occasions [*sic*] a money bonus. The money was always given to me with a 'Thanks' for working hard." Simpson was hesitant in some of her responses. She testified to receiving only one such bonus from Respondent Cheuk Tsui, although she had earlier told Complainant of others. The Forum has found credible only those portions of her testimony that were uncontroverted or were verified by other credible evidence.

54) Complainant's testimony was generally credible. Her description of the key incidents giving rise to her allegations was consistent internally and with her prior reports to others. She responded to questioning without

hesitation or avoidance. Although obviously upset by recounting her experiences at work, as evidenced by tears at one point, she remained generally under control. There was no reason to disbelieve her straight forward testimony.

ULTIMATE FINDINGS OF FACT

1) During times material herein, Respondents Cheuk Tsui and Respondent Shuk Yee Tsui, husband and wife, owned and operated a restaurant in Coquille, Oregon, which engaged or utilized the personal service of one or more employees.

2) Complainant, a female, worked for Respondents as a waitress from late 1990 to mid-September 1993.

3) Both Respondents were Complainant's direct supervisors.

4) On or about June 13, 1993, Respondent Cheuk Tsui offered Complainant money above her regular salary to be his special friend, have sex with him, and not tell his wife.

5) On the same date, Respondent Cheuk Tsui also touched Complainant on the breast and expressed admiration for her breasts.

6) For approximately two to three weeks, Respondent Cheuk Tsui continued to suggest that Complainant accept money from him for sex. His initial suggestion and his continuing course of verbal and physical conduct of a sexual nature toward Complainant because of her sex was unwelcome to Complainant.

7) Complainant was embarrassed, humiliated, and very offended by Respondent Cheuk Tsui's behavior. She did not report it to Respondent Shuk

Yee Tsui because she did not want to lose her job.

8) Complainant believed that she must accept Respondent Cheuk Tsui's actions and conduct toward her as a term or condition of working there. This created for her a hostile working atmosphere.

9) Respondent Cheuk Tsui had ceased his unwelcome verbal and physical sexual conduct when Complainant quit her job in mid-September 1993 and reported his behavior to Respondent Shuk Yee Tsui. Respondent Cheuk Tsui denied Complainant's allegations.

10) Respondent Cheuk Tsui's behavior toward Complainant caused her severe and long-lasting emotional distress.

CONCLUSIONS OF LAW

1) ORS 659.010 provides, in part:

"As used in ORS 659.010 to 659.110 *** unless the context requires otherwise:

"(6) 'Employer' means any person *** who in this state *** engages or utilizes the personal service of one or more employees reserving the right to control the means by which such service is performed.

"(12) 'Person' includes one or more individuals ****"

Respondents were employers subject to ORS 659.010 to 659.110 at all times material herein.

2) ORS 659.040 (1) provides:

"Any person claiming to be aggrieved by an alleged unlawful

employment practice, may *** make, sign and file with the commissioner a verified complaint in writing which shall state the name and address of the *** employer *** alleged to have committed the unlawful employment practice complained of *** no later than one year after the alleged unlawful employment practice."

Under ORS 659.010 to 659.110, the Commissioner of the Bureau of Labor and Industries has jurisdiction of the persons and subject matter herein.

3) ORS 659.030 provides, in part:

"(1) For the purposes of ORS 659.010 to 659.110 *** , it is an unlawful employment practice:

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

OAR 839-07-550 provides, in part:

"Harassment on the basis of sex is a violation of ORS 659.030. It is discrimination related to or because of an individual's gender. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when such conduct is directed toward an individual because of that individual's gender and:

"(1) Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment; or

"(3) Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."

The activities of Respondent Cheuk Tsui consisted of unwelcome sexual advances and unwelcome verbal and physical conduct of a sexual nature directed toward Complainant because of her sex, creating an intimidating, hostile, and offensive working environment, contrary to OAR 839-07-550, and became an explicit term or condition of Complainant's employment in violation of ORS 659.030(1)(b).

4) OAR 839-07-555 provides, in part:

"(1) An employer *** is responsible for its acts with respect to sexual harassment ****"

Respondents were liable for the sexual harassment of Complainant in the workplace.

5) Pursuant to ORS 659.060(3) and by the terms of ORS 659.010(2), the Commissioner of the Bureau of Labor and Industries has the authority to issue a Cease and Desist Order requiring Respondents to perform an act or series of acts in order to eliminate the effects of an unlawful practice and to protect the rights of others similarly situated. The amount awarded in the Order below is a proper exercise of that authority.

OPINION

Facts demonstrate that Respondent Cheuk Tsui sexually harassed Complainant through unwanted physical touching and the offer of money for sexual favors. These facts are based

on a preponderance of the available evidence. Complainant testified with specificity to the offensive conduct. She reported these incidents to friends, family, and co-workers. Her descriptions of those events were consistent. Even those witnesses who chose to disbelieve that Respondent Cheuk Tsui would intentionally harass an employee acknowledged that Complainant reported unwanted touching and sexual solicitation. With the possible exception of Respondent Shuk Yee Tsui, no witness suggested that Complainant made up the story or that she had any motive for doing so.

It was established to the Forum's satisfaction that Complainant was a popular, efficient, and dependable employee. There was no evidence of complaints regarding her performance and, until the revelation of her charges against Respondent Cheuk Tsui, she was a valued member of Respondents' restaurant "family."

Testimony by Respondents' current and former employees to the effect that Complainant was inappropriately flirtatious and immodest, told off color jokes to customers, had a troubled marriage and an alleged drinking problem did nothing to lessen the likelihood that the reported behavior occurred. A common theme among all of Respondents' witnesses was that the inappropriate physical touching resulted from the crowded working space and misunderstanding, but that did nothing to explain or refute the verbal suggestions that Complainant stated accompanied the touching.

Respondent Cheuk Tsui understandably denied any sexual touching of or suggestion to Complainant. The

Hearings Referee paid particular attention to his testimony and demeanor at the hearing and thereafter reviewed his testimony in detail, and has allowed for cultural and language differences. Nonetheless, based on the evidence in the whole record, the Forum has found that the unwelcome conduct reported by Complainant did occur.

Damages

The effect of Respondent Cheuk Tsui's unwelcome offensive conduct resulted in severe emotional distress for Complainant. When she heard Respondent Cheuk Tsui's offer of money for sex, Complainant "froze and felt numb." It was obvious to all to whom she reported the incidents that she was very upset. She wanted to work because she needed the money, but she feared for her job. She felt trapped. Her attitude toward her job and her customers deteriorated. She was less talkative and not her "bouncy self." She didn't appear to care as much, felt terrible about herself, and became withdrawn. She was mean to her children. She did not want to be touched by her spouse because she could only feel Respondent Cheuk Tsui's hands and hear his remarks. She felt demeaned. She felt that because she was happy and outgoing there were those who thought she would accept money for sex.

Part of the effect on her was the creation of the perception that, even after Respondent Cheuk Tsui's solicitations ceased, he was rude and unfriendly and the prior congenial work relationship was destroyed. This, combined with Complainant's uncertainty as to whether the unwelcome behavior might resume, weighed on

Complainant and caused her to seek legal advice and redress. Even though the unwelcome behavior was discontinued, she pursued a complaint with the Agency, knowing that an inevitable result would be a job change. At the time of the hearing, she was still upset by her experiences at work and she felt hurt and betrayed by Respondents.

This Forum is authorized to eliminate the effects of any unlawful practice found. The effects described herein were significant and long term. The Forum is awarding \$20,000 to compensate Complainant for her emotional distress.

Respondents' Exceptions

Respondents' first exception challenges the absence from the Proposed Order of a Finding of Fact based on the uncontroverted testimony of Trudy Simpson reciting that Complainant, while on a camping trip with Trudy Simpson and her family, had gone swimming nude in the company of strangers "in a public swimming area on a river after the alleged sexual harassment had begun and prior to her quitting her job [with Respondents]." Counsel argues that this incident "is relevant to proper assessment of [Complainant's] emotional distress claim" and proposes its inclusion in both the Findings of Fact and the Ultimate Findings of Fact.

Counsel misperceives the nature of the emotional distress assessed. Sexual harassment of an employee by an employer is not about whether the victim is chaste or angelic; it is in most cases about whether the behavior of the harasser is an unwelcome exercise of the inherent imbalance of power between owner and employee.

In the Matter of Jerome Dusenberry, 9 BOLI 173, 187 (1991); *In the Matter of Stop Inn Drive In*, 7 BOLI 97, 114 (1988). A complainant's life outside of work has no bearing on whether the employer discriminated against her in the terms and conditions of employment by subjecting her to sexual harassment. *Dusenberry*, at 188; *Stop Inn*, at 114. Thus the incident sought by Respondents to be included is not relevant and the exception is overruled.

Respondents' second exception excepts to the Proposed Order in its entirety as violative of "respondents' right to trial by jury on the issue of damages for emotional distress." Respondents' third exception excepts to the Ultimate Finding of Fact that Respondent Cheuk Tsui's behavior toward Complainant caused her severe and long-lasting emotional distress, to the Commissioner's jurisdiction over emotional distress damages, and to the order awarding damages for emotional distress. Respondents' fourth exception excepts to the amount of the damage award on the "ground that it is excessive, not supported by the evidence and serves no valid legislative purpose." Because Respondents' argument for these latter three exceptions focuses mainly on the jury trial issue and because these exceptions are interrelated and involve the proposed remedy and the Commissioner's authority to grant it, the Forum will deal with them together.

The jury trial argument has previously been ruled upon by this forum contrary to Respondents' position. A

pre-hearing ruling on a respondent motion to dismiss for lack of jurisdiction based on the same constitutional grounds cited above stated in part:

"The statutes and rules upon which this contested case proceeding is based provide for redress of the Complainant's grievance through administrative procedures. ORS 659.010 to 659.110, ORS 183.413, et seq, OAR 839-03-000 to 839-03-095, OAR 839-07-500, 839-07-550 to 839-07-565, OAR 839-30-000 to 839-30-200." This scheme is presumptively valid, and the Forum declines to declare it otherwise." *In the Matter of Dunkin' Donuts, Inc.*, 8 BOLI 175, 182 (1989).

In that case, the jurisdictional argument was renewed at hearing and appeared in the answer as an affirmative defense, citing the same constitutional grounds. In again denying the motion to dismiss and rejecting the affirmative defense, the Commissioner stated:

"In its pre-hearing denial of Respondents' position, the Forum merely declined to declare invalid the presumptively valid legislative scheme underlying the Bureau's contested case proceedings in discrimination cases. But this forum and the courts have previously ruled on the cited constitutional issue adversely to Respondents' position. *In the Matter of Fred Meyer, Inc.*, 1 BOLI 84 (1978). The Commissioner cited *Williams v. Joyce*, 4 Or App 482, 479 P2d 513 (1971) and *School District No. 1 v. Nilsen*, 271 Or 641, 534 P2d 1135 (1975)

* OAR 839-30-000 to 839-30-200 have been amended and renumbered to 839-50-000 to 839-50-420, Contested Case Hearing Rules, 1993.

in rejecting this attack on the Commissioner's authority. In the appellate opinion resulting from the *Fred Meyer* order, the Court of Appeals stated:

[Employer] also contends that the Commissioner's award of damages is unconstitutional because it violates [employer's] right to a jury trial guaranteed by Article I, section 17 and Article VII, section 3 of the Oregon Constitution. This argument was considered and rejected in *Williams v. Joyce*, 4 Or App at 500-502, 479 P2d 513, and we have no reason to reconsider that holding.' *Fred Meyer, Inc. v. Bureau of Labor*, 39 Or App 253, 592 P2d 564 (1979), *rev den* 287 Or 129 (remanded on other grounds); *In the Matter of Fred Meyer, Inc.*, (Order on Remand) 1 BOLI 179 (1979)."

Id., at 180.

Respondents acknowledge that the constitutional jury trial guarantee applies to the "classes of cases wherein the right was customary at the time the constitution was adopted." This forum agrees. But it cannot agree with the ingeniously constructed argument that *Williams* was wrongly analyzed by the court, citing Judge Buttler's special concurrence in *Fred Meyer*. After a lengthy exposition regarding the propriety of compensatory damages for mental distress absent physical injury, the *Williams* court concluded that such an award carried out the

Commissioner's statutory duty to "eliminate the effects of any unlawful practice found." No action existed at common law to remedy employment discrimination based on sex, or based on any other protected class. Such a remedy is a creature of statute, as is the administrative procedure before the Commissioner. That procedure and the Commissioner's authority have been consistently upheld by the courts and were left undisturbed by the Legislature when ORS chapter 659 was amended to allow a circuit court right of suit on employment discrimination issues." Respondents' constitutional challenge is rejected.

Intertwined with Respondents' constitutional argument is the suggestion that the remedy proposed for emotional distress was excessive. Respondents cite the nominal \$200 award in *Williams* and suggest that the proposed award in this case is "wildly excessive." Other than the general description of humiliation, the Court of Appeals opinion does not recite the specific evidence of the effects of the discrimination in *Williams* which occurred in 1967. This forum has previously rejected exceptions based on excessive damages in a case wherein a black youth was discharged due to his race and awarded \$6,000 for mental suffering, but was not subjected to the continued racial harassment present in *Fred Meyer*, where the complainant was awarded \$4,000, saying:

"Respondents' exceptions suggest that the seriousness of

Respondents' offense did not approach that of the employer in *Fred Meyer, supra*, and that therefore the award proposed is excessive. The facts in *Fred Meyer* arose in 1972, almost 20 years before those in this case. Mental suffering awards are based on the effects of the unlawful act(s) translated into current dollars as a measure of damage. The *Fred Meyer* award would be woefully inadequate today. The award in this case is not excessive and is affirmed." *In the Matter of Rose Manor Inn*, 11 BOLI 281, 293 (1993).

The facts in this case arose 26 years after *Williams* and 21 years after *Fred Meyer*. Whether the basis be race or sex, there is no question that discriminatory practices have become more costly to employers. There is also no question that mental suffering awards are actual compensation for actual harm, and that there must be evidence to support any award. Such evidence exists here. The proposed award is not excessive and is affirmed. All of Respondents' exceptions are overruled.

ORDER

NOW, THEREFORE, as authorized by ORS 659.060(3) and 659.010 (2), and in order to eliminate the effects of the unlawful practices found, Respondents Chuek Tsui and Shuk Yee Tsui are hereby ordered to:

1) Deliver to the Fiscal Services Office of the Bureau of Labor and Industries, State Office Building, Suite 1010, 800 NE Oregon Street, # 32, Portland, Oregon 97232-2162, a certified check, payable to the Bureau of Labor and Industries in trust for

SHAWN MARIE HORLACHER, in the amount of:

a) TWENTY THOUSAND DOLLARS (\$20,000), representing compensatory damages for the mental and emotional distress suffered by SHAWN MARIE HORLACHER as the result of Respondents' unlawful practice found herein, PLUS

b) Interest at the legal rate on the sum of \$20,000 from the date of the Final Order herein until Respondents comply therewith, and

2) Cease and desist from discriminatory conduct in the workplace directed toward any employee based upon that employee's sex.

In the Matter of JOHN W. HATCHER, Respondent.

Case Number 04-96
Final Order of the Commissioner
Jack Roberts
Issued February 9, 1996.

SYNOPSIS

Where Respondent submitted an answer to the Order of Determination and requested a hearing but failed to appear at the hearing, the Commissioner found Respondent in default. Where the Agency made a prima facie case supporting the Agency's Order of Determination on the record, the Commissioner found that Claimant was an

* Chapter 221, Oregon Laws 1949, as amended by section 3, chapter 618, Oregon Laws 1969, to include sex, now, as further amended, codified in ORS chapter 659.

** Chapter 453, Oregon Laws 1977

employee of Respondent and that Respondent failed to pay Claimant all wages, including overtime wages, when due upon Claimant's termination by mutual agreement. Respondent's failure to pay the wages was willful, and the Commissioner ordered Respondent to pay civil penalty wages. ORS 652.140 (1); 652.150; 652.610(3) and (4); 653.025; 653.035; 653.055; OAR 309-40-045; 309-40-053(7); 839-20-004(12), (14), (16), (20); 839-20-010(1); 839-20-025; 839-20-030(1); 839-20-080(1)(e) through (f); 839-20-082(1), (2).

The above-entitled contested case came on regularly for hearing before Linda A. Lohr, designated as Administrative Law Judge (ALJ) by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on October 10, 1995, in conference room #4 of the Employment Department, State Office Building, 119 North Oakdale Street, Medford, Oregon.

The Bureau of Labor and Industries (the Agency) was represented by Alan McCullough, an employee of the Agency. Erma Jean (Jean) Henderson (Claimant) was present throughout the hearing and not represented by counsel. John W. Hatcher (Respondent), after being duly notified of the time and place of this hearing, failed to appear in person or through a representative.

The Agency called as witnesses Jackson County Mental Health Department employee Scott Hampson; Respondent's landlord Georgiana Dodd; Claimant; and (by telephone) Margaret

Pargeter, Screener for the Wage and Hour Division.

Having fully considered the entire record in this matter, the Commissioner of the Bureau of Labor and Industries makes the following Ruling on Motion, Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

RULING ON MOTION

Subsequent to hearing and before the record closed on October 20, 1995, the Agency moved to amend its Order of Determination to reduce the amount of wages allegedly due and owing to Claimant, including penalty wages, to \$56,713.80. The motion was based on Claimant's record of wages paid by Respondent between January 3, 1992, through July 1994, part of which was submitted at hearing as an Agency exhibit, and a supplement which was attached to the Agency's motion. Because the amendment further reduces the amount allegedly owed by Respondent, the motion is granted and the Order of Determination is amended to reflect the Agency's revised calculation of wages owed.

FINDINGS OF FACT – PROCEDURAL

1) On November 2, 1994, Claimant filed a wage claim with the Agency. She alleged that she had been employed by Respondent, who failed to pay wages earned and due to her.

2) At the same time she filed the wage claim, Claimant assigned to the Commissioner of Labor, in trust for Claimant, all wages due from Respondent.

3) On March 12, 1995, the Agency, through the Jackson County Sheriff and by way of certified mail, served on Respondent at 683 Ross Lane, Medford, Oregon, Order of Determination No. 95-007 (Determination Order) based upon the wage claim filed by Claimant and the Agency's investigation. The Determination Order found that Respondent owed Claimant a total of \$25,346 in straight time wages and \$47,203.13 in overtime wages computed at a minimum wage of \$4.75 per hour on a total of 11,961 hours worked, 6,625 of which were worked over 40 hours in a workweek, less the sum of \$8,065, leaving a total of \$64,484.13 unpaid. The Determination Order found further that the failure to pay was willful and that there was due and owing the sum of \$2,394 in civil penalty wages.

4) The Determination Order required that within 20 days Respondent either pay the sums in trust to the Agency or request an administrative hearing and submit a written answer to the charge.

5) On April 12, 1995, Respondent's then counsel, having been granted an extension of time by the Agency, filed a written answer to the Determination Order and a request for a contested case hearing. The answer admitted that Claimant worked in a residential home operated by Respondent during the times alleged, denied that Claimant worked the total hours claimed, denied that Claimant was owed additional wages or that Respondent willfully failed to pay wages, and alleged by way of affirmative defenses that Claimant received meals, lodging, and other services as part of her

compensation, that Claimant did not work the hours claimed, that Claimant did not work the overtime claimed, that Claimant was not eligible for the overtime claimed and that Claimant was an independent contractor. On June 23, 1995, Respondent's counsel notified the Agency that as of May 1995 she no longer represented Respondent and withdrew as attorney of record.

6) The Agency requested a hearing date and on August 18, 1995, the Hearings Unit issued a Notice of Hearing setting forth the time and place of the hearing, which was served on Respondent at 683 Ross Lane, Medford, Oregon, together with a Notice of Contested Case Rights and Procedures containing the information required by ORS 183.413 and a complete copy of Oregon Administrative Rules (OAR) 839-50-000 to 839-50-420 regarding the contested case process.

7) On August 24, 1995, the forum issued a notice to the Agency and Respondent of a change in ALJ from Douglas A. McKean to Linda A. Lohr.

8) On September 20, 1995, the forum received the Agency's request for a discovery order encompassing items requested by the Agency from Respondent on September 1, 1995, but not received. On September 20, 1995, the ALJ issued discovery orders for the requested items and requiring both participants to submit a summary of the case pursuant to OAR 839-50-200 and 839-50-210. The Agency submitted a timely summary. The discovery orders were directed to Respondent at 683 Ross Lane, Medford, Oregon 97501. Respondent did not produce the requested documents nor did he file a summary.

9) At the time and place set forth in the Notice of Hearing for this matter, the Respondent did not appear or contact the Agency or the Hearings Unit. Pursuant to OAR 839-50-330(2), the ALJ allowed Respondent 30 minutes to appear at the hearing. At the end of that time, Respondent had still not appeared or contacted the Agency or the Hearings Unit. The ALJ then found Respondent in default as to the Order of Determination, pursuant to OAR 839-50-330(2), for failure to attend the hearing, and continued with the hearing.

10) At commencement of the hearing on October 10, 1995, pursuant to ORS 183.415(7), the Agency waived the ALJ's recitation of the issues involved in the hearing, the matters to be proved, and the procedures governing the conduct of the hearing.

11) At commencement of the hearing, the ALJ allowed the Agency's first motion to amend the Determination Order to reduce the amount of wages alleged as due and owing Claimant from \$64,484.13 to \$57,963.90. The motion was based on the Agency's recalculation of overtime taking into account the statutory limitation on overtime actions and a recalculation of the sum paid to Claimant by Respondent which reflected that she was paid \$10,880 rather than the \$8,065 alleged in the Determination Order.

12) The ALJ allowed the Agency's second motion to amend the Determination Order as set forth in the Ruling

on Motion preceding the Findings of Fact - Procedural.

13) The record in this matter closed on October 20, 1995.

14) The proposed order, containing an exceptions notice, was issued on November 29, 1995. Exceptions were due December 9, 1995. No exceptions were received.

FINDINGS OF FACT - THE MERITS

1) During times material herein, Respondent, an individual, operated an adult foster care home at 2982 Far West in Medford, Oregon. Respondent owned or rented the furniture and equipment used to operate the home and rented the real property, *i.e.*, the house, on a month to month basis from Georgiana Dodd. Respondent engaged or utilized the personal service of one or more employees in operating the home.

2) During times material herein, Respondent was licensed by the Oregon Department of Human Resources, Mental Health and Developmental Disability Services Division (MHDDSD), as an adult foster care provider and was subject to the administrative rules promulgated by the MHDDSD for adult foster homes, OAR 309-40-000 through 309-40-100.

3) Prior to her employment with Respondent, Claimant was trained as a certified nurse's aide.

4) Respondent employed Claimant as the resident manager of the home he operated between March 3, 1990, and July 18, 1994.* Respondent

and Claimant had a verbal agreement that Claimant would receive \$500 per month for all hours worked regardless of the number. Claimant was paid once a month, usually in the form of a check. There was no regularly scheduled pay day and between January 1992 and July 1994 there were at least 14 months where Claimant either received no pay, less than the agreed amount, or she was unable to cash a paycheck because of insufficient funds in Respondent's account.

5) At times material, Claimant, as the resident manager, was required by her employer and as a matter of law to live in the licensed adult foster home operated by Respondent. In addition to Claimant, the occupants of the household included five residents who were mentally or developmentally disabled. Claimant was directly responsible for the care of the residents on a day-to-day 24 hour basis. Her work day began at 7 a.m. by preparing breakfast for the residents, administering medications, and packing lunches for those who worked or attended a day treatment center during the day. She was responsible for the daily maintenance of the home which included doing dishes, cleaning the entire house, doing the laundry for the residents, grocery shopping and preparing no less than three meals a day for the residents. For those residents who qualified for personal care service, Claimant assisted them with their basic personal hygiene, which sometimes included grooming, cutting toenails, and dressing for the day. Throughout the day Claimant had the responsibility of monitoring medication charts, filling out paperwork, and dealing with

counselors and family members of the residents by telephone or in person. In the evenings, after preparing and assisting residents with dinner, Claimant cleaned the kitchen and planned for the next day's meals. Claimant's own meals were taken when time permitted. At 8 p.m. she dispensed the night medications and assisted those who needed it with getting ready for bed. Frequently, part of her evenings were spent listening to residents who had the need just "to talk." Claimant's day usually did not end until 11 p.m. Claimant was not free to leave the premises at any time the residents were present unless spelled by a substitute caregiver. (OAR 309-40-053(7), 309-40-045)

6) Claimant rarely, if ever, worked less than seven days per week. Although Respondent designated Val Todd as a relief worker on Saturdays, he frequently arrived late or, on some occasions, not at all. Claimant routinely worked an average of six hours on Saturdays and eight hours on Sundays, which she understood to be her designated days off. The rest of the week she averaged 16 hour days.

7) Scott Hampson is the manager and coordinator of residential services for Jackson County Mental Health. He monitors adult foster homes for the mentally and developmentally disabled on behalf of the county and the state. He had routine contacts with Respondent when determining placements in the foster home and during annual licensing inspections, which are required under state law. He met with Respondent at least once a month, sometimes more often. He has visited the home Respondent operated many

* At hearing, Claimant testified that she began her employment on March 3, 1990. However, the claim calendar she prepared in October 1994 with the aid of the Agency begins in December 1992. The Agency treated the wage claim period as December 29, 1992, through July 18, 1994.

times and Respondent was only there when requested to be present during an inspection. Hampson found Claimant and the residents always on the premises and never observed a relief worker when he visited the home. Claimant, on several occasions, complained to Hampson about Respondent's failure to pay her wages or the utility bills for the home. She also expressed concern about the lack of time off she had from her duties. Influenced, in part, by Claimant's complaints, Jackson County Mental Health ultimately removed the residents from the home in or around June or July of 1994 and placed them in another facility. After the residents were moved, Claimant no longer had a job and had to make other living arrangements for herself. Respondent remains licensed as an adult foster home provider and continues to operate homes in the Medford area.

8) Claimant's last day of employment with Respondent was July 18, 1994.

9) When she filed her wage claim with the Agency, Claimant prepared a calendar reflecting her recollection at that time of the hours she worked for Respondent during the period between December 29, 1992, and July 18, 1994.

10) In August 1995, after the Agency sent Respondent a demand letter for unpaid statutory minimum and overtime wages, Respondent mailed Claimant two promissory notes signed by Respondent acknowledging that he owed Claimant \$7,500 in one of the notes and \$5,500 in the second note. He included a check for \$100 and indicated the money would be paid back in

installments of \$100 each month. Claimant did not cash the check nor did she receive any checks from Respondent thereafter.

11) Claimant's testimony was generally credible. While she admitted her memory was not altogether reliable, she accounted for the hours she worked in a straightforward manner and most, if not all, of her testimony was corroborated by the record as a whole. There was no evidence to dispute the days and hours she claimed and there was no reason to consider her testimony other than credible.

12) At times material, the minimum wage in Oregon was \$4.75 an hour. The rate of pay for overtime, based upon the minimum wage, was \$7.13.

13) ORS 12.110 provides that an action to collect unpaid overtime wages shall be commenced within two years. The action in this case commenced when Respondent was served by certified mail with the Order of Determination on March 3, 1995.

14) Claimant's overtime claim covers the period between March 3, 1993, and July 18, 1994, a period within the statutory limitation of 2 years.

15) Based on Claimant's testimony and supporting documents, which are accepted as fact, during the period between December 29, 1992, and July 18, 1994, Claimant worked a total of 12,200 hours in 916 days. Of those hours, 8,540 hours were "straight time hours," that is, hours worked up to 40 per workweek. The remaining 3,660 hours were "overtime hours," that is, hours worked in excess of 40 hours per workweek. The overtime hours are those worked in excess of 40 per

week between March 3, 1993, and July 18, 1994.

16) Pursuant to ORS chapter 653 (Minimum Wages), OAR 839-20-030 (Payment of Overtime Wages) and Agency policy, the Agency calculated Claimant's total earnings to be \$66,660.80. The total reflects the sum of the following:

8,540 hours at \$4.75 per hour (the minimum wage (MW))	\$40,565.00
3,660 hours at \$7.13 per hour (overtime rate: 1.5 x MW)	26,095.80
TOTAL EARNED	\$66,660.80

17) Respondent paid Claimant \$11,765 for work performed during the wage claim period.

18) Civil penalty wages were computed according to Agency policy as follows: \$66,660 (the total wages earned) divided by 916 (the number of days worked during the claim period) equals \$72.77 (the average daily rate of pay). This figure of \$72.77 is multiplied by 30 (the number of days for which civil penalty wages continued to accrue) for a total of \$2,183, rounded to the nearest dollar per Agency policy.

ULTIMATE FINDINGS OF FACT

1) During times material herein, Respondent was an employer in this state.

2) Respondent employed Claimant as a resident manager at Respondent's adult foster care home between December 29, 1992, and July 18, 1994.

3) Claimant lived on the premises where she worked and took her meals there if she wished to do so. There was no written or oral agreement regarding the value of her meals or living facilities.

4) Claimant was paid at the rate of \$500 per month by Respondent. She was paid a total of \$11,765.

5) At material times herein the state minimum wage was \$4.75 per hour.

6) From December 29, 1992, until July 18, 1994, Claimant averaged nearly 13 ½ hours per day, seven days per week, in Respondent's employ. She worked 8,540 straight time hours and 3,660 overtime hours, earning a total of \$66,660.80 on the basis of minimum wage. At termination on July 18, 1994, \$54,895.80 remained unpaid.

7) When Claimant's employment ended, Respondent willfully failed to pay her the wages due immediately upon termination of her employment and willfully failed to pay her for 30 days thereafter.

8) Claimant's average daily rate for the wage claim period of employment was \$72.77. Civil penalty wages, computed pursuant to ORS 652.150 and agency policy, equal \$2,183.

CONCLUSIONS OF LAW

1) During all times material herein,* Respondent was an employer and Claimant was an employee subject to the provisions of ORS 652.110 to 652.200 and 652.310 to 652.405.

* The facts herein arose in January 1992, prior to the effective dates of any amendments to Oregon Revised Statutes and Oregon Administrative Rules resulting from the 1993 legislative session. The statutes and rules quoted are as they appeared at that time.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and the Respondent herein. ORS 652.310 to 652.405.

3) At times material, OAR 839-20-080 provided in part:

"(1) Every employer regulated under ORS 653.010 to 653.261 shall maintain and preserve payroll or other records containing the following information and data with respect to each employee to whom the law applies:

[(a) through (d), identifying personal data on each employee]

"(e) Time of day and day of week on which the employee's workweek begins, ***

"(f) Regular hourly rate of pay for any workweek in which overtime compensation is due, ***

"(g) Hours worked each workday and total hours worked each workweek, ***

"(h) Total daily or weekly straight time earnings or wages due for hours worked *** exclusive of premium overtime compensation,

"(i) Total premium pay for overtime hours, ***

"(j) Total additions to or deductions from wages paid each pay period including employee purchase orders or wage assignments. *** [including] the dates, amounts, and nature of the items ***

"(k) Total wages paid each pay period,

"(l) Date of payment and the pay period covered by payment."

At times material, OAR 839-20-082 provided in part:

"(1) In addition to keeping other records required by these rules, an employer *** who furnishes such lodging, meals, other facilities or services to employees as an addition to wages, shall maintain and preserve records substantiating the fair market value of furnishing each class of facility. Separate records of the fair market value of each item furnished to an employee need not be kept. The requirements may be met by keeping combined records of the fair market value in each class of facility, such as housing, fuel, or merchandise ***. Such records shall include itemized accounts showing the nature and amount of any expenditures entering into the computation of the fair market value, as defined in these rules.

"(2) If additions to or deductions from wages paid so affect the total cash wages due in any workweek (even though the employee actually is paid other than a workweek basis) as to result in the employee receiving less in cash than the applicable minimum hourly wage, or if the employee works in excess of the applicable maximum hours standard and any addition to the wages paid are a part of wages, or any deduction made are claimed as allowable deductions, the employer shall maintain records showing on a workweek basis those additions to or deductions from wages."

Respondent was obligated to create and maintain contemporaneous records of Claimant's hours and days of work and to provide to Claimant each payday an itemized accounting of her earnings and allowable deductions. Respondent did not create nor maintain the required records.

4) At times material, ORS 653.025 required that:

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

"*****

"(3) For calendar years after December 31, 1990, \$4.75.

At times material, OAR 839-20-010 provided:

"(1) Employees shall be paid no less than the applicable minimum wage for all hours worked, which includes 'work time' as defined in ORS 653.010(12). If in any pay period the combined wages of the employee are less than the applicable minimum wage, the employer shall pay, in addition to sums already earned, no less than the difference between the amounts earned and the minimum wage as prescribed by the appropriate statute or administrative rule."

At times material, OAR 839-20-030(1) provided in part:

"[A]ll work performed in excess of 40 hours per week must be paid for at the rate of not less than one and one-half times the regular rate of pay when computed *** pursuant to ORS 653.261(1)."

Respondent was obligated to pay Claimant a minimum wage of \$4.75 an hour for hours worked up to 40 hours per week, and not less than one and one-half times \$4.75 for all hours worked in excess of 40 hours in a week. Respondent failed to so pay Claimant.

5) At times material, ORS 653.035 provided in part:

"(1) Employers may deduct from the minimum wage to be paid employees under ORS 653.025 *** the fair market value of lodging, meals or other facilities or services furnished by the employer for the private benefit of the employee."

At times material, OAR 839-20-004 provided in part:

"(12) 'Fair Market Value' means an amount not to exceed the retail price customarily paid by the general public for the same or similar meals, lodging or other facilities or services provided to the employee by the employer.

"*****

"(14) 'Hours Worked' means all hours for which an employee is employed by and required to give to his/her employer and includes all time during which an employee is necessarily required to be on the employer's premises, on duty or at a prescribed work place and all the time the employee is suffered or permitted to work. 'Hours worked' includes 'work time' as defined in ORS 653.010(12).

"*****

"(16) 'Minimum Wage' means the rate of pay prescribed in ORS 653.025.

"(20) 'Salary' and 'Salary basis' means a predetermined amount paid for each pay period of one week or longer (but not to exceed one month) regardless of the number of days or hours worked and in no instance shall be any amount less than required to be paid pursuant to ORS 653.025. ****"

At times material, OAR 839-20-025 provided in part:

"(1) The fair market value of meals, lodging and other facilities or services furnished by the employer to the employee for the private benefit of the employee may be deducted from the minimum wage.

"(2) Full settlement of sums owed to the employer by the employee because of meals, lodging and other facilities or services furnished by the employer shall be made on each regular payday.

"(3) The deductions referred to in (1) above may be made only if the employee actually receives meals, lodging or other facilities or services and only if the meals, lodging or other facilities or services are furnished by the employer for the private benefit of the employee.

"(4) As used in this rule, meals, lodging or other facilities or services furnished by the employer as a condition of employment shall not be considered to be for the private benefit of the employee. ****"

At times material, ORS 652.610 provided that an employer must furnish the employee an itemized statement each regular payday showing the amount and purpose of deductions made during the pay period at the time wages are paid. That statute continued as follows:

"(3) No employer may withhold, deduct or divert any portion of an employee's wages unless:

"(a) The employer is required to do so by law;

"(b) The deductions are authorized in writing by the employee, are for the employee's benefit, and are recorded in the employer's books;

"(c) The employee has voluntarily signed an authorization for a deduction for any other item, provided that the ultimate recipient of the money withheld is not the employer, and that such deduction is recorded in the employer's books; or

"(d) The deduction is authorized by a collective bargaining agreement to which the employer is a party.

"(4) Nothing in this section shall be construed as prohibiting the withholding of amounts authorized in writing by the employee * * * where such is not otherwise prohibited by law; nor shall this section diminish or enlarge the right of any person to assert and enforce a lawful setoff or counterclaim or to attach, take, reach or apply an employee's compensation on due legal process."

Under the circumstances of this record, where there was no agreement as to the value or deductibility of any meals or lodging furnished to Claimant, and no written agreement authorizing Respondent's deduction from Claimant's wages of the purported cost of meals and lodging, and where the meals and lodging provided to Claimant were a condition of employment rather than for her private benefit, any such deduction would be a violation of ORS 652.610 and constitute a failure to pay wages earned.

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

"Whenever an employer discharges an employee or where such employment is terminated by mutual agreement, all wages earned and unpaid at the time of such discharge shall become due and payable immediately."

Respondent violated ORS 652.140(1) by failing to pay Claimant all wages earned and unpaid at the time her employment ended on July 18, 1994.

7) At times material, ORS 652.150 provided:

"If an employer willfully fails to pay any wages or compensation of any employee whose employment ceases, as provided in ORS 652.140, then, as a penalty for such nonpayment, the wages or compensation of such employee shall continue from the due date thereof at the same rate until paid or until action therefor is commenced; provided, that in no case shall such wages or compensation continue for more than 30 days from the due date; and provided

further, the employer may avoid liability for the penalty by showing financial inability to pay the wages or compensation at the time they accrued."

At times material, ORS 653.055 provided in part:

"(1) Any employer who pays an employee less than the wages to which the employee is entitled under ORS 653.010 to 653.261 is liable to the employee affected:

"(a) For the full amount of the wages, less any amount actually paid to the employee by the employer;

"(c) For civil penalties provided in ORS 652.150.

"(2) Any agreement between an employee and an employer to work at less than the wage rate required by ORS 653.010 to 653.261 is no defense to an action under subsection (1) of this section.

"(3) The commissioner has the same powers and duties in connection with a wage claim based on ORS 653.010 to 653.261 as the commissioner has under ORS 652.310 to 652.445

Respondent is liable for a civil penalty under ORS 652.150 for willfully failing to pay all wages, including overtime wages, to Claimant when due as provided in ORS 652.140.

8) Under the facts and circumstances of this record, and in accordance with ORS 652.332, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondent to pay Claimant her

earned, unpaid, due, and payable wages and the civil penalty wages, plus interest on both sums until paid.

OPINION

Default

Respondent failed to appear at the hearing, and thus defaulted to the charges set forth in the Order of Determination. In a default, pursuant to ORS 183.415(5) and (6), the task of this Forum is to determine if a prima facie case supporting the Agency's Order of Determination has been made on the record. *In the Matter of John Cowdrey*, 5 BOLI 291 (1986); *In the Matter of Art Farbee*, 5 BOLI 268 (1986); *In the Matter of Judith Wilson*, 5 BOLI 219 (1986). OAR 839-50-330 (2).

Where a respondent submits an answer to a charging document, the Forum may admit the answer into evidence during a hearing and may consider the answer's contents when making findings of fact. Where a respondent fails to appear at hearing, the Forum may review the answer to determine whether the respondent has set forth any evidence or defense to the charges. *In the Matter of Jack Mongeon*, 6 BOLI 194 (1987); *In the Matter of Richard Niquette*, 5 BOLI 53 (1986). In a default case where the respondent's total contribution to the record is his or her request for a hearing and an answer which contains nothing other than unsworn and unsubstantiated assertions, those assertions are overcome wherever they are controverted by other credible evidence on the record. *Mongeon, supra*.

The Agency has established a prima facie case. A preponderance of

the credible evidence on the whole record shows that Respondent employed Claimant during the period of the wage claim, and willfully failed to pay her all wages, earned and payable, when due. That evidence, which establishes that Respondent owes Claimant the amount in the Order below, was credible, persuasive, and the best evidence available, given Respondent's failure to appear at the hearing. There is no evidence in the record to contradict or overcome the prima facie case.

Hours Worked

ORS 653.045 requires an employer to maintain payroll records. Where the Forum concludes that a claimant was employed and was improperly compensated, it becomes the burden of the Respondent to produce all appropriate records to prove the precise amounts involved. *Anderson v. Mt. Clemens Pottery Co.*, 328 US 680 (1946); *In the Matter of Dan's Ukiah Service*, 8 BOLI 96 (1989). Where the employer produces no records, the Commissioner can then rely on the evidence produced by the Agency "to show the amount and extent of [claimant's] work as a matter of just and reasonable inference," and "may then award damages to the employee, even though the result be only approximate." *Mt. Clemens Pottery Co.*, 328 US at 687-88. Based on these rulings, the Forum may rely on the evidence produced by the Agency regarding the number of hours worked and rate of pay for Claimant.

The Agency, in this case, produced sufficient evidence to establish that Claimant worked the hours she claimed. She was hired to provide

continuous care for five mentally and developmentally disabled residents and to maintain the foster care home in which they resided. Her testimony regarding her daily duties and the hours it took to perform them was consistent with Hampson's testimony that resident managers, under the applicable adult foster care rules, are responsible for the 24 hour supervision of the residents and the ongoing maintenance of the home. The claim calendar she created for the Agency a short time after she left her employment, though only approximate by her testimony, was not contradicted by "evidence to negative the reasonableness of the inference to be drawn from the employee's evidence." *Id.*, at 686-88.

Minimum Wage and Overtime

There are no exemptions or exclusions from the coverage of the Minimum Wage Law, ORS 653.010 to 653.261, or the Wage and Hour Laws, ORS chapter 652, for Respondent or Claimant in this case. The Forum does find, however, that Claimant's overtime entitlement is limited by statute to the period between March 3, 1993, and July 18, 1994, and the Agency's amendments to the Order of Determination* appropriately reflect the overtime limitation.

ORS 653.025 prohibits employers from paying their workers at a rate less than \$4.75 for each hour of work time. ORS 653.055(1) provides that "[a]ny employer who pays an employee less than the [minimum wage and overtime] is liable to the employee affected: (a) For the full amount of the wages, less any amount actually paid to the employee by the employer; * * * and (c)

For civil penalties provided in ORS 652.150." ORS 653.055(2) states that "[a]ny agreement between an employee and an employer to work at less than the [minimum wage and overtime] is no defense to an action under subsection (1) of this section." Claimant could not agree to accept less than the minimum wage, whether as a "salary" or otherwise. The agreement to pay at a fixed rate includes the statutory requirement to pay a minimum wage. *In the Matter of Ashlanders Senior Foster Care, Inc.*, 14 BOLI 54, 80 (1995); *In the Matter of Martin's Mercantile*, 12 BOLI 262 (1994); *In the Matter of Crystal Heart Books Co.*, 12 BOLI 33 (1993). The evidence based on the whole record establishes that Respondent paid Claimant at a rate less than \$4.75 per hour.

Though Respondent attempted to assert in his answer that Claimant received room and board as part of her pay, the record as a whole shows that her presence during meals and at night were for her employer's benefit and not for her private benefit. There is no evidence that Respondent provided Claimant with an itemized contemporaneous accounting each payday as to the value of the meals and lodging. When she was paid the agreed upon amount, she was paid \$500 for one month's work. Even if she had worked a 40 hour work week, the limited salary scale involved was still below the statutory minimum.

OAR 839-20-030 provides that all work performed in excess of 40 hours per week must be paid for at the rate of not less than one and one-half times

* See Findings of Fact -- Procedural, numbers 11 and 12.

the regular rate of pay. Respondent was obligated by law to pay Claimant one and one-half times the minimum wage rate for all hours she worked in excess of 40 hours in a week.

Computation of Penalty Wages

There was no evidence in the record that Respondent was unable to pay Claimant in full when her employment with Respondent ended. Respondent was still licensed to operate adult foster homes in the Medford area and was continuing to do so at the time of hearing.

Awarding penalty wages turns on the issue of willfulness. The meaning of "willfully fails to pay any wages," as used in ORS 652.150, has been repeatedly held not to imply or require blame, malice, wrong, perversion or moral delinquency. Willfulness only requires that what was done was done with free will by the employer. *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 907 (1950). That case has been followed in numerous orders of this Forum. Respondent, as an employer, had a duty to know the amount of wages due to his employee. *McGinnis v. Keen*, 189 Or 445, 221 P2d 907 (1950); *In the Matter of Box/Office Delivery*, 12 BOLI 141 (1994); *In the Matter of Jack Coke*, 3 BOLI 238 (1983). Respondent's willful failure to pay Claimant all wages when due in accordance with statute rendered Respondent liable for penalty wages.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent John W. Hatcher to deliver to the

Business Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2109, the following:

(1) A certified check payable to the Bureau of Labor and Industries In Trust For Erma Jean (Jean) Henderson in the amount of FIFTY SEVEN THOUSAND SEVENTY EIGHT DOLLARS AND EIGHTY CENTS (\$57,078.80), representing \$54,895.80 in gross earned, unpaid, due and payable wages and \$2,183 in penalty wages, less appropriate lawful deductions; PLUS

(2) Interest at the rate of nine percent per year on the sum of \$54,895.80 from July 18, 1994, until paid, PLUS

(3) Interest at the rate of nine percent per year on the sum of \$2,183 from August 17, 1994, until paid.
