

In the Matter of
ARABIAN RIDING AND RECREATION CORP., dba C Bow Arrow Ranch,
Respondent.

Case Number 24-97
Final Order of the Commissioner
Jack Roberts
Issued July 22, 1997.

SYNOPSIS

Respondent operated a horse rental and riding ranch, employing a 15 year old minor as a ranch hand. Respondent failed to verify a work permit, failed to file an Employment Certificate, failed to maintain and preserve records, employed the minor to operate a tractor, failed to pay minimum wage, and failed to post a maximum work hours notice. Respondent also employed the minor during school hours, for more than 18 hours per week and more than three hours per day when school was in session, for more than 40 hours per week and more than eight hours per day when school was not in session, and for more than ten hours a day and more than six days a week. The Commissioner imposed civil penalties totaling \$23,050. ORS 652.210(1) and (2); 653.010(3) and (4); 653.025(3); 653.305(1), (2), and (3); 653.307(1), (2), and (3); 653.310; 653.315(1) and (4); 653.370(1); OAR 839-21-006(1), (5) through (13); 839-21-070(1)(a) through (e); 839-21-087 (1)(g)(C); 839-21-170(1), (2), and (3); 839-21-180(1) and (2); 839-21-220 (1)(a) and (3); 839-21-280 (2) and (3).

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 14 and December 19, 1996, in a conference room of the Bureau of Labor and Industries, 165 East Seventh Avenue, Eugene, Oregon. The Bureau of Labor and Industries (the Agency) was represented by Alan McCullough, an employee of the Agency. Arabian Riding and Recreation Corp. (Respondent), a corporation, was represented by William L. Ghiorso, Attorney at Law, Salem.

The Agency called as witnesses Agency child labor unit clerk Eileen Clappé (by telephone), Respondent's former ranch hands Kenzie Wright (by telephone) and Jack Pierce, Kenzie Wright's mother Carol Wright (by telephone), and Respondent's former ranch manager Gloria E. Bates (formerly Burns).¹

Respondent called as witnesses Thurston High School registrar Wanda Grant (by telephone) and Respondent's president Alfred J. Antonini (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 January 29, 1996, the Agency issued a "Notice Of Intent To Assess Civil Penalties" (Notice of Intent) to Respondent. The Notice of Intent informed Respondent that the Commissioner intended to assess civil penalties against Respondent totaling \$49,150 pursuant to ORS 653.370(1), based upon multiple alleged violations resulting from Respondent's alleged employment of Kenzie Wright, a minor born April 24, 1979, between on or about February 9 and September 30, 1994. The

Notice of Intent was served on Respondent's registered agent at Eugene, Oregon, and on Respondent's president at Hayward, California, on or about February 10, 1996.

2) On February 27, 1996, Respondent through counsel timely answered the Notice of Intent by denying specifically each of the multiple counts. In addition, Respondent alleged as affirmative defenses:

- 1) C Bow Arrow is not a dba of Arabian Riding & Recreation Corp.
- 2) Incorporating the previous denials, Kenzie Wright, DOB 4/24/79, was not at any time hired or employed by Respondent for agricultural or any other kind of employment or labor.
- 3) Incorporating the previous denials, the allegations which form the basis of the Notice of Intent are frivolous and without merit or truth.

3) The Agency requested a hearing date and on April 11, 1996, the Hearings Unit issued to Respondent and the Agency a Notice of Hearing setting forth the time and place of the requested hearing and the designated ALJ, 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 the Agency's administrative rules regarding the contested case process — OAR 839-50-000 through 839-50-420.

4) On July 2, 1996, counsel for Respondent requested a postponement of the hearing based on counsel's unavoidable absence from the state. The Agency did not object and on July 3 the hearing was reset to August 14, 1996.

5) The Agency and Respondent timely filed their respective case summaries.

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

7) At the commencement of the hearing, pursuant to ORS 183.415(7), the ALJ orally advised the participants of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing. The ALJ noted that

the violations alleged concerned the relevant statutes and rules as they existed before the 1995 session of the Oregon Legislature, which amended some of the statutes, necessitating amendment of some of the OARs.

8) At the close of the Agency's evidence on August 14, 1996, the Agency moved to amend portions of the Notice of Intent, resulting in alleged violations and penalties summarized as follows:

1. Failure to Verify Work Permit at the Time of Hire: One (1) Violation of OAR 839-21-220(1)(a). CIVIL PENALTY IN THE AMOUNT OF \$100.
2. Failure to File Employment Certificate: One (1) Violation of OAR 839-21-220(3). CIVIL PENALTY IN THE AMOUNT OF \$100.
3. Failure to Preserve and Maintain Records: One (1) Violation of OAR 839-21-170. CIVIL PENALTY IN THE AMOUNT OF \$500. AGGRAVATION: The magnitude and seriousness of the violation.
4. Employing a Minor Under 18 Years of Age to Operate Power-Driven Farm Machinery: One (1) Violation of OAR 839-21-280(2). CIVIL PENALTY IN THE AMOUNT OF \$500. AGGRAVATION: The magnitude and seriousness of the violation.
5. Failure to Comply with ORS 653.025 Relating to the Payment of Wages: One (1) Violation [of OAR 839-21-087(1)(g)(C)]. CIVIL PENALTY IN THE AMOUNT OF \$250. AGGRAVATION: The magnitude and seriousness of the violation.
6. Failure to Post a Notice Regarding Maximum Work Hours Where a Child Under 16 Years of Age is Employed: One (1) Violation [of OAR 839-21-180, ORS 653.315(4)]. CIVIL PENALTY IN THE AMOUNT OF \$100.
7. Employment of a Child Under 16 Years of Age for Longer than 10 Hours for any One Day: 120 Violations [of ORS 653.315(1)]. CIVIL PENALTY OF \$12,000.
8. Failure to Confine Employment of a Minor Under 16 Years of Age to Outside School Hours: One (1) Violation [of OAR 839-21-070 (1)(a)]. CIVIL PENALTY IN THE AMOUNT OF \$500. AGGRAVATION: The magnitude and seriousness of the violation.
9. Failure to Confine Employment of a Minor Under 16 Years of Age to Not More than 40 Hours in any One Week While School is Not in Session: 9 Violations [of OAR 839-21-070(1)(b)]. CIVIL PENALTY IN THE AMOUNT OF \$900.
10. Failure to Confine Employment of a Minor Under 16 Years of Age to Not More than 18 Hours in any One Week While School is in Session: 19

Violations [of OAR 839-21-070(1)(c)]. CIVIL PENALTY IN THE AMOUNT OF \$1,900

11. Failure to Confine Employment of a Minor Under 16 Years of Age to Not More than Eight Hours in any One Day When School is not in Session: 73 Violations [of OAR 839-21-070(1)(d)]. CIVIL PENALTY IN THE AMOUNT OF \$7,300.

12. Failure to Confine Employment of a Minor Under 16 Years of Age to Not More than Three Hours in any One Day When School is in Session: 88 Violations [of OAR 839-21-070(1)(e)]. CIVIL PENALTY IN THE AMOUNT OF \$8,800.

13. Employment of a Child Under 16 Years of Age for More than Six Days in Any One Week: 10 Violations [of ORS 653.315(1)]. CIVIL PENALTY IN THE AMOUNT OF \$1,000.

The Agency had alleged alternatives to paragraphs 8, 9, 10, 11, 12, and 13 involving the employment of a minor under 16 years of age in agriculture. After both sides had rested on December 19, 1996, the Agency conceded that Respondent's ranch was not an agricultural operation and withdrew those allegations.

9) The proposed order, containing an exceptions notice, was issued on June 4, 1997. Acting on Respondent's timely request, the ALJ extended the due date for exceptions to July 1, 1997. Respondent's exceptions were timely received and are dealt with in the Opinion section of this Order.

FINDINGS OF FACT -- THE MERITS

1) At times material herein, Respondent was an Oregon corporation with an address of 33435 Van Duyn Road, Eugene, Oregon. At that address, beginning in February 1994, it operated a facility devoted to horse rentals and riding known as "C Bow Arrow Ranch."

2) Alfred J. Antonini was president of Respondent, and his wife, Alva, was secretary. He had also been president of CBA Operations, a corporation which operated the ranch until February 1994. The name "C Bow Arrow Ranch" referred to a

tract of land of approximately 1800 acres north of Eugene near Coburg, Oregon. Antonini was the owner of the land, which he leased to the corporation. Respondent, as well as its predecessor, CBA Operations, engaged the personal services of one or more persons at that location.

3) In early 1989, Robert Burns worked for one of Antonini's enterprises in Houston, Texas. At Antonini's request, Burns and his wife Gloria came to Oregon and managed C Bow Arrow Ranch (C Bow, or the ranch), which was operated by CBA Operations. They received a salary and use of a mobile home on the premises. They had an assumed business name of "Burns Ranch Management" in Harris County, Texas. Robert Burns died in 1992 and Gloria Burns registered individually in Lane County, Oregon, as "Burns Management" at the ranch address.

4) C Bow was a "horse operation" open to the public. In 1989, there were over 50 head of horses and some sheep, geese, and peacocks. At times material, the business offered boarding facilities for horses, trail rides, barn dances, hay rides, cookouts, and a children's horse camp.

5) The ranch managers were not expected to do all of the labor in the care and feeding of the horses and other animals and the running of the ranch operation. They were authorized to engage ranch hands as laborers, but only with the approval of Antonini. It was also policy to accept labor from customers in exchange for riding privileges. Most of this "volunteer" labor was performed by females in their early teens.

6) Gloria Burns was instructed by Antonini to engage ranch hands as independent contractors. Ranch hands Jack Pierce and Matt Walker registered an assumed business name of "Dakota and Indiana Ranch Contractors" at the ranch address. The ranch hands did not work for other ranches and did not hire individuals to

assist them. Their work was directed by Gloria Burns, or by Antonini through Gloria Burns.

7) Jack Pierce worked as a ranch hand at the ranch from June through September 1994. He answered a newspaper ad, filled out an employment application, submitted a letter of recommendation, was interviewed twice by the manager, Gloria Burns, and was hired. He was entitled to live in a two room house on the property while he worked there for which he signed a separate agreement for living accommodations on the premises. He provided his own food and telephone. He was required to agree to a "service contract" and to acknowledge in writing his status as an independent contractor, including agreeing to provide his own insurance. As part of the application process, Burns furnished him with a copy of OAR 436-50-030.3 He was paid \$300 per month (\$10 per day), in a gross amount with no deductions. He received an IRS form 1099 rather than a W-2 for his annual earnings. He had worked there previously and knew that the hours were approximately 7 a.m. to 5 p.m. in winter and 7 a.m. to 9 p.m. from May through September. He kept no record of the exact hours he worked each day. He was aware that the manager kept a record of days worked, but not hours.

8) The ranch hands fed and watered the horses and other animals, saddled, bridled, exercised, and put up the horses, cleaned the stalls and the barn, groomed the horses, acted as guides for trail rides of from one to 20 riders, mended fence, and ran the tractor. In addition they assisted the veterinarian, provided staff and security for events such as weddings, cookouts, and barn dances and, in the summer, acted as instructors for the children's horse camp. They worked seven days a week, and were paid once a month at \$10 per day. They received a gross check, with no deductions. The checks were signed by Alva or Alfred Antonini.

9) Individuals acting as "volunteers" performed the same work as the ranch hands. At first, a "volunteer" might just clean stalls and groom horses, supervised by a ranch hand. As they gained experience, they assumed the other duties, except for driving the tractor. The opportunity to ride without charge was often coupled with acting as a trail guide. Otherwise, the opportunity to ride without charge was limited to daylight hours late in the day on the few occasions when no event was scheduled. The horses had to be put in by dark.

10) As ranch manager, Gloria Burns ran the day-to-day operations. She had a ranch bank account for purchases of supplies, but all other expenditures had to be authorized and approved by Antonini in Hayward, California. She could recommend the hire of ranch hands, but Antonini had final authority. The paychecks for the ranch hands came from Hayward. Revenues from ranch operations were deposited to the corporate account and not to the ranch account. Antonini was a "hands on" administrator.

11) In 1992, Kenzie Wright, date of birth April 24, 1979, (the minor) lived with her mother on North 67th Street in Springfield, Oregon, and attended Thurston Middle School, a public school in Springfield. She was fond of horses and rode at the ranch. She began cleaning stalls and doing related work as a "volunteer" in 1992 in exchange for riding. At that time she worked after school and on weekends

12) The minor's mother, who was employed elsewhere, sometimes worked as a "volunteer." The minor worked as a "volunteer" in the summer of 1993. Her mother would drive her to the ranch, go to her own job, and pick her up in the evening. Burns invited the minor to live at the ranch because of the long days. The minor's mother agreed and the minor lived with Burns in the mobile home.

13) The minor enrolled at Thurston High School in September 1993 and

withdrew a few weeks later. Her mother arranged that she be "home schooled," and she continued to live and work at the ranch.

14) The minor was a dependable worker and performed the same duties as the regular ranch hands. She fed and watered the horses and other animals, saddled, bridled, exercised, and put up the horses, cleaned the stalls and the barn, groomed and trained the horses, acted as a guide for trail rides, and drove the tractor. In addition she assisted the veterinarian, acted as staff and security for weddings, cookouts, and barn dances and, in the summer, acted as an instructor for the children's horse camp. She also answered the telephone, scheduled riding reservations, and operated the cash register.

15) The minor kept no record of the exact hours she worked each day. Burns kept no record of employee hours but did report the number of days each worked to Respondent's headquarters for payroll purposes. Burns felt that the minor was a good worker and should be paid.

16) The ranch hands were paid each month for the number of days submitted for them by the ranch manager on individual invoices. Beginning sometime in late 1993, Burns submitted a monthly invoice for the minor. The minor began receiving a monthly check in about November 1993. She did not fill out any sort of employment application prior to receiving paychecks.

17) Available records indicate that invoices were submitted on behalf of the minor (and paid) as follows:

"Kenzie Wright to CBA Operations, December 1993, Casual Labor \$250"

"Kenzie Wright to Arabian Riding & Recreation Corp., April 1994, Casual Labor \$280"

"Kenzie Wright to Arabian Riding and Rec. Corp., May 1994, Casual Labor \$300"

"Kenzie Wright to Arabian Riding & Recreation Corp., June 1994, Contract Work \$300"

"Kenzie Wright to Arabian Riding & Recreation Corp., July 1994, Contract Work \$80"

"Kenzie Wright to Arabian Riding and Recreation Corp., August 1994, Horse Camp & Function Work \$150"

Burns was instructed by Antonini to use terms such as "casual labor" or "contract labor" on invoices for the ranch hands.

18) In Springfield Public Schools in the month of December 1993, there were 13 days (2½ weeks) when school was in session. In the month of April 1994, there were 19 days (4+ weeks) when school was in session. In the month of May 1994, there were 21 days (4+ weeks) when school was in session. In the month of June 1994, there were 15 days (3 weeks) when school was in session. School was not in session after June 21, 1994, or in July or August 1994. The minor left the ranch and the school district in September 1994.

19) There was no schedule regarding maximum work hours by minors under 16 years of age posted in a conspicuous place at the ranch while the minor worked there.

ULTIMATE FINDINGS OF FACT

1) At times material herein, Respondent was an Oregon corporation operating a facility devoted to horse rentals and riding known as "C Bow Arrow Ranch" near Eugene, Oregon.

2) Between February 9 and September 30, 1994, Respondent utilized the personal services of Kenzie Wright, a minor born April 24, 1979. At all times material, she was under 16 years of age.

3) On or about February 9, 1994, Respondent did not verify the age of Kenzie Wright at the time of hire by requiring her to produce a work permit.

4) Respondent did not file a completed Employment Certificate form with the

Bureau of Labor and Industries within 48 hours after hiring Kenzie Wright on or about February 9, 1994.

5) Respondent did not maintain and preserve records related to hours worked by Kenzie Wright while in Respondent's employ.

6) Respondent employed Kenzie Wright to operate a tractor.

7) Respondent did not pay employee Kenzie Wright the minimum wage of \$4.75 per hour.

8) Respondent did not post in a conspicuous place a printed notice stating the maximum work hours required in one week and in every day of the week for minors under 16 years of age.

9) Between April 1 and September 1, 1994, Respondent employed Kenzie Wright to work more than ten hours a day for 101 separate days.

10) Between April 1 and June 21, 1994, Respondent employed Kenzie Wright to work during school hours on 55 different days.

11) Between April 1 and September 1, 1994, Respondent employed Kenzie Wright to work more than 40 hours per week during three different weeks when school was not in session.

12) Between April 1 and September 1, 1994, Respondent employed Kenzie Wright to work more than 18 hours per week during 11 weeks when school was in session.

13) Between April 1 and September 1, 1994, Respondent employed Kenzie Wright to work more than eight hours per day when school was not in session on 30 separate days.

14) Between April 1 and September 1, 1994, Respondent employed Kenzie Wright to work more than three hours per day when school was in session on 55

separate days.

15) Between April 1 and September 1, 1994, Respondent employed Kenzie Wright to work more than six days in any one week during 10 separate weeks.

16) Between February 9 and September 30, 1994, Respondent did not employ Kenzie Wright in the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodity; the raising of livestock or in preparation for market, delivery to storage or to market or to carriers for transportation to market any such commodities or livestock.

CONCLUSIONS OF LAW

1) At times material herein,⁴ OAR 839-21-006 provided, in pertinent part:

"As used in ORS 653.305 to 653.360 and in OAR 839-21-001 to 839-21-500, unless the context requires otherwise:

" * * * * *

"(5) 'Employ' shall have the same meaning as that which appears in ORS 653.010(1)⁵.

"(6) 'Employer' shall have the same meaning as that which appears in ORS 653.010(2)."

At times material herein, ORS 653.010 provided, in pertinent part:

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

" * * * * *

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

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

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

2) At times material herein, ORS 653.305 provided:

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

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

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

At times material herein, ORS 653.307 provided:

"(1) The Wage and Hour Commission shall provide a method for issuing employment certificates to minors and employment certificates to employers for the employment of minors in accordance with rules and regulations which it may hereafter adopt pursuant to the provisions of ORS 183.310 to 183.550, and shall by such rules and regulations require reports from employers employing minors.

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

"(3) All school districts shall cooperate with the Wage and Hour Commission and make available upon request of the commission, information concerning the age and schooling of minors who have applied for or been issued an employment certificate."

At times material herein, ORS 653.310 provided:

"No child under 18 years of age shall be employed or permitted to work in any employment listed in ORS 653.320(2),⁶ unless the person employing the child procures and keeps on file and accessible to the school authorities of the district where such child resides, and to the police and the commission an employment certificate as prescribed by the rules and regulations adopted by the Wage and Hour Commission pursuant to ORS 653.307, and keeps a complete list of all such children employed therein."

At times material herein, ORS 653.370 provided, in pertinent part:

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

The Commissioner of the Bureau of Labor and Industries has jurisdiction over the persons and subject matter herein. Respondent was not regulated under the Fair Labor Standards Act.

3) At times material herein, OAR 839-21-006 provided, in part:

"As used in ORS 653.305 to 653.360 and in OAR 839-21-001 to 839-21-500, unless the context requires otherwise:

"(1) 'Agriculture' includes farming in all its branches and among other things includes the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities, the raising of livestock, bees, fur-bearing animals, or poultry and any practices performed by a farmer or on a farm as an incident to or in conjunction with such farming operations, including preparation for market, delivery to storage or to market or to carriers for transportation to market. 'Agricultural employment' is employment in 'Agriculture' as herein defined.

" * * * * *

"(5) 'Employ' shall have the same meaning as that which appears in ORS 653.010(1)⁷.

"(6) 'Employer' shall have the same meaning as that which appears in ORS 653.010(2).

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

"(8) 'Executive Secretary' means the Commissioner of the Bureau of Labor and Industries.

" * * * * *

"(10) 'Minor' means any person under 18 years of age.

"(11) 'Workday' means any fixed period of 24 consecutive hours.

"(12) 'Workweek' means any fixed and regularly recurring period of seven consecutive workdays.

"(13) 'Work Permit' means the employment certificate issued to minors pursuant to ORS 653.307."

At times material herein, OAR 839-21-220 provided in part:

"(1) Unless otherwise provided by rule of the Commission, no minor 14 through 17 years of age shall be employed or permitted to work unless the employer:

"(a) Verifies the minor's age by requiring the minor to produce a Work Permit and

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

" * * * * *

"(3) Within 48 hours after the hiring of a minor, or of permitting a minor to work, an employer shall file a completed Employment Certificate Form by taking or mailing the completed form to any office of the Bureau of Labor and Industries."

Between February and September 1994, Respondent was not engaged in agriculture at C-Bow Ranch and did not employ Kenzie Wright, a minor, in agriculture.

4) In February 1994, by permitting Kenzie Wright, a minor between 14 and 17 years of age, to work without verifying said minor's age by requiring her to produce a work permit, Respondent violated OAR 839-21-220(1)(a).

5) By failing to file a completed Employment Certificate form with the Bureau of Labor and Industries in February 1994 within 48 hours after permitting Kenzie Wright, a minor between 14 and 17 years of age, to work, Respondent violated OAR 839-21-220(3).

6) At times material herein, OAR 839-21-170 provided:

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

"(a) Name in full, as used for social security recordkeeping purposes and on the same record, the minor's identifying symbol or number if such is used in place of name on any time, work or payroll records;

"(b) Home address, including zip code;

"(c) Date of birth;

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

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

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

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

"(2) In addition to the records referred to in section (1) of this rule, every employer employing minors under 16 years of age shall maintain and preserve records containing the following information and data with respect to each minor under 16 years of age employed:

"(a) The time of day that the minor began working and the time of day that the minor stopped working;

"(b) A schedule of the maximum number of hours to be worked each day and each week by each minor under 16 years of age.

"(3) The records required to be maintained and preserved in sections (1) and (2) of this rule are required in addition to and not in lieu of any other recordkeeping requirement contained in OAR 839-21-001 to 839-21-500. However, when one record will satisfy the requirements of more than one rule, only one record shall be required."

By failing to maintain and preserve records related to hours worked by Kenzie Wright, a minor, while in Respondent's employ between February 9 and September 30, 1994, Respondent violated OAR 839-21-170.

7) At times material herein, OAR 839-21-280(2) provided, in part:

"(2) [N]o minor under 18 years of age may be employed to operate or assist in the operation of power-driven farm machinery of any kind. * * *

"(3) As used in section (2) of this rule 'assist(ing) in the operation of power-driven farm machinery', includes starting, stopping, adjusting, feeding or any other activity involving physical contact associated with the operation of the machinery."

By permitting Kenzie Wright, a minor under 18 years of age, to operate a tractor between February 9 and September 30, 1994, Respondent violated OAR 839-21-280(2).

8) At times material herein, ORS 653.025 provided:

"Except as provided by ORS 652.020 and the rules of the commissioner issued under ORS 653.030 and 653.261, 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 herein, OAR 839-21-087 provided, in part:

"(1) No employer shall employ any minor to work in the State of Oregon, except under the following conditions:

" * * * * *

"(g) Where the employer is in full compliance with the provisions of the following statutes relating to the payment of wages:

" * * * * *

"(C) ORS 653.010 to 653.265[.]"

By failing to pay minimum hourly wage to Kenzie Wright, a minor, between February 9 and September 30, 1994, contrary to ORS 653.025, Respondent violated OAR 839-21-087(1)(g)(C).

9) At times material herein, ORS 653.315(4) provided:

"(4) Every employer of children under 16 years of age shall post in a conspicuous place where such children are employed, a printed notice stating the maximum work hours required in one week, and in every day of the week from such children."

At times material herein, OAR 839-21-180 provided:

"(1) Every employer required to maintain a schedule of the maximum hours of work by minors under 16 years of age, shall post the schedule in a conspicuous place where all such minors have easy access to it.

"(2) Every notice required by any law or rule to be posted at the employer's place of business and that has applicability to the employment of minor employees shall be displayed in a conspicuous place where all minors have easy access to them."

By failing to post a schedule of the maximum hours required in one week while employing Kenzie Wright, a minor under 16 years of age, between February 9 and September 30, 1994, contrary to ORS 653.315(4), Respondent violated OAR 839-21-180.

10) At times material herein, ORS 653.315(1) provided:

"(1) No child under 16 years of age shall be employed for longer than 10 hours for any one day, nor more than six days in any one week."

By employing Kenzie Wright, a minor under 16 years of age, for more than 10 hours per day on at least 101 separate days between February 9 and September 30, 1994, Respondent committed 101 violations of ORS 653.315(1).

11) By employing Kenzie Wright, a minor under 16 years of age, for more than six days in any one week in at least 10 separate weeks between February 9 and September 30, 1994, Respondent committed 10 violations of ORS 653.315(1).

12) At times material herein, OAR 839-21-070 provided in part:

"(1) Except as provided in section (2) of this rule, employment of minors under 16 years of age shall be confined to the following periods:

"(a) Outside school hours;

"(b) Not more than 40 hours in any one week when school is not in session;

"(c) Not more than 18 hours in any one week when school is in session;

"(d) Not more than eight hours in any one day when school is not in session;

"(e) Not more than three hours in any one day when school is in session."

By employing Kenzie Wright, a minor under 16 years of age, to work during school hours on 55 different days between April 1 and June 21, 1994, Respondent violated OAR 839-21-070 (1)(a).

13) By employing Kenzie Wright, a minor under 16 years of age, to work more than 40 hours per week during at least three different weeks when school was not in session between April 1 and September 1, 1994, Respondent committed three violations of OAR 839-21-070(1)(b).

14) By employing Kenzie Wright, a minor under 16 years of age, to work more than 18 hours per week during 11 weeks when school was in session between April 1 and June 21, 1994, Respondent committed 11 violations of OAR 839-21-070(1)(c).

15) By employing Kenzie Wright, a minor under 16 years of age, to work more than eight hours per day on 30 separate days when school was not in session

between April 1 and September 1, 1994, Respondent committed 30 violations of OAR 839-21-070(1)(d).

16) By employing Kenzie Wright, a minor under 16 years of age, to work more than three hours per day on 55 separate days when school was in session between April 1 and September 1, 1994, Respondent committed 55 violations of OAR 839-21-070(1)(e).

OPINION

The evidence in this case establishes that Kenzie Wright, a minor under 16 years of age, worked at Respondent's C Bow Ranch beginning sometime in 1992. She was initially regarded as a "volunteer" by Respondent. Sometime in late 1993, Respondent began issuing paychecks to the minor on a regular basis, based on Respondent's pay scale for a ranch hand.

Respondent's policies regarding persons who worked at the ranch encompassed numerous violations of this state's wage and hour laws. Respondent's policies regarding Kenzie Wright working at the ranch encompassed numerous violations of this state's child labor laws. Respondent's position was that the minor was a "volunteer" during her early tenure and was not later a regular "contract" ranch hand because she did not go through the normal recruitment process and was not authorized by Antonini for hire as a "contractor."

VOLUNTEER STATUS

By statutory definition, one employs another by allowing or permitting that individual to work. Such work may be voluntary, without expectation of compensation, only if the entity for which the services are performed is "a public employer * * * or a religious, charitable, educational, public service or similar nonprofit corporation, organization or institution for community service, religious or humanitarian reasons" or

the work is part of a work training program administered under state or federal assistance laws. ORS 653.010(3). There was no evidence or attempt to show that Respondent was a public employer or a religious, charitable, or educational institution as described or was involved in federal or state public assistance program. Respondent could not therefore accept the personal services of Kenzie Wright or any other individual as a volunteer.

INDEPENDENT CONTRACTOR STATUS

Respondent attempted to give its ranch hands the status of independent contractors by having them register assumed business names, sign an independent contractor agreement, receive periodic compensation without deductions, and report their income on IRS form 1099. But this forum determines whether an individual rendering personal services is an employee or an independent contractor by applying an "economic reality" test. The forum has explained this test as follows:

"The forum considers five factors to gauge the degree of the worker's economic dependency, with no single factor being determinative. These factors are:

"(1) The degree of control exercised by the alleged employer;

"(2) The extent of the relative investment of the worker and the alleged employer;

"(3) The degree to which the worker's opportunity for profit and loss is determined by the alleged employer;

"(4) The skill and initiative required in performing the job;

"(5) The permanency of the relationship." *In the Matter of Frances Bristow*, 16 BOLI 28, 37 (1997) (citing *In the Matter of Geoffroy Enterprises, Inc.*, 15 BOLI 148 (1996)).

In this instance, 1) the employer controlled the work; 2) the worker had no investment and the employer owned the facilities, livestock, and equipment; 3) the worker's opportunity for profit was limited to a daily wage; 4) job performance was ordinary labor requiring minimal skill; and 5) the relationship was an indefinite one. All of these factors

suggest an employer-employee relationship between Respondent and the ranch hands, and, it follows, between Respondent and the minor. Respondent was an employer in its work relationship with Kenzie Wright and the minor was Respondent's employee.

In another case wherein the employer claimed that the minor's labor was given willingly in exchange for training opportunity, this forum said:

"It is not a defense for Respondent that [the minor] willingly and eagerly undertook the [unpaid] position. The subject statutes and rules were clearly designed to protect minors from their own eagerness and naiveté, and from less than scrupulous potential employers." *In the Matter of LaVerne Springer*, 15 BOLI 47, 68 (1996).

MINIMUM WAGE

Non-agricultural employees in Oregon, including minor employees, were entitled to a wage rate of at least \$4.75 an hour. The wage paid to Kenzie Wright, when she was paid at all, was far short of that amount.

The Agency initially charged violations encompassing the entire period between February and September 1994, and sought penalties for the multiple violations involved. At the close of its presentation, it reduced the number of daily and weekly offenses based upon the documentation it anticipated. The documentary evidence of Kenzie Wright's employment showed fewer days "billed" for her labor than the testimony originally indicated. This is not surprising, given the lack of written records and the fact that her testimony (and that of her mother and Jack Pierce) in August 1996 was almost two full years after the events it described. While it is clear that Respondent violated several statutes, the trier of fact has found violations only where the documentary evidence and the testimonial evidence coincide. Thus, while one could infer from the testimony that the minor worked ten or more hours a day, seven days a week for the entire period charged, the forum has limited penalties to those days for which she was compensated. For instance, while the testimony would give the impression that she

worked all of the months of April, July, and August 1994, the invoices indicate 28 days, 8 days, and 15 days, respectively. This necessarily alters the calculation of days worked both when school was in session and when it was not. This forum generally considers each day of a per-day violation or each week of a per-week violation as a separate violation. Because the forum is imposing sanctions, any doubt regarding the exact number of days or weeks worked has been resolved in Respondent's favor. On the other hand, the actual dates when school was in session was a matter of record in this proceeding and Respondent's suggestion that the minor was being home schooled and was not subject to the Wage and Hour Commission's rules regulating the employment of minors is without merit.

MINOR UNDER 18

At times material, an employer employing a minor between 14 and 17 years of age was obligated to verify age by viewing the minor's work permit before hire. Within 48 hours after hire, the employer was obligated to file an Employment Certificate with the Agency. Respondent did not verify a work permit and did not file an Employment Certificate, either at the time the minor began work or at any time thereafter. Respondent failed to maintain and preserve records required when employing a minor, and allowed the minor to operate machinery (the tractor).

MINOR UNDER 16, SCHOOL IN SESSION

Respondent might have avoided violations by verifying the minor's age. Because the minor was under 16, the employer had a number of obligations not required with older minor employees. When employing minors under 16, employers must post a printed notice stating the maximum work hours required in one week. Even more serious violations involving school requirements revolved around the minor's age. By statute, minors under 16 must work outside school hours and may not work over 10

hours a day or over six days a week. Commission regulations restrict the employment of minors under 16 to three hours per day and 18 hours per week when school is in session and eight hours per day and 40 hours per week when school is not in session. Respondent breached these statutes and rules as described herein.

The statutes and rules authorize the Commissioner to impose particular penalties. The order below is a proper exercise of that authority.

RESPONDENT'S EXCEPTIONS

Respondent timely filed two exceptions to the Proposed Order.

"Exception 1. The * * * civil penalties * * * in items 9, 11, and 13 * * * should be abated [because] * * * the minor * * * was not enrolled in school [while] she was present and living on the property occupied by Respondent. * * * [S]he had dropped out of school and was not living with either of her natural parents. * * * "

Respondent argues that OAR 839-21-070(1)(a), (c), and (e) mandate that an employer not require a minor to work during times which conflict with the minor's status as a student and with the minor's school schedule, that the minor's legal guardian had consented to the minor's removing herself from school, and that Respondent did not interfere with the minor's schooling. Rather, Respondent provided adult supervision and a place to live when the parents could or did not. It is suggested that penalties under such circumstances are inappropriate.

The cited rules were promulgated by the Wage and hour Commission under its authority to "administer, execute and carry out the provisions of ORS 653.010 to 653.545 * * *," (ORS 653.520) and to "prepare, adopt and promulgate rules for the carrying into effect of ORS 653.305, 653.315 and 653.505 to 653.540 * * *." (ORS 653.525). The cited rules are based on ORS 653.315 and related statutes limiting the employment of minors under 16 years of age. There are statutory exceptions to those

limitations, but enrollment or non-enrollment in school is not one of them. Rather, because the statute requires that the school authorities of the resident school district be informed by certificate of a minor's work status, the Commission's rules couple the age of the child with whether or not school is in session. There is no exception in the statute or in the rules covering employment of a child who merely doesn't attend school. I cannot find that the casual presence of a supervisor, in this case a ranch foreman, is the same as employment by a parent or person standing in the place of a parent permitted by ORS 653.365.⁸ Respondent's first exception is overruled.

"Exception 2. The * * * penalties [in] items 7, 8, 10, and 12 * * * are excessive and not borne out by the unique facts of this case. * * * [D]uring all relevant times Wright was living on the business premises * * * [,] was not in school [and] was present on the business premises 24 hours a day, seven days a week. * * * Respondent's * * * premises was Wright[']s surrogate home. * * * Wright liked horses and the rural life [which] attracted her * * * in the first place. * * * [Her] mother believed that * * * [it] was a safe and healthy environment for her daughter in the absence of a home with her own family. * * * [S]ince Wright was not in school and not living at home, she * * * occup[ied] her otherwise free time * * * with the various horse related activities [at] Respondent's." (Emphasis in original.)

Respondent's argument parallels that of the first exception, to the effect that ORS 653.315 and OAR 839-21-070(1)(b) and (d) are intended to prevent exploitation of a minor, that the unique circumstances of this case were not exploitive because respondent's management was providing a place for the minor to live "with full knowledge and consent of the minor's guardian," and that the "penalties totalling [*sic*] \$14,400 are excessive, not justified, and should be abated."

The evidence indicated that Kenzie Wright's living arrangement was not a mere rooming situation arranged through the parent, and, given the expectation and actuality of the minor's labor, was not the result of Respondent's largesse. The civil penalties

proposed are appropriate, within the statutory authority, not excessive, and are hereby confirmed. Respondent's second exception is overruled.

ORDER

NOW, THEREFORE, as authorized by ORS 653.370, Arabian Riding and Recreation Corp. is hereby ordered to deliver to the Bureau of Labor and Industries, Fiscal Services 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 TWENTY THREE THOUSAND FIFTY DOLLARS (\$23,050), plus any interest thereon, which accrues at the annual rate of nine per cent, between a date ten days after the issuance of the Final Order herein and the date Respondent complies therewith. This assessment is the sum of the following civil penalties against Respondent:

- (1) \$100 for violation of OAR 839-21-220(1)(a).
- (2) \$100 for violation of OAR 839-21-220(3).
- (3) \$500 for violation of OAR 839-21-170.
- (4) \$500 for violation of OAR 839-21-280(2).
- (5) \$250 for violation of OAR 839-21-087(1)(g)(C).
- (6) \$100 for violation of OAR 839-21-180.
- (7) \$10,100 for 101 violations of ORS 653.315(1) (more than 10 hours per day).
- (8) \$1,000 for 10 violations of ORS 653.315(1) (more than six days per week).
- (9) \$500 for violation of OAR 839-21-070(1)(a).
- (10) \$300 for three violations of OAR 839-21-070(1)(b).

(11) \$1,100 for 11 violations of OAR 839-21-070(1)(c).

(12) \$3,000 for 30 violations of OAR 839-21-070(1)(d).

(13) \$5,500 for 55 violations of OAR 839-21-070(1)(e).

¹This witness, known as Gloria Bates at the time of the hearing, was referred to in documents and testimony as Gloria Burns, and is referred to individually in this order as "Burns" or "Gloria Burns."

²The Forum has used the term used by the witnesses to describe the status of individuals who performed labor for Respondent in exchange for "free" horse riding. Because Oregon law does not recognize as a volunteer one who performs labor without pay for other than a charitable, religious, or governmental entity, this order uses quotation marks when referring to the "volunteers" utilized by Respondent. ORS 653.010(3).

³OAR 436-50-030 was a rule of the Workers' Compensation Division regarding Employer/Insurer Coverage Responsibility, implementing ORS 656.029 respecting responsibility for workers' compensation coverage between contractors and subcontractors for contract labor. The rule was repealed in 1996.

⁴As noted previously, the ORS and OAR sections are quoted as they appeared at times material, prior to the 1995 legislative changes.

⁵The numbering of the referenced subsections of ORS was changed to (3) and (4), respectively, in 1989. Section 1, chapter 446, Oregon Laws 1989.

⁶ORS 653.320(2) provides: No child under 14 years of age shall be employed or permitted to work in, or in connection with, any factory, workshop, mercantile establishment, store, business office, restaurant, bakery, hotel or apartment house.

⁷The numbering of the referenced subsections of ORS was changed to (3) and (4), respectively, in 1989. Section 1, chapter 446, Oregon Laws 1989.

⁸ORS 653.365: "Notwithstanding the provisions of ORS 653.370, a parent or person standing in the place of a parent may employ the child of the parent or a child in the custody of the parent under the age of 18 years in any occupation."

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