

In the Matter of

LABOR READY NORTHWEST, INC.,

Case No. 31-01

Final Order of the Commissioner Jack Roberts

Issued December 13, 2001

SYNOPSIS

Respondent became a subcontractor on a public works project by providing workers to a client who had a subcontract to install fireproofing on the project. Respondent misclassified its eight workers and, as a result, paid them a wage lower than the applicable prevailing wage rate for the job that they performed, in violation of ORS 279.350(1). Respondent failed to post the prevailing wage rate on the project, in violation of ORS 279.350(4), and filed nine payroll statements that contained incorrect information and were not accompanied by appropriate statements of certification, in violation of ORS 279.354 and OAR 839-016-0010. Respondent also provided four itemized statements of earnings that contained incorrect information, violating OAR 839-020-0012. Respondent's violations of ORS 279.350(1) and (4) were intentional, and the Commissioner placed Respondent on the list of contractors or subcontractors ineligible to receive any contract or subcontract for public works for a period of one year. The Commissioner also assessed \$34,000 in civil penalties. ORS 279.350(1), ORS 279.350(4), ORS 279.354, ORS 279.261, ORS 279.370, ORS 653.256; OAR 839-016-0010, OAR 839-016-0033, OAR 839-016-0035, OAR 839-016-0085, OAR 839-016-0090, OAR 839-016-0500, OAR 839-016-0520, OAR 839-016-0530, OAR 839-016-0540, OAR 839-020-0012, OAR 839-020-1010, OAR 839-020-1020, OAR 839-020-1030.

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on June 19 and 20, and August 8, 2001, in the hearing room of the Bureau of labor and Industries, located at 800 NE Oregon Street, Portland, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter David K. Gerstenfeld, an employee of the Agency. Respondent was

represented by David J. Sweeney, attorney at law. Timothy Adams, Respondent's general counsel and executive vice president, was present on June 19 as the individual designated to assist in the presentation of Respondent's case.

The Agency called as witnesses: John Rowand, Jr., senior investigator for the southwest Washington Fair Contracting Foundation; Kathleen Johnson, BOLI Wage and Hour Division ("WHD") compliance specialist; Viladda Souryammat, BOLI's MIS coordinator; Chet Nakada, BOLI Technical Assistance coordinator; and Michael Wells, BOLI WHD compliance specialist.

Respondent called as witnesses: Timothy Adams, Respondent's general counsel and executive vice president; Raymond Mott, Respondent's Oregon district manager; and Kathleen Johnson.

The forum received into evidence:

- a) Administrative exhibits X-1 through X-28 (submitted or generated prior to hearing);
- b) Agency exhibits A-1 through A-20 and A-22 through A-24 (submitted prior to hearing), and A-25 through A-30 (submitted at hearing). Agency exhibits A-21, A-31 and A-32 were offered but not received.
- c) Respondent exhibits R-1 through R-17 (submitted prior to hearing).

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 1, 2000, the Agency issued a Notice of Intent to Place on List of Ineligibles and to Assess Civil Penalties in the amount of \$44,000 in which it made the following charges against Respondent:

a) Between approximately May 8 and June 9, 2000, Respondent provided manual labor as a subcontractor on the New Bend Middle School Project (the "Project"), a public works project subject to regulation under Oregon's prevailing wage rate laws and intentionally failed to pay \$3,442.91 in prevailing wages to eight employees, in violation of ORS 279.350 and OAR 839-016-0035. The Agency sought a \$24,000 penalty for these eight alleged violations.

b) Respondent filed nine certified payroll reports reflecting work performed on the Project that were inaccurate and/or incomplete, in violation of ORS 279.354 and OAR 839-016-0010. The Agency sought an \$18,000.00 penalty for these nine alleged violation.

c) Respondent intentionally failed to post the prevailing wage rates in a conspicuous and easily accessible place at the work site on the Project, in violation of ORS 279.350(4) and OAR 839-016-0033(1). The Agency sought a \$2,000 penalty for this alleged violation.

d) The Agency asked that Respondent, and any firm, corporation, partnership or association in which it had a financial interest be placed on the list of those ineligible to receive contracts or subcontracts for public works ("List of Ineligible") for a period of three years.

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

3) The Agency served the Notice of Intent on Respondent's registered agent, together with a document providing information on how to respond to a notice of intent.

4) Respondent, through counsel, filed an answer and request for hearing on November 22, 2000. Respondent's answer included the affirmative defenses of claim preclusion, waiver, and estoppel.

5) The Agency filed a request for hearing with the Hearings Unit on November 30, 2000.

6) On January 9, 2001, the Hearings Unit served Respondent with: a) a Notice of Hearing in Case Number 31-01 that set the hearing for June 19, 2001; b) a Summary of Contested Case Rights and Procedures containing the information required

by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case hearing process; and d) a copy of the Notice of Intent.

7) On February 28, 2001, the Agency filed a motion for partial summary judgment as to Respondent's affirmative defenses of claim preclusion, waiver, and estoppel.

8) On February 28, 2001, the Agency filed a motion to consolidate case 31-01 with a second case in which a Notice of Intent containing similar allegations and sanctions, including placement on the List of Ineligibles, had been issued against and served on Respondent, Respondent having already filed an answer and request for hearing in that case.

9) On February 28, 2001, the Agency filed a motion for a discovery order requesting the production of documents relevant to the allegations contained in its Notice and requiring Respondent to respond to two interrogatories. The Agency described the relevancy of the documents and information sought and represented that the Agency had unsuccessfully attempted to obtain the documents and information through an informal exchange of information.

10) On March 2, 2001, the ALJ ordered the Agency and Respondents each to submit a case summary including: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a statement of any agreed or stipulated facts; a brief statement of the elements of the claim and any civil penalty calculations (for the Agency only); and a brief statement of any defenses to the claim (for Respondent only). The ALJ ordered the participants to submit their case summaries by June 8, 2001, and notified them of the possible sanctions for failure to comply with the case summary order.

11) On March 2, 2001, the ALJ issued an interim order stating that Respondent had seven days after service of the Agency's motion to file a written response.

12) On March 6, 2001, Respondent requested an extension of time until March 12 to respond to the Agency's motions.

13) On March 12, 2001, the ALJ granted Respondent's motion for extension of time to respond to the Agency's motions, giving Respondent until March 12, 2001, to respond to the Agency's motion to consolidate and until March 21, 2001, to respond to the Agency's motion for partial summary judgment.

14) On March 12, 2001, Respondent filed a response to the Agency's motion to consolidate hearings in which Respondent objected to the Agency's motion on the grounds that the two cases were factually distinct and that Respondent would be prejudiced additionally by consolidation based on the extreme sanctions sought by the Agency in both cases.

15) Respondent did not object to the Agency's motion for discovery order, and on March 12, 2001, the ALJ granted the Agency's motion in full.

16) On March 23, 2001, Respondent filed a response to the Agency's motion for partial summary judgment in which Respondent objected to the Agency's motion and requested oral argument.

17) On March 27, 2001, the ALJ denied Respondent's request for oral argument on the Agency's motion for partial summary judgment.

18) On March 28, 2001, the ALJ issued an interim order granting the Agency's motion for partial summary judgment. That order is affirmed, except as modified in the section of the Opinion discussing Respondent's exceptions with regard to the following discussion on waiver. The interim order stated:

“Introduction

“The Agency alleged in its Notice of Intent (‘Notice’) that, on the New Bend Middle School Project (the ‘Project’), Respondent intentionally failed to pay \$3,442.91 in prevailing wages, filed nine inaccurate and/or incomplete certified payroll reports, and failed to post prevailing wage rates. The Agency further alleged that Respondent should be assessed \$44,000 in civil penalties and placed on the commissioner’s list of those ineligible to receive contracts or subcontracts for public works as a result of the alleged violations.

“Respondent timely filed an answer and request for hearing and raised three affirmative defenses -- waiver, estoppel, and claim preclusion -- in its answer.

“On February 28, 2001, the Agency filed a motion for partial summary judgment regarding Respondent’s affirmative defenses, contending they were not available to Respondent as a matter of law. Respondent filed objections to the Agency’s motion on March 21, 2001, and requested oral argument with regard to the Agency’s motion. The forum denied this request on March 27, 2001.

“Summary Judgment Standard

“A motion for summary judgment may be granted where no genuine issue as to any material fact exists and a participant is entitled to a judgment as a matter of law, as to all or any part of the proceedings. OAR 839-050-0150(4)(B). The standard for determining if a genuine issue of material fact exists follows:

‘ * * * No genuine issue as to a material fact exists if, based upon the record before the court viewed in a manner most favorable to the adverse party, no objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject of the motion for summary judgment. The adverse party has the burden of producing evidence on any issue raised in the motion as to which the adverse party would have the burden of persuasion at [hearing]. ORCP 47C.’ *In the Matter of Cox and Frey Enterprises*, 21 BOLI 175, 178 (2000).

“Waiver

“On July 28, 2000, BOLI issued a ‘Notice of Claim’ against the bond taken by Kirby Nagelhout Construction Co., as principal, and Safeco Insurance Company, as surety, based on BOLI’s ‘prima facie determination that the prevailing wage as required by ORS 279.350 in the amount of \$3,442.91 has not been paid [by Respondent], plus \$3,442.91 as liquidated damages pursuant to ORS 279.356 for a total claim of \$6,885.82.’ Subsequently, BOLI dropped its demand for liquidated damages and accepted \$3,442.91 in wages from Respondent in resolution of the issues raised in the Notice of Claim. Respondent contends that BOLI’s actions ‘in resolving and fully

compromising the claim dated July 28, 2000' constitute waiver by estoppel.

"Waiver is 'the intentional relinquishment of a known right.' *Wright Schuchart Harbor v. Johnson*, 133 Or App 680, 685 (1995) (*quoting Drews v. EBI Companies*, 310 Ore. 134, 150 (1990)). Waiver must be plainly and unequivocally manifested, either 'in terms or by such conduct as clearly indicates an intention to renounce a known privilege or power.' *Id.* at 685-86. In general, the question of whether a waiver has occurred is resolved by examining the particular circumstances of each case. *Id.* at 686. Waiver may be either explicit or implicit, that is, implied from a party's conduct. *Id.* Although an explicit disclaimer is ordinarily not a prerequisite for an enforceable waiver, waiver will not be presumed from a silent record. *Id.* Waiver by estoppel occurs when a party is misled to the party's prejudice into an honest and reasonable belief that waiver is intended. *Mitchell v. Pacific First Bank*, 130 Or App 65, 71, n.3 (1994).

"It is undisputed that Kathleen Johnson, BOLI compliance specialist, and Raymond Mott, Respondent's district manager, negotiated the resolution of the Agency's July 28, 2000, Notice of Claim. The Agency and Respondent submitted affidavits from Johnson and Mott that contain Johnson's and Mott's respective versions of the negotiations. Also submitted were a copy of the Notice of Claim and several letters between Johnson and Mott depicting the understanding between Respondent and the Agency in the resolution of the claim. The forum examines this evidence in the light most favorable to Respondent.

"In order for Respondent to avoid summary judgment on this issue, the evidence, when viewed in the light most favorable to Respondent, must show that Johnson misled Mott, to Respondent's prejudice, into an 'honest and reasonable belief' that BOLI intended to waive all sanctions available to BOLI arising out of Respondent's actions on the Project. Accordingly, the forum assumes that all facts stated in Mott's affidavit are true and that the letters reflect the understanding between Respondent and the Agency regarding the resolution of the Notice of Claim.

"Respondent's argument objecting to the Agency's motion contends that Respondent 'honestly and reasonably believed that the payment of \$3,442.91 was a settlement of any and all problems associated with the prevailing wages of the [Project].' However, Mott's affidavit does not bear this out. In his affidavit, Mott refers specifically to the back wages and liquidated damagesⁱ sought in the Notice of Claim, states that 'Kathleen Johnson agreed to drop the penalties in exchange for the payment of the primary wages totaling \$3,442.91,' and concludes that 'Upon payment of the \$3,442.91, I believed the issue was completely settled with BOLI.' Mott conspicuously fails to mention any discussion whatsoever of any other sanctions available to BOLI regarding Respondent's work on the Project, and Johnson's letter to Mott confirming resolution of the Notice of Claim refers only to 'owed wages' and 'liquidated damages.' Viewed in

this context, it is apparent that that the only 'issue' settled was the payment of back wages and liquidated damages sought in the Notice of Claim. Respondent also does not dispute Johnson's lack of authority, stated in her affidavit, to negotiate away potential civil penalties or placement on the list of ineligible based on Respondent's violation of Oregon's prevailing wage rate statutes. Finally, there is no explicit or implicit reference to BOLI's waiver of the sanctions sought in this proceeding in the correspondence between Johnson and Mott.

"Viewing the evidence in the light most favorable to Respondent, the forum is unable to conclude that Johnson misled Mott into an honest and reasonable belief that BOLI intended to waive its right to pursue the sanctions sought in this proceeding in exchange for the \$3,442.91 received by BOLI to settle the July 28, 2000, Notice of Claim. Consequently, Respondent's waiver by estoppel defense fails as a matter of law. The Agency's motion for partial summary judgment with regard to Respondent's affirmative defense of waiver by estoppel is **GRANTED**.

"Estoppel

"Respondent's second affirmative defense is that 'by virtue of BOLI-Bend and BOLI-Portland's actions and Respondent Labor Ready's reliance to its detriment, upon those actions, [the commissioner] is estopped from commencing and maintaining this action.'

"In two prior cases in which violations of Oregon's prevailing wage rate laws were alleged, this forum held that the doctrine of equitable estoppel does not apply to the agency where it is enforcing a mandatory requirement of the law. *In the Matter of Southern Oregon Flagging*, 18 BOLI 138, 162 (1999); *In the Matter of Larson Construction Co., Inc.*, 17 BOLI 54, 74 (1998). In this case, the agency is seeking to enforce mandatory requirements of the lawⁱⁱ and equitable estoppel is not available to Respondent as a defense as a matter of law.ⁱⁱⁱ The Agency's motion for partial summary judgment with regard to Respondent's affirmative defense of equitable estoppel is **GRANTED**.

"Claim Preclusion

"Claim preclusion bars the Agency from obtaining a final judgment against a Respondent, then issuing charges in a subsequent proceeding against the same Respondent where the subsequent charges are based on the same factual transaction that was at issue in the first proceeding, seek a remedy additional or alternative to the one sought earlier, and are of such a nature as could have been joined in the first proceeding. *In the Matter of Catalogfinder, Inc.*, 18 BOLI 242, 257 (1999).

"Respondent contends that the resolution of the Agency's July 28, 2000, Notice of Claim is the functional equivalent of a final judgment, that the allegations raised in the Notice in this case could have been raised in the Notice of Claim, and that the doctrine of claim preclusion prevents the

Agency from seeking any other sanctions against Respondent based on Respondent's work on the Project. Respondent is incorrect. First, the Notice of Claim and its resolution do not constitute a judgment, much less a final judgment. Second, the sanctions sought in this proceeding are only available through a contested case proceeding in this forum and could not have been sought in an action against the bond. The Agency's motion for partial summary judgment with regard to Respondent's affirmative defense of claim preclusion is **GRANTED.**"

19) On April 2, 2001, the ALJ heard oral arguments from Respondent and the Agency regarding the Agency's motion to consolidate. That same day, the ALJ issued an interim order denying the Agency's motion. In pertinent part, the order stated:

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

20) The Agency and Respondents filed timely case summaries on June 8, 2001.

21) On June 18, 2001, Respondent filed a supplemental case summary.

22) At the outset of the hearing, pursuant to ORS 183.415(7), the ALJ verbally advised the Agency and counsel for Respondent of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

23) The Agency case presenter waived the ALJ's recitation of the manner in which objections may be made and matters preserved for appeal.

24) At the outset of the hearing, Respondent stipulated to the facts recited in paragraphs 1-4 of the section of the Agency's case summary entitled "Agreed or Stipulated Facts."

25) At the outset of the hearing, Respondent and the Agency stipulated to the admission of exhibits A-1 through A-20, A-22, A-23, and A-24, and R-1 through R-10.

26) Just prior to adjournment on June 19, the Agency moved to amend its Notice to allege four violations of OAR 839-020-0012(1) based on pay stubs issued to David Shielar and Santiago Venegas. The Agency's motion was based on testimony by Raymond Mott that the information contained in Exhibit A-20 was the same information that would be on an employee's pay stub and Respondent's failure to object to this testimony. Respondent objected to the Agency's amendment. The ALJ reserved ruling until the following morning. When the hearing recommenced on June 20, the Agency made its amendment more specific by stating that the specific violations involved Shielar's and Venegas's pay stubs for April 13 and May 3, 2000, and that the pay stubs were deficient by failing to state the number of hours worked, rate of pay, and pay period covered by each payment. Respondent renewed its objection to the Agency's amendment and moved for a continuance in order to present evidence to meet the new allegations presented in the Agency's amendment if the ALJ granted the Agency's motion. The ALJ granted the Agency's motion based on OAR 839-050-0140(2)(a), which allows amendments after the commencement of hearing where there is implied consent. The ALJ also granted Respondent's motion for a continuance. Based on the mutual agreement of the participants, the ALJ set July 6 as a date for a teleconference to determine what date the hearing would continue.

27) On July 6, 2001, the ALJ conducted a teleconference with Mr. Sweeney and Mr. Gerstenfeld to determine what date the hearing would continue. By mutual

agreement of the participants, the hearing was scheduled to reconvene on August 8, 2001, at 1 p.m. The ALJ subsequently issued an interim order stating that the scope of the reconvened hearing would be limited to the Agency's allegation that Respondent violated OAR 839-020-0012(1) on four occasions with regard to information contained on pay stubs received by David Shielar and Santiago Venegas for work performed on April 13 and May 3, 2000. Both participants were ordered to file case summaries by July 30, 2001.

28) On July 30, 2001, Respondent filed an additional case summary. The Agency did not file an additional case summary.

29) The hearing reconvened on August 8, 2001. Respondent chose not to present any new evidence. The Agency and Respondent both made closing arguments.

30) On October 17, 2001, the ALJ issued a proposed order that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. On October 24, 2001, Respondent filed a motion for an extension of time to file exceptions to the proposed order until November 7, 2001. The Agency did not object and the ALJ granted Respondent's motion. On November 7, 2001, Respondent filed exceptions to the proposed order. The Agency did not file exceptions. Respondent's exceptions are addressed in the Opinion section of this Final Order.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent Labor Ready Northwest, Inc. ("LRNWI") was an Oregon corporation and a wholly owned subsidiary of Labor Ready, Inc. ("LRI"). Respondent operates in Oregon, Washington, Idaho, Alaska, and Montana. Respondent was incorporated in 1998, at which time LRI formed ten wholly owned subsidiary companies, including Respondent, each responsible for an area of the United States.

2) Respondent is in the business of providing temporary workers to other client businesses. Respondent's selling point is that it can have workers on a job site by 8 a.m. if a client calls at 6 a.m. that same day needing workers.

3) Most of the workers hired by Respondent perform unskilled labor for Respondent's clients and would be classified as laborers on prevailing wage rate jobs.

4) On July 22, 1999, the Agency issued a Notice of Intent to Assess Civil Penalties against LRI and LRNWI alleging that Respondents had violated Oregon's prevailing wage rate laws in October and November 1998 and in February 1999 and proposed to assess \$20,000 in civil penalties. On June 1, 2000, after hearing, the Commissioner issued a final order concluding that LRI had: (a) violated ORS 279.355 and OAR 839-016-0025 by failing to make and maintain records of the daily hours worked by its employees on a public works project; (b) violated ORS 279.355 and OAR 839-016-0025 by failing to make and maintain records of the daily compensation paid to each of its employees on the project; and (c) violated ORS 279.354 by filing certified payroll reports that stated inaccurately the projects on which two employees had worked. The commissioner imposed civil penalties totaling \$13,000.00 for these violations.

5) On June 2, 1999, the "New Middle School Building" project ("Project") in Bend, Oregon was first advertised for bid. On July 13, 1999, the Project was awarded to Kirby Nagelhout Construction Co. The contract award was in the amount of \$12,187,431.

6) The Project was regulated under Oregon's prevailing wage rate laws.

7) Pro-Tec Fireproofing, Inc. ("Pro-Tec") was a subcontractor on the Project.

8) On April 3, 2000, a Pro-Tec representative telephoned Respondent's Bend office and placed a job order with Mandalyll, Respondent's employee in that

office. When Mandalyll took the job order, she recorded information about Pro-Tec's job order on Respondent's job order form.

9) The information recorded by Mandalyll is printed below in boldface type, prefaced by questions printed on the job order form that precede the information she recorded:

"Job Date: **4-3-00**

Number of Workers Needed: **2**

Customer Name: **Protect Fire Proofing**

Job Site Address: **Cooly Rd New Bend Middle School**

Report To: **Claued** Time: **12:00 a.m.**

Type of Work: **Scissor Lift – 60 lb bags**

Safety Equipment: **Hard Hat, Boots, Gloves"**

10) The job order form completed by Mandalyll also contained a section entitled "**Prevailing Wage Fax to 1-800-662-2154.**" (emphasis in original) This section had boxes in which Respondent's employee taking the job order could check "type of job," a space to write the "contract #," and the notation "**MUST HAVE COPY OF RATE SHEET.**" (emphasis in original) Mandalyll wrote nothing in this section.

11) At the time Pro-Tec placed the job order, Respondent's employees made notations in the "Prevailing Wage" section only if there was a question as to whether or not the job was subject to the prevailing wage.

12) Between April 4 and June 2, 2000, Respondent supplied eight workers to Pro-Tec in response to its April 3 job order, including David Shielar, Santiago Venegas, Michael Gallano, Richard Hadley, Timothy Fallin, Steven Donoghue, Paul Cooper, and Joe Herberhole. These workers performed manual labor on the Project, assisting Pro-Tec employees who were applying sprayed on fireproofing material at the Project. These workers performed two primary duties. First, carrying bags of dry insulating material to a hopper, then cutting open the bag and dumping the material into the

hopper, where it was mixed with water and sprayed by a Pro-Tec employee through a nozzle onto the Project's walls. Second, cleaning up any resultant overspray.^{iv}

13) Respondent's Bend branch manager determined that the job was a prevailing wage rate job and that all eight workers were properly classified as "laborers." Accordingly, Respondent paid them at the base rate of \$21.59 per hour, including fringe benefits paid as wages, for all work performed on the Project. This was the correct rate for general laborers working on the Project.

14) Respondent billed Pro-Tec for the work performed by Respondent's workers on the Project and was reimbursed by Pro-Tec at the rate of \$34.30 per hour.

15) Respondent is motivated to pay the highest possible labor rate to its workers because the higher the pay rate, the more money Respondent makes.

16) Prevailing wage rates were posted in the general contractor's job shack at the Project while Respondent's eight employees worked for Pro-Tec on the Project. However, Respondent did not post prevailing wage rates on the Project. There was no evidence that the prevailing wage rate for the specific classification of "tender to plasterer" was or was not posted at the Project.

17) Respondent had paychecks ready for all eight employees at the end of each workday on the Project, with the exception of the first day each employee worked. The employees received their paychecks at the end of each workday at Respondent's Bend office unless they chose not to visit Respondent's office that day to pick up their paychecks.

18) On April 13, 2000, David Shielar and Santiago Venegas both worked 10 hours. Respondent issued written itemized statements of earnings to both stating that they had worked 13.5 hours on April 13 and paid them for 13.5 hours worked at the rate of \$21.59 per hour.

19) On May 3, 2000, Shielar and Venegas both worked 10 hours. Respondent issued written itemized statements of earnings to both stating that they had worked 11 hours on May 3 and paid them for 11 hours at the rate of \$21.59 per hour.

20) Respondent billed Pro-Tec for 8 hours straight time and 2 hours overtime worked by both Shielar and Venegas on April 13 and May 3, 2000.

21) LRI's corporate office created and submitted payroll statements on behalf of Respondent for all work performed by Respondent's eight employees on the Project. In all, LRI submitted nine payroll statements. Dates of completion listed on the payroll statements are April 12, April 19, April 26, May 3, May 10, May 17, May 19, May 26, June 1, and July 3, 2000.

22) The nine payroll statements filed by Respondent contained blanks for providing information on the following elements: name of Respondent's client, Respondent's local office that hired the workers, Respondent's address, payroll number, week ending, project and location, project or contract number, name/address/social security number of employee, number of exemptions for each employee, work classification, straight time and overtime worked each day and date, total hours worked, rate of pay, gross pay, "Trans," withholding tax, state tax, FICA, other withholdings, garnishments, total deductions, "EIC," and net pay.

23) Respondent's nine payroll statements contain the following incorrect information:

- a) All nine statements classify all workers as "Laborers."
- b) The 4/7/00 statement states that Shielar and Venegas each worked 10.0 hours of straight time on April 5-7.^v
- c) The 4/14/00 statement states that Shielar and Venegas each worked 9.0 hours of straight time on 4/11, 10.0 hours of straight time on 4/11 and 4/12, and 13.5 hours straight time^{vi} on 4/13.
- d) The 4/21/00 statement states that Shielar and Venegas each worked 16.0 hours straight time and 3.0 hours of overtime on 4/18.

e) The 5/5/00 statement states that Shielar and Venegas each worked 11.0 hours straight time on 5/3.^{vii}

24) Each payroll statement was accompanied by a "Statement of Compliance" that was signed by one of Respondent's administrative assistants and contained the following language:^{viii}

- "1. Payroll Number
- "2. Payroll Statement Date
- "3. Contract Number
- "4. Date

"I, *(name of signatory party)*, *(title of signatory party)*^{ix} do hereby state (1) That I pay or supervise the payment of the persons employed by *(Contractor or subcontractor)*^x on the *(Building or work)*^{xi}: that during the payroll period commencing on the ___ day of _____, _____, and ending the day of _____, _____, on said project have been paid the full weekly wages earned, that no rebates have been or will be made either directly or indirectly to or on behalf of said *(Contractor or subcontractor)*^{xii} from the full weekly wages earned by any person and that no deductions have been made either directly or indirectly from the full wages earned by any person, other than permissible deductions as defined in Regulations, Part 3 (29 CFR Subtitle A), issued by the Secretary of Labor under the Copeland Act, as amended * * * and described below:

"(2) That any payrolls otherwise under this contract required to be submitted for the above period are correct and complete; that the wage rates for laborers or mechanics contained therein are not less than the applicable wage rates contained in any wage determination incorporated into the contract; that the classifications set forth therein for each laborer or mechanic conform with the work performed.

"(3) That any apprentices employed in the above period are duly registered in a bona fide apprenticeship program registered with a State apprenticeship agency recognized by the Bureau of Apprenticeship and Training, United States Department of Labor, or if no such recognized agency exists in a State, are registered with the Bureau of Apprenticeship and Training, United States Department of Labor.

"(4) That:

"(a) Where fringe benefits are paid to approved plans, funds, or programs, [i]n addition to the basic hourly wage rates paid to each laborer or mechanic listed in the above referenced payroll, payments of fringe benefits as listed in the contract have been or will be made to appropriate programs for the benefit of such employees, except as noted in Section 4(c) below.

"(b) Where fringe benefits are paid in cash, [e]ach laborer or mechanic listed in the above referenced payroll has been paid as indicated on the payroll, an amount not less than the sum of the applicable basic hourly wage rate plus the amount of the required fringe benefits as listed in the contract, except as noted in Section 4(c) below.

"(c) Exceptions

"Exception (<i>Craft</i>)	Explanation
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"5. Remarks

"6. Name	Title	Signature
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"The willful falsification of any of the above statements may subject the contractor or subcontractor to civil or criminal prosecution. See Section 1001 of Title 18 and Section 3729 of Title 31 of the United States Code.

"DD FORM 879, APR 1998 (EG) * * *"

25) BOLI has created a form called a "WH-38" that contractors and subcontractors may use to comply with the wage certification statement required by ORS 279.354. Employers can obtain copies of this form directly from BOLI or from BOLI's Internet website. The Form WH-38 disseminated by BOLI in the year 2000 required subcontractors to provide information concerning the following elements: business name, street address and mailing address, phone, CCB registration number, project name, project number, project location, project county, type of work, date pay period began, date pay period ended, subcontract amount, prime contractor business name, prime contractor phone and CCB registration number, date subcontractor began work on the project, name and address of employee, trade/classification, straight time and overtime hours worked each day and date, total hours worked, basic hourly rate of pay, hourly fringe benefit paid as wage to employee, gross amount earned, total deduction, net wage paid for week, hourly fringe benefit paid to party, plan, fund or program, and name of benefit party, plan, fund, or program.

26) The certified statement contained on Form WH-38 disseminated by BOLI in the year 2000 contains the following language:

"CERTIFIED STATEMENT

"I, (*Name of signatory party*)(*title*) do hereby state:

"(1) That I pay or supervise the payment of the persons employed by; (*contractor, subcontractor or surety*) on the (*building or work*);:] that during the payroll period commencing on the ____ day of _____, 19__, and ending the ____ day of _____, 19__ all persons employed on said project have been paid the full weekly wages earned, that no rebates have been or will be made either directly or indirectly to or on behalf of said _____ from the full weekly wages earned by any persons, and that no deductions have been made either directly or indirectly from the full wages earned by any person, other than permissible deductions as specified in ORS 652.610, and described as follows: _____.

"(2) That any payrolls otherwise under this contract required to be submitted for the above period are correct and complete; that the wage rates for workers contained therein are not less than the applicable wage rates contained in any wage determination

incorporated in the contract; that the classification set forth therein for each worker conforms with work performed.

“(3) That any apprentices employed in the above period are duly registered in a bona fide apprenticeship program registered with a state apprenticeship agency recognized by the Bureau of Apprenticeship and Training, United States Department of Labor, or if no such recognized agency exists in a state, are registered with the Bureau of Apprenticeship and Training, United States Department of Labor.

“I have read this certified statement, know the contents thereof and it is true to my knowledge.

“(name and title)

(signature)”

27) In April and May 2000, John Rowand, senior investigator for the Fair Contracting Foundation in southwest Washington, made visits to the Project. During his visit, he observed Pro-Tec’s employees applying fireproofing that was sprayed on through a nozzle and Respondent’s employees loading the hopper with fireproofing material and cleaning up overspray.

28) Between his May inspection and June 26, 2000, Rowand inspected Respondent’s payroll statements for the Project and saw that Respondent had classified and paid its workers as laborers. Rowand then phoned Respondent’s employee Mandalyll and told her that Respondent had incorrectly classified and paid its workers on the Project. In turn, Mandalyll phoned Raymond Mott, Respondent’s Oregon District Manager who oversees operations, sales, staffing, and hiring in Oregon for Respondent, and Mott called Rowand. Rowand explained his concern that Respondent’s workers on the Project were misclassified and underpaid as a result, and Mott responded that Respondent would pay the higher rate if Rowand was correct.

29) On June 26, 2000, Rowand sent a fax to Mandalyll on the subject of “wage issues involving workers for Pro Tec Fireproofing on the New Bend Middle School.” The fax read, in pertinent part:

“I am sending you the pages from the Jan 15, 1999 BOLI prevailing wage rate book that show the correct wage rate for fireproofing. The individual that sprays the fireproofing should be classified as a Plasterer, Nozzleman; the individual that operates the mixer, moves the scaffolding and cleans up is classified as a Tender to Plasterer. Because the

application of sprayed fireproofing is not clearly defined, I have also included a copy of the appropriate page from the BOLI index of job classifications showing the correct classification as Plasterer."

30) On June 26, 2000, Rowand filed a complaint with BOLI's prevailing wage rate unit alleging that Respondent had failed to pay overtime after 8 hours a day and that 2-4 Respondent employees had been incorrectly paid.

31) On or about June 27, 2000, Mott called Pro-Tec and spoke with Joe Turi, owner of Pro-Tec, concerning the proper classification of Respondent's employees on the Project.

32) Turi responded by sending Mott, via fax, an August 27, 1997, letter from then-BOLI WHD compliance specialist David Gerstenfeld to Turi. This letter included the following statement:

"Since you have asked for written clarification regarding classification of the application of fireproofing, I would like to provide that to you. The application of intumescent fireproofing which was done on this project (I understand it is either brushed on or rolled on) is properly classified as 'Painters.' The application of Cafco brand sprayed-on fireproofing is properly classified as 'Plasterers.' Sprayed on fireproofing is either painters or plasterers, depending on the equipment and method of application: while you have mentioned a difference between cementitious fireproofing and others, this is not the distinction that is important for classification of the work for prevailing wage rate purposes. Instead, you look at the application methods and equipment. The feeding of the 'hopper,' clean up, moving materials on the job site and protection from overspray for the sprayed on fireproofing is classified as laborer, group one. I hope that this clarifies the classification of these various duties."

There was no testimony as to whether Gerstenfeld was aware of the 1997 internal document, or used it in arriving at his conclusion.

33) Respondent had not seen Gerstenfeld's August 27, 1997, letter before receiving it from Turi and did not rely on it to determine that Respondent's workers on the Project should be classified as laborers.

34) On June 28, 2000, Mott visited BOLI's Bend office and met for several hours with Rhoda Briggs, a WHD compliance specialist stationed in that office. Mott and

Briggs discussed the situation and the documentation provided by Pro-Tec. Briggs faxed the Pro-Tec documentation to Lois Banahene, lead compliance specialist in the WHD's prevailing wage unit. The next day, Mott met again with Briggs, accompanied by Charles Stanley, Respondent's Bend office manager.

35) Rowand's complaint was assigned to Kathleen Johnson, a WHD compliance specialist, for investigation. On July 11, 2000, Johnson sent a letter to "Charles," Respondent's Bend branch manager. The letter stated that BOLI had received a complaint that Respondent's employees "may not be receiving overtime or payment at the appropriate job classification wage rate" and requested records for all employees who performed work on the New Bend Middle School Project from January to April 2000. The letter also stated, in pertinent part:

"Violations of the prevailing wage regulations are a serious matter and may result in a requirement not only to pay workers unpaid prevailing wages, but an additional amount equal to the unpaid prevailing wages as liquidated damages to the workers. In addition to liquidated damages for unpaid workers, the law also provides that the Commissioner may assess civil penalty (sic) for violations of the prevailing wage regulations. Each violation of any provision of the prevailing wage laws is separate and distinct and in the case of continuing violations, each day's continuance is a separate and distinct violation. The law also allows the Commissioner to take enforcement actions against a contractor that prohibit the contractor from receiving any public works contracts for a period of three years. Payment of prevailing wages to workers does not relieve the contractor from any other enforcement action that the Bureau may determine is appropriate."

Johnson and Mott subsequently communicated in early August 2000. Mott explained his understanding that Respondent's employees on the Project should have been paid as laborers based on BOLI's 1997 letter to Pro-Tec. Johnson told Mott that BOLI had changed the job classification and that Respondent's employees on the Project should have been paid as tenders to plasterers at the higher rate of \$20.59 per hour and \$6.00 per hour in fringe benefits. Mott provided Johnson with copies of Respondent's nine payroll statements submitted for work done on the Project. Based on those statements,

Johnson calculated that Respondent had underpaid its eight workers on the Project by a total of \$3,442.91. On August 14, 2000, Johnson and Mott agreed that Respondent would pay \$3,442.91 in back wages to Respondent's employees on the Project and that the Agency would not seek liquidated damages.

36) On August 14, 2000, Johnson wrote a letter to Raymond Mott, Respondent's Oregon district manager, that stated, in pertinent part:

"This is to confirm our telephone conversation on 8/14/00. You will pay \$3,442.91 in owed wages. This amount does not include the liquidated damages set out in the Notice of Claim (enclosed).

"These owed wages stem from work performed by Labor Ready employees on the New Bend Middle School Project * * *. The employees were not paid the prevailing wage rate for their classification; Tender to Plasterer, \$26.59 per hour."

On August 15, 2000, Mott sent checks totaling \$3,442.91 to Johnson.

37) On August 21, 2000, Mott sent Johnson a letter that read as follows:

"I wanted to thank you for your help of the New Bend Middle School Project. If you have any more concerns about this project please let me know.

"Thank you for meeting with me last week. As when we met, I want you to know that at any time you or any of the other compliance specialist have a concern of question, just get in touch with me and we will get it taken care of. As you said, it is much easier and less time consuming to get a concern taken care of before it is a complaint. As a company, Labor Ready, and as the district manager, we will always try to help get concerns taken care of on a timely basis.

"The only way to get in touch with me is to page me at 1-800-800-8596. They will ask who the message is for and type it into me. My page is on 24 hours per day 7 days per week."

38) Prior to 1997, BOLI adopted current Davis-Bacon prevailing wage rates as the applicable prevailing wage rates in Oregon. Since then, BOLI has conducted annual wage surveys in Oregon and has used the data collected from them to determine prevailing wage rates in Oregon. On February 15, 1998, BOLI published its first rate book using rates determined by BOLI instead of Davis-Bacon. That book

included some changes in classification and additions. Since that time, BOLI has published rate books in January and July of each year containing Oregon prevailing wage rates. There are usually wage rate changes in each book. However, job classifications stay the same from book to book, although some new classifications may be added. Prevailing wage rates are published for 14 geographical regions, and the rate for a specific classification can vary from region to region.

39) Factors used to determine the appropriate prevailing wage rate on any given prevailing wage rate job are the geographical region, when the job was bid, which prevailing wage rate book applies, and what classification workers are in.

40) Wages that apply to a project are the ones in effect in BOLI's book at the time the project is bid. The prevailing wage rates that applied to the Project were those for Deschutes County published in BOLI's January 1999 prevailing wage rate booklet.

41) Prior to February 15, 1998, BOLI's prevailing wage rate book classified tenders to plasterers as general laborers. BOLI's February 15, 1998, rate book moved the job of tenders to plasterers to a separate classification of their own.

42) The BOLI prevailing wage rate booklet published January 15, 1999, contains several sections.

43) One section of BOLI's prevailing wage rate booklet published January 15, 1999, is entitled "1998 Definitions of Covered Occupations." It includes the following relevant definitions:

"21. Plasterers and Stucco Masons^{xiii}

Apply coats of plaster onto interior or exterior walls, ceilings, or partitions of buildings to produce finished surface according to blueprints, architect's drawings, or oral instructions.

Nozzleman

Swinging Scaffold

All Other Work

“* * * * *

“31. Tenders to Plasterers: Assistants, Painters, Paperhangers, Plasterers, and Stucco Masons^{xiv}

Assist painters, paperhangers, plasterers, or stucco masons by performing duties of lesser skill. Duties include supplying or holding materials or tools, and cleaning work area and equipment. Exclude construction or maintenance laborers who do not primarily assist painters, paperhangers, plasterers, or stucco masons.”

Respondent could not have determined that the covered occupation applicable to its workers was “tenders to plasterers” by reference to the definitions of covered occupations contained in BOLI’s prevailing wage rate booklet published January 15, 1999.

44) Another section of BOLI’s prevailing wage rate booklet published January 15, 1999, is entitled “Oregon Determination 99-01.” It includes the following relevant information:

<u>“TRADE</u>	<u>BASIC HOURLY RATE</u>	<u>FRINGE BENEFITS</u>
<u>“PLASTERERS^{xv}</u>		
Nozzleman	25.16	5.86
Swinging scaffold	24.16	5.86
all other work	23.16	5.86

“* * * * *

“TENDERS TO PLASTERERS^{xvi} 20.59 6.00”

45) In addition to its semi-annual prevailing wage rate book, since 1993 BOLI has published an internal document that lists classifications for different types of jobs and is designed to simplify the process for finding the correct job classification. This document was updated in 1997. One of its pages lists “Fire Proofing (Sprayed)” as a

type of work and indicates persons performing that type of work would be classified as “Plasterers.”

46) Although BOLI’s 1/15/99 prevailing wage rate book did not contain a specific classification for workers doing “fireproofing” or a description for work involved in fireproofing, the classification of workers engaged in spraying fireproofing could be determined by reading the rate book and the BOLI internal document mentioned in the prior finding.

47) In 1999, BOLI expected contractors to contact BOLI to determine the correct classification for workers performing fireproofing work.

48) BOLI’s Wage and Hour Division has a work unit called the prevailing wage rate unit. BOLI’s prevailing wage rate books, including the book published in January 1999, contain a statement indicating that persons who have any questions about prevailing wage rate can contact BOLI’s prevailing wage rate unit. The statement provides the telephone number for the prevailing wage rate unit.

49) Respondent’s workers were properly classified as tenders to plasterers on the Project and entitled to be paid \$20.59 per hour for straight time hours and \$6.00 per hour in fringe benefits.

MITIGATION AND AGGRAVATION

50) At the time of hearing, LRI or Respondent had employed workers on 407 prevailing wage rate projects in Oregon since 1997, including 36 in 1997, 100 in 1998, 121 in 1999, 134 in 2000, and 16 in 2001.

51) At the time of hearing, Mott had been Respondent’s Oregon district manager for 1½ years. Mott trains his employees in complying with Oregon’s prevailing wage rate laws. Up to the time of the hearing, Mott himself had received some training from LRI in December 2000 at a company-wide training for district managers in

complying with Oregon's prevailing wage rate laws. Mott had also attended prevailing wage rate seminars presented by BOLI.

52) At the time of the hearing, Mott could not recall hearing about BOLI's prior case with LRI that resulted in a Final Order.

53) Respondent keeps copies of BOLI's prevailing wage booklets in its local offices in Oregon, organized by date. There was no evidence presented as to when this practice began.

54) As of January 1, 2001, none of Respondent's offices in Oregon are allowed to refer workers to prevailing wage rate jobs unless Mott first sees the job.

55) Timothy Adams is LRI's general counsel and executive vice-president, as well as chief legal officer who oversees legal operations for Labor Ready, Inc. throughout the United States. Since the final order was issued in case number 70-99, Adams has taken steps to insure compliance with Oregon's prevailing wage rate laws. To begin with, Adams reviewed all of Labor Ready, Inc.'s prevailing wage rate policies to see if there were any systemic issues that would continue to cause problems. He sent a memo to LRI's prevailing wage rate department and corporate controller to whom that department reported that directed them to assume that Oregon has a "zero tolerance" policy regarding its prevailing wage rate laws. This memo still hangs in the cubicles of all employees in the prevailing wage rate department and is referred to as the "fear of God" memo. He terminated Frankie Sanders, director of the prevailing wage rate department, because of her relative lack of competence. He contacted Oregon's two district managers, Raymond Mott and John Horsigger (phonetic) by phone and suggested they avail themselves of training opportunities offered by BOLI and that they develop relationships with BOLI to open lines of communication so issues could be addressed before they became problems. He reviewed LRI's branch operations manual

and tried to address each issue that the final order suggested was deficient. He added language to the manual stating “[f]or prevailing wage rate jobs, we must maintain accurate records of daily hours worked by each employee on each project. Therefore, weekly work tickets are unacceptable on a prevailing wage job.” He has instructed LRI’s employees that if a job is mistakenly not identified as a prevailing wage rate job and a worker is underpaid, the worker should be correctly paid, “no questions asked.”

56) After the final order was issued in case number 70-99, Adams added a provision to LRI’s standard contract requiring customers to affirmatively represent whether or not a project is a prevailing wage job.

57) A few months before the hearing in the present case, Adams added a provision to LRI’s contract addenda that is used by Respondent whenever Respondent and a client use the client’s contract instead of Respondent’s. This provision requires the client to provide Respondent with “a copy of the proper wage classification schedule” and warrant that it has been posted appropriately at the jobsite, and to “reimburse [LRI] for underpayment of wages, penalties, and other losses due to CUSTOMER’s failure to do so.”

58) LRI brings in groups of 20 managers from around the United States for weekly training sessions. One of these sessions is taught by LRI’s legal department and is two hours long. 30 minutes of that time is devoted to prevailing wage rate law. During the weeklong training, LRI’s prevailing wage rate department director also meets with the managers to discuss details about prevailing wage rate laws and procedures. The training on prevailing wage rate is based on an outline developed by LRI. Summarized, that outline: (a) provides examples of prevailing wage rate projects; (b) states that prevailing wages must be paid on prevailing wage rate jobs; (c) requires each branch office to maintain accurate records of daily hours worked by each

employee and that employee's pay rate; (d) states that certified payrolls are prepared and submitted by LRI's corporate office, but branch offices are responsible for designating the job as prevailing wage on work tickets and on LRI's computer job record screen; and (e) stresses the critical importance of identifying a job as prevailing wage and advises branch offices to do a site visit and look for postings on the job site of the prevailing wage rate, if necessary. LRI's legal department conducts regular telephone conference calls with area directors and district managers and uses the same outline for training. In December 2000, LRI brought all 110 of its district managers to corporate headquarters in Tacoma and Adams "preached" to them for 30 minutes on the subject of prevailing wage rates, using the same outline.

59) LRI has an Internet website that is accessed by all of LRI's branches and that site has a web page dedicated to prevailing wage processes and regulations. There was no evidence presented as to when this web page was created.

60) Before the hearing in case number 70-99, LRI adopted a new computer procedure for job orders in prevailing wage rate jobs to reduce human error. Prior to that hearing, LRI's branch offices had to fax worker's work tickets to LRI's prevailing wage rate department in Tacoma, Washington so that the data could be transposed onto certified payroll statements. The new procedure involves using a screen in the initial intake process that has a toggle in which the employee taking the job order toggles "Y" if the job is a prevailing wage rate job and "N" if the job is not a prevailing wage rate job. If the employee toggles "Y," the job order is automatically "uplined" to LRI's prevailing wage rate department, which in turn automatically downloads the information into certified payroll format. The net result of this automation is work tickets no longer have to be transposed by hand onto certified payroll records, eliminating the possibility of human error in transposition.

61) There have been no changes to Respondent's job order sheet since the 70-99 hearing.

62) On January 26, 2000, the Agency sent Adams a letter stating, among other things, that the "'statement of compliance' (Form DD879)" on Respondent's payroll statements needed to be reviewed and reworded so that it met the "content requirements of ORS 279.354 and BOLI's 'Certified Statement' form WH-38."

63) On July 5, 2000, Chet Nakada, a coordinator employed in BOLI's Technical Assistance Division, made a three hour presentation to Mott and branch managers supervised by Mott on the subject of Oregon's wage and hour laws. Mott contracted with BOLI for this presentation and paid BOLI \$465 in fees for it. BOLI's Technical Assistance Division does not give presentations on prevailing wage rate law. That function is performed by the Wage and Hour Division's prevailing wage rate unit.

64) At the time of hearing, Respondent still did not post prevailing wage rates on prevailing wage job sites.

CREDIBILITY

65) John Rowand was a credible witness. His testimony was straightforward and internally consistent, and he responded without hesitation to questions on direct and cross-examination. With one exception, the forum has credited his testimony in its entirety. That exception is his testimony that Respondent's employees told him, during his Project inspection, that they had "no idea what they made." This is inherently improbable, given that Respondent's employees received daily paychecks, along with statements of itemized earnings and deductions on which was printed their wage rate.

66) Kathleen Johnson was a credible witness. She answered questions deliberately and thoughtfully on direct and cross-examination except where she did not

know the answer. Where she did not know the answer, she readily admitted her lack of knowledge. The forum has credited her testimony in its entirety.

67) Timothy Adams, LRI's general counsel and executive vice president, clearly believed that BOLI is overzealous in enforcing Oregon's prevailing wage rate laws. He testified that Oregon is a "zero tolerance" state with regard to BOLI's enforcement of Oregon's prevailing wage rate laws and described his internal staff memo to that effect as the "fear of God" memo. His testimony was internally consistent and he did not try to embellish his testimony concerning Respondent's mitigation efforts with evidence of which he had no direct knowledge. Despite his bias, the forum found him to be a credible witness and has credited his testimony in its entirety.

68) Chet Nakada's testimony was brief and limited to the subject of the training he conducted for Mott and Mott's branch managers. His testimony on direct and cross-examination was straightforward and unimpeached, and the forum has credited his testimony in its entirety.

69) Raymond Mott had an inherent bias in that he is a long-term employee of Respondent and is in charge of the geographical area where the alleged violations occurred. His testimony was also significantly at odds with the credible testimony of Adams and Nakada. He testified that he had received no training in prevailing wage rate law from Respondent, whereas Adams testified that Mott, along with all of LRI's district managers, received training from Adams himself in a training conducted at LRI's corporate headquarters in December 2000. He testified that he hired the Technical Assistance Division of BOLI to conduct a training in prevailing wage rate law for himself and his branch managers, whereas Nakada, who conducted the training, testified that that Division never conducts training in the area of prevailing wage rate law, that Mott did not contract with the Division to conduct a training on prevailing wage rate law, and

that Nakada did no training in this area. The forum has only credited Mott's testimony where it was corroborated by the testimony of other credible witnesses or supported by credible documentary evidence.

ULTIMATE FINDINGS OF FACT

1) On July 13, 1999, the "New Middle School Building" project in Bend, Oregon ("Project") was awarded to Kirby Nagelhout Construction Co. The Project was first advertised for bid on June 2, 1999. The contract was for the amount of \$12,187,431.

2) The Project was regulated under Oregon's prevailing wage rate laws and the prevailing wage rates that applied to the project were those published in the January 1999 prevailing wage rate booklet for Deschutes County. The Project was not subject to the Davis-Bacon Act.

3) Pro-Tec was a subcontractor on the Project.

4) Respondent provided eight workers to Pro-Tec between April 4 and June 2, 2000, who performed manual labor on the Project.

5) While working on the Project, all eight workers performed work that was properly classified as tender to plasterer. The correct prevailing wage rate for that classification of work was \$20.59 per hour for straight time work and \$6.00 per hour in fringe benefits.

6) Respondent classified its employees on the Project as laborers and paid them the straight time rate of \$21.59 per hour, including fringe benefits that were paid as wages.

7) Respondent did not post the prevailing wage rate for the position of tender to plasterer on the Project.

8) Between April 12 and July 3, 2000, Respondent filed nine certified payroll statements showing work performed by its employees on the Project. All nine

statements classified the listed employees as “Laborers.” All nine statements lack the statement of certification required by ORS 279.354 and OAR 839-016-0010. Four of the statements incorrectly state or mislabel hours worked by two of Respondent’s employees on eight separate days when both employees worked.

9) Respondent issued itemized statements of deductions to David Shielar and Santiago Venegas that showed that they had both worked 13.5 hours on April 13, and that they were paid \$21.59 per hour for 13.5 hours worked on April 13, 2000. Shielar and Venegas only worked 10 hours on April 13, 2000.

10) Respondent issued itemized statements of deductions to David Shielar and Santiago Venegas that showed that they had both worked 11 hours on May 3, and that they were paid \$21.59 per hour for 11 hours worked on May 3, 2000. Shielar and Venegas only worked 10 hours on April 13, 2000.

CONCLUSIONS OF LAW

1) ORS 279.348(3) provides:

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

OAR 839-016-0004(17) provides:

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

ORS 279.348(5) provides:

“Public agency’ means the State of Oregon or any political subdivision thereof or any county, city, district, authority, public corporation or entity

and any of their instrumentalities organized and existing under law or charter.”

See *also* OAR 839-016-0004(16) (same). The New Bend Middle School Project was a public works project. Respondent was a subcontractor who employed workers on the Project.

2) ORS 279.354 provides, in pertinent part:

“(1) The contractor or the contractor’s surety and every subcontractor or the subcontractor’s surety shall file certified statements with the public contracting agency in writing in form prescribed by the Commissioner of the Bureau of Labor and Industries, certifying the hourly rate of wage paid each worker which the contractor or the subcontractor has employed upon such public work, and further certifying that no worker employed upon such public work has been paid less than the prevailing rate of wage or less than the minimum hourly rate of wage specified in the contract, which certificate and statement shall be verified by the oath of the contractor or the contractor’s surety or subcontractor or the subcontractor’s surety that the contractor or subcontractor has read such statement and certificate and knows the contents thereof and that the same is true to the contractor or subcontractor’s knowledge. The certified statements shall set out accurately and completely the payroll records for the prior week including the name and address of each worker, the worker’s correct classification, rate of pay, daily and weekly number of hours worked, deductions made and actual wages paid.

”(2) Each certified statement required by subsection (1) of this section shall be delivered or mailed by the contractor or subcontractor to the public contracting agency. * * *”

OAR 839-016-0010 provides, in pertinent part:

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

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

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

”(4) Each Payroll and Certified Statement form shall be delivered or mailed by the contractor or subcontractor to the public contracting agency.
* * *”

Respondent filed nine payroll statements showing work performed by its employees on the Project. All nine statements incorrectly classified Respondent’s workers; all nine statements lacked a statement of certification; and four of the statements incorrectly stated or mislabeled hours worked by two of Respondent’s employees on eight separate days when both employees worked, constituting nine violations of ORS 279.354(1) and OAR 839-016-0010.

3) ORS 279.350(4) provides:

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

OAR 839-016-0033(1) provides:

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

Respondent did not post the prevailing wage rate applicable to the Project while its employees worked on the Project and committed one violation of ORS 279.350(4) and OAR 839-016-0033(1).

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

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

OAR 839-016-0035(1) provides:

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

Respondent committed eight violations of ORS 279.350(1) and OAR 839-016-0035(1) by paying its workers on the Project as laborers at the rate of \$21.59 per hour, including fringe benefits paid as cash, instead of paying them as tenders to plasterers at the rate of \$20.59 per hour, plus \$6.00 per hour as fringe benefits paid as cash.

5) OAR 839-020-0012(1) provides:

“(1) Except for employees who are otherwise specifically exempt under ORS 653.020, employers shall furnish each employee, each time the employee receives a compensation payment from the employer, a written itemized statement of earnings. The written itemized statement shall include:

“(a) The total gross payment being made;

“(b) The amount and a brief description of each and every deduction from the gross payment;

“(c) The total number of hours worked during the time covered by the gross payment;

“(d) The rate of pay;

“(e) If the worker is paid on a piece rate, the number of pieces done and the rate of pay per piece done;

“(f) The net amount paid after any deductions;

“(g) The employer's name, address and telephone number;

“(h) The pay period for which the payment is made.”

Respondent committed four violations of OAR 839-020-0012(1) by providing itemized statements of deductions to David Shielar and Santiago Venegas on April 13 and May 3, 2000, that misstated the total number of hours worked during the time covered by the gross payment and the pay period for which the payment was made.

6) ORS 653.256(1) and (2) provide:

“(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 \$1,000 against any person who willfully violates ORS 653.030, 653.045, 653.050, 653.060 or 653.261 or any rule adopted pursuant thereto. However, no civil penalty may be assessed for violations of rules pertaining to the payment of overtime wages.

“(2) Civil penalties authorized by this section shall be imposed in the manner provided in ORS 183.090.”

OAR 839-020-1010 provides, in pertinent part:

“The commissioner may assess a civil penalty for any of the following willful violations:

“* * * * *

“(5) Failure to supply each of the employer's employees with itemized statements of amounts and purposes of deductions in the manner provided in ORS 652.610 in violation of ORS 653.045, OAR 839-020-0012 and 839-020-0080.”

OAR 839-020-1020 provides:

“(1) The commissioner may consider the following mitigating and aggravating circumstances when determining the amount of any civil penalty to be assessed and cite those the commissioner finds to be appropriate:

“(a) The history of the employer in taking all necessary measures to prevent or correct violations of statutes or rules;

“(b) Prior violations, if any, of statutes or rules;

“(c) The magnitude and seriousness of the violation;

“(d) Whether the employer knew or should have known of the violation;

“(e) The opportunity and degree of difficulty to comply;

“(f) Whether the employers' action or inaction has resulted in the loss of a substantive right of an employee.

“(2) It shall be the responsibility of the employer to provide the commissioner any mitigating evidence concerning the amount of the civil penalty to be assessed.

“(3) Notwithstanding any other section of this rule, the commissioner shall consider all mitigating circumstances presented by the employer for the purpose of reducing the amount of the civil penalty to be assessed.”

OAR 839-020-1030 provides:

“(1) The civil penalty for any one violation shall not exceed \$1,000. The actual amount of the civil penalty will depend on all the facts and on any mitigating and aggravating circumstances referred to in OAR 839-020-1020.

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

The Commissioner's imposition of the penalties for Respondent's violation of OAR 839-020-0012(1) in this case is an appropriate exercise of his discretion.

7) ORS 279.370 provides, in pertinent part:

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

OAR 839-016-0500 provides:

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

OAR 839-016-0520 provides:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

“* * * * *

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

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

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

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

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

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

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

“* * * * *

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

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

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

7) ORS 279.361(1) provides:

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

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

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

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

"* * * * *

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

"* * * * *

"(4) The Wage and Hour Division shall maintain a written list of the names of those contractors, subcontractors and other persons who are ineligible to receive public works contracts and subcontracts. The list shall contain the name of contractors, subcontractors and other persons, and the name of any firms, corporations, partnerships or associations in which the contractor, subcontractor or other persons have a financial interest.

Except as provided in OAR 839-016-0095, such names will remain on the list for a period of three (3) years from the date such names were first published on the list.”

OAR 839-016-0090 provides, in pertinent part:

“(1) The name of the contractor, subcontractor or other persons and the names of any firm, corporation, partnership or association in which the contractor or subcontractor has a financial interest whom the Commissioner has determined to be ineligible to receive public works contracts shall be published on a list of persons ineligible to receive such contracts or subcontracts.

“(2) The list of persons ineligible to receive contracts or subcontracts on public works shall be known as the List of Ineligibles.”

Respondent intentionally failed to pay the prevailing wage rate to eight employees for their work on the Project and intentionally failed to post the prevailing wage rates as required by ORS 279.350(4). For these reasons, the Commissioner must place Respondent on the List of Ineligibles for a period not to exceed three years. The Commissioner’s decision to place Respondent on that list for one year is an appropriate exercise of his discretion.

OPINION

INTRODUCTION

The Agency seeks to assess \$46,000 in civil penalties against Respondent based on its violations of Oregon’s prevailing wage rate laws and wage and hour laws. The Agency also seeks to have Respondent placed on the Commissioner’s List of Ineligibles for a period of three years.

RESPONDENT FAILED TO POST THE APPLICABLE PREVAILING WAGE RATES WHILE IT EMPLOYED WORKERS ON THE PROJECT

A. Respondent failed to post the applicable prevailing wage rates.

Respondent acknowledges that it did not post the applicable prevailing wage rates while its workers performed work on the project. However, Respondent contends that the posting requirement contained in ORS 279.350(4) was satisfied because

someone else posted prevailing wage rates for the project in the general contractor's job shack. In its exceptions, Respondent again asserts "that so long as the job site is posted with the appropriate prevailing wage rates, a subcontractor may rely upon a posting undertaken by the general contractor." Respondent misinterprets the statute. .

ORS 279.350(4) reads as follows:

"Every contractor or subcontractor engaged on a project for which there is a contract for a public work shall keep the prevailing wage rates for that project posted in a conspicuous and accessible place in or about the project."

Where statutory interpretation is required, the forum must attempt to discern the legislature's intent. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610 (1993). To do that, the forum first examines the text and context of the statute. *Id.* The text of the statutory provision itself is the starting point for interpretation and the best evidence of the legislature's intent. *Id.* Also relevant is the context of the statutory provision, which includes other provisions of the same statute and other related statutes. *Id.* at 611. If the legislature's intent is clear from the text and context of the statutory provision, further inquiry is unnecessary. *Id.* Accordingly, the forum begins its analysis of ORS 279.350(4)'s posting requirement for subcontractors by an examination of the statutory text.

The text of ORS 279.350(4) mandates that "[e]very contractor or subcontractor * * shall keep the prevailing wage rates * * * posted * * *." There is only one way this mandate can be accomplished – someone must actually post the rates. The statute provides that the "someone" is "every contractor or subcontractor." There is nothing in the other provisions of ORS 279.350 that creates an ambiguity in this language, and nothing in its related statutes in ORS chapter 279 leads to a conclusion that those words are susceptible to more than one interpretation. Additionally, ORS 174.010 limits the forum's role in construing ORS 279.350(4) "simply to ascertain[ing] and declar[ing]

what is, in terms or in substance, contained therein, *not to insert what has been omitted, or to omit what has been inserted*[.]” (emphasis added) In this case, that means the forum is not free to omit subcontractors from the statute’s posting mandate or to insert terms to the effect that subcontractors are not required to post or keep posted the prevailing wage rates, so long as the general contractor posts and keeps them posted.

Respondent contends that the forum’s interpretation erroneously rests “on a strictly textual analysis,” arguing that “common sense or business practicalities” should be considered to avoid a result that “would require a job shack festooned with the same notices.” The forum rejects both of Respondent’s arguments. First, the forum is bound to follow the methodology set out by the Oregon Supreme Court in *PGE*. Under *PGE*, if the legislative intent can be determined from the wording of the statute, no further inquiry is permissible. *Id.* Hence, Respondent’s argument that the forum erred by relying “on a strictly textual analysis” must fall on deaf ears. Second, Respondent’s argument that the forum’s interpretation would lead to absurd results (a “festooned” job shack) is similarly misplaced. When legislative intent is clear from an inquiry into text and context, the forum may not apply the absurd-result maxim. *State v. Vasquez-Rubio*, 323 Or 275, 282-83 (1996).

In conclusion, the proper interpretation of ORS 279.350(4) is that every contractor and subcontractor engaged on a project for which there is a contract for public work must post and keep posted the prevailing wage rates for the project for the period of time that the contractor or subcontractor is engaged in work on the project. Respondent failed to do so and violated ORS 279.350(4).

B. Civil penalty.

1. Aggravating circumstances.

There are several aggravating factors in this case. First, it would have been simple for Respondent to comply with the statute; all it would have taken was a visit by Respondent's local branch manager to the job site to post a copy of the prevailing wage rate for Respondent's workers in a place conspicuous and accessible to them. Second, the violation is a serious one that requires debarment^{xvii} if the Commissioner finds that the violation was intentional. The magnitude is high because Respondent itself did not provide its workers with any way of finding out that they were being underpaid and because Respondent did not post prevailing wage rates at any of the 134 prevailing wage rate jobs on which it employed workers in the year 2000.^{xviii} Third, Respondent certainly knew of its violation, and in fact at the time of hearing still did not post prevailing wage rates on public works projects subject to Oregon's prevailing wage rate laws where Respondent employs workers. In its exceptions, Respondent argues that, "[g]iven Labor Ready's policy of looking for postings during site visits, the ALJ's conclusion that Respondent 'certainly knew of its violation' must fail." Respondent misses the point that its violation was its own failure to post, of which it was certainly aware.

2. Mitigating circumstances.

The only mitigating factor is that LRI, Respondent's parent company, advises branch managers to do a site visit and look for postings on the job site. However, there is no evidence that this advice was followed on the Project. LRI has also adopted a contract addenda that requires clients on prevailing wage rate jobs to provide Respondent with "a copy of the proper wage classification schedule," warrant that it has been posted appropriately at the jobsite, and to "reimburse [LRI] for underpayment of

wages, penalties, and other losses due to [the client's] failure to do so.” While this may encourage Respondent’s clients to post, this requirement does nothing to insure that Respondent will post the rates and the forum does not consider it to be a mitigating factor. In its exceptions, Respondent argues that the fact that prevailing wage rates were posted at the job should be added as a mitigating factor. The forum rejects this argument for the reason that Respondent itself did not post the rates and there is no evidence that Respondent took any action on the Project to ensure that the rates were posted. The forum also rejects Respondent’s invitation, in its exception, to add as a mitigating circumstance “the fact that there is no evidence that any employee received an improper wage due to the circumstances of the prevailing wage rate posting.”

3. Amount of civil penalty.

Considering all the aggravating and mitigating factors, the forum concludes that \$2,000, the amount sought by the Agency, is an appropriate civil penalty.

RESPONDENT PAID ITS WORKERS LESS THAN THE PREVAILING RATE OF WAGE FOR THEIR WORK ON THE PROJECT

A. Respondent paid its workers \$21.59 per hour as laborers, instead of \$26.59 per hour as tenders to plasterers, on the Project.

Respondent classified its workers as laborers and paid them \$21.59 per hour, including fringe benefits, the correct rate for laborers on the Project. The Agency’s position is that Respondent’s workers were properly classified as tender to plasterers, a classification with a wage rate of \$20.59 per hour and \$6.00 per hour in fringe benefits, and that Respondent paid its workers less than the prevailing wage rate as a result. Respondent contends its workers were correctly classified and paid. To support this contention, Respondent points to Gerstenfeld’s August 27, 1997, letter to Pro-Tec as proof that laborer was the correct classification for Respondent’s workers on the Project and argues it was entitled to rely on the opinion expressed in that letter. Respondent

further argues that, even if the classification was incorrect, this could not have been determined from BOLI's January 15, 1999, rate book. Again, Respondent misses the mark.

Respondent's reliance on the August 27, 1997, letter is misplaced for two reasons. First, Respondent had no knowledge of that letter when it made the decision to classify its workers as laborers and therefore could not have relied on it in making that decision. Second, the Agency presented credible evidence, via Rowand's testimony, that the opinion in the August 27, 1997, letter stating that tenders to plasterers were properly classified as general laborers was no longer valid as of February 15, 1998, when BOLI moved tender to plasterer from the general laborer classification into the higher paying plasterer category.

Respondent's argument that it could not have determined from the February 15, 1999, rate book that its workers should have been classified and paid as tender to plasterers fails for three reasons. First, Respondent presented no credible evidence that its branch manager who made the classification determination ever consulted that rate book. In fact, there was no credible evidence presented as to the means by which that determination was made. Second, other than the cryptic entry "Scissor Lift – 60 lb bags" recorded on Respondent's job order form, there was no evidence presented that Respondent ever determined, while its workers worked on the Project, what specific job duties its workers were performing. Third, there was no evidence presented that Respondent could have determined that its workers should have been classified as laborers from the January 15, 1999, rate book. On the other hand, Johnson and Rowand's credible testimony established that, had Respondent's employees called the Agency's prevailing wage rate unit with an accurate description of the work its workers were performing on the Project, the caller would have been told that the workers should

be classified and paid as tender to plasterers. This conclusion is supported by the August 27, 1997, letter stating the workers spraying on fireproofing were properly classified as plasterers and the definition of “Tenders to Plasterers” in the January 15, 1999, rate book which defines their duties as “[a]ssist[ing] * * * plasterers * * * by performing duties of lesser skill. Duties include supplying or holding materials or tools, and cleaning work area and equipment. * * *” It is further supported by the Agency’s internal document, which existed at the time of the Project, indicating that persons who spray on fireproofing are properly classed as plasterers.

Had Respondent exercised reasonable diligence in this matter commensurate with the degree of diligence Adams asserted is required by Respondent’s corporate policy, it would have ascertained the specific job duties its workers were performing and called the Agency’s prevailing wage rate unit to determine the appropriate classification for its workers. Respondent did not do this and misclassified and underpaid all eight of its workers on the Project. In doing so, Respondent committed eight violations of ORS 279.350(1).

B. Civil penalties.

1. Aggravating circumstances.

It would have been relatively simple for Respondent to comply with the law. All Respondent had to do was to determine the specific duties performed by its workers, pick up the phone and call BOLI’s prevailing wage unit, then follow the advice BOLI’s prevailing wage unit would have given. Respondent did none of these things. The violation is a serious one that requires debarment if the Commissioner finds that the violation was intentional. The magnitude is high because it resulted in the underpayment of eight workers. Finally, Respondent knew or should have known of its violation. OAR 839-016-0500 provides:

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

Here, Respondent was aware that the Project was subject to the prevailing wage rate, but elected not to ascertain the specific job duties its workers performed and make an appropriate inquiry to determine what the applicable prevailing wage rate was for those workers while those workers were employed on the Project.

2. Mitigating circumstances.

Mitigating Respondent’s violation is Respondent’s subsequent cooperation with the Agency in paying the \$3,442.91 in back wages that the Agency asserted was owed to Respondent’s eight workers, Respondent’s revised policy requiring that Mott, its Oregon district manager, must now visit the job site of all public works projects in Oregon before Respondent can send workers to it, and the lack of any prior violations by Respondent of ORS 279.350(1).

3. Amount of civil penalty.

The Agency seeks \$24,000 in civil penalties, calculated at \$3,000 per violation. This is based on the aggravating circumstances and the Agency’s allegation that these are “first repeated” violations. “[R]epeated violations” are defined in OAR 839-016-0540(2) as “violations of a provision of law or rule which has been violated on more than one project within two years of the date of the most recent violation.” The only violations proved at hearing, other than those alleged in the Notice itself, were those found in the final order in case number 70-99 in which LRI, not Labor Ready Northwest,

Inc., was the respondent. As these violations were not committed by Respondent, the present eight violations cannot be considered “first repeated violations.”

In prior cases, the amount assessed by the Commissioner for first violations of ORS 279.350(1) has ranged considerably. Under the facts and circumstances of this case, the forum finds that \$12,000, or \$1,500 for each violation, is an appropriate civil penalty for Respondent’s violations of ORS 279.350(1).

RESPONDENT FILED NINE PAYROLL STATEMENTS THAT LACKED A STATEMENT OF CERTIFICATION AND CONTAINED INCORRECT WORKER CLASSIFICATION AND INCORRECT STATEMENTS OF HOURS WORKED

A. Respondent filed nine payroll statements that violated ORS 279.354 and OAR 839-016-0010.

ORS 279.354 requires contractors and subcontractors on prevailing wage rate jobs to file payroll statements that “set out accurately and completely the payroll records for the prior week” that include, among other things, “the worker’s correct classification” and “daily and weekly number of hours worked.” A contractor or subcontractor may use BOLI’s Form WH-38 or an equivalent form. OAR 839-016-0010(2). If an equivalent form is used, the certified statement contained on Form WH-38 must be attached to the payroll forms submitted. OAR 839-016-0010(3).

An examination of Respondent’s nine payroll statements representing work performed by Respondent’s workers on the Project shows they fall short of the statutory requirements in several respects. First, all nine misclassify the workers as laborers. Second, four of the statements either misstate the amount of straight time worked by Respondent’s workers on particular days or misstate the total hours worked by those workers on particular days. Third, all nine are missing the certified statement contained on Form WH-38. These deficiencies constitute nine separate violations of ORS 279.354 and OAR 839-016-0010.

B. Civil penalty.

1. Aggravating circumstances.

Respondent's violations are aggravated by several factors. First, it would have been relatively simple for Respondent to comply with the statute. All Respondent had to do was list the same hours on its payroll statements as submitted on its invoices to Pro-Tec, use the WH-38 certification attachment, and make a phone call to BOLI's prevailing wage unit to ascertain the correct classification for its workers and record that information. Along this same line, Respondent appears to have ignored the Agency's letter of January 26, 2000, informing Adams that its statement of compliance needed to be reworded to comply with Oregon law. Second, the violations are serious, in that the misclassification of workers and inaccurate statements of hours worked make it impossible for BOLI to determine, based on the payroll statements, just what the workers should have been paid. The magnitude of the violation is substantial, given that there are nine defective statements involving eight workers and over \$3,000 in unpaid wages. Third, Respondent knew or should have known of the violations based on the Agency's letter of January 26, 2000.

2. Mitigating circumstances.

LRI's revamp of its computer system, as described in Finding of Fact – The Merits 60, might be considered a mitigating circumstance except for the fact that it did nothing to correct the problems in this case and was implemented prior to the hearing in case number 70-99. As it is, there are no mitigating circumstances.

3. Amount of civil penalty.

In its Notice of Intent, the Agency sought a \$2,000 civil penalty for each violation, for a total of \$18,000. Considering all the aggravating factors and assessments for

similar violations in prior final orders, the forum concludes that a \$2,000 civil penalty for each violation, for a total of \$18,000, is an appropriate civil penalty.^{xix}

RESPONDENT PROVIDED FOUR ITEMIZED STATEMENTS OF EARNINGS THAT CONTAINED INACCURATE INFORMATION

A. Respondent provided four pay stubs that violated OAR 839-020-0012.

OAR 839-020-0012(1) requires employers to furnish employees with a written itemized statement of earnings that contains specific elements, including the total number of hours worked during the time covered by the gross payment and the pay period for which the payment is made. Respondent issues daily paychecks to its employees, with an itemized statement of earnings accompanying each paycheck. To comply with the rule, each itemized statement issued by Respondent must state the exact number of hours the worker actually worked on the date for which the paycheck is issued. A comparison of Respondent's daily work tickets and invoices sent to Pro-Tec with the itemized statements provided to Respondent's workers Shielar and Venegas on April 13 and May 3, 2000, shows that Respondent incorrectly stated the number of hours actually worked by Shielar and Venegas on both dates, for both workers. All four itemized statements showed that Shielar and Venegas worked more hours on those dates than are reflected on Respondent's daily work tickets and invoices to Pro-Tec.^{xx} Respondent's inflation of the actual number of hours worked by Shielar and Venegas on April 13 and May 3, 2000, violated OAR 839-020-0012(1)(c) and (h). The itemized statements did not violate paragraph (1)(d) for the reason that the wage rate of \$21.59 per hour that appears on the itemized statement is the rate of pay that the workers actually received.

B. Civil penalty.

1. Aggravating circumstances.

The purpose of the rule is so workers can verify that they have been correctly paid for all hours worked. Where the itemized statements contain inaccurate information, this becomes impossible. Accordingly, the forum considers these violations serious because of their potential to affect substantive workers' rights. However, the magnitude is only moderate because there is no evidence that any of Respondent's other workers on the Project were issued itemized statements containing inaccurate information. There can be no question that Respondent knew or should have known of the violations, in that Respondent created the records based on daily work records created by Respondent that contain different figures. Respondent could have complied with the rule merely by issuing its workers itemized statements containing information identical to that found on Respondent's daily work records.

2. Mitigating circumstances.

There are no mitigating circumstances.

3. Amount of civil penalty.

ORS 653.256 allows the Commissioner to assess a maximum \$1,000 civil penalty for each violation of OAR 839-020-0012. The Agency seeks a penalty of \$500 each for Respondent's four violations. Under the circumstances, a \$500 civil penalty for each violation, for a total of \$2,000, is an appropriate penalty.

PLACEMENT ON THE LIST OF INELIGIBLES

The Agency seeks to debar Respondent on the basis of its intentional failure to pay the applicable prevailing wage rate to eight workers on the Project and on Respondent's intentional failure to post the prevailing wage rate on the Project.

A. Liability of Respondent.

ORS 279.361 provides that when a subcontractor intentionally fails or refuses to pay the applicable prevailing wage rates or intentionally fails or refuses to post the applicable prevailing wage rates, the subcontractor and any firm in which the subcontractor has a financial interest shall be placed on the list of persons ineligible to receive contracts or subcontracts for public works for a period not to exceed three years. The forum has already concluded that Respondent failed to pay and post the applicable prevailing wage rates. The question now before the forum is whether either of those failures were “intentional.” If so, Respondent must be placed on the List of Ineligibles.

In the context of a prevailing wage rate debarment, this forum considers “intentional” as being synonymous with “willful.” *In the Matter of Loren Malcom*, 6 BOLI 1, 9-10 (1986). In *Malcom*, the forum also adopted the Oregon Supreme Court’s interpretation of “willful” set out in *Sabin v. Willamette Western Corporation*, 276 Or 1083 (1976). “Willful,” the court said, “amounts to nothing more than this: That the person knows what he is doing, intends to do what he is doing, and is a free agent.” *Id.* at 1093. In its closing argument, Respondent argued for a different standard of liability, contending that Respondent’s subjective motivation, as determined by its conduct, should be considered as an element in determining whether a violation is “intentional.” Respondent further argued that *Sabin* should be distinguished from this and other prevailing wage rate cases because it dealt with penalty wages, not a three-year debarment, which is a higher and greater penalty than penalty wages. The forum rejects this invitation to abandon its long-standing reliance on the *Sabin* standard.

In this case, Respondent knew it had not posted the applicable prevailing wage rates on the Project, intended not to post them, and was under no restrictions that would

have prevented it from posting the rates. Respondent also failed to exercise reasonable diligence in determining the proper classification and pay rate for its workers and thereby acted knowingly in classifying and paying its workers on the Project as laborers instead of tenders to plasterers, a classification that paid \$5.00 per hour, including fringe benefits, more than the laborer classification. OAR 839-016-0500. Consequently, the forum must debar Respondent for a period of time not to exceed three years.

B. Length of debarment.

ORS 279.361 provides that debarment shall be for “a period not to exceed three years.” Although that statute and the Agency’s administrative rules interpreting it do not explicitly authorize the forum to consider mitigating factors in determining the length of a debarment, the commissioner has held that mitigating factors may be considered in determining whether the debarment of a contractor or subcontractor should last less than the entire three-year period allowed by law. See *In the Matter of Larson Construction Co., Inc.*, 22 BOLI ____ (2001); *In the Matter of Keith Testerman*, 20 BOLI 112, 129 (2000); *In the Matter of Southern Oregon Flagging, Inc.*, 18 BOLI 138, 169 (1999); *In the Matter of Intermountain Plastics*, 7 BOLI 161 (1988).^{xxi} Aggravating factors may also be considered. See, e.g., *Testerman* at 129.

In this case, a number of aggravating factors are present. Among those factors are Respondent’s lack of reasonable diligence in determining the specific job duties of its workers and their correct classification that resulted in significant underpayment of wages to Respondent’s workers, Respondent’s corporate policy of not posting prevailing wage rates at job sites, the total number of violations, Respondent’s failure to correct the certification statement attached to its certified payroll -- despite a warning from BOLI, the relative ease with which Respondent could have avoided the violations, and the seriousness and magnitude of the violations.

As mitigation, the forum considers Respondent's current policy that its district manager must visit prevailing wage rate job sites before Respondent can send workers to those sites, Respondent's advisory that branch managers should do a site visit and look for postings, Respondent's prompt payment of back wages owed to its eight workers when BOLI made a demand for payment, and the prevailing wage rate training to which LRI, Respondent's parent company, currently subjects its managers.

Under the circumstances, the forum finds that one-year is an appropriate period of debarment.

MISCELLANEOUS ISSUES IN WHICH THE ALJ RESERVED RULINGS FOR THE PROPOSED ORDER

A. Official Notice

During the hearing, the Agency asked the ALJ to take official notice of the fact that BOLI's Wage and Hour Division has a sub-unit called the Prevailing Wage Unit. This issue is moot because of Johnson and Nakada's credible testimony that BOLI has a work unit called the Prevailing Wage Rate unit.^{xxii}

B. Respondent's objection to the Agency's legal theory that Respondent's failure to pay the prevailing wage rate was based on overtime violations.

In its closing argument, the Agency argued that Respondent's violation of ORS 279.350(1) was predicated on Respondent's failure to pay the prevailing wage rate, based on its misclassification of workers, and Respondent's failure to pay overtime, as shown by Respondent's work tickets and itemized payroll summaries for Shielar and Venegas. Respondent objected to the Agency's overtime theory on the basis that it was not set out specifically in paragraph 3 of the Agency's Notice of Intent and that Respondent would be prejudiced by the forum's consideration of overtime as sought by the Agency. A review of that Notice and of the record shows that the Agency's case was predicated on the failure of Respondent "to pay \$3,442.91 in prevailing wages to 8

employees.” Consequently, the forum finds that the Agency’s theory is within the scope of its allegations contained in the Notice and overrules Respondent’s objection. However, there is insufficient evidence in the record for the forum to make an accurate determination of whether or not Shielar and Venegas, the only two workers who worked overtime, were paid the correct overtime rate for the classification of laborers.

C. Respondent’s objection to the consideration of travel time violations as an aggravating factor in determining civil penalties and debarment.

In its closing argument, the Agency urged the forum to consider evidence that Respondent might not pay its employees for travel time as an aggravating circumstance, and Respondent objected. Respondent’s objection is sustained. No evidence was received that Respondent had committed prior violations of OAR 839-020-0045(3) and no such evidence has been considered in formulating this Final Order.^{xxiii}

RESPONDENT’S EXCEPTIONS

Respondent filed 32 detailed exceptions to the proposed order. The forum has changed portions of proposed order in response to Respondent’s exceptions and overruled the remainder of the exceptions, as discussed below.

A. Exception 1.

Respondent excepts to the portion of Proposed Finding of Fact 18 – Procedural in which the ALJ granted partial summary judgment to the Agency on Respondent’s affirmative defense of “waiver by estoppel.” In review, the forum concludes that the ALJ applied an incorrect legal standard by mixing the law of waiver and estoppel, but arrived at the correct result. The forum restates the correct legal standard and applies that standard to the facts.

“Waiver is ‘the intentional relinquishment of a known right.’” *Wright Schuchart Harbor v. Johnson*, 133 Or App 680, 685 (1995). “Waiver must be plainly and

unequivocally manifested, either ‘in terms or by such conduct as clearly indicates an intention to renounce a known privilege or power.’” *Id.* at 685-86. In general, the question of whether a waiver has occurred is resolved by examining the particular circumstances of each case. *Id.* at 686. Waiver may be either explicit or implicit, that is, implied from a party’s conduct. *Id.* Respondent argues a theory of “waiver by estoppel,” relying on *Mitchell v. Pacific First Bank*, 130 Or App 65 (1994), in an attempt to extend the application of the doctrine of waiver to situations where “a party is misled to the party’s prejudice into an honest and reasonable belief that waiver is intended.” *Id.*, at 71, n.3. The forum declines to adopt Respondent’s theory. As the Oregon Supreme Court has explained, the term “waiver by estoppel * * * should be understood to refer to estoppel and not waiver.” *Reed v. Commercial Insurance Company*, 248 Or 152, 155 (1967).

Respondent alleges that waiver occurred as a result of the Agency’s settlement of the July 28, 2000, Notice of Claim. Kathleen Johnson, an Agency compliance specialist, issued that Notice of Claim and negotiated a settlement of the claim with Mott, Respondent’s district manager. Based on the forum’s restatement of the law of waiver, the forum relies on Johnson’s statements and actions, not Mott’s alleged “honest and reasonable belief that waiver [was] intended,” to determine if the Agency waived its power to bring the present action.^{xxiv} The forum reexamines the exhibits submitted in support of, and opposing, the Agency’s motion for partial summary judgment. These include affidavits of Kathleen Johnson and Raymond Mott, the Notice of Claim, two letters from Johnson to Mott, dated August 14 and 18, 2000, and an August 25, 2000, letter from Mott to Johnson.

The Notice of Claim sought unpaid wages in the amount of \$3,442.91, and an equal amount as liquidated damages, for a total claim of \$6,885.82 on behalf of eight

employees. The Notice contains no reference to civil penalties or placement on the List of Ineligibles.

Johnson makes the following pertinent statements in her affidavit:

“The Notice of Claim was issued * * * to ensure payment of any wages found to be owing if those back wages were not voluntarily paid.

”I did not (and do not) believe or know that filing a Notice of Claim * * * nor resolving or compromising such a Notice of Claim, could be construed as giving up the Agency’s ability to pursue civil penalties or placement of [Respondent] on the list of ineligibles. I did not intend to give up the Agency’s right to do so, do not believe I have the authority to do so and, in fact, recommended to the Wage and Hour Division’s administration that civil penalties be assessed against [Respondent] and that it be placed on the list of ineligibles. These are sanctions I have believed at all times to be possible and I was never aware that it was possible for me to waive that right on behalf of the Agency. I still do not believe I can waive the Agency’s right to pursue these sanctions and certainly never intended to waive that right as to [Respondent].”

Johnson’s August 14, 2000, letter to Mott confirms their settlement agreement. It states, in pertinent part:

“This is to confirm our telephone conversation on 8/14/00. You will pay \$3,442.91 in owed wages. This amount does not include the liquidated damages set out in the Notice of Claim (enclosed).”

The letters of August 18 and 25 shed no additional light on Johnson’s intent in settling the Notice of Claim.

Mott’s affidavit completes the picture. It contains the following pertinent statements:

“9. [A] representative named Kathleen Johnson from the BOLI Portland office then filed a Notice of Claim on July 28, 2000 * * *.

“* * * * *

“11. I attempted to speak with Kathleen Johnson regarding the Notice but I was unsuccessful in reaching her. I went to the BOLI Portland office and explained to her what had happened at the BOLI Bend office.

“12. I reviewed with her the case that had resolved the issue in Bend, but Kathleen Johnson stated that the position had been reclassified since that BOLI ruling.

“13. Although unaware of this information, I agreed that Labor Ready would pay the back wages to the employees. However, I told her that Labor Ready would not agree to pay the penalties BOLI had assessed.

“14. Kathleen Johnson agreed to drop the penalties in exchange for the payment of the primary wages totaling \$3,442.91. In a letter dated August 14, 2000, I received confirmation of this settlement.”

In a nutshell, Johnson’s affidavit disavows any intent or the authority to waive the Agency’s power to pursue civil penalties or disbarment; nothing in her letter confirming the settlement indicates an intent to waive this power; and Mott’s affidavit provides no evidence of Johnson’s intent to settle any issues other than those raised in the July 28, 2000, Notice of Claim. When viewed in the light most favorable to Respondent, this is not evidence of “terms or * * * conduct as clearly indicates an intention to renounce a known privilege or power.” Respondent’s exception is overruled.

B. Exception 2.

Respondent excepts to the ALJ’s ruling allowing the Agency to amend its Notice of Intent to include “paystub violations,” arguing that the Agency’s motion to amend was untimely and that Respondent did not impliedly consent. The record supports the ALJ’s ruling. Respondent’s exception is overruled.

C. Exception 3.

Respondent excepts to the inclusion of the statement “Mandalyll wrote nothing in this section” in Proposed Finding of Fact 10 – The Merits, on the basis that it is based on the improper inference and conclusion that “something” should have been written. This exception lacks merit. The objectionable phrase is merely an accurate statement of fact in the forum’s description of Respondent’s job order form.

D. Exception 4.

Respondent excepts to the ALJ’s findings that: (1) Respondent did not post prevailing wage rates on the Project, and (2) that the applicable prevailing wage rate for

“tender to plasterer” was not posted on the Project by Respondent or anyone else. The forum denies (1) and has modified Finding of Fact 16 – The Merits in response to (2).

E. Exception 5.

This exception argues that Proposed Finding of Fact 41 – The Merits is not supported by the evidence. The testimony of Rowand, and Exhibits A-3 and R-9, viewed together, constitute substantial evidence supporting this finding. Respondent’s exception is overruled.

F. Exceptions 6-8.

These exceptions related to the ALJ’s credibility findings regarding Rowand, Johnson, and Mott. These credibility findings are supported by substantial evidence. Respondent’s exceptions are overruled.

G. Exception 9.

Respondent’s exception is granted and Finding of Fact 43 – The Merits has been modified to reflect this exception.

H. Exceptions 10-15.

These exceptions seek to add additional findings of fact. The proposed additions all relate, directly or indirectly, to Respondent’s affirmative defenses of waiver or equitable estoppel. Because the Agency was granted summary judgment with respect to these defenses prior to the hearing, the proposed additions are rejected.

I. Exceptions 16-17.

These exceptions seek to add a new finding to Proposed Finding of Fact 49 – The Merits and replace Proposed Finding of Fact 46 – The Merits. These exceptions are overruled because Respondent’s proposed language, as worded, is not supported by substantial evidence.

J. Exception 18.

Finding of Fact 45 – The Merits has been modified to reflect Respondent’s exception.

K. Exception 19

Respondent excepts to Proposed Finding of Fact 32 – The Merits, asking that the following language be added:

“Gerstenfeld’s August 27, 1997 letter concluded that the same type of work at issue in this case, was correctly categorized as labor group 1. There was no testimony as to whether Mr. Gerstenfeld was aware of the 1997 internal document, or used it in arriving at his conclusion. BOLI did not call Mr. Gerstenfeld as a witness.”

The forum declines to add the first sentence for the reason that its contents are implicit in the statement cited in Finding 32. The forum has added the second sentence, but not the third, as this fact is already spelled out by the omission of Gerstenfeld’s name from the list of Agency witnesses.

L. Exceptions 20-21

Respondent excepts to Proposed Conclusions of Law 3 and 5. These exceptions are overruled on the basis that both Conclusions are supported by substantial evidence and reason.

M. Exception 22.

Exception 22 excepts to the entirety of Proposed Conclusion of Law 7 that recommends placement of Respondent on the List of Ineligibles for three years. Respondent’s exception is granted in part, as reflected in Conclusion of Law 7.

N. Exception 23.

Respondent excepts to the ALJ’s analyses and conclusions in the proposed opinion that: (1) applicable prevailing wage rates must be posted by all contractors and subcontractors on a prevailing wage rate job, and (2) that the “tender to plasterer” wage

rate was not posted on the Project. Respondent's exception (1) is denied and exception (2) is granted. The forum has modified paragraph A in the section of the Opinion entitled "Respondent Failed to Post the Applicable Prevailing Wage Rates While it Employed Workers on the Project" in response to this exception.

O. Exceptions 24-25.

Respondent excepts to the analysis set forth in the "Civil Penalty" section in the proposed opinion related to Respondent's violation of ORS 279.350(4). In response, the forum has modified that section.

P. Exception 26.

Respondent excepts to the analysis and conclusions set forth in the section of the proposed opinion entitled "Respondent Paid Its Workers Less than the Prevailing Rate of Wage for their Work on the Project." The issues raised by Respondent were adequately considered in the proposed order. Respondent's exception is overruled.

Q. Exception 27.

Respondent excepts to the analysis set forth in the "Civil Penalty" section in the proposed opinion related to Respondent's violation of ORS 279.350(1). In response, the forum has modified that section.

R. Exception 28.

This exception contends that the ALJ should have listed four additional mitigating circumstances in the "Civil Penalty" section in the proposed opinion related to Respondent's violation of ORS 279.350(1). Those include: (1) "Demonstrated BOLI confusion on the issue of the wage classification"; (2) "Labor Ready's corrective action in responding to previous violations of different statutes and roles (sic)"; (3) "No Labor Ready prior violations of failure to pay prevailing wages"; and (4) "Labor Ready's prompt action in attempting to determine what the wage rate classification was after being

notified of the issue by the Fair Contracting Foundation.” The forum rejects (1) based on a lack of substantial evidence. (2) is overruled because there is no evidence that Labor Ready Northwest, Inc., the Respondent in this case, had ever committed any prior violations,^{xxv} therefore, it cannot be said to have engaged in actions designed to correct prior violations. For the same reason, the forum has not cited prior violations by Respondent Labor Ready Northwest, Inc. as an aggravating circumstance. (3) is granted for the reason that the forum has previously recognized the absence of prior violations of Oregon’s prevailing wage rate laws as a mitigating factor. *In the Matter of William George Allmendinger*, 21 BOLI 151, 172 (2000). Finally, (4) was considered under the rubric of “Respondent’s subsequent cooperation.”

S. Exception 29.

Respondent excepts to the analysis and conclusions set forth in “Respondent Filed Nine Payroll Statements that Lacked a Statement of Certification and Contained Incorrect Worker Classification and Incorrect Statements of Hours Worked.” This portion of the proposed opinion is supported by substantial evidence and reason. Respondent’s exception is overruled.

T. Exception 30.

Respondent excepts to the analysis and conclusions in the section of the proposed opinion discussing Respondent’s violation of OAR 839-020-0012(1). In response, the forum has modified that section.

U. Exception 31.

Respondent’s exception argues that the ALJ used an inappropriate standard in determining that Respondent’s violations were “intentional” in the context of Respondent’s placement on the List of Ineligibles. This issue was raised in

Respondent's closing argument and appropriately resolved in the proposed order. Respondent's exception is overruled.

V. Exception 32.

Respondent's final exception contends that the three-year period of debarment proposed by the ALJ is "grossly excessive." After review, the forum is in partial agreement and has lessened the period of debarment to one year. This exception also points out that Pro-Tec had prior prevailing wage rate violations but was not subject to BOLI sanctions. The Pro-Tec issue is properly an affirmative defense of selective enforcement,^{xxvi} which was not raised by Respondent through its answer or by a motion to amend at the hearing. Consequently, the forum need not consider it. OAR 839-050-0130(2).

ORDER

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

FURTHERMORE, as authorized by ORS 279.370 and ORS 653.256, and as payment of the penalties assessed as a result of its violations of ORS 279.350(1), ORS 279.350(4), ORS 279.354, OAR 839-016-0010, OAR 839-016-0033, OAR 839-016-0035, and OAR 839-020-0012, the Commissioner of the Bureau of Labor and Industries hereby orders **Labor Ready Northwest, Inc.**, to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, the following:

A certified check payable to the Bureau of Labor and Industries in the amount of THIRTY FOUR THOUSAND DOLLARS (\$34,000), plus interest at the legal rate on that sum between a date ten days after the issuance of the final order and the date Respondent **Labor Ready Northwest, Inc.** complies with the Final Order.

ⁱ Mott erroneously refers to them as “penalties.”

ⁱⁱ ORS 279.350(1) provides: “The hourly rate of wage to be paid by any contractor or subcontractor to workers upon all public works **shall be not less** than the prevailing rate of wage * * *.” ORS 279.350(4) provides: “Every contractor or subcontractor engaged on a project for which there is a contract for a public work **shall keep** the prevailing wage rates for that project posted * * *.” ORS 279.354(1) provides: “The contractor or contractor’s surety and every subcontractor or the subcontractor’s surety **shall file** certified statements * * *.” (Emphasis supplied)

ⁱⁱⁱ However, the facts that would otherwise give rise to an equitable estoppel defense, if proven, may be considered by the forum as mitigating evidence. See, e.g., *In the Matter of Southern Oregon Flagging, Inc.*, 18 BOLI 138, 162-63 (1999).

^{iv} Rowand testified that there is a fairly extensive mess left after fireproofing is sprayed on, and referred to the excess that must be removed as “overspray.”

^v ORS 279.334(1)(a)(A) provides that all hours worked “in excess of eight hours a day” are overtime hours when “the work week is five consecutive days, Monday through Friday.”

^{vi} See Finding of Fact – The Merits 18, *supra*.

^{vii} *Id.*

^{viii} The cited text reproduces the language, but not the specific format of the Statement of Compliance.

^{ix} Each was filled in with the words “Administrative Assistant.”

^x Each was filled in with the words “Labor Ready, Inc.”

^{xi} Each was filled in with the words “Cooly Rd.”

^{xii} Each was filled in with the words “Labor Ready, Inc.”

^{xiii} This definition is printed on page 9 of the booklet.

^{xiv} This definition is printed on page 13 of the booklet.

^{xv} The information regarding plasterers is contained on page 64.

^{xvi} The information regarding tenders to plasterers is contained on page 72.

^{xvii} The forum uses the term “debarment” as a shorthand means of referring to placement of a contractor or subcontractor on the Commissioner’s List of Ineligibles.

^{xviii} The forum draws this conclusion from Adams’ testimony that the posting of prevailing wage rates on job sites by Respondent where Respondent has workers “is not a part of our compliance process.”

^{xix} See *In the Matter of Larson Construction Co., Inc.*, 22 BOLI ____ (2001), for a discussion of civil penalties assessed in recent final orders involving for violations of ORS 279.354.

^{xx} No copies of daily statements of itemized deductions provided to workers were introduced into evidence. These conclusions are based on a summary of daily itemized deductions for Shielar and Venegas generated by Respondent and Mott’s testimony that the summary contained the same information that was printed on the actual statements provided to Respondent’s workers.

^{xxi} Compare *In the Matter of Larson Construction Co., Inc.*, 17 BOLI 54, 76 (1998), where the commissioner held that mitigating factors may not be considered in the “initial determination of whether to debar a subcontractor.”

^{xxii} See Finding of Fact – The Merits 48, *supra*.

^{xxiii} See, e.g., *In the Matter of M. Carmona Painting, Inc.*, 22 BOLI ____, n. 3 (2001) (Where facts giving rise to alleged prior violations were outside the substantive allegations in the Agency’s Notice, the forum refused to consider respondent’s failure to return 1998 and 1999 wage surveys as “prior violations.”)

^{xxiv} Of course, Mott’s perception of what Johnson said and did may be considered if a dispute exists as to the actual content of Johnson’s statements and actions.

^{xxv} See *In the Matter of Labor Ready, Inc.*, 20 BOLI 73, 98 (2000) (Labor Ready Northwest, Inc. held not liable for failure to submit certified payroll records upon request and to provide records necessary to determine if the prevailing wage rate was paid because Labor Ready, Inc., not Labor Ready Northwest, Inc., was the subcontractor on the subject project).

^{xxvi} See *In the Matter of Albertson’s, Inc.*, 10 BOLI 199, 318 (1992), *rev’d and remanded*, *Albertson’s v. Bureau of Labor and Ind.*, 128 Or App 97 (1994).