

In the Matter of
LARSON CONSTRUCTION CO., INC., and David M. Larson, Respondents.

Case Number 36-98
Final Order of the Commissioner
Jack Roberts
Issued July 22, 1998.

SYNOPSIS

Where respondents, a corporation and its president, performed a subcontract on a public works project and intentionally failed to pay 29 workers the prevailing wage rate, in violation of ORS 279.350(1), intentionally failed to post the prevailing wage rates at the project, in violation of ORS 279.350(4), filed inaccurate and incomplete certified statements, in violation of ORS 279.354, and took action to circumvent payment of the prevailing wage rate by requiring workers to accept less than the prevailing wage rate as part of a bogus apprenticeship program, in violation of ORS 279.350(7), respondents became ineligible for a period of three years to receive any contract or subcontract for public works, pursuant to ORS 279.361, and the commissioner assessed respondents civil penalties of \$59,993.72 for those violations, pursuant to ORS 279.370. ORS 279.350(1), (4), (7); 279.354; 279.361; 279.370; OAR 839-016-0085, 839-016-0095, and 839-016-0520 to 839-016-0540.

The above-entitled contested case came on regularly for hearing before Douglas A. McKean, 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 April 21 and 22, 1998, in the Council Chambers of the City of

Cannon Beach, 163 East Gower Street, Cannon Beach, Oregon, and on April 23, 1998, in room 1005 of the State Office Building, 800 NE Oregon Street, Portland, Oregon.

The Bureau of Labor and Industries (the Agency) was represented by Linda Lohr, an employee of the Agency. Larson Construction Co., Inc. (Respondent LCCI) and David M. Larson (Respondent Larson) were represented by Margaret Hoffmann and Darien Loiselle, Attorneys at Law. David M. Larson was present throughout the hearing on his own behalf and as Respondent LCCI's representative.

The Agency called the following witnesses: Jason Bergeson, former employee of Respondent LCCI; Dan Bott, Project Superintendent, Wildish Construction Company; Stacy Clark, former employee of Respondent LCCI; Lora Lee Grabe, Compliance Specialist with the Wage and Hour Division (WHD) of the Agency; and Vicki King, former Compliance Specialist with WHD.

Respondent called the following witnesses: Mike Caccavano, City Engineer of Astoria; Julie Fritz, Respondents' office manager; Gil Gramson, City Manager of Warranton; David Larson, Respondent and president of Respondent LCCI; and Darien Loiselle, Respondents' attorney.

Administrative exhibits X-1 to X-16; Agency exhibits A-1 to A-13, A-15, A-17, A-19 to A-31, A-33, and A-34; and Respondents' exhibits R-1 to R-5 and R-7 to R-11 were offered and received into evidence. The Agency withdrew exhibits A-16, A-32, and A-35. Respondents withdrew exhibit R-6. The record closed on May 7, 1998.

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 October 24, 1997, the Agency issued a "Notice of Intent to Make Placement on List of Ineligibles and to Assess Civil Penalties" (Notice of Intent) to Respondents. The Notice of Intent alleged that (1) Respondents intentionally failed to pay the prevailing rate of wage to workers on a City of Seaside water treatment plant public works project in violation of ORS 279.350(1); (2) Respondents intentionally failed to post the applicable prevailing wage rates on that project in violation of ORS 279.350(4); (3) Respondents filed inaccurate and incomplete certified statements on that project in violation of ORS 279.354; and (4) Respondents took action to circumvent the payment of the applicable prevailing wage on that project in violation of ORS 279.350(7). The Agency alleged aggravating circumstances. The Agency proposed to place Respondents' names on the list of contractors ineligible to receive any contract or subcontract for public works for a period of three years from the date of publication of their names on the ineligible list, pursuant to ORS 279.361, and to assess civil penalties against Respondents in the amount of \$58,522, pursuant to ORS 279.370 and applicable rules. The Agency attached an appendix listing 25 workers who were not paid prevailing wages on the project and listing related civil penalties. At hearing, the Agency moved to amend the notice to correct the appendix to list 29 workers and related civil penalties of \$45,993.72. Respondents stipulated to the amendments and the ALJ granted the motion.

2) On November 12, 1997, Respondents filed an answer. They denied the violations alleged above in the Notice of Intent and stated five affirmative defenses. Respondents requested a contested case hearing. At hearing, Respondents moved to amend their answer to allege an additional affirmative defense challenging the constitutionality of ORS 279.361. Over the Agency's objection, the ALJ granted the

motion and set a briefing schedule. After hearing, Respondents withdrew this affirmative defense.

3) On December 17, 1997, the Hearings Unit issued to Respondents and the Agency a Notice of Hearing, which set forth the time and place of the requested hearing. With the hearing notice, the Hearings Unit sent to Respondents a "Notice of Contested Case Rights and Procedures" containing the information required by ORS 183.413, and a complete copy of the Agency's administrative rules regarding the contested case process -- OAR 839-050-0000 through 839-050-0440. On February 13, 1998, the Hearings Unit issued to Respondents and the Agency a notice that OAR 839-050-0220 had been amended, along with a copy of the new rule and a complete copy of OAR 839-050-0000 through 839-050-0440.

4) Pursuant to OAR 839-050-0210 and the ALJ's order, the Agency and Respondents each filed a Summary of the Case.

5) On March 11, 1998, Respondents requested a discovery order permitting the deposition of Lora Lee Grabe, the Agency's compliance specialist. The Agency had no objection and the ALJ granted the request.

6) At the start of the hearing on April 21, 1998, Respondents' attorney said that she had received and read the Notice of Contested Case Rights and Procedures and had no questions about it.

7) The participants waived the requirement that the ALJ advise them of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing. ORS 183.415(7).

8) Respondents' attorneys filed a hearing memorandum.

9) Early in the hearing, the participants agreed to several stipulations, which Respondents later reduced to writing and submitted for the record.

10) The proposed order, containing an exceptions notice, was issued June 9, 1998. Exceptions were due June 19, 1998. Respondents timely filed exceptions which are dealt with in the Opinion section of this Final Order.

FINDINGS OF FACT -- THE MERITS

1) At all times material, Respondent LCCI was an Oregon corporation. Respondent Larson was Respondent LCCI's president.

2) Respondent LCCI was the prime contractor on a Cannon Beach Rural Fire Protection District public works project. Beginning in December 1995, Agency Compliance Specialist (CS) Vicki King investigated Respondents' alleged failure to pay the prevailing wage rate (PWR) (including zone pay, driving time, and overtime over eight hours per day) and failure to post PWR information at the job site of the Cannon Beach project. As a result of the investigation, Respondents paid 10 workers PWR wages due totaling \$2,846.14. CS King found 10 violations of failing to pay PWR and one violation of failing to post PWR information at the job site. She recommended that the Agency send Respondents a warning letter and place Respondents on its warning letter list. The Agency sent Respondents a warning letter on May 31, 1996, informing them that their practices did not comply with the PWR law. The letter warned them that the Agency would consider placing their names on a list of persons ineligible to receive public works contracts for a period of up to three years should they be found to have failed or refused to pay PWR in the future.

3) Wildish Building Company (Wildish) was the prime contractor on a Seaside Water Treatment Plant public works project. The City of Seaside was the contracting agency. Respondent LCCI was a subcontractor. Respondents performed excavation and earthwork on the project.

4) Respondents intentionally failed to pay the prevailing wage rate between on or about September 12, 1995, to on or about January 6, 1997, to 29 of its workers, the names of said workers set out below, on the City of Seaside's Seaside Waste Treatment Plant public works contract, upon which Respondents were a subcontractor, by not paying said workers for all hours worked, by not paying the prevailing hourly wage rates specified by the Commissioner for workers employed as truck drivers and heavy duty mechanics, and by not paying zone pay to power equipment operators. The names of the workers, as listed in "Corrected Appendix A" to the Notice of Intent, are: Kurt Anderson, Jason Bergeson, Stacy Clark, Joseph Cox, Bryan Edwards, Andy Finn, Gary Fritz, Jennifer Fritz, Joe Gilmore, Randy Gilmore, Chris Gipson, Mike Goodwin, Joel Grothe, Bill Gunderson, Les Hannah, Rod Herndon, Chad Mason, Travis Owsley, Joseph Painter, Paul Parker, Paul Phillips, Michael Rider, Jeff Rosa, John (Rick) Schertenleib, Clyde Stanley, Mark Stough, Leo Susbauer, Joe Talbot, and Glen Wadley.

5) Between on or about September 12, 1995, to on or about January 6, 1997, Respondents intentionally failed to post in a conspicuous and accessible place in or about its public works project the applicable prevailing wage rates on the City of Seaside's Seaside Waste Treatment Plant public works contract, upon which Respondents were a subcontractor.

6) Between on or about September 12, 1995, to on or about January 6, 1997, Respondents filed inaccurate and incomplete certified statements by failing to report workers, hours and dates of work on the City of Seaside's Seaside Waste Treatment Plant public works contract, upon which Respondents were a subcontractor.

7) Between on or about September 12, 1995, to on or about January 6, 1997, Respondents took action to circumvent the payment of the applicable prevailing

wage by requiring workers to accept less than the prevailing wage rate as part of a bogus apprenticeship agreement on the City of Seaside's Seaside Waste Treatment Plant public works contract, upon which Respondents were a subcontractor.

8) The following provides further explanation for Findings of Fact -- The Merits number 4, 6, and 7:

(a) In some instances, Respondents reported on certified statements and paid employees for only a certain percentage of the hours reported by those employees;

(b) In some instances, hours worked by employees on weekends were reported by Respondents on certified statements and paid as [though] they had been worked on weekdays;

(c) In some instances, hours in excess of eight worked in a day were banked or reported on certified statements and paid as though they had been worked on another day.

9) Respondents' intentional failure to pay the prevailing wage rate, as described in Findings of Fact -- The Merits numbers 4 and 8; their failure to file accurate and complete certified statements, as described in Findings of Fact -- The Merits numbers 6 and 8; and their actions to circumvent the payment of the applicable prevailing wage, as described in Findings of Fact -- The Merits numbers 7 and 8, were done knowingly and deliberately. These actions and failures (acts) affected 29 workers and occurred over a long time. Some of the acts were the same as those that Respondents committed on the Cannon Beach project. The acts occurred at the same time that the Agency was warning Respondents about such acts and collecting back wages on the Cannon Beach project. Respondent Larson knew such acts violated the law. He chastised workers who complained about such acts.

10) Early in the Seaside project, Wildish was the only contractor with a job shack on site. Wildish had a BOLI PWR poster posted in the shack. No subcontractor posted the prevailing wage rates. Respondent Larson thought it was difficult to post the prevailing wage rates before he had a trailer on site. Around late May or early June 1996, Respondents put a trailer on the Seaside site. He never called the Agency about how to post the rates when he did not have a trailer on site.

11) On September 20, 1996, Respondent Larson hired Stacy Clark as an equipment operator of bulldozers and scrapers. Clark did not know what his wage rate was or that the Seaside job was a public works project. When Clark asked about his wages, Respondent Larson told him that he would be paid 70 percent of the regular wage because Clark, like all new employees, was part of an apprenticeship program. When Clark worked 10 hours one day, he saw the foreman write down seven hours. The foreman said this was how Respondents figured Clark's 70 percent wage rate. Clark learned from a Wildish superintendent that the Seaside job was a public works project and that he should be getting PWR. Clark started keeping track of his hours. He checked with other employees and they were not being paid PWR. Clark was not in any apprenticeship program. Respondent Larson heard that Clark was angry about his wages. He jumped up on Clark's machine, called him dirty names, and challenged Clark to turn him in to BOLI. Respondent Larson later told Clark that he wanted him to stay with Respondent LCCI, but Respondent Larson was going to send him to a non-public works job and pay him only \$10 per hour. After Clark got his second paycheck, he went to Wildish's office and got a paper showing what he should have earned based on his hours and the PWR. He then went to Respondents' office and gave a secretary a copy of his hours to get his pay straightened out. Later a job bidder for Respondents called Clark. Clark went to the office, where the bidder gave him a document entitled "Labor

Dispute Settlement Agreement." Clark read and signed the document, and then he got a paycheck for additional wages. The secretary then called Wildish and had Clark tell Wildish that he had settled his wage claim with Respondents. The employment relationship between Clark and Respondents was terminated.

12) On October 30, 1996, Respondents' former employee Chad Mason filed a complaint with the Agency about Respondent LCCI. He complained that Respondents were improperly paying him and others for all hours worked on the Seaside project. Mason worked for Respondents from November 1, 1995, to October 19, 1996. On December 2, 1996, he filed a wage claim with the Agency against Respondent LCCI for regular and overtime wages at the prevailing wage rate.

13) The Agency has a procedure in its Field Operations Manual called "Prevailing Rate Investigations for wage claims and complaints." Section III.E. of the procedure, entitled "Final Determination," provides in part:

"2) If investigation reveals wages are owed, make final demand, in writing, advising contractor of possible debarment. Do not advise contractor he/she will not be debarred if he/she pay [sic] wages.

"a) If contractor pays wages due, remit wages to claimant/worker and write WH-60 [Case Summary Report]. Get written promise from contractor of future compliance with PWR Law. Detail in WH-60 the contractor's reasons for initial failure to pay PWR.

"b) If contractor refuses payment of wages, prepare a legal WH-60 report, detailing contractor's reasons for initial failure to pay PWR, and recommend legal action, pursuing unpaid wage from the surety.

"3) Debarment should be recommended in the following situations:

"a) Contractors have previously been found in violation of the PWR law; have been warned that placement on the Ineligible List would be considered in the future and have committed subsequent violations.

"b) Contractors have been found in violation of the PWR law where the violation includes falsification of records or clear evidence of subterfuge designed specifically to avoid paying PWR.

"c) Contractors have been found in violation of the PWR law and there is clear evidence they knew the PWR must be paid and failed to do so.

"d) There is evidence of kickbacks.

"e) First time offenders when the violations are extremely serious, such as preceding examples b, c, d.

"f) Refusal and/or failure to post prevailing wage rates (this is not routinely treated as a debarment offense when found alone)." (Emphasis original.)

During November 1996, the Agency assigned Compliance Specialist (CS) Lora Lee Grabe to investigate the complaint against Respondents. Beginning in January 1997, Grabe was the lead worker in the Agency's PWR program and investigated only PWR claims and complaints. She was familiar with the PWR statutes, rules, and investigation procedure. She was aware that the Agency had sent Respondents a warning letter concerning the Cannon Beach public works contract. She drafted a Notice of Claim to file against the prime contractor's bond for back wages. To estimate the back wages and liquidated damages potentially due, Grabe relied on interviews with two of Respondents' employees (Chad Mason and Jason Bergeson), some records (including some of Respondents' certified statements), and allegations that Respondents had not properly paid PWR to other employees. At the time, Grabe was not evaluating the case for whether there was sufficient evidence to debar Respondents.

14) During December 1996, the Agency filed a Notice of Claim against Wildish's bond, creating a lien on the bond for about \$2.5 million, in connection with the PWR claims against Respondents. Wildish withheld around \$250,000 in progress payments to Respondents. This put Respondents in extreme financial difficulty.

15) On December 9, 1996, CS Grabe sent a letter to Respondent Larson advising him of the prevailing wage rate claim filed against Respondent LCCI. She advised Respondent Larson that she would investigate the claim and needed him to provide various time and payroll records, including certified statements, related to the

Seaside project. She also requested that he make himself and workers available to be interviewed regarding the project.

16) On January 6, 1997, CS Grabe and CS King interviewed a number of workers at Respondents' offices. CS Grabe conducted an initial conference with Respondent Larson and Respondents' attorney, Darien Loiselle. She asked Respondent Larson questions about how time records were kept, whether prevailing wage rates were paid on the project, and whether he had posted the prevailing wage rates on the project. Respondent Larson explained his time keeping methods, said he thought he was paying the correct amount of PWR, and said he had posted a PWR poster on the project. Respondent Larson said he had a financial interest in no other company. He was troubled by the dollar amount in the Notice of Claim. Later, at Mr. Loiselle's request, CS Grabe explained the Agency's debarment policy. Grabe said that Respondents were on the warning letter list for violations found during the investigation of the Cannon Beach public works project in the summer of 1995. That investigation resulted in the collection of PWR wages. She explained to Respondent Larson that she had some discretion in making a debarment recommendation. As was her practice, she explained that a debarment recommendation is not contingent on whether an employer pays the PWR back wages. She never told them that payment of back wages would prevent a debarment recommendation. As she described the Agency's debarment policy, Loiselle was nodding and Grabe believed he understood the policy and the seriousness of the situation. She told them it was the Agency's policy not to pursue liquidated damages unless the Agency had to seek payment of the back wages from the surety company. She also said that the Agency had civil penalty authority and that she used agreements for future compliance as enforcement tools. During this meeting, Loiselle and Respondent Larson did not understand the distinction between civil

penalties and liquidated damages. CS Grabe then collected available records. Respondent Larson said his office was still gathering reports and information for her. He said he had limited office staff to collect records. Respondent Larson asked when the investigation would be completed, because Wildish was withholding almost \$250,000 in payments to Respondent LCCI. He said he'd have to shut down the business soon if he didn't get that money. CS Grabe explained that she couldn't complete the investigation without the additional records and that she had to interview other employees. Grabe told Loiselle that if he had any question or needed information, he should put this in writing and send it to her.

17) After the meeting, Respondent Larson talked with Loiselle. They felt relieved because they thought that if Respondents cooperated with the Agency and paid the back wages, there would be no other sanction. Respondent Larson showed willingness to cooperate with the Agency. The next day, Respondent Larson telephoned Loiselle to say that he felt comfortable getting his records together for the Agency and did not need Loiselle's help any longer. Respondent Larson felt that debarment was not an issue. Loiselle was not involved in the Agency's investigation after that.

18) Early in the investigation, Respondent Larson conceded to CS Grabe that Respondents had problems with paying prevailing wages, and he said the back wages would be paid.

19) During the investigation, CS Grabe asked for and received documents from an engineering firm, a construction management company that helped administer the Seaside project, and the prime contractor (Wildish). These records included daily progress reports, field reports, and work force records. Grabe used these records along with Respondents' records to try to calculate prevailing wages due Respondents' workers.

20) In a telephone call with him on January 27, 1997, CS Grabe told Respondent Larson that the Agency would waive any liquidated damages on the wages due if Respondents paid them. Respondent Larson wrote to Wildish demanding payment of the withheld progress payments. At some point in the investigation, Grabe told Respondents' office manager, Julie Fritz, that the Agency would not pursue liquidated damages if the workers were paid their back PWR wages.

21) On January 30, 1997, CS Grabe wrote to Respondent Larson, to follow up on a telephone conversation she had with him on January 29, 1997, and again requested time and payroll records for work on the Seaside project. On February 3, 1997, Julie Fritz wrote to Grabe that Respondents would try by the end of the week to supply timecard records for every employee on the Seaside job from September 1995 to November 1996.

22) On February 18, 1997, CS Grabe wrote Respondent Larson about the progress of the investigation and included a list of employees for whom she had calculated revised amounts due. She was reviewing additional time records that Respondents had submitted and she requested additional records.

23) On February 19, 1997, Respondent Larson wrote to Wildish again requesting payment of the withheld funds, claiming that the withholding was causing Respondents damages. Respondent Larson wrote that he felt the Agency's revised wage claim amounts were high.

24) On March 7, 1997, CS Grabe wrote to Respondent Larson recapping the wages found due to 29 employees based on additional time records reviewed. She also described her belief that reports and records were still missing for many employees and for specific periods of time. She requested these missing records and said that all back wage estimates may need revision due to the missing records. During the entire course

of her investigation, CS Grabe asked Respondents for records many times in writing and by telephone. She talked with Julie Fritz several times. Grabe believed she never got all the requested documents and there were obvious records of hours missing. Each time she got additional records from Respondents, she recalculated the unpaid PWR wages.

25) On March 12, 1997, Fritz sent Grabe daily timecards for the period April 23 to May 12, 1996. Fritz wrote that she believed Grabe should have all daily reports for the Seaside project and all timecards for the applicable employees for September 1995 to November 1996. Fritz wrote that a reference to "Larson Excavation" on a daily report was incorrect and that there was no such business or any others that Respondent LCCI had an interest in.

26) On March 14, 1997, the Commissioner e-mailed the administrator of the Wage and Hour Division, Christine Hammond. The Commissioner had been contacted by Steve Wildish about reducing the lien amount to more accurately reflect the amount of wages Respondents owed. Hammond responded that there was no reason not to amend the Notice of Claim to reflect the amount CS Grabe had determined appeared due, with liquidated damages. They agreed to wait until Respondents responded to a request for records. Grabe got a copy of these e-mails.

27) On March 17, 1997, Respondent Larson wrote to CS Grabe that "we may not agree with several employee calculations" contained in a revised wage estimate, and he asked to meet with her to discuss the revised amounts. He also asked her to file a revised notice of claim in the amount of the back wages claimed. On March 20, 1997, CS Grabe sent Respondent Larson wage transcription and computation sheets reflecting the prevailing wage calculations. She asked him to call her to schedule a meeting after he had reviewed the sheets.

28) On March 22, 1997, the Agency notified Respondents, Wildish, and the City of Seaside that it had reduced the Notice of Claim against Wildish's bond to \$142,959.10. This amount was based on unpaid wages of \$71,479.55 and liquidated damages of \$71,479.55. After this time, Respondents gave CS Grabe additional records. She gave them credit for benefits and wages already paid. Respondent Larson told Grabe he would not dispute small differences he had with the amounts Grabe found due, but he did not concede those amounts were due. He thought specific employees were not due additional wages. In the context of Wildish continuing to withhold around \$250,000 from Respondents even after the Notice of Claim was amended, Respondent Larson said paying the back wages was tantamount to blackmail. At one point in the investigation, Respondent Larson told Grabe he was not going to pay snot-nosed kids PWR.

29) On April 25, 1997, CS Grabe wrote to Wildish that the Agency had completed its investigation of Respondent LCCI and listed the 29 workers who had prevailing wages due them. The total unpaid prevailing wages due was \$55,456.38. She advised that the Agency would release its notice of claim on Wildish's bond after receiving payment of the wages to the workers. The workers listed and the amount of unpaid prevailing wages due each worker were: Kurt Anderson, \$462.78; Jason Bergeson, \$6,725.23; Stacy Clark, \$465.15; Joseph Cox, \$12.00; Bryan Edwards, \$821.15; Andy Finn, \$10,420.44; Gary Fritz, \$873.30; Jennifer Fritz, \$85.19; Joe Gilmore, \$4,621.93; Randy Gilmore, \$9,059.81; Chris Gipson, \$1,701.75; Mike Goodwin, \$493.50; Joel Grothe, \$1,799.41; Bill Gunderson, \$116.32; Les Hannah, \$823.12; Rod Herndon, \$4,442.25; Chad Mason, \$2,689.99; Travis Owsley, \$783.85; Joseph Painter, \$155.62; Paul Parker, \$455.36; Paul Phillips, \$76.50; Michael Rider, \$157.50; Jeff Rosa, \$31.50; John (Rick) Schertenleib, \$354.49; Clyde Stanley, \$670.64;

Mark Stough, \$2,745.22; Leo Susbauer, \$773.04; Joe Talbot, \$385.85; and Glen Wadley, \$3,253.49. Grabe sent a copy of the letter to Respondents.

30) CS Grabe never sent to Respondents a written "final demand" for wages owed -- as described in section III.E.2. of the investigation procedure (see Finding of Fact -- The Merits number 13) -- because Respondent Larson said he would pay the back wages that were owed according to the investigation. Grabe did not advise Respondents in writing that they could be debarred because she had already articulated the Agency's policy to Respondent Larson and his attorney on January 6, 1997, and the Agency had already sent Respondents a warning letter in May 1996.

31) On May 7, 1997, Respondents' office manager sent CS Grabe cashier's checks for the prevailing wages owed on the Seaside project. Respondents paid the amounts found due by the Agency as listed in Finding of Fact -- The Merits number 29, above. The Agency then sent these checks to the workers. Thereafter, the bond was released and Respondents received their money from Wildish.

32) Along the north Oregon coast, it is difficult to get contractors to bid on public works projects. For contracts over \$100,000, there are only two contractors available in the area to perform the kind of work Respondents perform, and Respondent LCCI is one of those. Construction work provides high-wage jobs in the area. In the five years before hearing, Respondents performed several contracts for the City of Warranton. Their job performance was satisfactory and on schedule. Additional public works projects were coming up in the next two years. If Respondents were not available to bid on those contracts, the city's options would be limited and it would be harder to get bids. With reduced competition, bids would not be as competitive and the price would be higher. The City of Astoria used Respondents on several public works projects. On one project, Respondent LCCI was the only bidder. The city engineer

would be concerned if prevailing wage rates were not being paid, and he relied on the Agency to watch that.

33) After the investigation in this matter was finished, Respondent Larson checked into setting up a registered apprenticeship program, but did not do so because of the cost.

34) Julie Fritz attended a seminar about PWR. Respondent Larson consulted with CS Grabe about other public works projects.

35) Respondent Larson's testimony was not wholly credible. Some of his testimony was corroborated by other credible evidence. However, on important questions related to the conversation on January 6, 1997, Respondent Larson's testimony was not reliable. For example, he testified that Grabe said, "Mr. Larson, we are not seeking liquidated damages or disbarment * * * if you cooperate." This testimony was contradicted by the testimony of Grabe and Loiselle, the other two participants at the meeting. Such a statement by Grabe would contradict Agency policy, and the forum finds it highly unlikely that she would make such a statement. Likewise, Respondent Larson testified that Grabe reassured him in a later conversation that the Agency would not debar him. He repeatedly called liquidated damages "penalties" and used these terms interchangeably. The forum finds his testimony regarding conversations about sanctions unreliable and incredible. Other testimony by Respondent Larson was also inconsistent with and contradicted by credible evidence. For example, he testified that he had worked hard to comply with the PWR law. Given the stipulated facts and other credible evidence related to Respondent Larson's actions and inactions concerning this law, however, the forum finds such testimony incredible. Some of his testimony was not believed because experience demonstrates that it was logically incredible. For example, Respondent Larson testified that, when he set up his bogus apprenticeship program, he

thought one of the requirements was having a collective bargaining agreement with his employees. He testified he thought he had a collective bargaining agreement with them, when in fact he did not. The forum found this testimony incredible, coming from a man who had worked in the construction trades and run a construction business for much of his life. Accordingly, the forum gave little weight to Respondent Larson's testimony whenever it was contradicted by other credible evidence, and at times the forum did not believe his testimony even when it was not contradicted by other evidence.

ULTIMATE FINDINGS OF FACT

1) Respondent LCCI is an Oregon corporation. Respondent Larson is its president.

2) Respondent LCCI received a subcontract on the City of Seaside's Seaside Waste Treatment Plant public works.

3) Respondent LCCI intentionally failed to pay the prevailing rate of wage to 29 workers employed upon the City of Seaside's Seaside Waste Treatment Plant public works project.

4) Respondent LCCI intentionally failed to post in a conspicuous and accessible place in or about the City of Seaside's Seaside Waste Treatment Plant public works project the prevailing wage rates as required by ORS 279.350(4).

5) Respondent Larson, a corporate officer of Respondent LCCI, was responsible for Respondent LCCI's failure to pay and failure to post the prevailing rate of wage. He knew or should have known the amount of the applicable prevailing wages and that such wage rates must be posted.

6) Respondents filed inaccurate and incomplete certified statements by failing to report workers, hours, and dates of work on the City of Seaside's public works contract.

7) Respondents took actions that circumvented the payment of prevailing wages to workers employed upon the City of Seaside's public works contract by requiring workers to accept less than the prevailing wage rate as part of a bogus apprenticeship agreement.

CONCLUSIONS OF LAW

1) The Commissioner of the Bureau of Labor and Industries has jurisdiction over Respondents and the subject matter herein. ORS 279.348 to 279.380.

2) ORS 279.350(1) provides in 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."

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 LCCI violated ORS 279.350(1) by failing to pay the prevailing rate of wage to workers employed upon a public works project.

3) ORS 279.350(4) provides in part:

"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."

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 LCCI violated ORS 279.350(4) by failing to post the prevailing wage rates for the Seaside project in a conspicuous and accessible place in or about the project.

4) ORS 279.350(7) provides:

"No person shall take any action that circumvents the payment of the prevailing rate of wage to workers employed on a public works contract, including, but not limited to, reducing an employee's regular rate of pay on any project not subject to ORS 279.348 to 279.380 in a manner that has the effect of offsetting the prevailing wage on a public works project."

Respondents violated ORS 279.350(7) by requiring workers to accept less than the prevailing wage rate as part of a bogus apprenticeship agreement.

5) ORS 279.354(1) provides in part:

"* * * [E]very subcontractor * * * 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 hours rate of wage paid each worker which 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 * * * subcontractor * * * that the * * * subcontractor has read such statement and certificate and knows the contents thereof and that the same is true to the * * * 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."

Respondent LCCI violated ORS 279.354 by failing to file certified statements that set out accurately and completely the payroll records for the prior week.

6) ORS 279.361 provides in part:

"(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 * * * subcontractor has intentionally failed or refused to pay the prevailing rate of wage to workers employed upon public works, * * * or * * * a subcontractor has intentionally failed or refused to post the prevailing wage rates as required by ORS 279.350(4), the * * * subcontractor or any firm, corporation, partnership or association in which the * * * 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 * * * 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.

"(2) When the contractor or subcontractor is a corporation, the provisions of subsection (1) of this section shall apply to any corporate officer or corporate agent who is responsible for the failure or refusal to pay or post the prevailing rate of wage * * *."

OAR 839-016-0085 provides in 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 * * * subcontractor * * * is ineligible to receive any contract or subcontract for a public work:

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

"(2) When the * * * subcontractor is a corporation, the provisions of section (1) of this rule shall apply to any corporate officer or corporate agent who is responsible for the failure or refusal to pay or post the prevailing wage rates.

"(3) As used in section (2) of this rule, any corporate officer or corporate agent responsible for the failure to pay or post the prevailing wage rates * * * includes, but is not limited to the following individuals when the individuals knew or should have known the amount of the applicable prevailing wages or that such wages must be posted:

"(a) The corporate president[.]

" * * * * *

"(4) * * * Except as provided in OAR 839-016-0095 [Removal of Names from List], 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 839-016-0095(1) provides:

"The names of the * * * subcontractor or other persons * * * shall remain on the list for a period of three (3) years from the date of publication of such name on the list."

Pursuant to ORS 279.361 and based on the facts set forth herein, the Commissioner has the authority to place the name of Respondents LCCI and Larson on the list of

persons who are ineligible to receive any contract or subcontract for public works for a period not to exceed three years from the date of publication of their names on that list.

Because Respondent LCCI intentionally failed to pay the prevailing rate of wage to workers employed upon a public works and intentionally failed to post the prevailing wage rates as required by ORS 279.350(4), it shall be ineligible for a period of three years from the date of publication of its name on the ineligible list to receive any contract or subcontract for public works.

Because Respondent Larson was a corporate officer responsible for the failure to pay and post the prevailing wage rates, he shall be ineligible for a period of three years from the date of publication of his name on the ineligible list to receive any contract or subcontract for public works.

7) ORS 279.370 provides in part:

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

"(2) Civil penalties under this section shall be imposed as provided in ORS 183.090."

OAR 839-016-0530 provides in 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;

" * * * * *

"(h) Taking action to circumvent the payment of the prevailing wage, other than subsections (e) and (f) of this section, in violation of ORS 279.350(7)[.]"

OAR 839-016-0520 provides in part:

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

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

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

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

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

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

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

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

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

OAR 839-016-0540 provides in 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;

"(c) Three times the amount of the unpaid wages or \$5,000, whichever is less, for second and subsequent repeated violations.

" * * * * *

"(5) The civil penalty for all other violations shall be set in accordance with the determinations and considerations referred to 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."

Under the facts and circumstances of this record, and according to ORS 279.370 and OAR 839-016-0500 to 839-016-0540, the Commissioner of the Bureau of Labor and Industries has the authority to impose a civil penalty for each violation found herein. The assessment of the civil penalties specified in the Order below is an appropriate exercise of that authority.

OPINION

Respondents stipulated to facts that established the violations alleged by the Agency. At hearing the participants focused on the sanctions proposed by the Agency and on Respondents' affirmative defenses. The Agency proposed to place Respondents' names on the list of contractors ineligible to receive any public works contracts and to assess civil penalties. Regarding civil penalties, the participants offered evidence of aggravating and mitigating circumstances. The forum will address Respondents' affirmative defenses first and then the sanctions.

1. Respondents' Affirmative Defenses

In their amended answer, Respondents raised six affirmative defenses. They withdrew the sixth one after the hearing.

Their first defense was that the Commissioner failed to state claims for which relief should be granted. They presented no evidence or argument supporting this defense. The Notice of Intent to Make Placement on List of Ineligibles and to Assess Civil Penalties met the requirements for a notice under the Administrative Procedures Act (ORS 183.415(2)), under the forum's contested case hearing rules (OAR 839-050-0060), and under the Agency's rule regarding placing a name on the ineligible list (OAR 839-016-0085). Accordingly, Respondents did not prove this defense.

Respondents' second affirmative defense claimed that the Commissioner waived or was estopped from assessing civil penalties and placing Respondents' names on the ineligible list because the Agency induced them to pay \$55,456.38 in back wages by representing that this payment would be the only assessment against them in this matter. The Agency denied that it made any such representation.

Related to Respondents' second affirmative defense was their fourth affirmative defense, which claimed that the Agency "is not entitled to any additional assessments, penalties, and/or place [Respondents] on the List of Ineligibles because [Respondents have] settled this dispute with the Bureau of Labor and Industries." The Agency denied that a settlement existed. The forum will return to the second and fourth affirmative defenses in a moment.

In their third affirmative defense, Respondents alleged they did not intentionally perform any act or omission alleged in the Notice of Intent. In the notice, the Agency alleged that Respondents intentionally failed to pay and post the prevailing wage rates on the Seaside public works project. At hearing, Respondents' stipulated that they

intentionally failed to pay and post the prevailing wage rates on the project. There was no evidence to the contrary. Accordingly, Respondents failed to prove this defense.

In their fifth affirmative defense, Respondents alleged that they were entitled to an offset and/or reduction in any penalty or assessment and a waiver of being placed on the ineligible list. This was allegedly because they cooperated completely and expeditiously with the Agency, they paid the underlying wage claims, which amounts they agreed were owed, and they corrected any practice that could result in a future violation. The forum has addressed these matters below in the discussion of placing Respondents' names on the ineligible list and assessing civil penalties.

a. The Settlement Defense

As mentioned above, Respondents raised a purported settlement agreement and the doctrine of equitable estoppel as separate defenses in their answer. However, in their arguments and in their hearing memorandum, they appear to combine the settlement agreement within their equitable estoppel defense. For clarity, the forum will address the settlement defense separately and then address it in the context of the equitable estoppel defense.

In their memorandum Respondents argued that the Agency, through Compliance Specialist Grabe, agreed to waive all sanctions if Respondent Larson agreed to pay the back wages owed. They relied on Loiselle and Larson's testimony about the meeting with Grabe on January 6, 1997, and also Fritz's testimony that Grabe told her that all damages would be resolved via the agreement on back wages, and that Grabe never disclosed that civil penalties and debarment (placing Respondents' names on the ineligible list) were being considered.

In Finding of Fact -- The Merits number 16, the forum has set out its findings concerning the meeting among Grabe, Larson, and Loiselle on January 6, 1997. During

that meeting, Loiselle and Respondent Larson did not understand the distinction between civil penalties and liquidated damages. Larson thought that liquidated damages, penalties, and sanctions were all the same thing. This lack of familiarity with the different sanctions caused Larson and Loiselle to misunderstand Grabe's explanation of them.¹

Grabe gave Respondents and Loiselle accurate information about debarment, civil penalties, and liquidated damages, but they misunderstood this information and incorrectly assumed that all sanctions would be waived if Respondents just paid the back wages. Likewise, Fritz did not appreciate the different sanctions provided in the law. The forum believes Grabe told Fritz that the Agency would waive liquidated damages if the back wages were paid, which is the same thing she had told Respondent Larson and his attorney. The preponderance of credible evidence on the whole record shows that Grabe did not say the Agency would waive all possible sanctions if Respondents paid the back wages owed.

Much of Respondent Larson's testimony concerning the January meeting was not credible. Loiselle testified that he asked Grabe whether she was considering debarring Respondents and she said she was not considering it at that time. In her testimony, Grabe flatly denied that she said that. She testified credibly that she remembered this because she was expecting him to ask such a question, and he did not. Furthermore, she made contemporaneous notes of what was discussed in this meeting, and her notes do not reflect that Loiselle asked her such a question or that she made such a statement. No one else offered notes of this meeting. Grabe's testimony and notes reflect that her advice to Larson and Loiselle was accurate and consistent with Agency policy. Accordingly, the forum concludes that Grabe's testimony and notes of her conversation with Larson and Loiselle were more reliable than Loiselle's memory

of the conversation. The forum concludes further that Grabe did not say she was not considering debarment at that time.

Even if Grabe had made such a statement, the forum would find that Loïselle misunderstood it. The statement would have been accurate because, at the time she allegedly made it, Grabe was in the initial stage of her investigation -- long before she would make a final determination on whether wages were due or violations had occurred. Appropriately so, she was then not prepared to make a recommendation about debarring Respondents. Loïselle felt that Grabe's statement meant that if Respondents paid the back wages and cooperated, the Agency would not debar them. This feeling amounts to nothing more than an inaccurate assumption. Grabe's purported statement did not create a settlement agreement, nor was it a false representation by the Agency. I find nothing misleading or ambiguous about it, given the circumstances under which she allegedly made it. Her alleged statement must be taken in context, including her advice that debarment recommendations were not based on whether back wages were paid. Loïselle's and Respondent Larson's opinion at the end of the meeting that there was an agreement between the Agency and Respondents (the agreement being that if Respondents paid the back wages and cooperated, the Agency would not impose any other sanction) was not based in fact and was unfounded. Accordingly, the forum finds that no agreement existed between the Agency and Respondents as claimed. Respondents' fourth affirmative defense fails for lack of proof.

b. The Equitable Estoppel Defense

Respondents contended that the Agency was equitably estopped from debarring them and assessing civil penalties because CS Grabe falsely represented the Agency's objectives regarding these sanctions in January 1997. In the alternative, they alleged that Grabe made inaccurate and misleading representations regarding the status of the

sanctions. They claim she did so with knowledge of the facts. They say they were ignorant of the truth and relied to their detriment on Grabe's misrepresentations. The Agency denies that it made any false representation to Respondents. It claims that Respondents had knowledge of the truth, because of the advice Grabe gave them, the statutes and rules that disclose the different sanctions, and the warning letter Respondents received before the investigation in this case.

The Commissioner has previously held that the doctrine of equitable estoppel does not apply to the agency when it is enforcing a mandatory requirement of the law. *In the Matter of Albertson's, Inc.*, 10 BOLI 199, 299 (1992) (citing *Bankus v. City of Brookings*, 252 Or 257, 259-60, 449 P2d 646, 648 (1969); *Solberg v. City of Newberg*, 56 Or App 23, 641 P2d 44, 48 (1982)). After reviewing several cases in which the doctrine was invoked against the government, the Commissioner found that

"the courts have limited the application of the doctrine to tax and government benefit cases, and to cases in which the government was involved in a land transaction or had negotiated a contract. The Oregon Supreme Court, in a recent case, did not reveal any intention to broaden the doctrine as applied against the government when it said:

'Estoppel, if ever applicable against the government, certainly does not apply here.' *Committee in Opposition to the Prison in Malheur County v. Oregon Emergency Corrections Facility Siting Authority*, 309 Or 678, 792 P2d 1203, 1207 (1990).

"The Forum finds that the doctrine of equitable estoppel does not apply in a case such as this, where the Agency is enforcing a mandatory requirement of the law. An Agency employee could not have waived the requirements of the law and rules." *Albertson's*, 10 BOLI at 299.

In *Albertson's*, a child labor case, the respondent argued that assessing civil penalties was discretionary, and that even if the Agency could not be estopped from requiring the respondent to comply with a record keeping requirement of the law, the Agency could still be equitably estopped from imposing a discretionary civil penalty. The Commissioner found that argument meritless.

"What Respondent urges is a distinction without a difference. The Agency's use of all of its enforcement tools is discretionary. If the Agency could be estopped from using its enforcement tools (civil penalties being one), it would be effectively estopped from enforcing the mandatory requirements of the law. Employers, such as Respondent, could refuse to comply with the mandatory requirements of the law, and the Agency would be estopped from using its statutorily provided enforcement tools. The Forum finds that the doctrine of equitable estoppel does not apply to stop the Commissioner from exercising her power to impose civil penalties under ORS 653.370 for violations of child labor statutes and rules." *Albertson's*, 10 BOLI at 299.

The forum believes the Commissioner's holdings in *Albertson's* are still valid and concludes that the doctrine of equitable estoppel does not apply to the Agency in this case.

Nevertheless, if the doctrine does apply here, Respondents must prove it by a preponderance of the evidence. *McKinney v. Hindman*, 86 Or 545, 551, 169 P2d 93 (1917). To constitute equitable estoppel, there must be a false representation, it must be made with knowledge of the facts, the other party (Respondents) must have been ignorant of the truth, the representation must have been made with the intention that it should be acted on by the other party, and the other party must have been induced to act on it. *Coos County v. State*, 303 Or 173, 180-81, 734 P2d 1348, 1354 (1987).

The first element of the doctrine disposes of Respondents' estoppel claim here. The forum has found that CS Grabe did not make a false or misleading statement to Respondents and their attorney. That they misunderstood her explanation concerning liquidated damages does not make her statements misleading. Nor were her statements incomplete. Her credible testimony, which was corroborated by her notes from the meeting, was that she explained that the Agency had the authority to assess civil penalties. She explained the Agency's policy regarding debarment. She did not say that the Agency would waive these sanctions if Respondents paid the back wages. She said the Agency's policy was not to seek liquidated damages if Respondents paid the back

PWR wages found owing. Respondents' attorney was present during the conversation, he had reviewed the prevailing wage rate law and rules before the meeting, and he appeared to understand Grabe's explanation of the possible sanctions and enforcement tools. The PWR statutes and rules clearly show differences between liquidated damages, civil penalties, and debarment. Given these facts, the forum will not now hear Respondents' claim that they did not understand the different sanctions and their argument that Grabe had some duty to give them more information about the sanctions.

Respondents and their attorney were free at any time to put their understandings and any purported agreement with the Agency in writing, to ensure that they understood these matters correctly and to confirm an agreement with the Agency. They did not do that.

Furthermore, one element of the purported agreement was that Respondents would cooperate with the investigation. Evidence shows that Respondents were not wholly cooperative with the Agency, in that Grabe had to request repeatedly (and then received piecemeal) additional records from them, and she believed she never got all the relevant records. Thus, a condition upon which Respondents' estoppel argument is based was not satisfied.

In addition, Respondents' argue that they were induced by the Agency's misrepresentations to settle the back wage claims. For several reasons, the forum is not persuaded by this argument. The doctrine of equitable estoppel requires that one is induced to act by a false representation. It presumes that the party taking the action had no other reason or duty to take the action. Here, Respondents already had a legal obligation (or inducement) to pay the back wages. They presented no evidence that the amount of wages found owing (which Respondents paid) was inaccurate. Thus, for purposes of equitable estoppel, the Agency could not have induced Respondents to do

what they already had a legal duty to do. Although no credible evidence on the record supported his position, Respondent Larson testified that he disputed the amount of back wages the Agency ultimately found owing. He argued that he settled the disputed amounts because of the Agency's false representations. However, undisputed evidence showed that Respondents worked with the Agency for months to resolve the amount of unpaid wages, offering additional records and discussing the Agency's calculations. Respondent Larson said he felt he was blackmailed into settling because Wildish was withholding Respondents' progress payments. Further, Respondent Larson knew that if he paid the back wages found due, the Agency would not seek liquidated damages. From this undisputed evidence, the forum concludes that these were the reasons Respondents paid the back wages, rather than some alleged inducement from an alleged misrepresentation.

Respondents have failed to prove their second affirmative defense of equitable estoppel.

2. Ineligibility for Public Works Contracts

From the stipulated facts and the uncontroverted evidence, the forum found that Respondent LCCI failed to pay the prevailing wage rate to its workers on the Seaside public works project, in violation of ORS 279.350(1). Likewise, from the stipulated facts and the uncontroverted evidence, the forum found that Respondent LCCI failed to post the prevailing wage rates on the Seaside project, in violation of ORS 279.350(4). Respondents admitted that these failures were intentional. It is no defense that, after the filing of a Notice of Claim and an Agency investigation, Respondent LCCI paid the back wages owed.

"The fact that the wage differential was ultimately paid to the workers does not negate the violation. Likewise, the fact that the Contractor did eventually begin to pay the appropriate prevailing wage rate does not

release the Contractor from liability." *In the Matter of P. Miller and Sons Contractors, Inc.*, 5 BOLI 149, 159 (1986).

Under ORS 279.361(1), if a subcontractor has "intentionally failed" to pay or post the prevailing wage rates as required, then the subcontractor "shall be ineligible" for up to three years to receive any contract or subcontract for public works. Under ORS 279.361(2), any corporate officer who is responsible for the failure or refusal to pay or post the prevailing wage rates shall also be ineligible for up to three years to receive any contract or subcontract for public works. Here, the preponderance of credible evidence shows that Respondent Larson was responsible for Respondent LCCI's intentional failure to pay and post the prevailing wage rates as required. He was the one who did not want to pay young workers the prevailing wage rate and who set up the bogus apprenticeship program. He was responsible for Respondent LCCI's intentional failure to post the prevailing rate of wage, even after he had put a trailer at the Seaside project. Pursuant to ORS 279.361, OAR 839-016-0085, and 839-016-0095(1), and from the facts found in this case, placing Respondents' names on the list of persons ineligible to receive any contract or subcontract for public works for three years is appropriate.

Respondents presented evidence to show the negative effects on local government agencies, local workers, and the local economy if Respondents were debarred. They also presented evidence that they cooperated with the Agency during the investigation, paid the underlying wage claims, and corrected their practices that could result in a future violation. The forum notes that neither ORS 279.361, OAR 839-016-0085, nor any final order of the Commissioner states that the Commissioner should consider such matters when considering whether to debar a contractor. The forum also notes, however, that when reviewing a petition to remove a name from the ineligible list under OAR 839-016-0095, the Commissioner may consider matters such as a petitioner's history of correcting violations and its likelihood of violating the prevailing

wage rate law in the future. The forum infers that such matters are not considerations in the initial determination of whether to debar a subcontractor. If such mitigating matters were to be considered, however, the forum would also consider the aggravating circumstances present in this case. The forum's determination to debar Respondents for three years would not change.

3. Civil Penalties

a. Failure to Pay the Prevailing Wage Rates

The Agency alleged and proved 29 violations of ORS 279.350(1). In its amended Notice of Intent, it proposed to assess \$45,993.72 in civil penalties for the 29 "first repeated violation[s]." Civil penalties are authorized by ORS 279.370 and OAR 839-016-0530 (3)(a). A minimum civil penalty for each violation of ORS 279.350(1) is required by OAR 839-016-0540(3). Because the Agency requested only the minimum civil penalty for each of the violations, and because the forum has assessed those minimums, there is no need to address evidence of aggravating and mitigating circumstances here.

The only question for the forum in assessing these civil penalties is whether the violations are "first repeated violation[s]," as alleged, under OAR 839-016-0540(3)(b). "Repeated violations" are "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." OAR 839-016-0540(2). Here, Respondents violated a provision of law, namely ORS 279.350(1), by failing to pay 10 workers the prevailing wage rate in 1995 on the Cannon Beach public works project. The Agency found and reported the violations, and Respondents paid the wages found owing. Those violations occurred within two years of the most recent violations of ORS 279.350(1) found on the Seaside project. Accordingly, the minimum civil penalty shall be calculated for each violation at

two times the amount of the unpaid wages or \$3,000, whichever is less. OAR 839-016-0540(3)(b).

The table below lists each worker, the amount of the unpaid wages found due, and the civil penalty ("C.P.") assessed.² Accordingly, the forum assesses Respondents \$45,993.72 for 29 "first repeated" violations of ORS 279.350(1).

b. Failure to Post the Prevailing Wage Rates

The Agency sought a \$5,000 civil penalty for Respondents' failure to post the prevailing wage rates at the Seaside public works project. A civil penalty is authorized by ORS 279.370 and OAR 839-016-0530(3)(b). The penalty shall not exceed \$5,000, and the amount will depend on all the facts and on any mitigating and aggravating circumstances. OAR 839-016-0540(1). Those circumstances, pursuant to OAR 839-016-0520(1), include:

- "(a) The actions of the * * * subcontractor * * * 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 * * * subcontractor * * * knew or should have known of the violation."

Evidence shows that Respondents failed to post the prevailing wage rates on the Cannon Beach project. While the evidence does not show it expressly, the forum infers that the Agency advised Respondents of the violation and the requirement to post the rates. Respondents' failure to post the rates on the Seaside project was occurring at the same time as the Agency's investigation of the Cannon Beach project. Thus, Respondents' apparent response to the previous violation of the statute was inaction and a repeated violation on the Seaside project. These factors aggravate the violation. On the other hand, Respondents did show some cooperation with the Agency's

investigation in this case and paid the back wages the Agency found owing. There was some evidence that Respondents were taking actions, such as sending the office manager to PWR training, that indicate that they are less likely to violate the PWR laws and rules in the future. These are mitigating circumstances.

Respondents presented evidence to show the difficulty of complying with the posting requirement. They presented evidence that the prime contractor had a PWR poster in its job shack, that no other subcontractors posted the rates, and that Respondents did not have a job shack on site for the first few months of the job. Respondent Larson claimed the rates were in a brief case in his truck at the site. The Agency presented evidence that Respondents never contacted the Agency about how to comply with the posting requirement on this project. Evidence also established that Respondent Larson did not show the rates to the workers who asked about them. The forum recognizes that there would be some difficulty posting the rates on a project such as the one here, compared with one where a building is under construction. However the forum also recognizes that many public works projects are like the one here, such as road building and maintenance projects. It appears to the forum that it was not the difficulty of posting the rates that prevented Respondents from complying with the statute. Rather, it appears that Respondents never attempted or intended to post the rates on this job. That view is bolstered by the fact that Respondents did not post the rates even after they put a trailer on site. For these reasons, the forum gives little weight to Respondents' argument that the difficulty of posting the rates is a mitigating circumstance.

The forum views a failure to post the prevailing wage rates as a serious violation. The legislature considered it serious enough to justify making a violating contractor or subcontractor ineligible to receive any public works contracts for up to three years. ORS

279.361. Here, Respondents did not post the rates for many months of the project, and one worker at least had to go to the prime contractor to find out what his correct prevailing wage rate was. And, as noted above, Respondent Larson did not show the rates to workers who asked about them. These facts aggravate the violation and show why the law requires every contractor and subcontractor to post the rates.

Because of the Cannon Beach investigation, Respondents either knew or should have known of their duty to post the prevailing wage rates. Respondent Larson also testified that he had been performing public works contracts for over 10 years. He, like other employers, has a duty to know the wage and hour laws that apply to Respondent LCCI and their workers. This factor aggravates the violation.

Having considered the applicable aggravating and mitigating circumstances, the forum assesses Respondents a civil penalty of \$4,000 for their violation of ORS 279.350(4).

c. Filing Inaccurate and Incomplete Certified Statements

The Agency proposed a \$5,000 civil penalty for Respondents failure to file accurate and complete certified statements, in violation of ORS 279.354. A civil penalty is authorized by ORS 279.370 and OAR 839-016-0530(3)(e). By stipulation, Respondents presented no evidence or argument to explain the inaccuracies in their certified statements. The Agency presented evidence to show aggravating circumstances.

Above, the forum discussed the evidence on Respondents' prior violations of the PWR statutes and their response to those violations. These aggravating factors apply here as well.

Regarding the magnitude and seriousness of the violation, the forum finds Respondents' acts egregious. The incompleteness and inaccuracies were not isolated

or trivial. They were widespread and deliberate. Respondents' apprenticeship program was an obvious sham. He made no effort to become a registered training agent or operate a registered apprenticeship program. He offered no related training to his workers. The only part of Respondents' strategy that imitated a real apprenticeship program was the payment of 70 percent of journeymen's wages. Likewise, Respondents' practice of banking hours and recording overtime and weekend hours as though they were worked on weekdays was plainly carried out to circumvent paying the correct prevailing wage to the workers. Respondents' office manager certified statements that had deliberately falsified hours and rates of pay. These are aggravating circumstances.

Respondents knew or should have known of this violation. All employers are charged with knowledge of wage and hour laws governing their activities as employers. *In the Matter of Country Auction*, 5 BOLI 256, 267 (1985). The law imposes a duty upon employers to know the wages that are due to their employees. *McGinnis v. Keen*, 189 Or 445, 459, 221 P2d 907 (1950). Respondents should have known that their payroll methods, as reflected in their certified statements, were illegal. This too is an aggravating circumstance.

Having considered the applicable aggravating circumstances, the forum assesses Respondents a civil penalty of \$5,000 for their violation of ORS 279.354.

d. Taking Action to Circumvent Payment of the Prevailing Wage

The Agency proposed a \$5,000 civil penalty for Respondents action to circumvent payment of the prevailing wage by requiring workers to accept less than the prevailing wage rate as part of the bogus apprenticeship program, in violation of ORS 279.350(7). A civil penalty is authorized by ORS 279.370 and OAR 839-016-0530(3)(h).

The discussion in part 3.b. of this opinion, above, concerning Respondents' prior violations and their actions in responding to previous violations applies here as well. The forum finds no mitigation in Respondent Larson's recent consideration of becoming a registered apprenticeship program.

The forum considers this violation particularly serious because it was a deliberate effort to avoid complying with the law, and its effect was to cheat the workers out of the minimum wage required by law. Respondent Larson's testimony that he thought the scheme was legitimate was incredible, and suggests that he hasn't yet accepted responsibility for his actions. He knew or should have known this action violated the law, given his years in the construction trades and the plain language of certified statements that apprentices must be in registered programs. These circumstances aggravate the violation.

Having considered the applicable aggravating and mitigating circumstances, the forum assesses Respondents a civil penalty of \$5,000 for their violation of ORS 279.350(7).

Respondent's Exceptions

Respondents timely filed exceptions to the Proposed Order. Respondents argued that the forum's position that equitable estoppel does not apply against the Agency, or, if it does, that Respondents failed to show a false or misleading statement upon which Respondents relied to their detriment was contrary to Oregon law. Respondents then cite a number of cases in support of their view. The cases cited deal with tax exemption criteria,³ personal property authority,⁴ real property authority and statute of frauds,⁵ assessment of employment tax,⁶ prison siting appeals qualification,⁷ and worker's compensation coverage.⁸

While none of these cases have facts approaching those in a prevailing wage enforcement action, all are cited in support of the proposition that equitable estoppel can run against BOLI, and that the Proposed Order erred in holding that affirmative misconduct and intent to mislead were required. While the result of the order does not depend on that view, the forum acknowledges that *Western Graphics* and *Swift & McCormick* suggest that affirmative misconduct and intent to mislead are not necessarily elements, at least where government is concerned. But the factual findings in this case are that CS Grabe did not make a false or misleading statement to Respondents and their attorney, intentionally or not. Her statements were found by the forum to be complete and accurate. The differences between liquidated damages, civil penalties, and debarment are the subjects of the PWR statutes and rules. Respondents' claim that they did not understand the different sanctions is suspect in that they did not attempt in writing to ensure and confirm an agreement with the Agency.

Respondent's exceptions are denied.

ORDER

NOW, THEREFORE, as authorized by ORS 279.361, the Commissioner of the Bureau of Labor and Industries hereby orders that Respondents Larson Construction Company, Inc. and David M. Larson or any firm, corporation, partnership, or association in which they have a financial interest shall be ineligible to receive any contract or subcontract for public works for a period of three years 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, the Commissioner of the Bureau of Labor and Industries hereby orders Respondents Larson Construction Company, Inc. and David M. Larson to deliver to the Bureau of Labor and Industries,

Business Office, Ste 1010, 800 NE Oregon Street # 32, Portland, Oregon 97232-2109, a certified check payable to the Bureau of Labor and Industries in the amount of Fifty Nine Thousand, Nine Hundred Ninety Three Dollars and Seventy Two Cents (\$59,993.72), plus any interest that accrues at the annual rate of nine percent between a date ten days after the issuance of the final order and the date Respondents comply with the final order. This assessment is the sum of the following civil penalties against Respondents: \$45,993.72 for 29 violations of ORS 279.350(1); \$4,000 for one violation of ORS 279.350(4); \$5,000 for one violation of ORS 279.354; and \$5,000 for one violation of ORS 279.350(7).

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¹It is notable that, even at hearing, Loisselle and Respondent Larson referred to "penalties" and "sanctions" when the matter under discussion was liquidated damages. This continuing failure to appreciate the difference between liquidated damages, civil penalties, and debarment says much about their misunderstanding of Grabe's statements to them on January 6, 1997.

²Table:

Name	Wages	C.P.	Name	Wages	C.P.
Kurt Anderson	\$462.78	\$925.56	Rod Herndon	\$4,442.25	\$3,000.00
Jason Bergeson	\$6,725.23	\$3,000.00	Chad Mason	\$2,689.99	\$3,000.00
Stacy Clark	\$465.15	\$930.30	Travis Owsley	\$783.85	\$1,567.70
Joseph Cox	\$12.00	\$24.00	Joseph Painter	\$155.62	\$311.24
Bryan Edwards	\$821.15	\$1,642.30	Paul Parker	\$455.36	\$910.72
Andy Finn	\$10,420.44	\$3,000.00	Paul Phillips	\$76.50	\$153.00
Gary Fritz	\$873.30	\$1,746.60	Michael Rider	\$157.50	\$315.00
Jennifer Fritz	\$85.19	\$170.38	Jeff Rosa	\$31.50	\$63.00
Joe Gilmore	\$4,621.93	\$3,000.00	John Schertenleib	\$354.49	\$708.98
Randy Gilmore	\$9,059.81	\$3,000.00	Clyde Stanley	\$670.64	\$1,341.28
Chris Gipson	\$1,701.75	\$3,000.00	Mark Stough	\$2,745.22	\$3,000.00
Mike Goodwin	\$493.50	\$987.00	Leo Susbauer	\$773.04	\$1,546.08
Joel Grothe	\$1,799.41	\$3,000.00	Joe Talbot	\$385.85	\$771.70

Bill Gunderson	\$116.32	\$232.64	Glen Wadley	\$3,253.49	\$3,000.00
Les Hannah	\$823.12	\$1,646.24	Total Civil Penalties		\$45,993.72

³ *Pilgrim Turkey Packers, Inc. v. Dept. of Revenue*, 261 Or 305, 493 P2d 1372 (1972)

⁴ *Belleville v. Davis*, 262 Or 387, 498 P2d 744 (1972)

⁵ *Wiggins v. Barrett & Associates, Inc.*, 295 Or 679, 669 P2d 1132 (1983)

⁶ *Employment Division v. Western Graphics Corp.*, 76 Or App 608, 710 P2d 788 (1985); *Employment Department v. Funseth*, 140 Or App 464, 916 P2d 1043 (1996)

⁷ *Committee in Opposition to the Prison in Malheur County v. Oregon Emergency Corrections Facility Siting Authority*, 309 Or 678, 792 P2d 1203 (1990)

⁸ *Swift & McCormick Metal Processors v. Burbin*, 117 Or App 605, 845 P2d 931 (1993)