

**In the Matter of  
ARJAE SHEET METAL COM-  
PANY, INC.,**

**Case No. 94-06  
Final Order of Commissioner  
Dan Gardner  
Issued March 30, 2007**

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**SYNOPSIS**

Respondent failed to complete and return BOLI's 2005 prevailing wage rate survey by the date specified by the Commissioner. After considering aggravating and mitigating circumstances, the forum imposed a \$1,000 civil penalty for Respondent's violation of ORS 279C.815(3). ORS 279C.815; ORS 279C.865; OAR 839-025-0520; OAR 839-025-0530; OAR 839-025-0540.

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The above-entitled case came on regularly for hearing before Linda A. Lohr, designated as Administrative Law Judge ("ALJ") by Dan Gardner, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on November 7, 2006, in the W. W. Gregg Hearing Room of the Bureau of Labor and Industries, located at the State Office Building, Suite 1045, 800 NE Oregon Street, Portland, Oregon.

Case Presenter Jeffrey C. Burgess, an employee of the Agency, represented the Bureau of Labor and Industries ("BOLI" or

"the Agency"). Ray Brossart, president of Arjae Sheet Metal Company, Inc. ("Respondent"), appeared as Respondent's authorized representative.

The Agency called as witnesses: Leanna Harmon, research analyst for the Workforce and Economic Research Division of the Oregon Employment Department, and Marsha Jossy, administrative specialist in the Prevailing Wage Rate Unit of the BOLI Wage and Hour Division.

Respondent called as witnesses: Tanya Brossart, Respondent's bookkeeper; David Trammel, Respondent's vice president; and Ray Brossart, Respondent's president.

The forum received into evidence:

- a) Administrative exhibits X-1 through X-8 (submitted or generated prior to hearing);
- b) Agency exhibits A-1, A-2, A-5, A-6 (submitted prior to hearing);
- c) Respondent exhibit R-1<sup>1</sup> (submitted prior to hearing).

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<sup>1</sup> Respondent timely submitted a case summary that included certain declarations and a list of witnesses Respondent intended to call at hearing. The case summary included the statement: "The above response will be put into evidence." Although the document was not marked or offered as an exhibit, there was testimony regarding the declarations and the ALJ, on her own motion, has marked the case summary as exhibit R-1 and received it into evidence.

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

**FINDINGS OF FACT –  
PROCEDURAL**

1) On March 24, 2006, the Agency issued a Notice of Intent to Assess Civil Penalties (“Notice”) alleging Respondent unlawfully failed to complete and return the 2005 Construction Industry Occupational Wage Survey (“wage survey”) by September 19, 2005, in violation of ORS 279(C).815(3). The Agency alleged aggravating circumstances and sought a civil penalty of \$1,000 for the single alleged violation. The Notice was served on Respondent by certified mail directed to Respondent’s business address at 5510 SE McLoughlin Blvd., Portland, OR 97202. The Notice gave Respondent 20 days to file an answer and make a written request for a contested case hearing.

2) On March 28, 2006, Respondent timely filed an answer through its owner and authorized representative, Ray Brossart. The answer stated in pertinent part:

“We have been in business for 20+ years and have always complied with surveys. We would not and have not intentionally missed filling out a required survey or any type of

notice of non-compliance. The only documentation that we received was this notice of intent to assess civil penalties. This brings me to the conclusion that I should not be fined or penalized for something I had no control over.

“I at this time am contesting the allegations of guilt and request the survey be sent to me so that I may fill it out and return it or if necessary request that a hearing to resolve this issue [sic]. Either I, Ray Brossart [sic] or David Trammel will be representing Arjae Sheet Metal Company, Inc. in this matter.

“In response to allegations [sic].

1. I understand the purpose of the survey but never received the survey.

2. We did perform nonresidential construction work in 2005. We did not receive the survey so we could not complete or return the survey.

3. We did not have ample opportunity to comply since we did not receive this survey so the failure to comply with the law was out of our control. We never have had this violation pointed out to us in any manner either via mail or phone, [sic] it was out of our control to prevent its occurrence.”

3) On June 5, 2006, the Agency requested a hearing. On

October 5, 2006, the Hearings Unit issued a Notice of Hearing stating that the hearing would commence at 9 a.m. on November 7, 2006. The hearing notice included a copy of the Notice of Intent, a language notice, a Servicemembers Civil Relief Act notification, and copies of the Summary of Contested Case Rights and Procedures and the Contested Case Hearing Rules, OAR 839-050-0000 to 839-050-0440.

4) On October 9, 2006, the forum issued an interim order pertaining to fax filings and timelines, and a case summary order requiring the Agency and Respondent to submit case summaries that included: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; and any civil penalty calculations (for the Agency only). The forum ordered the participants to submit their case summaries by October 27, 2006, and notified them of the possible sanctions for failure to comply with the case summary order.

5) On October 19, 2006, the forum granted the Agency's motion to extend the time for filing case summaries to October 30, 2006. The Agency and Respondent timely filed case summaries.

6) At the start of hearing, the ALJ orally advised the participants of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

7) At the start of hearing, the Agency made an oral motion to amend the Notice to correct certain citation errors in the Notice. Respondent did not object and the forum granted the Agency's motion.

8) The ALJ issued a proposed order on February 6, 2007, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. Neither the Agency nor Respondent filed exceptions.

#### **FINDINGS OF FACT – THE MERITS**

1) At all times material, Respondent was a duly registered Oregon corporation and an employer engaged in residential and non-residential construction. Respondent's principal place of business was 5510 SE McLoughlin Blvd, Portland, OR 97202. Respondent's business address was also its mailing address.

2) At times material, Ray Brossart ("R. Brossart") was Respondent's president and Tanya Brossart ("T. Brossart") was Respondent's bookkeeper.

3) Respondent employed workers who performed nonresidential construction work during 2005.

4) The Workforce and Economic Research Division of the Oregon Employment Department ("Employment Department") contracted with BOLI from 1999 to 2005 to conduct annual wage surveys. The wage surveys are conducted to aid the BOLI Com-

missioner in the determination of the prevailing wage rates in Oregon. In 2005, as in past years, the BOLI Commissioner used the wage surveys to determine Oregon's prevailing wage rates. During the course of her official duties as research analyst for the Employment Department, Leanna Harmon participated in the 2005 wage survey.

5) As part of its contract with BOLI, the Employment Department is required to keep and routinely maintain electronic files showing the name of each business entity to which wage survey packets are sent each year, the address where each survey was sent, the date on which each survey was sent, whether each survey was returned and whether it was timely returned, and whether and when reminders were mailed to each business entity.

6) The Employment Department conducts wage surveys by first sending "presurvey" postcards to business entities that have been identified through the Quarterly Census Employment and Wages database, using the North American Industry Classification [Code] System to determine which entities perform construction contracts. The Employment Department also uses information and lists obtained from labor unions and the Oregon Construction Contractor's Board to include in the survey pool. Contractors who participated in the previous year's survey are sent a postcard notifying them that they

have been selected to participate in the current wage survey and that the survey packet will follow in the mail. An entity that is identified as one that supplied or made deliveries to construction sites is sent a post card requiring a response to questions about any labor performed during deliveries. All other entities are sent a post-card requiring a response to questions about the nature of the construction work they perform, e.g., whether they perform residential only, nonresidential, or a combination thereof. The post-card questionnaires require a response. Depending on the response to the questions, the Employment Department may or may not mail a wage survey packet to the responding entity. If an entity fails to respond, the Employment Department sends a wage survey packet to the address or addresses listed for that entity.

7) On July 5, 2005, the Employment Department sent Respondent a presurvey postcard requiring a response. Respondent did not return the postcard. On August 10, 2005, the Employment Department sent Respondent a 2005 wage survey packet that included a pre-addressed, postage paid, envelope for return of the survey. The survey packet also included a notice that its completion and return was required by law and that a violation could result in the assessment of civil penalties. The packet included instructions to complete and return the survey by September 19, 2005. The presur-

vey postcard and the 2005 wage survey packet were mailed to Respondent's business at 5510 SE McLoughlin Blvd., Portland, OR 97202. Respondent did not return the wage survey by September 19, 2005.

8) On September 26, 2005, the Employment Department sent Respondent a reminder postcard advising that the completed wage survey had not been received, that Respondent was required to complete and return it by law, and that penalties could be imposed. On October 10, 2005, the Employment Department sent Respondent a second wage survey packet, labeled "Final Notice" with a printed warning: "SURVEY PAST DUE \* \* \* Please Respond Immediately" along with the same advisory set forth in the reminder postcard. The reminder postcard and final notice, including the second wage survey packet, were mailed to Respondent's business at 5510 SE McLoughlin Blvd., Portland, OR 97202. Respondent did not respond to the mailings.

9) On February 17, 2006, BOLI, through its Prevailing Wage Rate Unit, sent Respondent a letter that stated, in pertinent part:

"ORS 279C.815 requires you to report information pertaining to wages paid in non-residential construction to the Commissioner as requested in the annual survey. Our records indicate that despite reminders, you failed to return a report for the 2005 [prevailing wage rate survey] by September 19, 2005. Our re-

ords also indicate that this may not be the first time you have failed to respond as required. If that is the case, you have violated the law in multiple years.

"Since you have not responded to the survey, it has become necessary to begin the Administrative Process. We will soon serve upon you a Notice of Intent and ultimately a judgment in this matter. You are advised that failure to return this survey or filing fraudulent or incomplete information will result in penalties. We would prefer to resolve this matter prior to taking legal action; however, without your cooperation, this is not possible. You may stop this action by completing and returning the enclosed 2005 [wage survey] by no later than March 3, 2006.

"If you did not perform any non-residential construction within Oregon during the time period covered by this survey, you can satisfy your legal obligation to respond to the survey by answering questions 1 and 2 of the survey as directed, signing it where indicated and returning it in the pre-addressed, postage paid envelope included in the survey booklet.

"If we do not receive a completed survey from you by March 3, 2006, we will assess a civil penalty against you based on your continuing violations. Each day that you do not provide the survey is a

separate violation, and each violation can subject you to a civil penalty of up to \$5,000. (ORS 279(C).865 and OAR 839-025-0510).”

The letter was mailed to Respondent’s business at 5510 SE McLoughlin Blvd., Portland, OR 97202, and included a third 2005 wage survey packet. Respondent did not respond to the letter and did not return the completed wage survey by March 3, 2006.

10) On March 24, 2006, the Agency issued a Notice of Intent to Assess Civil Penalties that was sent through the U. S. Postal Service to Respondent at 5510 SE McLoughlin Blvd. Portland, OR 97202. On March 28, 2006, R. Brossart filed an answer denying that it had received the 2005 wage survey packet. On April 6, 2006, the Employment Department received a completed 2005 wage survey from Respondent.

11) In 2005, returned wage surveys were accepted and included in the survey results as late as October 28, 2005. The survey database was then closed to prepare for a rate setting meeting with the BOLI Commissioner and his staff on November 4, 2005. Surveys received after October 28, 2005, were not included in the results of the survey as published by the Employment Department in January 2006 and not considered by the BOLI Commissioner when setting prevailing wage rates.

12) All of the Employment Department wage survey mailings

that were directed to Respondent’s address at 5510 SE McLoughlin Blvd., Portland, OR 97202 were sent by first class mail, postage paid, through the U. S. Postal Service. None of the mailings were returned to the Employment Department by the U. S. Postal Service as undeliverable.

13) The BOLI letter, along with the third wage survey packet, was sent on February 17, 2006, to Respondent’s address at 5510 SE McLoughlin Blvd., Portland, OR 97202 by first class mail, postage paid, through the U. S. Postal Service. The letter was not returned to BOLI by the U. S. Postal Service as undeliverable.

14) Harmon and Jossy were credible witnesses and the forum credited their testimony in its entirety.

15) R. Brossart’s, T. Brossart’s, and Trammel’s testimony that Respondent did not receive the 2005 wage survey was not credible. First, none of those witnesses explained why Respondent failed to respond to the several other mailings sent in conjunction with the 2005 wage survey. Other than implying that Respondent received no mailings from the Employment Department or BOLI regarding the 2005 wage survey, none of Respondent’s witnesses mentioned the other mailings. Curiously, they all contended that Respondent did not receive the 2006 wage survey either, but acknowledged receiving the subsequent reminder postcard to which they “promptly” responded. While it is conceivable

that a mailing may have been misdelivered or not delivered at all, the forum finds it inherently improbable that not one of the five 2005 mailings, all properly addressed and mailed separately by two different agencies, was delivered to Respondent's business. Trammel's testimony that there is "not a chance" that an article placed in the mail will reach its destination was echoed by the Brossarts and further strains their credibility. The forum gave no weight to R. Brossart's, T. Brossart's, or Trammel's testimony that Respondent did not receive a wage survey packet in 2005 and only credited their testimony when it was an admission or corroborated by credible evidence.

#### **ULTIMATE FINDINGS OF FACT**

1) Respondent was an Oregon employer and performed non-residential construction work in 2005.

2) The Commissioner, through the Employment Department, conducted a wage survey in 2005 that required persons receiving the surveys to make reports or returns to the Commissioner for the purpose of determining the prevailing wage rates.

3) In 2005, the Employment Department sent a presurvey postcard on July 5; a wage survey packet on August 10; a subsequent reminder notice on September 26; and a final notice and second wage survey packet on October 10 to Respondent's business address via first class

mail through the U.S. Post Office. None of the mailings were returned to the Employment Department as undeliverable.

4) Respondent failed to return the completed survey by September 19, 2005, the date specified by the Commissioner.

5) On February 17, 2006, BOLI sent a letter and a third 2005 wage survey packet to Respondent's business address via first class mail through the U.S. Post Office, warning that there would be sanctions for failing to return the 2005 wage survey. Respondent was given additional time until March 3, 2006, to submit the wage survey. The letter was not returned to BOLI as undeliverable.

6) Respondent failed to complete and return the wage survey by March 3, 2006, in accordance with the BOLI letter.

7) Respondent received the Agency's Notice of Intent in March 2006 and subsequently returned the completed survey on April 6, 2006, which was too late to be included in the results of the survey as published by the Employment Department in January 2006. Respondent's survey information was not considered when the Commissioner reviewed the survey data for the setting of the prevailing wage rates.

#### **CONCLUSIONS OF LAW**

1) The actions, inaction, and statements of Ray and Tanya Brossart are properly imputed to Respondent.

2) Respondent was a person required to make reports and returns under ORS 279C.815 who violated ORS 279C.815(3) by failing to return the Commissioner's 2005 wage survey by September 19, 2005, the date specified by the Commissioner.

3) The Commissioner is authorized under ORS 279C.865 to assess civil penalties not to exceed \$5,000 for each violation of any provision of ORS 279C.800 to 279C.870 or any rule of the commissioner adopted thereunder and, having considered any aggravating and mitigating circumstances in accordance with OAR 839-025-0520, has exercised his discretion appropriately by imposing a \$1,000 civil penalty for Respondent's single violation of ORS 279C.815(3).

#### OPINION

#### 2005 PREVAILING WAGE SURVEY VIOLATION

To prove Respondent violated ORS 279(C).815(3), the Agency must establish:

(1) Respondent is a "person" as defined in ORS 279(C).815(1);

(2) The Commissioner conducted a survey in 2005 that required persons receiving the surveys to make reports or returns to the Agency for the purpose of determining the prevailing wage rates;

(3) Respondent received the Commissioner's 2005 survey; and

(4) Respondent failed to make the required reports or returns within the time prescribed by the Commissioner.

*In the Matter of Emmert Industrial Corp.*, 26 BOLI 284, 289 (2005).

The only disputed element is Respondent's contention that it did not receive the Commissioner's 2005 wage survey.

Respondent acknowledged that all of its business mail is received at the McLoughlin Blvd. location, but denied receiving anything from the Employment Department or BOLI until it received the Agency's Notice of Intent to Assess Civil Penalties. However, the Agency established by a preponderance of credible evidence that the Employment Department and BOLI mailed to Respondent no fewer than five properly addressed items pertaining to the 2005 wage survey, including no fewer than three 2005 wage survey packets, over an eight month period. None of the items were returned to the senders as undeliverable and Respondent proffered no plausible explanation for not receiving even one of the items. Respondent's bare contention that "something in the system hasn't worked," and that the U. S. Postal Service is somehow to blame, was not credible and fails to rebut the legal presumption that "[a] letter duly directed and mailed was received in the regular course of the mail." ORS 40.135(1)(q). The forum concludes that Respondent received the 2005 wage survey and took no action to respond to the

survey until after the Notice of Intent to Assess Civil Penalties issued on March 24, 2006. Respondent failed to make the required reports or returns within the time prescribed by the Commissioner and is liable for civil penalties.

#### **CIVIL PENALTY**

Although the commissioner may impose a penalty of up to \$5,000 for Respondent's violation, the Agency proposes \$1,000 as a civil penalty in this case. In determining the appropriate penalty amount, the forum must consider the criteria set forth in OAR 839-016-0520, including any mitigating circumstances presented by Respondent.

While there is no documentary evidence establishing that Respondent has a history of cooperating with wage survey requirements, the Agency did not controvert R. Brossart's statements to that effect or present any evidence of prior violations. Consequently, the forum finds this is Respondent's first violation, a mitigating circumstance that may be weighed against the aggravating circumstances in this case.

First, the forum finds Respondent knew or should have known of the violation. Respondent admits the 2005 wage survey was not timely completed or returned. Respondent's assertion that it did not receive the 2005 wage survey and, by implication, the pre-survey postcard, subsequent reminder cards, the final warning with a second 2005 wage survey mailing

from the Employment Department, or the February 17, 2006, warning letter and third wage survey packet from BOLI was not believed. Several of those mailings included the admonishment that completion and return of the wage survey was required by law and that a violation could result in the assessment of civil penalties. The forum concludes therefore that Respondent received the mailings and through selective ignorance or inattention knew it was violating the law when it failed to respond to the 2005 wage survey.

Second, given the number of mailings over an eight month period, Respondent had ample opportunity to comply with the law. Respondent had at least two reminders after the due date passed before the Agency warned that sanctions were imminent, and, even after the Agency's February 17 final warning letter, Respondent remained unresponsive until the Agency issued its notice proposing civil penalties on March 24, 2006. Respondent's bare assertion that it has a history of completing and returning wage surveys in previous years which demonstrates a "pattern of cooperation" does not negate the conclusion, as Respondent suggests, that Respondent had an opportunity to comply and did not do so. The forum does not find it logically credible that Respondent received the civil penalty notice and not the five previous mailings from two different agencies related to the same matter. Consequently, given Respondent's admission that it had no

difficulty completing and returning the wage survey when it received the fourth 2005 wage survey packet, the forum concludes that Respondent had ample opportunity and no degree of difficulty to comply with the 2005 wage survey requirement.

Third, while Respondent's violation is not as serious as failing to pay or post the prevailing wage rate, this forum previously has determined that "workers may suffer substantial financial harm if the prevailing wage rates set by the Commissioner do not accurately reflect wages paid in the community because employers who pay their employees well do not return the surveys." *In the Matter of F.R. Custom Builders*, 20 BOLI 102, 111 (2000). Moreover, since the Commissioner is mandated to "make determinations of the prevailing wage rates," the forum infers that the wage surveys, conducted pursuant to ORS 279C.815 (5), are the Commissioner's primary source of "relevant data and information" to ensure that the determinations accurately reflect wages paid in the community. The forum concludes therefore that the relevant data and information are useless if not submitted in time to be considered in the prevailing wage rate calculations. In this case, Respondent's data would have been considered in the 2005 survey because Respondent admitted performing non-residential work during 2005. Consequently, Respondent's non-compliance is serious because it undermines the Commissioner's ability to com-

plete his statutory duty to accurately determine the prevailing wage rates. *In the Matter of Emmert Industrial Corporation*, 26 BOLI 284, 289 (2005).

The forum concludes that under these circumstances, the \$1,000 penalty proposed by the Agency is appropriate.

#### ORDER

NOW, THEREFORE, as authorized by ORS 279C.865 and as payment of the penalty assessed as a result of Respondent's single violation of ORS 279C.815(3), the Commissioner of the Bureau of Labor and Industries hereby orders **Arjae Sheet Metal Company, Inc.** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, a certified check payable to the Bureau of Labor and Industries in the amount of ONE THOUSAND DOLLARS (\$1,000), plus any interest that accrues at the legal rate on that amount from a date ten days after issuance of the Final Order and the date Respondent complies with the Final Order.

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**In the Matter of  
MOUNTAIN FORESTRY, INC.**

**Case No. 30-05  
Final Order of Commissioner  
Dan Gardner  
Issued May 11, 2007**

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**SYNOPSIS**

Respondents, an individual and corporation, while acting jointly as a farm/forest labor contractor, failed to comply with the terms and conditions of lawful agreements made between Respondents and the Oregon Department of Forestry ("ODF") and the Bureau of Labor and Industries ("BOLI"), in violation of ORS 658.440(1)(d). Additionally, Respondent Mountain Forestry, Inc. hired minors without first obtaining an employment certificate, in violation of ORS 653.307, and employed minors under 16 years old to fight wildland fires, in violation of OAR 839-021-0102(p). Although the Agency established that Respondents made or caused to be made false and misleading representations, and published or circulated false and misleading information to ODF and BOLI representatives, the Agency did not prove that any of the misrepresentations were about the terms, conditions, or existence of employment in violation of ORS 658.440(3)(b). For Respondents' failure to comply with the ODF In-

teragency Firefighting Crew Agreements in violation of ORS 658.440(1)(d), the Commissioner ordered Respondents Mountain Forestry, Inc. and Francisco Cisneros to pay \$43,500 in civil penalties (\$500 per violation for a total of 87 violations). For Respondents' failure to comply with BOLI agreements in violation of ORS 658.440(1)(d), the Commissioner ordered Respondents Mountain Forestry, Inc. and Francisco Cisneros to pay \$8,000 in civil penalties (\$1,000 per violation for four violations and \$2,000 per violation for two violations). Additionally, the Commissioner ordered Respondent Mountain Forestry, Inc. to pay \$1,000 for each of four violations of ORS 653.307, and \$1,000 for one violation of OAR 839-021-0102(p), for a total of \$5,000. Based on the whole record herein, the Commissioner further found that Respondents lacked the character, competence and reliability to act as farm/forest labor contractors and denied them a license pursuant to ORS 658.445. ORS 658.440; ORS 658.445; ORS 658.453; ORS 653.307; ORS 653.370; OAR 839-015-0520; OAR 839-015-0507; OAR 839-015-0508; OAR 839-015-0510; OAR 839-015-0512; OAR 839-021-0220; OAR 839-021-0102; OAR 839-019-0010; OAR 839-019-0015; and OAR 839-019-0020.

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The above-entitled case came on regularly for hearing before

Linda A. Lohr, designated as Administrative Law Judge (“ALJ”) by Dan Gardner, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on November 1-4, 7-11, 14-15, 2005, in the Bureau of Labor and Industries Conference Room, located at 3865 Wolverine Street NE, Building E-1, in Salem, Oregon.

Cynthia L. Domas, an employee of the Agency, represented the Bureau of Labor and Industries (“BOLI” or “the Agency”). Robert C. Williamson, Attorney at Law, represented Mountain Forestry, Inc. and Francisco Cisneros (“Respondents”). Michael Cox was present during the hearing as Mountain Forestry, Inc.’s corporate representative.

The Agency called as witnesses: Donald Moritz, Oregon Department of Forestry, Protection Contract Services contract manager; Benjamin Jones, former Respondent employee; Steven Johnson, Oregon Department of Forestry Contract Services compliance officer; and Stan Wojtyla, BOLI Farm Labor Unit compliance specialist.

Respondents called as witnesses: Michael Cox, Respondents’ fire director; Donald Pollard, Respondents’ tax preparer and enrolled IRS agent (telephonic); and Addison Johnson, free lance firefighting instructor.

The forum received as evidence:

a) Administrative exhibits X-1 through X-120 (generated prior to hearing) and X-121 through X-126 (generated after hearing);

b) Agency exhibits A-1 through A-55 (filed with case summary), A-56 through A-59, A-68, A-69, A-71 through A-73, and A-78 (submitted during hearing);

c) Respondent exhibits R-1 through R-3, R-6 through R-11, R-14 through R-16 (filed with case summary), R-19, and R-21 (submitted during hearing).

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

#### **FINDINGS OF FACT – PROCEDURAL**

1) On April 11, 2005, the Agency issued a Notice of Intent to Refuse to Renew/Revoke License and Intent to Assess Civil Penalties (“Notice”) to Mountain Forestry, Inc. and Francisco Cisneros (“Respondents”). The Notice informed Respondents that the Commissioner intended to revoke or refuse to renew Respondents’ farm/forest labor contractor license, pursuant to ORS 658.405 to ORS 658.503 and specifically ORS 658.445 and OAR 839-015-0520, and further intended to assess civil penalties against Respondents in the amount of \$112,000, pursuant to ORS 658.453 and OAR 839-015-

0508. The Notice alleged the following bases for the Agency action: 1) Respondents, in their capacity as farm/forest labor contractors, failed to comply with the terms and provisions of lawful agreements or contracts, including contracts or agreements with the Oregon Department of Forestry ("ODF")(96 violations), in violation of ORS 658.440(1)(d); 2) Respondents, in their capacity as farm/forest labor contractors, failed to comply with the terms and provisions of lawful agreements or contracts, including contracts or agreements with BOLI (four violations), in violation of ORS 658.440(1)(d); 3) Respondents willfully made "false, fraudulent or misleading representations or published or circulated false, fraudulent or misleading information concerning the terms and conditions or existence of employment at any place or by any person, including but not limited to [BOLI] and [ODF]" (102 violations), in violation of ORS 658.440(3)(b); 4) Respondents failed to obtain an annual employment certificate to employ minors (four violations), in violation of ORS 653.307 and OAR 839-021-0220; and 5) Respondents employed a minor in a hazardous occupation (one violation), in violation of OAR 839-021-0102(p). In determining the civil penalty amounts, the Agency alleged aggravating circumstances. Based on the alleged violations, the Agency proposed to revoke or refuse to renew Respondents' farm/forest labor contractor license, pursuant to ORS

658.445(1) and OAR 839-015-0520(1)(b). Additionally, the Agency alleged Respondents were unfit to act as farm/forest labor contractors because the alleged violations demonstrate they lack the requisite character, competence and reliability under ORS 658.445(3) and OAR 839-015-0520(2) and further alleged:

"[Respondents] willfully violated the terms and conditions of numerous agreements and contracts over a number of years as alleged [herein]. OAR 839-015-0520(3)(c); \* \* \* Respondents, as alleged [herein] have violated numerous sections of ORS 658.405 to 658.485. OAR 839-015-0520(3)(a); \* \* \* Respondents willfully made misrepresentations or false statements or concealments in their applications for a license by agreeing to comply with all laws and rules when in fact they were not in compliance. OAR 839-015-0520(3)(h); \* \* \* Respondents willfully made or caused to made false, fraudulent or misleading representations or published or circulated false, fraudulent or misleading information concerning the terms, conditions or existence of employment at any place by any person including but not limited to the occasions set forth [herein]. OAR 839-015-0520(3)(i); \* \* \* Respondents, as alleged [herein], engaged in a course of misconduct over a period of years in relations with individuals and organizations, including but not limited to

[BOLI] and [ODF], with whom respondents conducted business.”

The Notice was served on Respondents on April 12, 2005.

2) On April 29, 2005, Respondents, through counsel, timely filed an answer to the Notice and requested a hearing. In its answer, Respondents admitted: 1) they conducted business in Oregon or took workers from Oregon to work in other states; 2) that for an agreed remuneration or rate of pay, they recruited, solicited, supplied or employed workers to perform labor, specifically to engage in fire suppression activities, during the 2000 through 2004 fire seasons; 3) Respondent Mountain Forestry, Inc. (“Mountain Forestry”) entered into agreements with ODF from 2000 through 2004; 4) Respondents employed Victor Cisneros, Andrew Williamson, Gerardo Herrera, and Samuel Cisneros as firefighters; 5) from July 1 through July 31, 2004, Alex Coronado worked two fire suppression activities, the Cole Complex fire and the Reno Standby, and Leticia Ayala worked the Cole Complex fire; and 6) Victor Cisneros is a relative of Respondent Francisco Cisneros (“F. Cisneros”). Respondents did not deny the validity of the ODF agreements or that they entered into the agreements in their joint capacity as a farm/forest labor contractor. Respondents did not deny they entered into agreements with BOLI in their joint capacity as farm/forest labor contractors. Re-

spondents affirmatively alleged that 1) the Agency refused to renew Respondents' license without proper notice and procedure and its investigation was “unreasonably long and unlimited in scope” and therefore “arbitrary and capricious”; 2) ODF did not provide for a pre-termination hearing as required by the Fourteenth Amendment to the U. S. Constitution before it terminated its agreement with Respondents and therefore the BOLI “complaint is unfounded, and Respondents are entitled to judgment in their favor”; 3) in terminating its contract with Respondents, ODF was motivated by F. Cisneros's race or ethnicity in violation of the Fourteenth Amendment to the U. S. Constitution and therefore the BOLI “complaint is unfounded, and Respondents are entitled to judgment in their favor”; 4) Respondents' Notice of Claim for Damages to the State of Oregon, reserving the right to bring a civil action “for ODF's Constitutional violations, was a substantial factor in BOLI's “decision to refuse to renew and revoke Respondents' license”; 5) a BOLI employee made a defamatory statement to a prospective insurer of Mountain Forestry and caused the insurer to decline to do business with Mountain Forestry which caused Respondents economic damage and damage to their reputation, “the amount to be determined at hearing”; 6) the Agency failed to state a claim; 7) the Commissioner and BOLI are not taking similar action to similarly situated

regulated entities; and 8) entrapment and equitable estoppel.

3) On May 4, 2005, the Agency requested a hearing and on May 20, 2005, the Hearings Unit issued a Notice of Hearing stating the hearing would commence at 9:30 a.m. on August 16, 2005. With the Notice of Hearing, the forum included a copy of the Notice, a language notice, a Servicemembers Civil Relief Act notification, and copies of the Summary of Contested Case Rights and Procedures and the Contested Case Hearing Rules, OAR 839-050-0000 to 839-050-0440.

4) On June 3, 2005, the Hearings Unit received a letter from Respondents' counsel addressed to the ALJ that stated in pertinent part:

"I am in receipt of your Notice of Hearing, and have reviewed my calendar. I take three weeks vacation in August, and I am not scheduled to return until the final week. The hearing date needs to be moved to the latter part of September.

"Please accept this letter as my motion to reset the hearing date."

5) On June 7, 2005, the Hearings Unit received a letter from the Agency case presenter that stated in pertinent part:

"The Agency opposes Mr. Williamson [sic] request for postponement of the hearing set for August 16, 2005, in the above matter. No alternate

dates were mentioned in Mr. Williamson's request and the Agency's docket is quit [sic] full, making it very difficult to reschedule the hearing."

6) On June 7, 2005, the ALJ denied Respondents' request for postponement for lack of good cause shown, but allowed Respondents additional time to submit sufficient information to meet the forum's good cause standard. By letter dated June 8, 2005, Respondent's counsel protested the Agency's objection to postponement. On June 10, 2005, Respondents filed a motion to extend the time set for hearing and included counsel's affidavit in support of the motion. Counsel requested the hearing "to be set in November on any date from November 1 to November 23." By letter dated June 13, 2005, the Agency stated that, "based on [counsel's] recent affidavit \* \* \* the Agency does not oppose his motion to reset the hearing on November 1, 2005." On June 13, 2005, the ALJ issued an order granting Respondents' motion and the hearing was rescheduled to convene on November 1, 2005.

7) On June 14, 2005, the forum issued a case summary order requiring the Agency and Respondents to submit case summaries that included: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a brief statement of the elements of the claim (for the Agency only); a brief statement of any defenses to the claim (for Re-

spondents only); a statement of any agreed or stipulated facts; and any penalty calculations (for the Agency only). The forum ordered the participants to submit their case summaries by October 21, 2005, and advised them of possible sanctions for failure to comply with the case summary order.

8) On June 16, 2005, Respondents filed a motion and affidavit to disqualify the ALJ on the following grounds: 1) Respondents "should be entitled to reassignment as a matter of course for any reason or no reason at all"; 2) the ALJ "may have a bias" in favor of the Agency and Agency case presenter and against Respondents; and 3) the ALJ "does not have the professional qualifications required to render an informed decision in this case." On June 22, 2005, the Agency filed a response to the motion contending: 1) by statute, the Agency is exempt from the statutes and rules governing the Office of Administrative Hearings and therefore Respondents are not entitled to reassignment as a matter of course; 2) Respondents' motion was not timely filed; 3) Respondents did not set forth sufficient cause to disqualify; and 4) the ALJ's "professional training is irrelevant." On June 23, 2005, Respondents filed a reply to the Agency's response. On June 27, 2005, the ALJ issued an order denying Respondents' motion to disqualify on the basis that it was not timely filed in accordance with the contested case hearing rules and even if it had been timely

filed, Respondents failed to establish the required grounds for disqualification.

9) On June 28, 2005, Respondents moved for reconsideration of the ALJ's ruling denying Respondents' motion to disqualify the ALJ. On June 30, 2005, the ALJ denied Respondents' motion for reconsideration.

10) On July 18, 2005, Respondents filed a motion to dismiss paragraph 12 of the Agency's Notice. Respondents contended the allegation was predicated on a rule that applies to "existing contracts of employment" and "because an *existing* contract of employment was not violated at the time the Agency brought the Notice of Intent, or, in the alternative that the ODF contract was not a 'contract of employment,' the Agency has failed to state a claim upon which relief can be granted according to its own rules."

11) On July 18, 2005, the Agency filed a motion and affidavit for an extension of time until August 24, 2005, to respond to Respondents' motion. Respondents subsequently filed an objection to the Agency's motion on July 20, 2005. The Agency responded to Respondents' objection on July 25, 2005, and filed a supplemental response and affidavit on July 26, 2005. On July 29, 2005, Respondents filed a response to the Agency's supplemental response, and, on the same date, filed a supplement to its motion to dismiss. The ALJ entered a ruling on the Agency's

motion for extension of time on August 3, 2005, that stated in pertinent part:

“On July 19, 2005, the Hearings Unit received the Agency’s timely motion for an extension of time until August 24, 2005, to file its response to Respondents’ July 18, 2005, motion to dismiss. As grounds for the motion, the Agency case presenter states in her affidavit that she has previously scheduled commitments during the weeks of July 18, July 25, August 1, August 8, and August 15, 2005, that include a previously scheduled medical appointment, jury duty, previously scheduled case related interviews in La Pine, Oregon, and four previously scheduled hearings. Respondent’s counsel submitted a response on July 22, 2005, stating that ‘Respondents would not object to an extension of time until August 11, 2005 \* \* \* provided that the Agency can establish the necessary “good cause” by supplemental affidavit.’ Counsel also avers that ‘to put this matter off for over one month is unreasonable.’ On July 26, 2005, the Agency case presenter responded to Respondents’ objection by filing an affidavit that reiterates the grounds set forth in her first affidavit and states ‘there are a number of prescheduled hearings and related events that would be impracticable to reschedule’ and ‘[t]here is no other employee available that could handle this matter on

behalf of the Agency.’ On July 27, 2005, the Agency case presenter filed a supplemental affidavit stating that she ‘may need to confer with counsel in preparing [the Agency’s] response to the Respondents’ motion to dismiss’ and that the Agency has no control over its counsel’s availability.

“On August 1, 2005, the Hearings Unit received Respondents’ reply to the Agency’s response and affidavits, along with Respondents’ Supplement to Respondents’ Motion to Dismiss the Agency’s Notice of Intent.

“OAR 839-050-0050(3) provides that ‘the administrative law judge may grant [an] extension of time only in situations where the requesting participant shows good cause for the need for more time or where no other participant opposes the request.’ Under OAR 839-050-0010(11), ‘[g]ood cause means, unless otherwise specifically stated, that a participant failed to perform a required act due to \* \* \* a circumstance over which the participant had no control.’

“In this case, the Agency case presenter provided specific information establishing that she is otherwise encumbered by previously scheduled hearings and events that are impracticable, if not impossible, to change and that impede her ability to prepare a proper response to Respondents’ motion to dismiss. Although

counsel asserts without elaboration that an extension until August 24 is 'unreasonable,' I find that in light of Respondents' August 1 Supplement to Respondents' Motion to Dismiss that cites case law the Agency may address only through legal counsel, and considering the Agency's current work load, the requested due date is reasonable. Moreover, the Agency case presenter is entitled to the same courtesy extended to Respondents' counsel when he moved for a postponement of the hearing based on his previously planned vacation. In that case, counsel provided sufficient information to establish that his plans were already in place when the notice of hearing issued, were impracticable to change, and he would suffer a hardship if his motion were denied. I find that the Agency case presenter will suffer a similar hardship if the Agency's motion is not granted.

"The Agency's motion for an extension of time until August 24, 2005 is hereby **GRANTED**.

"The Agency must file with the Hearings Unit and serve on Respondents its response to Respondents' Motion to Dismiss and Supplement to Motion to Dismiss no later than **Wednesday, August 24, 2005**, in accordance with OAR 839-050-0040(1)." (footnote omitted)

12) On August 9, 2005, Respondents, through counsel, filed a motion for a discovery order requesting certain documents and the Agency's response to Respondent Mountain Forestry, Inc.'s interrogatories. On August 15, 2005, the Agency sought an extension of time until September 7, 2005, to respond to the discovery order. On August 17, 2005, Respondents filed a motion for leave to depose two witnesses. On August 18, 2005, the Agency, through counsel, filed its response to Respondents' motion to dismiss. On the same date, the Agency filed its response to Respondents' motion for depositions. On August 19, 2005, the Agency, through counsel, filed a motion to strike certain affirmative defenses set forth in Respondents' answer. On August 23, 2005, Respondents filed a reply to the Agency's response to Respondents' motion to dismiss.

13) On August 26, 2005, the ALJ entered a ruling on Respondents' motion to conduct depositions that stated in pertinent part:

"On August 18, 2005, pursuant to OAR 839-050-0200(3), Respondents moved for leave to conduct depositions of Javier Campa-Avila and Javier Sanchez 'at a time mutually convenient to both the Agency and counsel for Respondents, but no later than September 2, 2005.' In an affidavit in support of the motion, Respondents' counsel states that his clients have informed

him that Campa-Avila and Sanches, Respondent Mountain Forestry's former employees, have been 'approached by investigators' and the investigators questioned them about Respondents 'on topics of great importance to this case.' Counsel further states that his clients told him that Campa-Avila and Sanches were 'threatened with deportation if they do not provide incriminating information on Respondents.' According to counsel, both have been arrested and are currently detained in a federal facility 'awaiting deportation hearings.' Counsel states that 'the investigators that have interrogated these individuals have alleged that Respondent Francisco Cisneros knowingly hires illegal aliens, and makes personal loans to pay their way into this country.' Counsel seeks the depositions because Campa-Avila and Sanches 'deny those allegations,' will be deported before the November 1, 2005 hearing, and 'their testimony may be crucial to rebut similar allegations raised by other witnesses or by the Agency.' Counsel asserts that other methods of discovery are not adequate because they are 'less likely to lead to admissible evidence.'

"On August 23, 2005, pursuant to OAR 839-050-0150, the Agency filed a response and supplemental affidavit to Respondents' motion. Citing OAR 839-050-0200(3), the

Agency objects to the motion to conduct depositions and asserts that Respondents failed to show that other methods of discovery are inadequate or that other discovery methods have been attempted. The Agency also contends that Respondents' 'very broad allegations' do not include the names of the 'investigators' or how they are connected with this case, or what the 'alleged topics of great importance to this case are or how they are relevant to this case.' Additionally, the Agency asserts that there is no allegation in the Notice of Intent that Respondent Cisneros 'knowingly hires illegal aliens and makes personal loans to pay their way into this country' and, thus, the Agency contends, 'the proposed depositions would not lead to the discovery of generally relevant evidence.' In her affidavit, the Agency case presenter states that she ascertained that Campa-Avila is currently detained in a federal facility in Tacoma, Washington, and that 'if Mr. Javier Sanches is being detained, he would most likely be detained at that facility.' The case presenter also states that Campa-Avila was scheduled for a 'new master hearing' August 24, 2005, at which he 'may request a bond,' and that immigration court staff informed her that there was 'no indication when or if Mr. Campa-Avila would actually be deported.' Finally, in her affi-

davit, the case presenter also states she was informed that Homeland Security is 'in charge of the detention facility where Mr. Campa-Avila is being held.'

"My ruling is based on Respondents' and the Agency's arguments, the pleadings, and the applicable contested case hearing rules.

"OAR 839-050-0200(7) provides that:

'Any discovery request must be reasonably likely to produce information that is generally relevant to the case. \* \* \* If the request appears unduly burdensome, the administrative law judge may require an explanation of why the requested information is necessary or is likely to facilitate resolution of the case.'

"Here, Respondents have not shown how taking depositions from Campa-Avila and Sanchez is likely to produce information that is generally relevant to this case. Whether or not Respondent Cisneros knowingly employed illegal aliens is not an issue before this forum, and short of amending its Notice of Intent, the Agency is precluded from raising 'similar allegations \* \* \* [through] other witnesses' for Respondents to 'rebut.' Moreover, Respondents' assertion that unnamed investigators have asked the witnesses

about 'topics of great importance to this case' does not sufficiently establish a connection between an apparently unrelated investigation and any of the issues in this case.

"Even if Respondents had established that the witness testimony was reasonably likely to produce information with some relevance, the request for depositions is unduly burdensome because, as a practical matter, the witnesses are inaccessible. While this forum may issue commissions for out-of-state depositions, it is not clearly established that the forum's authority to do so extends to detainees in a federal facility under Homeland Security jurisdiction. At best, the logistics of arranging depositions under those circumstances is unduly burdensome for all of the participants in this matter. Therefore, absent any evidence showing how the witness information is necessary or is likely to facilitate resolution of this case, the forum concludes that the burden created by granting Respondents' motion far outweighs the dubious significance of information obtained by deposing the witnesses.

"Depositions, in any event, are only permitted in this forum under very limited circumstances. OAR 839-050-0200(3) states:

'Depositions are strongly disfavored and will be al-

lowed only when the requesting participant demonstrates that other methods of discovery are so inadequate that the participant will be substantially prejudiced by the denial of a motion to depose a particular witness.'

"In this case, Respondents have not made any showing that other methods of discovery are so inadequate that Respondents will be substantially prejudiced if their motion is denied. So far, all Respondents have shown is that they are interested in deposing potential rebuttal witnesses about an issue that has not been raised in this case. They have not demonstrated how the other discovery methods, including but not limited to those described in OAR 839-050-0200(2), are inadequate and less likely to produce information that is generally relevant to the issues raised in the Notice of Intent. Notably, ORS 183.425 provides that an agency may order the deposition of any *material* witness in the manner prescribed by law for depositions in civil actions. However, the statute requires that the petition for deposition include, among other things, the name and address of the witness whose testimony is sought and a showing of the materiality of the witness's testimony. In this case, Respondents have not placed the witnesses at a verifiable address – in fact, the Agency

case presenter determined that one of the witnesses was recently transferred to a Washington facility and the other witness's whereabouts are apparently unknown. More significantly, however, Respondents have not demonstrated the materiality of either witness's testimony.

"Finally, Respondents made no showing that they complied with OAR 839-050-0200(4) that requires participants to seek discovery through an informal exchange of information before requesting a discovery order.

"For all of those reasons, Respondents' motion is **DENIED.**"  
(footnote omitted)

14) On August 26, 2005, the ALJ entered a ruling on the Agency's motion for extension of time to respond to motion for discovery order that stated in pertinent part:

"On August 16, 2005, the Hearings Unit received the Agency's timely motion for an extension of time until September 7, 2005, to file its response to Respondents' Motion for Discovery Order. As grounds for the motion, the Agency case presenter states in her affidavit that she 'is in the middle of preparing for a hearing \* \* \* scheduled for August 16, 2005,' in Bend, Oregon. She further states that after the Bend hearing has concluded she will be vacationing until August 30, 2005.

Respondents had seven days to respond to the Agency's request. OAR 839-050-0150. To date, Respondent has not filed a response.

"OAR 839-050-0050(3) provides that 'the administrative law judge may grant [an] extension of time \* \* \* where no other participant opposes the request.' The forum infers from Respondent's lack of response that it does not oppose the Agency's request.

"Therefore, the Agency's motion for an extension of time to respond to Respondents' motion for discovery order is **GRANTED**.

"The Agency must file with the Hearings Unit and serve on Respondents its response to Respondents' Motion for Discovery Order no later than **Wednesday, September 7, 2005**, in accordance with OAR 839-050-0040(1)"

15) On August 26, 2005, Respondents filed a response to the Agency's motion to strike affirmative defenses. On September 6, 2005, the Agency, through counsel, filed a response to Respondents' motion for discovery order. On September 7, 2005, the Agency's counsel filed supplemental documents that were "inadvertently omitted" at the time of filing the Agency's response. On September 9, 2005, Respondents filed a reply to the Agency's response to motion for discovery order. The ALJ issued an order on September 14, 2005,

granting, in part, Respondents' motion for a discovery order and a discovery order compelling the Agency to deliver to Respondents a complete copy of its investigative file, including any and all witness interview notes prepared by the Agency investigator. The discovery order stated that the Agency was not required to produce the case presenter's witness interview notes or communications with Agency staff.

16) On September 14, 2005, Respondents filed a "first amended answer" to the Agency's Notice. On September 26, 2005, the Agency filed a response to Respondents' amended answer and a motion for a discovery order and request for *in camera* inspection by facsimile transmission. In its response to the amended answer, the Agency alleged the amended answer was not properly before the forum and was "an attempt to make an end run around the Agency's Discovery Request."

17) On September 26, 2005, based on the participants' submissions, the ALJ entered a ruling on the Agency's motion to strike Respondents' affirmative defenses that stated in pertinent part:

"On August 23, 2005, the Agency filed a Motion to Strike Respondents' first through seventh affirmative defenses on various grounds. Respondents timely filed an objection to the motion contending that the Agency's motion is untimely and without merit. As Respondents accede, the

contested case hearing rules do not limit the Agency's ability to file a motion to strike even though the rules do not include a procedure for filing such a motion. In this case, Respondents urge the forum to apply the Oregon Rules of Civil Procedure and hold the Agency to a 10 day time limitation from the date the answer was filed even though Respondents acknowledge that the forum is 'not necessarily bound' by the time limitation. In this forum, filing dates may be set or changed by the administrative law judge. OAR 839-050-005; OAR 839-050-0150. The Agency's motion was filed well over two months before the hearing date and Respondents have not established how they are 'severely prejudiced' if the Agency's motion is granted. For those reasons, I find the Agency's motion to strike was timely filed and make the following rulings.

#### **"First Affirmative Defense**

"In their first affirmative defense, Respondents allege (1) the Agency 'refused to renew [Respondents'] license \* \* \* without proper notice and procedure' and (2) the Agency's investigation was 'unreasonably long and unlimited in scope' and therefore 'arbitrary and capricious.' The record shows that on or about April 11, 2005, the Agency issued to Respondents a notice proposing to refuse to renew and/or revoke Respondents' license.

Respondents timely filed an answer and demanded a contested case hearing pursuant to ORS chapter 183.

"ORS 183.430(1) provides:

In the case of any license which must be periodically renewed, where the licensee has made timely application for renewal in accordance with the rules of the agency, such license shall not be deemed to expire, despite any stated expiration date thereon, until the agency concerned has issued a formal order of grant or denial of such renewal. In case an agency proposes to refuse to renew such license, upon demand of the licensee, the agency must grant hearing as provided by this chapter before issuance of order of refusal to renew.

"I infer from the record that Respondents 'made timely application for renewal in accordance with the rules of the agency,' and that they have continued to operate under a license that, by law, has not expired and will not expire until 'a formal order of grant or denial of such renewal' is issued following the hearing in this matter that was scheduled in response to Respondents' 'demand for contested case hearing.' Respondents' contention that the Agency failed to renew its license without proper notice and procedure has no basis in fact.

“Moreover, the issues raised in the Agency’s pleadings are (1) whether Respondents complied with the terms and conditions of lawful agreements or contracts; (2) whether Respondents willfully made a false, fraudulent, or misleading representation to the Agency and the Oregon Department of Forestry (ODF) about the terms, conditions, or existence of employment; (3) whether Respondents failed to obtain an annual employment certificate to employ minors; and (4) whether Respondents employed a minor in a hazardous occupation, in violation of Oregon farm labor contracting and child labor laws. The length and scope of the Agency’s investigation has no bearing on the truth of those matters alleged. The Agency’s motion to strike Respondents’ first affirmative defense is therefore **GRANTED**.

**“Second and Third Affirmative Defenses**

“In their second and third affirmative defenses, Respondents contend they are ‘entitled to judgment in their favor’ and allege, respectively, (1) that ODF terminated its contract with Respondent Mountain Forestry, Inc. without providing a ‘pre-termination hearing’ and (2) ODF’s motivation to terminate the contract was based on Respondent Cisneros’s ‘race or ethnicity.’ Neither issue is relevant to this case. As the Agency points

out, ODF is not a party to this case and the Commissioner has no jurisdiction over its actions against Respondents. Additionally, the Agency’s proof of its allegations is not dependent on ODF’s reasons for terminating its contract with Respondents. Per its pleadings, the Agency must show the existence of a contract or contracts and establish that Respondents violated certain terms and provisions in violation of ORS 658.440(1)(d). Whether or not the alleged violations resulted in ODF terminating its contract with Respondents is not an issue before this forum. The Agency’s motion to strike Respondents’ second and third affirmative defenses is **GRANTED**.

**“Fourth Affirmative Defense**

“Respondents allege that ‘a substantial factor in the Commissioner’s decision to refuse to renew and revoke Respondents’ license was that Respondents had submitted a Notice of Claim for Damages to the State of Oregon, which reserved Respondents’ right to bring a civil action against the State for ODF’s Constitutional violations.’ Respondents have not alleged facts that constitute an affirmative defense and the Agency’s motion to strike is **GRANTED**.

**“Fifth Affirmative Defense and Counterclaim**

“Respondents’ defamation claim, based on allegations that an agency investigator made ‘false and misleading statements,’ that caused the insurer to decline to do business with Respondent Mountain Forestry, Inc., ‘which caused Respondents economic damage and damage to their reputation,’ constitutes a civil matter that belongs in another forum. As the Agency correctly states, the Commissioner does not have the authority to hear and decide the defamation claim as alleged. Therefore, the Agency’s motion to strike Respondents’ fifth affirmative defense is **GRANTED**.

#### “Sixth Affirmative Defense

“Contrary to the Agency’s contention, Respondents’ allegation that ‘the commissioner has failed to plead ultimate facts sufficient to constitute a claim for relief’ is a proper pleading and the Agency’s motion to strike Respondents’ sixth affirmative defense is **DENIED**.

#### “Seventh Affirmative Defense

“By simply stating that the Agency ‘is not taking similar action to similarly situated regulated entities,’ Respondents have not alleged facts that constitute an affirmative defense. In their response to the Agency’s motion, Respondents cite a U. S. Supreme Court case [*Village of Willow-*

*brook v. Olech*, 528 U.S. 562, 563, 120 S. Ct. 1073 (2000) (*per curiam*)] to support their ‘equal protection based defense,’ but in their answer they fail to plead facts consistent with the holding in that case. Moreover, the Agency has alleged multiple causes of action and Respondents have not – in any of their defenses – referred to the specific cause of action to which each defense is intended to answer. The Agency’s motion to strike Respondents’ seventh affirmative defense is therefore **GRANTED**.

“Accordingly, Respondents’ first, second, third, fourth, fifth and seventh affirmative defenses are stricken from their answer and I will not take evidence on those defenses at the hearing.”

18) On September 26, 2005, the ALJ issued an order scheduling a prehearing conference on September 29, 2005. The purpose of the conference was “to clarify and narrow the issues posed by the pleadings and motions pertaining to the pleadings.”

19) On September 27, 2005, the Hearings Unit received the Agency’s original response to Respondents’ amended answer, motion for a discovery order and request for *in camera* inspection.

20) On September 28, 2005, Respondents filed a motion to reconsider interim order striking affirmative defenses and a motion to file an amended answer. In

their motion to amend, Respondents stated: "In light of the forum's rulings on Respondents' Second, Third, Fourth, Fifth, and Seventh Affirmative Defenses, \* \* \* Respondents hereby withdraw their First Amended Answer filed September 15, 2005, and move this forum for an order allowing Respondents to file a new Amended Answer, which is attached as exhibit A."

21) On September 29, 2005, Respondents filed a motion and affidavit to postpone hearing and a motion for extension of time to file case summary.

22) On October 4, 2005, the ALJ entered an order summarizing the September 29 prehearing conference and ruling on Respondents' motion to dismiss that stated in pertinent part:

"On September 29, 2005, at approximately 4:00 p.m., the participants convened in the conference room of the Bureau of Labor and Industries, located at 3865 Wolverine NE, Building E-1, Salem, Oregon, to clarify and narrow the issues posed by the pleadings and motions pertaining to the pleadings. The issues for discussion included Respondents' pending motion to dismiss paragraph 12 of the Agency's charging document, Respondents' first amended answer submitted by facsimile transmission on September 30, 2005, the Agency's response to Respondent's amended answer, motion for a discovery order, and request for *in cam-*

*era* inspection of certain file documents submitted on September 28, 2005. During the prehearing conference, Respondents withdrew their first amended answer and instead submitted a motion to amend answer, including a revised first amended answer, pursuant to OAR 839-050-0140(1). Additionally, Respondents submitted a motion to postpone hearing and extend time for filing case summaries, a motion to reconsider interim order granting, in part, the Agency's motion to strike, and a response to the Agency's discovery order and request for *in camera* inspection.

**"Ruling on Respondents' Motion to Dismiss**

"On July 18, 2005, Respondents timely filed a Motion to Dismiss the Agency's Notice of Intent ('Notice'). In the motion, Respondents moved for an order striking paragraph 12 from the Notice and the record and dismissing the Agency's case to revoke or refuse to renew Respondents' license pursuant to OAR 839-015-0520(1)(b). Respondents argued the rule provides that the Agency 'will' propose to deny or revoke a license when a contractor causes 'an existing contract of employment to be violated,' and '[b]ecause an existing contract of employment was not violated at the time the Agency brought the Notice of Intent, or in the alternative that the [Oregon Department of Forestry

(“ODF”)] contract was not a “contract of employment” the Agency has failed to state a claim upon which relief can be granted according to its own rules.’ Respondents also argued that even if the Agency alleges that its authority to refuse or revoke Respondents’ license in this case is based on broader statutory authority, the Agency is bound by its adoption of a rule that limits that authority. On August 1, 2005, Respondents filed a supplement to their Motion to Dismiss to include a recent Oregon Supreme Court decision that [clarifies] points of law that are controlling and relevant to [Respondents’ motion].’

“The Agency was granted an extension of time to respond to the motion and on August 19, 2005, timely filed a response through counsel. In their submissions, the Agency and Respondents aptly explained at length their positions on the meaning of OAR 839-015-0520(1)(b). After considering the arguments, I found that Respondents correctly interpreted the rule and that the rule refers to existing employment contracts. I also found that paragraph 12 of the Agency’s charging document does not plead facts necessary for a cause of action under OAR 839-015-0520(1)(b). However, Respondents’ argument that the rule narrows the statute and therefore the Agency has not stated a cause

of action under ORS 658.445(1) has no merit.

#### **“Respondents’ Latest Motions**

“During the prehearing conference, the forum granted the Agency’s request for a one day extension of time to file its responses to Respondents’ motion to amend, motion to postpone hearing and extend time for filing case summaries, and motion to reconsider order granting, in part, the Agency’s motion to strike. This order confirms that the Agency must file its responses by **Friday, October 7, 2005**.

#### **“Agency’s Response To Respondents’ Amended Answer, Motion For Discovery Order, Request For *In Camera* Inspection**

“The Agency’s response to Respondents’ amended answer was rendered moot after Respondents withdrew the first amended answer during the prehearing conference. Additionally, the Agency’s discovery order, for the most part, was rendered moot by the interim order granting the Agency’s motion to strike several of Respondents’ affirmative defenses. During the prehearing conference, the participants agreed that the Agency has leave to renew its request for a discovery order if the order granting the Agency’s motion to strike certain affirmative defenses is reversed.

“After reviewing documents the Agency provided with its request for *in camera* inspection, and based on the Agency’s representation that the documents were contained within the Agency’s investigative file, I ordered the Agency to provide Respondents with a copy of each of the documents, in accordance with the Discovery Order issued on September 14, 2005. Before the prehearing conference concluded, the Agency’s case presenter provided counsel with the documents at issue.”

23) On October 6, 2005, the Agency filed 1) a motion for an order altering the time line for Respondents to file a response to the Agency’s second set of interrogatories; 2) a “response to Respondents’ response to the Agency’s motion for discovery order and *in camera* inspection”; 3) a response to Respondents’ motions to postpone hearing and extend time to file case summaries; 4) a response to Respondents’ motion to reconsider order striking affirmative defenses; 5) a response to Respondents’ motion to file an amended answer; and (6) a motion to strike Respondents’ first amended answer (in the alternative).

24) On October 7, 2005, Respondents filed a motion “to reconsider ruling on Respondents’ motion to dismiss.” On October 11, 2005, the Agency filed a response to Respondents’ motion to reconsider motion to dismiss. On

October 12, 2005, the ALJ entered an order ruling on Respondents’ motion to reconsider and motion to amend, and the Agency’s alternative motion to strike that stated in pertinent part:

“At the prehearing conference on September 29, 2005, Respondents submitted a motion to reconsider the forum’s order striking certain affirmative defenses alleged in Respondents’ original answer, withdrew the first amended answer filed on September 15, 2005, and submitted a motion to amend answer along with a revised first amended answer. Respondents also withdrew the alleged fourth, fifth and eighth affirmative defenses in their original answer. On October 7, 2005, the Agency timely filed responses to the motions to reconsider and to amend and, alternatively, moved to strike Respondent’s September 29 first amended answer.

#### **“Respondents’ Motion for Reconsideration**

##### **1. Timeliness**

“Respondents question why the Agency was not required to show ‘good cause’ for filing what Respondents characterize as an untimely motion to strike while Respondents were required to show good cause for requesting a postponement and were also held to an ‘imposed deadline’ after they exceeded the filing deadline for a motion to recuse by two

weeks. The contested case hearing rules supply the answer to the question.

“There are numerous motions that do not have precise filing deadlines or require a good cause showing, such as motions to dismiss, motions to consolidate, motions to make more definite and certain, motions to exclude witnesses, motions for summary judgment, and motions to amend. Although the rules describe certain motions that may be filed, the list is not exhaustive and the forum regularly considers motions that are not mentioned in the rules, such as motions to strike, which have no time limitation or good cause requirement. While a motion to postpone a hearing does not have a filing deadline, the rule pertaining to the motion is explicit and provides that, unless the participants agree to postponement, the ALJ may grant the motion ‘for good cause shown.’ OAR 839-050-0150(5)(a). Thus, when the Agency objected to Respondents’ initial one sentence request for postponement, Respondents were required by rule to show good cause, *i.e.*, show that the need for postponement was due to excusable mistake or circumstances beyond Respondent’s control. OAR 839-050-0020(11). Respondents were not held to a higher standard, they were in fact treated as every other participant who files a motion to postpone over

another participant’s objection, in accordance with the contested case hearing rules and Agency precedent.

“Additionally, notwithstanding Respondents’ failure to prevail on the merits of their motion to recuse, Respondents’ ongoing consternation at being held to the 14 day limitation for filing the motion is excessive given that they received a copy of the rules with the Notice of Hearing and the rules clearly state the filing deadline for that particular motion. On the other hand, the rules do not address motions to strike and in this case the forum found the Agency’s motion was filed well over two months prior to the hearing date, which is not unreasonable. Furthermore, Respondents could not establish how they would be ‘severely prejudiced’ if the Agency’s motion was granted. A ‘good cause analysis’ is not relevant to this particular motion and Respondents’ assertion that the forum is holding them to a different standard has no merit.

## **2. First Affirmative Defense**

“Respondents seek reconsideration of the forum’s order striking their first affirmative defense that alleges (1) the Agency refused to renew their license ‘without proper notice and procedure’ and (2) the Agency’s investigation was ‘arbitrary and capricious’ in its length and scope. As a supplement to the order striking

Respondents' first affirmative defense, I find that contrary to Respondents' contention, the first allegation presents a conclusion rather than issuable facts and the second allegation fails to allege facts that constitute a substantive due process defense. Therefore, the order striking Respondents' first affirmative defense is hereby **AFFIRMED**.

### 3. Unfair Prejudice

"Respondents claim that striking their defenses at this juncture results in 'wasted time, energy, and effort' in case preparation and, thus, constitutes 'unfair prejudice.' Respondents also claim the forum has denied them the opportunity to present their case at hearing. Those claims have no merit and further discussion about them is unnecessary.

### 4. Unlicensed Practice of Law

"Although Respondents 'wish to revisit' their previous contention, I have ruled on that issue and the ruling is final. Respondents' position is in the record and I will not consider further argument on the subject.

"For all of the reasons stated above, Respondents' motion to reconsider is **DENIED**.

### "Respondents' Motion to Amend Answer

"In their motion to amend answer, Respondents propose to

insert additional language in paragraphs five, seven, and nine and withdraw their fourth, fifth and eighth affirmative defenses.

Additionally, Respondents reallege their first affirmative defense, revise and renumber their second, third and fifth affirmative defenses, and raise a new sixth affirmative defense of equitable estoppel. The Agency objects to the motion as untimely and asserts that Respondents 'should be made to show "good cause" for the amended answer.' Alternatively, the Agency moves to strike the added language in paragraph nine of the first amended answer and Respondents' alleged first, second, third, fifth and sixth amended affirmative defenses.

"OAR 839-050-0140(1) provides that:

'a participant may amend its pleading once as a matter of course at any time before a responsive pleading is served. Otherwise, a participant may amend its pleading only by permission of the administrative law judge or by written consent of the other participants. \* \*  
\* Permissible amendments to answers include, but are not limited to, additions or deletions of affirmative defenses. Permission will be given when justice so requires.'

"Respondents filed their motion to amend over a month before

hearing and the Agency has not established how it is prejudiced if Respondents' motion is granted. Moreover, I find the merits of Respondents' defense are served by allowing Respondents to partially amend their pleading. Having considered the Agency's objection to Respondents' proposed language in paragraph nine, I find that it is not well taken and Respondents are not precluded from alleging a mitigating factor that, in any event, is subject to proof at hearing. Therefore, Respondents are granted leave to amend their answer to include the proposed language in paragraphs five, seven and nine and to delete the fourth, fifth and eighth affirmative defenses from their answer. However, for the following reasons, the remaining proposed amendments are **DENIED**.

"First, Respondents' first, second and third affirmative defenses have already been stricken from the answer and the proposed language in the second and third affirmative defenses does not 'correct' the pleading as Respondents contend. In any event, Respondents are not precluded from arguing at hearing whether or not any weight should be given to another state agency's investigation and findings.

"Second, Respondents' seventh affirmative defense, now revised and renumbered as the

fifth affirmative defense, previously was stricken because it failed to allege facts constituting a defense under *Village of Willowbrook v. Olech*, 528 U.S. 562, 563 (2000)(*per curiam*). Respondents' revised allegation still suffers from a failure to state facts that constitute a valid defense under that case. Respondents' proposed amended fifth affirmative defense does not correct the original pleading.

"Third, I find that Respondents' 'new affirmative defense of equitable estoppel' numbered as Respondents' sixth affirmative defense is a sham pleading. The forum takes official notice that the Oregon Farm/Forest Labor Handbook was first published in February 2005. Moreover, Respondents misrepresent the information contained in the handbook, which demonstrates a decided lack of good faith on Respondents' part. Even if the allegations were true, and I conclude that they are not, Respondents have not alleged facts that constitute an equitable estoppel defense in this forum.

"Accordingly, for the record, Respondents' answer is amended by interlineation as follows:

1. Paragraph five now includes the sentence, 'This allegation as pled in the Notice of Intent falls outside the scope of ORS 658.440(3)(b).'

2. Paragraph seven now includes the sentence, 'Moreover, the alleged aggravating factor is not germane to the nexus of the Notice of Intent.'

3. Paragraph nine now includes the sentence, 'Respondents further allege that the relationship between Respondent Francisco Cisneros and Victor Cisneros is a mitigating factor under ORS 653.365.'

4. Respondents' fourth, fifth and eighth affirmative defenses are deleted from the answer.

"Additionally, Respondents' first, second, third and seventh affirmative defenses have been stricken from the answer by a previous ruling, leaving Respondents' sixth affirmative defense intact.

#### "Agency's Motion to Strike

"To the extent that the forum granted Respondents leave to amend their answer to allege a mitigating factor in paragraph nine, the Agency's motion to strike the mitigating factor is **DENIED**. Otherwise, the remaining issues in the Agency's motion are moot as they pertain to affirmative defenses that have been already stricken from the answer or amendments that were not allowed pursuant to this Order."

25) On October 12, 2005, Respondents' counsel sent the

ALJ a letter by facsimile transmission that stated in pertinent part:

"Dear Judge Lohr:

"This letter and a following fax of this letter confirm my telephone message to Cynthia Domas and an in person conversation with Etta Creech requesting an in person status conference.

"It appears we are on the verge of narrowing the issues and I would like some direction from the court as to precisely (now after the agencies [sic] stipulations) what the remaining issues are to be tried."

On October 13, 2005, the ALJ issued an order scheduling a prehearing status conference "to clarify the remaining issues for hearing and to resolve any remaining discovery issues." Pertaining to discovery, the ALJ further stated:

"Bear in mind that under this forum's hearing rules, discovery is not a matter of right – the ALJ has the discretion to order discovery and is not required to authorize any discovery. Moreover and most important, once the ALJ authorizes discovery, the ALJ 'will control the methods, timing, and *extent of the discovery*.' (emphasis added) OAR 839-050-0200(1). That means that I may cut off discovery if I find that the participants are using it as a means for delaying the hearing. Notably, since the Notice of Hearing issued on May 20, 2005, the participants will have

had well over five months before the hearing date to prepare their cases. Having read what borders countless submissions from both participants, my observation is that they would better serve their cases by engaging in more cooperation and less fingerpointing.

“At the prehearing conference, the participants will be given the opportunity to identify the information they requested informally and have not yet received. I will determine at the prehearing conference if and when the information will be produced. If the Agency and Respondents are prepared to make stipulations or admissions at the prehearing conference, the stipulations or admissions will be placed on the record, will be binding on the participants, and will be regarded and used as evidence at the hearing. OAR 839-050-0280(1).

“At the conclusion of the conference, I will issue an interim order reciting any action taken and agreements reached by the Agency and Respondents during the prehearing conference.”

26) On October 12, 2005, the ALJ entered an order ruling on Respondents’ motion to postpone hearing that stated in pertinent part:

“At the prehearing conference on September 29, 2005, Respondents, through counsel,

moved for a second postponement of the hearing currently scheduled for November 1, 2005, the date Respondents initially requested for hearing. Respondents included counsel’s affidavit with the motion. In his affidavit, counsel requested a 10 week postponement and stated that ‘Respondents’ goal is to avoid hearing by means of reasonable negotiation’ and asserted that the ‘delays by the Agency’ and the Agency case presenter’s ‘refusal to cooperate on discovery issues’ has hindered his ability to ‘adequately prepare for the hearing.’

“The Agency timely filed an objection to the motion on October 6, 2005. In its response, the Agency provided a ‘chronology of the case’ and asserted, among other things, that counsel was granted their first postponement on June 13, 2005, and did not request discovery until July 18, 2005, three days after Respondents filed a motion to dismiss. The Agency further states that ‘Respondents have filed numerous duplicitous pleadings requiring the Agency to respond in a short time frame’ while, ‘other than motions for extensions [of] time to respond to Respondents’ numerous pleadings, the Agency has only filed two affirmative motions.’

“The Agency asserts that although it has produced over 2,500 documents, most in re-

sponse to an informal discovery request, Respondents have not produced any of the documents that the Agency requested informally. In support of its objection, the Agency contends that 'the Agency is ready to proceed to hearing on November 1, 2005.'

"I have considered the requirements of OAR 839-050-0150(5) that says, in part, 'the administrative law judge may grant the request for good cause shown.' OAR 839-050-0020(10) provides, in pertinent part:

"'Good cause' means, unless otherwise specifically stated, that a participant failed to perform a required act due to an excusable mistake or circumstance over which the participant had no control. "Good cause" does not include a lack of knowledge of the law including these rules.'

"I have also considered OAR 839-050-0000 which states that one of the purposes of the hearings rules is to provide for timely hearings. I find Respondents' reasons given in support of their second request do not satisfy the requirements of these rules.

"Respondents were granted a previous postponement that resulted in the current November 1 hearing date. In their second request, Respondents seek a 10 week postponement

based solely on Respondents' anticipated need for additional discovery and their 'goal [] to avoid hearing by means of reasonable negotiation.' Notwithstanding that 'settlement negotiations do not serve as a basis for postponement of the hearing,' given the apparent enmity between the participants, the forum finds it highly unlikely the participants would actually spend the next 10 weeks in 'reasonable negotiation' to 'avoid hearing.' Additionally, Respondents have not demonstrated that they have made adequate efforts to timely complete discovery or to review the discovery they received during the four months since their first request for postponement was granted. Moreover, Respondents admit that the Agency provided over 2,500 pages of discovery well before September 29, 2005, and that the issues have been narrowed by the Agency's acknowledgment that one of the ODF contracts 'in question had no minimum age requirement for the contract years 2000, 2001, and 2002.' For those reasons and based on the record herein that shows Respondents' priorities did not include timely seeking discovery, I find that Respondents' reasons for their motion are not due to circumstances beyond their control.

"Respondents have not established good cause for postponing this matter and

there is no basis for any claim of excusable mistake. Therefore, Respondents' motion for a second postponement is hereby **DENIED.**"

27) On October 13, 2005, the ALJ denied Respondents' motion to reconsider ruling on Respondents' motion to dismiss.

28) On October 13, 2005, the Hearings Unit received 1) Respondents' "reply to Agency's response to motion to reconsider interim order striking affirmative defenses and motion to file an amended answer [and] Respondents' response to the Agency's motion to strike first amended answer"; 2) Respondents' "response to Agency's renewed motion for discovery order"; (3) Respondents' "response to Agency's motion to set time to respond to second set of interrogatories"; 4) Respondents' "motion to extend time to respond to interrogatories and informal discovery request"; 5) Respondents' "reply to the Agency's response to motion to postpone hearing [and] motion to extend time to file Respondents' case summary"; and, 6) by facsimile transmission, Respondents' letter stating in pertinent part:

"This is to notify the forum, pursuant to OAR 839-050-0300(1), that Respondent Francisco Cisneros is unable to speak or understand the English language. Interpreter services are hereby requested."

29) On October 14, 2005, the ALJ entered an order appoint-

ing an interpreter that stated in pertinent part:

"On October 13, 2005, Respondents, through counsel, submitted a letter dated October 12, 2005, via facsimile transmission, requesting an interpreter for Respondent Francisco Cisneros who counsel represents is 'unable to speak or understand the English language.'

"OAR 839-050-0300(1) provides:

'When a person unable to speak or understand the English language, \* \* \* is involved in a contested case hearing, such person is entitled to a qualified interpreter \* \* \*. All interpreters shall be appointed by the administrative law judge. A participant wishing to obtain the services of an interpreter \* \* \* must notify the administrative law judge no later than 20 days before the hearing.'

"Although the forum was notified one day outside the time limitation established in the rule and even though Respondents' counsel evidently knew of the need for an interpreter when the hearing notice issued in May, I am allowing the request. Respondent Cisneros's right to participate in the hearing should not be jeopardized because counsel inadvertently missed the time limitation by one day. Additionally, after

confirming with Respondents' counsel by telephone that Respondent Cisneros's native language is Spanish, the Hearings Unit Coordinator was able to obtain the services of Oregon Certified Court Interpreter Terry Rogers, who I have appointed to provide interpreter services in Spanish for the hearing's duration.

"At hearing, I will instruct the participants and witnesses about the interpreter's role in the conduct of the hearing."

30) On October 14, 2005, the Hearings Unit received the Agency's "motion for reconsideration of interim order ruling on Respondents' motion to dismiss." On October 18, 2005, the ALJ issued an order summarizing the prehearing status conference and authorizing mediation. The order stated, in pertinent part:

"On October 17, 2005, at 2 p.m., the participants convened in the W. W. Gregg Hearing Room of the Bureau of Labor and Industries, located at 800 NE Oregon Street, Portland, Oregon, to clarify issues and resolve discovery matters. The forum also addressed the Agency's current motion to reconsider ruling on Respondents' motion to dismiss.

#### **"Agency's Motion**

"During the status conference, the Agency advised the forum that should its motion be granted, the Agency seeks only clarification of the forum's

ruling on the subject rule's interpretation and not the rule's reinstatement in the pleading as a basis for the Agency's action. Since the rule will not be at issue during the hearing, I will rule on the Agency's motion in the proposed order. Respondents must file their response to the motion no later than **Friday, October 21, 2005.**

#### **"Substantive Issues**

"The Agency and Respondents agreed that at this juncture, the sole issues on the merits before the forum are (1) whether Respondents complied with the terms and conditions of lawful agreement or contracts; (2) whether Respondents willfully made a false, fraudulent, or misleading representation to the Agency and the Oregon Department of Forestry about the terms, conditions or existence of employment; (3) whether Respondents failed to obtain an annual employment certificate to employ minors; and (4) whether Respondents employed a minor in a hazardous occupation, in violation of Oregon farm labor contracting and child labor laws.

"The Agency stipulated that age requirements for firefighters were not written into the Oregon Department of Forestry contracts until 2003, but asserted that with or without contractual age requirements, the basis for the Agency's allegation regarding age requirements during contract

years 2000 through 2004 is a matter of state law. Respondents argued that the Agency has not 'proven' that the alleged minors failed to meet the age requirements during the applicable contract years and therefore Respondents are entitled to summary judgment on that basis. The forum found summary judgment was not appropriate at this time because the age of the alleged minors during the contract years is still in dispute.

#### **"Discovery**

"During the prehearing conference, the Agency submitted a second motion for discovery order. After a recess to discuss the matters raised in the motion, the participants reported they exchanged information and Respondents agreed to provide a written response to the Agency's first interrogatory no later than Friday, October 21, 2005. Additionally, Respondents answered the Agency's second interrogatory pertaining to the familial relationship between Victor, Samuel, Ramon and Francisco Cisneros and provided the Agency with 'certified true copies of all documents indicating the age of the individuals listed in the Notice of Intent with the exception of Respondent Francisco Cisneros.' The participants also reported that the Agency voluntarily produced documents that Respondents had not requested and that they

expect to resolve the few remaining discovery matters. The forum determined that any outstanding discovery issues should resolve after the participants file their case summaries on October 21, 2005.

#### **"Mediation**

"Judge Alan McCullough has agreed to conduct mediation in this case to facilitate resolution of the pending issues provided the participants agree to compromise on all issues, including the proposed refusal to renew license, and to include Respondent Cisneros and Wage and Hour Administrator Hammond in the mediation process. The participants agreed to those conditions. Judge McCullough and the participants will set a date and time for mediation during a telephone conference initiated by Judge McCullough. The conference call is tentatively scheduled to take place at 8:30 a.m. on Tuesday, October 18, 2005, subject to Judge McCullough's availability."

31) On October 18, 2005, the Agency and Respondents filed a joint motion to extend time to file case summaries. The ALJ verbally granted the motion and the Agency and Respondents timely filed case summaries on October 24, 2005.

32) On October 20, 2005, the Hearings Unit received a letter from the Agency stating, in pertinent part:

“The Agency has reviewed the Interim Order – Summarizing Status Conference and Authorizing Mediation and brings to the forum’s attention an error in the first full paragraph on page two. The Agency stipulated that the ODF contracts did not have an age requirement in the contract until 2003 (not 2004 as stated in the Interim Order). Prior to that time, age was [a] matter of state law.

“Although the ALJ requested that the Agency provide the forum with a copy of the stipulation at the close of the status conference, the Agency neglected to do so. I apologize for any inconvenience or confusion that may have caused and have enclosed a copy of the written stipulation. Part of the letter has been redacted for confidentiality purposes.”

The Agency enclosed a copy of a letter to Respondents’ counsel, dated October 10, 2005, a portion of which was redacted, which stated: “The Agency has not received a written stipulation from you. However, the Agency will stipulate that the ODF contracts did not have an age requirement in the contract until the 2003 contract. Prior to that time, age was a matter of state law.”

33) On October 21, 2005, the Hearings Unit received Respondents’ “response to the Agency’s motion to reconsider the forum’s ruling on motion to dismiss” by facsimile transmission. On October 24, 2005, the Hearings Unit received the original

(“hard copy”) document and Respondents’ “consent to law student appearance.”

34) On October 26, 2005, the Hearings Unit received the Agency’s “request to cross-examine document preparer” for three exhibits Respondents submitted in their case summary, including letters written by Donald Pollard and Addison Johnson, and “letters and evaluations from contracting officers and/or governmental agencies.” On the same date, the Agency submitted additional exhibits that were “inadvertently omitted” from the Agency’s case summary.

35) On October 26, 2005, the ALJ issued an order requesting that Respondents provide additional information pertaining to Respondents’ “consent to law student appearance.” On October 26, 2005, the ALJ issued an amended order correcting a typographical error. The amended order stated, in pertinent part:

“On October 24, 2005, Respondent Cisneros submitted a sworn statement entitled Respondents’ Consent to Law Student Appearance. Respondent Cisneros states that he is authorized to ‘execute the [statement] on behalf of Mountain Forestry, Inc.’ and that his counsel advised him that ‘paralegal, Kevin J. Jacoby, is eligible to appear’ on his behalf and that of Respondent Mountain Forestry, Inc., ‘pursuant to the Law Student Appearance Rule.’ Respondent Cisneros states: ‘I hereby consent to any

appearance in this case by Kevin J. Jacoby as may be necessary to pursue the interests of Mountain Forestry, Inc. and myself individually.'

"While it is true that a certified law student may appear before an administrative tribunal with a client's consent and under an attorney's supervision, any appearance by a certified law student in this forum is subject to the administrative law judge's approval. See Rule 13.10(6) of the Oregon Supreme Court Rules for Admission of Attorneys in Oregon. Respondents have not requested my approval or given the Agency an opportunity to weigh in on the efficacy of allowing Mr. Jacoby to appear in this case on Respondents' behalf.

"Furthermore, I have misgivings about Respondent Cisneros's affidavit. Respondents' counsel previously represented that Respondent Cisneros was 'unable to speak or understand the English language.' Consequently, the Hearings Unit appointed a certified court interpreter to provide interpreter services in Spanish for two weeks of hearing at significant cost to the Agency. Yet, Respondent Cisneros signed and swore to a statement - written in English - representing that he understands the nature and extent of Jacoby's participation in the hearing and giving his consent. Either Respondent Cisneros

signed a document that he did not understand or he misrepresented his ability to speak and understand English.

"If Respondents expect a certified law student to appear on their behalf at the hearing in any capacity, they must comply with the following conditions before I will consider giving my consent:

"1. Prior to hearing, Respondents must file a true copy of Kevin J. Jacoby's certification to appear under the Law Student Appearance Rules showing approval by the Oregon Supreme Court and the date it was filed by the State Court Administrator.

"2. Within 24 hours, Respondents must advise the forum, in writing, whether or not Respondent Cisneros submitted valid consent on October 24, 2005. If it is valid consent, the forum will cancel the court interpreter's appointment to provide interpreter services in Spanish. If it is not valid consent, the forum will not consider giving approval until Respondents submit written consent prior to hearing establishing that Respondents were informed of the nature and extent of Jacoby's anticipated participation in the hearing before they consented. Respondents may submit their response to this condition by facsimile transmission to (971) 673-0762, or by hand delivery, but must do so within 24 hours of receipt of this interim order.

"Any objections the Agency has to allowing a certified law student to appear on Respondents' behalf in this matter must be filed no later than Friday, October 28, 2005."

36) On October 27, 2005, Respondents sent the forum a document by facsimile transmission that was missing the first page. On October 28, 2005, at the forum's request, Respondents sent page one of "Response to the Forum's Interim Order of October 26, 2005." On the same date, the Agency submitted an exhibit that was "inadvertently omitted from the case summary."

37) On October 31, 2005, the ALJ entered a ruling on Respondents' request for approval of law student appearance that stated in pertinent part:

"On October 27, 2005, Respondents faxed to the Hearings Unit a 'Response to the Forum's Interim Order.' The faxed response was incomplete and on October 28, at the forum's request, Respondents faxed the missing page to the Hearings Unit. A copy of a memo dated May 12, 2005, signed by James W. Nass, confirming that Kevin J. Jacoby's Law Student Appearance Rule Certificate was filed in the Supreme Court and that he is 'eligible to practice under the Law Student Appearance Rules as of May 11, 2005,' was attached to the response and marked as Exhibit A. Respondents also included the Affidavit of Robert C. William-

son, marked as Exhibit B, which states in pertinent part:

'2. Respondent Francisco Cisneros does not speak English very well, and cannot read English.

'3. On the morning of October 21, 2005, Respondent Francisco Cisneros was in my office prior to our scheduled mediation for that date. I am fluent in Spanish, and translated the contents of the Consent to Law Student Appearance to him. He understood and gave his consent by signing the affidavit in the presence of a notary public.'

"Without determining whether or not counsel's affidavit complies with the forum's interim order dated October 26, 2005, I am withholding my consent to law student Kevin Jacoby's appearance in this matter.

"Although the forum wholly supports the underlying policy of the Law Student Appearance Rules, each case presents different circumstances that a presiding officer must consider before approving a law student's appearance.

"Here, I have considered the complexities of this particular case, which include the extensive record developed thus far, the multiple issues involved, the voluminous exhibits submitted with the participants' case summaries, and the need for a court interpreter's full time

services throughout the entire hearing which necessarily correlates to the hearing's expected 10 day duration. Under these circumstances, allowing a law student to present any part of Respondents' case at hearing is not conducive to ensuring the orderly and timely development of the hearing record. Therefore, to ensure a complete and accurate record and a full and fair hearing, the forum will not consent to Kevin Jacoby's appearance during any part of the hearing in this matter.

"Respondents' request for approval is hereby **DENIED**."

38) At the start of hearing, the ALJ swore in the interpreter and, pursuant to ORS 183.415(7), verbally advised the Agency and Respondents of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

39) At the start of hearing, Respondents withdrew their third affirmative defense and stipulated to certain Agency exhibits.

40) At the start of hearing, Respondents made a motion for reconsideration of the forum's ruling denying Respondents' request for approval of counsel's law clerk's appearance under the Student Appearance Rule and a motion to strike paragraph five of the Agency's Notice for failure to state a claim. The ALJ denied the motion for reconsideration and took the motion to strike "under advisement." The ALJ also over-

ruled Respondents' objection to the Agency's case summary.

41) At the start of hearing, the Agency moved for summary judgment on paragraphs three, four, five, and eight of the Notice of Intent as they pertain to the 2004 Interagency Firefighting Agreement on the ground that the issues were fully litigated in a prior proceeding in another forum. The Agency proffered a court certified copy of Judge Dickey's ruling, dated August 20, 2004, and requested that the forum take judicial notice. Respondents argued the two proceedings were not identical and that the judge's ruling was "essentially arguably withdrawn in favor of an actual judgment that was entered in this case." The ALJ took official notice of the court certified ruling and gave Respondents' leave to provide supplemental documentation.

42) At the start of hearing, Respondents stipulated that 1) Francisco Cisneros is Mountain Forestry, Inc.'s majority shareholder and owns 52 percent of its shares; 2) Victor Cisneros is Francisco Cisneros's son and has a birthdate of July 27, 1984, 3) Victor Cisneros worked for his father through Mountain Forestry, Inc. as a firefighter for 30 days before 16<sup>th</sup> birthday during the 2000 fire season; 4) Victor Cisneros was engaged in firefighting activities for 30 days prior to his 16<sup>th</sup> birthday; and 5) Francisco Cisneros is uncle to Samuel Cisneros and Ramon Cisneros.

43) At the start of hearing, the Agency stipulated that the

2000 through 2002 Agreements did not include a specific minimum age requirement and that age was a matter of state law during that period. Both participants stipulated that the 2003 and 2004 Agreements included a provision requiring that firefighters must be 18 years old to engage in fire-fighting activities.

44) During the hearing, the Agency moved to amend paragraph five of the Notice of Intent to include the definition of "person" found in ORS 174.110(5). In a later motion, the Agency moved to amend the same paragraph to include the definition of "person" found in OAR 839-015-0004(20). The forum granted the Agency's motions and denied Respondents' motion to strike paragraph five of the Notice of Intent.

45) Following the Agency's case-in-chief, Respondents moved to strike any references by witnesses to statements made by Alex Coronado. Respondents also made separate motions to dismiss paragraphs 3, 8, 9, 12, and 13 of the Notice of Intent. Respondents also renewed their previous motion to strike paragraph five of the Notice by moving to dismiss it for failure to state a claim and failure to put forward clear and convincing evidence to support the claim. Following argument, the ALJ denied Respondents' motion to strike references to Alex Coronado's statements and denied the motion to dismiss paragraphs 12 and 13 of the Agency's Notice. The ALJ reserved ruling on Respondents'

motions to dismiss paragraphs three, eight, and nine until the proposed order and reserved discussion on the motion to dismiss paragraph five until the close of hearing.

46) At the close of hearing, the ALJ reserved ruling on any anticipated post-hearing motions until the proposed order and ordered the participants to submit simultaneous written closing arguments no later than November 30, 2005. The ALJ ordered the Agency to submit any rebuttal to Respondent's closing argument no later than December 10, 2005. Respondents' request to submit "rebuttal" to the Agency's closing argument was denied. Additionally, after reconsidering her previous ruling, the ALJ requested that the participants submit simultaneous briefs addressing Respondents' motion to strike paragraph five of the Notice of Intent and the Agency's motions to amend to include definitions of the term "person" no later than November 30, 2005.

47) On November 22, 2005, the Hearings Unit received a letter from Respondents' counsel, dated November 18, addressed to the ALJ that included a "wrap-up of some of the remaining post trial issues." Counsel enclosed a post-hearing motion for summary judgment on the issue of minimum age and training requirements and renewed its motion to dismiss paragraphs 12 and 13 of the Notice of Intent on grounds that the Agency had failed to state a claim for relief and had waived its right

to seek revocation of Respondents' farm/forest labor contractor license. Counsel also included a copy of Judge Dickey's order denying Respondents' motion for a temporary restraining order. In the letter, counsel moved to strike witness Stan Wojtyla's testimony "regarding statements made to him by German Munoz and Israel Munoz" because it was "unsubstantiated and unreliable hearsay," and reiterated Respondents' motion at hearing to strike Alex Coronado's testimony for the same reasons.

48) The ALJ issued an order on November 23, 2005, establishing post-hearing timelines for the Agency's response to the motions for summary judgment and to dismiss, and reiterated the timeline for filing simultaneous briefs and submitting closing arguments and rebuttal. The order further stated that the ALJ "will rule on all post-hearing motions in the proposed order."

49) The Agency and Respondents timely filed written closing arguments. On November 30, 2005, the Agency filed a response to Respondents' motion to dismiss and motion for summary judgment, and, through counsel, a response to Respondents' motion to dismiss paragraph five of the Notice of Intent. On the same date, Respondents filed a memorandum of law in support of Respondents' motion to strike and a response to the Agency's motion to amend. Respondents also filed an "Affidavit of Robert C. Wil-

liamson Regarding Judge Dickey's August 2004 Order."

50) On December 12, 2005, the Hearings Unit received a letter addressed to the ALJ from Respondents' counsel that stated in pertinent part:

"Tendered herewith are documents for the forum's consideration.

"Replies to the two Motions to Dismiss are included for your review. The Department of Justice literally misses the point regarding the problems with paragraph 5; and in addition they choose to ignore the law as if it does not exist. [citation omitted]

"The Agency too misses the point in its response to our Motion to Dismiss Paragraphs 12 and 13, and grossly misinterprets OAR 839-015-0520.

"Enclosed also is the Respondents' last closing argument. You will find it brief and to the point and a clear demonstration of the Agency's failure to make its case at a preponderance of evidence standard let alone the higher standard of proof for fraudulent activity.

"I shared portions of the Agency's written closing with members of the bench and bar both in Salem and Portland. The personal attacks against me, my clients and witnesses are appalling. I don't know what invoked such a sense of personal hatred by Case Presenter Domas as revealed by

the writing. I can only hope that, evaluated in a professional sense, it must arise from the difficulties of her case.

"It was a long and tiring hearing but I felt it was conducted with relatively good order and organization and although the record is long it is complete with full regard and cite to the law and well developed facts.

"I know that the proposed order will take some time to prepare because of the required length of consideration by the forum; and in the interim I would like to have a complete copy of the hearing tapes for my own review. Do I need to request them from Etta Creech?

"In closing please enjoy a Merry Christmas."

51) On December 12, 2005, the forum received the Agency's rebuttal argument dated December 10, and Respondents' "Rebuttal to the Agency's Written Closing" dated December 8, 2005.

52) The hearing record closed on December 12, 2005.

53) On December 14, 2005, the ALJ issued an order "Denying Consideration of Respondents' Reply to the Agency's Response to Motion, Reply to the Agency's Brief, and Rebuttal to the Agency's Written Closing Argument. In the order, the ALJ addressed Respondents' request for the hearing tapes, and ruled, in pertinent part:

"As I advised the participants when the hearing concluded, I will provide copies of the hearing tapes to both participants, if they so request, after I issue the proposed order. Until then, the hearing tapes are part of the official record, which remains in my custody until I issue the proposed order for the Commissioner's consideration."

54) On March 30, 2006, the Hearings Unit received Respondents' motion for an order reopening the contested case hearing record to permit Respondents to offer new evidence that was not available at the time of hearing. Because the Agency's case presenter was not available to respond to Respondents' motion within seven days after service, the forum extended the filing deadline for the Agency's response to April 21, 2006, after which the Agency timely filed a response.

55) On August 25, 2006, the Hearings Unit received Respondents' motion to reconsider the forum's interim order regarding hearing tapes and motion to extend time for filing exceptions to the proposed order. On August 30, 2006, the Hearings Unit received the Agency's response to the motions. After considering the participants' arguments, the forum reconsidered its previous ruling and provided the participants with the hearing tapes following their subsequent written requests. The forum also extended the deadline for filing exceptions to the pro-

posed order to no later than 30 days from the date the proposed order issued.

56) The ALJ has reconsidered that part of the December 14, 2005, order regarding Respondents' rebuttal to the Agency's closing argument. Since the ALJ requested simultaneous written closing arguments without giving Respondents an opportunity to respond to the Agency's argument as would have happened had the participants given oral closing arguments, the ALJ has read and considered Respondents' rebuttal argument for the purposes of this order.

57) For reasons stated in the rulings on motions section of this Final Order, Respondents' motions to dismiss paragraphs 3, 8, 9, 12, and 13 of the Notice of Intent are **DENIED**.

58) For reasons stated in the opinion section of this Final Order, Respondents' motion to strike paragraph five of the Notice of Intent is **DENIED**.

59) The ALJ issued a proposed order on January 22, 2007, that notified the participants they were entitled to file exceptions to the proposed order within 30 days of its issuance. The Agency did not file exceptions. Respondent timely filed exceptions that are addressed in the opinion section of this Final Order.

#### **RULINGS ON MOTIONS**

#### **RESPONDENTS' MOTION TO DISMISS PARAGRAPHS THREE,**

#### **EIGHT, AND NINE OF AGENCY'S NOTICE OF INTENT**

*Paragraph Three:* Respondents argue that the allegations regarding Alex Coronado and Leticia Ayala "fail as a matter of pleading and fact." Respondents contend Coronado and Ayala were dispatched to fires in Nevada under a federal contract "not subject to the jurisdiction or the ability of the Agency to bring the complaint regarding violations under a federal dispatch." Respondents further argue that even if the Agency has jurisdiction, the federal contract did not arise under the Interagency Firefighting Crew Agreement ("Agreement") and the Agency failed to allege it as a separate contract. Respondents' arguments are not well founded.

First, the Commissioner's authority to regulate farm/forest labor contractors who recruit workers to perform forestation work out of state under federal contracts, particularly U. S. Forest Service ("USFS") contracts, is well established. *In the Matter of Manuel Galan*, 15 BOLI 106, 130-31 (1996); *In the Matter of Jose Linan*, 13 BOLI 24, 36 (1994). Under the ODF agreements, Respondents were required to obtain a farm labor contractor license with a forestation endorsement before recruiting workers to perform firefighting activities under government contracts. As a licensed farm/forest labor contractor, Respondents were at all times subject to ORS 658.405 to 658.503 and, therefore, subject

to the Commissioner's authority to regulate their out of state fire-fighting activities, including those in Nevada as alleged.

Second, the Agency's allegation that Coronado and Ayala were Mountain Forestry employees who were recruited and dispatched to perform firefighting activities on two USFS fires in Nevada without the required pack testing under an agreement with the Oregon Department of Forestry, "as a matter of fact," is subject to proof and not a basis for dismissal for failure to state a claim. Consequently, Respondents' motion to dismiss the allegations pertaining to Alex Coronado and Leticia Ayala in paragraph three is **DENIED**.

*Paragraph Eight:* Respondents contended at hearing that the Agency failed to state a claim because it made "no showing of the requirement to have an annual employment certificate." The Agency expressly alleged Respondents violated ORS 653.307 and OAR 839-021-0220 by employing at least seven minor children without applying for, obtaining, or posting an annual employment certificate. Both the statute and rule require an employer who hires minors to first obtain an annual employment certificate before employing minors. The Agency alleged facts that, if proven, constitute a per se violation of ORS 653.307 and OAR 839-021-0220. Respondents' motion to dismiss paragraph eight is **DENIED**.

*Paragraph Nine:* Respondents contended at hearing that the Agency failed to state a claim because it "did not offer proof that a minor engaged in a hazardous occupation." Notwithstanding Respondents' stipulation that one of Mountain Forestry's employees was less than 16 years when he engaged in firefighting activities in 2000, the Agency alleged sufficient facts to state a claim under OAR 839-021-0102(p). Respondents' motion to dismiss paragraph nine is **DENIED**.

**RESPONDENTS' POST-HEARING MOTION FOR RECONSIDERATION OF ORDER DENYING MOTION TO DISMISS PARAGRAPH 12 OF AGENCY'S NOTICE OF INTENT**

Respondents filed a post-hearing motion requesting, for the second time, reconsideration of the ALJ's order denying Respondents' motion to dismiss paragraph 12 of the Notice of Intent. In particular, Respondents requested reconsideration of the forum's ruling that OAR 839-015-0520(1) does not limit the Agency's authority under ORS 658.445(1). Without further consideration, the forum's October 13, 2005, order denying Respondents' motion to dismiss paragraph 12 of the Notice of Intent is hereby **AFFIRMED**. Respondents' second motion for reconsideration is **DENIED**.

**RESPONDENTS' POST-HEARING MOTION FOR AN ORDER DISMISSING PARAGRAPHS 12 AND 13 OF AGENCY'S NOTICE OF INTENT**

*Paragraphs 12 & 13:* In a post-hearing motion, Respondents renewed its motion to dismiss paragraph 12 and moved to dismiss paragraph 13 on the ground that the Agency waived its right to pursue license revocation under ORS 658.445(1) & (3) when it made no effort to correct the ALJ's failure to include license revocation as an issue when the issues were summarized during a pre-hearing conference and at the commencement of the hearing. In its response to the motion, the Agency argued that it made no waivers and that waiver is an intentional act that must be plainly and unequivocally manifested either "in terms or by such conduct that clearly indicates an intention to renounce a known privilege or power," citing *In the Matter of Rodrigo Ayala Ochoa, revised final order on reconsideration*, 25 BOLI 12, 35 (2004), *affirmed without opinion*, *Ochoa v. Bureau of Labor and Industries*, 196 Or App 639, 13 P3d 1212 (2004).

In order to establish that the Agency waived its right to litigate two of the allegations in its Notice of Intent, Respondents must show the Agency plainly and unequivocally manifested explicitly or implicitly *an intention* to renounce its power to do so. The forum notes that the first sentence in the Agency's Notice of Intent reads: **"THIS WILL NOTIFY YOU** that

the Commissioner of the Bureau of Labor and Industries intends to revoke/refuse to renew the farm/forest labor contractor license of Mountain Forestry, Inc. and Francisco Cisneros." Respondents requested a hearing on that issue that resulted in a license revocation proceeding. While at the outset of the hearing the ALJ may have inadvertently failed to state the obvious and, instead, recited the issues requiring resolution before determining whether or not to revoke Respondents' license, the forum finds the Agency's failure to speak up when the issues were summarized does not unequivocally manifest an intention to waive the very reason for the contested case hearing. Indeed, if the Agency had intended to relinquish its right to pursue license revocation and Respondents *believed* the Agency intended to waive its right, then the participants would not have wasted the forum's time, or the interpreter's time, litigating the issue to the fullest extent over a two and one half week period. Respondents' argument is disingenuous and is redolent of invited error. There is no basis for Respondents' contention that the Agency intentionally and unequivocally renounced its right to litigate the license revocation issue raised in the Notice of Intent.

Although Respondents aptly pointed out that waiver is separate and distinct from the "issue of notice," the forum is compelled to address the notice issue based on ORS 183.415(7) which requires that the presiding officer at the

start of hearing “explain the issues involved in the hearing and the matters that the parties must prove or disprove.” Respondents do not contend they had inadequate notice of the license revocation proceeding. However, lest there be any misunderstanding, the forum concludes that, despite the ORS 183.415(7) requirement, the ALJ’s failure to mention the proceeding’s purpose specifically, i.e., to determine if there was sufficient reason to refuse to renew or revoke Respondents’ license, did not impair the fairness of the proceeding or deprive Respondents of due process or a full and fair hearing on all of the issues properly set forth in the Notice of Hearing as required under ORS 183.415(10). As previously noted, the entire proceeding was based on the Agency’s Notice of Intent which squarely and unequivocally set forth the Agency’s intent to revoke Respondents’ farm/forest labor contractor license. Moreover, well after the ALJ summarized the alleged violations at hearing, Respondents sought to preserve certain constitutional issues by stating: “We believe the Agency’s position to revoke the license – license of Mountain Forestry and F. Cisneros would be a taking or a deprivation of a fundamental right under the Oregon and United States Constitution for both of these individuals and corporations for the right to pursue a trade or calling.” Later still, during cross-examination of a witness, Respondents’ counsel objected to the Agency’s question and stated:

“That’s an unfair characterization pretty far afield in litigation. I don’t know what it has to do with the notice of intent to revoke the license.” Respondents not only knew what the core issue was throughout this proceeding, they were zealously represented by counsel who fully litigated the issue.

For all of the reasons stated above, Respondents’ motion to dismiss paragraphs 12 and 13 is **DENIED**.

#### **RESPONDENTS’ MOTION TO REOPEN CONTESTED CASE RECORD TO ADMIT NEW EVIDENCE**

OAR 839-050-0410 provides:

“On the administrative law judge’s own motion or on the motion of a participant, the administrative law judge will reopen the record when the administrative law judge determines additional evidence is necessary to fully and fairly adjudicate the case. A participant requesting that the record be reopened to offer additional evidence must show good cause for not having provided the evidence before the record closed.”

Respondents moved to reopen the record to permit Respondents to offer a document that “was not released to the general public until March 20, 2006.” The document is a 28-page “Audit Report” issued by the U. S. Department of Agriculture (“USDA”) Office of Inspector General (“OIG”) in March 2006. The report “presents the results of the OIG’s review of

Forest Service (U. S. Forest Service) firefighting contract crews” and includes comments and recommendations based on OIG’s findings. Respondents contend the report 1) “shows the prevalence of records discrepancies throughout the industry, contrary to the Agency’s position regarding Respondents”; 2) “shows that ODF did not have specific experience requirements for supervisor personnel prior to 2003, contrary to Agency argument”; and 3) “rebukes the negative inference drawn by Steve Johnson’s testimony regarding the absence of training records from the NWSA database.” Respondents further contend that the report is “necessary for a full and fair adjudication of this case” and “shows that Respondents are well within the industry-wide margin of error for training record discrepancies.” Respondents further note that the report is necessary mitigating evidence.

In its response, the Agency contends that Respondents have not demonstrated good cause in that they did not submit an affidavit stating they were unaware of the federal audit at the time of hearing. To support its contention, the Agency proffered several reasons why Respondents may have been aware of the audit before the hearing record closed. Additionally, the Agency contends the proffered document is “not relevant, not controlling” and “does not stand for the propositions offered by Respondents.” The Agency points out that “the document actually shows ODF as

a model of how to do things correctly and efficiently” and that “there were problems with owners administering pack tests (as there was in this case) and that the owners were not doing a good job of self-policing the industry.” Finally, the Agency noted that the “main problem identified with USFS and ODF was inadequate resources and that is not an excuse for labor contracts [sic] to violate the law.”

Having considered the participants’ arguments and the proffered document, the forum concludes that the Audit Report, albeit interesting and informative about the industry, is not necessary to fully and fairly adjudicate this matter.

First, according to the report, the objective was to audit the USFS’s use of contract firefighting crews and evaluate its “direct administration of these contracts and its coordination with other parties that administer contracts for crews that fight wildfires on [Forest Service] land.” In the “results in brief” section of the report, the OIG “found that the [USFS] needed to improve contract oversight, strengthen training and experience requirements, address control weaknesses at wildfire suppression associations, improve language proficiency assessments, and coordinate with other Federal agencies to identify undocumented workers.” As the Agency pointed out, the report commended certain ODF practices and procedures and made recommendations to the USFS to

follow the example, e.g., "Modify the national contract to incorporate experience requirements from the ODF agreement" and "Adopt ODF's standardized field language assessment for national contract crews." However, none of that information is relevant to whether Respondents violated Oregon's farm/forest labor contracting statutes and rules.

Second, Respondents' contention that OIG concluded that discrepancies in the contractor records were widespread in the industry, and were "due to the lack of information and training by the administering agencies, such as ODF and the [USFS]," is simply not true. In fact, the OIG found that in a "self-certifying" industry, contractors were not performing well. Significantly, OIG noted: (1) "numerous performance problems with poorly trained and inexperienced crews under the PNWCG/ODF agreement";<sup>1</sup> (2) that contractors "certified qualifications for crewmembers who had not satisfied standards and requirements for their positions \* \* \* these records lacked documentation required for the individual firefighters' positions. For example, training certificates were

missing, task books were not completed properly, and firefighters were advanced to supervisory positions with inadequate work experience"; (3) that "since association officers and trainers may be the owners and employees of companies that provide firefighter contract crews, the associations may have a conflict of interest when performing duties that require independence \* \* \* Association instructors may be vulnerable to pressure from their companies to cut corners when they provide training, and the integrity of training and qualification records may be compromised when owners or employees of contract companies have unchecked access to association databases." Contrary to Respondents' contention, the upshot of the report was "serious control weaknesses" and lack of oversight by the government due, in part, to lack of resources. Third, the fact that other contractors in the same industry have similar performance problems does not mitigate the failure to comply with contract terms. By bidding on and accepting a contract award, Respondents represented they were able to perform under the contract. *In the Matter of Charles Hurt*, 18 BOLI 265, 276-77 (1999).

<sup>1</sup> The OIG also noted that "Since 2003, ODF personnel have performed pre-season reviews of contractors' qualification records \* \* \* and significantly enhanced this process in 2004 by adding more in depth compliance reviews throughout the year and in 2005 by monitoring pre-season work capacity fitness testing for a sample of contractors."

Notwithstanding Respondents' failure to submit an affidavit showing they had no knowledge of the federal audit until the document was released on March 20, 2006, the forum concludes the document is not necessary to fully and fairly adjudicate this case. Respondents' motion to reopen the

contested case hearing record is **DENIED**.

#### **OFFERS OF PROOF**

1) During witness Don Moritz's cross-examination, Respondents sought testimony concerning whether ODF found that contractors other than Mountain Forestry had used underage employees during 2000 through 2002. The Agency objected on the basis of relevance. Respondents did not satisfactorily explain the question's relevance and the ALJ sustained the Agency's objection. However, Respondents were allowed to elicit Moritz's response to the question as an offer of proof. In response to the question, Moritz stated he had no "action sheets" for those years and could not answer the question. In a related question, Respondents sought the same information for the year 2003 and the Agency renewed its objection to Respondents' line of questioning as irrelevant. The objection was sustained but Respondents were allowed to elicit Moritz's response as an offer of proof. Moritz testified that two contractors had received a notice of noncompliance for employing underage firefighters in 2003. The forum concludes that excluding the evidence did not violate the duty to conduct a full and fair inquiry under ORS 183.415(10), because it is not relevant to the issue of whether Mountain Forestry employed underage firefighters to fight wildfires. Moreover, even if it had been admitted, the evidence does not in any way alter the ulti-

mate findings and conclusions found herein. The forum hereby affirms both rulings.

2) During cross-examination, witness Don Moritz was asked if he was aware of a "provision in the law that exempts children who are working under their parents under the age of 16?" When he responded, "No, I'm not," he was asked, "If that were the law, would you find a violation of underage workers for Mountain Forestry?" The Agency objected on the ground that the question called for speculation. The ALJ sustained the objection. Respondents requested and were allowed to elicit Moritz's response as an offer of proof. Moritz was then asked, "If I told you there was an exception to the application of the rule that [V. Cisneros] must be 16, and you as a contract officer for [ODF] knew that to be the law, would you sanction Mountain Forestry for having an underage worker?" Moritz responded that he would "go to the Agreement for guidance on that." The forum concludes that excluding the evidence did not violate the duty to conduct a full and fair inquiry under ORS 183.415(10), because it was speculative and not relevant to the issue of whether Mountain Forestry employed underage firefighters. Moreover, even if it had been admitted, the evidence does not alter the ultimate findings and conclusions found herein. The forum hereby affirms the prior ruling.

3) During cross-examination, witness Don Moritz was asked, "If

you were to take evaluations from 2001 through the years 2004, and they were all good, would that lead you to the conclusion that the contractor was competent?" The Agency objected on the ground that the question called for a conclusion and speculation on Moritz's part. The ALJ sustained the objection. Respondents requested and were allowed to elicit Moritz's response as an offer of proof. Moritz was then asked, "If you had evaluations from 2000 to 2004 for contractors in which all these 224's were positive, would that lead you to believe they were competent?" Moritz responded, "Yes." Respondents requested that the testimony be admitted as substantive evidence "because [the Agency] has alleged character, competence and reliability." The ALJ reserved ruling on the offer until the proposed order. After considering the testimony, the forum concludes that the duty to conduct a full and fair inquiry under ORS 183.415(10) is not violated by excluding the testimony because it is not relevant to whether Respondents violated farm/forest labor contracting laws that would demonstrate they lack the character, competence and reliability to act as a farm/forest labor contractor. Even if the forum admitted the testimony, it does not alter the ultimate findings and conclusions found herein. Consequently, the testimony is not admitted as substantive evidence in this case.

4) Respondents subsequently asked Moritz, "For the years 2000, 2001, 2002, 2003, and 2004, if

you've got the 224 evaluations in and were to look at those for a contractor, and they were all positive, would that be a body of evidence saying that they are reliable?" The Agency again objected to the question on the ground it called for speculation. Respondents replied, "Same question, offer of proof." Moritz responded that "it would be an indicator that the people that evaluated them at the incident said that they gave them good reviews for their performance." Respondents' offer of proof continued with the following questions and responses:

"Q. [I]n the general scope of things, if you have 10 or 12 government officials spread in three to four different states all saying regarding a particular contract that they did a good job, they worked hard, would that be indicia of reliability? Would that be credible for your office? Yes or no? Would it be credible for your office?"

"A. Yes.

"Q. Now, you awarded Mountain Forestry a contract in 2005, did you not?"

"A. We did.

"Q. Given just what we have heard about the lack of negative evaluations, I'm going to ask you a hypothetical. If all the evaluations for Mountain Forestry were positive for the years 2000 through 2004, would that be a basis by which to award them the contract for 2005?"

"A. No.

"Q. And is that because you do not use these evaluations in awarding contracts?

"A. We don't review those for award unless there's been an issue involving them and we've done an investigation and had a conclusion to it. But we do not go back to the 224's for consideration of award.

"Q. Okay. And I think that's consistent with what you told us earlier. So if an incident comes up in some of these years, you may use that regarding an award? Isn't that what you just told me?

"A. No. I don't think I said that. I talked to you about future in 2006. That's not the current reality.

"Q. Okay. Well, let's talk about 2005. In the 2005 award, did your agency use the 224 evaluations for the award of contract to any contractor?

"A. No.

"Q. Okay. And you awarded Mountain Forestry a 2005 contract?

"A. That's correct.

"Q. And is it fair to say it was on the basis of past performance of responsiveness and responsibility?

"A. That's what we would award a solicitation to. Yes, that is a consideration.

"Q. Okay. Now, for the 2006 contract which you brought up,

are you going to use these 224 evaluations in assessing the award to contractors?"

At this point in Respondents' offer of proof, the Agency objected to further questioning about 2006 as less relevant than the previous questions. The ALJ did not allow Respondents to continue questioning about prospective contracts in 2006 as an offer of proof. After considering the testimony, the forum concludes that the duty to conduct a full and fair inquiry under ORS 183.415(10) is not violated by excluding the testimony because it is speculative and not relevant to whether Respondents violated farm/forest labor contracting laws that would demonstrate they lack the character, competence and reliability to act as a farm/forest labor contractor. Even if admitted, the evidence would not alter the ultimate findings and conclusions found herein. Consequently, the forum affirms the prior ruling and further finds Respondents were not prejudiced by the ALJ's refusal to allow testimony on prospective 2006 contracts as an offer of proof.

5) During cross-examination, witness Moritz was asked to read from a document that Respondents represented was a "224 evaluation form" prepared by an unidentified author and signed by Alex Coronado. The Agency objected based on Moritz's lack of knowledge about the document or its origin and because the document was part of Respondents' case in chief and not provided

previously in their case summary. Additionally, the Agency contended that the document was not relevant to the issues before the forum. Respondents did not satisfactorily explain why the document was not included in their case summary or how it was otherwise relevant and the ALJ sustained the Agency's objection. However, Respondents were allowed to summarize the comment portion of the document through Moritz as an offer of proof. Moritz summarized, stating, "The comment said he [Alex Coronado] did a – he – it said he was a knowledgeable crew boss. In one block he failed to communicate well, and in another area he needs to be more aware of where his crew is. That's what the evaluation says. Okay?" Respondents indicated their offer of proof was completed. After considering the testimony, the forum concludes that the duty to conduct a full and fair inquiry under ORS 183.415(10) is not violated by excluding the summary because Respondents failed to establish its relevance to any issues before the forum. Even if admitted, the evidence would not alter the ultimate findings and conclusions found herein. Consequently, the forum affirms the prior ruling.

6) During witness Michael Cox's direct examination, he was asked that "given the heightened requirements for crew bosses and squad bosses, would that be the year for contractors to begin to cheat, fudge, falsify records to present qualified crew bosses and squad bosses?" The Agency ob-

jected to the question on the ground it called for speculation. The ALJ sustained the objection but Respondents were allowed to elicit Cox's response to the question as an offer of proof. In response to the question, Cox stated, "That would have been the year that you would have – if you were going to cheat, you would have wanted to have the cheating accomplished before you got to records inspection in 2003." The ruling was thereafter reconsidered and the testimony was admitted as substantive evidence demonstrating Respondents' possible motive for falsifying records as alleged in the Notice of Intent.

7) During Michael Cox's direct examination, Respondents sought testimony concerning the contents of a document marked as exhibit R-20 and sought to have the testimony and document admitted as evidence. Both consisted of John Venaglia's statement in a letter addressed to F. Cisneros that "We have reviewed your response to our concerns \* \* \* and are satisfied \* \* \* that the requisite training, and pack tests were administered." The Agency had previously objected to the document on the ground that it was not included in Respondents' case summary and did not constitute impeachment. Respondents did not articulate a satisfactory reason for not providing the document in their case summary and the forum excluded it as evidence. However, Respondents were allowed to submit the document and Cox's testimony as an offer of proof. After considering both, the forum

concludes that the duty to conduct a full and fair inquiry under ORS 183.415(10) is not violated by excluding both based on their lack of relevance to any of the issues raised in the pleadings. Even if admitted, the evidence would not alter the ultimate findings and conclusions found herein. Consequently, the forum affirms the ALJ's prior ruling.

8) During witness S. Johnson's cross-examination, Respondents sought testimony concerning whether S. Johnson, in his "investigation of trainers in the 2004 year," had ever declared any of their "qualifications as void or any of their certifications for any task books as void or invalid." The Agency objected to the relevancy as to Mountain Forestry. Respondents did not satisfactorily explain the question's relevance and the ALJ sustained the Agency's objection. However, Respondents were allowed to elicit S. Johnson's response to the question as an offer of proof. In response to the question, S. Johnson stated he does not make those determinations or recommendations and, when asked if he reported any trainers "to a specific Pacific Northwest Wildfire Coordinator in the 2004 year," S. Johnson responded that he had reported none. The forum concludes that excluding the evidence did not violate the duty to conduct a full and fair inquiry under ORS 183.415(10), because it is not relevant to the issues set forth in the pleadings. Moreover, even if admitted, the evidence does not in any way alter the ultimate findings

and conclusions found herein. The forum hereby affirms the ruling.

9) In a related question, Respondents asked if he had reported any trainers in 2004 to "his superior, Ed Daniels." The Agency raised the same relevance objection which was sustained. Respondents were allowed to offer S. Johnson's response, which was "no," as an offer of proof. For the same reasons stated above, the forum concludes that excluding the evidence did not violate the duty to conduct a full and fair inquiry under ORS 183.415(10). Moreover, even if admitted, the evidence does not in any way alter the ultimate findings and conclusions found herein. The forum hereby affirms the ruling.

10) During cross-examination, Respondents asked S. Johnson whether "in the last half, from June through December of year 2004, after you had reported to the panel regarding a contractor's failure to correct task book mistakes, do you know of any time the panel did not take action against the contractor?" The Agency objected on the basis the question was outside the scope of direct. The ALJ sustained the objection and Respondents were allowed to elicit a response from S. Johnson as an offer of proof. S. Johnson stated, "First of all, I make the suggestions to correct task books. As to fix a problem, the problem is what gets referred to the panel, not the fix, which is how to correct, alter as you put it,

change the task book. That is how we remedy the problem. The problem is what gets referred to the panel, not whether or not they make the changes.” Respondents continued a line of questioning that was outside the scope of direct and after several Agency objections, the ALJ instructed Respondents to conclude the offer and reserve their questions for their case in chief. The forum concludes that excluding the evidence did not violate the duty to conduct a full and fair inquiry under ORS 183.415(10) because it is not relevant to any of the issues in this case. Even if it had been admitted, the evidence would not in any way alter the ultimate findings and conclusions found herein. The forum hereby affirms the prior ruling and further finds that Respondents were not prejudiced by the ALJ’s decision to end the offer of proof.

#### **FINDINGS OF FACT – THE MERITS**

1) At all times material, Respondent Francisco Cisneros (“F. Cisneros”) was president and majority shareholder of Respondent Mountain Forestry, Inc. (“Mountain Forestry”), an Oregon corporation, conducting business jointly as a licensed farm labor contractor with a forest endorsement (“farm/forest labor contractor”). Mountain Forestry incorporated in April 1988 and was licensed as a farm/forest labor contractor beginning in or around April 1989.

2) At all times material, Respondents conducted business from F. Cisneros’s home at 4570

Independence Highway, Independence, Oregon.

3) At all times material, Penny Cox was Mountain Forestry’s only other shareholder. From at least 2000 through 2004, Penny Cox owned 48 percent of Mountain Forestry.

4) At all times material, Michael Cox was Penny Cox’s husband and Mountain Forestry’s Fire Director and “overall boss” of Mountain Forestry’s “Fire Fighting Services.” Michael Cox has known F. Cisneros and his family since 1980. In or around 1982, Michael Cox incorporated C&H Reforesters, Inc. (“C&H”) and at some point became co-owner of another farm/forest labor contracting company, Ferguson Management. During the 1980’s, F. Cisneros worked for Ferguson Management until Mountain Forestry incorporated in 1988. F. Cisneros and Dennis Sickels co-owned Mountain Forestry until early 1990 when F. Cisneros “bought out” Sickels and Cox’s wife became a 48 percent shareholder in Mountain Forestry. Until approximately 1996, Mountain Forestry provided reforestation workers and firefighters primarily to Ferguson Management and some workers to C&H. Thereafter, until the late 1990’s, Mountain Forestry primarily “subcontracted” with C&H to “fulfill reforestation” and “firefighting” contracts in order “to accomplish C&H bids.” C&H also administered Mountain Forestry’s payroll “to make sure that everything [was] paid.” During that time, Mountain Forestry pro-

vided C&H with crews to perform reforestation work and supplied fire suppression crews “under C&H’s name.” C&H, in turn, paid F. Cisneros a “management fee.”

5) In 1998, C&H sold some of its stock to Bob Gardner. In or around the fall of 1999, Cox joined Mountain Forestry “to help [Respondents] get their company – get their legs under them” and to perform firefighting contracts under the Mountain Forestry name. While continuing to perform some duties for C&H, Cox helped Respondents get their books in order “so they could keep good records and get their accounts lined up.” By late 1999, Cox was working full time for Respondents as their “Fire Director” from an office located at F. Cisneros’s home in Independence.

6) As Mountain Forestry’s Fire Director, Cox’s primary responsibilities included organizing and maintaining firefighter files, scheduling refresher classes and S-131, S-230, S-290, and other upper level classes, ordering equipment for the fire crews, making sure firefighting crews were properly dispatched, and negotiating contracts “with [the Oregon Department of Forestry].” Cox’s duties also included preparing payroll, doing the banking and paying bills, and advising F. Cisneros “on the costs of doing certain types of work.” Cox “made payments to insurance companies” and “lined up bonds for bonded jobs.” Additionally, Cox accompanied F. Cisneros in the field to “get a feel for production

rates” and “to know how good the crew really was.” Cox prepared all of Mountain Forestry’s paperwork, including the renewal applications for Mountain Forestry’s farm/forest labor contracting license. F. Cisneros signed the renewal application forms and other documents that Cox prepared, but Cox regularly signed documents on Mountain Forestry’s behalf, including firefighter records, and had signatory authority for Mountain Forestry checks. Additionally, Cox co-signed the firefighting contracts as Mountain Forestry’s “Secretary” and for an unspecified period between 2000 and 2004, was Mountain Forestry’s corporate secretary.

7) In February or March 2000, Cox acquired the C&H firefighting crew records for Mountain Forestry. Since “all of Francisco’s people that had ever worked with him were at C&H working under that company, [Cox] had to get those records and have them moved over to Mountain Forestry.” The records included firefighting files for each worker recruited by Mountain Forestry to work for C&H.

8) Each year, beginning in March 2000, Respondents entered into an Interagency Firefighting Crew Agreement (“Agreement”) with the Oregon Department of Forestry (“ODF”). The purpose of the Agreement was to establish a listing of 20-person firefighting crews “for preparedness, initial attack, suppression and mop-up and

other fire support activities at wildland fires within the States of Oregon and Washington and elsewhere.” By entering into the Agreement each year, Respondents agreed to provide firefighting services to ODF under the terms and conditions of the Agreement without a guarantee of work. Under the Agreement, Respondents were independent contractors and each confirmed dispatch to a wildland fire constituted a separate and binding contract.

9) The parties to each Agreement included the State of Oregon, the State of Washington, and five federal agencies: the U. S. Forest Service (“USFS”), National Parks Service (“NPS”), Bureau of Land Management (“BLM”), Bureau of Indian Affairs (“BIA”), and U. S. Fish & Wildlife (“USFW”). At all times material, ODF was responsible for administering the Agreement and dispatching crews to wildland fires on behalf of Oregon, Washington, and the federal agencies. Each Agreement included additional requirements that were specific to each of those states and federal agencies. As a term and condition of the Agreement, Respondents agreed to “comply with all other federal, State, county and local laws, ordinances and regulations applicable to [the] agreement.”

10) As a term and condition of the 2000 through 2004 Agreements, Oregon contractors were required to obtain and maintain an Oregon farm/forest labor contrac-

tor license from BOLI before performing any work under the Agreements. From 2000 through 2004, Respondents applied annually to renew their farm/forest labor contractor license. On each renewal application, F. Cisneros signed a statement under oath that Respondents agreed to “at all times conduct the business of a farm and/or forest labor contractor in accordance with all applicable laws of the State of Oregon and rules of the Commissioner of the Bureau of Labor and Industries.”

11) The Agreements from 2000 through 2004 contained terms and definitions that remained substantially the same from year to year. Unless otherwise noted, the following terms and definitions applied to all of the Agreements:

**AGREEMENT: (or INTERAGENCY FIREFIGHTING CREW AGREEMENT)** The Invitation to Bid (ITB), including all exhibits and attachments to the ITB, and the **CONTRACTOR'S** Bid submit[ted] in response to the ITB thereto.

**BID:** An offer by a **CONTRACTOR** to provide one or more fire suppression Crews according to the terms and conditions of the Interagency Firefighting Crew Agreement. *This definition was added in 2001.*

**BID RATE:** The hourly rate at which a Crew is paid. *This definition was added in 2001.*

**BUSINESS ESTABLISHMENT: CONTRACTOR'S** base of operations located in the geographic

area in which **CONTRACTOR** submitted a quotation.

**CERTIFYING AUTHORITY:** **CONTRACTOR** or their designee who is responsible for all training, safety and employer requirements for Crew members. *This definition was added in 2001.*

**CONFIRMED:** The condition or status that exists when agreement is reached between **CONTRACTOR** and **GOVERNMENT** official that: 1) Crew(s) ordered are available; 2) agreement has been reached on time to start working and on estimated time of arrival at the Incident; 3) the Crew is specifically identified; 4) **GOVERNMENT** assignees request number and project order to the assignment.

**CONTRACT:** Same as **AGREEMENT**.

**CONTRACTOR:** An individual or legal entity with whom **GOVERNMENT** enters into an Agreement for the provision of firefighting services under the terms and conditions of this Agreement.

**CREW, TYPE II:** 20-person firefighting crew consisting of 16 Firefighter Type 2 (FFT2), and 1 Crew Boss (CRWB) and 3 Squad Bosses (SB); OR a 10-person crew consisting of 8 Firefighter Type 2 (FFT2), 1 Squad Boss (SB) and 1 Crew Boss (CRWB), and of whom 40% or more have at least one Season of firefighting experience. *This definition was*

*added in 2003 and changed the previous years' crew configuration from two to three squad bosses per 20-person crew.*

**CREW REPRESENTATIVE:** Agent/employee of **CONTRACTOR** responsible for the welfare of the Crew and who provides a contact between the Crew and the appropriate Incident Command Organization.

**CREW MEMBER** or **CREW PERSON:** Basic wildland firefighter, who is a resource used in the control and extinguishment of wildland fires and who works as a member of a Crew under the supervision of a higher qualified individual.

**GOVERNMENT:** The party for whom **CONTRACTOR** is performing firefighting services and who has jurisdiction over a fire, which may include any of the following agencies, either singly or in combination: Oregon Department of Forestry (ODF), Washington Department of Natural Resources (WDNR), United State Forest Service (USFS), National Parks Service (NPS), Bureau of Land Management (BLM), and Bureau of Indian Affairs (BIA), and United States Fish & Wildlife Service (USF&WS).

**GOVERNMENT REPRESENTATIVE:** Any designated employee of one of the agencies listed under the definition of **GOVERNMENT**.

**INCIDENT:** Emergency or wild-fire support activities and

events managed by **GOVERNMENT**. *This definition was added in 2001.*

**INCIDENT COMMANDER: GOVERNMENT** Representative with responsibility for the overall management of the Incident, including evaluation and coordination of the status of Crews participating in the Incident. *This definition was added in 2001.*

**INCIDENT MANAGEMENT TEAM: GOVERNMENT** Representatives responsible for managing an Incident. *This definition was added in 2001.*

**INTERAGENCY CONTRACT REPRESENTATIVE (IACR): GOVERNMENT** agent/employee responsible for assisting in the administration of the Agreement.

**OPERATIONAL PERIOD:** A period of time (usually eight or twelve hours) determined for each Incident and which serves as the basis for determining the length of time of a Shift. *This definition was added in 2003.*

**POINT OF HIRE [AKA DISPATCH LOCATION]:** The physical location from which a Crew is hired, which may be the Dispatch Location, an Incident managed by **GOVERNMENT**, or another location agreed upon by **CONTRACTOR** and **GOVERNMENT**.

**POSITION TASK BOOK (PTB):** A component of the Wildland and Prescribed Fire Qualification System that documents the

critical tasks required to perform Type II Crew position tasks and the individual Crew Member's ability to perform such tasks (See Exhibit J). The PTB is described in greater detail in the National Interagency Incident Management System publication PMS 310-1, Wildland and Prescribed Fire Qualification System Guide. *This definition was added in 2003.*

**PREPAREDNESS:** Activities assigned in advance of fire occurrence to ensure effective suppression action.

**PRESUPPRESSION:** Activities assigned in advance of fire occurrence to ensure effective suppression action.

**RESOURCE ORDER REQUEST:** Form used by **GOVERNMENT** to record resource order from an Incident for personnel, supplies, and equipment. *This definition was added in 2001.*

**SEASON:** Designation of a period of time of indeterminate length, within which a firefighter has documented satisfactory performance on at least three (3) Type 3, Type 2 or Type 1 Incident assignments that included hotline activities and constituted at least fifteen (15) Operational Periods. *This definition was added in 2003.*

**SINGLE RESOURCE BOSS-CREW (CRWB):** Individual responsible for supervising and directing a fire suppression Crew.

**SHIFT:** One continuous 8 to 16-hour period of time in a 24-hour period.

**TRAINEE:** An individual who is preparing to qualify for a Crew position. Trainee status requires that all required training courses and prerequisite experience has been completed prior to initiation of a Position Task Book, following which the Trainee is eligible for on-the-job training, task evaluation and position performance evaluation. *This definition was added in 2003.*

The definitions that were added in 2001 and 2003 were applicable to the subsequent Agreements through 2004.

12) The Agreements from 2000 through 2004 contained a provision describing the work environment which stated, in pertinent part:

“The work required under this Agreement is performed in a forest and rangeland environment in steep terrain where surfaces may be extremely uneven, rocky, covered with thick tangled vegetation, etc. Temperatures are frequently extreme, either from the weather or from the fire. Smoke and dust conditions are frequently severe. Hazardous nature of the work requires that protective clothing be worn \* \* \*.”

13) At all times material, the State of Oregon designated firefighting as a hazardous occupation. The minimum age for

firefighters in Oregon was and still is 16 years old. The 2000 through 2002 ODF Agreements did not specify a minimum age requirement for firefighters and Respondents were subject to Oregon’s minimum age requirement. In 2003 and 2004, the Agreements added a provision to section 4.1.3 that stated: “All Crew Members provided by **CONTRACTOR** under this Agreement shall be at least 18 years of age.”

14) From 2000 through 2002, it was common practice and “quite prevalent” for contractors to hire and deploy 16 year old firefighters to wildfire incidents.

15) At all times material, the State of Oregon required employers to obtain a validated employment certificate from BOLI before employing minors from 14 through 17 years old in Oregon. Applications for an employment certificate are available upon request at the BOLI offices. After a completed application is returned, BOLI must either deny the application, stating the reasons for the denial, or issue a validated employment certificate to the employer. The employer must then post the employment certificate in a conspicuous place where all employees can readily see it. If the employer employs minors to perform work at more than one location, a copy of the employment certificate must be posted at the place where the minor receives management direction and control. As long as the employer continues to employ minors, the employer must apply for the em-

ployment certificate once each year by submitting a renewal application.

16) After researching BOLI records, BOLI compliance specialist Wojtyla found no record showing that Respondents had applied for or that BOLI had ever issued Respondents an employment certificate to employ minors in Oregon.

17) Under the 2000 through 2002 Agreements, the standard configuration for a firefighting crew was 1 Single Resource Crew Boss ("CRWB" or "SRB" or "crew boss"), 2 Squad Boss/Firefighter Type 1 ("FFT1" or "SQB" or "SB" or "squad boss") crew members, and 17 Firefighter Type 2 ("FFT2" or "entry level firefighter") crew members. In 2003 and 2004, the 20-person crew configuration changed to 1 CRWB crew boss, 3 FFT1 squad bosses, and 16 FFT2 entry level firefighters.<sup>2</sup> Entry level firefighters with no experience could make up 60 percent of the firefighter crew, but 40 percent of the crew had to consist of returning firefighters with more than one year of firefighting experience.

18) The 2000 through 2004 Agreements required that each firefighting crew consist of 20 "properly trained individuals."

When monitoring the training and experience component of the Agreement, ODF relied on the Program Management System ("PMS") 310-1, published by the National Wildfire Coordinating Group, which prescribes the standards and guidelines for the firefighter training and experience set forth in the Agreement. Training in accordance with the Agreement included classroom and supervised on-the-job training, which included on-the-job performance evaluations. Under the Agreement, contractors were responsible for qualifying and certifying their employees as firefighters in accordance with the Agreement specifications.

19) Whether for the entry level firefighter position or the squad or crew boss positions, firefighters began their training by taking required classes specific to each position level. The purpose of the coursework was to teach firefighters basic firefighting skills and to prepare for hazardous work conditions. Upper level course work was designed to teach supervisory skills necessary for managing firefighting crews under hazardous conditions. The Agreement only recognized instructors designated and approved by a recognized national or local training association or a government approved educational institution. A training association or educational institution's authorization to train firefighters for ODF assignments derived from a Memorandum of Understanding ("MOU") executed by ODF with the Pacific Northwest Wildfire Co-

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<sup>2</sup> Under certain circumstances not relevant to this case, ODF could request and approve a crew of less than 20 firefighters as long as the ratio of supervisory personnel to entry level firefighters remained the same.

ordination Group (“PNWCG”). Under the MOU, the trainers agree they will meet the course content and instructor standards set forth in the PMS guidelines.

20) In addition to the classroom training, trainees for any firefighter position were required to complete the performance tasks set forth in the Position Task Book (“PTB” or “task book”).<sup>3</sup> The PTB (hereinafter “task book”) is a component of the Wildland and Prescribed Fire Qualification System Guide Subsystem and is administered by the contractor to qualify employees to meet the position requirements set forth in the Agreement. The contractor is responsible for obtaining and issuing a task book appropriate for the position each employee will perform on a crew. A firefighter in training for a position or working on an “evaluation assignment” must carry the task book at all times while in training or during the evaluation period. Those who are already qualified in their position are not required to carry their completed task book. Upon completion of the task book, the contractor is responsible for certifying the firefighter-in-training for the position the firefighter trained to perform on the crew by using the procedures set forth in the task book. The Agreements specify that ODF is not involved in task book administration and its per-

sonnel will not sign the certification portion of the task book. However, before a firefighter is certified for the CRWB crew boss position, a government supervisor must review, approve, and sign the performance evaluation assignment.

21) From 2000 through 2002, trainees for any firefighter position were paid by the contractor while in training and their pay was not chargeable to the government. In 2003 and 2004, the Agreements added the provision: “Each trainee shall be a paid Member of the 20-person Crew confirmed available to **GOVERNMENT** at the time the dispatch assignment was accepted.”

22) From 2000 through 2004, Michael Cox prepared and filed the company manifests presented to ODF in June each year and the crew manifests that were presented to ODF upon arrival at the wildfire site.

#### **TRAINING REQUIREMENTS AND PROCEDURES: 2000 – 2002 AGREEMENTS**

23) To become certified as a FFT2 entry level firefighter, individuals were required to complete the Firefighter Training (S-130) and Introduction to Fire Behavior (S-190) classes. Prior experience was not a prerequisite, but all FFT2’s were required to successfully complete the classroom training and performance tasks set forth in the appropriate task book before assignment to a wildland fire.

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<sup>3</sup> Prior to 2003, the Agreements referred to task books as either “performance” or “position” task books.

24) To become certified as a FFT1 advanced firefighter squad boss, individuals were required to complete the S-130 and S-190 classes. No additional classroom training was required until 2001 when the requirement to successfully complete the Advanced Firefighter Training class (S-131) was added to the Agreement. All FFT1's were required to successfully complete the classroom training, demonstrate satisfactory performance as a FFT2, and demonstrate satisfactory position performance by completing the performance tasks set forth in the appropriate task book, including supervising a minimum of five firefighters on a wildfire incident, within the previous five years, before certification as a squad boss. The 2000 Agreement stated that meeting the position qualification standards for FFT1 squad boss was "required in the progression of qualifications from FFT2 to CRWB."

25) To become certified as a CRWB crew boss, individuals were required to successfully complete the Intermediate Wildland Fire Behavior (S-290) class in addition to the S-130, S-190, and S-131 classes (effective 2001). For certification, individuals also were required to demonstrate satisfactory performance as a FFT1 and successfully complete the performance tasks set forth in the appropriate task book, including satisfactory position performance as a crew boss, supervising a minimum of 18 firefighters on a wildland fire, within the previous five years.

26) The 2000 through 2002 Agreements included pre-incident, incident, and post-incident procedures that dictated how contractors were to use the task book for qualifying their employees to meet the specifications in the Agreements.

*Pre-Incident Procedures*

27) Under the Agreements, *prior to* assigning the employee to a "wildfire incident," contractors were responsible for ensuring that each employee was issued a task book appropriate to the position using a three step procedure. Step one instructs the contractor to obtain the task books from the National Interagency Fire Center ("NIFC") and recommends that "the Task Book Administrator's Guide, PMS 330-1 be obtained" as well. Step two instructs the contractor to issue the task book to employees with the inside cover "Assigned To" and "Initiated By" information appropriately filled out. Step three instructs the contractor to assure that each employee has completed "all required training" for their position.

*Incident Procedures*

28) After assignment to a wildfire incident, in addition to the general provisions pertaining to PTB administration,<sup>4</sup> the following incident procedures applied:

**"CONTRACTORS** may use **GOVERNMENT** incidents, for which they are requested or

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<sup>4</sup> See Finding of Fact – The Merits 19 for general provisions.

assigned, to qualify and certify employees for FFT1 and CRWB positions. Only one training OR evaluation assignment will be permitted per crew on each incident. The coach/evaluator must, as a minimum, be certified in the position they are coaching or evaluating and will be paid as part of the contracted crew. The trainee will be in addition to the contracted crew and paid by the **CONTRACTOR** (not charged to the **GOVERNMENT**).

“a. **FFT2** personnel must be certified prior to arrival at the incident. No task book administration at an incident is required.

“b. **FFT1** personnel require a performance evaluation assignment on a wildfire to qualify for certification. The **GOVERNMENT** will NOT participate in the administration of the FFT1 PTB’s nor verify evaluation assignments.

“c. **CRWB** personnel require a performance evaluation assignment on a wildfire to qualify for certification. Refer to the procedures that follow for specific steps for PTB administration for these assignments.”

The procedures that followed included a five step process for evaluating CRWB trainees that contained the following provisions:

“**Step 1: CONTRACTORS** must identify any trainee in an evaluation assignment to the Incident

Management Team at initial check-in. An incident performance evaluation form should also be requested and obtained at this time.

**Step 2:** During the assignment, the **CONTRACTOR’S** evaluator will observe the trainee’s performance as the crew boss and initial all tasks in the PTB that the trainee demonstrates successfully. The incident and evaluation assignment should be of sufficient duration and complexity so that the trainee has the opportunity to demonstrate all the tasks of the position. If the trainee does not have the opportunity to demonstrate all the tasks, a second evaluation assignment will be necessary.

“**Step 3:** Upon completion of the evaluation assignment, the **CONTRACTOR’S** evaluator will complete an ‘Evaluation Record’ in the back of the PTB.

“**Step 4:** The **CONTRACTOR’S** evaluator will ask their **GOVERNMENT** supervisor \* \* \* to state in writing, under the PTB Evaluation Record completed by the evaluator, whether or not the incident was of sufficient complexity and duration to provide a valid opportunity to evaluate the CRWB trainee’s performance. The **GOVERNMENT** supervisor will sign the record next to their statement.

“1. If the **GOVERNMENT** supervisor states that the incident **was not** adequate to evaluate the CRWB trainee’s performance, a second evaluation assignment will

be necessary before individual can be certified in the position.

"2. If the **GOVERNMENT** supervisor states that the incident **was** adequate to evaluate the CRWB trainee's performance, the **CONTRACTOR'S** evaluator should complete the 'Final Evaluator's Verification' portion of the inside front cover of the PTB.

"**Step 5:** The **CONTRACTOR'S** evaluator will complete a written rating of the trainee's performance, using the **GOVERNMENT'S** evaluation form that was provided during the initial check-in, and provide the Incident Management Team with a copy. A copy of this rating shall be kept by the **CONTRACTOR** to be included with the employee's training records. The IMT will maintain a copy with the final incident records."

#### *Post Incident Procedures*

29) Following an incident, the contractor was responsible for certifying their employees' task books by using the following five step procedure:

"Step 1: CONTRACTOR reviews all information written in each PTB to assure it has been properly completed. This review should include checking that an evaluator has initialed all tasks, the Evaluation Records in the back of the PTB have been appropriately completed, that GOVERNMENT supervisor's statements have been obtained, and the Final Evaluator's Verification has been completed.

"Step 2: CONTRACTOR reviews each employee's training and experience records to assure all other qualification standards for the position, as listed in EXHIBIT K are met.

"Step 3: When all EXHIBIT K qualification standards are met, CONTRACTOR completes the 'Agency Certification' portion of the inside cover of the PTB.

"Step 4: Place a copy of the completed PTB in the employee's training file.

"Step 5: If an individual leaves a CONTRACTOR'S employ, the original PTB will be given to the departing individual. It is recommended that the CONTRACTOR for future reference purposes keep a copy."

30) To demonstrate satisfactory performance in a position under the PMS 310-1 guidelines, trainees were required to perform work on "one or more fires" after completing the task book before becoming qualified in a particular position. After qualifying for a position, the firefighter was required to perform work on at least one additional fire in that position before training for the next position.

31) Between 2000 and 2002, contractors, including Mountain Forestry, were "short-cutting" the training process by permitting trainees to begin and complete a task book for one position on one fire and begin and complete a new task book for another position on the next fire. In

many cases, contractors had entry level firefighters who began and completed task books as a FFT2 on one fire and began and completed task books as a FFT1 squad boss on the next fire without performing any work on a fire as a FFT2.

32) Due to a particularly “bad fire season” in 2002, ODF requested increased fire crews and contractors were “rushing” firefighters through the promotional process to get the extra crews out to the fires. During that time, ODF became concerned about the training and safety issues created by the rapid progression of inexperienced firefighters and revamped its 2003 Agreement to bolster existing requirements and implement more stringent training requirements.

33) Each year, ODF conducted meetings at several sites in October or November to discuss all changes in the upcoming Agreements. All interested contractors were notified of the meetings and could attend one in their area to update their knowledge and understanding of the Agreement specifications.

#### **TRAINING REQUIREMENTS AND PROCEDURES: 2003 – 2004 AGREEMENTS**

34) In the 2003 and 2004 Agreements, ODF added a minimum age requirement requiring that all fire crew members be at least 18 years old. The Agreements also added a requirement that firefighters engage in a prescribed amount of “fire

suppression action on active flame (hotline)” before promoting to the next level. The Agreements reinforced the original requirements by detailing the training sequence for each position, including the number of incidents and “operational periods”<sup>5</sup> required for qualification.

35) Except for the age requirement, the requirements for certification as an entry level firefighter FFT2 did not change in the 2003 and 2004 Agreements. As in previous years, no prior experience was necessary, but to become FFT2 certified, individuals were required to successfully complete the classroom training (S-130 and S-190 classes) and the performance tasks set forth in the PTB before assignment to a wildland fire. The sequence for position qualification as a FFT2 was:

“1. Complete S-130/S-190 training and FFT2 Task Book.

“2. Pass pack test.

“3. **Become certified as an FFT2.**

“4. Work on at least three wild-fire Incidents that include hotline activities and total at least fifteen (15) Operational Periods, 10 of them on Type 2 or 1 Incidents. This meets requirement for satisfactory performance as FFT2 and one season of experience.

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<sup>5</sup> See Finding of Fact – The Merits 11 for “operational periods” definition.

"5. Eligible to be considered for FFT1 **Trainee** once #1 through #4 above are met."

36) To become FFT1 certified in 2003 and 2004, individuals were required to successfully complete the following sequence:

"1. Complete S-131.

"2. FFT1 task book is issued following S-131 training making the firefighter an FFT1 Trainee.

"3. Complete annual refresher training prior to next season.

"4. Pass pack test prior to next season.

"5. As an FFT1 Trainee, work on at least three (3) training/evaluation assignments on Type 3, 2 or 1 wildfire Incidents that included hotline activities and total at least 15 Operational Periods, 10 of them on Type 2 or 1 Incidents and complete the FFT1 task book. This meets requirement for satisfactory position performance as an FFT1.

"6. **Become certified as a FFT1/Squad Boss.**

"7. Work on an additional three (3) wildfire Incidents that included hotline activities and total at least 15 Operational Periods, 10 of them on Type 3, 2 or 1 fires. This meets the satisfactory performance requirement as FFT1/Squad Boss.

"8. Eligible to be considered for **CRWB Trainee** once #1 through #7 above are met."

37) To become certified as a CRWB crew boss in 2003 and 2004, individuals were required to successfully complete the following sequence:

"1. Complete S-230 and S-290. [The S-290 (Intermediate Fire Behavior) class was added in the 2003 Agreement and had to be completed by December 31, 2004.]

"2. CRWB task book is issued following S-230 & S-290 training making the firefighter a CRWB Trainee.

"3. Complete Annual Refresher training prior to next fire season.

"4. Pass pack test prior to next fire season.

"5. As a CRWB Trainee, work on at least three (3) training/evaluation assignments on Type 3, 2 or 1 wildfire Incidents that included hotline activities and total at least 15 Operational Periods, 10 of them on Type 2 or 1 Incidents and complete the CRWB task book. This meets requirement for satisfactory position performance as a CRWB.

"6. **Become certified as a CRWB.**"

38) The 2003 and 2004 Agreements clarified requirements applicable to the 2000 through 2002 Agreements by specifically noting that 1) "all required training for a position must be completed before the firefighter can begin working on the task book for that position"; 2) "a firefighter may

work on only one task book at a time"; and 3) all required prerequisite experience must be completed before the firefighter can begin working on the task book for the next higher position."

39) The 2000 through 2004 Agreements required that all firefighters in every position successfully complete an annual refresher class prior to the next fire season. In the 2000 through 2002 Agreements, the annual refresher training consisted of "Standards for Survival" and "Your Fire Shelter" classes. Under the 2003 and 2004 Agreements, some firefighters, depending on their position, could satisfy the annual refresher requirement by successfully completing the "Standards for Survival" or "Look Up, Look Down" or "LCES (S-134)" classes, in addition to the mandatory "Your Fire Shelter" class. The annual refresher training also included updates on fire behavior and safety issues.

40) The 2000 through 2004 Agreements required that a firefighter must have at least one qualifying assignment every five years to maintain a current certification in a position. The Agreements also required that all trainees be identified at check-in and on the crew manifest.

41) Between 2000 and 2004, firefighting contracts were awarded after a bidding process. In response to an invitation to bid, contractors submitted a bid stating how many crews they expected to make available for dispatch. Contractors were required to make

their company roster available for an initial inspection prior to the bid awards in or around May of each year. An ODF representative reviewed company rosters to determine how many supervisory personnel the contractors had listed. The bid was awarded in or around May based on the number of supervisors listed on the roster. The information was passed along to ODF's training manager, whose job was to verify the qualified supervisory personnel and the supporting entry level firefighters upon a contractor's request or at ODF's instigation as time and resources permitted. Prior to 2003, other than the initial records inspection to determine supervisory personnel, ODF relied on a contractor's representations and did not routinely audit contractors. However, ODF turned away crews in June if a company manifest failed to reflect enough qualified entry level firefighters to support the crews listed. ODF did not view discrepancies between the company rosters presented in May and the crew manifest presented in June as deliberate misrepresentations because the rosters were usually based on the contractor's anticipated crew numbers and sometimes employees failed to return for the next fire season. However, if it was determined that a company manifest was based on false documents created by the contractor, ODF could terminate the Agreement.

#### **PACK TESTS**

42) The 2000 through 2004 Agreements required that all fire-

fighters pass the "Work Capacity Fitness Test" at the "arduous" level of physical fitness by taking a "pack test." The Agreements incorporated the work capacity guidelines published by the USFS. The pack test's purpose is to measure endurance and "requires completing a three (3) mile hike with a 45-pound pack in 45 minutes." Under the Agreements, contractors were required to administer annual pack tests to all firefighter crew members prior to providing the June 1 crew manifest and to include the score for each crew member and the date the test was taken on the manifest.<sup>6</sup>

43) Under the 2000 through 2004 Agreements, contractors were responsible for administering the pack tests. At that time, pack tests could be given by a company owner, a qualified employee of the company owner, e.g., squad or crew boss, or a certified trainer. The pack test was usually conducted on an oval, track-like, course or by sending the firefighter "out and back," i.e., "a mile and a half down a road and back." The "administering official" conducting the pack test was required to monitor the test from start to finish. On an oval track, the administering official can stand in the middle of the oval and observe everyone taking the pack test. On an "out and back," the administer-

ing official either must move with those taking the test or enlist additional help to monitor them. The administering official is monitoring to ensure that those taking the pack test are walking and not running and that they are carrying the 45 pound packs for the duration of the test. On an "out and back" the official is also monitoring to ensure the test taker makes it to the mile and a half marker and back. The test is conducted on a "pass/fail" basis. A score of 45 or less is a passing score.

44) Between 2000 and 2004, pack tests were sometimes given in conjunction with the annual refresher training for the contractor and crew's convenience. During that period, trainers sometimes sent ODF a list of those attending the training and included pack test scores representing that the trainees had been given pack tests following their training. The trainers sent the training rosters to the contractors showing the names and identification numbers of those who completed the refresher and the pack test scores of those who took a pack test. If for any reason a trainee did not take a pack test, the trainer either left the score box blank or wrote "NT" signifying "not taken." Usually, the trainers included pack test information on the training certificates issued to the trainees. Under the Agreements, the contractors were ultimately responsible for ensuring the pack tests were properly administered and, unless ODF received a complaint indicating

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<sup>6</sup> Contractors were required to administer pack tests to any new crew members hired after June 1 before dispatching them to a fire.

otherwise, it relied on the contractor's representations.

45) Before 2002, contractors were not required to notify ODF when they administered pack tests. In 2002, subsection 3.8.2 was added to the Agreement and stated, in pertinent part:

"**CONTRACTOR** shall report to the [ODF] Fire Operations Unit in writing \* \* \* at least 3 working days \* \* \* prior to administering each test. The report shall include the date, time, address, estimated number of people taking the pack test, and name and phone number of the administering official. Within 7 calendar days following administration of each test, **CONTRACTOR** shall report to the Fire Operations Unit the names and company affiliation of each person who passed or failed the test. **GOVERNMENT** reserves the right to monitor the administration of the tests for compliance with 'Work Capacity Fitness Test Instructor's Guide.' If the test was not conducted as required, each **CONTRACTOR** with an employee present for testing will receive a Notice of Noncompliance. A second failure to comply with testing standards or tests performed without the 3-day notice will result in administrative action, up to and including termination of the Agreement."

Except for a slight change in language, the addition of a waiver for emergency training needs, and a

change from a three to a five day notice requirement, the 2003 and 2004 Agreements included substantially the same pack test provisions as set forth in the 2002 Agreement.

46) The required advance pack test notice included the date, time, and address of the pack test and an estimated number of people taking the pack test. Following the pack test, contractors were required to provide the names and company affiliations of those who passed and failed the test. Although ODF discouraged the practice, contractors were in compliance with the notice requirements if they hired certified trainers to administer the pack tests in conjunction with the classroom training and notified ODF by using the training rosters with the requisite information.

47) Under the 2000 through 2004 Agreements, all firefighters were required to carry a photo identification card, also known as an "incident qualification card," "red card," or "crew identification card," that included the firefighter's name and photograph, social security number, list of positions for which the firefighter was qualified, and the date the firefighter passed the pack test. A red or blue dot on the card designated the firefighter as a supervisor. The back side of the card consisted of a list of the firefighter's training and training dates. The Agreements required that the "certifying authority," i.e., the company owner, sign the identification card certifying that the

firefighter “has met all training requirements of [the] Agreement.”

#### ODF INVESTIGATION

48) In or around July 2004, Mountain Forestry employee Alex Coronado went to the ODF office and told ODF contract officers Patricia Morgan and Don Moritz that he had worked on a federal wildfire in Reno, Nevada, and had been dispatched to the fire without taking a pack test. He told Moritz and Morgan that Mountain Forestry fired him after “he turned down a dispatch while he followed rest standards.” He also complained about food and housing conditions that were covered under a different contract. Shortly thereafter, Moritz contacted ODF compliance specialist S. Johnson to investigate the validity of Coronado’s complaint. At that time, S. Johnson was in the midst of a records audit involving several contractors, including Mountain Forestry.

49) S. Johnson’s audits included reviewing contractor files and filing systems, bookkeeping methods, and recordkeeping systems. He also examined each contractor’s database to see what kind of database was used, who had access to it, and how it was secured. His audits also included inspecting the premises for required postings and licenses. As part of his records inspection, S. Johnson audited individual firefighter files to verify their qualifications. Due to the large number of contractors operating under the Agreement, he selected random files to audit based on

company size. With a small company, he reviewed 100 percent of the supervisory files (FFT1 and CRWB) and 10 percent of the entry level firefighter (FFT2) files. With the larger companies, he audited only 10 percent of the supervisory files as well as 10 percent of the FFT2 firefighter files. S. Johnson could spend from four hours to a full day auditing individual files, depending upon the number of problems with the files. Usually he needed at least four hours to examine 20 files. He generally notified contractors of his visit on the day of the audit in order to get a sense of their actual practices.

50) Although he had audited contractors previously as part of his ODF duties, his compliance specialist position was created in 2004 to increase ODF’s ability to monitor the growing number of firefighter crew contractors. His primary responsibility was to audit approximately 90 contractors and inspect the records of approximately 6,000 firefighters in Oregon and Washington. At all material times, he was the only person auditing contractors for ODF in that region.

51) S. Johnson began an audit at the Mountain Forestry office in Independence on or about July 7, 2004. F. Cisneros’s daughter, Leticia, was the only Mountain Forestry employee present when he arrived and she identified herself as the bookkeeper and dispatcher. After examining Mountain Forestry’s database, S. Johnson observed

that it was susceptible to manipulation. The database was not secured by a “user name and password” and was set up in a manner allowing anyone access and the opportunity to change dates, test scores, and information in individual files, including crew identification card information. Leticia Cisneros acknowledged that anyone had access to the database and allowed S. Johnson to enter the database on his own and he was able to observe files and photographs of firefighters taken and downloaded into the database by Mountain Forestry employees. Leticia Cisneros explained to him that Mountain Forestry matched the photographs with information in the database to create its own crew identification cards. At that time, contractors were not prohibited from making their own identification cards, but S. Johnson was concerned about Mountain Forestry’s database security issues because “anyone [could] go in and enter pack test information or other things in that file that – with no documentation.”

52) At some point during the Mountain Forestry audit, Moritz called S. Johnson and told him about Alex Coronado’s complaint and asked him to investigate. At that point, the audit developed into an ongoing investigation of Mountain Forestry’s practices and procedures. Over the next three days, S. Johnson examined Mountain Forestry’s 2004 company manifests and training records and examined several firefighter files with F. Cisneros and Michael Cox present. He

found possible infringements in three areas: pack testing, training certification, and the use of underage firefighters. During his investigation, S. Johnson interviewed former and current Mountain Forestry employees, Alex Coronado, Virgil Urena, Jose Avila, Leticia Cisneros, Brandon Creson, Benjamin Jones, and company officials, Michael Cox, and F. Cisneros. He also interviewed Bob Gardner from C&H Reforesters and Addison “Dick” Johnson (“A. Johnson”), owner of the APIFFI training association. His interviews primarily focused on reconciling the discrepancies he found in the company and crew manifests, training rosters, and firefighter files. Many of the discrepancies arose out of the 2004 Agreement, but as his investigation continued, he uncovered problems in some of the files that dated back to the 2000 through 2003 Agreements.

#### ***Pack Test Issues***

53) On or about July 8, 2004, S. Johnson interviewed Mountain Forestry employee, Virgil Urena, about Alex Coronado’s complaint. S. Johnson asked him about his credentials and Urena told S. Johnson that he had obtained certification as a trainer under A. Johnson who is part of the APIFFI training association in Bend, Oregon. Urena, whose office was located at a Mountain Forestry satellite office in Dallas, Oregon, showed S. Johnson the database where he maintained Mountain Forestry’s training and test records. Urena

acknowledged that he worked also as a crew boss for Mountain Forestry when he was not training firefighters. S. Johnson told Urena that ODF had received information that Mountain Forestry had used some firefighters on a wildfire incident without administering pack tests. Urena admitted that Alex Coronado had not completed a refresher course or pack test before he was sent to a fire in Nevada. Urena told S. Johnson that he had refused to sign Alex Coronado's refresher course certificate because Coronado did not stay for the entire class and, instead, left early without taking the pack test. Urena stated that he was sent to train firefighters in Nevada and when he arrived, he offered to administer a pack test to Alex Coronado who had been assigned to the Reno wildfire. Coronado declined stating that he "already had a card that showed he had completed a pack test." Urena told S. Johnson that he discussed the matter with Michael Cox but was told not to worry about it because Coronado had a card that showed he had completed the test. Urena told S. Johnson that Cox had told him to sign the annual refresher certificate for Coronado but Urena refused and told Cox that he would not put his own training certificate in jeopardy to "cover this up." Before S. Johnson concluded the interview, Urena agreed to send ODF a copy of his training roster with his handwritten test scores confirming that Alex Coronado and another Mountain Forestry employee, Jose Avila,

had not taken the pack test. S. Johnson later received a faxed copy of the training document from Urena.

54) On the same day he interviewed Virgil Urena, S. Johnson met with Alex Coronado to obtain additional information about his complaint. During the interview, Coronado stated he had not taken a pack test before he was sent to Nevada on a wildfire assignment. On the day he spoke to S. Johnson, Coronado stated he still had not been pack tested. He told S. Johnson that Michael Cox had given him an identification card that showed he had taken a pack test and confirmed that Urena had offered to give him a test and that he refused. Coronado stated he felt that if he already had a card stating he had taken it and could do the work, he did not need to take the test. He also told S. Johnson that he understood he needed to take the test before working for another company. When S. Johnson showed Coronado a Mountain Forestry training roster that had a handwritten date and pack test score next to his name, Coronado denied taking the test and had "no idea" who wrote the note.

55) Michael Cox issued Alex Coronado a crew identification card that showed Coronado completed a refresher course on February 29, 2004, and pack test on March 25, 2004. Cox signed his name on the "Owner Signature" line.

56) Mountain Forestry provided S. Johnson with a training roster from the February 29, 2004, refresher course that had Urena's handwritten scores for everyone on the roster except Alex Coronado and Jose Avila. On the document provided to S. Johnson, Michael Cox had written in pack test scores and test dates for Coronado and Avila and wrote his initials "M.C." next to the notes. Next to Coronado's name, Cox wrote "44 Pack 3/25/04," and next to Avila's name he wrote "41 Pack 3/15/04." In an interview with S. Johnson, Cox stated he had "personally" pack tested Jose Avila at the Mountain Forestry office and had written the score and date on the training roster. Cox stated that he did not monitor Avila's pack test. He observed Avila leaving and coming back, but could not confirm the course was completed correctly. Cox also told S. Johnson that F. Cisneros had given Alex Coronado a pack test and that Cox wrote the date and score by Coronado's name on the roster when F. Cisneros gave him the pack test date. F. Cisneros was present during the interview and confirmed to S. Johnson that he had given Alex Coronado a pack test. Cox told S. Johnson that Coronado and Avila were the only firefighters tested at the Mountain Forestry office, the rest were tested by Urena at his training location in Rickreall. When S. Johnson asked whether Mountain Forestry had sent ODF notification that pack tests were going to be conducted on those dates at the Mountain Forestry office five days

in advance as required under the Agreement, Cox and F. Cisneros stated they had not sent ODF the required notification.

57) During his interview with Cox and F. Cisneros, S. Johnson asked them about other pack test scores that he questioned during his investigation. Michael Cox acknowledged that he had prepared the Mountain Forestry manifest that was presented to ODF and that he prepared it from the "pack test/refresher roster." S. Johnson asked to review the 16 files of those persons listed on the manifest whose scores he questioned. After looking at the files, S. Johnson determined that 4 firefighters had refresher certificates but no pack test scores and the remaining 12 had no certificates at all. Cox told S. Johnson that they had not received the certificates from Urena because he had been "busy." S. Johnson observed that two firefighters, Emilio Martinez and Jose Macias, were listed on the company manifest as having passing pack test scores (Martinez - 40 and Macias - 34), but on the refresher course roster prepared by Virgil Urena, Martinez was noted as having not taken the pack test due to a "hurt foot." Macias was listed on the same refresher course roster with no recorded test score. Cox could not give S. Johnson a reason why the pack test scores were not documented. During the interview, S. Johnson also inquired about two other firefighters whose names appeared on the refresher course roster with test scores and dates handwritten next to their

names that were different than what was reported on the company manifest. Firefighter Rosendo Cabral appears on the company manifest and shows a May 3, 2004, pack test date and a 45 pack test score. On the refresher course roster prepared by Urena, Cabral appears with a pack test score of 46 written by Urena. In different handwriting, a second number, 45, appears next to the 46 score with "5/31/04" handwritten alongside the score. Firefighter Leticia Ayala's file revealed that no pack test score appeared for Ayala next to the May 3, 2004, pack test date on the company manifest and on the refresher course roster, Urena had written "NT" for "not taken" where a pack test score ordinarily appears. On the refresher roster, in different handwriting, the number "44" is written above the "NT" notation and "5/30/04" is written next to the number. Cox told S. Johnson that he believed the handwriting in both cases belonged to Brandon Creson, a Mountain Forestry crew boss who was out of the country at the time of the interview. S. Johnson checked all test dates and determined that no pack tests were administered on May 30 or 31, 2004.

58) The day after his interview with Michael Cox and F. Cisneros, S. Johnson returned to the Mountain Forestry office to review additional records. He examined several crew identification cards and discussed them with Cox. One of the cards belonged to Jose Avila who came

into the office while S. Johnson was examining the cards. Avila's crew identification card, issued by Cox, showed that Avila completed both a refresher course and a pack test on February 29, 2004, and had Cox's signature on the company owner's signature line. In response to S. Johnson's inquiry, Avila stated he had taken the test at the Mountain Forestry office and that it was administered by F. Cisneros. Avila told S. Johnson that he would be "more than happy to take the test again" if there was a question about his pack test.

59) Later that day, S. Johnson met with Brandon Creson and they examined the Mountain Forestry refresher course rosters together. Creson confirmed that he had entered the pack test scores and dates for Leticia Ayala and Rosendo Cabral. He told S. Johnson he could not remember who told him to enter the information or why. Creson also stated that Ayala was Alex Coronado's girlfriend and that they took the pack test together. After examining the class roster, Creson appeared surprised that the reported pack test dates for Coronado and Ayala were different. When Creson stated that the new pack test dates for Ayala and Cabral were from other pack tests, S. Johnson pointed out that there were no pack tests given on those dates and Creson "seemed surprised." When S. Johnson asked Creson about other score changes on the rosters, Creson told him that he remembered a class where nobody passed the

pack test and the firefighters took the test again later. Creson told S. Johnson that he "walked with them to help them maintain a more rapid pace" and the pack test scores were then changed on the roster.

60) Mountain Forestry, pursuant to the 2004 Agreement, gave ODF notification of the following pack testing dates:

On January 26, 2004, Virgil Urena notified ODF's training manager, Ed Daniels, by facsimile transmission, of the annual refresher training and pack testing scheduled for January 31 and February 1, 2004, for Mountain Forestry.

On February 9, 2004, Urena notified Daniels of the annual refresher training and pack testing scheduled for February 14 and 15, 2004, for Mountain Forestry.

On February 27, 2004, Urena notified Daniels of the annual refresher training and pack testing scheduled for March 6, 2004, for Mountain Forestry.

On March 8, 2004, Urena notified Daniels of the annual refresher training and pack testing scheduled for "3-12 3-15," 2004, for Mountain Forestry.

On May 3, 2004, Urena notified Daniels of the annual refresher training and pack testing scheduled for "May 7-10-04" for Mountain Forestry.

On May 11, 2004, Urena notified Daniels and A. Johnson of

the annual refresher training and pack testing scheduled for "5-14-05" [sic] for Mountain Forestry.

On June 18, 2004, Urena notified Daniels and A. Johnson of the annual refresher training and pack testing scheduled for June 24, 2004, for Mountain Forestry.

There are no records that show Mountain Forestry gave ODF the requisite notice for pack testing that, according to Mountain Forestry records, was administered in 2004 on the following dates: February 22 and 29; March 7, 8, and 27; April 25, 26 and 29; May 1, 3, 16, 17, 30 and 31; and June 7, 2004.

61) On one of the days he reviewed records at Mountain Forestry, S. Johnson contacted Virgil Urena. Urena stated he had just given a pack test to Emilio Martinez in Milton-Freewater on July 12, 2004. Urena stated that Martinez had been listed on the training roster with a hurt foot but had now passed the test with a 41 score. Urena told S. Johnson that he did not notify ODF before he administered the pack test to Martinez in July. Urena also confirmed that Leticia Ayala had not taken a pack test administered by him. Later, on July 22, 2004, S. Johnson met with Urena in the ODF office in Salem to discuss his findings with Urena and to obtain his written statement. He asked Urena about Jorge Carbajal because Urena's refresher course roster for January 31, 2004, showed that someone had written

the number "45" over other handwriting that indicated Carbajal had not taken the test. Urena confirmed that Carbajal had not taken the pack test and, after going over the pack test information S. Johnson provided, further confirmed that Emilio Martinez, Jose Macias, Alex Coronado, Jose Avila, Rosendo Cabral, and Leticia Ayala had not taken the pack test as Mountain Forestry records indicated. Urena showed S. Johnson the original training rosters he had sent to Mountain Forestry, which confirmed his statement that the scores were added after he sent the rosters to Mountain Forestry. At S. Johnson's request, Urena hand wrote and signed a statement documenting what he had told S. Johnson during the interview.

62) Later in July 2004, S. Johnson contacted the federal Interagency Dispatch center in Nevada and confirmed that Alex Coronado (crew boss) and Leticia Ayala (FFT2) had worked on wildfires in their respective positions in Nevada after they were dispatched from Mountain Forestry without taking pack tests. Alex Coronado worked on the Cole Complex and Reno Standby wildfires and Leticia Ayala worked on the Cole Complex wildfire.

63) After a supplemental follow-up interview with Alex Coronado in August 2004, S. Johnson noted:

"On 08-11-04 at 1300 hours, I met Alex Coronado at the ODF office in Salem. Alex maintains that he did not take a

pack test. During the time indicated (03-25-04) on the training roster obtained from Mountain Forestry, Alex told me that he was working on a job of budcapping near Astoria. During the time that Leticia Ayala was indicated as having taken the test, he [Alex Coronado] was working either in Warm Springs, Oregon or Grangeville, Idaho. Alex showed me the Mountain Forestry firefighting card, which had been issued to Leticia. The date for the refresher and pack testing was 05-03-04. When I checked the date of the class roster for 05-03-04, Leticia failed to complete the test and had an NT for score. A handwritten date of 05-30-04 and score was written by her name. Alex told me that both he and Leticia left for Nevada on 06-15-04. When Virgil Urena and Brandon Creson came to Nevada, they both tried to get Alex and Leticia to take a pack test. Alex knew that he should take the test, but went on a wildfire before he could take it. Alex also knew that he needed to take a pack test before going to a wildfire. I told Alex that Mountain Forestry is claiming that there was drug and alcohol abuse as a reason to terminate him. Alex told me NO, that was not true. He maintains that Mountain Forestry is upset because he refused to take a second wildfire assignment due to having a tired crew. I asked if there were any prob-

lems on the fire. Alex told me that he had a few medical concerns on the fire due to very hot fire line conditions. He stated that he failed to notify the Division Group Supervisor and took care of the situation himself. Alex also provided me additional information on possible falsified record [sic] that Mountain Forestry is allowing a firefighter to use another person's name and records to avoid paying child support."

Mountain Forestry's 2004 certified payroll reports show that Alex Coronado planted trees for Mountain Forestry in Warm Springs, Oregon, and in Grangeville, Idaho, from May 1 through 31, 2004. Mountain Forestry's 2004 certified payroll reports also show Alex Coronado performed work on the Reno Standby wildfire and he and Leticia Ayala both performed work on the Cole Complex wildfire from July 1 through 31, 2004.

#### ***Underage Firefighter Issues***

64) During his initial interview with Alex Coronado regarding his crew identification card and the pack test issues, S. Johnson asked whether Mountain Forestry had made crew identification cards for other firefighters as well. Coronado told him that F. Cisneros's son, V. Cisneros, who was 20 years old in 2004, was certified as a crew boss with eight years of experience. When S. Johnson expressed his concern that it appeared V. Cisneros started fighting wildfires when he was 12 years old, Coronado told him he believed the records were

taken from "another Victor Cisneros who formerly worked for the company."

65) During a later visit to Mountain Forestry, and while examining crew identification cards, S. Johnson pulled V. Cisneros's card and showed the card to Leticia Cisneros who told him that V. Cisneros was her 20 year old brother. S. Johnson asked to see V. Cisneros's file and located the page containing V. Cisneros's incident assignment history. He found that V. Cisneros's birthdate was reported as "07/27/77." When he examined the file carefully, he determined that someone had used "whiteout" to change the year "from something else to a 77." He asked Leticia Cisneros what V. Cisneros's birthdate was and she told him it was July 27, 1984. S. Johnson asked and she confirmed that the file belonged to her brother, V. Cisneros. He proceeded to examine the task book information in the file that showed the FFT2 task book was completed June 22, 1995, when V. Cisneros was 10 years old; the FFT1 task book was completed March 1, 1999, when V. Cisneros was 14 years old; and the CRWB task book was completed August 30, 2000, when V. Cisneros was 16 years old. S. Johnson examined the training certificates in the file and they showed that the S-130 and S-190 classes were completed on June 22, 1995 (when V. Cisneros was 10 years old) and the S-131 class was completed on April 3, 1999 (when V. Cisneros was 14 years old). All of the training was provided by

C&H Reforesters. S. Johnson observed that the fire experience records showed numerous wildfires in 1995 and 1996, with a gap until July 1999. The fire experience records for 2000 showed that V. Cisneros worked on at least three wildfires that year before he turned 16 years old.

66) Toward the end of July 2004, S. Johnson interviewed Bob Gardner from C&H Reforesters about V. Cisneros. Gardner told S. Johnson that F. Cisneros had a younger brother named Victor Cisneros who began working for C&H Reforesters in 1995. He told S. Johnson that F. Cisneros had a son also named Victor who was too young to have worked in 1995. Gardner stated that when Michael Cox left the company in 1999, he took "numerous original files" with him, including those for Victor and F. Cisneros. Gardner told S. Johnson that he was aware that F. Cisneros's son had been working as a crew boss "for the past several years," but stated that V. Cisneros was too young to have the proper training and experience. In a second interview in August 2004, Gardner reiterated his previous statements and told S. Johnson that C&H Reforesters was taking "Mountain Forestry (i.e. Mike Cox)" to court for undisclosed reasons. S. Johnson reviewed several portions of V. Cisneros's file with Gardner and Gardner confirmed that the "original person trained was [F. Cisneros's] brother." Gardner stated that F. Cisneros's brother, Victor, transferred from Ferguson Management Company to C&H in

1996. Gardner confirmed that he initialed some of the original pack test forms and that Michael Cox initialed others for pack tests taken by F. Cisneros's brother. S. Johnson showed Gardner a 2001 refresher course training certificate with a photograph that Gardner identified as F. Cisneros's son, V. Cisneros. Gardner stated that he could not remember what happened to F. Cisneros's brother, Victor, but knew that he had two brothers, one who was killed in a car accident and one who was in jail. Gardner could not remember which one was Victor. Gardner told S. Johnson that Cox was an equal partner in C&H until he left in 2000. Gardner also told S. Johnson that Cox handles the management duties at Mountain Forestry and although Mountain Forestry is in F. Cisneros's name, Cox "previews all documents then shows Francisco where to sign."

67) During one of his interviews with Virgil Urena, S. Johnson asked if he knew V. Cisneros. Urena told him that V. Cisneros was F. Cisneros's son and was working as a firefighter when Urena began working for Mountain Forestry in 2000. Urena had not trained V. Cisneros but had given him some refresher courses. He stated that training courses were administered by John Berger prior to 2000. When S. Johnson mentioned that V. Cisneros was only 16 years old in 2000, Urena told him that was probably true and that he often asks firefighters for their identification when they look too young.

During the interview, Urena also expressed concern that false identification can be purchased in Woodburn for less than \$50 and that it is not uncommon for firefighters to lie about their ages.

68) Benjamin Jones was not a firefighter but he was 16 years old when he worked for Mountain Forestry from June through August 2003. His birthdate is September 8, 1986, and he was recruited to work for Mountain Forestry by Michael Cox's wife, Penny. Jones had known the Coxes for seven years and Penny told him that Michael Cox needed help creating a computer program for making identification cards. Jones was very good with computers and he agreed to work for the summer creating a computer program and doing data entry. Jones understood that the reason he was creating the identification cards in the computer was "because they had new crews that needed to be going out on fires fairly quickly and they didn't have time to wait for the ID cards to come in the mail." He was responsible for entering each employee's name, height, weight, social security number, and training information. Virgil Urena provided the names and digital photographs and Michael Cox provided the rest of the information, including social security numbers. On August 8, 2004, S. Johnson interviewed Jones about his Mountain Forestry employment, summarizing the interview in notes that stated, in pertinent part:

"Benjamin gave me a sample of his work and explained how the [identification] cards were created and data entered. He used a Micro Soft program to create and design firefighter identification cards. He downloaded digital photos from a camera provided by Mountain Forestry trainer Virgil Urena then used a training class roster to match the photos with the correct person. He used numbers on the roster to match with numbers of the digital photos. Benjamin did not know the people, so Virgil would look over the cards for accuracy before they were printed.

"Benjamin often had to go to the Mountain Forestry office on short notice to create the identification cards quickly, as the firefighters were standing waiting and could not leave without the cards. Benjamin would take the class roster and enter the data. I showed Benjamin a copy of a training roster obtained from Mountain Forestry. Benjamin identified this copy as what he used to do the data entry. I asked how he knew if the firefighters on the list were the same ones who were waiting to go to a fire? Benjamin told me that he did not know the people and did not compare them with the pictures. He only made the cards. I asked how he knew what position the person was qualified for. Benjamin told me that Mike Cox would identify the positions for each name. Ben-

jamin did the data entry; the cards were printed then signed by Mike Cox or [F. Cisneros] (both are co-owners of the company). The cards were cut apart, laminated, and then given out to the crew boss. The crew would then leave to go to a fire. I asked about experience dots. Benjamin told me that Mike Cox would have a sheet of dots to put on the cards.

“One night, Benjamin was comparing the roster to information on the cards to check for data entry errors. He noticed that the Social Security numbers did not look right. The numbers were very close with very little differences. Benjamin pointed this out to Mike Cox and stated that the numbers did not look right, as the names did not appear to be related. Mike Cox told him not to worry about it, that the numbers are not totally accurate, that some people do not have numbers, but it is the only way to track people. On the roster, when a Social Security number was missing, Mike Cox would look in the personnel files then give a number to Benjamin to use on the card. Benjamin did not know if Mike Cox used a valid number or created one.

“I asked Benjamin to show me an example of what he meant about social security numbers not looking right. Benjamin explained that once the numbers were lined up together, he would see numbers that were

identical except for 1 number. Example: 763-21-7896 and 763-31-7896. Another example would be 763-21-7896 and 763-21-7897.

“Benjamin told me that the identification cards were not maintained, that after each sheet was printed, the data would be changed and new persons entered into the template. Some of the information would remain the same and did not need to be changed or modified.”

69) Respondents prepared and filed Mountain Forestry's Quarterly Tax Reports with the Oregon Employment Department from 2000 through 2004. Respondents' records show that in 2001, at least four different Mountain Forestry employees were assigned the same social security number of “111-11-1111.” The same records show that at least two people were assigned social security number “333-33-3333.” Respondents' records show that in 2003, Mountain Forestry employed two persons named Elizar Puente, J. One Puente was assigned social security number “222-22-2222” and the other Puente was assigned social security number “[REDACTED].” Respondents' records show that Mountain Forestry assigned “V. Urena” social security number “444-44-4444” in 2000 and “Mosquada Garcia J.” the identical social security number in 2003. In 2000, Mountain Forestry assigned “J. Sanchez” social security number “555-55-5555” and “Jorge

Hernandez" the identical number in 2002. Also in 2000, Mountain Forestry assigned a second "J. Sanchez" social security number "666-66-6666." In 2003, Mountain Forestry also assigned "Garcia, I" social security number "666-66-6666." In 2000, Mountain Forestry assigned "H. Sanchez" social security number "777-77-7777," "E. Alvarez" social security number "888-88-8888," and "M. Torres" social security number "999-99-9999." Finally, Respondents' records show that in 2004, Mountain Forestry assigned "Cruz Herrera, Rigoberto" social security number "222-22-0000," "Moreno, Octavio" social security number "222-22-0002," and "Ochoa, Lorenzo" social security number "222-22-0003."

70) While inspecting North Reforestation, Inc.'s ("North") records in January 2005, S. Johnson examined Andrew Williamson's firefighting file which had been transferred to North from Mountain Forestry. He identified what he believed to be a minimum age infringement and later summarized his findings in an investigation report along with findings resulting from his record inspections of other companies. The report stated, in pertinent part:

"During the [January 21, 2005] record inspection, I examined a file transferred from Mountain Forestry belonging to Andrew Williamson. Andrew Williamson had a date of birth of 01-04-84. Original training as an FFT2 was done on 05-

28-01. An FFT1 task book was also dated 05-28-01. This made Andrew Williamson only 17 years of age when he was working on wildfires as an employee for Mountain Forestry. This is a violation of the age requirement as specified in the Interagency Crew Agreement due to the hazardous conditions of firefighting. Williamson also had a completed task book for Crew Boss.

"Upon returning to the Salem ODF office, I examined manifest records submitted by Mountain Forestry. On the 2001 company manifest for Mountain Forestry, Andrew Williamson is listed as an FFT2 with a training date of 05-28-01 (age 17). On the 2002 company manifest, Andrew Williamson is listed as an FFT1 with a training date of 02-10-02 (1 month after he turned 18). On the 2003 company manifest, Andrew Williamson is listed as a CRWB with the highest level training date of 03-03-03.

"By searching past fire manifests for incidents where Mountain Forestry had sent crews, I discovered that on 08-04-2001, Mountain Forestry accepted a dispatch to the Indian Springs fire near Klamath Falls, Oregon. I located a manifest which identified Andrew Williamson as an FFT2 on this fire. Williamson was only 17 years of age at that time.

“When completing record inspections for other companies, I discovered several firefighters who had received their original training from Mountain Forestry that were underage when they started fighting fire. All were located on company manifests. These persons are:

Samuel Cisneros Perez  
DOB 09-08-83 on fires at  
age 17 in 2000.

Ramon Herrera Cisneros  
DOB 10-17-87 on fires at  
age 16 in 2003.

Ryan Sims DOB 04-28-85  
on fires at age 17 in 2002.

Antonio Valdez Perez (at-  
tempting to verify)

“It became clear after re-searching company manifests for Mountain Forestry, that there is no clear training date for Andrew Williamson after he turned 18. All his training appeared to have occurred while he was only 17 years of age. Training as an FFT1 and CRWB requires on the fire experience. No fires occurred during the certification dates listed for Andrew Williamson. Mountain Forestry repeatedly trained and used underage firefighters. This is a clear attempt by Mountain Forestry to falsify training records to obtain and use underage firefighters.”

S. Johnson’s conclusion that Andrew Williamson and Samuel Cisneros (“S. Cisneros”) were underage when they began working on wildfires was based on his er-

roneous belief at the time that ODF’s minimum age requirement was applicable to all Agreements prior to 2005. Although he primarily focused on what he perceived as Mountain Forestry’s use of underage firefighters, he also determined that in Williamson’s case there were file discrepancies including evidence that Williamson was certified as a FFT1 and CRWB crew boss without the necessary fire experience.

71) Ryan Sims, whose birth date is April 28, 1985, appears on Mountain Forestry’s company manifests and on Mountain Forestry’s quarterly tax report during the third quarter of 2002. He reportedly worked 323 hours for Mountain Forestry and earned \$2,917.83 during that period. Compliance specialist Wojtyla was not able to verify Sims’s employment through Mountain Forestry payroll records because Mountain Forestry did not file certified payroll reports with BOLI as required in 2002.

72) At times material, Ramon Cisneros (“R. Cisneros”) resided at 2450 Carlton Way NE, Salem, Oregon, and was F. Cisneros’s nephew. He was born on October 14, 1987, and his social security number was xxx-x8-6954.<sup>7</sup> His name and social security number appear on Mountain Forestry’s 2003 Quarterly Tax Reports, which show he worked

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<sup>7</sup> References to social security numbers herein will be limited to the last five digits to protect the privacy of the persons involved in this case.

83 hours during the third quarter and earned \$819.03, and worked 75 hours during the fourth quarter and earned \$4,122.51. R. Cisneros's name and address also appear on Mountain Forestry's certified payroll reports that were submitted to BOLI by Michael Cox on November 24, 2003, and covered pay dates from September 1 through October 31, 2003. Each payroll report included the names and addresses of the crew members, along with their payroll information, the pay period and pay date, the name of the crew boss (SRB) and the location of the work. R. Cisneros appears on a payroll report that shows Herman Creek, a wildfire incident, as the location of work for the period September 3 through September 7, 2003, and Blackfoot Lake, a wildfire incident, as the location of work for the period September 7 through September 10, 2003. Russ Irwin was R. Cisneros's SRB at both locations. Another payroll report submitted by Cox in November 2003 shows that V. Cisneros was the SRB of a different crew at Blackfoot Lake in September 2003. R. Cisneros was 15 years old when he performed work at both locations.

73) In July 2003, R. Cisneros was certified by the APIFFI training association as having completed the S-130 Firefighter Training, the S-190 Introduction to Wildland, I-100 Basic ICS, and "Your Fire Shelter" courses. Following R. Cisneros's coursework on July 8, 2003, Virgil Urena, "Level One," issued a task

book for the position of Firefighter Type 2 ("FFT2") to R. Cisneros. In July 2004, the APIFFI certified that R. Cisneros had taken the "Annual Refresher." R. Cisneros's instructor of record for his 2003 and 2004 coursework was Mountain Forestry employee, Virgil Urena.

74) The 2004 ODF Agreement included a provision requiring contractors to notify ODF within 24 hours when a firefighter transfers from one company to another. In August 2004, ODF received notification from Mountain Forestry that R. Cisneros was transferring to Mosqueda Reforestation. The "transfer request" was dated August 5 and the transfer date was listed as August 10, 2003. The notification included R. Cisneros's social security number and described his "Qualified Position" as "experienced FFT-2."

75) After the transfer from Mountain Forestry, Manuel Mosqueda from Mosqueda Reforestation brought R. Cisneros's Mountain Forestry file to ODF to "make sure that everything that was needed was in the file." R. Cisneros's file was one of seven files Mosqueda brought in for inspection and all were transfers from Mountain Forestry. Upon examining the file, S. Johnson noticed that "something didn't look quite right" and requested some documents from the U. S. Department of Justice to compare with the documents in the Mountain Forestry file. He discovered that the Employment Eligibility Verification form supplied by the

Justice Department showed R. Cisneros's birthdate was October 14, 1987, instead of 1984, as the Mountain Forestry file indicated. Subsequently, S. Johnson interviewed Manuel Mosqueda and R. Cisneros. During the interview, R. Cisneros told S. Johnson he was 16 years old in 2004 when he went to work for Mountain Forestry.<sup>8</sup> He also verified he had filled out the employment eligibility form and that the information he provided to Immigration and Naturalization was correct, including his birthdate. He stated to S. Johnson that he had provided his photograph to "someone" at Mountain Forestry at Mountain Forestry's request and subsequently was given an identification card that showed an earlier birthdate than the one appearing on the employment eligibility form.

76) David Trujillo, whose birthdate is March 14, 1984, appears on Respondent Mountain Forestry's payroll certification reports dated July 21 and August 22, 2001. His reported wage rate on July 21, including regular and fringe rate, was \$43.92 per hour and his total reported earnings for that period were \$361.20. His reported wage rate on August 22, including regular and fringe rate, was 173.17 per hour and his total reported earnings for that period were \$1,830.73.

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<sup>8</sup> Mountain Forestry records showed R. Cisneros actually was employed by Mountain Forestry in 2003 when he was 15 years old. See Finding of Fact – The Merits 70.

77) Mountain Forestry kept preliminary paperwork, such as W-4 forms and I-9 forms, in files for its firefighters. Michael Cox copied the personal identification provided by the firefighter and placed it with the forms in the firefighter's file "so that when it comes time to dispatch them on a fire we're not delayed in trying to get this paperwork before they go out on a fire." In 2000, the forms and identification copies were kept separate from the firefighter files "for payroll purposes." The required I-9 forms included a date of birth for each firefighter.

### ***Training and Certification Issues***

#### **1. Victor Cisneros**

78) At material times herein, Mountain Forestry employed Victor Francisco Cisneros ("V. Cisneros"). V. Cisneros is F. Cisneros's son and his birthdate is July 27, 1984. At material times herein, V. Cisneros's social security number was xxx-x1-5979.

79) During S. Johnson's records inspection in July 2004, Mountain Forestry presented S. Johnson with V. Cisneros's complete file documenting his firefighting training and experience from 1995 through 2004. Mountain Forestry, through Leticia Cisneros, represented to S. Johnson that the file was V. Cisneros's complete firefighting record.

#### **1995-96**

80) V. Cisneros's firefighter records showed that "Victor Cisneros" had completed the S-

130 and S-190 classes and all of the tasks required for certification as a FFT2 by June 22, 1995, when V. Cisneros was 10 years old. The records also showed that "Victor Cisneros" performed work on the Chelan Complex and Dry Creek wildfires in September 1995 when V. Cisneros was 11 years old. The records also showed that "Victor Cisneros" completed the annual refresher course in May 1996 when V. Cisneros was 11 years old. According to the records, in August 1996, "Victor Cisneros" worked on five wildfires (Simnosho, Wildcat and Bull Complex, Summit, and Thomas), was issued a task book for the FFT1 position on August 10, and thereafter worked on three wildfires (Blaze, Hill Complex, and Big Bar) in September and October 1996, when V. Cisneros was 12 years old. While discussing the records with Mountain Forestry's fire director Michael Cox during the records inspection, S. Johnson pointed out that the records showed V. Cisneros started working on wildfires when he was only 12 years old. Cox replied that it "might be true because that was the culture."

81) An undated document included in V. Cisneros's file, entitled "Wildland Fire – Training and Experience Interagency Crew Contract (Verification Form for Each Employee)," showed that "Victor Cisneros" was qualified as a FFT2 for Ferguson Management Company (FMC). According to the document, his social security number was xxx-x9-7465. V. Cisneros's records also included

an evaluation record for "Victor Cisneros" dated August 16, 1996, and contained the following information for "trainee Victor Cisneros" for the FFT1 position: the evaluator was Brandon Creson, a "SRB" from C&H Reforesters; the name of the incident was "Bull Complex" (the evaluation did not include the "type" or "location" of the incident as requested); the "Number & Type of Resources Pertinent to Trainee's Position" were listed as "5 FFT2" and the duration of the incident was between August 13 and 15, 1996; the complexity level of the fire was listed as "1" and the "NFFL Fuel Model(s)" was listed as "10." Creson recommended that the trainee "promote to FFT1." The evaluation was prepared and initialed by Brandon Creson.

#### 1998-99<sup>9</sup>

82) V. Cisneros's records showed that on June 19, 1998, Ferguson Management Company transferred "Victor Cisneros's" firefighter file to C&H Reforestation. His file continued to accrue documentation and included training rosters addressed to C&H Reforestation from A.C.S. Technology that showed "Victor Cisneros-Martinez" had passed the annual refresher course effective June 20, 1998; that "Victor Cisneros" had passed the annual refresher course effective March 15, 1999; and that "Victor Cisneros" had passed the S-130 class for a

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<sup>9</sup> The records show no firefighting activity in 1997. (Entire record)

squad boss position effective April 3, 1999. The social security number listed for "Victor Cisneros" on all three rosters was xxx-x9-7465. In another record, dated March 1, 1999, Brandon Creson recorded for the second time the following information for "trainee Victor Cisneros" for the FFT1 position: the evaluator was Brandon Creson, but the evaluation did not include Creson's title or company name; the name of the incident was "Bull Complex" and the incident "type" was listed as "wildfire"; the "Number & Type of Resources Pertinent to Trainee's Position" was listed as "20 man crew" and the duration of the incident was between August 13 and 15, 1996; the complexity level of the fire was listed as "2" and the "NFFL Fuel Model(s)" was listed as "6." Creson recommended that the trainee "promote to squad boss." As with the August 1996 evaluation, Brandon Creson prepared and initialed the evaluation. On March 3, 1999, Creson certified that "Victor Cisneros" completed the FFT1 task book. The records also show that "Victor Cisneros" was pack tested on April 3, 1999. At that time, V. Cisneros was 14 years old.

83) The training records showed that, following his certification, "Victor Cisneros" performed work as a FFT1 on five wildland fires (Thomas, Blaze, Hill Complex, and Big Bar) between July and October 1999. At that time V. Cisneros was 15 years old.

## 2000

84) V. Cisneros started working for Mountain Forestry in 2000. The firefighter file presented to S. Johnson showed that "Victor Cisneros" completed the annual refresher course and a pack test effective May 22, 2000. According to the records, between June 18 and July 27, 2000, V. Cisneros performed work as a FFT1 on the Soldier, Tam Tam, and Wall fires. At that time, V. Cisneros was 15 years old.

85) V. Cisneros's file contained a document showing that while he was still 15 years old and working on the Wall fire, he was evaluated as a SRB (crew boss) trainee. The evaluator was Gustavo Cisneros ("G. Cisneros"). The evaluation, dated July 26, 2000, included a description of the incident type - "wildfire" - and the "Number & Type of Resources Pertinent to Trainee's Position" were listed as "20 man crew." The duration of the incident was from July 24 to July 26, 2000, and the complexity level was listed as "Type I." G. Cisneros certified that "[t]he individual has successfully performed all tasks for the position and should be considered for certification." The same document included a second evaluation, dated August 10, 2000, showing that after his 16<sup>th</sup> birthday, V. Cisneros was evaluated as a SRB trainee by G. Cisneros on the Coyote and Crusoe wildland fires between July 26 and August 10, 2000. A second document, dated August 27, 2000, showed V. Cisneros was evaluated as a SRB

trainee by G. Cisneros on the Burnt Flats wildland fire between August 12 and 27, 2000.

86) During his records inspection, S. Johnson observed a task book for the CRWB crew boss position for V. Cisneros that was initiated on August 30, 2000. The task book included the three earlier wildfire evaluations and was initiated by G. Cisneros, but the required company certification, verifying and certifying that V. Cisneros had "met all requirements for qualification in this position and that such qualification had been issued" was not made until Mountain Forestry's Fire Director, Michael Cox, signed the certification four years later as the "certifying official" on April 8, 2004. Under the 2000 Agreement, Mountain Forestry was required to review V. Cisneros's task book and confirm that an evaluator had initialed all tasks, ensure that the evaluation records in the back of the task book had been appropriately completed, and confirm that the government supervisor's statements had been obtained and the final evaluator's verification had been completed. After reviewing the file and noting the date that Mountain Forestry signed the certification, S. Johnson determined that V. Cisneros's task book was void because it was not properly verified and certified in accordance with the 2000 Agreement.

#### **2001-04**

87) Between 2001 and 2004, V. Cisneros continued to work for Mountain Forestry as a

CRWB crew boss. His firefighter file included a document entitled "Employee Training and Qualification Form" for Victor F. Cisneros, dated February 2004, that recorded his "date of birth" as "7/27/77." The document listed his "Fully Qualified Jobs" progression as FFT2, FFT1, and SRB, and listed his SRB wildfire experience, including the Link, Fawn Peak Complex, Umpqua Preposition, ONC Sept. Support, Blackfoot Lake, and Coyote wildfires.

88) V. Cisneros's firefighter file also included a 2004 document entitled "Mountain Forestry Firefighter Training Records By: Cisneros, F. Victor" that sets forth detailed training information beginning in 1995 for "Firefighter: Cisneros F. Victor," social security number xxx-x1-5979. On its face, the document represents that V. Cisneros received the appropriate training to qualify as a CRWB crew boss, beginning with his completion of a FFT2 task book when he was 10 years old.

89) V. Cisneros's training records show that from August 30, 2000, when he completed the S-230 training for the CRWB position, through 2004, V. Cisneros completed no other training, other than the required annual refresher courses.

90) V. Cisneros's firefighter records show that he performed work as a FFT1 on the Soldier, Tam Tam, Wall, Coyote Complex, Crusoe Complex, and Burnt Flats wildfires in 2000.

91) V. Cisneros's firefighter records show that he performed work as a FFT1 on the Mill Creek, Bald Peter, and Union Valley wildfires and as a CRWB crew boss on the Bald Peter, Union Valley, Boundary, Delango, Elko/Rodeo, Blue Complex, and Ollalie Complex wildfires in 2001.

92) V. Cisneros's firefighter records show that he performed work as a CRWB crew boss on the Eyerly Complex, Grizzly, Union Valley, Biscuit, Tiller Complex, and Large Fire Support wildfires in 2002.

93) V. Cisneros's firefighter records show that he performed work as a CRWB crew boss on the Link, Fawn Peak, Umpqua Preposition, Blackfoot Lake, Coyote Rock, 9-05 Complex, Isabel, ONC Sept. Support, and 7<sup>th</sup> Parallel wildfires in 2003.

94) V. Cisneros's firefighter records show that he performed work as a CRWB crew boss on the Beebe Ridge, Waterfall, Reno Standby, and Oregon wildfires in 2004.

## 2. Gerardo Herrera Silva

95) At material times herein, Mountain Forestry employed Gerardo Herrera Silva ("Silva") as a firefighter in 2003. Immigration and Social Security Administration records show his birth date is November 29, 1984, and his social security number is xxx-x4-3487. Mountain Forestry records show that Herrera's address was 3227 Beacon Street NE, Salem, Oregon.

96) In September 2004, as part of his ongoing investigation, S. Johnson inspected what Mountain Forestry represented as Silva's firefighter file. The file was a combination of documents that apparently pertained to five other individuals, including Genaro Herrera, Genaro Herrera Adame, Juan M. Herrera, Gerardo Herrera, Gerardo Herrera Adame, and Gerardo Herrera Silva. The documents, when organized chronologically and taken at face value, show that Genaro Herrera and Genaro Herrera Adame, assuming they are the same individual, completed the FFT2 task book in 1998, trained as a FFT1 in August 2000, and fought wildfires as a FFT2 through 2001. The documents also show, if taken at face value, that Gerardo Herrera, Gerardo Herrera Adame, and Gerardo Herrera Silva completed the March 2001 annual refresher and Gerardo Herrera Adame completed a pack test. The file contains certificates for Juan M. Herrera and Gerardo Herrera Silva representing that they completed, respectively, the April and July 2002 annual refresher. The file documents include a certificate representing Gerardo Herrera Silva completed the February 2003 annual refresher course. Other than the annual refresher certificates, there are no training records for Silva and no records showing he completed a pack test.

97) Mountain Forestry's certified payroll records, provided to BOLI by Michael Cox, show that Silva performed work on at least

five incidents during the 2003 fire season. According to the records, Herrera worked under “foreman” Gustavo Cisneros (“G. Cisneros”) on the Link fire between July 6 and 20 and the I-5 Milepost 94/RAC – MOB incident between July 21 and August 2, 2003. The records also show he worked under R. Cisneros on the Chelan Butte (Washington) fire between August 1 and 8, 2003. He again worked under G. Cisneros on the RAC/MOB incident on August 3 and 4 and on the South Fork (Idaho) fire between August 12 and 23, 2003. He also worked under SRB Russ Irwin on the Herman Creek fire between September 3 and 7 and the Blackfoot Lake fire between September 7 and 10, 2003. Gerardo Herrera’s address appears on all of the certified payroll records as 3227 Beacon Street NE, Salem, Oregon.

98) During the BOLI investigation, compliance specialist Stan Wojtyla requested that the NWSA provide to him all training records for Gerardo Herrera, ID number 001284. Wojtyla received a response from NWSA’s executive secretary Debbie Miley that stated, in pertinent part:

“Per your request, the following information was found.

“I have attached Certificates of Training for Gerardo Herrera-Silva, and also the training records with 001284 assigned in our database.

“I do not find anything for the social security numbers you

gave me xxx-x4-3487 or xxx-x7-2364. In addition, I did not find anything for Gerardo Herrera, Genaro Herrera or Genaro Herrera-Adame.

“Please provide NWSA with a copy of your findings and the outcome of this case for our records.”

The “Certificates of Training” included a certificate showing that Gerardo Herrera-Silva completed an annual refresher and pack test on February 15, 2003, and it was signed by John Berger and Michael Cox. The firefighter ID number for Gerardo Herrera-Silva was noted as 00041 and his “student training history” showed that he had taken two annual refreshers in March 2001, seven days apart. One was administered by Carl A. Sylvester in Albany, Oregon, on March 24, 2001, and the other was administered by John Berger in Philomath, Oregon, on March 31, 2001. According to the training history, Gerardo Herrera-Silva also received annual refreshers from John Berger in Philomath on July 2, 2002 and February 15, 2003.

99) During his investigation, Wojtyla met with Gerardo Herrera Silva in the fall of 2004. Herrera told Wojtyla that he worked for Mountain Forestry “for a few days” in 2003 and that he used social security number xxx-x4-3487. The Gerardo Herrera Silva he met with in 2004 was the same person whose photograph appeared on the February 15, 2003, Certificate of Training.

100) Gerardo Herrera's file was one of the seven files transferred from Mountain Forestry to Mosqueda Reforestation. In his follow-up investigation notes, S. Johnson summarized the file as follows:

"On 09-09-04, I met Manuel Mosqueda at the Salem ODF Office to review 7 transferred firefighter files from Mountain Forestry. Each file I reviewed included experience, training and certification records from FFT2 up to their current position. Missing from several files were records of pack test information. Mosqueda was hesitant to employ these firefighters due to problems with their records.

"One of the files belonged to Gerardo Herrera. He was transferred by Mountain Forestry as an experienced FFT2. I began to review his file. Employment identification information provided was for Gerardo Herrera Silva DOB 11-29-84 with social security number xxx-x4-3487. As I continued through the file, I located an Annual Refresher certificate signed by Virgil Urena for Mountain Forestry on 01-31-04. No pack test score was found in the file. Immediately following this certificate was a training roster from NWFF Environmental for a refresher and standards for survival/fire shelter deployment from 2001. I located the name Gerardo Herrera on this roster. The next item was another

class roster from NWFF Environmental for refresher training in 2000. The name listed on this roster was Genaro Herrera Adame. A 1999 refresher training was done by C&H Reforesters and listed Genaro Herrera Adame with an ID number of 098612. Additional training records were for Genaro Herrera back to 1998.

"Wildfire experience records began in 2001 with Gerardo Herrera listed in Crew Time Reports as a FFT2. Immediately following were Crew Time Reports for wildfires in 2000, which listed Genaro Herrera as a FFT2. Next I located a training certificate for Gerardo Herrera in 2001 from NWSA, signed by John Berger. A Par-Q & You form dated 03-31-01 signed by Mike Cox had the name Gerardo Herrera Adame. A Par-Q & You form dated 05-28-00 also signed by Mike Cox had the name Genaro Herrera Adame. This was followed by one signed by Bob Gardner, C&H Reforesters, dated 04-24-99 for Genaro Herrera.

"A class roster for S-131 Advanced Firefighter Training dated 05-31-01 provided by Northwest Fire Fighters and signed by John Berger listed Gerardo Herrera. A FFT1 Task Book immediately followed this roster and was issued to Genaro Herrera by Mountain Forestry on 08-30-00. A FFT2 Task Book dated 08-02-98 was issued to Ge-

naro Herrera by C&H Reforesters.

"I examined company manifests for Mountain Forestry in 2000. I located only the name Genaro Herrera Adame with social security number xxx-x9-8612 listed as a FFT2. Next, I examined company manifests for Mountain Forestry in 2001. I located only the name Gerardo Herrera Adame with social security number xxx-x4-3487 listed as a FFT1. Company manifests for 2002, 2003, and 2004 list only Gerardo Herrera as a FFT2. It became apparent from the file and manifests that a switch had occurred between Genaro and Gerardo between 2000 and 2001. Gerardo Herrera is NOT qualified as an FFT1 or FFT2 due to the fact he is using training and experience for Genaro Herrera.

"I talked with Bob Gardner from C&H Reforesters. He stated that Genaro Herrera was one of the files taken by Mike Cox when he left during the night and created Mountain Forestry in 2000. Cox took entire files and did not leave any copies. Gardner could not provide any additional information regarding Herrera."

### 3. Andrew Williamson

101) Andrew Williamson's file, presented to S. Johnson in January 2005, consisted of training certificates, crew performance ratings, a "Wildfire Assignment History," crew time reports,

"emergency personnel shift tickets," and three task books. Those records, taken at face value, show Williamson completed a task book for the FFT2 position in or around May 2001 and that Mountain Forestry fire director Michael Cox certified Williamson as a qualified FFT2 on June 28, 2001. The records also show that Williamson's task book for the FFT1 squad boss position was initiated by SRB Leopoldo Rincon on August 15 and that he was evaluated on the Bridge Creek fire between August 15 and 21, 2001. Williamson's name appears on a "Crew Performance Rating" in the box designated "Crew Boss (name)" that was prepared and signed on August 21, 2001. Although someone crossed out "crew boss" and hand wrote "FFT1" next to the preprinted words, the name Andrew Williamson appears in the signature section designated "Crew Boss (signature)" without correction. The FFT1 task book shows that on October 1, 2001, Cox certified that Williamson was qualified as a FFT1 squad boss. According to an evaluator's note in the task book, "Not all tasks were evaluated on this assignment and an additional assignment is needed to complete the evaluation." The file contains no documentation that shows Williamson completed an additional assignment or was evaluated on all of the tasks required in the FFT1 task book. Williamson appeared on the June 2002 company manifest as a FFT1 and his records show he performed work as a FFT1 on the Eyerly

Complex and Biscuit fires from June through September 2002.

102) Williamson's file shows that while he was working on the Eyerly Complex fire in August 2002, Cox initiated Williamson's task book for the crew boss (CRWB or SRB) trainee position. According to the task book "Evaluation Record," "Fire Director" Cox evaluated Williamson as a crew boss on the Biscuit fire from August 31 to September 13, 2002, although Cox's evaluation (Evaluation #1) was not initialed and dated until a year later on October 1, 2003. Cox's evaluation included a check mark by the sentence: "Not all tasks were evaluated on this assignment and an additional assignment is needed to complete the evaluation." The evaluation record also shows "SRB" Felix Cisneros ("F. Cisneros") initialed Evaluation #3 for the same fire (Biscuit) during the same period (from August 31 to September 13, 2002) on October 2, 2002. Evaluation #3 shows that F. Cisneros made no recommendations pertaining to Williamson's work on the Biscuit wildfire. Gustavo Cisneros ("G. Cisneros") apparently evaluated Williamson as a crew boss on the Eyerly Complex fire from August 1-20, 2002. G. Cisneros signed the evaluation (Evaluation #2) on October 10, 2002. His recommendation included a check mark next to the sentence: "The individual was not able to complete certain tasks (comments below) or additional guidance is required." There were no "comments" listed "below" as suggested in the nota-

tion. Classroom trainer John Berger initialed the fourth evaluation (Evaluation #4) on March 19, 2003, and indicated by a check mark that "Not all tasks were evaluated on this assignment and an additional assignment is needed to complete the evaluation." All of the evaluations, except for Berger's, appear to be in the same handwriting.

103) According to the file presented to S. Johnson, Williamson was listed on Mountain Forestry's training roster as a qualified "SRB" or crew boss when he took the annual refresher course on February 1, 2003. Page two of Williamson's task book is designated as "Verification/Certification of Completed Task Book." The "Final Evaluator's Verification" section is blank. NWSA Trainer John Berger signed the company certification section on April 2, 2003, apparently certifying that Andrew Williamson "has met all requirements for qualification in this position and that the qualification has been issued."<sup>10</sup> When Williamson's file was transferred to North Reforestation and presented to S. Johnson, the file included a cover sheet listing Wil-

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<sup>10</sup> The space for Andrew Williamson's name was left blank; however, the certificate was on page 2 of Williamson's task book and the forum infers that Berger was certifying Williamson as a crew boss rather than some other unnamed individual. Notably, there is no evidence that Berger was authorized to certify a crew boss on Mountain Forestry's behalf as required under the ODF Agreement.

Williamson's training as a FFT1 and "Crew Boss/Single Resource Boss (CRWB)." According to the cover sheet, Williamson completed both the FFT1 and CRWB crew boss task books on April 2, 2003. Williamson's file also included certificates issued by NWSA and signed by Cox and Berger showing Williamson completed the required S-230 and S-290 classes in March 2003. According to the "Wildfire Assignment History" in Williamson's file and prepared by Mountain Forestry, Williamson worked on five wildfires (Large Fire Support, Roybal, Trampas, Eyerly, and Biscuit) in 2002 and four wildfires (Tobias, Cramer, Fawn Peak, and Slims Complex) in 2003. On a June 2004 company manifest, Williamson is listed as a SRB (crew boss) with a March 3, 2003, certification date. In a supplemental company manifest presented to ODF in September 2003, Williamson was listed as a SRB (crew boss) with an April 18, 2002, certification date.

104) Respondents introduced a file at hearing that they represented was Andrew Williamson's "complete" firefighter file. Several documents are duplicates of those found in the file S. Johnson inspected for North in January 2005, including Williamson's FFT2 task book. The file Respondents presented contained only one other task book and it did not resemble either of the two task books in the file S. Johnson inspected. Taken at face value, the "task book" appears to be a combination of two task books issued

to Williamson for the same FFT1 squad boss position. The first page shows it was assigned to Williamson and initiated by squad boss Alejo Mejia on July 12, 2003. The third page is similar to the first, only it shows a task book was issued to Williamson and initiated by Mejia on July 23, 2003.

The document also includes two separate Evaluation Records. One represents that Mejia evaluated Williamson on the Cramer and Slims wildfires, and the other represents that Mejia evaluated him on the Tobias, Cramer, and Slims wildfires, and Jose Martinez evaluated him on the Fawn Peak wildfire. In Evaluation #1 of the first record, Mejia's evaluation is dated July 31, 2003, and represents that he evaluated Williamson on the Cramer wildfire during the period July 23-31, and notes, "not all tasks evaled [sic]." Evaluation #2 of the second record shows a similar evaluation of the same fire (Cramer) during the same period (July 23-31) and signed on the same day (July 31, 2003) with the comment, "finish all tasks."

In Evaluation #2 of the first record, Mejia's evaluation is dated September 9, 2003, and represents that he evaluated Williamson on the Slims wildfire during the period August 11 to September 9, 2003, and notes, "not all tasks evaled [sic]." Evaluation #4 of the second record is for the same fire (Slims) during the same period (August 11 to September 9, 2003), but dated September 10, 2003, and

with a check mark next to the sentence, "The individual has successfully performed all tasks for the position and should be considered for certification."

Evaluations #1 and #3 of the second record represent that Williamson was evaluated on the Tobias and Fawn Peak wildfires in July and August 2003. Both evaluations indicate that "not all tasks were evaluated on this assignment" and add the note: "Finish all tasks." Although the record indicates that Mejia evaluated Williamson during the Tobias wildfire and Martinez evaluated him during the Fawn Peak wildfire, the handwriting on both evaluations appears identical.

105) The FFT1 task book in the file Respondents presented does not include a "Verification/Certification of Completed Task Book" section and there is no other document in the file that verifies or certifies that Williamson was qualified as a FFT1 squad boss. The file includes a list dated March 30, 2005, that represents Williamson's wildfire experience between 2001 and 2004. According to the list, Williamson performed work as a FFT1 on one wildfire (Bald Peter) in 2001 and on five wildfires (Large Fire Support, Biscuit, Eyerly, Roybal, and Trampas) in 2002. The list also represents that he performed work as a FFT2 on four wildfires (Tobias, Slims Complex, Fawn Peak Complex, and Cramer) in 2003 and two wildfires (Bee Be Bridge and Bland Mountain) in 2004. Other records in the file, including

crew time reports, show Williamson worked as a SRB crew boss on the Tobias, Cramer, Bland Mountain, Bee Be Bridge, Fawn Peak Complex, and Slims Complex wildfires from 2003 through 2004. There is no task book or other records in the file that show Williamson was qualified as a SRB crew boss.

106) In April 2004, ODF inspected Mountain Forestry records, including Andrew Williamson's file. ODF inspector Tom O'Connor determined that Williamson was "not OK" as a CRWB crew boss and found that an additional "hot line assignment" evaluation was necessary. He also found that Williamson's FFT1 squad boss task book was lacking two hot line assignment evaluations for qualification as a FFT1. Respondents did not provide ODF with Williamson's complete firefighting file during the ODF inspection. S. Johnson had not seen the file Respondents represented was Andrew Williamson's complete firefighter file before the hearing date.

#### 4. Samuel Cisneros

107) S. Johnson inspected S. Cisneros's firefighter file during his records inspection in or around January 2005 and determined that S. Cisneros (Samuel Cisneros Perez) had received his original training from Mountain Forestry. Initially, he erroneously determined S. Cisneros, born September 8, 1983, was underage when he began firefighting at age 17 in 2000. S. Cisneros's file included training certificates,

“Wildfire Assignment History” records, crew time records, and three task books. The records show Mountain Forestry initiated S. Cisneros’s FFT2 task book in April 2000 and Michael Cox certified S. Cisneros as a qualified FFT2 on May 4, 2000. Trainer and evaluator John Berger certified that S. Cisneros completed the necessary classroom training. There are no records showing S. Cisneros worked on wildfires as a FFT2 between his certification and his FFT1 training.

108) Mountain Forestry records show that Mountain Forestry SRB crew boss Alex Coronado initiated S. Cisneros’s FFT1 task book on July 24, 2000, at the Tam Tam wildfire. On the same day, Coronado certified that S. Cisneros was qualified as a FFT1 by completing and signing the “Verification/Certification of Completed Task Book” on Mountain Forestry’s behalf. The evaluation record at the end of the task book shows Coronado completed two evaluations. In Evaluation #1, S. Cisneros purportedly supervised a 20 person crew on the Beatty Butte wildfire from July 13 to 15, 2000, before the task book was initiated or assigned to him. Alex Coronado put a check mark alongside the sentence, “The individual has successfully performed all tasks for this position and should be considered for certification.” Coronado also noted, “Elevate to FFT1.” In Evaluation #2, Coronado certified that S. Cisneros supervised a 20 person crew on the Tam Tam wildfire from July

23-24, 2000, and made the same recommendation to “Elevate to FFT1.” Although the qualification record section represents that S. Cisneros completed tasks on the Bilk Creek Complex (July 18-21), Coyote (July 26-August 6), Crusoe (August 6-10), and Wall (July 24-26) wildfires in 2000, no evaluations are recorded for those fires in the evaluation record section. S. Cisneros’s file includes a training certificate showing he completed the S-131 advanced firefighter training in May 2001.

109) In June 2001, during a routine records inspection to determine Mountain Forestry’s supervisory capacity, ODF’s Tom O’Connor inspected and approved approximately 32 Mountain Forestry supervisory files, including S. Cisneros’s file that apparently showed he was qualified as a FFT1. Based on the file he reviewed in 2005, S. Johnson determined that S. Cisneros’s FFT1 task book was void because it was not properly certified by a Mountain Forestry officer.

110) S. Cisneros’s firefighter file also included the front page of a CRWB crew boss task book that shows S. Cisneros’s name and the notation “SRB in training.” The page does not include the company affiliation or the date and location the task book was initiated. S. Johnson subsequently concluded that the task book was never assigned or initiated. Mountain Forestry’s records show S. Cisneros worked as a FFT1 squad boss on at least 12 wildfires (Apple Complex, Hensel-Reese,

ABC Support, Beatty Butte, Way, Crusoe, Dam Water Tower, Pinus Underburn, Fawn Peak, Lightning Creek, Cob Complex, Biscuit) from 2001 through 2003. The records also show that in or around 2005, S. Cisneros began working for another contractor.

111) During the Mountain Forestry investigation and in the regular course of his duties as an ODF compliance specialist, S. Johnson maintained contemporaneous notes that documented his entire investigation and conversations with witnesses. The notes included a follow-up investigation in September 2004 when contractor Manuel Mosqueda requested ODF to review the files he had received from Mountain Forestry of firefighters who had transferred from Mountain Forestry to Mosqueda's company.

112) Early in S. Johnson's Mountain Forestry investigation, on or about July 7, 2004, Don Moritz sent an e-mail to Patricia Morgan instructing her to forward to John Venaglia, Contracting Officer at the National Interagency Fire Center, "the information we received today concerning Mountain Forestry." A subject line preceded the e-mail's text and read: "FW: alcohol/drug report." The text stated, in pertinent part:

"Contact person providing complaint information is Mountain Forestry crew boss Alex Coronado. Alex lives in Independence Oregon, and his telephone number is [(503) xxx-xxxx]. Alex claims that while participating on the na-

tional crew contract as a crew boss for Mountain Forestry several non-complaint actions took place. He claims he was terminated because he turned down a dispatch while he followed work rest standards. He plans on discussing this issue with the Oregon Bureau of Labor and Industry [sic]. John should be particularly interested in the following issues: 1) Alex claims Mountain Forestry falsified pack test records and sent him to fire without meeting the requirement. 2) Individuals on the crew were singled out and harassed. Alex will provide collaborative [sic] statements from crew members if requested. Keep a copy of your correspondence on file."

Venaglia replied by e-mail shortly thereafter on July 7, 2004, and said:

"Thanks for the info. Earlier today I received a letter from Mountain Forestry stating that Alex Coronado has been fired and I have removed him from the list of key personnel from their contract. The specific reasons for his termination [are] not a matter normally in which a federal CO has privity. Alex may have rights under Oregon law for wrongful termination. While his allegations are disturbing the fact remains that they are not untypical of those sorts of complaints I've heard before from disgruntled employees. In any case, the burden is on the employee, but

if performance is in anyway indicative of his claim I'll go back to this as cause for further investigation.

"The further question is whether other such allegations have been made against the contractor. If you have data on that please forward it to me and I will discuss the matter with Mtn Forestry, and if necessary I will implement an audit of pack testing, or another related matters [sic]. Feel free to call me at \* \* \*. Thanks.

113) Respondents' records show that F. Cisneros, Michael Cox, and Penny Cox collectively earned \$1,422,988 in personal income from Mountain Forestry firefighting activities in 2002, and \$1,424,200 in personal income from Mountain Forestry firefighting activities in 2003. In both years, F. Cisneros personally earned over \$700,000 and the Cox's collectively earned personal income of just under \$700,000. Mountain Forestry's earnings for firefighting activities were over \$900,000 in 2000.

114) During a prior investigation, BOLI Compliance Manager Mortland wrote a letter, dated January 9, 2004, to Campbells Group that stated, in pertinent part:

"Per the request of Michael Cox, I am writing to inform you that Mr. Francisco Cisneros and Mountain Forestry, Inc. are currently authorized to act

in the capacity of a licensed Farm/Forest Contractor.

"Mr. Cisneros and Mountain Forestry are expressly authorized to continue to engage in farm/forest contracting activities under their 2003 license #7185. An unsigned copy of the license is attached, although you should already have a copy signed by Mr. Cisneros in your files from last year."

Respondents continued to operate in their capacity as a farm/forest labor contractor throughout the BOLI investigation and thereafter.

115) Following an investigation in or around April 2004, the BOLI Commissioner issued a Notice of Intent alleging Respondents had violated provisions of ORS 658.417, ORS 653.045, OAR 839-015-0300, and OAR 839-020-0080, and assessing civil penalties of \$26,800. In May 2004, Respondents entered into a Consent Order with BOLI in which Respondents admitted to violating provisions of ORS 658.417, ORS 653.045, OAR 839-015-0300, and OAR 839-020-0080, and agreed to pay a \$12,500 civil penalty. On June 1, 2004, BOLI issued a Final Order Based On Informal Disposition in which the Commissioner adopted and incorporated the terms of the Consent Order.

116) In July 2004, following the ODF investigation, S. Johnson, Don Moritz, and Patricia Morgan met with Mountain Forestry representatives, including F.

Cisneros and Michael Cox, to discuss ODF's findings and conclusions. During the meeting, ODF terminated its firefighting crew agreement (2004 Agreement) with Mountain Forestry. Thereafter, Contract Service Manager, Don Moritz, detailed the reasons for the termination in a letter, dated July 30, 2004, that stated:

"This is to notify you that the Oregon Department of Forestry (ODF) is terminating its Fire Crew Agreement with Mountain Forestry, pursuant to paragraph 3.15.3. For the reasons stated below, ODF finds Mountain Forestry to be in material breach of the Agreement, and declines its option to provide an opportunity to cure. At this time, ODF is not taking additional steps to disqualify Mountain Forestry from bidding on future fire crew agreements, though it reserves the option to do so.

"As you know, ODF has audited certain Mountain Forestry employment records in order to evaluate contractor compliance. As a result of this audit, Mountain Forestry was found to be 'materially deficient in contract performance' under the 2004 Interagency Crew Agreement. In particular, the company failed to comply with the requirements of Sections 4.8.1 (Identification of Personnel); 4.12.1, 4.12.2, 4.12.4 (Pack Test); 4.14.1, 4.14.2 (Crew Training and Experi-

ence); and 4.15.1 (Crew Records).

"Mountain Forestry violated Section 4.12.1 by providing falsified documentation indicating that pack tests had been taken when in fact they had not. Mountain Forestry thus failed to 'ensure that all Crew personnel assigned to Crew for the current fire season have passed the 'Work Capacity Test.' Mountain Forestry violated Section 4.12.2 by failing to notify ODF prior to administering each pack test.

"Under Section 4.14.1 of the Agreement, contractors represent and warrant 'that each of CONTRACTOR'S employees serving as a Crew Member has met the minimum training and experience requirements [specified in the Agreement] for the position each such Crew Member is assigned.' Mountain Forestry has violated Sections 4.14.1, 4.14.2, and 4.8.1 by issuing a falsified identification card to a Mountain Forestry crew boss who was dispatched to a fire incident, with knowledge that the crew boss had not been pack tested.

"Section 4.15.1 of the Agreement requires contractors to maintain complete training, experience, and fitness records for each Crew Member that documents compliance with all Exhibit I requirements for each position in which the Crew Member is certified to perform. This section further states that

these records shall be complete and on file prior to accepting a dispatch assignment. In the audit of Mountain Forestry, ODF discovered sixteen training crewmember records, which were randomly selected, all failing to have pack test certification. In addition to the non-compliance of pack test certification, ODF's training record review documented that records were falsified and altered. For example, one training record of a crewmember listed experience and fitness records which, if true, would mean the crewmember started firefighting at the age of eleven. These findings demonstrate that Mountain Forestry is in violation of Sections 4.15.1 and 4.14.2.

"For the foregoing reasons, ODF has determined that Mountain Forestry is in material breach of the Agreement and subject to termination under Section 3.15.3. Based on the findings of our investigation, Mountain Forestry falsified training documentation and used unqualified personnel during fire assignments in 2004. These material deficiencies suggest a serious and potentially dangerous pattern of unsatisfactory performance.

"ODF is hopeful that Mountain Forestry will take measures to rectify the concerns noted above such that it can successfully participate in future fire crew contracts."

117) BOLI began investigating Respondents' fitness to act as a farm/forest labor contractor soon after ODF terminated Mountain Forestry's firefighting crew agreement. In a letter dated August 16, 2004, BOLI Compliance Manager, Michael Mortland, notified Respondents that their farm/forest labor contractor license renewal depended on the outcome of the BOLI investigation. The letter, addressed to F. Cisneros, stated, in pertinent part:

"The Farm Labor Licensing Unit of the Bureau of Labor and Industries for the state of Oregon has become aware that your company's wildland firefighting crew contract with the Oregon Department of Forestry has been terminated by the Oregon Department of Forestry. It is the Bureau's understanding that the termination is based on allegations of inaccurate record keeping and possible falsification of firefighter training and/or qualification records.

"As you were previously advised, your 2004 farm labor license has not been issued by the Bureau to date due to a prior investigation primarily involving your company's failure to file certified payroll records as required. Although that matter has now been satisfactorily resolved, this letter is to advise you that the Bureau will now be investigating the circumstances of the termination of your wildland firefighting crew contracts by ODF. Until

this additional investigation is complete your farm/forest license will not be eligible for renewal.

“Under OAR 839-015-0520, if a licensee demonstrates that his character, reliability, or competence makes the licensee unfit to act as a farm/forest contractor, the Bureau shall propose that the license not be renewed. Because your contract fire crews have been terminated by ODF, and therefore do not possibly pose any serious danger to the public health or safety, in the event the Bureau does propose not to renew your license as a result of the investigation, you will first be provided with a formal notice and an opportunity for a hearing before your renewal license is denied.

“As was the case in relation to the previous investigation concerning your company, you are presently fully authorized to continue to engage in farm/forest contracting activities pursuant to your 2003 license #7185. The present investigation in no way prohibits you from continuing to act as a farm/forest labor contractor at this time.”

Respondents continued to operate in their capacity as a farm/forest labor contractor throughout the BOLI investigation and thereafter.

118) BOLI Compliance Specialist Stan Wojtyla was assigned to investigate the circumstances under which Mountain Forestry's

2004 Agreement with ODF terminated. As part of his investigation, he interviewed former Mountain Forestry employees, including brothers Jose Israel Munoz-Moreno and German Munoz-Moreno, and Alex Coronado, who alleged Respondents created false identification cards for some employees. The Munoz-Moreno brothers told him they each had taken an annual refresher course in 2001 using the identities of F. Cisneros's relatives, Juan Pantoja-Cisneros and Delores Cisneros-Martinez, at F. Cisneros's request. The brothers told Wojtla that the relatives were in Mexico at the time and F. Cisneros asked them to take the training so that the Cisneros's training records would reflect the 2001 refresher training. Wojtla accepted their statements at face value and did not interview other witnesses to confirm their statements. Although Wojtla obtained training documents that showed Pantoja-Cisneros and Delores Cisneros-Martinez had taken the refresher course in 2001, he found no evidence that supported the Munoz-Moreno brothers' story that they had taken the courses for them. In an interview with Alex Coronado, Coronado confirmed that he had not taken a pack test before he fought wildfires in 2004 even though his identification card showed otherwise.

119) Don Moritz's testimony was credible. As the ODF contract services manager, he had firsthand knowledge of the ODF Agreements and the ODF investigation. Despite occasional

memory problems, his testimony was consistent and reliable. The forum credited his testimony in its entirety.

120) Steve Johnson was a credible witness. His testimony was based on his firsthand knowledge of the ODF investigation initiated during a routine records inspection. As a longtime ODF employee, he had knowledge of the Agreements and their administration. Although he mistakenly applied ODF's minimum age requirement (effective as of 2003) to earlier Agreements when he reviewed firefighter files in 2005, there is no evidence that his conclusions regarding minimum age violations were motivated by bias against Respondents or any other contractor he was investigating at that time. Although he had done some audits prior to 2004, his position as compliance specialist was newly created and his territory covered two states, 90 contractors, and 6,000 firefighters.<sup>11</sup> Given the number of firefighter files those statistics necessarily imply, S. Johnson's misapplication of the minimum age contract provision in some instances is not particularly unexpected. The forum finds his belief in 2005 that certain firefighters were underage when they were hired was genuine, albeit erroneous. In any event, his investigation in 2004 was thorough and well documented, and his findings and conclusions were

corroborated by Mountain Forestry records, Cox's testimony, and other witness testimony. The forum credits S. Johnson's testimony in its entirety.

121) Stan Wojtyla's testimony was generally credible. He acknowledged that he did not verify with other sources the information supplied to him by brothers Israel and German Munoz-Moreno and that he relied solely on their "self-declarations." He also readily acknowledged that although training records he obtained tended to discredit their contentions that they worked under different names for Mountain Forestry in 2000, he accepted the witness statements as fact. Wojtyla also displayed considerable confusion about which brother worked under which false name. For those reasons, the forum finds that, while the brothers no doubt made those statements to Wojtyla, the statements are not reliable hearsay and are afforded no weight in this proceeding. However, the forum credited Wojtyla's testimony when it was based on personal knowledge and to the extent he verified ODF findings with documents or through interviews with witnesses identified by ODF.

122) Benjamin Jones was a credible witness. His memory was reliable, his testimony was straightforward, and his demeanor was courteous and composed. He was not impeached in any way and the forum credited his testimony in its entirety.

123) Addison "Dick" Johnson ("A. Johnson") provided sufficient

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<sup>11</sup> See Finding of Fact – The Merits 50.

information to demonstrate his knowledge of training, certifying, and qualifying firefighters. Although he had some familiarity with the interagency Agreements, he readily acknowledged he was not an expert on government contract management and had no specialized knowledge of the Agreements. He also acknowledged that he was “friends” with Michael Cox, had discussed some of his testimony with Cox during the hearing, and had been at odds with ODF on occasion.<sup>12</sup> The forum finds those facts may have influenced some of his opinions at hearing, particularly his ultimate opinion that Mountain Forestry’s files established that all of the employees named in the Agency’s charging document met the minimum age and training requirements for the positions they held as firefighters from 2000 through 2004. For instance, according to his testimony, he reviewed all of the files the evening before he testified and found two files that were questionable. He opined that Gerardo Herrera Silva’s file appeared “a mix of several people,” but despite the mix-up concluded that Gerardo Herrera Silva was qualified to fight wildfires in 2001. He also testified

that Victor Cisneros’s file raised an age issue that he resolved only by determining that the file was a “mixture of files” involving two persons named Victor Cisneros. According to A. Johnson, V. Cisneros’s file, “if I take them as two separate files,” raised a training issue because he then had to determine if the “younger Victor,” i.e., F. Cisneros’s son, had a “full record.” He concluded that V. Cisneros’s record showed he never completed the required classes (S-130 and S-190) for his crew position, but opined that V. Cisneros’s later completion of an annual refresher that included “critical components” of the S-190 satisfied the requirement. A. Johnson’s opinion is not consistent with the 2000 Agreement that expressly requires successful completion of the S-130 and S-190 classes *and* the tasks described in the appropriate task books before assignment to a wildfire. Additionally, his testimony assumed that the “younger Victor” took the annual refresher course in March 2000 before he worked as a FFT1 on three wildfires in June and July 2000. However, other than his testimony that he believed V. Cisneros’s file was combined with “another Victor Cisneros’s file,” there is no evidence establishing at which point the file becomes separate files. Even if it was F. Cisneros’s son who took the March 2000 refresher course, the 2000 Agreement provides no exceptions to the core classroom training. Since A. Johnson is not qualified to interpret the Agree-

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<sup>12</sup> Question: “Isn’t it true that you’ve had some problems with ODF in the past?” Answer: “Yes. I’ve been an employee of theirs. I have been at odds with them on fires over management styles, responsibility, pay documents, how many – in the course of business, normal course of business.”

ments and has an apparent bias toward Respondents, the forum has given no weight to his opinion that the firefighters at issue were qualified to fight wildfires in 2000 and 2001. For the same reasons, the forum gave A. Johnson's other opinions appropriate weight only when they did not conflict with the terms and conditions of the Agreements or when they were consistent with other credible testimony in the record.

124) Michael Cox was not a credible witness. On key issues, his testimony was internally inconsistent and was contradicted numerous times by his prior sworn testimony and other credible evidence in the record. For instance, during the hearing he consistently downplayed his role in Mountain Forestry and his knowledge of the firefighting industry by describing himself as the "office person" with little experience with firefighting contracts. He denied having a title or any knowledge of task books or crew manifests in 2000 and alluded that any discrepancies between the Mountain Forestry task books and crew manifests presented to ODF in 2000 were C&H's or Ferguson Management's fault because they created the documents maintained in the firefighter task books that transferred to Mountain Forestry. Yet, in prior sworn testimony before a circuit court judge in August 2004, Cox described himself as Mountain Forestry's Fire Director and "overall boss" of the operations since 2000. He readily acknowledged that he was the contract negotia-

tor and organized the staff files. During the hearing, he also acknowledged on cross-examination that he prepared most of the documents for Mountain Forestry, including the license applications, and that F. Cisneros signed where necessary. Cox admitted he had signatory authority for Mountain Forestry checks and his initials and signature show up on most of the firefighter documents, including several that transferred from C&H.

Cox was evasive about his business interests and, instead, another witness described Cox's ownership interests in three other farm/forest labor contracting companies. Cox did not reveal that he co-owned Ferguson Management at one time, but his current business partner, Don Pollard, testified that not only had they co-owned Ferguson, they had been business partners in GFP Enterprises, a wild land firefighting company, since at least 2000. When viewed in light of the entire record that includes credible evidence that Cox and his wife together earned well over half a million dollars in personal income from Mountain Forestry's firefighting activities in 2002 and 2003, the forum concludes that Cox's knowledge of and experience with the firefighting industry is far greater than he represented at hearing.

Cox was equally evasive about Alex Coronado's status with Mountain Forestry. When asked on direct examination if he fired Coronado, Cox said "no." When

asked if Coronado was fired by anyone, he replied, "He was asked to return to the office in Independence." Later, on cross-examination, he denied that Coronado was ever fired and specifically stated that neither he nor F. Cisneros fired Coronado. However, in his sworn testimony before a circuit court judge in August 2004, when he was asked if he had fired Alex Coronado, Cox responded, "I did not fire him. Francisco did." When asked when Coronado was fired, Cox responded, "more or less somewhere around the first of July" and alluded that drugs and alcohol played a role in his termination.

Cox, whose memory was dim when responding to questions on cross-examination, had perfect recall of the pack tests he claimed were administered to Alex Coronado, Leticia Ayala and Jose Avila. He first testified at counsel's suggestion that he and F. Cisneros had administered the pack tests to all three of them. Later, he claimed it was actually F. Cisneros who had administered Coronado's and Ayala's tests together on the same day and Cox claimed he had tested Avila on a different day. However, during the ODF investigation, Avila told S. Johnson that F. Cisneros administered his pack test and that he had taken the pack test with Coronado and Ayala. Moreover, Cox acknowledged he had documented the pack test scores on Virgil Urena's training roster and the crew manifest, but those records show that Coronado and Ayala purportedly took the pack

test on different dates. Cox's testimony about the pack tests further stretches credulity when compared with documentary evidence that shows Cox issued an identification card to Avila with a different pack test date than the one Cox documented on the crew manifest.

Cox's responses to questions about V. Cisneros's training and qualifications were evasive and generally not credible. In his prior sworn testimony, he stated that V. Cisneros came to Mountain Forestry from C&H as a qualified FFT1 in 2000 and alluded it was possible that V. Cisneros had been working on wildfires for C&H since he was 10 years old. At hearing, he expressed limited knowledge of V. Cisneros's wildfire activity at C&H stating only that he had "knowledge that [V. Cisneros] fought fires in 1999." Although he has known the Cisneros family since 1980 and was the one witness who could shed light on the issue, he did not refute any of the evidence suggesting F. Cisneros had a brother, also named Victor, who worked as a firefighter for C&H. Although he had ample opportunity, Cox never adequately explained the discrepancies in V. Cisneros's file or how documentation for Victor Cisneros Martinez became part of the file and part of V. Cisneros's firefighting history.

In some cases, his inconsistencies were the result of making up his story as he went along. For instance, during direct examination, when responding to the

question about why the tasks in some task books were documented after the evaluation assignment, Cox replied:

“They – since fires are a dirty business, you get pretty dirty. To pack them around on a fire line would mean that they would get pretty ragged, pretty dirty. So, as a general rule, they’re not packed on to the fire line. And, since fire hours are extremely long, meaning 12 to 16 hours per day, a lot of times the person that’s administering or saying – checking off on the list as to the qualifications of the individual that is being qualified for that position – a lot of times they’re at a later date than what the event actually indicates, because he’s tired, and he wants to get in his eight hours rest, too.”

Later, still on direct, when explaining how the task book is initiated, Cox stated:

“I can initiate the task book for Mountain Forestry. Then I can give the task book to either another squad boss or I can give it to the crew boss. Either one can evaluate FFT2 firefighter to the position of a squad boss, and they will continue the application of what’s in the book to say this person did this on that fire.

“Question from counsel: So the task books are sent with the crew boss and the ID cards to the fire?

“Cox’s answer: Yes, they are.”

When he was asked if copies of the squad boss task book was kept at the office while the original was sent to the fire, Cox replied, no. Following counsel’s statement:

“The squad boss completes the requirements on one fire. The firefighter who is aspiring to be a squad boss completes the squad boss requirements on one fire, and the crew comes back. Tell me what happens to the task book then.

“Cox’s response: The task book is then attached to his file, and it’s kept in the office.

“Question from counsel: So the original goes to the –

“Cox’s response: Goes in the person’s paperwork, yes.”

Finally, in testimony given as an offer of proof that the forum has since admitted as substantive evidence, Cox described when a contractor would have been likely to cheat during the period at issue. Counsel asked, “So, for the year 2003, given the heightened requirements for crew bosses and squad bosses, would that be the year for contractors to begin to cheat, fudge, falsify in records to present qualified crew bosses and squad bosses?” Cox responded, “That would have been the year that you would have -- if you were going to cheat, you would have wanted to have the cheating accomplished before you got to records inspection in 2003.”

For all of the reasons set forth above, the forum gave little or no

weight to Cox's testimony and credited it only when it was corroborated by other credible evidence.

125) Donald Pollard's testimony was brief and offered by Respondents as foundation for a "To Whom it May Concern" letter that, according to his testimony, "had to do with, you know, some of the charges that have been filed against [Mountain Forestry, Michael Cox, and F. Cisneros] and – you know, I don't have all the details to those, but that I – you know, that I've been doing – doing their books and things of that nature for quite some time and have a hard time believing that there's – there's major fraud or whatever." The letter, dated September 21, 2005, and offered into evidence, stated, in pertinent part:

"I have owned and managed my own accounting practice for fifteen years and at one time serviced over five hundred clients. I also own a wild land firefighting company that has contracts or agreements with government agencies to provide 20 person hand crews and wild land fire engines. I have had ownership in a wild land firefighting company since 1997."

He further stated that: "As the tax preparer for [Mountain Forestry, Michael Cox, F. Cisneros, and C&H], I have never had any reason to believe that they have done anything of an illegal nature or participated in an illegal business activity." Explaining his relation-

ship with Respondents, Pollard wrote:

"I have known Michael Cox and Francisco Cisneros since 1991. At the time, I was controller of a large reforestation company and both Mike and Francisco worked for this company at the time. As time went by and the company struggled to keep pace in a decreasing reforestation market, I started my own accounting practice and this company, Mike Cox, C&H Reforesters, Inc., and Francisco Cisneros were all among my first clients. I have prepared income taxes and provided other related accounting services to Mountain Forestry, Michael Cox, and Francisco Cisneros ever since."

When asked if the opinions he stated in the letter were his current opinions of Mountain Forestry's practices, Pollard replied: "Yeah. I'm not aware of any – any material wrongdoing that would cause me to believe that I think they're crooks, if that's what you're asking me." On cross-examination, Pollard admitted he and Michael Cox had co-owned Ferguson Management at one time and that he and Cox have been business partners and co-owners of GFP Enterprises since approximately 2000. Pollard was not straightforward about those connections in his September 5, 2005, letter, or in his initial testimony. Moreover, he was evasive about the timeframes during which he and Cox established their

business relationship. For those reasons, the forum found the letter misleading and Pollard's testimony motivated by his business associations with Cox and Mountain Forestry. Other than his admission that he and Cox were longstanding business partners, the forum gave Pollard's letter and testimony no weight.

126) Respondents offered Jose Avila's prior testimony in a civil proceeding before a circuit court judge to support their contention that Mountain Forestry pack tested Alex Coronado and Leticia Ayala before dispatching them to wildfires in Nevada and California. His entire testimony was admitted as part of an Agency exhibit that includes a partial transcript of the previous proceeding. The forum finds Avila's prior testimony unreliable for several reasons. First, the Agency introduced impeachment evidence establishing that Avila had three felony convictions for which his release date from the penalty imposed was within 15 years of the hearing date.<sup>13</sup> Avila did not appear at hearing to explain the circumstances of his prior convictions. Second, his prior testimony that he participated in a pack test with Coronado and Ayala is suspect because Michael Cox represented to S. Johnson that F. Cisneros

pack tested Coronado on March 25, 2004, and Mountain Forestry employee Brandon Creson confirmed to S. Johnson that he had added a pack test date to a company training roster that showed Ayala ostensibly had been given a pack test on May 30, 2004.<sup>14</sup> Creson also claimed he had administered a pack test to Coronado and Ayala together on the same day and appeared surprised to discover that different dates had been reported on the company roster. Additionally, during the ODF investigation, Avila acknowledged to S. Johnson that F. Cisneros had administered his pack test on February 29, 2004, as stated on the crew identification card that Cox signed and issued to Avila.<sup>15</sup> Yet, Cox told S. Johnson and testified at hearing that he had "personally" administered Avila's pack test on March 15, 2004, and had recorded Avila's pack test score and date on the company training roster.<sup>16</sup>

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<sup>13</sup> Avila's release date on the first conviction was 13 years prior to hearing. Avila's release date on the two later convictions was seven years prior to hearing.

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<sup>14</sup> Avila's brief prior testimony consisted of: "Q. Were you present before June 1 when Alex Coronado and Leticia Ayala took the pack test? A. Yes. Q. Did you walk with them? A. Sure. Q. And walk back? A. Right. Q. Did you tell Mr. Johnson that you had taken the pack test? A. Yes, I did. Q. And was that before you were dispatched on any fire? A. That is right." (Exhibit A-78)

<sup>15</sup> See Finding of Fact – The Merits 58.

<sup>16</sup> Cox acknowledged at hearing that he did not monitor Avila's pack test, but only observed him leaving and re-

Avila's prior testimony is further eroded by S. Johnson's credible testimony that Coronado told him 1) he had not taken a pack test before Mountain Forestry dispatched him to wildfires in Nevada and California; 2) he was "bud-capping" near Astoria on March 25, 2004, the date Cox claims Coronado was pack tested at the Mountain Forestry office; and 3) he was working in Warm Springs or Grangeville on May 31, 2004, the day Ayala was purportedly pack tested. Coronado also showed S. Johnson Ayala's crew identification card that showed a May 3, 2004, refresher and pack test date. Mountain Forestry's payroll records confirm that Coronado planted trees for Mountain Forestry in Warm Springs and Grangeville from May 1 through 31, 2004.<sup>17</sup> Furthermore, Mountain Forestry trainer Virgil Urena's statement to S. Johnson that he did not pack test Avila, Coronado or Ayala prior to their dispatch to wildfires lends additional credence to Coronado's statements to S. Johnson. Avila did not appear at hearing to explain the discrepancies between his prior testimony and the multiple versions proffered by Respondents of when and how Coronado and Ayala were pack tested. For all of the above reasons, the forum has discredited Avila's prior testimony in its entirety.

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turning from the pack test. See Finding of Fact – The Merits 56.

<sup>17</sup> See Finding of Fact – The Merits 63.

#### ULTIMATE FINDINGS OF FACT

1) At all times material, F. Cisneros and Mountain Forestry conducted business jointly as a licensed farm/forest labor contractor.

2) At all times material, Penny Cox was Mountain Forestry's only other shareholder and Michael Cox, her husband, was Mountain Forestry's fire director.

3) At all times material, Michael Cox co-owned at least three farm/forest labor contracting companies, Ferguson Management, C&H Reforesters, Inc., and GFP Enterprises, before or while employed by Mountain Forestry, all of which have had contracts or agreements with government agencies to provide fire suppression crews to fight wildfires.

4) At all times material, V. Cisneros was F. Cisneros's son and R. Cisneros was F. Cisneros's nephew.

5) Respondents entered into Agreements with ODF each year from 2000 through 2004. Each of those years, Respondents agreed to provide firefighting services to ODF in accordance with the terms and conditions of the Agreements. Under each Agreement, Respondents were independent contractors and each confirmed dispatch to a wildfire constituted a separate and binding contract.

6) The parties to each Agreement included the States of Oregon and Washington and five federal agencies, the USFS, NPS, BLM, BIA, and USFW. At all

times material, ODF was responsible for administering the Agreement and dispatching crews to wildfires on behalf of Oregon, Washington, and the federal agencies.

7) As a term and condition of each Agreement, Respondents agreed to “comply with all other federal, State, county and local laws, ordinances and regulations applicable to [the] agreement.”

8) In order to perform any work under the 2000 through 2004 Agreements, Oregon contractors were required to obtain and maintain an Oregon farm/forest labor contractor license from BOLI.

9) Respondents applied annually to renew their farm/forest labor contractor license from 2000 through 2004. On each renewal application, F. Cisneros signed a statement under oath that Respondents agreed to “at all times conduct the business of a farm and/or forest labor contractor in accordance with all applicable laws of the State of Oregon and rules of the Commissioner of the Bureau of Labor and Industries.”

10) The work required under the Agreements from 2000 through 2004 was hazardous work, performed in forest and rangeland environments that included steep terrain, “extremely” uneven and rocky surfaces covered with thick tangled vegetation, and extreme temperatures, either from the weather or the fire conditions. Firefighters were exposed to smoke and dust conditions, fre-

quently severe, and were required to wear protective clothing.

11) At all times material, the State of Oregon designated fire-fighting as a hazardous occupation. The minimum age for firefighters in Oregon was and still is 16 years old.

12) From 2000 through 2002, the Agreements did not specify a minimum age requirement for firefighters. During that time, Respondents were subject to Oregon’s minimum age requirement for firefighters. In 2003 and 2004, the Agreements provided that all firefighters provided by contractors pursuant to the Agreements shall be at least 18 years old.

13) At all times material, the State of Oregon required employers to obtain a validated employment certificate from BOLI before employing minors from 14 through 17 years old in Oregon.

14) In 2000, Mountain Forestry employed at least three minors, V. Cisneros (DOB: July 27, 1984), S. Cisneros (DOB: September 8, 1983), and Jose Manuel Herrera Leon (DOB: February 23, 1983), without first obtaining a validated employment certificate.

15) In 2001, Mountain Forestry employed at least three minors, V. Cisneros (DOB: July 27, 1984), Andrew Williamson (DOB: January 4, 1984), and David Trujillo (DOB: March 14, 1984), without first obtaining a validated employment certificate.

16) In 2002, Mountain Forestry employed at least two minors, V. Cisneros (DOB: July 27, 1984) and Ryan Sims (DOB: April 28, 1985), without first obtaining a validated employment certificate.

17) In 2003, Mountain Forestry employed at least one minor, R. Cisneros (DOB: October 14, 1987), without first obtaining a validated employment certificate.

18) In 2004, Mountain Forestry employed at least two minors, Benjamin Jones (DOB: September 8, 1986) and R. Cisneros (DOB: October 14, 1987), without first obtaining a validated employment certificate.

19) Under the 2000 Agreement, Mountain Forestry employee V. Cisneros performed work as a squad boss on the Soldier, Tam Tam, and Wall wildfires before his 16<sup>th</sup> birthday in 2000.

20) Under the 2003 Agreement, Mountain Forestry employee R. Cisneros performed work on the Herman Creek and Blackfoot Lake wildfires before his 16<sup>th</sup> birthday in 2003.

21) The 2000 through 2004 Agreements required that each firefighting crew consist of 20 "properly trained individuals." Under each Agreement, the training included required classroom work and supervised on-the-job training.

22) When monitoring the training and experience component of the Agreement, ODF relied on the Program Management Sys-

tem ("PMS") 310-1, published by the National Wildfire Coordinating Group, which prescribes the standards and guidelines for the firefighter training and experience set forth in the Agreement.

23) Under the Agreement, contractors were responsible for qualifying and certifying their employees as firefighters using the specifications set forth in the Agreement.

24) All firefighters begin training for their positions by taking required classes specific to each position level. The purpose of the coursework is to teach firefighters basic firefighting skills and to prepare for hazardous work conditions.

25) The classroom training includes course work taught by certified instructors affiliated with authorized training associations or with a community college. A training association's authorization to train firefighters for ODF assignments derives from a Memorandum of Understanding ("MOU") executed by ODF.

26) In addition to the classroom training, trainees for any firefighter position are required to complete the performance tasks set forth in the appropriate task book. Task books are administered by the contractor to qualify employees to meet the position requirements set forth in the Agreement.

27) Under the Agreements, contractors are responsible for obtaining and issuing a task book

appropriate for the position each employee will perform on a crew.

28) A firefighter in training for a position or working on an "evaluation assignment" is required to carry the task book at all times while in training or during the evaluation period. Those who are already qualified in their position are not required to carry their completed task books. Upon completion of the task book, the contractor is responsible for certifying the firefighter-in-training for the position the firefighter trained to perform on the crew by using the procedures set forth in the task books.

29) The task book is not complete until all tasks are properly performed and verified by the evaluator. Additionally, the contractor or contractor's corporate officer must review the task book to ensure it has been properly completed, including checking that an evaluator has initialed all tasks, the evaluation records at the back are properly completed, the government supervisor's statement has been acquired (for CRWB certification), and the Final Evaluator's Verification has been completed. The contractor is responsible for reviewing each employee's training and experience to ensure that all other qualification standards for the position have been met. Before the task book is valid, the contractor or contractor's corporate officer must complete the company certification portion of the task book.

30) ODF is not involved in task book administration and its

personnel do not sign the certification portion of the task book. Before a firefighter is certified for the crew boss position, a government supervisor is required to review, approve, and sign the performance evaluation assignment.

31) Under the 2000 through 2002 Agreements, trainees for any firefighter position were paid by the contractor while in training and their pay was not chargeable to the government. In 2003 and 2004, trainees for the squad boss and crew boss positions were chargeable to the government.

32) Under the 2000 through 2002 Agreements, to become certified as a FFT2 entry level firefighter, individuals were required to complete the Firefighter Training (S-130) and Introduction to Fire Behavior (S-190) classes. Prior experience was not a prerequisite, but all FFT2's were required to successfully complete the classroom training and performance tasks set forth in the appropriate task book before assignment to a wildland fire.

33) Under the 2000 through 2002 Agreements, individuals were required to complete the S-130 and S-190 classes to become certified as a FFT1 advanced firefighter squad boss. No additional classroom training was required until 2001 when the requirement to successfully complete the Advanced Firefighter Training class (S-131) was added to the Agreement. All FFT1s were required to successfully complete the classroom training, demonstrate satisfactory performance as a

FFT2, and demonstrate satisfactory position performance by completing the performance tasks set forth in the appropriate task book, including supervising a minimum of five firefighters on a wildfire incident, within the previous five years, before certification as a squad boss.

34) Under the 2000 through 2002 Agreements, to become certified as a CRWB crew boss, individuals were required to successfully complete the Intermediate Wildland Fire Behavior (S-290) class in addition to the S-130, S-190, and, effective 2001, S-131 classes. For certification, individuals also were required to demonstrate satisfactory performance as a FFT1 and successfully complete the performance tasks set forth in the appropriate task book, including satisfactory position performance as a crew boss, within the previous five years, supervising a minimum of 18 firefighters on a wildland fire.

35) The 2000 through 2002 Agreements included pre-incident, incident, and post-incident procedures that dictated how contractors were to use the task books for qualifying their employees to meet the specifications in the Agreements.

36) Under the 2000 through 2002 Agreements, *prior to* assigning the employee to a "wildfire incident," contractors were responsible for ensuring that each employee was issued a task book appropriate to the position using a three step procedure. Step one instructed the contractor to obtain

the task books from the National Interagency Fire Center ("NIFC") and recommended that "the Task Book Administrator's Guide, PMS 330-1 be obtained" as well. Step two instructed the contractor to issue the task book to employees with the "Assigned To" and "Initiated By" information appropriately filled out. Step three instructed the contractor to assure that each employee has completed "all required [classroom] training" for their position.

37) Under the 2000 through 2002 Agreements, after assignment to a wildfire incident, in addition to the general provisions pertaining to PTB administration, the following incident procedures applied:

"**CONTRACTORS** may use **GOVERNMENT** incidents, for which they are requested or assigned, to qualify and certify employees for FFT1 and CRWB positions. Only one training OR evaluation assignment will be permitted per crew on each incident. The coach/evaluator must, as a minimum, be certified in the position they are coaching or evaluating and will be paid as part of the contracted crew. The trainee will be in addition to the contracted crew and paid by the **CONTRACTOR** (not charged to the **GOVERNMENT**).

"a. **FFT2** personnel must be certified prior to arrival at the incident. No task book administration at an incident is required.

“b. **FFT1** personnel require a performance evaluation assignment on a wildfire to qualify for certification. The **GOVERNMENT** will NOT participate in the administration of the FFT1 PTB’s nor verify evaluation assignments.

“c. **CRWB** personnel require a performance evaluation assignment on a wildfire to qualify for certification. Refer to the procedures that follow for specific steps for PTB administration for these assignments.”

The procedures that followed included a five step process for evaluating CRWB trainees that contained the following provisions:

**“Step 1: CONTRACTORS**

must identify any trainee in an evaluation assignment to the Incident Management Team at initial check-in. An incident performance evaluation form should also be requested and obtained at this time.

**Step 2:** During the assignment, the **CONTRACTOR’s** evaluator will observe the trainee’s performance as the crew boss and initial all tasks in the PTB that the trainee demonstrates successfully. The incident and evaluation assignment should be of sufficient duration and complexity so that the trainee has the opportunity to demonstrate all the tasks of the position. If the trainee does not have the opportunity to demonstrate all the

tasks, a second evaluation assignment will be necessary.

**“Step 3:** Upon completion of the evaluation assignment, the **CONTRACTOR’s** evaluator will complete an ‘Evaluation Record’ in the back of the PTB.

**“Step 4:** The **CONTRACTOR’s** evaluator will ask their **GOVERNMENT** supervisor \* \* \* to state in writing, under the PTB Evaluation Record completed by the evaluator, whether or not the incident was of sufficient complexity and duration to provide a valid opportunity to evaluate the CRWB trainee’s performance. The **GOVERNMENT** supervisor will sign the record next to their statement.

“1. If the **GOVERNMENT** supervisor states that the incident **was not** adequate to evaluate the CRWB trainee’s performance, a second evaluation assignment will be necessary before individual can be certified in the position.

“2. If the **GOVERNMENT** supervisor states that the incident **was** adequate to evaluate the CRWB trainee’s performance, the **CONTRACTOR’s** evaluator should complete the ‘Final Evaluator’s Verification’ portion of the inside front cover of the PTB.

**“Step 5:** The **CONTRACTOR’s** evaluator will complete a written rating of the trainee’s performance, using the **GOVERNMENT’s** evaluation form that was provided during the

initial check-in, and provide the Incident Management Team with a copy. A copy of this rating shall be kept by the **CONTRACTOR** to be included with the employee's training records. The IMT will maintain a copy with the final incident records."

38) Under the 2000 through 2002 Agreements, following an incident, the contractor was responsible for certifying their employees' task books by using the following five step procedure:

"**Step 1: CONTRACTOR** reviews all information written in each PTB to assure it has been properly completed. This review should include checking that an evaluator has initialed all tasks, the Evaluation Records in the back of the PTB have been appropriately completed, that **GOVERNMENT** supervisor's statements have been obtained, and the Final Evaluator's Verification has been completed.

"**Step 2: CONTRACTOR** reviews each employee's training and experience records to assure all other qualification standards for the position, as listed in EXHIBIT K are met.

"**Step 3:** When all EXHIBIT K qualification standards are met, **CONTRACTOR** completes the 'Agency Certification' portion of the inside cover of the PTB.

"**Step 4:** Place a copy of the completed PTB in the employee's training file.

"**Step 5:** If an individual leaves a **CONTRACTOR's** employ, the original PTB will be given to the departing individual. It is recommended that the **CONTRACTOR** for future reference purposes keep a copy."

39) To demonstrate satisfactory performance in a position under the PMS 310-1 guidelines, trainees were required to perform work on "one or more fires" after completing the task book before becoming qualified in a particular position. After qualifying for a position, the firefighter was required to perform work on at least one additional fire in that position before training for the next position.

40) Between 2000 and 2002, contractors were "short-cutting" the training process by permitting trainees to begin and complete a task book for one position on one fire and begin and complete a new task book for another position on the next fire. In many cases, contractors had entry level firefighters who began and completed task books as a FFT2 on one fire and began and completed task books as a FFT1 squad boss on the next fire without performing any work on a fire as a FFT2.

41) Due to a particularly bad fire season in 2002, ODF requested increased fire crews and contractors were "rushing" firefighters through the promotional process to get the extra crews out to the fires. During that time, ODF became concerned about the training and safety issues created

by the rapid progression of inexperienced firefighters and revamped its 2003 Agreement to bolster existing requirements and implement more stringent training requirements.

42) In the 2003 and 2004 Agreements, ODF added a requirement that firefighters engage in a prescribed amount of "fire suppression action on active flame (hotline)" before promoting to the next level. The Agreements reinforced the original requirements by detailing the training sequence for each position, including the number of incidents and "operational periods" required for qualification.

43) Except for the age requirement, the requirements for certification as an entry level firefighter FFT2 did not change in the 2003 and 2004 Agreements. As in previous years, no prior experience was necessary, but to become FFT2 certified, individuals were required to successfully complete the classroom training (S-130 and S-190 classes) and the performance tasks set forth in the PTB before assignment to a wildland fire. The sequence for position qualification as a FFT2 was:

"1. Complete S-130/S-190 training and FFT2 Task Book.

"2. Pass pack test.

"3. **Become certified as an FFT2.**

"4. Work on at least three wildfire Incidents that include hotline activities and total at

least fifteen (15) Operational Periods, 10 of them on Type 2 or 1 Incidents. This meets requirement for satisfactory performance as FFT2 and one season of experience.

"5. Eligible to be considered for FFT1 **Trainee** once #1 through #4 above are met."

44) To become FFT1 certified in 2003 and 2004, individuals were required to successfully complete the following sequence:

"1. Complete S-131.

"2. FFT1 task book is issued following S-131 training making the firefighter an FFT1 Trainee.

"3. Complete annual refresher training prior to next season.

"4. Pass pack test prior to next season.

"5. As an FFT1 Trainee, work on at least three (3) training/evaluation assignments on Type 3, 2 or 1 wildfire Incidents that included hotline activities and total at least 15 Operational Periods, 10 of them on Type 2 or 1 Incidents and complete the FFT1 task book. This meets requirement for satisfactory position performance as an FFT1.

"6. **Become certified as a FFT1/Squad Boss.**

"7. Work on an additional three (3) wildfire Incidents that included hotline activities and total at least 15 Operational Periods, 10 of them on Type 3, 2 or 1 fires. This meets the

satisfactory performance requirement as FFT1/Squad Boss.

"8. Eligible to be considered for **CRWB Trainee** once #1 through #7 above are met."

45) To become certified as a crew boss ("CRWB") in 2003 and 2004, individuals were required to successfully complete the following sequence:

"1. Complete S-230 and S-290. [The S-290 (Intermediate Fire Behavior) class was added in the 2003 Agreement and had to be completed by December 31, 2004.]

"2. CRWB task book is issued following S-230 & S-290 training making the firefighter a CRWB Trainee.

"3. Complete Annual Refresher training prior to next fire season.

"4. Pass pack test prior to next fire season.

"5. As a CRWB Trainee, work on at least three (3) training/evaluation assignments on Type 3, 2 or 1 wildfire Incidents that included hotline activities and total at least 15 Operational Periods, 10 of them on Type 2 or 1 Incidents and complete the CRWB task book. This meets requirement for satisfactory position performance as a CRWB.

"6. **Become certified as a CRWB.**"

46) The 2003 and 2004 Agreements clarified its 2000

through 2002 requirements by specifically stating that 1) "all required training for a position must be completed before the firefighter can begin working on the task book for that position"; 2) "a firefighter may work on only one task book at a time"; and 3) all required prerequisite experience must be completed before the firefighter can begin working on the task book for the next higher position."

47) The 2000 through 2004 Agreements required that all firefighters in every position successfully complete an annual refresher class prior to the next fire season.

48) The 2000 through 2004 Agreements required that a firefighter must have at least one qualifying assignment every five years to maintain a current certification in a position.

49) All Agreements required that all trainees be identified at check-in and on the crew manifest.

50) The 2000 through 2004 Agreements required that all firefighters pass the "Work Capacity Fitness Test" at the "arduous" level of physical fitness by taking a "pack test" and incorporated the work capacity guidelines published by the USFS. The pack test's purpose was to measure endurance and required completing a three mile hike with a 45-pound pack in 45 minutes.

51) Under the Agreements, Respondents were required to administer pack tests to all firefighters at the start of fire season

prior to listing them on the June 1 crew manifest.

52) Under the 2000 through 2004 Agreements, contractors were responsible for administering the pack tests. Pack tests could be given by a company owner, a qualified employee of the company owner, e.g., squad or crew boss, or a certified trainer. The pack test was usually conducted on an oval, track-like course, or by sending the firefighter “out and back,” i.e., a “mile and a half down a road and back.” The “administering official” conducting the pack test was required to monitor the test from start to finish. On an oval track, the administering official can stand in the middle of the oval and observe everyone taking the pack test. On an “out and back,” the administering official either must move with those taking the test or enlist additional help to monitor them. The administering official is monitoring to ensure that those taking the pack test are walking and not running and that they are carrying the 45 pound packs for the duration of the test. On an “out and back” the official is also monitoring to ensure the test taker makes it to the mile and a half marker and back. The test is conducted on a “pass/fail” basis.

53) Between 2000 and 2004, pack tests were often given in conjunction with the annual refresher training for the contractor and crew’s convenience. During that period, trainers sometimes sent ODF a list of those attending the training and included pack test scores representing that the train-

ees had been given pack tests following their training. Contractors were ultimately responsible for ensuring the pack tests were properly administered and, unless ODF received a complaint indicating otherwise, it relied on the contractor’s representations.

54) Before 2002, contractors were not required to notify ODF when they administered pack tests.

55) In 2002, contractors were required to notify ODF in writing at least three days in advance prior to administering a pack test. The notification had to include the date, time, address, estimated number of people taking the pack test, and name and phone number of the administering official. Within seven days following the pack test, contractors were required to report to ODF the names and company affiliation of each person who passed or failed the test. In 2003 and 2004, the notification period was changed from three days to five days.

56) Although ODF discouraged the practice, contractors were in compliance with the notice requirements if they hired certified trainers to administer the pack tests in conjunction with the classroom training and notify ODF by using the training rosters with the requisite information.

57) Under the Agreements, ODF reserved the right to monitor pack test administration. If ODF determined that a pack test was not conducted properly, ODF

could issue a notice of non-compliance to each contractor with an employee present for training.

58) Under the 2000 through 2004 Agreements, all firefighters were required to carry a picture identification card that included the firefighter's name and photograph, social security number, list of positions for which the firefighter was qualified, and the date the firefighter passed the pack test. A colored dot on the card designated the firefighter as a supervisor. The back side of the card consisted of a list of the firefighter's training and training dates. The Agreements required that the company owner sign the identification card certifying that the firefighter has met all training requirements of the Agreement.

59) Michael Cox issued Alex Coronado a crew identification card that showed Coronado completed an annual refresher course on February 29, 2004, and pack test on March 25, 2004. Cox signed his name on the "Owner Signature" line.

60) On a training roster dated February 29, 2004, Michael Cox wrote "44 Pack 3/25/04" next to Alex Coronado's name and "Late" in the pack score box along with his initials.

61) Michael Cox issued Jose Avila a crew identification card that showed Avila completed an annual refresher course and a pack test on February 29, 2004. Cox signed his name on the "Owner Signature" line.

62) On a training roster dated February 29, 2004, Michael Cox wrote "41 Pack 3/15/04" next to Jose Avila's name and "Late" in the pack score box along with his initials.

63) Virgil Urena prepared the training roster dated February 29, 2004, and entered pack scores for everyone except Alex Coronado and Jose Avila prior to Michael Cox's entries.

64) On the Mountain Forestry crew manifest for 2004, Jose Avila was listed as a SRB with a March 15, 2004, fitness training date and a 41 pack test score. Alex Coronado's name and pack test information was covered with white-out.

65) Leticia Ayala's name appeared on the April 29, 2004, training roster prepared by Virgil Urena. Urena wrote NT in the pack score box because Ayala had not taken the pack test. The same information appeared on the 2004 Mountain Forestry crew manifest.

66) Mountain Forestry employee Brandon Creson was told to write a pack score and date next to Ayala's name on the April 29, 2004, training roster. He wrote "44.00" and "5/30/04" next to the NT notation in Ayala's pack score box. No pack tests were administered on May 30, 2004. Alex Coronado was tree thinning in Warm Springs and Grangeland on May 30, 2004.

67) Respondents did not administer a pack test to Alex Coronado before dispatching him

to the Cole Complex and Reno Standby wildfires in California and Nevada in 2004.

68) Respondents did not administer a pack test to Leticia Ayala before dispatching her to the Cole Complex wildfire in California in 2004.

69) Under the 2004 Agreement, Respondents agreed to notify ODF before administering pack tests to firefighters.

70) Respondents administered pack tests on the following dates in 2004: February 22 and 29; March 7, 8, and 27; April 25, 26 and 29; May 1, 3, 16, 17, 30 and 31; June 7; and July 12, 2004, without providing the requisite notice to ODF.

71) Mountain Forestry did not administer pack tests to Jorge Carbajal, Emilio Martinez, Jose Macias, Alex Coronado, Jose Avila, Rosendo Cabral, and Leticia Ayala as indicated by Mountain Forestry records. Urena confirmed to S. Johnson that he had not pack tested any of them and the scores were added after he sent the rosters to Mountain Forestry. Urena later told S. Johnson that he had administered a pack test to Emilio Martinez on July 12, 2004, but acknowledged he did not provide any notice to ODF.

72) V. Cisneros did not complete the entry level training classes (S-130 and S-190) or a FFT1 task book before he performed work as a FFT1 squad boss on three wildfires in 2000. Between 2000 and 2004, he did

not complete any training to qualify as a FFT2 or FFT1 and was not qualified to progress to CRWB. During that time, he was dispatched to at least 35 wildfires as a Mountain Forestry CRWB crew boss.

73) Gerardo Herrera Silva did not complete the entry level training classes (S-130 and S-190) or a FFT2 task book before he performed work as a Mountain Forestry FFT2 firefighter on five wildfires in 2003.

74) Andrew Williamson did not complete all of the tasks required in the FFT1 task book before he performed work as a Mountain Forestry FFT1 squad boss and SRB crew boss on 11 wildfires between 2002 and 2004.

75) Samuel Cisneros was assigned a FFT1 task book and promoted to FFT1 squad boss on the same day, two months after he was certified as a FFT2, and after he had already performed work as a Mountain Forestry FFT1 on three wildfires. His FFT1 task book was not properly certified and ODF voided the task book. In total, S. Cisneros worked as a FFT1 squad boss on 12 wildfires from 2001 through 2003.

76) On or about July 30, 2004, ODF terminated its firefighting crew agreement (2004 Agreement) with Mountain Forestry. ODF determined that Mountain Forestry was "materially deficient in contract performance" under the 2004 Agreement. ODF's findings included Mountain Forestry's "failure to comply with

the requirements of Sections 4.8.1 (Identification of Personnel); 4.12.1, 4.12.2, 4.12.4 (Pack Test); 4.14.1, 4.14.2 (Crew Training and Experience); and 4.15.1 (Crew Records).” ODF notified Respondents that based on their findings following the investigation, “Mountain Forestry falsified training documentation and used unqualified personnel during fire assignments in 2004.” ODF determined that the “material deficiencies suggest a serious and potentially dangerous pattern of unsatisfactory performance.”

77) Respondents, through F. Cisneros, knowingly and purposely made misrepresentations on its license renewal applications from 2000 through 2004 when they agreed to comply with all State laws and Commissioner’s rules.

78) Respondents signed a Consent Order in May 2004, in which they admitted to record keeping violations under ORS 658.417, ORS 653.045, OAR 839-015-0300, and OAR 839-020-0080, and agreed to pay a \$12,500 civil penalty.

79) Respondents, through fire director Michael Cox, knowingly and purposely falsified pack test information on at least three crew identification cards prior to dispatching two of the firefighters to wildfires in 2004.

80) Respondents, through fire director Michael Cox, knowingly and purposely falsified training information on at least one crew identification card prior

to dispatching the firefighter to wildfires from 2000 through 2004.

81) Respondents, through fire director Michael Cox, knowingly and purposely falsified at least two training rosters to show pack test scores for at least three firefighters who were not pack tested and presented the falsified records to ODF.

82) Respondents knowingly and purposely created false training records and task books for at least two firefighters to cover up training and minimum age deficiencies and presented the falsified records to ODF.

83) Respondents knowingly and purposely advanced at least four firefighters to positions they were not qualified or properly certified to perform.

84) Respondents knowingly and purposely falsified crew manifests to show the existence of pack tests that were not administered and presented the falsified manifests to ODF.

#### **CONCLUSIONS OF LAW**

1) The Commissioner of the Oregon Bureau of Labor and Industries has jurisdiction over the subject matter and of Respondents Francisco Cisneros and Mountain Forestry, Inc. herein. ORS 658.405 to 658.503 and ORS 653.305 to 653.370.

2) The actions, inaction, and statements of Francisco Cisneros and Michael Cox are properly imputed to Mountain Forestry, Inc.

3) Respondents violated ORS 658.440(1)(d) by providing ODF with wildfire suppression crews that included at least two firefighters who did not meet the statutory minimum age requirements for firefighting in Oregon, which violated the terms and conditions of their legal and valid agreements with ODF that were entered into in Respondents' capacity as a farm/forest labor contractor.

4) Respondents violated ORS 658.440(1)(d) by dispatching at least four firefighters who did not meet the minimum training requirements for their positions under the 2000 through 2004 Interagency Firefighting Crew Agreements and who collectively performed work on at least 68 wildfires, which violated the terms and conditions of their legal and valid agreements with ODF that were entered into in Respondents' capacity as a farm/forest labor contractor.

5) Respondents violated ORS 658.440(1)(d) by dispatching at least two firefighters to fight wildfires without the requisite endurance testing required under the 2004 Interagency Firefighting Agreement, which violated the terms and conditions of their legal and valid agreement with ODF that was entered into in Respondents' capacity as a farm/forest labor contractor.

6) Respondents violated ORS 658.440(1)(d) by failing to notify ODF prior to administering endurance tests on 16 separate occasions as required under the 2004 Interagency Firefighting

Agreement, which violated the terms and conditions of their legal and valid agreement with ODF that was entered into in Respondents' capacity as a farm/forest labor contractor.

7) Respondents violated ORS 658.440(1)(d) by employing minors in Oregon each year from 2000 through 2004 without first obtaining a validated annual employment certificate to employ minors pursuant to ORS 653.307, which violated the terms and conditions of five legal and valid agreements with BOLI that were entered into in Respondents' capacity as a farm/forest labor contractor.

8) Respondents violated ORS 658.440(1)(d) by employing at least two minor children less than 16 years of age in 2000 and 2003 to engage in firefighting, a hazardous occupation pursuant to OAR 839-021-0102(p), which violated the terms and conditions of legal and valid agreements with BOLI that were entered into in Respondents' capacity as a farm/forest labor contractor.

9) Mountain Forestry, Inc. violated ORS 653.307 and OAR 839-021-0220 by employing minors in Oregon each year from 2000 through 2004 without first obtaining a validated annual employment certificate to employ minors.

9) Mountain Forestry, Inc. violated OAR 839-021-0102(p) by employing at least two minor children less than 16 years of age in

2000 and 2003 to engage in fire-fighting, a hazardous occupation.

10) Under the facts and circumstances of this record, and according to the applicable law, the Commissioner of the Bureau of Labor and Industries is authorized to assess civil penalties against Mountain Forestry, Inc. and Francisco Cisneros for each violation of ORS 658.440(1)(d). The civil penalties assessed in the Order herein are a proper exercise of that authority. ORS 658.453(1)(c), OAR 839-015-0508(1)(f).

11) Under the facts and circumstances of this record, and according to the applicable law, the Commissioner of the Bureau of Labor and Industries is authorized to assess civil penalties against Mountain Forestry, Inc. for each violation of ORS 653.305 to 653.370 or any rule adopted by the Wage and Hour Commission thereunder. ORS 653.370, OAR 839-019-0010(1)&(2), and OAR 839-019-0025.

12) Respondents' multiple violations of ORS 658.440(1)(d), course of misconduct in their dealings with ODF and BOLI, and willful misrepresentations on their license renewal applications demonstrate that their character, competence, and reliability makes them unfit to act as farm/forest labor contractors. ORS 658.420(1), OAR 839-015-0520(3).

#### OPINION

The Agency alleges Respondents, while jointly acting as a farm/forest labor contractor, failed

to comply with the terms and conditions of lawful agreements or contracts; "made false, fraudulent, or misleading representations or published or circulated false, fraudulent, or misleading information concerning the terms, condition or existence of employment at any place or by any person, including but not limited to, the [BOLI] and the [ODF]"; failed to obtain an annual employment certificate to employ minors; and employed a minor in a hazardous occupation. The Agency contends the alleged violations demonstrate that Respondents lack the character, competence and reliability to act as a farm/forest labor contractor and seeks to revoke or refuse to renew their farm/forest labor contractor license. The Agency also seeks civil penalties totaling \$112,000.

#### FARM/FOREST LABOR CONTRACTOR VIOLATIONS

##### A. Failure to Comply with Lawful Contracts in Violation of ORS 658.440(1)(d)

In order to maintain a farm/forest labor contractor license in Oregon, contractors are required to abide by any lawful contracts and agreements entered into in their capacity as farm/forest labor contractors. The Agency must prove that Respondents, 1) acting jointly as a farm/forest labor contractor, 2) entered into legal and valid contracts or agreements with ODF and BOLI, 3) entered into the contracts or agreements in their capacity as a farm/forest

labor contractor, and 4) violated provisions of those contracts or agreements. *In the Matter of Rodrigo Ayala Ochoa*, 25 BOLI 12, 36 (2003), *revised final order on reconsideration, affirm'd without opinion, Ochoa v. Bureau of Labor and Industries*, 196 Or App 639 (2004).

In their answer, Respondents did not deny they entered into legal and valid agreements with ODF from 2000 through 2004 while jointly acting in their capacity as a licensed farm/forest labor contractor and those facts are deemed admitted by Respondents. OAR 839-050-0130(2). However, Respondents argue that "the [BOLI] license applications are not within the scope of the statute pleaded [ORS 658.440(1)(d)]" which applies only to "agreements or contracts entered into in the contractor's capacity as a farm labor contractor" and that Respondents were not acting in that capacity each time they made application for a license. The issues, therefore, are 1) whether Respondents violated the terms and provisions of their contracts or agreements with ODF; 2) whether Respondents entered into legal and valid agreements or contracts with BOLI, in their capacity as a farm/forest labor contractor, when they submitted their annual applications for license renewal beginning 2000 through 2004; and, 3) if so, whether Respondents violated the terms and provisions of legal and valid agreements or contracts with BOLI as the Agency alleges.

1. Respondents violated the terms of their agreement with ODF when they provided firefighters to ODF during the 2000 through 2004 fire seasons who did not meet the minimum age and training requirements required under the Interagency Firefighting Crew Agreements.

#### *Minimum Age Requirement*

The participants agree that the 2003 and 2004 Agreements included a requirement that all firefighter crew members shall be at least 18 years old. The participants stipulated that the Agreements did not specify a minimum age for crew members prior to 2003. However, the Agency pled and proved that the Agreements from 2000 through 2004 included a provision that stated, in pertinent part:

**"CONTRACTOR** shall comply with all other federal, State, county and local laws, ordinances and regulations applicable to this Agreement."

Respondents did not at any time dispute the Agency's assertion that Respondents were subject to Oregon's minimum age requirements under the child labor law provisions. At all material times the minimum age for minors employed as firefighters in Oregon was 16 years old. OAR 839-021-0102(1)(p).

The Agency established by a preponderance of credible evidence that Respondents employed at least one underage

firefighter in 2000 (V. Cisneros) and one underage firefighter in 2003 (R. Cisneros).

#### **Victor Cisneros**

Respondents stipulated that V. Cisneros engaged in firefighting activities at least 30 days prior to his 16<sup>th</sup> birthday. Additionally, credible evidence, along with Respondents' records, established that Mountain Forestry employed V. Cisneros as a firefighter when he was 15 years old during the 2000 firefighting season and that he performed work on at least three wildfires (the Soldier, Tam Tam, and Wall fires) as a squad boss and was evaluated on the Wall fire as a crew boss before he turned 16 on July 27, 2000. Accordingly, the forum concludes that Respondents violated the terms and conditions of the 2000 Agreement when Mountain Forestry employed V. Cisneros, a 15 year old, to perform firefighting activities during the 2000 firefighting season in violation of Oregon child labor laws. By violating the terms and conditions of the 2000 Agreement, which included the condition that Respondents abide by all applicable state laws and rules, Respondents violated ORS 658.440(1)(d). Under the Agreement, each confirmed dispatch to a wildfire constitutes a separate contract. In this case, evidence showed V. Cisneros performed work on three wildfires while under the minimum age allowed and Respondents therefore are liable for three separate violations of ORS 658.440(1)(d). (Three viola-

tions @ \$500 per violation equal \$1,500 in civil penalties)

#### **Ramon Herrera Cisneros**

Credible evidence established that Ramon Herrera Cisneros ("R. Cisneros") was employed by Mountain Forestry in 2003 and performed work as an entry level firefighter when he was 15 years old. Under the 2003 Agreement, the legal age for firefighters was 18 years old. In this case, R. Cisneros did not meet the minimum age requirement under Oregon child labor laws or the 2003 Agreement. Respondents' payroll records established that R. Cisneros performed work on at least two wildfires (the Herman Creek and Blackfoot Lake fires) as an entry level firefighter before his 16<sup>th</sup> birthday on October 14, 1987. Accordingly, the forum concludes that Respondents violated the terms and conditions of the 2003 Agreement when Mountain Forestry employed R. Cisneros, a 15 year old, to perform firefighting activities during the 2003 firefighting season and are liable for two separate violations of ORS 658.440(1)(d). (Two violations @ \$500 per violation equal \$1,000 in civil penalties)

#### *Minimum Training Requirements*

The Agency established by a preponderance of credible evidence that Respondents employed at least four firefighters (V. Cisneros, Gerardo Herrera, Andrew Williamson, and S. Cisneros) who did not have the minimum training or experience necessary to perform the positions

they held when they were deployed to wildfires under the Agreements. Moreover, the Agency provided clear and convincing evidence that V. Cisneros's and Gerardo Herrera's firefighter files were deliberately fabricated to support the positions held by both.

### **Victor Cisneros**

Under the 2000 Agreement, the requisite training for a firefighter performing work as a FFT1 squad boss included successful completion of the entry level S-130 and S-190 courses and satisfactory performance as a FFT2. Although the FFT1 was not a required position under the Agreement in 2000, it was "required in the progression of qualifications from FFT2 to CRWB." Respondents' records established that V. Cisneros was not trained in accordance with the 2000 Agreement and therefore was not qualified to fight wildfires as a FFT2, FFT1, or CRWB.

Respondents stipulated that the V. Cisneros at issue in this case is F. Cisneros's son, his birthdate is July 27, 1984, and he engaged in firefighting activities in 2000 at least 30 days before his 16<sup>th</sup> birthday. Moreover, there is no dispute that V. Cisneros's social security number is xxx-x1-5979.

The records Respondents presented to ODF and BOLI included V. Cisneros's firefighter file that ostensibly documented his progression from an entry level FFT2 through CRWB crew boss certifi-

cation. According to the file, he completed the S-130 and S-190 classes and was certified as a FFT2 in June 1995 when he was 10 years old. The file also showed he purportedly performed work on at least two wildfires in September 1995 when he was 11 years old. While still 11 years old in May 1996, V. Cisneros purportedly completed an annual refresher course. In August 1996, when he was 12 years old, V. Cisneros purportedly completed the FFT1 task book and engaged in firefighting activities as a FFT1 on at least six wildfires. There is no activity documented in the file in 1997, but V. Cisneros purportedly completed an annual refresher course in June 1998 when he was 13 years old. In 1998, V. Cisneros purportedly transferred from Ferguson Management to C&H. According to the file, V. Cisneros took an annual refresher and completed the Advanced Firefighter training (S-131) course in April 1999 when he was 14 years old. His file shows he performed work on at least four wildfires in 1999 when he was barely 15 years old.

The documentation on its face, if believed, established he was qualified as a FFT1 squad boss, albeit underage, when he performed work as a FFT1 on the Soldier, Tam Tam, and Wall wildfires in June and July 2000. However, credible evidence plainly established that either V. Cisneros's file was inadvertently combined with the file of a person also named Victor Cisneros or his file was purposely created to sup-

port his wildfire activities as a FFT1 in June and July 2000 and his subsequent progression to CRWB crew boss in August 2000. Based on the following credible evidence, the forum finds the latter to be true.

First, V. Cisneros's file included training rosters addressed to C&H showing that Victor Cisneros-Martinez, social security number xxx-x9-7465, had completed the annual refreshers in 1998 and 1999. Cisneros-Martinez's name and social security number also appear on a training roster in the file showing it was he who actually completed the S-130 class in April 1999. Moreover, during his investigation, S. Johnson interviewed C&H's Bob Gardner, among others, who told him that F. Cisneros had a brother, Victor, who transferred from Ferguson Management to C&H in 1998. Gardner also told S. Johnson that F. Cisneros's son was too young to have worked during the years documented in V. Cisneros's file.

Even Respondents' expert A. Johnson testified that V. Cisneros's file set off "alarm bells" that raised an age issue he resolved only by determining that the file was a "mixture of files" involving two persons named Victor Cisneros. According to A. Johnson, V. Cisneros's file, "if I take them as two separate files," raised a training issue because he then had to determine if the "younger Victor," i.e., F. Cisneros's son, had a "full record." He concluded that V. Cisneros's record showed he

never completed the required classes (S-130 and S-190) for his crew position, but opined that V. Cisneros's later completion of an annual refresher that included "critical components" of the S-190 satisfied the requirement. Other than A. Johnson's opinion, there is no evidence that under the 2000 Agreement a contractor or a firefighter could substitute an annual refresher for the required entry level classes, particularly a firefighter progressing from FFT1 to CRWB crew boss.

Credible evidence demonstrated that the "mix-up" in files was not inadvertent or unintentional. First, the file contained a document entitled "Mountain Forestry Firefighter Training Records by: Cisneros F, Victor" that included a complete list of all the training courses for "Firefighter: Cisneros F. Victor SSN: xxx-x1-5979" purportedly completed, including dates and instructor information beginning in June 1995, when V. Cisneros was 10 years old. The training record was prepared in 2004 and was clearly meant to represent to ODF and any other interested party that V. Cisneros was fully qualified and properly certified as a CRWB crew boss. Second, the file also contained an "Employee Training and Qualification Summary Form" that recorded Victor F. Cisneros's birthdate as "7/27/77." S. Johnson's credible testimony established that the training summary had been noticeably altered to change whatever was written there and replace with V. Cisneros's birthdate using an ear-

lier birth year. The file was riddled with inconsistencies, duplicate evaluations with different dates, and entries that were post dated, including a CRWB evaluation on a wildfire incident dated three days before the incident occurred. Respondents' records established that V. Cisneros was dispatched as a CRWB crew boss to at least 35 wildfires between 2000 and 2004. Each time Respondents deployed V. Cisneros, an improperly trained firefighter, on a wildfire, Respondents violated the terms and conditions of the 2000 through 2004 Agreements. The forum concludes that Respondents are liable for 35 violations of ORS 658.440(1)(d). (35 violations @ \$500 per violation equal \$17,500 in civil penalties)

#### **Gerardo Herrera Silva**

Under the 2003 Agreement, the requisite training for a firefighter performing work as a FFT2 entry level firefighter included successful completion of the entry level S-130 and S-190 courses prior to assignment on a wildfire. Evidence showed that Mountain Forestry employed Gerardo Herrera Silva as a firefighter in 2003 and that he performed work on at least five wildfire incidents as a FFT2 between July 6 and September 7, 2003. The firefighter file Mountain Forestry produced for S. Johnson's inspection during his investigation was a jumble of documents related to several people, only one of whom had any semblance of training. The file included documents pertaining to Genaro Herrera, Genaro

Herrera Adame, Juan M. Herrera, Gerardo Herrera, Gerardo Herrera Adame, and Gerardo Herrera Silva. Other than a few annual refresher certificates, all of the substantive training documents apparently belonged to Genaro Herrera or Genaro Herrera Adame. Those documents dated back to 1998 and showed that Genaro Herrera was certified as a FFT2 in 1998, trained as a FFT1 in 2001, and worked on wildfires as a FFT2 from 1998 through 2002. There was no documentation in the file to show that Herrera Silva had received any training as a FFT2, much less certification as a FFT2. The only documents in the file that were related to Herrera Silva were three annual refresher certificates from 2001 through 2003. The certificates prior to 2003 were questionable. There is no other evidence that Herrera Silva worked for Mountain Forestry prior to 2003 and Herrera Silva told BOLI compliance specialist Wojtyla that he only worked "a few days" for Respondents in 2003.

Notably, when Herrera Silva transferred from Mountain Forestry to Mosqueda Reforestation, Mountain Forestry represented to Mosqueda and ODF that Herrera Silva was an "experienced FFT2." At hearing, Respondents' expert witness, A. Johnson, acknowledged the file was "mixed up," but opined that when viewed separately, the documents demonstrated that all of the individuals were properly trained. His opinion does not comport with the evidence. The file presented

to ODF and to BOLI is devoid of any training records related to Herrera Silva. As Cox testified, the time to cheat was in 2003, before the records inspection. The forum concludes Respondents purposely used Genaro Herrera's training to establish a training history for Herrera Silva in 2003. Respondents dispatched Herrera Silva to at least five wildfires without the requisite training and therefore are liable for five violations of ORS 658.440(1)(d). (Five violations @ \$500 per violation equal \$2,500 in civil penalties)

#### **Andrew Williamson**

Respondents' records establish that Andrew Williamson was not qualified to supervise firefighters as a FFT1 squad boss when he worked as a FFT1 on the Eyerly and Biscuit wildfires in 2002. The records show Michael Cox, representing that he was a Mountain Forestry officer, "verified" that Williamson was qualified as a FFT1 and certified him on October 1, 2001. However, the task book entries do not support certification. In fact, two evaluators specifically noted that not all tasks were evaluated on one assignment and Williamson was unable to complete certain tasks on the other assignment. The evaluator on Williamson's third assignment did not complete the evaluation. There is no evidence that Williamson ever completed the FFT1 task book in 2001 as Respondents represented to ODF.

Curiously, Respondents presented a file at hearing that they claimed was Williamson's com-

plete firefighter file, although the file did not contain the FFT1 task book Cox initiated in August 2001. Instead, the file contained a FFT1 task book Alejo Mejia purportedly initiated on two different dates, July 12 and July 23, 2003. The 2003 task book includes two sets of evaluations found in different sections that include two conflicting evaluations pertaining to Williamson's performance on the Slims Complex wildfire. The contradictory evaluations were apparently written by the same evaluator for the same training period. The evaluation that purportedly was completed at the end of the wildfire incident indicated Williamson supervised 10 firefighters and was "unable to complete certain tasks." The other evaluation, purportedly completed one day later, indicated Williamson supervised 20 firefighters and "successfully performed all tasks for the position." That evaluation included a recommendation that Williamson promote to FFT1 squad boss. Because the evaluations reach very different conclusions and cannot both be true, the forum infers that Respondents intended only that the file reflect that Williamson completed the task book and was qualified as a FFT1 in September 2003. However, even if Respondents had not unwittingly included a contradictory evaluation establishing that Williamson had not successfully completed the task book, there is no documentation showing the task book was verified and certified by a Mountain Forestry corporate offi-

cer. Under the ODF Agreements, the only measure of a properly trained firefighter is a completed task book properly verified and certified by the contractor or the contractor's corporate officer. Neither the 2001 nor 2003 task book supports certification for FFT1 squad boss. The forum concludes that Andrew Williamson was not a properly trained firefighter when he was permitted to fight at least 11 wildfires from 2002 through 2004. Consequently, Respondents are liable for 11 violations of ORS 658.440(1)(d). (11 violations @ \$500 per violation equal \$5,500)

### **Samuel Cisneros**

Respondents' records established that S. Cisneros was assigned a task book and purportedly certified as a FFT1 squad boss all on the same day in July 2000, within two months of his FFT2 certification. There is no evidence that he worked on any wildfires as a FFT2 between his FFT2 certification and his one day FFT1 "training." However, the records show he performed work as a FFT1 on at least two wildfires prior to his FFT1 "certification." As already noted herein, in order to be considered a "properly trained" firefighter under the ODF Agreements, the firefighter must have a task book that was certified by the contractor or contractor's corporate officer. In this case, a preponderance of credible evidence established that S. Cisneros's task book was not certified by a Mountain Forestry corporate officer. Instead, evalua-

tor Alex Coronado certified S. Cisneros's qualification as a FFT1 and there is no evidence that he was authorized in any way to issue a task book let alone certify a trainee. The forum concludes that S. Cisneros was not properly certified as a FFT1 squad boss and Respondents breached their agreement with ODF by permitting him to supervise firefighters as a FFT1 squad boss without the requisite certification. Credible evidence shows S. Cisneros worked as a FFT1 on at least 12 wildfires from 2001 through 2003. Consequently, the forum finds Respondents liable for 12 violations of ORS 658.440(1)(d) based on their breach of the ODF Agreement. (12 violations @ \$500 per violation equal \$6,000)

2. Respondents violated the terms of their agreement with ODF when they failed to notify ODF before administering required testing and sent workers to fight forest fires without the required testing.

Respondents agreed the 2000 through 2004 Agreements included a requirement that each firefighter demonstrate an arduous fitness level by taking a pack test at the start of each fire season and before engaging in firefighting activities. Respondents also agreed that the 2004 Agreement required that contractors report to the ODF Fire Operations Unit at least five working days before administering each pack test, the date, time, address, estimated number of those taking the pack

test, and the name and phone number of the administering official.

The Agency alleged that Respondents “agreed to notify [ODF] before administering required testing of individuals for firefighting but did not do so.” The Agency further alleged that “in some instances, Respondents sent individuals to fight fires without the required testing.” The 2004 Agreement, Section 4.12, states, in pertinent part:

“4.12.1 **CONTRACTOR** shall ensure that all Crew personnel assigned to Crews for the current fire season have passed the ‘Work Capacity Fitness Test’ at the arduous level of fitness based upon the ‘pack test’ \* \* \* **CONTRACTOR** shall provide, in each Crew Member’s training file, proof that the Crew Member has met this requirement.

“4.12.2 **CONTRACTOR** shall notify the [ODF] Protection Contract Services Section in writing \* \* \* at least five (5) calendar days prior to administering each pack test. The notice shall include the date, time, address, estimated number of people taking the pack test, and name and phone number of the administering official.

“ \* \* \* \* \*

“4.12.4 Within seven (7) calendar days following administration of each pack test, **CONTRACTOR** shall report to the ODF Contract Services

Manager the names and **CONTRACTOR** affiliation of each person who took the test, and whether this person passed or failed the test.

“4.12.5 **GOVERNMENT** reserves the right to monitor the administration of pack tests for compliance \* \* \* If the test was not conducted as required, each **CONTRACTOR** with an employee present for testing will receive a Notice of Non-compliance. A second failure to comply with testing standards, or tests performed without the 5-day notice, will result in administrative action, up to and including termination of the Agreement by ODF.”

Respondents argue that “to prove a violation of the contract, the Agency must prove Respondents sent a person to a fire without a pack test” and that “what is material to the contract and what is shown by the manifests is that the contractor has individuals prepared for dispatch.” Respondents contend the Agency failed to prove that “Alex Coronado, Leticia Ayala, Rosendo Cabral, Jose Macias, Jose Avila, Jorge Cabral, or Emilio Martinez was [sic] ever sent on a fire under the ODF contract without taking a pack test.” Respondents also argued that Respondents provided crews, including Alex Coronado and Leticia Ayala, under a federal contract that the Agency failed to properly plead or prove and that the Agency’s pleading “was a sham: good in form, but false in

fact.” Respondents' arguments have no merit in fact or in law.

The Agency was not required to prove that anyone was sent to a wildfire without a pack test in order to establish that Respondents violated the Agreement by failing to give ODF advance notice of the pack tests administered in 2004. The five day notice requirement stands alone and under the Agreement contractors risk administrative sanctions, including termination of the Agreement, if they perform pack tests without providing ODF the required notice.

*Respondents' Failure to Notify*

In this case, Respondents' company manifests for 2004 represented that pack tests were administered to specific Mountain Forestry employees on January 31; February 1, 15, 22, 29; March 7, 8, 14, 15, 27; April 25, 26, 29; May 1, 3, 9, 16, 17; and June 7, 2004. Additionally, in an interview with S. Johnson, Virgil Urena confirmed that Emilio Martinez had not completed a pack test on March 14, 2004, as the company manifest represented. Urena's March 14 training roster showed that Martinez had not taken (“NT”) the pack test because he had a “hurt foot.” However, Urena told S. Johnson that he administered Martinez's pack test on July 12, 2004, after Martinez's foot healed.

Respondents do not dispute that Virgil Urena was a Mountain Forestry employee and a certified trainer who administered the pack tests for Mountain Forestry in 2004 following the refresher train-

ing courses. ODF records show Urena notified ODF that pack testing was scheduled to take place on January 31; February 1, 14 and 15; March 6, and 12 through 15; May 7 through 10, and 14; and June 24, 2004. The records also show Urena timely notified ODF on January 26; February 9 and 27; March 8; May 3 and 11; and June 18, 2004, of the test dates, the location of the tests, and the approximate number of employees to be tested. Urena admitted to S. Johnson that he did not notify ODF, and there is no evidence showing that he notified ODF, prior to administering Martinez's pack test on July 12, 2004. Absent any documentation that proves otherwise, the forum concludes that Mountain Forestry violated the terms of the 2004 Agreement by failing to provide ODF advance notice of the pack tests reportedly administered on February 22 and 29; March 7, 8, and 27; April 25, 26 and 29; May 1, 3, 16, 17, 30 and 31; June 7; and July 12, 2004. Each date Mountain Forestry pack tested employees without notifying ODF beforehand pursuant to the 2004 Agreement constitutes a separate and distinct violation for a total of 16 violations. (Sixteen violations @ \$500 per violation equal \$8,000 in civil penalties)

*Respondents' Failure to Administer Pack Test*

The Agency properly pled and proved by a preponderance of credible evidence that Mountain Forestry dispatched Alex Coronado and Leticia Ayala to the

Reno Standby (Nevada) and Cole Complex (California) wildfires without administering the requisite pack tests. The Agency was not required to plead or enter into evidence a specific federal contract as Respondents contend. Michael Cox admitted and credible evidence established that the 2004 Agreement was an inter-agency agreement to which the federal government was a party. Moreover, the stated purpose of the 2004 Agreement was to:

“establish a binding agreement between the State of Oregon, acting by and through the [ODF] on behalf of those state and federal agencies identified in the MCFPA (**GOVERNMENT**), and **CONTRACTOR** whereby **CONTRACTOR** [sic] shall make available to **GOVERNMENT** one or more twenty (20)-person Type II wildfire firefighting Crews for initial attack, suppression, mop-up, and Severity Assignments within the States of Oregon and Washington and elsewhere.”

Based on the evidence herein, and in the absence of evidence demonstrating otherwise, the forum finds that all of Mountain Forestry’s firefighting activities at issue in this case in 2004 derived from the Agreement administered by ODF, including Mountain Forestry’s dispatches to the Nevada and California fires.

Respondents stipulated and Mountain Forestry’s certified payroll records established that Alex Coronado was dispatched to the Reno Standby and Cole Complex

wildfires in July 2004. The same records established that Leticia Ayala was dispatched to the Cole Complex wildfire, also in July 2004. Respondents argue that Coronado’s statements to ODF that neither he nor Ayala were pack tested before dispatch are false and that there is “no basis” for finding his statements credible. However, ODF did not solely rely on Coronado’s statements to conclude that the two firefighters were dispatched to wildfires without the requisite pack testing. S. Johnson conducted a thorough investigation that included interviewing several Mountain Forestry employees and reviewing voluminous documents that when considered as a whole lend credence to Coronado’s statements. For instance, his statements were corroborated by Virgil Urena’s statements to S. Johnson that Coronado did not complete the annual refresher course and neither Coronado nor Ayala took a pack test before both were dispatched to the wildfires. In turn, Urena’s statements were bolstered by his original training records that showed he reported no pack test scores for Coronado or Ayala. In contrast, Respondents provided conflicting information throughout S. Johnson’s investigation that was not reconciled at hearing.

Through Michael Cox’s and Jose Avila’s collective sworn testimony in a previous court proceeding, Respondents contended that Coronado was pack tested on or about May 24, 2004, along with Avila and Ayala at

Mountain Forestry's office in Independence. During the hearing, however, Cox admitted he added pack test scores and dates on Urena's training records for Coronado and Avila that purportedly demonstrate Avila completed a pack test on March 15 and Coronado completed a pack test on March 25, 2004. Although he testified he personally pack tested Avila on March 15, he admitted he prepared and signed Avila's firefighter identification card that showed Avila purportedly completed a pack test on February 29, 2004. However, Avila's name does not appear on any of the company manifests that list the firefighters who pack tested on February 29. In a prior statement to S. Johnson, Cox claimed, and F. Cisneros confirmed, that although he had written a pack test score and completion date for Coronado on Urena's training roster, F. Cisneros actually administered Coronado's pack test. Cox also claimed that Mountain Forestry employee Brandon Creson had recorded a May 30, 2004, pack test score and completion date for Leticia Ayala on Urena's training roster. Creson confirmed in a follow-up interview with S. Johnson that he had written Ayala's score on the training roster, but stated he had administered pack tests to both Coronado and Ayala on that date. Later, in sworn testimony in another proceeding, Creson stated he had a discussion with Coronado at the Reno Standby wildfire sometime in "June" 2004 and that he asked Coronado if he had taken a pack

test and Coronado replied that, "yes," he had taken a pack test. Despite the opportunity to do so, F. Cisneros and Creson did not testify at the hearing; consequently, the forum infers that their testimony would not have refuted S. Johnson's testimony in any way.

Respondents' conflicting versions of how and when the three firefighters completed pack tests are further corrupted by their certified payroll reports that show and confirm Coronado's statement to S. Johnson that Coronado was tree planting in Warm Springs, Oregon, or Grangeville, Idaho, on the day Ayala was purportedly pack tested.<sup>18</sup> Moreover, credible evidence established Coronado reported to S. Johnson that he was working in Astoria on a "bud-capping" project on March 25, 2004 - the date Respondents contend he completed a pack test administered by F. Cisneros.

Finally, Respondents' argument that Coronado was a "disgruntled" employee who falsely accused Respondents pales in light of the credible evidence establishing that several other Mountain Forestry employees also were not pack tested. Coronado may have complained because he was disgruntled, but that does not make him a liar as Respondents contend. Based on a preponderance of the credible evidence herein, the forum concludes that Respondents violated

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<sup>18</sup> See Finding of Fact – The Merits 64.

the terms and conditions of the 2004 Agreement by dispatching Coronado and Ayala to three fires without the requisite pack test. Or, put in Respondents' terms, they violated what is "material to the contract" and sent two firefighters who were not "prepared for dispatch" to fight three wildfires. In any event, Respondents are liable for three violations of ORS 658.440(1)(d). (Three violations @ \$500 per violation equal \$1,500 in civil penalties)

Credible evidence also established that Rosendo Cabral, Jose Macias, Jose Avila, Jorge Cabral, and Emilio Martinez were not pack tested as Respondents represented in the company manifests they provided to ODF in June 2004. During his investigation, S. Johnson found discrepancies between the training rosters Virgil Urena prepared and the company manifests Michael Cox prepared that showed the firefighters were pack tested on specific dates. In an interview, Urena confirmed that he had not pack tested any of the named firefighters except for Emilio Martinez who was pack tested on July 12 and not on March 14 as the company manifest represented. Respondents did not offer any credible evidence demonstrating otherwise and the forum concludes that Respondents knowingly and purposely misrepresented that Rosendo Cabral, Jose Macias, Jose Avila, Jorge Cabral, and Emilio Martinez were prepared for dispatch as of June 1, 2004. However, in order to prove its specific allegation, the Agency was required to prove that

each of those firefighters was dispatched on a fire without the requisite pack testing. The Agency presented no evidence that establishes Rosendo Cabral, Jose Macias, Jose Avila, Jorge Cabral, or Emilio Martinez worked on a wildfire after the company manifests were prepared and presented to ODF. Consequently, Respondents are not liable for the violations as pled by the Agency.

3. Respondents, in their capacity as a farm/forest labor contractor, entered into a legal and valid agreement with BOLI each time they applied for renewal of their farm/forest labor contractor license and Respondents violated those agreements each time they failed to obtain an annual employment certificate from 2000 through 2004, in violation of ORS 653.307 and OAR 839-021-0220, and each time they hired a minor child to perform hazardous work in violation of OAR 839-021-0102(p).

Credible evidence established that each year from 2000 through 2004, F. Cisneros signed an annual license renewal application form while licensed as a farm/forest labor contractor. Each of those years, F. Cisneros, on his and Mountain Forestry's behalf, confirmed under oath Respondents' agreement with BOLI to "at all times conduct the business of a farm and/or forest labor contractor

in accordance with all applicable laws of the State of Oregon and rules of the Commissioner of the Bureau of Labor and Industries.” To the extent that Respondents were a duly licensed farm/forest labor contractor each time they applied for renewal and certified to BOLI they would abide by all applicable laws and BOLI rules, the forum concludes they were acting in their capacity as a farm/forest labor contractor within the meaning of ORS 658.440(1)(d). Respondents’ argument that they were not acting in their capacity as a farm/forest labor contractor when they applied for their renewal licenses has no merit. The Agency seeks \$8,000 in civil penalties for the alleged breach of Respondents’ agreement with BOLI to abide by all applicable laws and BOLI rules in violation of ORS 658.440(1)(d).

#### *Employment Certificates*

There is no dispute that Mountain Forestry employed firefighters during the years 2000 through 2004. As an employer and pursuant to their agreement with BOLI, Respondents were obliged to abide by Oregon child labor laws, including those requiring employment certificates.

ORS 653.307(2) provides:

“An employer who hires minors shall apply to the Wage and Hour Commission for an annual employment certificate to employ minors. The application shall be on a form provided by the commission and shall include, but not be limited to:

“(a) The estimated or average number of minors to be employed during the year.

“(b) A description of the activities to be performed.

“(c) A description of the machinery or other equipment to be used by the minors.”

OAR 839-021-0220 provides, in pertinent part:

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

“(a) Verifies the minor’s age by requiring the minor to produce acceptable proof of age as prescribed by these rules; and

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

“(2) An employer may not employ a minor without having first obtained a validated employment certificate from the Bureau of Labor and Industries. Application forms for an employment certificate may be obtained from any office of the Bureau of Labor and Industries or by contacting the Child Labor Unit, Wage and Hour Division, Bureau of Labor and Industries, 800 NE Oregon Street Suite 1045, Portland, OR 97232, (971) 673-0836.

“(a) The Bureau of Labor and Industries will issue a validated employment certificate upon review and approval of the application. The validated

employment certificate will be effective for one year from the date it was issued, unless it is suspended or revoked.

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“(3) The employer must post the validated employment certificate in a conspicuous place where all employees can readily see it. When the employer employs minors in more than one establishment, a copy of the validated employment certificate must be posted at each establishment. As used in this rule, ‘establishment’ means a distinct physical place of business. If a minor is employed by one employer to perform work in more than one location, the minor will be considered employed in the establishment where the minor receives management direction and control.

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“(5) The employer must apply for a validated employment certificate once each year by filing a renewal application on a form provided by the Bureau of Labor and Industries. The renewal application must be received by any office of the bureau no later than the expiration date of the validated employment certificate.”

A preponderance of credible evidence established that Mountain Forestry employed or permitted at least nine minors under 18 years old to work during the years 2000 through 2003. Mountain Forestry’s records re-

vealed the minors ranged in age from 15 through 17 years old and included F. Cisneros’s son, Victor Cisneros, born July 27, 1984; F. Cisneros’s nephew, Samuel Cisneros, born September 8, 1983; Ramon Herrera Cisneros, born October 14, 1987; Andrew Williamson, born January 4, 1984; Jose Manuel Herrera-Leon, born February 23, 1983; David Trujillo, born March 14, 1984; Gerardo Herrera, born November 29, 1984; Ryan Sims, born April 28, 1985; and Benjamin Jones, born September 8, 1986.

Agency investigator Wojtyla credibly testified that during his investigation his “research” revealed no record of Respondents having obtained an employment certificate between 2000 and 2003 or at any other time. Wojtyla’s unrefuted testimony, albeit succinct, was sufficient to prove the Agency’s allegation. Respondents’ argument that “the Agency offered no evidence to prove [Respondents] had no employment certificate” and failed its burden of production has no merit. Wojtyla’s credible testimony *is* evidence and it was not disputed or refuted in any manner by Respondents.

By hiring nine minors between 2000 and 2003, Respondents had an affirmative duty to apply for and obtain an employment certificate. Based on Wojtyla’s testimony that his records search revealed no evidence that Respondents obtained an employment certificate and absent conflicting evidence, i.e., an employment certificate for each of

those years, the forum concludes that Respondents violated ORS 653.307 and OAR 839-021-0220 by failing to apply for and obtain an employment certificate. By failing to conduct their business as a farm/forest labor contractor in accordance with Oregon's child labor laws each year between 2000 and 2003, Respondents violated the terms and conditions of their agreement with BOLI. Accordingly, Respondents are liable for four violations of the statute and rule, one violation for each year Respondents failed to obtain the required employment certificate.<sup>19</sup> (Four violations @ \$1,000 per violation equal \$4,000 in civil penalties)

*Employing Minors in a Hazardous Occupation*

Under Oregon child labor rules, firefighting is a hazardous occupation and employers are prohibited from employing minors under 16 years old to engage in firefighting activities. OAR 839-021-0102(p). Respondents stipulated that V. Cisneros engaged in firefighting activities prior to his 16<sup>th</sup> birthday in 2000. Respondents' own records establish that V. Cisneros worked in a supervisory capacity on at least three

wildfires when he was 15 years old. Respondents' records also establish they employed at least one other minor, R. Cisneros, who engaged in firefighting activities in 2003. Respondents' records show R. Cisneros worked as a FFT2 on at least two wildfires when he was 15 years old. By permitting two minors less than 16 years old to engage in firefighting activities, Respondents violated OAR 839-021-0102(p) and, in turn, breached their agreement with BOLI to conduct their farm/forest labor contractor business in accordance with all applicable Oregon laws and the Commissioner's rules, thereby violating ORS 658.440(1)(d). (Two violations @ \$2,000 per violation equal \$4,000 in civil penalties)

**B. Respondents Willfully Made, or Published and Circulated, False, Fraudulent, or Misleading Representations or Information to ODF and BOLI.**

The Agency alleged in paragraph five of the Notice of Intent, in pertinent part:

"Respondents made false, fraudulent or misleading representations or published or circulated false, fraudulent or misleading information concerning the terms, condition or existence of employment at any place or by any person, including but not limited to, the Bureau of Labor and Industries and the Oregon Department of Forestry. Respondents, among other things and as

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<sup>19</sup> Credible evidence established that Respondents employed at least one minor in 2004 and did not obtain the required employment certificate. However, the Agency confined its pleading to four years from 2000 through 2003 and the forum is limited by the scope of the pleading when assessing civil penalties.

mentioned herein, misrepresented that workers were properly trained, the Respondents were complying with all state and federal laws and that Respondents were abiding by all lawful agreements and contract [sic]. Respondents published and caused to be circulated these misrepresentations on numerous occasions. This is in violation of ORS 658.440(3)(b).”

ORS 658.440(3)(b) provides, in pertinent part:

“(3) A person acting as a farm labor contractor, or applying for a license to act as a farm labor contractor, may not:

“ \* \* \* \* \*

“(b) Willfully make or cause to be made to any person any false, fraudulent or misleading representation, or publish or circulate any false, fraudulent or misleading information concerning the terms, condition or existence of employment at any place or by any person.”

Respondents argued that ORS 658.440(3)(d) does not apply to statements made or published to government agencies and that the Agency failed to plead any definition of “person” that would apply to the facts as pled. The forum need not decide that issue in this case. The Agency provided no evidence or argument that established how the false, fraudulent, or misleading representations that were established in this case are related to the “terms, condition or existence of employment” under

ORS 658.440(3)(b). The Agency did not address that issue in any manner at hearing. Thus, the Agency failed to establish how Respondents violated ORS 658.440(3)(b). However, as discussed elsewhere herein, the forum finds Respondents made false and misleading representations to ODF and BOLI that may be considered as aggravating circumstances when assessing civil penalties or determining Respondents' character, competence or reliability. *In the Matter of Andres Ivanov*, 11 BOLI 253, 266 (1993).

#### **CIVIL PENALTIES FOR FARM/FOREST LABOR VIOLATIONS**

The Agency proposed civil penalties for Respondents' failure to comply with the terms and conditions of lawful agreements entered into with ODF (\$500 per violation), in violation of ORS 658.440(1)(d), and Respondents' failure to comply with the terms and conditions of lawful agreements entered into with BOLI (\$8,000 for four violations), in violation of ORS 658.440(1)(d).

The Commissioner is authorized to assess a civil penalty not to exceed \$2,000 for each of the farm/forest labor violations found herein. ORS 658.453(1)(c) and OAR 839-015-0508(1)(f). When determining the amount of civil penalty to impose, the Commissioner may consider aggravating and mitigating circumstances that include, but are not limited to:

“(a) The history of the contractor or other person in

taking all necessary measures to prevent or correct violations of statutes and rules;

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

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

“(d) Whether the contractor or other person knew or should have known of the violation.”

OAR 839-015-0510(1). Respondents were required to provide the Commissioner with any mitigating evidence. OAR 839-015-0510(2). Ignorance of the law, inexperience, and press of business are not mitigating circumstances. *In the Matter of Charles Hurt*, 18 BOLI 264, 276-77 (1999); *In the Matter of Francis Kau*, 7 BOLI 45, 54-55 (1987).

#### 1. Failure to Comply with ODF Agreements

The Agency established by a preponderance of credible evidence that Respondents violated the terms of their agreement with ODF each time they 1) employed firefighters who did not meet the minimum age or training requirements (68 violations), 2) failed to notify ODF before administering required pack tests (16 violations), and 3) sent two firefighters to three wildfires without the required pack testing (3 violations), for a total of 87 violations. Although the maximum civil penalty is \$2,000 per violation, the Agency sought a nominal amount of \$500 for each violation of ORS 658.440(1)(d).

Credible evidence demonstrated that Respondents knew or

should have known of the violations. Respondents are charged with knowing contract requirements when they put in a bid for work. See *In the Matter of Charles Hurt*, 18 BOLI at 276-77. (“By bidding on and accepting the award of the contract, respondents represented that they were able to perform it”). In this case, Respondents agreed they would provide firefighting crews that were of legal age and properly trained in accordance with contract requirements. Not only did they breach that agreement, they purposely covered up any deficiencies to avoid sanctions, including falsifying training documents and task books. In the meantime, Respondents dispatched at least four untrained or improperly trained firefighters to fight wildfires on at least 68 occasions over a period spanning four years. The violations are particularly egregious because they included placing at least two untrained 15 year old firefighters at risk in a hazardous occupation and placed numerous other crew members and property at risk because at least one of the untrained 15 year olds was working in a supervisory capacity.

Credible evidence also established that Respondents knowingly misrepresented to ODF the pack test status of at least seven firefighters and subsequently dispatched at least two firefighters to wildfires who had not completed a pack test. Additionally, the firefighters were dispatched after fire director Michael Cox issued each of them a

firefighter identification card showing false pack test scores for both. The violations are further aggravated by credible evidence showing Cox also issued a firefighter identification card to a third firefighter showing a fabricated pack test score.

While there is evidence that Respondents, on some occasions, complied with the Agreement's requirement to provide advance notice of pack testing, there are at least 16 pack test dates in 2004 that were not reported to ODF. The violations are serious because they hinder ODF's ability to cross check the pack test information with the crew manifests and firefighter identification cards in order to prevent the type of deception that occurred in this case.

As an additional aggravating circumstance, the Agency pled and proved that Respondents had several prior violations of Oregon farm labor contracting laws that resulted in a written consent order, demonstrating Respondents' knowledge of their joint obligations as a farm/forest labor contractor. There is no evidence that Respondents took any actions to ensure their compliance with the ODF Agreements or the laws governing their farm/forest labor contracting activities.

Finally, the Agency established by clear and convincing evidence that Respondents knowingly and purposely misrepresented the training and pack testing status of several firefighters they supplied to ODF pursuant to the Agreements entered into between 2000

and 2004. Each time Respondents presented a manifest they knew contained false social security numbers or pack test scores, or provided a fabricated firefighter file to ODF during an inspection, they were willfully making or causing to be made a false, fraudulent or misleading representation. Although the forum has determined that the Agency failed to establish that Respondents' false, fraudulent, or misleading representations, as pled, constituted a violation of ORS 658.440(3)(b), this forum has previously held that "if such misrepresentations were made, it would constitute an aggravating circumstance to consider when assessing civil penalties for other violations \* \* \* [and] would reflect badly on [a respondent's] credibility and character." *In the Matter of Andres Ivanov*, 11 BOLI 253, 266 (1993). Consequently, the forum concludes Respondents knowingly, intentionally, and voluntarily made multiple misrepresentations to ODF and BOLI by publishing and circulating false documentation that further aggravates the seriousness and increases the magnitude of their multiple violations of ORS 658.440(3)(b).

All of the violations were of such magnitude and seriousness that the forum would have imposed the maximum civil penalty allowed for each violation. However, the Agency sought \$500 per violation and the forum is precluded from awarding an amount that exceeds the scope of the Agency's pleading. Consequently, the forum concludes that

Respondents are liable for \$43,500 as a civil penalty for 87 violations of ORS 658.440(1)(d), computed at \$500 per violation.

**B. Failure to Comply with BOLI Agreements**

The Agency alleged and proved five violations of ORS 658.440(1)(d) based on Respondents' failure to comply with the terms and conditions of lawful agreements entered into with BOLI, and, whether due to mathematical error or oversight, sought the maximum \$2,000 civil penalty per violation for four, instead of five, violations. The total penalty is limited by the pleading; however, the forum may impose a lesser amount than sought for four violations in order to impose a civil penalty for the fifth violation that was properly alleged and proved.

*Employment Certificate violations*

Credible evidence established that Respondents knew or should have known of the violations. First, Mountain Forestry's fire director Michael Cox admitted Respondents regularly hired 16 year old firefighters and that hiring minors was a prevalent practice in the industry. Second, Cox's admission that he prepared most of Mountain Forestry's paperwork and F. Cisneros's signature on every license renewal application submitted from 2000 through 2004 indicate Respondents knew they were obliged to comply with all applicable Oregon laws and commissioner's rules. In any event, ignorance of child labor laws does not mitigate the viola-

tions. Each time Respondents applied for license renewal, they assured BOLI that they would conduct their business as a farm/forest labor contractor in accordance with all applicable laws and, thus, had a duty to know and comply with those laws.

The violations are further aggravated by their seriousness. Failure to comply with the child labor laws by not obtaining an employment certificate hinders the Commissioner's ability to monitor and protect minors in the workplace, particularly a hazardous workplace. In this case, Respondents allowed at least two minors to work under hazardous work conditions. The Commissioner's charge to protect minors was seriously thwarted by Respondents' failure to comply with the law. Respondents breached its agreement with BOLI each year they failed to obtain an employment certificate. In the absence of mitigating circumstances, the forum concludes that \$4,000 (\$1,000 for each of four violations) is an appropriate civil penalty.

*Hazardous workplace violations*

Respondents knew or should have known they were violating child labor laws when they knowingly and purposely employed at least two underage firefighters in violation of OAR 839-021-0102(p). There is no question that F. Cisneros knew his son's age when Mountain Forestry allowed him to supervise firefighter crews on three wildfires when he was

only 15 years old.<sup>20</sup> Not only was his son placed at risk, but his son's crew was at risk as well, given his son's tender years and complete lack of training or experience. By knowingly breaching their agreement with BOLI to comply with all applicable state laws and Commissioner's rules, Respondents not only demonstrated a cavalier attitude about the import of the renewal application's provisions and conditions, but also undermined the Commissioner's ability to enforce the child labor laws. Respondents presented no mitigating evidence and the forum concludes that the violations are of such seriousness that the maximum penalty of \$4,000 (\$2,000 for each of two violations) is appropriate.

#### **CHILD LABOR VIOLATIONS**

The forum has already concluded that Respondents violated ORS 653.307 and OAR 839-021-0220 by failing to obtain an annual employment certificate to employ minors each year beginning 2000 through 2004. Likewise, the forum concluded that Respondents violated OAR 839-021-0102(p) by employing at least one minor child in 2000 to engage in firefighting

activities.<sup>21</sup> The forum determined that by violating the Oregon child labor statutes and rules, Respondents violated specific provisions of farm/forest labor contracting law warranting civil penalties under ORS chapter 658. However, Respondents' child labor violations are distinct from the farm/forest labor violations and therefore are subject to separate civil penalties under ORS 653.370 and OAR 839-019-0025.

Respondents argued that Mountain Forestry is exempt from civil penalties as they pertain to V. Cisneros because his employment fell under the "familial relationship exception to the rule against employing a minor in a hazardous occupation." Respondents cite ORS 653.365, which states, in pertinent part:

"The provisions of ORS 653.370 do not apply when minors under 18 years of age are employed under the following circumstances:

- (1) The minor is employed by the parent of the minor; or

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<sup>20</sup> The record shows Mountain Forestry's fire director Michael Cox has known F. Cisneros and his family since at least 1980 and the forum infers he also knew how old F. Cisneros's son was at the time he was dispatched to three wildfires as a FFT1 advanced firefighter squad boss in 2000.

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<sup>21</sup> The forum notes that credible evidence established at least one other minor, Ramon Herrera Cisneros, engaged in firefighting activities in 2003 while only 15 years old. However, the Agency alleged only one violation and confined its allegation to the 2000 fire season; consequently, the forum is limited to determining civil penalties based on one violation of OAR 839-021-0102(p).

(2) The minor is employed by a person standing in the place of the parent of the minor and who has custody of the minor.”

However, Respondents’ records, including certified payroll records and quarterly tax reports, unequivocally establish that Mountain Forestry employed V. Cisneros. On its face, the exemption is not available to a corporate entity even if the minor’s parent is the corporation’s majority shareholder. Respondents cite no authority that states otherwise and the forum concludes that the violations involving V. Cisneros are subject to civil penalties under ORS 653.370.

#### **CIVIL PENALTIES FOR CHILD LABOR VIOLATIONS**

The Agency alleged and proved five violations, one violation for each year Mountain Forestry failed to obtain a validated employment certificate and one violation for employing a minor to work in a hazardous occupation. Each violation is a separate and distinct offense. OAR 839-019-0015. Pursuant to OAR 839-019-0025(1), the maximum civil penalty for any one violation is \$1,000 and the actual amount depends upon “all the facts and any mitigating and aggravating circumstances.” Additionally, the minimum civil penalty for employing minors without a valid employment certificate is \$100 for the first offense, \$300 for the second offense, and \$500 for the third and subsequent offenses. OAR 839-019-0025(2).

When determining the actual amount, the forum must consider Mountain Forestry’s history in taking all necessary measures to prevent or correct violations; any prior violations, if any; the magnitude and seriousness of the violations; the opportunity and degree of difficulty in complying with the statutes and rules; and any mitigating circumstances. OAR 839-019-0020. Mountain Forestry was required to provide the Commissioner with evidence of any mitigating circumstances. OAR 839-019-0020(2).

In this case, the Agency alleged and established that Mountain Forestry knew or should have known of the violations, took insufficient measures to prevent or correct them, and that the violations were serious. The Agency sought the maximum penalty of \$1,000 for each of five violations. Mountain Forestry offered no evidence of mitigating circumstances.

Mountain Forestry had an affirmative duty to verify the age of its minor employees by requiring the minors to produce “acceptable proof of age.” OAR 839-021-0220(1)(a). According to Michael Cox, Mountain Forestry took copies of each firefighter’s personal identification and placed it in a file along with a completed I-9 form. Cox further testified that he has known F. Cisneros’s son, Victor, since he was at least 10 years old. F. Cisneros certainly knew his son’s age and more likely than not knew the age of his nephew, R. Cisneros. Additionally, Cox testi-

fied that from 2000 through 2002 it was common practice in the industry to use 16 year old firefighters on wildfires. Those facts establish that Mountain Forestry knew it was employing minors from 2000 through 2002 and actually had "proof of age" for those minors. There is no evidence that Mountain Forestry was impeded in any way from obtaining an annual employment certificate each year that it employed minors and ignorance of the law is not a mitigating circumstance. *In the Matter of Panda Pizza*, 10 BOLI 132, 144 (1992). Moreover, given clear and convincing evidence establishing that Mountain Forestry falsified documents to conceal the age and inexperience of its minor employees, the forum concludes that Mountain Forestry not only made no effort to prevent or correct the violations, it deliberately attempted to cover up the violations. Respondents' calculated deception further aggravates the violations.

While there is no record of violations prior to 2000 in evidence, Mountain Forestry's failure to obtain an annual employment certificate over a four year period<sup>22</sup> while employing at least

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<sup>22</sup> Evidence actually established that Respondents employed at least two minors in 2004 without first obtaining a validated employment certificate, but the Agency alleged only four violations from 2000 through 2003 and the forum is limited by the scope of the pleading when determining the amount of civil penalties.

nine minors during that time indicates a continuing disregard for Oregon child labor laws that enhances the seriousness of the violations.

Finally, a preponderance of credible evidence established that Mountain Forestry permitted at least two minors (V. Cisneros and R. Cisneros) to engage in fire-fighting activities while under the legal age allowed, placing not only the minors at risk but all other crew members as well. No one disputed at hearing that fire-fighting is a dangerous occupation that requires a minimum skill and experience level that cannot safely be met by hiring underage workers. As a matter of law, fire-fighting is a hazardous occupation and employers may not permit anyone under 16 years old to engage in that activity. Those facts further demonstrate the seriousness of Mountain Forestry's failure to obtain annual employment certificates that give the Commissioner the ability to monitor the employment of minors in that particularly hazardous occupation.

Having considered the above circumstances and, in the absence of mitigating circumstances, the forum concludes that \$1,000 for each year Respondents failed to obtain the required employment certificate and \$1,000 for employing at least one minor in a hazardous occupation<sup>23</sup> are ap-

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<sup>23</sup> Although the Agency established that R. Cisneros performed work on at least two wildfires in 2003 when he

propriate civil penalties in this case. Credible evidence established that Mountain Forestry employed the minors and, hence, is liable for \$5,000 for the violations of ORS 653.307, OAR 839-021-0220, and OAR 839-021-0102(p).

#### REFUSAL TO RENEW 2004 LICENSE APPLICATION

ORS 658.420 provides that the Commissioner shall investigate each applicant's character, competence and reliability and any other matter relating to the manner and method by which the applicant proposes to conduct and has conducted operations as a farm labor contractor. When a license applicant demonstrates that the applicant's character, competence, and reliability make that applicant unfit to act as a farm/forest labor contractor, the Agency "shall propose that the license application be denied." OAR 839-015-020(2). The Commissioner will not issue a license unless satisfied as to the applicant's character, competence, and reliability. ORS 658.420(3). See also, *In the Matter of Robert Gonzales*, 12 BOLI 181, 199 (1994)(the commissioner was not satisfied with respondents' char-

acter, competence and reliability and denied renewal of a license to act as a farm/forest labor contractor).

For the purposes of ORS 658.420, the forum adopts the pertinent definitions set forth in Webster's Third New International Dictionary for "character," "competence," and "reliability." As they pertain to farm/forest labor contractors, *character* means "9: reputation esp when good \* \* \* 10: a composite of good moral qualities typically of moral excellence and firmness blended with resolution, self-discipline, high ethics, force and judgment,"<sup>24</sup> *competence* means "3a: the quality or state of being functionally adequate or of having sufficient knowledge, judgment, skill, or strength (as for a particular duty or in a particular respect),"<sup>25</sup> and *reliability* means ": the quality or state of being reliable," i.e., "syn DEPENDABLE, TRUSTWORTHY, TRUSTY, TRIED: RELIABLE describes what can be counted on or trusted in to do as expected or to be truthful \* \* \* DEPENDABLE is a close synonym for RELIABLE and may indicate a steady predictability or trustworthiness or reliability worthy of fullest confidence \* \* \* TRUSTWORTHY indicates meriting confidence for proved soundness, integrity, veracity, judgment, or ability \* \* \* TRUSTY

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was 15 years old, and V. Cisneros performed work on three wildfires in 2000 when he was 15 years old, the Agency only alleged one violation and did not amend its pleading to conform to the evidence. Consequently, the forum is bound by the pleading when determining the civil penalty in this case.

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<sup>24</sup> Webster's Third New International Dictionary 376 (2002).

<sup>25</sup> Webster's Third New International Dictionary 463 (2002).

implies that the person or thing described has been tested and found dependable \* \* \* TRIED likewise stresses proved dependability.”<sup>26</sup>

Following an investigation, the Agency alleged Respondents were unfit to act as a farm/forest labor contractor because they lacked the requisite character, competence and reliability. Pursuant to OAR 839-015-0520(2), the Agency proposed that the Commissioner refuse to renew Respondents' farm/forest labor contractor license based on 1) their multiple violations of ORS chapter 658 provisions (OAR 839-015-0520(3)(a)); 2) their “willful” violations of the terms and conditions of “numerous agreements and contracts over a number of years” (OAR 839-015-0520(3)(c)); 3) their willful misrepresentations or false statements in their license applications “by agreeing to comply with all laws and rules when in fact they were not in compliance” (OAR 839-015-0520(3)(h)); and 4) their course of misconduct “over a period of years in their relations with individuals and organizations, including but not limited to [BOLI] and [ODF], with whom Respondents conduct business” (OAR 839-015-0520(3)(m)). Any one of the alleged actions, if proved, demonstrates that Respondents' character, competence or reliability make them unfit to act as a farm/forest labor contractor. OAR 839-015-520(3).

**A. Respondents violated provisions of ORS 658.405 to 658.485 - OAR 839-015-0520(3)(a).**

Each time Respondents entered into a valid and legal agreement with ODF to supply firefighters who met the minimum training, fitness, and age requirements specified in each agreement, they agreed to comply with the terms and conditions of those agreements pursuant to ORS 658.440(1)(d). Similarly, each time Respondents applied for renewal of their farm/forest labor license application, they agreed with BOLI to comply with the provisions of ORS 658.405 to 658.485.

A preponderance of credible evidence established that Respondents violated multiple provisions of each Agreement they entered into between 2000 through 2004. During that time, Respondents engaged at least two firefighters who were underage and at least four firefighters who had insufficient or no training to perform firefighting activities on wildfires, violating their agreement with ODF to provide properly trained firefighters who meet the minimum age and training requirements. Moreover, by providing two firefighters who did not meet the state's minimum age requirement, Respondents violated their agreements with both ODF and BOLI. Respondents employed numerous minors from 2000 through 2004 without first obtaining annual validated employment certificates required

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<sup>26</sup> Webster's Third New International Dictionary 1917 (2002).

under Oregon child labor laws, violating their agreements with ODF and BOLI to abide by applicable state laws and rules. In 2004, Respondents failed to give the requisite advance notice to ODF prior to administering pack tests on at least 16 occasions, violating their agreement with ODF.

Respondents' multiple violations of ORS 658.440(1)(d) demonstrate that Respondents are not reliable because they cannot be trusted to do what is expected to hold a farm/forest labor contractor's license, i.e., comply with the applicable laws. Moreover, the violations show they lack the requisite blend of self-discipline, ethics and judgment that compels contractors to honor their contracts, pursuant to ORS 658.440. Respondents' deficiencies confirm they lack sufficient knowledge, judgment or skill to perform the multiple responsibilities of farm/forest labor contracting. For those reasons, the forum concludes that Respondents lack the reliability, character, and competence as defined herein to act as a farm/forest labor contractor.

**B. There is no evidence to support the Agency's allegation that Respondents willfully violated terms and conditions of work agreements or contracts – OAR 839-015-0520(3)(c).**

The forum has already concluded that neither the Agreements nor the license renewal applications constitute

employment agreements or contracts. For similar reasons, the forum concludes they do not constitute "work" agreements or contracts. The term "work agreement or contract" is not ambiguous and the only reasonable interpretation is that the term is synonymous with employment agreement. Had the Agency intended the rule to mean *any* agreement or contract, it would have so stated or refrained from using the term "work" which is synonymous with "employment." The rule on its face and when read in context with the other related rules refers to employment contracts and is not applicable to this case.

**C. Respondents willfully misrepresented on their license application that they would comply with all laws and rules as farm/forest labor contractors – OAR 839-015-0520(3)(h).**

For the purposes of OAR 839-015-0520(3)(h), "knowingly" or "willfully" means:

"action undertaken with actual knowledge of a thing to be done or omitted or action undertaken by a person who 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 which, with reasonable diligent inquiry, would place the person on notice of the thing to be done or omitted to be done. A person

acts knowingly or willfully if the person has the means to inform himself or herself but elects not to do so. For purposes of this rule, the farm labor contractor \* \* \* is presumed to know the affairs of their business operations relating to farm or forest labor contracting.”

OAR 839-0505(1). Misrepresentation is defined as “an assertion made by a license applicant [that] is not in accord with the facts, where the applicant knew or should have known the truth of the matter asserted, and where the assertion is of a substantive fact which is influential in the commissioner’s decision to grant or deny a license.” *In the Matter of Rodrigo Ayala Ochoa*, 25 BOLI 12, 45-46 (2003), *revised final order on reconsideration, aff’d w/out opinion, Ochoa v. Bureau of Labor and Industries*, 196 Or App 639 (2005).

In this case, the Agency was required to prove that Respondents, through Mountain Forestry president F. Cisneros, 1) made an assertion on at least one license renewal application that was not in accord with the facts; 2) Respondents knew or should have known the falsity of the assertion; and 3) the assertion was of a substantive fact influential in the commissioner’s decision to grant or deny a license. The Agency was not required to prove intent to deceive or mislead to establish a willful misrepresentation. *Id.* at 46.

Credible evidence established that on July 15, 2000, F. Cisneros,

on his and Mountain Forestry’s behalf, asserted under oath that Respondents would comply with the provisions of ORS 658.405 to 658.485 and other “applicable laws of the State of Oregon and rules of the Commissioner of the [BOLI].” Each year, thereafter, through 2004, Respondents made the same assertion under oath each time they applied for license renewal.

Credible evidence also established that when F. Cisneros signed the renewal application on July 15, 2000, he knew or should have known of the following facts: 1) F. Cisneros’s son, V. Cisneros, was 15 years old when Mountain Forestry employed him to perform work as a squad boss on at least three wildfires between June 18 and July 27, 2000; 2) V. Cisneros had not received any training and was not certified as a FFT2 or a FFT1 squad boss prior to his wildfire assignments in June and July 2000; 3) the 2000 Agreement required that entry level firefighters and squad bosses complete the S-130 and S-190 training before assignment to a wildfire; 4) state child labor laws prohibited any child under 16 years old from engaging in firefighting activities. Moreover, V. Cisneros’s purported firefighter records from 2000 through 2004 demonstrated that V. Cisneros never made up the deficiencies in his training, and, thus, never received the preliminary training necessary to fight wildfires in accordance with any of the Agreements. Based on those facts, and because F. Cisneros knew his son was underage and

an untrained firefighter before and after he signed an oath in 2000 stating he would comply with applicable Oregon laws and Commissioner's rules, the forum infers that F. Cisneros knew the falsity of his assertion in 2000 and of each similar assertion he made under oath thereafter through 2004.

Additionally, credible evidence established that from 2000 through 2004, Mountain Forestry, in its capacity as a farm/forest labor contractor, employed minors to perform firefighting activities without obtaining the requisite employment certificates. Credible evidence established that Mountain Forestry knew it was employing minors under 17 years old and that it knew or should have known of the requirement to obtain an employment certificate each year that it employed minors. Hence, each year, from 2000 through 2004, F. Cisneros knew, contrary to his representation on the license renewal application, that Respondents were not complying with all applicable State laws and the Commissioner's rules and presumably knew he was not going to comply at any time thereafter.

Finally, F. Cisneros's assertion was of a substantive fact influential in the commissioner's decision to grant or deny a license. In fact, a contractor's commitment to comply with all applicable State laws and Commissioner's rules is the cornerstone of the farm/forest labor contractor license. Without that commitment, the Commis-

sioner would not issue the license at all.

The Agency proved by a preponderance of evidence that Respondents willfully misrepresented that they would comply with all laws and rules as a farm/forest labor contractor. Respondents' willful misrepresentation shows they lack 1) the moral strength and ethics required to demonstrate good character, 2) the integrity and judgment required to demonstrate trustworthiness and reliability, and 3) the necessary judgment to carry on business as a competent farm/forest labor contractor. Consequently, the forum concludes Respondents are not fit to act as a farm/forest labor contractor.

**D. Respondents engaged in a course of misconduct in its relations with ODF and BOLI – OAR 839-015-0520(3)(m).**

For the purpose of OAR 839-015-0520(3)(m), any violation of applicable Oregon laws or the BOLI commissioner's rules by a contractor acting in the capacity of a farm/forest labor contractor is *per se* misconduct. A preponderance of credible evidence established that between 2000 and 2004 Respondents repeatedly disregarded the terms and conditions of their agreements with ODF and BOLI by providing wild-fire suppression crews that included improperly trained or untrained individuals and, in some cases, underage individuals, to fight wildfires, placing other crews and their workers at risk.

Moreover, credible evidence established that Respondents repeatedly violated the terms of the 2004 Agreement by failing to notify ODF that they were administering pack tests and by sending some of their firefighters to fight wildfires without the required testing.

Additionally, they violated their agreements with BOLI each time they certified they would comply with Oregon law because they knew they were already in violation beginning in 2000 when they created a firefighter record for 15 year old V. Cisneros out of whole cloth. From 2000 forward, Respondents continued to falsify records, including altering identification cards to cover up their failure to pack test certain individuals. The Agency was not required to prove Respondents' motive for fabricating documents, but Cox's testimony is telling: Respondents' counsel asked: "So, for the year 2003, given the heightened requirements for crew bosses and squad bosses, would that be the year for contractors to begin to cheat, fudge, falsify records to present qualified crew bosses and squad bosses?" Cox replied, "That would have been the year that you would have -- if you were going to cheat, you would have wanted to have the cheating accomplished before you got to records inspection in 2003."

Respondents' course of misconduct, characterized by Respondents' repeated disregard for its commitments to ODF and BOLI and their ongoing efforts to

cover up the deficiencies in their training and recordkeeping, is sufficient to demonstrate again that Respondents lack the moral strength and ethics required to demonstrate good character and the reliability required to show they can be counted on or trusted to do what is expected of a farm/forest labor contractor. For all of the reasons stated herein, the forum concludes that Respondents lack the character, competence and reliability to act as a farm/forest labor contractor and the forum hereby refuses to renew Respondents' license for a period not to exceed three years.

#### **EXCEPTIONS**

Pursuant to OAR 839-050-0380, Respondents timely filed 23 exceptions to the proposed order.

#### **Exception 1 – Capacity as a Farm/Forest Labor Contractor**

Respondents dispute the forum's statement in the opinion that "Respondents *agree* they entered into legal and valid agreements with ODF from 2000 through 2004 while jointly acting in their capacity as a licensed farm/forest labor contractor," and argue the Agency was required to prove the allegation but failed to do so. Respondents did not deny the allegation in their answer and they did not raise the issue during hearing. The allegation was therefore deemed admitted pursuant to OAR 839-050-0130(2). The forum is precluded from considering new issues raised in Respondents' exceptions to the Final Order. OAR 839-050-

0380(1). However, the forum has replaced the word “agree” with language that more accurately describes the finding and conclusion set forth in this Final Order. Respondents’ exception 1 is **DE-NIED**.

#### **Exception 2 – Number of Violations**

Respondents except to the number of violations found in the order. Respondents correctly point out the apparent inconsistencies in the total number of violations stated in the order’s synopsis and the actual number found in the body of the order. This Final Order corrects any inconsistencies due to mathematical errors or miscalculations in the number of violations found and in the civil penalty amounts assessed herein.

#### **Exception 3 – Coronado and Ayala – Federal Contracts**

Respondents object to the forum’s conclusion that Alex Coronado and Leticia Ayala were dispatched to wildfires in Nevada and California under the ODF Interagency Agreement. To support their argument, they rely on testimony taken out of context and mischaracterized. Contrary to Respondents’ contention, Don Moritz never “confirmed that Coronado’s statements to him arose under Mountain Forestry’s national contract.” Moritz testified that when Coronado initially filed the complaint he was working on a national contract and no longer working for Mountain Forestry. Although Moritz noted that some of

Coronado’s complaints involved unrelated housing and food issues that were covered federally and not subject to ODF’s jurisdiction, he repeatedly stated that ODF verified that Coronado’s pack test complaint was related to his work under the “regional agreement,” i.e., the Interagency Agreement. There is no credible evidence in the record to support Respondents’ contention that Coronado and Ayala were working under a “national contract” rather than the regional agreement when they were dispatched to wildfires in Nevada and California in 2004. Respondents’ exception 3 is **DE-NIED**.

#### **Exception 4 – Ultimate Finding of Fact 51**

Respondents contest the finding that firefighters were required to complete an annual pack test “prior to providing the June 1 manifest.” That finding has been clarified to more accurately reflect S. Johnson’s testimony that contractors must provide a company manifest by June 1 listing all firefighters who have been properly trained and pack tested and who are ready for dispatch.

#### **Exception 5 – Length of Time to Issue Proposed Order**

Respondents take exception to the length of time between the close of hearing and issuance of the proposed order. Respondents misrepresent facts related to a separate proceeding that is not part of this record and characterize the time span as “vexatious, capricious, and oppressive.” Their

argument that the purported “delay” constitutes a violation of Article 1, § 10 of the Oregon Constitution apparently was considered and rejected in another forum and will not be considered here.<sup>27</sup> In any event, Respondents have made no showing that the forum unreasonably delayed making a decision in this case. The record’s scope is self-evident and Respondents are well aware that the 11 day hearing did not occur in a vacuum. Respondents bear some responsibility for the extensive record and complexity of the issues in this case. Indeed, Respondents’ counsel, in a post-hearing letter to the forum, stated:

“It was a long and tiring hearing but I felt it was conducted with relatively good order and organization and although the record is long it is complete with full regard and cite to the law and well developed facts.

“I know that the proposed order will take some time to prepare because of *the required length of consideration by the forum \* \* \**” (emphasis added)

Ensuring full and fair consideration of the issues and evidence presented in this case required time that was necessarily shared

with other responsibilities and duties. Moreover, Respondents made no showing they were prejudiced by any perceived delay. The record shows the Agency permitted Respondents to continue operating under their farm/forest labor contractor’s license during the pendency of this proceeding and Respondents were in no way denied the opportunity to engage in their chosen business. Consequently, the forum concludes that given the scope and nature of this case and the lack of prejudice to Respondents, the time span between the close of hearing and the issuance of the proposed order was not inordinate or unreasonable. Respondents’ exception 5 requesting that the case be dismissed is **DENIED**.

#### **Exception 6 – Respondents’ Exhibits**

Respondents except to the exclusion of Respondents exhibits marked R-4 (Samuel Cisneros’s file), R-5 (Jose Avila’s transcribed testimony), R-12 (A. Johnson’s “to whom it may concern” letter), R-13 (letters and evaluations pertaining to reforestation contracts), and R-20 (John Venaglia’s letter to F. Cisneros). According to the record, Respondents withdrew exhibit R-4 during the hearing and the ALJ excluded exhibit R-20 because it was not included in Respondents’ case summary in accordance with the ALJ’s discovery order and was otherwise deemed to have no impeachment value. The ALJ reserved ruling on exhibits R-5, R-12, and R-13 until

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<sup>27</sup> The forum infers from Respondents’ repeated references to “Plaintiff-Relators” and “this Court” that their argument was “cut and pasted” from a document filed in the other proceeding.

the issuance of the proposed order. The rulings on R-5, R-12, and R-13 were not explicit in the order and are hereby incorporated into the record as follows:

1) Respondents exhibit R-5 is already part of Agency exhibit A-78 which was received as substantive evidence in the record. Consequently, the forum excludes R-5 as unduly repetitious. Respondents' exception to the exclusion of R-5 is **DENIED**.

2) Prior to hearing, the Agency timely requested cross-examination of the document preparers of Respondents exhibits R-12 and R-13, pursuant to OAR 839-050-0260 that states, in pertinent part:

“(9) Any affidavit, certificate, or document included with a case summary or that a participant serves on the other participants at least ten days before hearing may be offered and received into evidence unless cross-examination is requested of the affiant, certificate preparer, or other document preparer or custodian no later than five days prior to hearing or, for good cause shown, by such other date as the administrative law judge may set. An affidavit or certificate may be offered and received with the same effect as oral testimony.

“(10) If cross-examination is requested of the \* \* \* document preparer \* \* \* as provided in section (9) of this rule and the preparer is not made available for cross-examination, but

the \* \* \* document is offered in evidence, the same may be received in evidence, provided the administrative law judge determines that:

“(a) The contents of the document are otherwise admissible; and

“(b) The participant requesting cross-examination would not be substantially prejudiced by the lack of cross-examination.”

A. Johnson prepared the letter offered as exhibit R-12 and gave lengthy testimony at hearing that included reiterating pertinent parts of the letter. The letter's remainder includes personal opinion statements that are not related to A. Johnson's qualification as an expert or to any issues in this case. Consequently, the forum has excluded R-12 from the record for the most part because it is not relevant to this proceeding and the remainder that is relevant is unduly repetitious. Respondents' exception to the exclusion of R-12 is **DENIED**.

Respondents exhibit R-13 is a collection of letters and evaluations acquired by Mountain Forestry in September 2005 pertaining to Respondents' tree planting activities. Respondents did not make the document preparers available for cross-examination at hearing as the Agency timely requested and the forum must determine if the documents are otherwise admissible and whether the Agency is substantially prejudiced by the lack of cross-examination. Having

reviewed each document, several of which were duplicates that contained similar handwriting, but with different dates and signatures, the forum concludes that if relevant at all, the probative value of the documents is too remote to be of any assistance in this case. At issue is whether Respondents' actions and inaction during their performance of the 2000 through 2004 firefighting contracts demonstrate they lack the character, competence and reliability to hold a farm/forest labor contractor license. How well they performed on small tree planting contracts between 2004 and 2005 is not pertinent to that issue. Moreover, Respondents' failure to make the document preparers available deprived the Agency and the ALJ the opportunity to question and resolve the anomalies contained in the documents. Consequently, the forum has excluded R-13 from the record and Respondents' exception to its exclusion is **DENIED**.

3) During the hearing, exhibit R-20 was excluded as substantive evidence because it was not included in Respondents' case summary in accordance with the forum's order issued pursuant to OAR 839-050-0210(1). Respondents did not offer a satisfactory reason for having failed to do so. Additionally, the exhibit, a letter addressed to Mountain Forestry and F. Cisneros from federal contracting officer, John Venaglia, was offered through a witness who had no knowledge of the letter or its contents. Neither F. Cisneros nor Venaglia appeared

as witnesses during the hearing and the forum concluded Respondents failed to lay a proper foundation. Alternatively, Respondents offered exhibit R-20 to impeach Alex Coronado's hearsay statements that he was not pack tested. The forum excluded the exhibit after ruling that it was not proper impeachment.<sup>28</sup> Consequently, the forum concludes the ALJ did not violate her duty to conduct a full and fair inquiry by excluding the proffered exhibit and the ruling excluding R-20 is hereby affirmed.<sup>29</sup> OAR 839-050-0210(5).

#### **Exception 7 – Respondents' Offers of Proof**

Respondents made numerous offers of proof throughout the hearing and now request that "each and every offer of proof submitted [and] not already admitted be received as evidence by the forum." Additionally, for offers of proof not admitted, Respondents "demand that a statement of the reasons for the denial be clearly stated in the order." Re-

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<sup>28</sup> Venaglia's letter was not based on his personal knowledge, but rather on what he was told by Respondents. See n.17.

<sup>29</sup> In his letter to F. Cisneros, Venaglia stated: "We have reviewed your response to our concerns \* \* \* and are satisfied \* \* \* that the requisite training, and pack tests were administered." Without knowing Respondents' response to Venaglia's concerns, the forum is unable to draw any conclusions based on Venaglia's letter.

spondents' offers are addressed herein in a separate section of this Final Order.

**Exception 8 – Respondents' Affirmative Defenses**

Respondents contend they were denied a full and fair hearing because some of their affirmative defenses were stricken from their answer. Respondents' affirmative defenses are fully addressed in the record and the forum concludes that the duty to conduct a full and fair inquiry under ORS 183.415(10) was not violated by striking them from Respondents' answer. The prior ruling is hereby affirmed and Respondents' exception 8 is **DENIED**.

**Exception 9 – Respondents' "Right to Counsel"**

Respondents contend they were denied the "right to be represented by counsel of their choosing" which amounted to a "denial of a fair hearing." Respondents merely reiterate their previous arguments that they were entitled to be represented by a certified law student throughout the hearing and erroneously declare that ORS 183.415(3) confers upon them a right to counsel of their choice.

Under the Administrative Procedures Act and the contested case hearing rules, a party may be represented by counsel or an authorized representative. ORS 183.415(3); OAR 839-050-0110(1). Counsel means "an attorney who is a member in good standing with the Oregon State Bar" or, at the forum's discretion,

an out-of-state attorney who is a member in good standing of that state's bar and associated with Oregon counsel. OAR 838-050-0020(9). Authorized representative means "a member of a partnership, an authorized officer or regular employer of a corporation, association or organized group, or an authorized officer or employee of a governmental agency who has been authorized by the partnership, corporation, association, organized group, or governmental agency to represent that entity during the contested case proceeding." OAR 839-050-0020(3). Certified law students are not included in either definition. For reasons fully addressed on the record before and during the hearing, the forum concludes the ALJ properly exercised her discretion by not permitting counsel's law clerk to represent Respondents during this particular hearing. The ALJ's prior ruling is hereby affirmed. Respondents' exception 9 and "demand for new hearing" is **DENIED**.

**Exception 10 – Alex Coronado and Leticia Ayala Hearsay Statements**

Respondents take exception to "the admission of and the forum's reliance on hearsay and multiple hearsay statements of Alex Coronado, as testified by Moritz, S. Johnson, and others." Contrary to Respondents' assertion, the forum's findings and conclusions are not based solely on Coronado's hearsay statements, but rather the totality of circumstances established by the credible evi-

dence. Based on the whole record herein, the forum concluded there were sufficient indicia of reliability to support the statements made to S. Johnson and others about Respondents' failure to pack test Coronado or Ayala before they were dispatched to wildfires. Respondents' assertion that they presented "volumes of countervailing evidence calling Coronado's veracity into question" is simply not supported by the record. Respondents offered two sources of rebuttal: Jose Avila's prior testimony in another proceeding and John Venaglia's letter purportedly concluding that Coronado and Ayala had taken the pack test. First, the forum considered Avila's prior felony convictions when evaluating the veracity of his "sworn" statement. The forum also concluded Avila's prior testimony was unreliable because it was contradicted by other credible evidence, conflicted with his prior statement to S. Johnson, and conflicted with Michael Cox's version of events, which, in turn, conflicted with Brandon Creson's version as told to S. Johnson. Second, Venaglia's letter was not admitted into evidence for reasons that are fully explained in this Final Order. Even if it had been admitted, any so called "conclusion" drawn by Venaglia was entirely based on information he received directly from Respondents. Finally, Respondents' assertion that they were prejudiced by the Agency's failure to call Coronado and Ayala as witnesses and, thus, denied the

opportunity to cross-examine both witnesses is not well taken. Respondents had notice of the allegations pertaining to Coronado and Ayala and many months thereafter to ensure they both appeared at hearing.<sup>30</sup> Instead, Respondents apparently opted to rely on the Agency's case summary that listed both as anticipated witnesses in the Agency's case. Notably, both participants listed several witnesses in their respective case summaries that they did not call at hearing. Neither participant should rely on the other to produce witnesses they consider critical to their case. Respondents' exception 10 is **DENIED**.

**Exception 11 – Waiver and ORS 183.415(7)**

Respondents object to the ruling on their motion to dismiss paragraphs 12 and 13 in the Agency's Notice of Intent. The ruling adequately sets forth the forum's rationale for denying the motion and is hereby affirmed. Respondents' exception 11 and request for a new hearing are **DENIED**.

**Exception 12 – Respondents' Motion to Re-Open Record**

Respondents object to the ALJ's ruling on their motion to re-open the record to admit additional evidence and contend the denial "amounts to a denial of Respondents' right to submit rebuttal

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<sup>30</sup> Participants typically issue subpoenas to ensure a witness's appearance at hearing.

evidence under ORS 183.450(3).” Respondents’ argument has no merit. Respondents’ “right” to submit rebuttal evidence after the record has closed is limited by the contested case hearing rules that authorize the ALJ to admit new evidence if the ALJ determines it is necessary to fully and fairly adjudicate the case and good cause is shown for not having submitted it before the record closed. In this case, the ruling adequately sets forth the ALJ’s rationale for denying the motion and the forum concludes that even if admitted, the new evidence would not have altered the findings and conclusions set forth herein. Consequently, the duty to conduct a full and fair inquiry was not violated by denying the motion and the ALJ’s ruling is hereby affirmed and Respondents’ exception 12 is **DENIED**.

**Exception 13 – Proposed Finding – The Merits # 21**

Respondents contend factual finding 21 on the merits is irrelevant. The forum agrees that the portion of the finding to which Respondents refer is irrelevant and has stricken that portion of the finding from this Final Order.

**Exception 14 –Virgil Urena Hearsay**

Respondents’ contention that “the forum bases its conclusion that Respondents did not pack test certain individuals based solely on the hearsay statements of Virgil Urena” is not supported by the record. The record shows the forum’s conclusions were

based on the whole record that included credible testimonial and documentary evidence, including Respondents’ own records. Respondents’ exception 14 is **DENIED**.

**Exception 15 – Bob Gardner Hearsay Statements**

Respondents object to the forum’s reliance on Bob Gardner’s hearsay statements to S. Johnson to “conclude that the V. Cisneros file was a mixture of F. Cisneros’s son and F. Cisneros’s brother.” First, hearsay, if reliable, is admissible in a contested case hearing. OAR 839-050-0260(1). In this case, the forum made an inference based on Gardner’s statements to S. Johnson and documentary evidence that unequivocally established that another person named Victor Cisneros worked for F. Cisneros several years before Mountain Forestry hired F. Cisneros’s son, also named Victor. F. Cisneros was present throughout the entire hearing and had ample opportunity to refute any of Gardner’s statements to S. Johnson. The forum infers from his failure to testify that his testimony would not have contradicted Gardner’s statements to S. Johnson. *See In the Matter of German Auto Parts, Inc.*, 9 BOLI 110, 128 (1990)(failure of a named respondent to testify allows the conclusion that such testimony would not contribute to that respondent’s defense). Proof includes both facts and inferences. *In the Matter of Labor Ready Northwest, Inc.*, 27 BOLI 83, 132 (2005). Second, whether

or not one of the Victors was brother to F. Cisneros is irrelevant and the answer to the question does not alter the ultimate findings and conclusions set forth herein. Consequently, Respondents' exception 15 is **DENIED**.

**Exception 16 – Ramon Herrera Cisneros**

Respondents allege facts not in evidence to support its contention that Ramon Herrera Cisneros ("R. Cisneros") is not related to F. Cisneros. Other than one document in the record that shows different addresses for "Ramon Herrera Cisneros" and "Ramon Cisneros," there is no other evidence including social security numbers or other identification that supports Respondents' contention. Even if R. Cisneros is not related to F. Cisneros, their relationship is not germane to the issues or findings in this case and the distinction does not alter the ultimate findings and conclusions. As for Respondents' argument that "[t]here is no evidence in the record to support the finding that Mountain Forestry provided [R. Cisneros] with a fake identification card showing an earlier birthdate," the forum finds there is sufficient reliable evidence, including S. Johnson's credible testimony regarding his conversation with R. Cisneros, to establish that more likely than not Mountain Forestry provided R. Cisneros with fake identification. Respondents' exception 16 is **DENIED**.

**Exception 17 – Michael and Penny Cox's Personal Income**

Respondents except to references to Michael and Penny Cox's personal income "derived from Mountain Forestry and other corporate holdings," stating that Penny Cox's personal income is not relevant because she "was not a party or a witness to this proceeding" and the information "is not a matter of public record." First, the single finding and reference to the Cox's personal income only pertains to Mountain Forestry earnings and no other "corporate holdings." Second, the information derives from a document that was received into evidence without objection and is a public record. Respondents cited no public records law provision applicable to this case that exempts the information from public disclosure. Third, Penny Cox, as a 48 percent shareholder, co-owned Mountain Forestry, and was at all material times the corporate manager's wife. Their joint earnings from Mountain Forestry are relevant because they go to Michael Cox's bias and demonstrate that he had a substantial financial incentive to fashion his testimony in a manner that protected his pecuniary interest in Mountain Forestry. Respondents' exception 17 is **DENIED**.

**Exception 18 – Conclusion of Law #5**

Respondents except to the forum's conclusion that "Respondents violated ORS 658.440(1)(d) by dispatching at least seven firefighters to fight

wildfires without the requisite endurance testing required under the 2004 Interagency Firefighting Agreement \* \* \*.” The conclusions of law have been corrected to more accurately reflect the number of violations found herein.

#### **Exception 19 - Opinion**

Respondents except to the forum's conclusion in the opinion section of the order that “[b]y violating the terms and conditions of the 2000 Agreement, which required, among other things, that Respondents abide by all applicable state laws and rules, including the commissioner's rule establishing a statutory minimum age requirement, Respondents violated ORS 658.440(1)(d).” Respondents contend that although the Notice of Intent alleges in paragraph three that “[t]he contracts or agreements included, among other things, a provision that Respondents would comply with all state, federal and local laws,” the allegation is not “notice” of a violation as required under ORS 183.415, “and the forum cannot find violations that were not properly notified.” After reviewing the pleading, the forum finds the Agency specifically alleged that Respondents employed underage firefighters, including V. Cisneros, and that by doing so, Respondents violated the terms and conditions of a legal and valid agreement, i.e., the 2000 ODF Agreement. The Agency proved that particular allegation by establishing that the Agreement included a term and condition that Respondents abide by applicable

state laws and regulations which at material times included a minimum age requirement applicable to minors employed as firefighters. Respondents' focus on paragraph three of the pleading ignores paragraph four that unambiguously alleges “Respondents \* \* \* entered into legal and valid contracts or agreements \* \* \* from 2000 through 2003 and failed to comply with the terms and provisions of those contracts and agreements by, among other things and in addition to the violations listed in paragraph 3 above, \* \* \* employing minors in violation of OAR 839-021-0102.<sup>31</sup> This is a violation of ORS 658.440(1)(d).” The forum finds the Agency's pleading in substance and form contains a “short and plain statement of the matters asserted or charged” in accordance with ORS 183.415(2)(d). The forum therefore concludes Respondents had adequate notice of the Agency's charge that they failed to comply with the terms and provisions of legal contracts and agreements by hiring minors in violation of child labor provisions, specifically OAR 839-021-0102. Respondents' exception 19 is **DENIED**.

#### **Exception 20 – Minimum Age and Training Requirements**

Respondents except to the omission of findings in the order that pertain to the Agency's allegations that Andrew Williamson and Samuel Cisneros failed to

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<sup>31</sup> OAR 839-021-0102 is the Commissioner's rule establishing a minimum age requirement for firefighters.

meet minimum age “and/or training requirements.” Respondents state that “the forum has presumably found nothing wrong with these two files” and assert that the finding should be noted in the record and factored into the credibility finding for S. Johnson. Although their presumption is inaccurate, they are correct to suggest that the forum is required to address every contested issue in a contested case.<sup>32</sup> Consequently, the forum has corrected its inadvertent omission in the factual findings and opinion section this Final Order.

#### **Exception 21 - Capacity**

Citing contract principals that do not apply in this case, Respondents except to the forum’s conclusion that they entered into an agreement with BOLI in their capacity as a farm/forest labor contractor each time they applied for license renewal. The issue was sufficiently addressed in the order and Respondents’ exception 21 is hereby **DENIED**.

#### **Exception 22 – Pack Test Notifications**

Respondents correctly note an error in the factual findings pertaining to pack test notification. Accordingly, the forum has made appropriate corrections to the factual findings, legal conclusions, and opinion and order that more accurately reflect the record. Additionally, Respondents claim that

under the 2004 Agreement, “a [notification] violation can only be found if the contractor had been previously provided with a notice of noncompliance and continued to pack test without notification (i.e. a ‘second violation’ after receiving the notice of noncompliance).” Citing the Agreement, section 4.12.5, Respondents state that “under the plain language of the contract, without such notice, there is no violation.” Respondents misconstrue the provision and the violation at issue in this proceeding. The Agency alleged that “Respondents agreed to notify [ODF] before administering required testing of individuals for firefighting but did not do so” and by failing to do so they “failed to comply with the terms and conditions of lawful agreements or contracts,” in violation of ORS 658.440(1)(d). The 2004 Agreement unambiguously states that the contractor “shall notify [ODF] in writing \* \* \* at least five (5) calendar days prior to administering each pack test.” Regardless of whether ODF issued a notice of noncompliance, Respondents either complied with that provision or they did not comply. Credible evidence established that Respondents did not provide the required notification to ODF and therefore did not comply with a term and condition of the 2004 Agreement, which is a violation of ORS 658.440(1)(d). Respondents’ exception 22 is **DENIED**.

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<sup>32</sup> *Dan McCormack Agency v. Employment Division*, 99 Or App 47, 50 (1989).

**Exception 23 – Bias**

Respondents allege facts that are not in the record to support their claim that the ALJ exhibited bias against Respondents during the hearing. Respondents had ample opportunity – two and one half weeks of hearing - to place on the record any occurrences Respondents perceived as bias on the ALJ's part. Indeed, the entire record reveals that Respondents' counsel was particularly diligent about preserving objections to procedural and evidentiary matters and had there been legitimate bias concerns, the forum is satisfied they would have been raised by counsel on the record.<sup>33</sup> In any event, the Commissioner renders the final decision based on the merits of each case heard in this forum. This case is no exception and Respondents have not alleged and there is no evidence that the Commissioner was biased in any way against Respondents or their counsel when considering the merits of this case. Respondents' exception 23 is **DENIED**.

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<sup>33</sup> Notably, Respondents first raised ALJ bias in their motion to disqualify that was untimely filed one month after the Notice of Hearing issued. The motion was denied and Respondents subsequently filed a motion for reconsideration on the same issue and it was denied. See Findings of Fact – Procedural 8 & 9. Those facts suggest Respondents are not reluctant to raise bias as an issue and presumably would have readily done so had there been sufficient basis.

**ORDER**

NOW, THEREFORE, as authorized by ORS 658.453, and as payment of the penalties assessed for violations of ORS 658.440(1)(d), the Commissioner of the Bureau of Labor and Industries hereby orders **Mountain Forestry, Inc. and Francisco Cisneros** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, a certified check payable to the Bureau of Labor and Industries in the amount of FIFTY ONE THOUSAND FIVE HUNDRED DOLLARS (\$51,500), plus any interest thereon that accrues at the legal rate between a date ten days after the issuance of the Final Order and the date Mountain Forestry, Inc. and Francisco Cisneros comply with the Final Order;

FURTHERMORE, as authorized by ORS 653.370, and as payment of the penalties assessed for violations of ORS 653.307, OAR 839-021-0220, and OAR 839-021-0102(p), the Commissioner of the Bureau of Labor and Industries hereby orders **Mountain Forestry, Inc.** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, a certified check payable to the Bureau of Labor and Industries in the amount of FIVE THOUSAND DOLLARS (\$5,000), plus any interest thereon that accrues at the

legal rate between a date ten days after the issuance of the Final Order and the date Mountain Forestry, Inc. complies with the Final Order;

FURTHERMORE, the Commissioner of the Bureau of Labor and Industries hereby denies **Mountain Forestry, Inc.** and **Francisco Cisneros** each a license to act as a farm/forest labor contractor, effective on the date of the Final Order. **Mountain Forestry, Inc.** and **Francisco Cisneros** are each prevented from reapplying for a license for three years from the date of this denial, in accordance with ORS 658.445 and OAR 839-015-0520.

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**In the Matter of  
KURT E. FREITAG**

and

**Kurt E. Freitag dba Big Fish  
Partners I**

and

**Meritage Homeowners' Association  
fka Meritage at Little  
Creek Homeowners' Association,  
Inc.**

**Case Nos. 77-06 & 65-06**

**Final Order of Commissioner  
Dan Gardner**

**Issued July 9, 2007**

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**SYNOPSIS**

Respondents are joint employers who employed Claimant and failed

to pay him wages for all of the hours he worked in June 2005, in violation of ORS 652.140(2), and are jointly and severally liable for \$252 in unpaid wages to Claimant. Respondents' failure to pay the wages was willful and they are jointly and severally liable for penalty wages in the amount of \$1,920, pursuant to ORS 652.150. Additionally, Respondents violated Oregon child labor laws by employing minors in 2004 and 2005 without obtaining a validated employment certificate, pursuant to ORS 653.307 and OAR 839-021-0220(2); by employing minors without first verifying the age of the minors, pursuant to OAR 839-021-0185; by employing at least one minor to perform work hazardous to minors under 16 years old, in violation of OAR 839-021-0102(1)(ss); by employing at least one minor to perform work declared to be particularly hazardous or detrimental to the health or well being of minors 16 and 17 years old, in violation of OAR 839-021-0104; and by failing to post a validated employment certificate, pursuant to OAR 839-021-0220(3). As a result of the violations, Respondents were found jointly and severally liable for civil penalties in the amount of \$9,000. ORS 652.140(2); ORS 652.150; ORS 653.307; ORS 653.370; OAR 839-021-0220(2); OAR 839-021-0185; OAR 839-021-0102(1)(ss); OAR 839-021-0104; OAR 839-021-0220(3); OAR 839-021-0104; OAR 839-019-0010(2); OAR 839-019-0020; OAR 839-019-0025.

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The above-entitled case came on regularly for hearing before Linda A. Lohr, designated as Administrative Law Judge ("ALJ") by Dan Gardner, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on October 10, 2006, in the U.S. Fish & Wildlife Conference Room, at 2127 SE Marine Science Drive, Newport, Oregon, and continued on February 21, 2007, in the Planning Department Conference Room, at 210 SW 2<sup>nd</sup> Street, Newport, Oregon.

Jeffrey C. Burgess, an employee of the Agency, represented the Bureau of Labor and Industries ("BOLI" or "the Agency"). Ryan Anthony Doherty ("Claimant") was present throughout the hearing and was not represented by counsel. Kurt E. Freitag ("Respondent Freitag") was present individually and as authorized representative for Meritage Homeowners' Association, formerly known as Meritage at Little Creek Homeowners' Association, Inc. ("Respondent Meritage").

In addition to Claimant, the Agency called as witnesses: Dan Christianson, Appraiser, Lincoln County Assessor's Office (telephonic); Margaret Pargeter, BOLI Wage and Hour Division compliance specialist (telephonic); Karen Gernhart, BOLI Wage and Hour Division administrative specialist (telephonic); Kurt E. Freitag, Respondent; George Wespi, Project Manager, Joseph Hughes Construction Company; and Respondents' former employees

Kelly Johnson, Seth Mross, and Brandon Haro (telephonic).

Respondents called Respondent Freitag as their only witness.

The forum received as evidence:

a) Administrative exhibits X-1 through X-27 (wage claim hearing);

b) Administrative exhibits CL-1 through CL-18 (child labor hearing);

c) Agency exhibits A-1 through A-23 (filed with the Agency's case summary in both cases), and A-24, A-25 (submitted at the wage claim hearing), and A-26 (submitted at the child labor hearing); and

d) Respondent exhibits R-1 through R-9 (filed with Respondents' case summary for the wage claim hearing), and R-10 (submitted at the wage claim hearing).

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

#### **FINDINGS OF FACT – PROCEDURAL**

1) On October 26, 2005, Claimant filed a wage claim form stating "Meritage," located at "881 NW Beach" in Newport, Oregon, had employed him from June 23 through June 29, 2005, and failed

to pay him all wages that were due when he quit his employment.

2) On October 10, 2006, Claimant assigned to the Commissioner of the Bureau of Labor and Industries, in trust for Claimant, all wages due from Respondents.

3) On March 16, 2006, the Agency issued an Order of Determination numbered 05-3331. In the Order of Determination, the Agency alleged Respondent Freitag had employed Claimant during the period June 23 through June 29, 2005, failed to pay Claimant for all hours worked in that period, and therefore was liable to Claimant for \$252 in unpaid wages, plus interest. The Agency also alleged Respondent Freitag's failure to pay all of Claimant's wages when due was willful and Freitag was liable to Claimant for \$1,920 as penalty wages, plus interest. The Order of Determination gave Respondent Freitag 20 days to pay the sums, request an administrative hearing and submit an answer to the charges, or demand a trial in a court of law. Respondent Freitag timely filed a request for hearing and an answer stating, in pertinent part:

"As to Paragraph I, Respondent neither admits nor denies the claims therein.

"As to Paragraph II, Respondent denies that he is an employer or payer of wages to any person in the State of Oregon, specifically that he has never employed or retained the

wage claimant, or any other person, to perform work for him. Respondent has no knowledge on the basis of which to admit or deny whether claimant did or did not earn wages, was paid wages, or is owed wages, and therefore denies the same. Respondent also has no knowledge on the basis of which to assess the Bureau's determination and therefore denies the same.

"As to Paragraph III, Respondent has no knowledge on the basis of which to admit or deny the allegations therein, and therefore denies the same. In particular, Respondent denies having received any notice pursuant to ORS 652.140 and ORS 652.150.

"For his affirmative allegations, Respondent states as follows:

"1. Respondent is a natural person and, as such, does not do business in the State of Oregon.

"2. Respondent received a copy of the Order of Determination on April 4, 2006. Accordingly, this Request for Hearing and Answer is timely.

"3. Respondent received, in his capacity as designee of Meritage at Little Creek Homeowners' Association, Inc., as well as, possibly, in his capacity as principal in other legal entities, correspondence concerning this claim. At no time did any correspondence assert that the wage claim was being brought against Re-

spondent personally. Although the Bureau seems to have asserted the wage claim against numerous entities from time to time, the one entity that it was *not* asserted against was Respondent personally.

"4. Pursuant to ORS 650.140 [sic] and ORS 652.150, therefore, no written notice was provided to Respondent and, therefore, no penalty wages are assessable.

"5. Respondent reserves the right to raise, at hearing or at trial, any additional or supplementary defenses that may be available to him under Oregon law."

4) On May 17, 2006, the Agency requested a hearing and filed a motion to amend Order of Determination # 05-3331 to add as Respondents, Kurt E. Freitag dba Big Fish Partners I and Meritage Homeowners' Association fka Meritage at Little Creek Homeowners' Association, Inc. ("Meritage"). As reasons for the amendment, the Agency stated that 1) the status of the potential respondents is "unclear from the file"; 2) Kurt E. Freitag dba Big Fish Partners I apparently issued Claimant a 1099 for wages earned in 2004; 3) Claimant listed Meritage as his employer on the wage claim form; and 4) Meritage is an active non-profit corporation for which Respondent Freitag serves as president. The Agency asserted that because Respondent Freitag was served with the original Order of Determination, filed an answer, and is president of

Meritage, all of the potential Respondents have notice of the wage claim and could not claim surprise. On May 18, 2006, the forum granted the Agency's motion and gave the named Respondents until June 7, 2006, to file an answer to the amended Order of Determination. On May 18, 2006, the Hearings Unit issued a Notice of Hearing stating the hearing would commence at 9:00 a.m. on September 19, 2006. With the Notice of Hearing, the forum included copies of the Order of Determination and Notice of Intent to Assess Civil Penalties, a "SUMMARY OF CONTESTED CASE RIGHTS AND PROCEDURES" and a copy of the forum's contested case hearings rules, OAR 839-050-0000 to 839-050-0440.

5) On May 18, 2006, the ALJ issued an order pertaining to fax filings and timelines for responding to motions and service of documents.

6) On May 24, 2006, the Agency sent documents to the Hearings Unit that initially were filed with the Agency's Judgment Unit and subsequently forwarded to Agency case presenter Domas. In her cover letter, Domas stated she had not received copies of the documents, apparently intended for the Hearings Unit, and she had taken the liberty of making copies before sending them to the Hearings Unit. The documents were from Respondents and included a response in opposition to the Agency's motion to amend, a request for subpoenas, an answer

to the amended Order of Determination, and a letter authorizing Kurt E. Freitag to act as Respondent Meritage's authorized representative and to represent "Big Fish Partners." In the answer to the amended Order of Determination, Respondents stated, in pertinent part:

"(1) Big Fish Partners is a general partnership engaged in the development of property commonly known as Meritage at Little Creek. Big Fish Partners is a licensed developer under Oregon law. As such, Big Fish is entitled to hire only licensed general contractors for construction related work. Upon information and belief, claimant Ryan Dougherty [sic] is not now and never has been a licensed general contractor. Big Fish Partners, therefore, denies that it has hired and asserts that it cannot hire this person for construction related work.

"(2) Meritage at Little Creek Homeowners' Association, Inc. is a not for profit corporation engaged in the management of common areas for the Meritage Development. At the time in question, Meritage Homeowners' Association collected no dues and therefore has no funds to hire, retain or pay any person for work. As such, Meritage Homeowners' Association, Inc. denies it did or has hired the claimant.

"(3) Both Respondents deny that they are properly added to

this matter, pursuant to the Motion filed.

"(4) Both Respondents assert, as they did in the Motion, that they were never properly served or corresponded with on this matter by the Agency. As such, even if a judgment for the wage portion were assessed against them, they are not liable for any penalties due to lack of notice.

"(5) Both entities hereby request costs and penalties against the Agency for malicious prosecution and frivolous claims."

In their response to the Agency's motion to amend the Order of Determination, Respondents contended that 1) the Agency should be "required to prosecute this matter against the Respondent named, or else dismiss against the Respondent and file against some other person or entity" and 2) service on Freitag was not sufficient to constitute service on the corporation.

7) On May 26, 2006, the forum, treating Respondents' response to the Agency's motion as a motion for reconsideration of the prior ruling granting the Agency's motion, denied the reconsideration request as to the amendment, but concluded that proper service upon Respondents was not adequately demonstrated and directed the Agency to serve the additional Respondents with the amended Order of Determination and provide the proof of service to the Hearings Unit. Re-

spondents were granted leave to file an amended answer and request for hearing within 20 days of their receipt of the amended order. On June 6, 2006, the Agency filed with the Hearings Unit proof of service for Respondents Freitag and Meritage.

8) On June 1, 2006, the Agency filed an objection to Respondents' request for subpoenas. On June 19, 2006, Respondents filed a reply to the Agency's response. On June 19, 2006, the ALJ issued a discovery order requiring the Agency to provide certain documents to Respondents and granting Respondents' request to subpoena Claimant. The ALJ denied Respondents' request to subpoena "any Agency employee or personnel with knowledge of this matter" as lacking specificity.

9) On July 12, 2006, the Agency provided the Hearings Unit with proof of service for Kurt E. Freitag dba Big Fish Partners I.

10) On July 28, 2006, Respondents moved for a change in the hearing date and a request to reissue subpoenas or permission to amend the existing subpoenas. The Agency had no objection to rescheduling the hearing and on August 1, 2006, the ALJ issued an order granting Respondents' motion and rescheduling the hearing for October 10, 2006.

11) On August 1, 2006, the ALJ ordered the Agency and Respondents each to submit a case summary that included: 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; and, a brief statement of the elements of the claim and any wage and penalty calculations (for the Agency only). The ALJ ordered the participants to submit their case summaries by September 29, 2006, and notified them of the possible sanctions for failure to comply with the case summary order.

12) On September 18, 2006, the Agency filed a motion to consolidate two "related" cases (Case No. 65-06 and Case No. 77-06) "pending before the forum."<sup>1</sup> Respondents did not file a response to the Agency's motion. The ALJ denied the motion on September 25, 2006, because the only charges pending before the forum at that time were those contained in the Order of Determination, Case No. 77-06. Thereafter, on the same date, the Agency submitted a request for hearing on a Notice of Intent to Assess Civil Penalties for Child Labor Violations ("NOI"), Case No. 65-06, that issued against Respondents on July 24, 2006, and renewed its request to consolidate the pending cases.

13) In the NOI, the Agency alleged Respondents violated Oregon child labor law provisions

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<sup>1</sup> Inexplicably, the Agency's motion to consolidate was not marked as an exhibit and is not included in the hearing file. Its existence is otherwise documented in the ALJ's ruling on the motion, marked as Exhibit X-20.

by 1) employing at least three minors without first obtaining an annual employment certificate; 2) employing at least three minors without first verifying the age of the children; 3) employing at least one minor to engage in work declared to be hazardous for minors under 16 years old; 4) employing at least one minor to engage in work declared to be particularly hazardous or detrimental to the health or well being of minors under 18 years old; and 5) failing to post a validated employment certificate. In the NOI, the Agency proposed civil penalties totaling \$11,000. Respondents timely filed a request for hearing and an answer that stated, in pertinent part:

“(1) As to allegation 1, all Respondents deny having employed any of the named persons. In addition, Respondents deny that any person who may have been in their employ was a ‘minor’ as defined relative to ORS 653.307.

“(2) As to allegation 2, Respondents reiterate their denials in Paragraph 1 and affirmatively allege that any person who may have been hired was hired based upon information provided to them by the hiree himself or herself.

“(3) As to allegation 3, Respondents reiterate their denials in Paragraphs 1 and 2. In addition, Respondents maintain that none of the Respondents engaged in any of the activities cited during the period set forth in the com-

plaint. Furthermore, Respondents assert that the work cited does not violate any administrative rules or statutes.

“(4) As to allegation 4, Respondents reiterate their denials in Paragraphs 1-3. Further, Respondents deny that the person named in this paragraph suffered bodily injury while performing any work while in Respondents' hire.

“(5) As to Paragraph 5, Respondents deny that they had any employees during the time in question.

“(6) As to Paragraph 6, Respondents deny that penalties are warranted under the administrative rules.

“Respondents hereby assert and reserve all affirmative defenses available to them under law. In particular and without limitation, Respondents assert that ORS 653-370 [sic] is unconstitutionally vague, insofar as it does not provide a definition of the term ‘minor.’ Section 653.010 provides definitions that apply to sections ‘653.010 to 653.261.’ 653.010 provides no definition for the term ‘minor’ as used in section 653.370, nor is the term defined in any section subsequent to 653.261. As such, the provisions of this section are unenforceable. In addition, Respondents assert that the complaint is time-barred under Oregon law.”

14) On September 25, 2006, the ALJ issued an order granting

the Agency's motion to consolidate after determining that there were common questions of fact and "perhaps some related questions of law in the two cases."

15) On September 29, 2006, the Hearings Unit received the Agency's written motion for an extension of time to file case summaries as a follow-up to an oral motion that was granted after Respondents indicated they did not object to an extension. On October 2, 2006, the ALJ issued an order affirming the oral ruling extending the time for filing case summaries.

16) On September 29, 2006, the Hearings Unit received Respondents' reply to the Agency's motion to consolidate, Respondents' motion for an order compelling the agency to produce its "complainants" and other requested discovery, and Respondents' motion "to avoid a sham hearing." On the same date, the ALJ convened a pre-hearing conference with the participants to discuss Respondents' motions and resolve remaining discovery issues. The ALJ ordered the Agency to provide Respondents with any discovery previously ordered and not yet produced and both participants agreed to manage the discovery issues cooperatively in a timely manner. Based on the timing of the Agency's request for hearing on the child labor issues, the ALJ concluded that Respondents' notice of hearing on those issues was not sufficient to allow adequate preparation. The hear-

ing was subsequently bifurcated and hearing on the child labor violations was deferred until December 12, 2006.

17) The Agency and Respondents timely filed case summaries.

18) At the start of hearing, the ALJ verbally advised the participants of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

19) During the hearing, the Agency offered a wage assignment, executed by Claimant earlier in the morning, as an exhibit and as evidence of Claimant's intent to assign his wages to BOLI for collection. The Agency's case presenter stated that the wage assignment, ordinarily executed at the time a wage claim is filed, was not in the file when the Agency began hearing preparations and there was no way to determine if it was ever signed prior to the wage claim investigation or if it was initially signed but later misplaced.<sup>2</sup> Respondents objected and moved for dismissal of the wage claim with prejudice on the ground that the assignment was procedurally flawed and that allowing the assignment *nunc pro tunc* "may very well terminate some of Respondents' rights to pursue that

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<sup>2</sup> Claimant testified he signed several documents when he filed his wage claim, but could not remember if the documents included a wage assignment form.

particular matter.” Respondents also argued the assignment was a prerequisite to issuing a charging document as evidenced by the Agency’s allegation in the Order of Determination that Claimant had assigned his wages to the Agency. The ALJ received the exhibit but held the record open until November 10, 2006, to allow briefing on the issue of whether a wage assignment is required before the Agency may proceed on a wage claim, and, if so, whether a wage assignment may be made *nunc pro tunc*. The ALJ reserved ruling on Respondents’ motion to dismiss the Order of Determination until issuance of the proposed order.

20) The Agency and Respondents timely filed briefs and the hearing record pertaining to the Agency’s Order of Determination closed on November 10, 2006.

21) After considering the briefs filed by the Agency and Respondents, the ALJ determined that 1) ORS 652.332 sets forth the process applicable when the Commissioner elects to seek collection of a wage claim administratively and does not mandate that a wage assignment be taken prior to pursuing an administrative action;<sup>3</sup> 2) although

the Commissioner has the authority to take assignments, in trust, of wage claims under ORS 652.330, it is the receipt of a wage claim that triggers the Commissioner’s authority to investigate and enforce a wage claim under both ORS 652.330 and ORS 652.332; 3) Claimant filed a wage claim and either signed a wage assignment at that time and it was misplaced, or he inadvertently neglected to include a wage assignment with the signed wage claim form and it was not noticed until the hearing date; 4) by his actions when filing the wage claim and his testimony at hearing, Claimant demonstrated an intent to assign his wages to the Commissioner; 5) Respondents failed to articulate any right that was adversely affected by Claimant’s wage assignment at hearing; and 6) Respondents’ contention that Claimant was paid in full before he executed a wage assignment was not supported by credible evidence. Based on those facts, the ALJ concluded that Claimant’s wage assignment at hearing was in accordance with applicable statutes and rules and the timing of the assignment did not prejudice Respondents in any manner. Respondents’ motion to dismiss with prejudice was denied and the Commissioner affirms that ruling.

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<sup>3</sup> Cf ORS 652.330 (“The Commissioner of the Bureau of Labor and Industries shall enforce ORS 652.310 to 652.414 and to that end may \* \* \* [t]ake assignments, in trust, of wage claims \* \* \* for payment of wages from the assigning employees \* \* \*” and

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“sue employers on wage claims \* \* \* thus assigned \* \* \* for collection of wages[.]” and is “entitled to recover, in addition to costs, such sum as the court or judge may adjudge reasonable as attorneys fees at trial and on appeal.”).

22) On October 27, 2006, Respondents moved for a discovery order based on a previous attempt to obtain informal discovery pertaining to the child labor issues by letter dated October 5, 2006. The Agency filed a timely response stating that Respondents were provided with all documents contained in the investigative file and that the remaining requests were vague, overbroad, ambiguous, and not calculated to lead to the discovery of relevant evidence.

23) On November 29, 2006, the ALJ ordered the Agency and Respondents each to submit a case summary that included: 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; and, a brief statement of the elements of the claim and any penalty calculations (for the Agency only). The ALJ ordered the participants to submit their case summaries by December 6, 2006, and notified them of the possible sanctions for failure to comply with the case summary order. On the same date, the ALJ issued an order scheduling a prehearing conference on December 4, 2006, to discuss rescheduling the hearing on the child labor issues and Respondents' motion for discovery order. Following verbal discussions between the Hearings Unit and the participants on the same date, the prehearing conference was rescheduled for December 5, 2006, the hearing was rescheduled for January 17, 2007, and the

due date for case summaries was changed to January 5, 2007.

24) On December 5, 2006, the ALJ conducted a prehearing conference to resolve the issues that were raised in Respondents' motion for discovery order. Following argument on the motion, the ALJ ruled that Respondents' motion lacked specificity and was vague and premature because they had not yet served written interrogatories or requests for admissions on the Agency. Based on the ALJ's ruling, Respondents agreed to promptly serve interrogatories and requests for admissions on the Agency along with a detailed request for documents. The Agency agreed to promptly respond and further agreed to find a way to provide Respondents with the information that formed the basis of the child labor complaint without providing the case presenter's notes prepared in anticipation of litigation.

25) During the December 5 prehearing conference, the ALJ noted she had received reports from BOLI staff that Respondent Freitag had made numerous phone calls to several Portland office staff on November 29, 2005, the same day the Hearings Unit Coordinator ("HUC") attempted to contact the participants to arrange the prehearing conference. According to the reports, he was belligerent and verbally abusive to the BOLI staff members he contacted and refused to leave his name and number for a return call. His phone calls were precipitated by his inability to reach the

HUC when he returned her call without success during the noon hour. The ALJ advised Respondent Freitag during the prehearing conference that his conduct was not acceptable and would not be tolerated.

26) On January 3, 2007, the ALJ issued an order notifying the participants that the hearing location had changed to Newport Parks and Recreation Building, 225 SE Avery Street, Newport, Oregon.

27) The Agency timely submitted a case summary on January 5, 2007.

28) On January 8, 2007, Respondents moved for an order compelling the Agency to provide the materials and information, including responses to interrogatories, requested in Respondents' letter dated December 6, 2006. Respondents also moved for a continuance or dismissal of the matter pertaining to the child labor violations stating that "no citizen is required to tolerate government harassment" and submitting the "Complainants sole purpose in this matter is to attempt to use deception and innuendo to penalize Respondent."

29) The Agency timely filed a response to Respondents' discovery motion indicating it had already provided the complete investigative file and intended to provide additional information as it became available, but no later than January 11, 2007. The Agency further indicated its efforts

to obtain additional information were ongoing and that other requested information was either not discoverable or nonexistent. The Agency further moved the forum to take official notice of the wage claim proceeding, Case No. 77-06, for the purposes of the child labor proceeding. In its response, the Agency stated, in pertinent part:

"In conclusion, it should be apparent from the proceedings in these cases to date that the Agency conducted a fair and thorough investigation, not to intimidate and harass Respondents, but to enforce the wage and hour laws and to prevent Respondents from exploiting and harming minors. If anyone is to be accused of intimidation and harassment it is Mr. Freitag due to the misconduct in his dealings with Agency staff on November 29, 2006."

The Agency included a copy of an e-mail that was sent to the BOLI Legal Policy Advisor on November 29, 2006, from a BOLI staff person, stating in pertinent part:

"The Salem office received 3 calls this afternoon from an individual at 541-574-9483 (maybe) who stated he was an attorney. He declined to provide his name.

"Anyway, he stated he had received a call from someone at the Hearings Unit (per Vickie it was Etta's number) and tried to call back but after 3 hours of trying only learned everyone

was at a lunch meeting (his words).

“Vickie spoke with him the first time, then Bob and then me. He refused to leave a number (we got the above # off caller id and it is in Newport without any further info available). He said he doesn’t call people or leave msgs for those who work for him (i.e. gov’t employees). He only leaves msgs for those he works for.

“He had a whole list of complaints about the bureau although I’m not sure which state agency he thought he was speaking with. I declined to give him my full name, only my first name. He had a lot of other questions about my previous work and qualifications for this job which I also declined to answer except for self-employment and military service.

“After about 10 minutes of his ranting & raving I provided him your number and suggested he call you. He did not want to be transferred. After informing him that I was terminating the call, I hung up.

“Hope you don’t hear from him.

“Apparently, this person (per Etta) is Kurt Freitag and Jeff has a case in which he is the respondent. I see that I had one a couple of years ago.”

Based on Respondent Freitag’s demonstrated hostility toward government process and as a precautionary measure, the ALJ

arranged to have an Oregon State Police officer present at the scheduled hearing.

30) On January 9, 2007, the ALJ issued a discovery order compelling the Agency to produce certain documents and information pertaining to the BOLI child labor investigation. The Agency also was ordered to answer specific interrogatories relevant to the proceeding. The ALJ also noted that “in light of the Agency’s failure to respond at all to Respondents’ December 6, 2006, letter which was written based on a mutual agreement reached during the prehearing conference to expedite discovery resolution, the forum will allow Respondents some concessions at hearing to be determined at the time of hearing, including leaving the record open if necessary to receive additional evidence from Respondents.” The ALJ also took official notice of the entire record of Case No 77-06 to avoid duplicating testimony and evidence.

31) Due to inclement weather on the hearing date, the ALJ was unable to travel from Portland to Newport. The hearing was cancelled and subsequently reset for February 21, 2007. The hearing was also relocated to the Planning Department Conference Room, at 210 SW 2<sup>nd</sup> Street, Newport, Oregon.

32) At the start of hearing, the ALJ verbally advised the participants of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

33) At the start of hearing, Respondent Freitag, acting individually and as Respondent Meritage's authorized representative, stated he did not intend to participate in the hearing and was present only to make an appearance and place certain evidentiary objections on the record. Respondent Freitag also moved for dismissal with prejudice on the ground the Agency did not make available information pursuant to the ALJ's discovery order. Respondent Freitag also stated he did not receive the Agency's case summary. Agency case presenter Burgess produced a five page document entitled "Agency Response to Discovery Request" that included a certificate of service establishing that Respondents were served by first class mail on January 11, 2007.<sup>4</sup> The Agency's case summary also included a certificate of service showing Respondents were served by first class mail on January 5, 2007. Burgess stated that neither document was returned to the Agency by the U. S. Post Office as undeliverable. In response to the ALJ's inquiry, Respondent Freitag acknowledged he received the Notice of Intent, the orders postponing the hearing, and the case summary order, but denied receive-

ing the Agency's response to the discovery request or the Agency's case summary. After considering the arguments, the ALJ concluded that the Agency timely responded to the discovery order and the response and case summary were properly served on Respondents by U. S. Mail. Respondents' motion to dismiss was denied and the ALJ advised Respondent Freitag that any objections to certain Agency exhibits must be made when offered during the hearing. Respondent Freitag remained present throughout the hearing.

34) During the hearing, the Agency offered paycheck stubs that were not provided to Respondents previously in accordance with the ALJ's discovery order. The ALJ admitted the paycheck stubs as evidence and left the record open to allow Respondents additional time to produce documents to rebut the paycheck stubs Claimant produced at hearing. On March 1, 2007, Respondents submitted various documents that included a fax transmission from Joseph Hughes Construction Company, a subcontract order, an invoice, and an unrecognizable photograph sans description. On March 7, 2007, the Agency filed objections to the post-hearing documents filed by Respondents and requested that the forum refuse to receive them into evidence. On March 13, 2007, Respondents filed a response to the Agency's objections, a renewed motion for dismissal, and additional documents "related to undisclosed documents." After reviewing the documents Re-

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<sup>4</sup> At hearing, the Agency's Response to Discovery Request was marked as exhibit A-24. Since the wage claim proceeding includes an exhibit (wage claim assignment) with the same exhibit number, the forum renumbered the Agency's Response to Discovery Request and it is now exhibit A-26.

spondents submitted, the ALJ determined that none of the documents serve as rebuttal to the Claimant's paycheck stubs and, contrary to Respondents' assertion, there were no other documents admitted as evidence that were not previously provided to Respondents. The ALJ found that Respondents submitted documents more fitting for their case in chief instead of evidence relating to the paycheck stubs. Respondents did not file a case summary in accordance with the ALJ's case summary order and the ALJ concluded the Agency was prejudiced by Respondents' failure to provide the documents prior to hearing. Moreover, even if the documents had been admitted, they lack foundation and their probative value is not apparent. Consequently, the documents were not admitted into the record as substantive evidence.

35) The record pertaining to the child labor violations closed on March 13, 2007.

36) The ALJ issued a proposed order on June 13, 2007, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. The Agency did not file exceptions. Respondent filed exceptions that are addressed in the opinion section of this Final Order.

#### **FINDINGS OF FACT – THE MERITS**

1) At times material herein, Respondent Kurt E. Freitag ("Respondent Freitag") was an

individual using the duly registered assumed business name of Big Fish Partners I to conduct a property development business in Newport, Oregon. Respondent Freitag's principal place of business was located at 4628 N. 39<sup>th</sup> Place, Phoenix, Arizona, and his mailing address was PO Box 16495, Phoenix, Arizona. Respondent Freitag's address, as the assumed business name registrant, was 1105 Church Street, Evanston, Illinois.

2) At times material herein, Respondent Meritage Homeowners' Association ("Respondent Meritage"), formerly known as Meritage at Little Creek Homeowners' Association, Inc.,<sup>5</sup> was duly registered in Oregon as a nonprofit corporation. Respondent Meritage's principal place of business is located at "3360 et al. NW Oceanview," i.e., TL 300 at the corner of NW 33<sup>rd</sup> Street and NW Oceanview Drive, Newport, Oregon,<sup>6</sup> and its mailing address is PO Box 429, Newport, Oregon. During all times material, Respondent Freitag was Respondent Meritage's corporate president and secretary with a corporate office located at 881 NW Beach, Newport, Oregon.

3) In 2004, Respondent Freitag owned development prop-

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<sup>5</sup> The Corporation Division records show that on November 28, 2003, Meritage at Little Creek Homeowners' Association, Inc. changed its name to Meritage Homeowners' Association.

<sup>6</sup> See *infra* Finding of Fact – The Merits 3.

erty in Newport, Oregon, designated as Lincoln County Tax Lot 10-11-32-AC-00300 ("TL 300"). The property, located at the corner of NW 33<sup>rd</sup> Street and NW Oceanview Drive, is the site of an ongoing townhouse development project that includes subdividing the tax lot for townhouse construction in at least three separate phases. The first phase, Meritage Phase I, includes six completed townhouse units. Four units, A through D, are located at 3360 NW Oceanview Drive and two units, A and B, are located at 3380 Oceanview Drive. All six units, upon completion, were sold by April 29, 2005. At the time of sale, the buyers obtained title to the units in Meritage Phase I. The second phase, Meritage Phase II, also includes six townhouse units. Four units, A through D, are located at 3420 Oceanview Drive and two units, A and B, are located at 3440 Oceanview Drive. Five of the six units in Meritage Phase II were still under construction and were not sold during times material herein. By January 14, 2006, all of the Meritage Phase II units were sold and titles were transferred to the buyers. Before the townhouse units were sold, Respondent Freitag and his wife, Rita Schaeffer, held title to the units. The address for both was recorded at the Lincoln County Assessor's Office as PO Box 429, Newport, Oregon. The original tax lot, TL 300, still exists because development is ongoing and townhouse construction continues as Meritage Phase III. Since December 19, 2003, and at

all material times herein and currently, Respondent Meritage, "attention Kurt Freitag and Rita Schaeffer, PO Box 429, Newport, Oregon," holds title to at least two tracts in TL 300 - a common area designated as "tract A" and another area that may or may not be a common area designated as "tract B."

4) In or around March 2004, Respondent Freitag dba Big Fish Partners I contracted with Joseph Hughes Construction ("JH") to perform construction work at the site known as the Meritage Development project. JH and its subcontractors handled the exterior work on the townhouses while Freitag's "forces" handled the interior drywall work. On June 15, 2005, the Oregon Construction Contractor's Board ("CCB") notified JH that "the developer" on the Meritage project was not licensed and that JH's CCB license was in jeopardy if it continued to work for an unlicensed developer. JH immediately ceased work on the project and sent Respondent Freitag and all of JH's subcontractors a "stop work letter" on June 15, 2005. Other than returning to the job site to pick up some equipment on June 16, JH employees and subcontractors under JH's control were not on the job site after June 15, 2005. JH subsequently terminated its contract with Respondents pursuant to a provision that permitted JH to "terminate upon seven (7) days written notice when the work has been stopped for a period of at least thirty (30) days through no fault of the contractor \* \* \*." In its

termination notice issued to Respondents on September 6, 2005, JH stated, in pertinent part:

“Additionally, pursuant to Paragraph 14.4.3, you have repeatedly and in unconditional terms expressed via e-mail and other communications that you have no intention of paying the most recent billings issued by Joseph Hughes, LLC, in connection with its work on the project. Quite apart from any additional charges that may be due as a result of your failure to be registered and the resulting additional costs, you have repeatedly leveled a wide variety of arguments, none of which are legitimately based upon the terms of the contract or the circumstances that led to the suspension of work, sufficient to form a basis for non-payment. Under Oregon law, you are obligated to conform to the Private Works Prompt Pay act. You have been represented by counsel in connection with this project for at least 60 days. Despite that, and despite receiving billings in accordance with the terms of the contract, you have not complied in any fashion with the Private Works Prompt Pay Act.”

The termination notice was addressed to: “Kurt Freitag or Meritage Development or Big Fish Partners I.”

5) Effective August 24, 2005, Respondent Freitag became licensed with the CCB as a “licensed developer.” His “Em-

ployer Status” is listed as “Exempt.” Prior to that date, Freitag was not licensed as a property developer in Oregon.

6) During the summer 2004, Claimant responded to a local newspaper advertisement seeking laborers to perform work on the Meritage construction site. Claimant’s birthdate is November 23, 1988, and he was a high school student looking for summer work. Claimant’s mother, who had met Respondent Freitag previously at a steakhouse where she worked, encouraged Claimant to apply and drove him to the job site for an interview. Respondent Freitag was at the job site and conducted a brief interview. Freitag asked Claimant how old he was and Claimant told him he was 15 years old. After asking Claimant a few questions about his experience, Freitag hired Claimant and agreed to pay him \$8 per hour.

7) Claimant worked with approximately five other laborers, including Kelly Johnson and another teenager, Seth Mross, whose birthdate is September 30, 1986. No one asked about Mross’s age when he applied for the laborer job that summer.

8) During the summer 2004, Claimant and Mross performed work at the Meritage construction site that included site clean-up, landscaping, rock work, digging holes and trenches, building fences, and clearing out brush and trees. Although neither had experience with power equipment, Claimant and Mross used power

saws to cut up branches and clear shrubs and brush. They also used a wood chipper that consisted of a wheel grinder and "big spouts" to grind the branches and brush. Freitag purchased two power saws from Wal-Mart for the crew to use because he did not want them using his "good saws." Although Respondent Freitag also provided the other equipment used at the work site, including a backhoe, skill saws, drills, bobcats, and an excavator, he did not supply safety equipment for power saw use or harnesses for hauling rock up a steep embankment for a rock wall that the crew, including Claimant and Mross, constructed on the property.

9) During the rock wall construction in 2004, Claimant, Mross, and Johnson loaded boulders into a "bucket" on a backhoe and Respondent Freitag then drove the loaded backhoe down a driveway to the street where the boulders were unloaded at the bottom of an embankment that ran along the street. Claimant and Mross used their hands and shovels to haul and place boulders weighing between 60 and 100 pounds along the embankment that was on an approximately 45 degree slope. Claimant, Mross, and Johnson lifted or dragged the boulders up the incline to form a rock wall approximately 30' from street level to the top of the embankment. They completed about 15 or 20 feet of rock wall along the embankment in two days. When Johnson asked Respondent Freitag for ropes or harnesses to aid in the boulder placement,

Freitag responded that "the slaves of Egypt moved larger stones than that, so you should be able to do the same."

10) During the summer 2004, as Mross stood at the top of a large brush pile cutting up branches in the common area, he "nicked his shin" with a power saw. The power saw cut through his pants and skin and drew blood. Mross tied a piece of cloth around his shin and kept on working with the crew. He did not believe it was serious enough to seek medical treatment, but the cut left a permanent scar. Mross did not report the injury to Respondent Freitag.

11) During the summer 2004, the laborers were paid every two weeks and Respondent Freitag signed and issued the checks. Claimant was paid for all of the hours he worked that summer and all of his pay checks were signed by Freitag. At the end of the year he received a Form 1099 that showed his earnings from "Big Fish Partners, PO Box 16495, Phoenix, Arizona," during 2004, totaled \$2,552.

12) Sometime in June 2005, Respondent Freitag's employee or associate, Joya Menashe, called Claimant's mother and asked her if Claimant was interested in working another summer for Respondent Freitag. Claimant agreed and was hired as a laborer at the same job site, performing the same work as the year before and at the same wage rate of \$8 per hour.

13) Claimant began working at the Meritage construction site on June 23, 2005. On his first day, he was greeted by Respondent Freitag who put him to work “re-boxing” materials that had been previously delivered. Claimant and Respondent Freitag did not get along well during Claimant’s first week of work. Claimant perceived Respondent Freitag was overly critical of his work and was insulted by some of Freitag’s comments. Following a particularly upsetting encounter with Respondent Freitag, Claimant quit his employment on June 29, 2005, after finishing out the work day per Menashe’s request.

14) Mross and Brandon Haro, whose birthdate is September 29, 1987, also worked at the Meritage construction site during the 2005 summer. Mross told Haro to “show up at the job site and start working.” Haro filled out some paperwork when he started the job and later received paychecks signed by Respondent Freitag. Haro did not use a wood chipper that summer, but he worked around heavy machinery and used a power saw and shovel while landscaping. In 2004 and 2005, Menashe was present on the job site and primarily worked on the interior design of the townhouses. Although Menashe occasionally supervised the laborers, Freitag gave the instructions and made the decisions about the work to be done. When he was present on the job site, Freitag supervised Claimant, Mross and Haro and they perceived him as the “boss of the operation.”

15) Respondents have never applied for or obtained an employment certificate from BOLI.

16) After Claimant quit his employment, he immediately submitted an “invoice” that included his handwritten dates and hours worked. The typewritten invoice was actually a “sample” invoice dating back to August 2004 that included space for a name, address, social security number, birthdate, and under the heading, “Meritage Labor/Work Description,” there were sample dates, descriptions of labor performed, e.g. “Helped set up warehouse & coordinate Staining & Tablesaw etc.[.] MERITAGE LANDSCAPING, INSTALLED INSTALLATION IN UNIT 2D17[.]” and hours worked. Claimant used the sample invoice to write down his work hours and describe the work he performed each day. He did not provide any additional information. As he had done the previous summer, he put the invoice through a mail slot at the Meritage office located at 881 NW Beach in Newport, which was Respondent Meritage’s corporate office. The invoice showed that he worked 7.5 hours on June 23, 8 hours on June 27, 8 hours on June 28, and 8.5 hours on June 29, 2005. He described his work each day as “site labor/clean-up”; “site labor/clean-up/dug out Electric & Water boxes/clean out carport”; “site labor/clean-up/dug out Electric & Water boxes”; and “site labor/clean-up/recycling.” After some communication with Respondents, Claimant sent in a variation of the invoice that con-

tained the same information as in the first invoice and additional information, including his name, address, social security number, birthdate, pay rate, and total hours worked.

17) In a letter addressed to "Ryan Doherty, 530 SW Fall Street, Unit 1, Newport, OR 97365," typewritten on "Meritage at Little Creek" letterhead and dated August 1, 2005, Claimant was advised that the invoices he submitted were not acceptable and he was asked to submit a timesheet including certain information. The letter stated in pertinent part:

"Dear Sir:

"We are again returning the enclosed invoice that was apparently forwarded to us by you. As noted in an earlier letter, to be paid on an hourly basis requires a time sheet with the following information:

- i Date
- i Time arriving at the jobsite
- i Time beginning and ending any breaks, including short breaks or lunch
- i Time leaving the jobsite
- i Total for the day
- i Total for the period
- i Rate of pay
- i Name
- i Address

- i SSN
- i Signature indicating that you attest, under penalty of perjury, to the accuracy of the record

"If you forward us that information not later than Friday, August 5, we may have the information in time for the next check run. Any information received later will not be processed until August 15.

"ACCOUNTING"

The following addresses were included on the Meritage letterhead: PO Box 429 and 881 NW Beach Drive, Newport, Oregon.

18) Following the August 1 letter, Complainant submitted a time sheet that subsequently was rejected by letter dated August 12, 2005. The letter, typewritten on the same "Meritage at Little Creek" letterhead as the August 1 letter, stated in pertinent part:

"To: Ryan Doherty

"Re: ATTACHED TIME SHEET

"We enclose the attached time sheet. Based on our information, this time sheet is inaccurate.

"For example, on no occasion did you take a ten minute break for lunch. In fact, we require a thirty minute, unpaid lunch break each day. In addition, on Monday, June 27, you took a fifteen-minute break at about 11 a.m., a lunch break

from about 12:30 to 1:15, and two afternoon breaks.

"Furthermore, we have no record of your ever working as late at [sic] 5:30.

"Please note that it is the worker's responsibility to maintain accurate records and provide an accurate account of his or her time. We do on site monitoring to ensure that time is correctly kept. In the past, we note that we have had to correct your time sheets on several occasions. You should be aware that making a false claim may be a felony.

"Please complete the time sheet accurately and return it to us at your earliest convenience. If you prefer, we can provide you with our records, which you will need to sign. Kindly MAIL this information to us at the address about, or to:

ACCOUNTING

POB 16495

PHOENIX, AZ 85011"

19) Before he filed a wage claim, Claimant on several occasions provided Respondents all of the payroll information they requested. Claimant did not receive any wages for the hours he worked from June 23 through June 29, 2005. Subsequently, he filed a wage claim with BOLI on October 15, 2005. On the wage claim form, Claimant identified "Meritage" as the "Name of Employer's Business" and "881 NW Beach, Newport" as the "Employer's Business Address."

Claimant left blank the space for "Business Owner's Name" because he was not certain of who owned the business.

20) In November 2005, "Meritage" ordered certain ads to appear between November 23 and December 21, 2005, in the "help wanted" section of the Newport News Times. One ad stated:

"HARD WORKERS

"Laborers needed. Experience with equipment and tools a plus. Must work weekends. Jobs and references to:

Worker Jobs

PO Box 429

Newport, OR 97365"

Another ad requested experienced carpenters and requested that applicants send "jobs and references" to "Carpenter Jobs" at the same PO Box 429 in Newport. The ad for laborers was similar to the one Claimant responded to in 2004.

21) On November 9, 2005, BOLI notified Respondent Meritage that Claimant had filed a wage claim for unpaid wages totaling \$256 at the rate of \$8.00 per hour from June 23 through June 29, 2005. The BOLI notification stated, in pertinent part:

"IF THE CLAIM IS CORRECT, you are required to IMMEDIATELY make a negotiable check or money order payable to the claimant for the amount of wages claimed, less deductions required by law, and send it to the Bureau of Labor and

Industries at the above address.

"IF YOU DISPUTE THE CLAIM, complete the enclosed 'Employer Response' form and return it together with the documentation that supports your position, as well as payment of any amount which you concede is owed the claimant to the BUREAU OF LABOR AND INDUSTRIES within ten (10) days of the date of this Notice.

"If your response to the claim is not received on or before November 23, 2005, the Bureau may initiate action to collect these wages in addition to penalty wages, plus costs and attorney fees."

The notice was mailed to Respondent Meritage at 881 NW Beach, Newport, Oregon, with a copy to PO Box 429, Newport, Oregon. The notice included a request that a reply be made to BOLI Office Specialist Wanda Gangle's attention.

22) By letter dated November 14, 2005, Respondent Freitag responded to the notice, stating in pertinent part:

"Dear Ms. Gangle:

"I am responding to the notice you sent, a copy of which is attached. First, the claimant is not and never has been an employee of the Meritage Homeowners' Association. He did provide clean-up and other manual labor on an as-needed basis for the then-contractor for the Meritage development.

But this activity has nothing to do with the homeowners association. As such, the assertion that the claimant worked for or was employed by the homeowners association is completely false.

"The work arrangement that the claimant did have was terminated for several reasons, primarily related to his repeated failure to perform the duties assigned to him. Nevertheless, some payment MAY be due to him. At this time, it is impossible for us to tell. I have requested repeatedly that the claimant provide the minimum information needed for him to be paid for any hours he actually worked. That includes:

- i Date of work
- i Time arriving at work
- i Time of any breaks, including lunch
- i Time departing
- i A description of the actual work done during any hours claimed

"The claimant has refused or failed to provide that information, or else provided information that was obviously fictional. For instance, every person on site is required to take an unpaid break in the morning and one in the afternoon. These usually amount to twenty minutes or a half hour, but they must be no less than fifteen minutes. In addition, everyone is required to

take a one hour lunch break, which is also unpaid. Most often, these stretch to an hour-and-a-half or two hours.

"The claimant first maintained that he had worked 32 hours in four days, but when required to actually account for those hours could not do so. Finally, he fabricated a work schedule that showed ten minutes for lunches, no morning or afternoon breaks, and so forth. The ten-minute lunches were obviously concocted to allow him to attempt to charge for a full hour through rounding up.

"I am still willing to present any true and accurate time claim, containing the above listed information, to the contractor. I am assured that any such time claim, meeting the above criteria, will be paid. However, any further attempts at what amounts to larceny will not be paid but rather reported to the appropriate law enforcement authorities. We maintain that stealing money through the false pretense of claiming hours one did not work is no different than holding up a liquor store for the same amount."

The letter was typewritten on Meritage at Little Creek letterhead and signed, "K. Freitag."

23) On November 21, 2005, BOLI compliance specialist Margaret Pargeter sent a letter to "Kurt Freitag, President of Meritage Homeowners' Association," stating in pertinent part:

"The wage claim of Ryan Anthony Doherty has been assigned to me for resolution. I have reviewed the information submitted by you as well as that submitted by the claimant with his wage claim. This letter will summarize my conclusions based on the evidence now available.

"You state the claimant was never employed by Meritage Homeowners' Association, if this is the case, please provide me with the name, address and phone number of the contractor whom Mr. Doherty was employed by.

"It is the responsibility of the employer, not the employee, to maintain accurate records of the hours worked by the employee per Oregon Revised Statute 653.045 and Oregon Administrative Rule 839-020-0080 (copies enclosed).

"Regarding meal and rest breaks, while it may have been your policy to provide a ten minute rest break for each four hours worked and an hour lunch, if the employee did not actually take the lunch, the employee must be paid. If you are saying he did take lunch, please provide me with witness statements from co-workers who worked on those same days, and their names, addresses and phone numbers where I can reach them.

" \* \* \* \* \*

“Please take one of the following actions by December 1, 2005:

“1. Have the contractor submit to me a check payable to Ryan Anthony Doherty in the gross amount of \$252.00 along with an itemized statement of lawful deductions, if any.

“2. Submit to me any evidence he did not work the hours claimed, or that he has been paid.

“3. Submit evidence my computations are incorrect.

“If I do not hear from you by December 1, 2005, I will pursue collection of wages owed through the Administrative Process in which case interest and civil penalties will be added to the wages owed.”

24) By letter dated November 29, 2005, Respondent Freitag responded to Pargeter’s letter, stating, in pertinent part:

“I am responding to your letter of November 21.

“First, unless Mr. Doherty has some document proving he was employed by Meritage Homeowners’ Association, I know of no obligation that we have to prove that he did not [sic]. In addition, we do not have an obligation to provide you with the name of any other employer he may have worked for. Since he was not an employee of ours, we have no obligation to keep a record of his time. If you disagree with this, then I claim that I worked

for six years for your agency and am owed \$155,536.00. See if you are able to prove I did not.

“More seriously, the HOA does not now and never has employed anyone. As far as I know, Mr. Doherty was never EMPLOYED by anyone at all. He worked as an independent contractor doing construction cleanup. Since several contractors work on the site, I do not know with whom he had a contractual relationship. If he does not know, then I think that should be illustrative of the problem here.

“I would also note the following:

- i You claim that Mr. Doherty worked ‘June 23, 2005 to June 29, 2005.’ That includes a Sunday. What hours did he work on Sunday?
- i Mr. Doherty, if in fact he worked at all, took lunch periods since everyone on site takes lunch at the same time.
- i Mr. Doherty has presented at least six different versions of his hours and time. Which one are you claiming is correct?

“It appears to me that you have taken little if any time to research this matter. That does not seem to be consistent with

the fact that you are being paid to do nothing other than such research. If you are claiming Mr. Doherty worked for the Meritage HOA, please provide ANY evidence of ANY kind that this is the case. If you or Mr. Doherty have [sic] no such evidence, I cannot really take seriously this claim. If Mr. Doherty is simply claiming that he was working on the site, then it certainly seems to me that the burden of proof is on him – not on me – to determine whom he was working for.”

The letter was typewritten on Meritage at Little Creek letterhead and signed, “Kurt E. Freitag.”

25) Following inquiries with the City of Newport about the Meritage development, including property ownership information, Pargeter sent Respondent Freitag a letter dated December 27, 2005, stating, in pertinent part:

“I received your letter of November 14, 2005. I did not say Mr. Doherty worked on Sunday I said he worked during the period June 23, 2005, to June 29, 2005. Since I already sent you a list of exactly what work he says he performed, and on what dates and times, you already know that he doesn’t claim to have worked on Sunday.

“In your letter, you argue that time spent by Mr. Doherty performing construction labor, and construction labor clean-up work was done as an independent contractor. The

standards used by the Bureau for determining whether or not someone performs services as an employee or an independent contractor are five-fold. These five factors are discussed in [*In the Matter of Geoffroy Enterprises, Inc.*, 15 BOLI 148 (1996)].

“ \* \* \* \* \*

“With reference to the degree of control exercised by Mr. Doherty you controlled what work would be done, when it was to be done and where it was to be done. Clearly if the work was not done, Mr. Doherty would be dismissed. Mr. Doherty does not have a business license, he does not advertise himself as a construction contractor, and he did not perform construction work for any other business while working the Oceanview Drive properties (10-11-32-AC tax lot 300) being developed by Meritage Homeowners’ Association. A woman named Joya who works in the office at Meritage Homeowners’ Association, contacted Mr. Doherty and asked him to return to work for Meritage Homeowners’ Association.

“There was no financial investment on the part of Mr. [Doherty] other than his labor at the site. Mr. Doherty does not own a construction business and does not advertise himself as such.

“Mr. Doherty could not negotiate how much he would charge

for specific services performed. You determined the opportunity for profit and loss for Mr. Doherty by setting a wage of \$8.00 per hour worked.

"Mr. Doherty required no specialized training or prior experience to perform his duties. His initiative was limited to shoveling dirt, picking up debris, and sorting recycling.

"With reference to the permanency of the relationship, Mr. Doherty did not leave the job to work as a contractor for anyone else.

"After analyzing these factors, the economic reality is that Mr. Doherty was not in business for himself but was dependent on Meritage Homeowners' Association for his income.

"ORS 653.045 requires employers to keep accurate payroll records. It is the burden of the employer to produce appropriate records to prove the precise number of hours worked. \* \* \* In this case, Meritage Homeowners' Association did not keep contemporaneous records of hours worked by Doherty. Doherty, however, did. You verbally disputed the hours worked by Mr. Doherty, but did not submit any actual time records as is required [by statute]. Mr. Doherty has responded with a detailed explanation of his hours of work \* \* \* where the employer produces no records, the Commissioner may rely on the

evidence produced by the Agency to show the amount and extent of work performed by the worker as a matter of 'just and reasonable inference' and 'may then award damages to the employee, even though the result may be only approximate.'

"You asked me to send evidence he worked for Meritage Homeowners' Association. I enclose copies of letters submitted to Mr. Doherty by Meritage Homeowners' Association. \* \* \*

"As indicated in my letter of November 21, 2005, I am requesting that Meritage Homeowners' Association submit to this office a check payable to Mr. Doherty in the amount of \$252.00 in wages due to him by January 9, 2006.

"If I do not hear from you by January 9, 2006, I will pursue collection of the wages owed through the Administrative Process in which case interest and civil penalties of \$1,920.00 will be added to the wages owed."

26) By letter dated January 3, 2006, Respondent Freitag replied to Pargeter's letter, stating:

"Perhaps I have not made myself sufficiently clear. I will try again.

"Mr. Doherty does not and has never worked for the Meritage Homeowners' Association, Inc. Indeed the Meritage HOA has absolutely nothing to do with

construction of any kind. The HOA, like most HOA's, is responsible for certain on-going activities on behalf of the homeowners, i.e., after the units have been constructed and have been sold.

"You repeatedly, as does Mr. Doherty, claim that we did 'construction clean-up' or 'insulation.' This work does not apply in any way to the HOA. The woman named 'Joya' does not work for the HOA. The HOA is not developing any property whatsoever. I do not care whether Mr. Doherty is a [sic] independent contractor or the president of the United States, he simply does not and never has done any work whatsoever for the HOA.

"You and he simply have the wrong entity."

The letter was typewritten on Meritage at Little Creek letterhead and signed by "K. Freitag."

27) On or about January 9, 2006, "George" from Joseph Hughes Construction, Inc. told Pargeter that Joya Menashe worked for Respondent Freitag.

28) Respondents maintain a website that describes the "townhomes" available for sale in the "Meritage at Little Creek community" and includes a photo of a sign located at the corner of NW 33<sup>rd</sup> Street and NW Oceanview Drive that says "Meritage at Little Creek."

29) On January 9, 2006, Pargeter sent Respondent Freitag

another letter stating, in pertinent part:

"Mr. Doherty was employed by you either directly or through an agent. In June 2005, you owned the properties where Mr. Doherty was working under your direction after being contacted by Joya Menashe, your employee.

"Since Joseph Hughes Construction ceased working on the Meritage at Little Creek Project on June 15, 2005, you were then the only party responsible for the development there.

"Submit to me a check payable to Ryan Doherty in the gross amount of \$252.00 by January 19, 2006, or I will serve an Administrative Order which will include penalty wages for your failure to pay him in a timely manner as is required by ORS 652.140."

30) Respondent Freitag responded with a letter dated January 17, 2006, stating:

"Your letter dated January 9 is factually inaccurate. Before, during and after the time that Joseph Hughes Construction stopped working on the site, there were – and are – at least two or three general contractors working on the site. In fact, no work of a construction nature is carried on by anyone other than a licensed general contractor (or else a specialty contractor working for the general, or an employee of the general, etc.)

“However, upon occasion, in order to ensure that workers or materialmen receive monies otherwise due to the general contractors, the developer has (as the law allows) made direct payments to said workers or materialmen. If Mr. Doherty believes that he falls into this category, we need to know, at very least, whom he was working for.

“It is very suspicious to me that you and he claimed, at first, that he worked for Meritage HOA, Inc. This, as you now allow, was false. It appears your tack at this point is to claim that it doesn’t matter who actually employed him – if he was on the site I have to pay him. I would be interested to see the legal support for such a position.

“In sum, the following seems to be the case:

- i Mr. Doherty submitted pay requests based on work that he could not justify to an entity that did not employ him.
- i When he was unable to coerce payment in that way, he attempted to involve the State of Oregon.
- i Rather than look carefully at the claim, the claimant, and the circumstances, the State appears to take the position that anything any claimant says, even if internally con-

tradictory, is good enough for you.

“Such a position hardly does you credit. Let me suggest another approach.

“Why not have Mr. Doherty complete an ACCURATE request for payment made out to the entity that actually employed him? If we know the entity, and/or get an accurate description of the work he did, it is possible that funds are being withheld from the contractor, or that the contractor can be encouraged to pay Mr. Doherty directly. But until Mr. Doherty is able to articulate the basics, I really cannot say that I am inclined to pay him money just because he was able to convince you to threaten us.”

The letter was typewritten on Meritage at Little Creek letterhead and signed by “Kurt E. Freitag.”

31) After receiving additional information about Claimant’s employment, Pargeter sent Respondent Freitag a final letter summarizing her findings and making a final request for Claimant’s wages. Her letter, dated March 1, 2006, stated in pertinent part:

“This is to advise you that this office is in possession of a form 1099 issued by Big Fish Partners to Ryan Doherty for work performed in 2004.

“In 2004, Mr. Doherty was only 15 years of age until November 23, 2004. Oregon law

requires all employers to obtain an annual employment certificate that must be posted where any minors work. You did not then, nor do you now have said employment certificate. In addition, minors under the age of 16 may not work on a construction site at all. These are serious violations of Oregon's laws regarding the employment of minors. I have enclosed a brochure about the employment of minors, and an application for an employment certificate should you decide to employ minors in the future. You may be fined up to \$1000 per violation and each day's continuance constitutes a separate violation.

"As stated in my previous correspondence, although you may have considered Mr. Doherty to be an independent contractor, facts support that he was an employee.

"This is my final request to you to submit to me a check payable to Ryan Doherty in the gross amount of \$252.00 along with an itemized statement of lawful deductions, if any, by March 13, 2006. If I do not receive payment by that date, I will proceed with the Administrative Process and will include \$1,920.00 in penalty wages which does not include interest or attorneys' fees. In addition, we will seek penalties for violations of Oregon's Child Labor laws."

32) By letter dated March 13, 2006, Respondent Freitag replied to Pargeter's letter, stating:

"I am writing in reference to your letter referenced above.

"(1) I am not aware of what work, if any, Mr. Doherty did that gave rise to the 2004 1099, but I can assure you that it was not construction related. In all likelihood, Mr. Doherty mowed grass or participated in light landscaping work. In any case, it was not on a construction site.

"(2) Once again, I have never claimed Mr. Doherty was an independent contractor. You have simply made that up. I claimed THAT HE HAS NEVER WORKED FOR MERITAGE AT LITTLE CREEK HOA.

"You now seem to have switched gears again, and are concerned about something from 2004. If we could keep our attention on one matter at a time [sic]. My earlier recommendation was simple: kindly provide me with THE NAME OF THE ENTITY MR. DOHERTY CLAIMS THAT HE WORKED FOR BUT WAS NOT PAID. It looks like to me that Mr. Doherty may be fabricating work based upon his experience from several years ago. If not, then he MUST know the name of the entity he was working for. I can tell you that it WAS NOT Meritage at Little Creek HOA. I can also tell you that Big Fish Partners

hires ONLY entities that are independent contractors.

"Now, I will agree that in the case of people who haul away trash, cut lawns, spread gravel and so forth, when that work is done on a one-time, two-time, etc., basis, we do not necessarily check credentials that closely. But every person signs a document warranting that he is an independent contractor, has insurance, and so forth. Some people lie, I suppose.

"I might also point out that even if we were intimidated and coerced, which you are obviously trying to do, into paying Mr. Doherty amounts he is not owed, we are forbidden by law from paying without obtaining employment information such as proof of citizenship, a form W-4, etc., that we do not have on Mr. Doherty because HE HAS NEVER WORKED FOR US. As such, I do not believe the law allows me to be coerced on this one.

"So, once more, WHAT IS THE NAME OF THE COMPANY OR OTHER ENTITY FOR WHICH HE CLAIMS TO HAVE WORKED? Is that really so hard?"

The letter was typewritten on Meritage at Little Creek letterhead and signed, "Kurt E. Freitag."

33) Respondent Freitag did not submit a check to BOLI and Claimant was never paid for the work he performed from June 23 through June 29, 2005.

34) Claimant worked 31.5 hours from June 23 through June 29, 2005, at the agreed rate of \$8.00 per hour, earning a total of \$252. As of the date of hearing, Claimant had not been paid his wages.

35) The legal age of majority in Oregon is 18 years old.

36) Claimant was a credible witness. His demeanor was sincere and his testimony was straightforward and responsive. He had a reasonably clear recollection of pertinent facts and did not embellish his testimony in any way. His testimony regarding the hours he spent working on the Meritage construction site was bolstered by other credible witness testimony and by Respondent Freitag's history of paying Claimant for similar work performed at the same site in 2004. The forum credits Claimant's testimony in its entirety.

37) Kelly Johnson's testimony was credible. His ability to recall pertinent facts was keen and he had no apparent bias toward or against Respondents. Johnson's testimony was not impeached in any way. The forum credits his testimony in its entirety.

38) Seth Mross was a credible witness. He had a reasonably clear memory of his work experience at the Meritage construction site in 2004 and 2005 and of his co-workers' work experience during that time. His testimony about his on-the-job injury with a chain saw was believable and not embellished in any way. He was not

impeached and the forum credits his testimony in its entirety.

39) Brandon Haro's testimony was credible. He had reasonably good recall of his 2005 work experience on the Meritage construction site and no apparent bias against Respondents. He was not impeached in any way and the forum credits his testimony in its entirety.

40) Pargeter, Gernhart, Christianson, and Wespi were all credible witnesses.

41) Respondent Freitag's testimony was similar in tone and content to the wordy letters he wrote to Pargeter during the wage claim investigation – riddled with internal inconsistencies and punctuated by self-righteous indignation. He relied on glibness rather than evidence to defend his position that Respondents were not responsible for Claimant's unpaid wages or the child labor violations. Initially, he contended that "[t]he work arrangement" with Claimant "terminated for several reasons, primarily related to his repeated failure to perform the duties assigned to him" and stated that Claimant was not paid his 2005 wages because he did not provide proper paperwork to show he took required breaks and a full lunch hour each day and that "[t]he ten-minute lunches were obviously concocted to allow [Claimant] to attempt to charge for a full hour through rounding up."<sup>7</sup>

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<sup>7</sup> See *supra* Finding of Fact – The Merits 22.

Later, he asserted that Claimant "was never EMPLOYED by anyone at all," but rather "worked as an independent contractor doing construction cleanup."<sup>8</sup> At another point, he suggested some other contractor on the work site employed Claimant.<sup>9</sup> Later still, when confronted with the 1099 that Respondent Freitag dba Big Fish Partners issued to Claimant in 2004, he suggested Claimant was "fabricating work based upon his experience from several years ago."<sup>10</sup>

Moreover, Respondent Freitag's overall demeanor was reflected in his closing summation when he repeated his previous declarations throughout the hearing that "I just can't take this very seriously, I really can't." He derided Oregon child labor laws by referencing Claimant, stating:

"If he was the kind of kid, I doubt that he is, but if he were the kind of kid who actually went around to construction sites looking for summer work and asked if he could do something, help out around the site, then, number one, I think that's the kind of thing that ought to be going on and, number two, if the State of Oregon has some bull-shit law that says you get in trouble for

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<sup>8</sup> See *supra* Finding of Fact – The Merits 24.

<sup>9</sup> See *supra* Finding of Fact – The Merits 30.

<sup>10</sup> See *supra* Finding of Fact – The Merits 32.

that, more shame on them, more shame on them \* \* \* and, I think you ought to have more kids going around [to construction sites], I don't care if they are 12 years old. \* \* \* I'm inclined to feel the following: the one thing Mr. Doherty said that made me give him grudging respect is that at least Mr. Doherty got off his duff and tried to make a buck. That was the one impressive thing he said."

When addressing the proposed civil penalties for the alleged child labor violations, Freitag stated:

"I didn't even do the arithmetic, that's how much I care about it. \* \* \* Does the State of Oregon really have so little to do that they're interested in this stuff and is this really what we are paying taxes to have pursued? If it is, then I just say shame on everybody that's doing that, shame on them. \* \* \* I happen to be a rich guy and the reason I don't know what [the penalty] amount is because it is not substantial enough to affect my lifestyle one way or the other."

In an apparent attempt to justify the alleged violations, Respondent Freitag stated:

"I would almost see it as a badge of honor \* \* \* if somebody says that's right, that's what you did, I'd hang it up on the wall – I might actually do this – I'd point to it and say, look folks, at least what somebody did, it wasn't me, but if it was Joya or Joseph Hughes, whoever it is, that's an indica-

tion of a decent person at work there, but that's a decent person."

Respondent Freitag's testimony, when coupled with his demeanor throughout the hearing, was neither believable nor persuasive. Consequently, the forum credited his testimony only when it was an admission or a statement against interest.

#### ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent Freitag was an individual engaged in property development at TL 300, located in Newport, Oregon, using the assumed business name of Big Fish Partners I. His mailing address was PO Box 16495, Phoenix, Arizona,

2) At all times material herein, Respondent Meritage was a duly registered non-profit corporation that maintained its principal place of business at TL 300, located in Newport, Oregon. Respondent Freitag was Respondent Meritage's corporate president and secretary with a corporate office located at 881 NW Beach in Newport, Oregon. Respondent Meritage's mailing address was PO Box 429, Newport, Oregon. Respondent Meritage's "accounting" department shared a mailing address - PO Box 16495, Phoenix, Arizona - with Respondent Freitag's business, Big Fish Partners I.

3) Respondent Meritage advertised for laborers to work on the Meritage development at TL 300 in a local newspaper in New-

port, Oregon, and ran payroll for the laborers through "accounting" in Phoenix, Arizona, at the Big Fish Partners I mailing address.

4) Respondents Freitag and Meritage co-owned TL 300 and jointly benefited from its development.

5) Respondents Freitag and Meritage jointly engaged the personal services of one or more persons in Oregon, including Claimant, Seth Mross, and Brandon Haro who were Respondents' employees.

6) Claimant was 15 years old and Seth Mross was 17 years old when they worked as laborers for Respondents on the Meritage construction site during the summer of 2004. Claimant and Mross used power saws and wood chipper while performing construction and wood cutting/sawing work.

7) While performing wood cutting/sawing work on Respondents' construction site during the summer of 2004, Mross nicked his shin with a power saw causing injury and a permanent scar.

8) In 2004, Claimant and Mross were paid every two weeks and Respondent Freitag signed and issued the checks. Claimant was paid for all of the hours he worked and at the end of the year he received a Form 1099 that showed his earnings from "Big Fish Partners, PO Box 16495, Phoenix, Arizona," during 2004, totaled \$2,552.

9) Claimant was 16 years old when he worked as a laborer for

Respondents on the Meritage construction site from June 24 through June 29, 2005, at the agreed wage rate of \$8 per hour.

10) Brandon Haro was 17 years when he worked as a laborer for Respondents on the Meritage construction site.

11) Respondents did not verify the ages of Claimant, Mross or Haro before they began working as laborers on the Meritage construction site.

12) Respondents did not apply for or obtain an annual employment certificate to hire minors in 2004 and 2005.

13) Respondents did not post a validated employment certificate in a conspicuous place readily visible to all employees.

14) From June 24 through June 29, 2005, Claimant worked 31.5 hours and earned \$252. Respondents have not paid Claimant any wages for the work he performed in 2005, leaving unpaid wages of \$252.

15) Claimant quit Respondents' employment without notice on June 29, 2005, and more than 30 days have passed since Claimant's wages became due.

16) Written notice of non-payment of wages was sent to Respondents on Claimant's behalf on January 2, 2003.

17) Respondents willfully failed to pay Claimant wages owed to him in the amount of \$252 and is liable for penalty wages.

18) Penalty wages, computed in accordance with ORS 652.150 and OAR 839-001-0479(1)(d), equal \$1,920 (\$8 per hour x 8 hours per day = \$64 per day x 30 days = \$1,920).

### CONCLUSIONS OF LAW

1) At all times material herein, Respondents were joint employers and Claimant was an employee subject to the provisions of ORS 652.110 to 652.200 and 652.310 to 652.405, and ORS 653.305 to 653.370.

2) The actions, inaction, statements, and motivations of Kurt E. Freitag, Meritage Homeowners' Association's president, are properly imputed to Respondent Meritage.

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

4) Respondents violated ORS 652.140(2) by failing to pay Claimant all wages earned and unpaid within five days, excluding Saturdays, Sundays and holidays, after Claimant quit his employment without notice. Respondent owes Claimant \$252 in unpaid, due and owing wages.

5) Respondent is liable for \$1,920 in civil penalties under ORS 652.150 for willfully failing to pay all wages or compensation to Claimant when due upon termination of employment as provided in ORS 652.140(2).

6) Under the facts and circumstances of this record, and

according to the applicable law, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondent to pay Claimant his earned, unpaid, due and payable wages and the penalty wages, plus interest on all sums until paid. ORS 652.332.

7) The legal age of majority in Oregon is 18 years old. ORS 109.510.

8) Respondents violated OAR 839-021-0185 by employing at least three minors under 18 years old without verifying their ages.

9) Respondents violated ORS 653.307 and OAR 839-021-0220(2) by employing minors under 18 years old in Oregon during 2004 and 2005 without first obtaining a validated annual employment certificate to employ minors.

10) Respondents violated OAR 839-021-0220(3) by failing to post a validated employment certificate in a conspicuous place readily visible to all employees.

11) Respondents violated OAR 839-021-0102(1)(j) and 839-021-0102(1)(ss) by employing at least one minor child under 16 years old in 2004 to perform work using power driven saws to cut wood, a hazardous occupation.

12) Respondents violated OAR 839-021-0104 by employing at least one minor child under 18 years old in 2004 to perform work using power driven saws to cut wood, an occupation declared to be particularly hazardous or det-

rimental to the health or well being of minors 16 and 17 years old.

13) Under the facts and circumstances of this record, and according to the applicable law, the Commissioner of the Bureau of Labor and Industries is authorized to assess civil penalties against Respondents Freitag and Meritage for each violation of ORS 653.305 to 653.370 or any rule adopted by the Wage and Hour Commission thereunder. ORS 653.370, OAR 839-019-0010(1)&(2), and OAR 839-019-0025.

## OPINION

### WAGE CLAIM

The Agency was required to prove: 1) Respondents jointly employed Claimant; 2) any pay rate upon which Respondents and Claimant agreed, if it exceeded the minimum wage; 3) Claimant performed work for which he was not properly compensated; and 4) the amount and extent of work Claimant performed for Respondents. *In the Matter of Barbara Coleman*, 19 BOLI 230, 262-63 (2000).

#### A. Respondents employed Claimant for an agreed upon rate of \$8 per hour.

ORS Chapter 652 governs claims for unpaid agreed wages. Under that chapter, "employer" means any person who engages the personal services of one or more employees. "Employee" means any individual who, other than a co-partner or independent

contractor, renders personal services in Oregon to an employer who pays or agrees to pay the individual a fixed pay rate. ORS 652.310(1)(a)&(b). The Agency alleged Respondents jointly employed Claimant and, therefore, must prove 1) Respondents jointly engaged Claimant's personal services and 2) Claimant rendered his personal services for an agreed upon rate.

In his answer to the original Order of Determination, Respondent Freitag denied he ever employed or retained the services of anyone and alleged he was a "natural person" who did not do business in Oregon. In their answer to the amended Order of Determination, Respondents alleged that "Big Fish Partners" is a partnership that operates in Oregon as a licensed developer and "entitled to hire only licensed general contractors for construction related work." Respondents also alleged Respondent Meritage was a "not for profit corporation engaged in the management of common areas for the Meritage Development" that "collected no dues" and therefore had no funds to "hire, retain, or pay any person for work." Additionally, Respondents deny they may be found liable as joint or co-employers.

This forum has long held that joint or co-employers are responsible, both individually and jointly, for compliance with all applicable provisions of Oregon's wage and hour laws. *In the Matter of Staff, Inc.*, 16 BOLI 97, 115 (1997); see also *In the Matter of Jack Crum*

*Ranches, Inc.*, 14 BOLI 258, 271 (1995)(when the agency issued an order of determination jointly against three separate employers who shared work crews and equipment, each employer was found to have failed to pay all sums due to claimant and the forum treated the employers as one employer for purposes of penalty wages, which were found against them jointly). This is consistent with the responsibility of joint employers under the federal Fair Labor Standards Act ("FLSA"). Under the FLSA, specifically, 29 CFR §791.2:

"(a) A single individual may stand in the relation of an employee to two or more employers at the same time under the [FLSA], since there is nothing in the act which prevents an individual employed by one employer from also entering into an employment relationship with a different employer. A determination of whether the employment by the employers is to be considered joint employment or separate and distinct employment for purposes of the act depends upon all the facts in the particular case. If all the relevant facts establish that two or more employers are acting entirely independent of each other and are completely disassociated with respect to the employment of a particular employee, who during the same workweek performs work for more than one employer, each employer may disregard all work performed by the em-

ployee for the other employer (or employers) in determining his own responsibilities under the Act. On the other hand, if the facts establish that the employee is employed jointly by two or more employers, i.e., that employment by one employer is not completely disassociated from employment by the other employer(s), all of the employee's work for all of the joint employers during the workweek is considered as one employment for purposes of the Act. In this event, all joint employers are responsible, both individually and jointly, for compliance with all of the applicable provisions of the Act \* \* \*.

"(b) Where the employee performs work which simultaneously benefits two or more employers, or works for two or more employers at different times during the workweek, a joint employment relationship generally will be considered to exist in situations such as:

"(1) Where there is an arrangement between the employers to share the employee's services, as, for example, to interchange employees; or

"(2) Where one employer is acting directly or indirectly in the interest of the other employer (or employers) in relation to the employee; or

"(3) Where the employers are not completely disassociated

with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer.”

In this case, based on a preponderance of credible evidence, the forum finds the following facts are indicia of a joint employment relationship at all times material: 1) Respondent Freitag, an individual, conducted a property development business in Oregon using the duly registered assumed business name of Big Fish Partners I; 2) the mailing address for Respondent Freitag’s property development business is PO Box 16495, Phoenix, Arizona, and his principal place of business is located at 4628 N 39<sup>th</sup> Place, Phoenix, Arizona; 3) Respondent Freitag and his wife, Rita Schaeffer, own development property, known as TL 300, located at the corner of NW 33rd Street and NW Oceanview Drive in Newport, Oregon; 4) Respondent Freitag did not become a licensed developer<sup>11</sup> in Oregon until August 24, 2005; 5) Respondent Freitag is the president and secretary of Respondent Meritage, an entity formerly known as Meritage at Little Creek Homeowners’ Association, Inc., that

holds title to that part of TL 300 known as the common areas located at NW 33rd Street and NW Oceanview Drive in Newport, Oregon; 6) Respondent Meritage’s mailing address is PO Box 429, Newport, Oregon, its principal place of business is located at NW 33rd Street and NW Oceanview Drive (TL 300), Newport, Oregon, and its corporate office is located at 881 Beach Street, Newport, Oregon; 7) in 2004, after responding to a newspaper ad and interviewing with Respondent Freitag, Claimant, a 15 year old, performed work as a laborer at Respondent Meritage’s principal place of business for an agreed wage rate of \$8 per hour; 8) for the work he performed at Respondent Meritage’s principal place of business in 2004, Claimant received a paycheck every two weeks, signed by Respondent Freitag, after submitting time sheets and/or invoices to Respondent Meritage’s corporate office; 9) for tax purposes, Claimant received a 1099 form sent from Big Fish Partners, PO Box 16495, Phoenix, Arizona, showing he earned wages in 2004 totaling \$2,552 and was paid by Respondent Freitag’s property development business, i.e., Respondent Freitag, “Payer’s Federal Identification Number 36-4285157”; 10) in 2005, after agreeing to return to work for Respondents, Claimant worked 31.5 hours as a laborer on a construction site at Respondent Meritage’s principal place of business for an agreed wage rate of \$8 per hour; 11) following a conflict between

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<sup>11</sup> He is licensed as a sole proprietor and his “employer status” is listed as “exempt.” See *supra* Finding of Fact – the Merits 5.

Respondent Freitag and Claimant, Claimant quit working at the Meritage construction site and submitted an invoice showing the dates and hours he worked to Respondent Meritage's corporate office; 12) by letter written on Respondent Meritage letterhead, which included addresses of PO Box 429 and 881 NW Beach Drive, Newport, Oregon, Respondent Meritage's "accounting" department advised Claimant that he must submit a time sheet in order to be paid on an hourly basis and that any information received later than August 15 would not be processed; 13) after Claimant provided a timesheet per Respondent Meritage's request, he received another letter on the same letterhead advising him that his timesheet was inaccurate, that they "had no record of [his] ever working as late as 5:30," that "[they] have had to correct [his] timesheets on several occasions," and instructing him to "complete the time sheet accurately" and "MAIL this information to us at the address about or to: ACCOUNTING, POB 16495, Phoenix, Arizona"; 14) in November 2005, Respondent Meritage advertised for laborers in the Newport News Times and requested that applicants submit "jobs and references" to Respondent Meritage's mailing address, PO Box 429, Newport, Oregon; 15) Respondent Freitag, acting individually or in concert with Respondent Meritage, provided all of the tools and equipment Claimant used to perform his job in 2004 and 2005, supervised and di-

rected Claimant's work in 2004 and 2005, and, in his capacity as a sole proprietor, paid Claimant directly for the work he performed in 2004.

From those facts, the forum infers that both Respondents actively participated in the Meritage townhouse development project, including engaging the personal services of Claimant and other laborers to perform landscape construction at the construction site. Respondent Meritage advertised in the local newspaper for the laborers and carpenters that performed work at the Meritage construction site. Respondent Meritage maintained an office where Claimant and other workers submitted their time sheets for the work they performed at the Meritage construction site. Respondent Meritage controlled, to some extent, how, when, and whether Claimant would be paid, as evidenced by its correspondence with Claimant after he quit his job in 2005. On the other hand, Respondent Freitag controlled and directed the work performed by Claimant and the other laborers and signed their paychecks. Respondent Freitag paid their wages as a sole proprietor using the assumed business name of Big Fish Partners I, as evidenced by credible testimony in the record and the 1099 form he provided Claimant in 2004.

The forum further infers from those facts that Claimant was under the simultaneous control of Respondents and simultaneously

performed services for both. Each Respondent had an interest in TL 300's development and both benefited from the personal services Claimant and other workers rendered at the construction site in furtherance of its development. For all of those reasons, the forum finds Respondent Freitag acted directly or indirectly in Respondent Meritage's interest regarding personal services Claimant rendered at the construction site, and rather than being disassociated with respect to Claimant's employment, by virtue of Respondent Freitag's control over Respondent Meritage as its corporate president, Respondents shared control of Claimant and other laborers hired to perform work at the Meritage construction site.

Finally, Claimant submitted invoices and a timesheet to Respondent Meritage that displayed his \$8 per hour wage rate and although Respondent Meritage questioned his hours based on its requirement that laborers take breaks and an hour lunch, it did not at any time dispute his hourly rate. Consequently, the forum concludes Claimant rendered his personal services to Respondents for the agreed upon rate of \$8 per hour and was a joint employee of both Respondents.

**B. Claimant performed work for which he was not properly paid.**

A claimant's credible testimony is sufficient evidence to prove work was performed for which the claimant was not properly compensated. *In the Matter of Orion*

*Driftboat and Watercraft Company*, 26 BOLI 137, 147-48 (2004). In this case, Claimant's testimony that he was not paid for construction work he performed for Respondents from June 23 through June 29, 2005, was credible and substantiated by documentary evidence showing Respondent Meritage repeatedly turned down the time records Claimant submitted for payment, not because it denied Claimant performed work at the construction site, but because it questioned the amount and extent of the work he performed. Absent any evidence that Claimant was paid for the hours he submitted to Respondent Meritage, the forum concludes Claimant performed work for which he was improperly compensated.

**C. Claimant worked 31.5 hours for which he was not paid.**

Employers are required to keep and maintain proper records of wages, hours and other conditions and practices of employment. ORS 653.045. When the forum concludes an employee performed work for which the employee was not properly compensated, the burden shifts to the employer to produce all appropriate records to prove the precise hours and wages involved. When, as in this case, the employer produces no records, the forum may rely on evidence produced by the Agency from which "a just and reasonable inference may be drawn." A claimant's credible testimony may

be sufficient evidence. *In the Matter of Kilmore Enterprises, Inc.*, 26 BOLI 111, 122-23 (2004). Credible evidence established that when Claimant quit working for Respondents, he submitted work hours to Respondent Meritage for payment that were repeatedly rejected based on his purported failure to submit accurate time sheets. At one point, Respondent Meritage, through its accounting department, advised Claimant:

“Please note that it is the worker’s responsibility to maintain accurate records and provide an accurate account of his or her time. We do on site monitoring to ensure that time is correctly kept. In the past, we note that we have had to correct your time sheets on several occasions. You should be aware that making a false claim may be a felony.”

Respondent Meritage then instructed Claimant to “[p]lease complete the time sheet accurately and return it to us at your earliest convenience. If you prefer, *we can provide you with our records*, which you will need to sign.” (emphasis added) Respondents at no time provided Claimant or the Agency with the purported records documenting Claimant’s work hours and did not produce them during the hearing. Consequently, the forum accepts Claimant’s testimony because it was not exaggerated or contradicted by any other credible evidence and was bolstered by other credible witness testimony and documentary evidence. Re-

spondents are jointly and severally liable to Claimant for \$252 in unpaid wages.

### PENALTY WAGES

The forum may award penalty wages where a respondent willfully fails to pay any wages due to any employee whose employment ceases. Willfulness does not imply or require blame, malice, or moral delinquency. Rather, a respondent commits an act or omission willfully if he or she acts, or fails to act, intentionally, as a free agent, and with knowledge of what is being done or not done. *In the Matter of Usra Vargas*, 22 BOLI 212, 222 (2001).

In this case, credible evidence established that Respondents deliberately withheld Claimant’s pay check after he voluntarily quit his employment. The earlier correspondence between Claimant and Respondents demonstrates that Respondents knew Claimant worked hours for which he was due wages. From that point forward, Respondents’ excuses for not paying Claimant his wages ranged from blaming Claimant for a purported failure to properly fill out his time sheets to accusing him of fabricating his work hours. Curiously, at hearing, Respondent Freitag insinuated that Respondents failure to pay was an oversight and that the “check was in the mail.” From those facts, the forum infers Respondents voluntarily and as free agents failed to pay Claimant all of the wages he earned from June 23 to June 29, 2005, at the time Claimant terminated his employment without

notice. Respondents acted willfully and are liable for penalty wages pursuant to ORS 652.150.

Penalty wages, therefore, are assessed and calculated in accordance with ORS 652.150 in the amount of \$1,920. This figure is computed by multiplying \$8 per hour by 8 hours per day multiplied by 30 days. See ORS 652.150 and OAR 839-001-0470.

### **CHILD LABOR VIOLATIONS**

In the Notice of Intent to Assess Civil Penalties for Child Labor Violations, the Agency alleged Respondents employed minors from 2003 through 2005 and failed to 1) obtain an annual employment certificate; 2) verify the minors' ages before employing them; and 3) post a validated employment certificate. The Agency also alleged Respondents employed at least one minor to engage in work hazardous to minors under 16 years old and at least one other minor to engage in work particularly hazardous or detrimental to the health and well being to minors 16 and 17 years old. The Agency further alleged that one minor suffered "bodily injury" as a result.

Respondents deny having employed the minors at issue or any minors "as defined relative to ORS 653.307," and deny "they had any employees during the time in question." In their answer, Respondents maintain that "any person who may have been hired was hired based upon information provided [to Respondents] by the hiree himself or herself," that Re-

spondents did not engage in "any of the activities cited during the period set forth in the complaint," and deny the person named in the complaint suffered bodily injury. Respondents affirmatively allege that ORS 653.370 (providing civil penalties for child labor violations) is "unconstitutionally vague insofar as it does not provide a definition of the term 'minor.'" Respondents assert that ORS 653.010 provides a definition of minor that applies to ORS 653.010 to 653.261 and that the term minor is not defined "in any section subsequent to 653.261." Consequently, Respondents argue, the subsequent provisions are unenforceable.

#### **A. Respondents Employed Minors In 2004 And 2005.**

The threshold question for the alleged violations is whether Respondents employed minors during the relevant period. For the purposes of ORS 653.305 to 653.370 and OAR 839-0210-0001 to 839-021-0500, "employer" means "any person who employs another person," "employ" means "to suffer or permit to work," and "minor" means "any person under 18 years of age." OAR 839-021-0006(5)(6)&(10).

For reasons stated elsewhere herein, the forum has already concluded that Respondents jointly employed Ryan Doherty and other laborers to work on the Meritage construction site. A preponderance of credible evidence established that Seth Mross and Brandon Haro, along with Doherty, performed work as laborers at the Meritage construction site in

2004 (Mross and Doherty) and 2005 (Mross, Doherty and Haro). Undisputed evidence established that all three were less than 18 years old in 2004 and 2005. Moreover, a preponderance of credible evidence established that, for the purposes of the child labor statutes and rules, Respondents Freitag and Meritage simultaneously suffered or permitted those three persons to work as laborers for Respondents for the benefit of the Meritage development project. The question Respondents raise is whether a person under 18 years old is a minor for the purpose of assessing civil penalties pursuant to ORS 653.370.

Respondents argue that, absent an applicable statutory definition of minor, ORS 653.370 is unenforceable. Notwithstanding the Commissioner's rule defining "minor" as "any person under 18 years of age" for the purposes of ORS 653.370, the plain, ordinary meaning of the term minor, as used in the statute, is a person "having the status of a legal minor not having reached the age of majority or full legal age."<sup>12</sup> The forum has already taken judicial notice that the legal age of majority in Oregon is 18 years old. Thus, the Commissioner's rule defining "minor" as any person under 18 years of age is consistent with the plain, ordinary meaning of minor as it used in ORS chapter 653, and consistent with the State

of Oregon's general definition. Doherty, Mross and Haro were legal minors for the purposes of assessing civil penalties pursuant to ORS 653.370.

**B. Respondents Employed Minors In 2004 and 2005 Without Obtaining An Annual Employment Certificate.**

As joint employers of minors, Respondents were obliged to abide by Oregon child labor laws, including those requiring employment certificates.

ORS 653.307(2) provides:

"An employer who hires minors shall apply to the Wage and Hour Commission for an annual employment certificate to employ minors. The application shall be on a form provided by the commission and shall include, but not be limited to:

"(a) The estimated or average number of minors to be employed during the year.

"(b) A description of the activities to be performed.

"(c) A description of the machinery or other equipment to be used by the minors."

OAR 839-021-0220 provides, in pertinent part:

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

<sup>12</sup> See Webster's Third New International Dictionary 1439 (2002).

“(a) Verifies the minor’s age by requiring the minor to produce acceptable proof of age as prescribed by these rules; and

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

“(2) An employer may not employ a minor without having first obtained a validated employment certificate from the Bureau of Labor and Industries. Application forms for an employment certificate may be obtained from any office of the Bureau of Labor and Industries or by contacting the Child Labor Unit, Wage and Hour Division, Bureau of Labor and Industries, 800 NE Oregon Street Suite 1045, Portland, OR 97232, (971) 673-0836.

“(a) The Bureau of Labor and Industries will issue a validated employment certificate upon review and approval of the application. The validated employment certificate will be effective for one year from the date it was issued, unless it is suspended or revoked.

“ \* \* \* \* \*

“(3) The employer must post the validated employment certificate in a conspicuous place where all employees can readily see it. When the employer employs minors in more than one establishment, a copy of the validated employment certificate must be posted at each establishment. As used in this rule, ‘establishment’ means a distinct physical place of business. If a minor is employed by

one employer to perform work in more than one location, the minor will be considered employed in the establishment where the minor receives management direction and control.

“ \* \* \* \* \*

“(5) The employer must apply for a validated employment certificate once each year by filing a renewal application on a form provided by the Bureau of Labor and Industries. The renewal application must be received by any office of the bureau no later than the expiration date of the validated employment certificate.”

A preponderance of credible evidence established that Respondents employed or permitted at least three minors under 18 years old to work as laborers at the Meritage construction site in 2004 and 2005. The minors ranged in age from 15 to 17 years old. By hiring minors, Respondents had an affirmative duty to apply for and obtain an employment certificate. Based on Respondents’ stipulation that they have never applied for or obtained an employment certificate, the forum concludes Respondents violated ORS 653.307 and OAR 839-021-0220 in 2004 and 2005 by failing to apply for and obtain an employment certificate. There is no evidence showing Respondents hired minors in 2003; consequently, Respondents are liable for two violations instead of three as the Agency alleged.

**C. Respondents Employed Minors In 2004 And 2005 Without Verifying The Age Of Each Minor.**

As joint employers who employed persons under 18 years old, Respondents were required to verify the age of all minors by requiring the minors to produce an acceptable proof of age document. OAR 839-021-0185(1). An acceptable proof of age document includes, but is not limited to, a birth certificate, a state-issued driver's license, a U. S. Passport, or other acceptable proof approved by BOLI. OAR 839-021-0185(2). Additionally, Respondents had an affirmative duty to retain a record of the document used to verify each minor's age. A notation in each minor's personnel file identifying the document used to verify the minor's age satisfies the requirement. OAR 839-021-0185(3).

Doherty and Mross credibly testified that Respondent Freitag did not ask them for documentation showing proof of age. Moreover, when Doherty was hired in 2004, he told Respondent Freitag he was 15 years old, thus, Respondents knew Doherty was a minor but did not ask for documentation proving his age. Haro testified that he filled out "basic" paperwork and showed some identification when he was hired, but did not otherwise describe the type of identification he provided or indicate whether Respondents made copies of the documentation he provided. Respondents, in

turn, offered no evidence demonstrating they verified the age of the minors by requiring proof of age at the time of hire or anytime thereafter. In fact, Respondents presented no records, personnel or otherwise, showing they maintained and preserved any of the records required when employing minors. Consequently, the forum concludes Respondents violated OAR 839-021-0185 by failing to verify the ages of the three minors they employed in 2004 and 2005 and to maintain required records showing proof of age.

**D. Respondents Employed At Least One Minor In A Hazardous Occupation.**

The Agency alleged Respondents violated OAR 839-021-0102(1)(j) or OAR 839-021-0102(1)(ss) by employing Ryan Doherty to engage in work declared hazardous for minors under 16 years old.

Under OAR 839-021-0102(1)(j), construction work is hazardous when in it involves "alteration, repair, painting, or demolition of buildings, bridges and structures." There is no evidence that Doherty engaged in construction work that involved any of those activities. However, under OAR 839-021-0102(1)(ss), woodcutting and sawing is deemed hazardous work and Respondents are prohibited from employing a minor to perform such work. A preponderance of credible evidence established that Ryan Doherty used a power saw to cut and saw wood while clearing brush at Respondents'

construction site when he was 15 years old. Credible evidence showed he also used a power driven wood chipper to make wood chips from the cut wood. Based on those facts, the forum concludes Respondents hired Doherty to engage in hazardous work, violating OAR 839-021-0102(1)(ss), and are liable for civil penalties under ORS 653.370.

**E. Respondents Employed A Minor To Engage In Work Declared To Be Particularly Hazardous Or Detrimental To The Health Or Well Being Of A Minor.**

The Agency alleged Respondents violated OAR 839-021-0104 by employing Seth Mross to engage in work declared to be particularly hazardous for minors 16 and 17 years old.

Under OAR 839-021-0104, the Commissioner has adopted those occupations set forth in the FLSA, particularly 29 CFR §570.51 and including §570.68, as amended in 1998, as occupations particularly hazardous or detrimental to the health and well being of minors 16 and 17 years old. Federal child labor regulations deem the occupation of operating power-driven wood-working machines as particularly hazardous for minors between 16 and 18 years old. 29 CFR §570.55 (Order 5). The term "power-driven woodworking machines" is defined in the regulations as "all fixed or portable machines or tools driven by power and used or designed for cutting \*

\*\* wood." 29 CFR §570.55(b)(1) (Order 5).

A preponderance of credible evidence established that Seth Mross used a power saw to cut and saw wood while clearing brush at Respondents' construction site when he was 17 years old. Credible evidence showed he also used a power driven wood chipper to make wood chips from the cut wood. Mross credibly testified that he was cut with the power saw he was using while standing on a brush pile cutting tree branches. Although Mross did not consider the injury sufficiently significant to seek medical attention, the power saw cut through his pants and caused bleeding that he stopped by tying some cloth around his leg. Based on those facts, the forum concludes Respondents employed Seth Mross to engage in work declared to be particularly hazardous for minors 16 and 17 years old under the federal regulations, thereby violating OAR 839-021-0104, and the violation is aggravated by the injury Mross suffered while using a power driven saw. Respondents are liable for civil penalties for one violation, pursuant to ORS 653.370.

**F. Respondents Failed To Post A Validated Employment Certificate.**

Based on Respondents' admission that they did not apply for or obtain an annual employment certificate, the forum concludes Respondents also failed to post a validated employment certificate in a conspicuous place readily

visible to all employees in 2004 and 2005, in violation of OAR 839-021-0220(3). Although the Agency alleged Respondents failed to post a validated employment certificate in 2003, there is no evidence in the record showing Respondents employed minors during that period. Consequently, the forum finds Respondents are liable for only two violations of OAR 839-021-0220(3).

### **CIVIL PENALTIES**

Respondents are liable for nine violations of Oregon child labor laws. Each violation is a separate and distinct offense. OAR 839-019-0015. Pursuant to OAR 839-019-0025(1), the maximum civil penalty for any one violation is \$1,000 and the actual amount depends upon "all the facts and any mitigating and aggravating circumstances." Additionally, the minimum civil penalty for employing minors without a valid employment certificate is \$100 for the first offense, \$300 for the second offense, and \$500 for the third and subsequent offenses. OAR 839-019-0025(2). The Agency seeks the maximum penalty for each violation.

When determining the actual amount, the forum must consider Respondents' history in taking all necessary measures to prevent or correct violations; any prior violations, if any; the magnitude and seriousness of the violations; the opportunity and degree of difficulty in complying with the statutes and rules; and any mitigating circumstances. OAR 839-019-0020. Respondents are required to pro-

vide the Commissioner with evidence of any mitigating circumstances. OAR 839-019-0020(2). Respondents offered no evidence of mitigating circumstances. However, there are several aggravating circumstances in this case that illustrate the seriousness of Respondents' child labor violations.

First, there is no evidence Respondents took any measures at any time to correct or prevent the violations. In fact, Respondent Freitag readily admitted that Respondents had never requested or obtained an annual employment certificate and stated in his closing argument that "kids" - even 12 year olds - with a desire to work on construction sites should be given that opportunity without "some bull-shit law that says you get in trouble for that." Second, while there is no evidence of prior violations, the forum finds it likely Respondents will not have any qualms about committing future violations. Respondent Freitag was quick to point out that "as a rich man," he was not affected by the penalty amount; indeed, he perceived any sanctions as a "badge of honor" and the hallmark of a "decent person." Third, and significantly, a minor was injured while operating a power driven saw on Respondents' watch. It matters not that the injury was slight. The power saw in a less sure hand or on another day could have caused significantly more damage. The fact that it did not in this case is not the point. The purpose of labor laws generally is to protect workers from employer

exploitation. Children are particularly vulnerable; hence, the child labor laws hold employers to certain standards that enable minors to participate in the workforce without risk to life and limb. Respondents' cavalier attitude toward those laws reflects an indifference to the law that poses a serious risk to the minors they employ in the construction business. Moreover, their demonstrated disdain for child labor laws has convinced the forum they have no intention of complying with those laws in the future.

Having considered the aggravating circumstances and there being no mitigating circumstances to consider, the forum concludes that the maximum penalty for each violation is an appropriate penalty for Respondents' failure to comply with Oregon's child labor laws. Consequently, Respondents are jointly and severally liable for \$9,000 for the violations of ORS 653.307, OAR 839-021-0220(2)&(3), OAR 839-021-0185, OAR 839-021-0102(ss), and OAR 839-021-0104.

#### **RESPONDENTS' EXCEPTIONS**

Respondents timely filed exceptions to the proposed order and "request that the Commissioner reject the proposals in their entirety."

##### *Exception I*

Respondents contend the Agency had no standing to pursue Claimant's wage claim because he had not assigned his wages to the Commissioner prior to hearing and "by that time, the claimant

had already been paid his full claim by Joya Menashe, the self-confessed obligator." As such, Respondents argue, "there was no claim to assign and the Agency had no basis for pursuing the issue." Respondents' argument has no merit. First, there is no credible evidence that Claimant was paid any wages due and owing at any time by Menashe or anyone else, including Respondents. Respondents produced no cancelled checks or any other documentation that contradicts the credible evidence showing Claimant was not paid any wages for the work he performed in June 2005. Second, for reasons already stated elsewhere herein, Respondents failed to persuade this forum that a wage assignment must be taken before the Commissioner may initiate enforcement proceedings.<sup>13</sup> For those reasons, Respondents' exception is **DENIED**.

##### *Exception II*

Respondents reiterate their contention that Claimant "had already been paid the full amount of the claim prior to the hearing \* \* \* [t]herefore, there is at least no basis for a judgment in this amount." There is simply no evidence to support that claim; thus, Respondents' exception is **DENIED**.

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<sup>13</sup> The ruling on Respondents' motion to dismiss based on the Agency's purported failure to take a wage assignment before issuing the Order of Determination has been supplemented for further clarification. See *supra* Finding of Fact – Procedural 21.

*Exception III*

Respondents contend the ALJ ignored “the un rebutted testimony, supported by affidavit, that the wage claimant was being retained and paid by Joya Menashe, not one of the respondents.” First, there is no “un rebutted testimony” in the record that Claimant was hired and paid by Menashe. A preponderance of credible evidence, including Claimant’s testimony and that of other credible witnesses, contradicts Menashe’s unsworn statement and demonstrates that Respondents employed Claimant and did not pay him for the work he performed in June 2005. Second, Menashe’s purported “affidavit” contained material inconsistencies that Respondents did not attempt to resolve by calling her as a witness at the hearing. Third, contrary to Respondents’ assertion that Menashe “admitted she was responsible for payment of the wage claimant,” Menashe denied Claimant was ever her employee. Respondents’ reliance on Menashe’s unreliable and unsworn statement is misguided. Therefore, Respondents’ exception is **DENIED**.

*Exception IV*

Respondents’ assertion that there is no evidence to support a finding that Respondent Meritage was connected to this matter has no merit. Respondents’ exception is **DENIED**.

*Exception V*

Respondents’ contention that Claimant “was caught lying about

events surrounding the claim” has no basis in fact. Consequently, Respondents’ exception is **DENIED**.

*Exception VI*

Respondents’ claim that “there is no legal minimum age for work covered by the penalty being sought” is nonsensical and frivolous and Respondents’ exception is **DENIED**.

*Exception VII*

Respondents’ claim that “the wage claimant was working for Joya Menashe at his mother’s behest, affording the ‘employer’ an *in loco parentis* exclusion from age requirements, if any,” is incorrect. ORS 653.365 provides a civil penalty exemption for parents or persons standing in place of the parents. The statute’s provisions do not apply to a person standing in place of the minor’s parents *and* who has custody of the minor. ORS 653.365(2). Respondents proffered no evidence that Menashe or anyone other than Claimant’s parents had custody of Claimant during times material. Respondents’ exception is **DENIED**.

*Exception VIII*

Respondents’ claim they were precluded from adequately defending themselves because the Agency “refused to provide meaningful and timely discovery.” That claim has no basis in fact and Respondents’ exception is **DENIED**.

*Exception IX*

Respondents' contention that "unrebutted evidence at hearing, including the evidence of Hughes Construction itself, was that during the period in question Hughes and Hughes alone employed all contractors, subcontractors and other workers at the site" is not supported by any credible evidence in the record. Consequently, Respondents' exception is **DENIED**.

**ORDER**

NOW, THEREFORE, as authorized by ORS 652.332, and as payment of the unpaid wages, **Kurt E. Freitag** and **Meritage Homeowners' Association** are hereby ordered 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 trust for Ryan Anthony Doherty, in the amount of TWO THOUSAND ONE HUNDRED AND SEVENTY TWO DOLLARS (\$2,172), representing \$252 in gross earned, unpaid, due and payable wages, less appropriate lawful deductions, and \$1,920 in penalty wages, plus interest at the legal rate on the sum of \$252 from August 1, 2005, until paid, and interest at the legal rate on the sum of \$1,920 from September 1, 2005, until paid.

FURTHERMORE, as authorized by ORS 653.370, and as payment of the penalties assessed for violations of ORS 653.307, OAR 839-021-0220, and

OAR 839-021-0102(p), the Commissioner of the Bureau of Labor and Industries hereby orders **Kurt E. Freitag** and **Meritage Homeowners' Association** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, a certified check payable to the Bureau of Labor and Industries in the amount of NINE THOUSAND DOLLARS (\$9,000), plus any interest thereon that accrues at the legal rate between a date ten days after the issuance of the Final Order and the date Kurt E. Freitag and Meritage Homeowners' Association complies with the Final Order.

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**In the Matter of**  
**JOSEPH FRANCIS SANCHEZ**  
**dba**  
**XX Concrete Foundations Now**

**Case No. 30-07**  
**Final Order of Commissioner**  
**Dan Gardner**  
**Issued July 9, 2007**

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**SYNOPSIS**

Respondent employed Claimant to perform construction work at the agreed rate of \$18 per hour. From September 20 through 30, 2005, Claimant worked 105 hours, including 25.5 overtime hours. At the agreed rate of \$18 per hour, Claimant earned \$2,119.50, in-

cluding wages for overtime hours, no part of which was paid. Respondent was ordered to pay the full amount of \$2,119.50 in unpaid, due and owing wages. Respondent's failure to pay was willful and he was ordered to pay \$4,320 in penalty wages. Respondent was also ordered to pay a \$4,320 civil penalty based on his failure to pay Claimant overtime for the hours Claimant worked in excess of 40 per week. ORS 652.140; ORS 652.150; ORS 653.055; ORS 653.261; OAR 839-020-0030(1).

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The above-entitled case came on regularly for hearing before Linda A. Lohr, designated as Administrative Law Judge ("ALJ") by Dan Gardner, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on April 17, 2007, in the W.W. Gregg Hearing Room of the Bureau of Labor and Industries, located at 800 NE Oregon Street, Portland, Oregon.

Patrick Plaza, an Agency employee, represented the Bureau of Labor and Industries ("BOLI" or "the Agency"). Dean Seefeldt ("Claimant") was present throughout the hearing and was not represented by counsel. Joseph Francis Sanchez ("Respondent") was present throughout the hearing and was not represented by counsel.

The Agency called as witnesses: Katherine Tucker, purchasing manager for JLS Custom

Homes; Todd Jeziarski, construction superintendent for JLS Custom Homes; Bernadette Yap Sam, BOLI Wage and Hour Division compliance specialist; Chris Day, Respondent employee; and Claimant.

Respondent testified on his own behalf and called no other witnesses.

The forum received as evidence:

- a) Administrative exhibits X-1 through X-9;
- b) Agency exhibits A-1 through A-20, and A-22 (filed with the Agency's case summary).

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

#### **FINDINGS OF FACT – PROCEDURAL**

1) On March 2, 2006, Claimant filed a wage claim with the Agency alleging Respondent had employed him from September 20 through September 30, 2005, and failed to pay his wages for hours he worked during that period.

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

3) On June 28, 2006, the Agency issued Order of Determination No. 06-0673. In the Order, the Agency alleged Respondent had employed Claimant during the period September 20 through September 30, 2005, failed to pay him for all hours worked in that period, including overtime hours pursuant to OAR 839-020-0030, and was liable to him for \$2,119.50 in unpaid wages, plus interest. The Agency also alleged Respondent's failure to pay all of Claimant's wages when due was willful and Respondent was liable to him for \$4,320 as penalty wages, plus interest. In addition to the penalty wages, the Agency alleged Respondent paid Claimant less than the wages to which he was entitled under ORS 653.010 to 653.261 and was therefore liable to him for \$4,320 as civil penalties, pursuant to ORS 653.055(1)(b), plus interest. The Order gave Respondent 20 days to pay the sums, request an administrative hearing and submit an answer to the charges, or demand a trial in a court of law.

4) On October 13, 2006, BOLI received two responses or "answers" from Respondent, both dated October 3, 2006. The first one stated, in pertinent part:

"To Whom it May Concern:

"I would like to request a hearing regarding [sic] file # 06-0673 and the wage claim matter of Oregon Bureau of Labor and Industries as assignee of Dean Seefeldt. I am disputing this matter on the grounds that said allegations are false. I

have a discrepancy not only on the period of time that is being claimed but also the amount per hour and the days and hours worked. The claimant in no way shape or form earned the amount claimed nor worked the # of hours stated in this allegation. Please inform me on any further proceedings regarding [sic] this case.

"Respectfully, Joe Sanchez"

The second one stated, in pertinent part:

"To Whom it May Concern:

"I am also stating all allegations are false including rate per day. My agreement with Dean was to be paid \$10.00 per hour. No more than \$100.00 per day unless otherwise arranged. We at no point in time made other arrangements. The claimant also did not show for multiple days of work. The job in question was a total of 5 business days that Dean was hired to work. He did not even show up for 2 of those days and was late the rest of the time. Claimant was also paid cash on completion of the job. Thank you for your time.

"Respectfully, Joseph Sanchez"

5) On February 15, 2007, the Agency submitted a request for hearing. On February 23, 2007, the Hearings Unit issued a Notice of Hearing stating the hearing would commence at 9 a.m. on April 17, 2007. With the Notice of

Hearing, the forum included copies of the Order of Determination, a language notice, a Service-members Civil Relief Act notification, and copies of the Summary of Contested Case Rights and Procedures and the Contested Case Hearing Rules, OAR 839-050-0000 to 839-050-0440.

6) On March 23, 2007, the ALJ ordered the Agency and Respondent each to submit a case summary that included: a list of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; and, for the Agency only, a brief statement of the elements of the claim and any wage and penalty calculations. The ALJ ordered the participants to submit their case summaries by April 6, 2007, and notified them of the possible sanctions for failure to comply with the case summary order.

7) On March 23, 2007, the ALJ issued a notice pertaining to fax filings and timelines.

8) On April 6, 2007, the Agency timely filed a case summary. Respondent did not file a case summary.

9) At the start of hearing, the ALJ verbally advised the participants of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

10) The ALJ issued a proposed order on April 25, 2007, that notified the participants they were entitled to file exceptions to

the proposed order within ten days of its issuance. Neither the Agency nor Respondent filed exceptions.

#### **FINDINGS OF FACT – THE MERITS**

1) At times material, Respondent was an individual conducting a construction contracting business under the assumed business name of XX Concrete Foundations Now. As of March 2006, Respondent's Construction Contractor's Board ("CCB") license was suspended due to an "insurance problem." CCB records show that Respondent was classified as a sole proprietor and his particular class of independent contractor was listed as "Exempt (Cannot Have Employees Has No Workers' Comp Coverage)."

2) In 2005, general contractor JLS Custom Homes ("JLS") awarded Respondent the bid on concrete work for a residential development project in Aloha, Oregon. As part of the subcontract, Respondent "set up, stripped and poured" concrete foundations for the Stillwater and Marty Meadows construction projects in August and September 2005. Respondent submitted invoices by the 20<sup>th</sup> of each month and JLS paid Respondent the following month on the 10<sup>th</sup>. In September 2005, JLS paid Respondent approximately \$11,351.50 for concrete work on the Stillwater project. In October and November 2005, JLS paid Respondent approximately \$25,395 and \$28,415, respec-

tively, for concrete work on the Marty Meadows project.

3) On or about September 19, 2005, Respondent's employee, Chris Day, telephoned Claimant about possible employment on the Marty Meadows project. Day previously had worked with Claimant at Bedford Construction and knew Claimant was laid off and, at that time, unemployed. Respondent needed some extra help on the Marty Meadows job and, after Day handed him the telephone, Respondent offered Claimant a job working with the concrete crew. Respondent agreed to pay Claimant \$18 per hour, the same hourly rate Claimant earned while working for Bedford Construction. Claimant would not have accepted Respondent's offer unless he agreed to pay Claimant his previous hourly rate. Claimant's first work day was September 20, 2005.

4) Claimant worked with a five person crew, including Day, setting up and stripping a large foundation for a "four or five plex" at the Marty Meadows site. Claimant recorded his work hours each day on his own time cards left over from other construction jobs. By the end of the first week, from September 20 through 24, Claimant had recorded 49.5 work hours. By the end of the second week, from September 25 through 30, he had recorded 58 work hours. The first day, he started work at 7 a.m. After that, he usually started work around 9 a.m. and worked until dark each day with a 30 minute lunch. The job

included weekend work and was completed approximately 11 days after Claimant started working for Respondent. Claimant's last work day was September 30, 2005.

5) During his last work week, Claimant asked about his wages and Respondent was unresponsive. On or about October 1, 2005, Claimant tried to discuss his wages with Respondent and Respondent "got in his truck and drove away." Respondent did not pay Claimant any wages for the work he performed from September 20 through September 30, 2005. Chris Day also was not paid for the work he performed on the Marty Meadows project. Claimant and Day both complained to JLS that Respondent had not paid them for their work and each complained to the CCB who advised them that Respondent was not insured. Claimant eventually filed a wage claim with BOLI. Day did not file a wage claim because he and Respondent were long-time friends and he was also collecting unemployment benefits and did not want to report his cash earnings.

6) On March 9, 2006, BOLI sent Respondent a Notice of Wage Claim ("Notice") that stated, in pertinent part:

"You are hereby notified that DEAN S. SEEFELDT has filed a wage claim with the Bureau of Labor and Industries alleging:

"Unpaid wages of \$1,935.00 at the rate of \$18.00 per hour

from September 20, 2005 to September 30, 2005.

"IF THE CLAIM IS CORRECT, you are required to IMMEDIATELY make a negotiable check or money order payable to the claimant for the amount of wages claimed, less deductions required by law, and send it to the Bureau of Labor and Industries at the above address."

The Notice was mailed to Foundations Now, 4803 SW 172<sup>nd</sup> Ave., Aloha, OR 97007, and was returned to BOLI by the U. S. Post Office on April 10, 2006. The envelope included a handwritten notation stating, "NOT AT THIS ADDRESS," and a Post Office sticker stating, "NOT DELIVERABLE AS ADDRESSED UNABLE TO FORWARD."

7) On May 23, 2006, BOLI compliance specialist Yap Sam mailed a letter to Respondent that stated in pertinent part:

"I am the Compliance Specialist who has been assigned the above noted wage claim for further investigation.

"On March 9, 2006, we mailed a notice of Mr. Seefeldt's wage claim and an Employer Response form (copies enclosed) but the correspondence was returned by the US postal service. On May 18, I called 503-473-2649 and left a voicemail message asking that you call me. I have not heard from you.

"Please review the enclosed correspondence and respond as directed therein by no later than **June 6, 2006**. Your response should be directed to my attention at the Eugene address noted below. If you are no longer carrying on business **and** you are unable to pay Mr. Seefeldt any wages that you admit are due and owing, please call me immediately.

"Payment of any undisputed wages should be remitted by check or money order payable solely to Dean Seefeldt but sent to my attention at the Eugene office.

"Please note that if you fail to cooperate as requested, the Division will most likely invoke the administrative process. In that event, not only will we seek the wages that I determine are due and owing to Mr. Seefeldt, but also penalty wages in the amount of \$4,320 for failure to pay final wages in a timely manner, interest on both the outstanding wages and penalty wages; and, reimbursement for the costs incurred by the Division during the administrative process."

The letter was mailed to Joseph Francis Sanchez, XX Concrete Foundations Now, at 18333 NW Chemeketa Ln., #C, Portland, OR 97229-3532. Yap Sam also sent copies of the letter to Respondent at PO Box 3278, Newberg, OR 97132, and 8830 NE Saint Paul Hwy., Newberg, OR 97132-7149. On May 30, 2006, the U. S. Post

Office returned the letter addressed to 18333 NW Chemeketa Ln., #C, Newberg, noting a forwarding address of PO Box 3278, Newberg, OR, and that the "forward time" had expired. On the same date, the letter addressed to 8830 NE Saint Paul Hwy., Newberg, OR, was also returned with the notation: "RETURN TO SENDER NO MAIL RECEIPTABLE UNABLE TO FORWARD." The letter addressed to PO Box 3278, Newberg, OR, was not returned to BOLI by the U. S. Post Office.

8) On June 7, 2006, Respondent left a telephone message for Yap Sam stating he had not had any employees in "7 or 8 yrs." In a later telephone conversation, on the same date, Respondent told Yap Sam that he did not know Claimant or Chris Day, was not allowed to have employees and had not had any for years, and had not subcontracted with JLS Custom Homes to prepare and pour concrete foundations.

9) Following the wage claim investigation, Yap Sam concluded that Respondent employed Claimant from September 20 through 30, 2005, and owed Claimant \$2,119.50 in unpaid wages. Respondent did not pay the wages owed and the Agency issued an Order of Determination on June 29, 2005, based on Claimant's wage claim and the Agency's investigation.

10) Claimant was a credible witness. His testimony was straightforward and unembellished. His testimony about his

pay rate and the number of hours he worked was corroborated by other credible evidence and, in any event, was more believable than Respondent's version of events. The forum credited Claimant's testimony in its entirety.

11) Tucker and Jezierski were credible witnesses. They each testified to their knowledge of the subcontract between JLS and Respondent and neither appeared to have a bias toward or against Respondent or Claimant. Jezierski acknowledged he had received complaints about unpaid wages from workers, including Claimant, after the Marty Meadows project was completed. The forum credited Tucker's and Jezierski's testimony in its entirety.

12) Chris Day was a credible witness. Although he acknowledged a long-term friendship with Respondent and had not been paid for his work on the Marty Meadows project, Day did not demonstrate any bias toward or against Respondent or Claimant. Rather, his testimony was straightforward and he testified, without rancor, to only those matters within his personal knowledge. The forum credited Day's testimony in its entirety.

13) Yap Sam was a credible witness. During the wage claim investigation, she maintained contemporaneous notes that support her independent recollection of her contacts with Respondent. She clearly remembered Respondent's statements that he had not employed anyone for seven or

eight years, did not know Claimant or Chris Day, and had not worked for JLS during times material. The forum credits Yap Sam's testimony in its entirety.

14) Respondent's testimony was not reliable. Although he ultimately admitted he was a subcontractor for JLS, had employed Claimant to work on the Marty Meadows project, and had known Chris Day for 14 years, Respondent's prior statements to Yap Sam denying any knowledge of Claimant, Day or the JLS construction project, demonstrate his willingness to prevaricate when it suits a purpose, which was at that time to deter the wage claim investigation. At hearing, his apparent purpose was to reduce his potential liability by denying he agreed to pay Claimant \$18 per hour and by challenging the number of Claimant's work hours. In any event, based on his prior false statements to the Agency and his failure to provide any evidence to support his claims at hearing, the forum did not credit Respondent's testimony unless it was an admission, statement against interest, or corroborated by other credible evidence.

#### **ULTIMATE FINDINGS OF FACT**

1) At times material, Respondent was an individual conducting business in Oregon and employing one or more persons in the operation of that business.

2) Respondent employed Claimant from September 20 through September 30, 2005.

3) Respondent agreed to pay Claimant \$18 per hour.

4) Between September 20 and September 30, 2005, Claimant worked 105 hours, 25.5 of which were hours that exceeded 40 hours in a given work week.

5) Claimant's last day of work was September 30, 2005.

6) From September 20 through September 30, 2005, Claimant earned \$2,119.50. Respondent did not pay Claimant any part of the wages earned and owes Claimant \$2,119.50 in due and unpaid wages.

7) On Claimant's behalf, BOLI sent Respondent written notice of nonpayment of wages on March 9 and March 23, 2006, before issuing an Order of Determination on June 29, 2006.

8) Respondent willfully failed to pay Claimant the \$2,119.50 in earned, due and payable wages. Respondent has not paid the wages owed and more than 30 days have elapsed from the date the wages were due.

9) Penalty wages for Claimant, computed pursuant to ORS 652.150, equal \$4,320.

10) Respondent paid Claimant less than the wages to which he was entitled and civil penalties, computed pursuant to ORS 652.150, equal \$4,320.

#### **CONCLUSIONS OF LAW**

1) At all times material herein, Respondent was an employer and Claimant was an employee subject to the provisions of ORS

652.110 to 652.200, 652.310 to 652.405, and ORS 653.010 to 261.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and the Respondent herein. ORS 652.310 to 652.414.

3) Respondent violated ORS 652.140 by failing to pay Claimant all wages earned and unpaid after Claimant's employment terminated.

4) Respondent is liable for penalty wages under ORS 652.150 for willfully failing to pay all wages or compensation earned and due to Claimant when his employment terminated, as provided in ORS 652.140.

5) Respondent is liable for civil penalties under ORS 653.055 for failing to pay Claimant overtime wages to which he was entitled pursuant to OAR 839-020-0030(1). ORS 653.055.

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

## OPINION

### WAGE CLAIM

The Agency was required to prove 1) Respondent employed Claimant, 2) any pay rate upon

which Respondent and Claimant agreed, if it exceeded the minimum wage, 3) Claimant performed work for which he was not properly compensated, and 4) the amount and extent of work Claimant performed for Respondent. *In the Matter of Tallon Kustom Equip., LLC*, 28 BOLI 32 (2006). Respondent does not dispute that he employed Claimant in September 2005 or that he owes Claimant some wages. Respondent disputes the agreed upon pay rate and the amount and extent of work Claimant performed for Respondent.

#### A. Agreed Upon Pay Rate

Claimant credibly testified that Respondent agreed to pay him the same \$18 per hour pay rate that he earned while working for Bedford Construction Company. Claimant's testimony was corroborated by Respondent's employee, Chris Day, who credibly testified that, at the time Claimant was hired, he understood that Respondent agreed to match what Claimant's former employer had paid him prior to his lay-off. Respondent's assertion that he hired Claimant without a wage agreement, and that he told Claimant he wanted to see how well Claimant performed before he agreed to a wage rate, was not credible. The forum finds more plausible Claimant's testimony that his agreement to work on the Marty Meadows project was contingent upon his receiving the same pay he received from his previous employer and that he communicated that contingency to Respondent. Con-

sequently, the forum concludes that Respondent agreed to pay Claimant \$18 per hour for his work on the Marty Meadows project.

**B. Amount and Extent of Work**

ORS 653.045 requires employers to keep and maintain proper records of wages, hours and other conditions and practices of employment. When the forum concludes an employee performed work for which he or she was not properly compensated, it becomes the employer's burden to produce all appropriate records to prove the precise hours and wages involved. When the employer produces no records, the Commissioner may rely on evidence produced by the Agency "to show the amount and extent of the employee's work as a matter of just and reasonable inference and then may award damages to the employee, even though the result be only approximate." *In the Matter of Diran Barber*, 16 BOLI 190 (1997), quoting *Anderson v. Mt. Clemens Pottery Co.*, 328 US 680 (1946).

Here, Respondent kept no record of the days or hours Claimant worked. This forum has previously accepted, and will accept, the credible testimony of a claimant as sufficient evidence to prove work was performed and from which to draw an inference of the extent of that work. *In the Matter of Graciela Vargas*, 16 BOLI 246 (1998). Claimant's testimony was credible as to the amount and extent of the work he performed. In addition, he kept a contemporaneous record of the hours he

worked. Respondent, on the other hand, produced no persuasive evidence to "negative the reasonableness of the inference to be drawn from the [Claimant's] evidence." *Id.* at 255, quoting *Mt. Clemens Pottery Co.*, 328 US at 687-88.

The forum has found that Claimant performed work for which he was improperly compensated and may rely on the evidence Claimant produced showing the hours he worked as a matter of just and reasonable inference. Claimant's credible testimony establishes that he worked a total of 105 hours for Respondent, 25.5 of which were hours worked in excess of 40 per week. For these hours, Claimant earned a total of \$2,119.50, based on the agreed upon rate of \$18 per hour. Although Respondent claimed he gave Claimant \$65 for gas and food, Claimant credibly testified that he never received any money from Respondent. In any event, Respondent cannot lawfully deduct money he purportedly paid for gas and food from Claimant's wages without Claimant's written authorization. See ORS 652.610(3)(b) ("No employer may withhold, deduct or divert any portion of an employee's wages unless: \* \* \* [t]he deductions are authorized in writing by the employee, are for the employee's benefit, and are recorded in the employer's books"). Consequently, absent evidence showing otherwise, the forum finds Respondent owes all of the wages Claimant earned between September 20 and September 30,

2007, and is liable for \$2,119.50 in unpaid wages.

**PENALTY WAGES - ORS  
652.150**

The forum may award penalty wages when it determines that a respondent's failure to pay wages was willful. Willfulness does not imply or require blame, malice, or moral delinquency. A respondent commits an act or omission "willfully" if the respondent acts or fails to act intentionally, as a free agent, and with knowledge of what is being done or not done. *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976).

At hearing, Respondent acknowledged he employed Claimant and, although he claimed in his answer that Claimant was "paid cash on completion of the job," he testified only that he had given Claimant \$65 for gas and food sometime before the job was completed. He also testified he intended to pay everyone \$200 when the job was completed, but he did not state he actually paid anyone anything at job's end. During the wage claim investigation, Respondent lied to BOLI compliance specialist Yap Sam when he told her he had not employed anyone for years, did not know Claimant or Chris Day, and only knew of JLS Custom Homes because they were "a big company." Respondent's initial attempt to disavow knowledge of Claimant and the construction project and his subsequent admission that he employed Claimant and that Claimant performed work for

him, but was paid in cash after the project was completed, demonstrate Respondent's guilty knowledge of the pertinent facts and that he voluntarily and as a free agent failed to pay Claimant all of the wages he earned between September 20 and September 30, 2005. Consequently, Respondent is liable to Claimant for penalty wages in the amount of \$4,320. This figure is computed by multiplying \$18 per hour by 8 hours per day multiplied by 30 days. See ORS 652.150 and OAR 839-001-0470.

**CIVIL PENALTIES - ORS  
653.055**

If an employer pays an employee "less than the wages to which an employee is entitled under ORS 653.010 to 653.161," the forum may award civil penalties to the employee. ORS 653.055. The Agency alleged Respondent failed to compensate Claimant at one and one half times his regular rate of pay for each hour he worked over 40 hours in a given work week between September 20 and September 30, 2005. The Commissioner's rules governing overtime requirements were promulgated pursuant to ORS 653.261 and are within the range of wage entitlements encompassed by ORS 653.055. The Agency presented sufficient evidence to show Respondent failed to pay Claimant overtime for the hours he worked in excess of 40 per week, as required under OAR 839-020-0030(1). Respondent is therefore liable to Claimant for \$4,320 in civil penalties as pro

vided in ORS 652.150 (\$18 x 8 hours per day x 30 days). See ORS 653.055(1)(b).

### ORDER

NOW, THEREFORE, as authorized by ORS 652.332, and as payment of the unpaid wages, penalty wages, and civil penalties, Respondent **Joseph Francis Sanchez dba XX Concrete Foundations Now** is hereby ordered to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, the following:

A certified check payable to the Bureau of Labor and Industries, in trust for Claimant Dean S. Seefeldt, in the amount of TEN THOUSAND SEVEN HUNDRED FIFTY NINE DOLLARS AND FIFTY CENTS (\$10,759.50), less appropriate lawful deductions, representing \$2,119.50 in gross earned, unpaid, due and payable wages, \$4,320 in penalty wages, and \$4,320, in civil penalties, plus interest at the legal rate on the sum of \$2,119.50 from November 1, 2005, until paid, and interest at the legal rate on the sum of \$8,640 from December 1, 2005, until paid.

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**In the Matter of  
PAVEL BULUBENCHI dba  
Benchi Homes**

**Case No. 67-06  
Final Order of Commissioner  
Dan Gardner  
Issued July 26, 2007**

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### SYNOPSIS

Respondent, who was engaged in residential construction, failed to pay three wage claimants all wages due when they quit their employment, in violation of ORS 652.140(2). Respondent's failure to pay was willful and he was ordered to pay each claimant penalty wages pursuant to ORS 652.150. Additionally, Respondent was ordered to pay each claimant civil penalties pursuant to ORS 653.055, based on his failure to pay the wage claimants overtime for the hours they worked in excess of 40 per week, in violation of ORS 653.261 and OAR 839-020-0030(1). ORS 652.140; ORS 652.150; ORS 653.055; ORS 653.261; OAR 839-020-0030(1).

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The above-entitled case came on regularly for hearing before Linda A. Lohr, designated as Administrative Law Judge ("ALJ") by Dan Gardner, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The

hearing was held on June 12, 2007, in the W.W. Gregg Hearing Room of the Bureau of Labor and Industries, located at 800 NE Oregon Street, Portland, Oregon.

Patrick Plaza, an Agency employee, represented the Bureau of Labor and Industries ("BOLI" or "Agency"). Martin Perez-Dominguez ("Claimant M. Perez") and Adrian Zuniga-Ramirez ("Claimant A. Zuniga") were present throughout the hearing and not represented by counsel. Raymundo Perez-Dominguez ("Claimant R. Perez") appeared by telephone to give testimony and was not represented by counsel. Pavel Bulubenchii ("Respondent") failed to appear for hearing in person or through counsel.

The Agency called as witnesses: Claimants M. Perez, R. Perez, and Zuniga; Elsa Berna, BOLI Wage and Hour Division Compliance Specialist; Vee Souryamat, BOLI Wage and Hour Division Order Processor/Judgment Clerk; and Carlos Zuniga-Munoz, former Respondent employee.

The forum received as evidence:

a) Administrative exhibits X-1 through X-10;

b) Agency exhibits A-1 through A-36 (filed with the Agency's case summary).

Having fully considered the entire record in this matter, I, Dan Gardner, Commissioner of the Bureau of Labor and Industries, hereby make the following Find-

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

#### **FINDINGS OF FACT – PROCEDURAL**

1) On June 17, 2005, Claimant M. Perez filed a wage claim with the Agency alleging Respondent had employed him from May 1, 2004, to May 30, 2005, and failed to pay his wages for hours he worked from April 1 to May 30, 2005.

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

3) On June 17, 2005, Claimant R. Perez filed a wage claim with the Agency alleging Respondent had employed him from December 27, 2004, to May 31, 2005, and failed to pay his wages for hours he worked from April 1 to May 31, 2005.

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

5) On June 17, 2005, Claimant A. Zuniga filed a wage claim with the Agency alleging Respondent had employed him from March 16 to May 31, 2005, and failed to pay his wages for all of

the hours he worked during that period.

6) On February 17, 2006, the Agency issued Order of Determination No. 05-1779. In the Order, the Agency alleged Respondent had employed Claimants during the period March 16 through May 31, 2005, failed to pay them for hours worked in that period, including overtime hours pursuant to OAR 839-020-0030, and was liable to them for \$16,385.50 in unpaid wages, plus interest. The Agency also alleged Respondent's failure to pay all of Claimants' wages when due was willful and Respondent was liable to them for \$9,600 as penalty wages, plus interest. In addition to the penalty wages, the Agency alleged Respondent paid Claimants less than the wages to which they were entitled under ORS 653.010 to 653.261 and was therefore liable to them for \$9,600 in civil penalties, pursuant to ORS 653.055(1)(b), plus interest. The Order gave Respondent 20 days to pay the sums, request an administrative hearing and submit an answer to the charges, or demand a trial in a court of law.

7) On March 7, 2006, Respondent timely filed an answer through counsel. In his answer, Respondent admitted all allegations except those alleging the amount of unpaid wages owed to Claimants and that Claimants were owed penalty wages and civil penalties. Respondent alleged:

"1. Adrian was due \$4,500, but paid \$1,500 in cash at his request. Thus, he is due \$3,040.

"2. Ray was due \$5,902, but he requested that employer deduct from his pay \$3,500 as payment for a truck that he purchased from employer.

"3. Martin was due \$4,944, but employer paid taxes on his behalf of \$2,444. Thus, he is due \$2,500."

8) On May 9, 2007, the Agency submitted a request for hearing. The Agency included a motion to amend the Order of Determination to correct a misspelling in the caption and to include attachments previously omitted. On May 11, 2007, the ALJ granted the Agency's motion and a Notice of Hearing issued from the Hearings Unit stating the hearing would commence at 9 a.m. on June 12, 2007. With the Notice of Hearing, the forum included copies of the Order of Determination, a language notice, a Servicemembers Civil Relief Act notification, and copies of the Summary of Contested Case Rights and Procedures and the Contested Case Hearing Rules, OAR 839-050-0000 to 839-050-0440. The Notice of Hearing was mailed to Respondent at 10920 NE Eugene Street, Portland, Oregon, and 415 SW Park Street, Camas, Washington. Neither mailing was returned to the Hearings Unit by the U.S. Post Office as undeliverable.

9) At the Agency's request, the Hearings Unit appointed two

court certified Spanish speaking interpreters to simultaneously interpret the proceedings for Claimants and to interpret their testimony during the hearing.

10) On May 14, 2007, the ALJ ordered the Agency and Respondent each to submit a case summary that included: a list of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; and, for the Agency only, a brief statement of the elements of the claim and any wage and penalty calculations. The ALJ ordered the participants to submit their case summaries by June 1, 2007, and notified them of the possible sanctions for failure to comply with the case summary order.

11) On May 14, 2007, the ALJ issued a notice pertaining to fax filings and timelines.

12) On May 23, 2007, the Agency filed a motion for partial summary judgment alleging that no genuine issue of material fact existed regarding 1) the minimum amount owed to each Claimant or 2) whether Respondent owed penalty wages or civil penalties for the unpaid amounts he admitted were owed. Respondent did not file a response to the Agency's motion.

13) On June 1, 2007, the Agency timely filed a case summary. Respondent did not file a case summary.

14) On June 6, 2007, the ALJ granted the Agency's motion for partial summary judgment

based on the pleadings and Respondent's admissions. The ruling stated, in pertinent part:

"The Agency alleged in the amended Order of Determination that Respondent employed Claimants Martin Perez-Dominguez, Raymundo Perez-Dominguez, and Adrian Zuniga-Ramirez in Oregon from March 16 to May 31, 2005, and unlawfully failed to pay them wages totaling \$16,385.50. The Agency further alleged that 30 days had elapsed since the wages became due and owing, that Respondent's failure to pay the wages was willful, and that Respondent, therefore, owed Claimants penalty wages totaling \$9,600. The Agency also alleged Respondent paid Claimants less than the wages to which they were entitled under ORS 653.010 to 653.261 and is liable for civil penalties totaling \$9,600. In response to the original Order of Determination, issued on August 30, 2005, Respondent, through counsel, sent a letter to BOLI on November 3, 2005, and made the following assertion:

Mr. Bulubenchi believes that the wages due were \$15,306, minus various setoffs. As a result of the setoffs, he believes that \$6,942 is actually due. This is computed as follows:

1. Adrian [Zuniga-Ramirez] was due \$4,540, but was paid \$1,500 in cash at his

request. Thus, he is due \$2,040.

2. Ray [Perez-Dominguez] was due \$5,902, but he agreed to have \$3,500 deducted from his pay for a truck he purchased from Mr. Bulubenchi. Thus, he is due \$2,402.

3. Martin [Perez-Dominguez] was due \$4,944, but Mr. Bulubenchi paid taxes on his behalf. Thus, his [sic] is due approximately \$2,500.

(Summary Judgment Motion, Exhibit AA)

“According to the Agency and the record herein, due to a service problem with the original Order of Determination, an identical Order of Determination issued on February 17, 2006. In response, Respondent, through counsel, filed a formal Answer and Request for Contested Case Hearing, in which he denied the Agency’s allegations in paragraphs two and three of the Order of Determination except he repeated his original assertion that the Claimants were owed wages totaling \$6,942, minus certain deductions.

“On May 22, 2007, the Agency filed a motion for partial summary judgment, claiming that no genuine issue of material fact exists as to whether Claimants are owed wages totaling \$6,942. Respondent had seven days, until May 28, 2007, to file a response to the

partial summary judgment motion, but, to date, has [not] filed a response.

“A participant in a BOLI contested case hearing is entitled to summary judgment only if the participant demonstrates that ‘[n]o genuine issue as to any material fact exists and the participant is entitled to a judgment as a matter of law \* \* \*.’ OAR 839-050-0150(4)(B). In reviewing a motion for summary judgment, this forum ‘draw[s] all inferences of fact from the record against the participant filing the motion for summary judgment \* \* \* and in favor of the participant opposing the motion \* \* \*.’ *In the Matter of Efrain Corona*, 11 BOLI 44, 54 (1992), *aff’d without opinion, Corona v. Bureau of Labor and Industries*, 124 Or App 211, 861 P2d 1046 (1993). In considering summary judgment motions, this forum gives some evidentiary weight to unsworn assertions contained in the participants’ pleadings and other filings. *Cf. In the Matter of Tina Davidson*, 16 BOLI 141, 148 (1997)(considering contents of the Respondent’s answer in making factual findings in a default hearing).

“In a typical wage claim case, the Agency has the burden of proving 1) that the respondent employed the claimant; 2) any pay rate upon which the respondent and the claimant agreed, if other than minimum wage; 3) that the claimant per-

formed work for the respondent for which the claimant was not properly compensated; and 4) the amount and extent of work the claimant performed for the respondent. *In the Matter of Barbara Coleman*, 19 BOLI 230, 262-63 (2000). In this case, only the fourth element is disputed. Respondent apparently does not dispute that he 1) employed Claimants during the time period claimed, 2) agreed to the individual pay rates alleged, and 3) failed to pay Claimants all of the wages earned and due. The only issue in dispute is the amount and extent of the work Claimants performed for Respondent, i.e., the Agency contends Claimants worked hours that resulted in earnings totaling \$16,385.50, and Respondent contends Claimants worked hours that resulted in earnings totaling \$15,306, minus certain setoffs. Although the amount and extent of work performed is a factual question that cannot be resolved by summary judgment when disputed, Respondent admits he owes Claimants back wages totaling at least \$6,942. Consequently, there is no genuine dispute of fact regarding Respondent's obligation to pay \$6,942 in unpaid wages, plus interest. See ORS 652.320(7); 652.330(1).

"The Agency also seeks penalty wages for Claimants totaling \$9,600. A respondent must pay penalty wages when

it has 'willfully fail[ed] to pay any wages or compensation of any employee whose employment ceases \* \* \*.' ORS 652.150. An employer acts 'willfully' when it 'knows what [it] is doing, intends to do what [it] is doing, and is a free agent.' *Vento v. Versatile Logic Systems Corp.*, 167 Or App 272, 277, 3 P3d 176, 179 (2000); see *Wyatt v. Body Imaging*, 163 Or App 526, 531-32, 989 P2d 36 (1999), *rev den* 320 Or 252 (2000).

"In this case, Respondent denied he willfully failed to pay wages in his answer. However, the record shows he agreed certain amounts were due to each Claimant and that Claimants were not paid those amounts. Those facts prove that Respondent acted knowingly, intentionally, and as a free agent in withholding Claimants' wages and, therefore, he acted willfully. The undisputed evidence also establishes that more than 30 days have passed since Respondent withheld Claimants' wages. Under these circumstances, 'as a penalty for such nonpayment,' Claimants' wages 'shall continue' as a matter of law. ORS 652.150. The amount of penalty wages owing for each Claimant is calculated pursuant to statute and Agency rule as follows: Martin Perez-Dominguez's penalty wages total \$3,120 (30 days x 8 hours/day x \$13/hour = \$3,120); Ramon Perez-Dominguez's penalty wages

total \$4,080 (30 days x 8 hours/day x \$17/hour = \$4,080); and Adrian Zuniga-Ramirez's penalty wages total \$2,400 (30 days x 8 hours/day x \$10/hour = \$2,400). See ORS 652.150; OAR 839-001-0470(1).

"The Agency also seeks civil penalties payable to Claimants totaling \$9,600. A respondent is liable for civil penalties as provided in ORS 652.150 when it 'pays an employee less than the wages to which the employee is entitled under ORS 653.010 to 653.261.' ORS 653.055. The Commissioner's rules governing overtime requirements were promulgated pursuant to ORS 653.261 and are within the range of wage entitlements encompassed by ORS 653.055. Respondent did not dispute the claims for overtime and, in fact, admitted Claimants collectively were owed at least \$15,306, albeit less certain setoffs, during the wage claim period. That amount differs from the Agency's calculation of \$16,385.50 by only \$1,079.50 and necessarily includes the overtime amounts alleged in the Agency's Order of Determination. Respondent's admission that collectively Claimants were owed at least \$15,306 is sufficient to prove Respondent failed to pay Claimants at one and one-half times their regular rate of pay for the hours they worked in excess of 40 hours per week as required under

OAR 839-020-0030(1). Respondent is therefore liable to Claimants for civil penalties, computed pursuant to ORS 652.150, as follows: Martin Perez-Dominguez's penalty wages total \$3,120 (30 days x 8 hours/day x \$13/hour = \$3,120); Raymundo Perez-Dominguez's penalty wages total \$4,080 (30 days x 8 hours/day x \$17/hour = \$4,080); and Adrian Zuniga-Ramirez's penalty wages total \$2,400 (30 days x 8 hours/day x \$10/hour = \$2,400). See ORS 652.150; OAR 839-001-0470(1).

"The Agency's motion for partial summary judgment is **GRANTED**. There are still issues of fact about the amounts owed Claimants in excess of the amounts admitted by Respondent and the participants should be prepared to address those issues at the hearing scheduled to commence on June 12, 2007. This order will become part of the Proposed Order that is issued subsequent to the hearing."

15) Respondent did not appear at the time and place set for hearing and no one appeared on his behalf or advised the ALJ of any reason for his failure to appear. The ALJ ruled that Respondent was in default, having been properly served with the Notice of Hearing, and having failed to appear at the hearing.

16) At the start of hearing, the Agency waived the ALJ's recitation of the issues to be

addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

17) The ALJ issued a proposed order on July 6, 2007, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. Neither the Agency nor Respondent filed exceptions.

#### **FINDINGS OF FACT – THE MERITS**

1) At times material, Respondent was a licensed general contractor conducting a residential construction business in Oregon using the assumed business name of Benchi Homes. Respondent was licensed with the Oregon Construction Contractor's Board ("CCB") as a sole proprietor and not permitted to have employees because he had no workers' compensation coverage.

2) In May 2004, Claimant M. Perez began working for Benchi Homes as a framer on new residential construction. Respondent paid his wages in cash every two weeks or when a particular house was completed. In December 2004, Claimant M. Perez went to Mexico for a visit and when he returned in February 2005 Respondent rehired him and agreed to pay him \$17 per hour to frame houses.

3) After hearing about Respondent's business from his brother, Claimant M. Perez, Claimant R. Perez and a friend, Carlos Zuniga Munoz ("C. Zuniga"), came to Oregon in December 2004 and started framing

houses for Respondent. Respondent agreed to pay Claimant R. Perez \$13 per hour.

4) In March 2005, Claimant A. Zuniga began working for Respondent as a laborer with the residential construction crew. Respondent agreed to pay him \$10 per hour.

5) Claimants each recorded their work hours in a notebook or on a notepad at the end of each work day or at the end of the work week and showed them to Respondent, who subsequently paid them by cash or check.

6) Starting in April 2005, Claimants had difficulty obtaining their wages from Respondent for the work they performed. All three continued to work and record their work hours until late May 2005, based on Respondent's promises to pay their wages. Eventually, Respondent paid Claimant M. Perez and Claimant R. Perez \$2,000 each for some of the hours they worked after April 2005. Respondent gave Claimant A. Zuniga a check for \$2,000 that Zuniga was unable to cash because Respondent did not have sufficient funds in his bank account to cover the check amount. Respondent did not pay Claimant A. Zuniga any wages for the hours he worked after April 2005.

7) From April 1 through May 30, 2005, Claimant M. Perez worked 446 hours, including 118.5 overtime hours, earning \$8,589.25.

8) From April 1 through May 31, 2005, Claimant R. Perez

worked 453 hours, including 117.5 overtime hours, earning \$6,652.75.

9) From April 1 through May 31, 2005, Claimant A. Zuniga worked 453 hours, including 117.5 overtime hours, earning \$5,117.50.

10) Claimants did not return to work after May 31, 2005, because Respondent refused to pay them for all of the hours they worked. They each filed a wage claim with BOLI and filled out a calendar, using the written records they maintained during their employment, showing the dates and hours each worked for Respondent.

11) On June 27, 2005, BOLI sent Respondent a Notice of Wage Claim ("Notice") that stated, in pertinent part:

"You are hereby notified that MARTIN PEREZ-DOMINGUEZ, ET AL. have filed wage claims with the Bureau of Labor and Industries alleging:

"[Claimant M. Perez] claims unpaid regular and statutory overtime wages of \$3,902.00 at the rate of \$13 per hour from April 1, 2005 to May 31, 2005.

"[Claimant R. Perez] claims unpaid regular and statutory overtime wages of \$5,463.00 at the rate of \$17 per hour from April 1, 2005 to May 31, 2005.

"[Claimant A. Zuniga] claims unpaid regular and statutory overtime wages of \$4,590 at

the rate of \$10 per hour from April 1, 2005 to May 31, 2005.

"IF THE CLAIMS ARE CORRECT, you are required to IMMEDIATELY make a negotiable check or money order payable to the claimant for the amount of wages claimed, less deductions required by law, and send it to the Bureau of Labor and Industries at the above address."

12) On July 15, 2005, BOLI compliance specialist Freytag mailed a letter to Respondent inquiring about whether the wages had been paid and requesting that Respondent send to BOLI either proof of payment or wage claim checks no later than July 29. Respondent replied by facsimile transmission on July 29, 2005, in a note that stated in pertinent part:

"You have made a mistake on Martin Perez and Raymundo Perez.

Martin Perez \$17 per hour.

Raymundo Perez \$13 per hour.

Martin Perez owes taxes for 1994 and 1995.

Raymundo Perez not return [sic] 1996 Mazda truck which is worth \$3,500.

Adrian Zuniga has a [illegible] for \$2,000.

"Therefore, they all owe money or truck.

"If there is [sic] more questions, I will give all information to my lawyer.

"They all start work [illegible] independent contractors.

"They failed to give me all information for 3 months.

"If you have any questions about taxes call my CPA Kevin."

Respondent included copies of "Benchi Homes" payroll summaries for January through December 2004 and 2005 showing that Claimant M. Perez was paid \$17 per hour; Claimant R. Perez was paid \$13 per hour; and Claimant A. Zuniga was paid \$10 per hour. The payroll summaries do not show Claimants were paid for the work they performed from April 1 through May 31, 2005.

13) After determining that Respondent's information was not responsive to her request, BOLI compliance specialist Freytag sent Respondent another letter requesting payroll records for each Claimant. When Respondent failed to reply, Freytag sent him a final letter on August 16, 2005, informing him that "it has become necessary to begin the Administrative Process" and that Respondent could "stop this action by responding no later than August 29, 2005, with payment in full of the wages owed." By letter dated November 3, 2005, Respondent's counsel at the time followed up on a conversation with Freytag stating, in pertinent part:

"Mr. Bulubenchi believes that the wages due were \$15,306, minus various setoffs. As a result of those setoffs, he believes that \$6,942 is actually

due. This is computed as follows

1. Adrian was due \$4,540, but was paid \$1,500 in cash at his request. Thus, he is due \$2,040.

2. Ray was due \$5,902, but he agreed to have \$3,500 deducted from his pay for a truck he purchased from Mr. Bulubenchi. Thus, he is due \$2,402.

3. Martin was due \$4,944, but Mr. Bulubenchi paid taxes on his behalf. Thus, his [sic] is due approximately \$2,500."

Thereafter, an Order of Determination issued on February 21, 2006, alleging Respondent owed \$16,385.50 in unpaid wages to Claimants.

14) All of the witnesses testified credibly.

#### **ULTIMATE FINDINGS OF FACT**

1) At times material, Respondent was an individual conducting business in Oregon and engaged or utilized the services of one or more persons in the operation of that business.

2) Respondent employed Claimant M. Perez in Oregon as a construction worker from April 1 through May 30, 2005.

3) Respondent agreed to pay Claimant M. Perez \$17 per hour.

4) Between April 1 and May 30, 2005, Claimant M. Perez worked 446 hours, 118.5 of which

were overtime hours, earning \$8,589.25. Respondent paid Claimant M. Perez only \$2,000 and owes him \$6,589.25 in due and unpaid wages.

5) Respondent employed Claimant R. Perez in Oregon as a construction worker from April 1 through May 31, 2005.

6) Respondent agreed to pay Claimant R. Perez \$13 per hour.

7) Between April 1 and May 31, 2005, Claimant R. Perez worked 453 hours, 117.5 of which were overtime hours, earning \$6,652.75. Respondent paid Claimant R. Perez only \$2,000 and owes him \$4,652.75 in due and unpaid wages.

8) Respondent employed Claimant A. Zuniga in Oregon as a construction worker from April 1 through May 31, 2005.

9) Respondent agreed to pay Claimant A. Zuniga \$10 per hour.

10) Between April 1 and May 31, 2005, Claimant A. Zuniga worked 453 hours, 117.5 of which were overtime hours, earning \$5,117.50. Respondent paid no wages to Claimant A. Zuniga and owes him \$5,117.50 in due and unpaid wages.

11) On Claimants' behalf, BOLI sent Respondent written notice of nonpayment of wages on June 27 and July 15, 2005, before issuing an Order of Determination on February 17, 2006.

12) Respondent willfully failed to pay Claimants total wages due of \$16,359.50 in

earned, due and payable wages. Respondent has not paid the wages owed and more than 30 days have elapsed from the date the wages were due.

13) Penalty wages for Claimants, computed pursuant to ORS 652.150, equal \$4,080 (Claimant M. Perez - \$17 per day x 8 hours per day x 30 days), \$3,120 (Claimant R. Perez - \$13 per day x 8 hours per day x 30 days), and \$2,400 (Claimant A. Zuniga - \$10 per day x 8 hours per day x 30 days).

14) Respondent paid Claimants less than the wages to which they were entitled and civil penalties, computed pursuant to ORS 652.150, total \$4,080 (Claimant M. Perez - \$17 per day x 8 hours per day x 30 days), \$3,120 (Claimant R. Perez - \$13 per day x 8 hours per day x 30 days), and \$2,400 (Claimant A. Zuniga - \$10 per day x 8 hours per day x 30 days).

#### CONCLUSIONS OF LAW

1) At all times material herein, Respondent was an employer and Claimants were employees subject to the provisions of ORS 652.110 to 652.200, 652.310 to 652.405, and ORS 653.010 to 261.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and the Respondent herein. ORS 652.310 to 652.414.

3) Respondent violated ORS 652.140 by failing to pay Claim-

ants all wages earned and unpaid after their employment terminated.

4) Respondent is liable for penalty wages under ORS 652.150 for willfully failing to pay all wages or compensation earned and due to Claimants when their employment terminated, as provided in ORS 652.140.

5) Respondent is liable for civil penalties under ORS 653.055 for failing to pay Claimants overtime wages to which they were entitled pursuant to ORS 653.261 and OAR 839-020-0030(1). ORS 653.055.

6) Under the facts and circumstances of this record, and according to the applicable law, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondent to pay Claimants their earned, unpaid, due and payable wages, penalty wages, and civil penalties, plus interest on those sums until paid. ORS 652.332.

#### OPINION

The Agency moved for partial summary judgment on the merits based on Respondent's admission in the pleadings that he owed Claimants at least \$6,942 in wages. The Agency also sought judgment on the merits as to the penalty wages and civil penalties sought in the Order of Determination. Based on Respondent's failure to raise a genuine issue of fact in response to the Agency's motion, partial summary judgment was granted. Respondent was deemed liable for unpaid wages totaling \$6,942, penalty wages to-

taling \$9,600, and civil penalties totaling \$9,600. The ruling granting partial summary judgment is hereby confirmed.

The sole factual issue remaining is whether Respondent owed Claimants an additional \$9,417.50 in unpaid wages. When Respondent failed to appear at hearing, the Agency was required to establish a prima facie case to support its contention that Respondent owed Claimants the additional amount of unpaid wages. *In the Matter of Peter N. Zambetti*, 23 BOLI 234, 241 (2002). Respondent's unsworn assertions contained in his answer may be considered when making factual findings, but those assertions are overcome by other credible evidence. *Id.*

In this case, Respondent did not dispute he employed Claimants for the periods and pay rates Claimants claimed or that they collectively were due at least \$15,346. Rather, Respondent claimed "deductions" for amounts purportedly paid to Claimants or on their behalf. In his answer, Respondent alleged 1) he paid taxes totaling \$2,444 on Claimant M. Perez's behalf and owes him only \$2,500; 2) Claimant R. Perez requested Respondent deduct \$3,500 from his wages "as payment for a truck he purchased from [Respondent]" and therefore is owed only \$2,402; and 3) Claimant A. Zuniga was owed \$4,500, but was paid \$1,500 "in cash at his request" and is therefore due only \$3,040. Respondent did not produce any

evidence to support his contentions in response to the Agency's motion for summary judgment and did not appear at hearing to controvert the Agency's evidence establishing the amounts owed each Claimant. Instead, Respondent's unsworn assertions were overcome by credible testimonial and documentary evidence showing Claimants are owed unpaid wages totaling \$16,359.50, which is only \$1,013.50 more than the amount Respondent admitted was due Claimants, less the alleged deductions. Based on the preponderance of credible evidence in the record and absent evidence that Respondent was entitled to deduct the amounts alleged in his answer, the forum concludes Respondent is liable for the additional amount of unpaid wages earned and owed to Claimants.

#### ORDER

NOW, THEREFORE, as authorized by ORS 652.332, and as payment of the unpaid wages, penalty wages, and civil penalties, Respondent **Pavel Bulubenchidba Benchi Homes** is hereby ordered to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, the following:

A certified check payable to the Bureau of Labor and Industries, in trust for Claimant Martin Perez-Dominguez, in the amount of FOURTEEN THOUSAND SIX HUNDRED SIXTY NINE DOLLARS AND

TWENTY FIVE CENTS (\$14,669.25), less appropriate lawful deductions, representing \$6,589.25 in gross earned, unpaid, due and payable wages, \$4,080 in penalty wages, and \$4,080, in civil penalties, plus interest at the legal rate on the sum of \$6,589.25 from July 1, 2005, until paid, and interest at the legal rate on the sum of \$8,160 from August 1, 2005, until paid.

A certified check payable to the Bureau of Labor and Industries, in trust for Claimant Raymundo Perez-Dominguez, in the amount of TEN THOUSAND EIGHT HUNDRED NINETY TWO DOLLARS AND SEVENTY FIVE CENTS (\$10,892.75), less appropriate lawful deductions, representing \$4,652.75 in gross earned, unpaid, due and payable wages, \$3,120 in penalty wages, and \$3,120, in civil penalties, plus interest at the legal rate on the sum of \$4,652.75 from July 1, 2005, until paid, and interest at the legal rate on the sum of \$6,240 from August 1, 2005, until paid.

A certified check payable to the Bureau of Labor and Industries, in trust for Claimant Adrian Zuniga-Ramirez, in the amount of NINE THOUSAND NINE HUNDRED SEVENTEEN DOLLARS AND FIFTY CENTS (\$9,917.50), less appropriate lawful deductions, representing \$5,117.50 in gross earned, unpaid, due and payable wages, \$2,400 in pen

alty wages, and \$2,400, in civil penalties, plus interest at the legal rate on the sum of \$5,117.50 from July 1, 2005, until paid, and interest at the legal rate on the sum of \$4,800 from August 1, 2005, until paid.

dence to establish that the remaining two claimants were employed by Respondent Steensland. In total, the Commissioner awarded \$4,217.30 in unpaid wages and \$14,904 in penalty wages. ORS 652.140(2), ORS 652.150.

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**In the Matter of  
JOHN STEENSLAND & PACIFIC  
YEW PRODUCTS, LLC**

**Case No. 46-05  
Final Order of Commissioner  
Dan Gardner  
Issued August 3, 2007**

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**SYNOPSIS**

The Agency's Order of Determination alleged that Respondents owed unpaid, due and owing wages to 14 wage claimants. The Commissioner held that Respondent Steensland employed 12 of the wage claimants and dismissed all claims against Respondent Pacific Yew Products, LLC, on the grounds that the Agency did not establish that it employed any of the claimants. The Commissioner awarded unpaid wages and penalty wages to nine claimants and found that three claimants were employed by Respondent Steensland, but there was no reliable evidence to establish the amount and extent of their work and the amount of wages they were owed, if any. The Commissioner held that there was no reliable evi-

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The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Dan Gardner, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on April 24 and 25, 2007, at the offices of the Oregon Employment Dept, located at 119 N. Oakdale Avenue, Medford, OR 97501.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Jeffrey C. Burgess, a case presenter employed by the Agency. Claimants Jose V. Leobardo, Juan Carlos Cordoba, Jose T. Cordoba, Raymundo Rodriguez, Ruben Hernandez, and Rene Hernandez testified in person or by phone and were not represented by counsel. Respondents did not appear at hearing and were held in default. Also present throughout the hearing was Karina Scott, an interpreter in Spanish, who translated the proceedings in their entirety.

The Agency called as witnesses: Jose V. Leobardo, Juan Carlos Cordoba, Jose T. Cordoba, Raymundo Rodriguez-Flores

(telephonic), Ruben Hernandez (telephonic), Rene Hernandez (telephonic), wage claimants; Randy Nice, OR-OSHA safety consultant (telephonic); and Raul Ramirez, former Wage and Hour Division compliance specialist.

The forum received into evidence:

a) Administrative exhibits X-1 through X-7 (submitted or generated prior to hearing);

b) Agency exhibits A-1 through A-32 (submitted prior to hearing), and A-33 through A-41 (submitted at hearing).

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

#### **FINDINGS OF FACT – PROCEDURAL**

1) On July 25, 2003, Claimant Jose L. Valle filed a wage claim with the Agency alleging that Respondent John Steensland ("Respondent Steensland") had employed him and failed to pay wages earned and due to him. At the time he filed his wage claim, Claimant assigned to the Commissioner of the Bureau of Labor and Industries, in trust for Claimant, all wages due from Respondent Steensland.

2) On July 26, 2003, Jose Valles filed a wage claim with the Agency alleging that Respondent

Steensland had employed him and failed to pay wages earned and due to him. At the time he filed his wage claim, Claimant assigned to the Commissioner of the Bureau of Labor and Industries, in trust for Claimant, all wages due from Respondent Steensland.

3) On July 29, 2003, Claimants Joel Hernandez, Ruben Hernandez, Rene Hernandez, and Fidel Perez filed wage claims with the Agency alleging that Respondent Steensland had employed them and failed to pay wages earned and due to them. At the time they filed their wage claims, Claimants assigned to the Commissioner of the Bureau of Labor and Industries, in trust for Claimants, all wages due from Respondent Steensland.

4) On July 30, 2003, Claimant Serafin R. Garduno filed a wage claim with the Agency alleging that Respondent Steensland had employed him and failed to pay wages earned and due to him. At the time he filed his wage claim, Claimant assigned to the Commissioner of the Bureau of Labor and Industries, in trust for Claimant, all wages due from Respondent Steensland.

5) On August 1, 2003, Claimant Heladio R. Soto filed a wage claim with the Agency alleging that Respondent Steensland had employed him and failed to pay wages earned and due to him. At the time he filed his wage claim, Claimant assigned to the Commissioner of the Bureau of Labor and Industries, in trust for Claim-

ant, all wages due from Respondent Steensland.

6) On August 1, 2003, Claimant Santana R. Soto filed a wage claim with the Agency alleging that Respondent Steensland had employed him and failed to pay wages earned and due to him. At the time he filed his wage claim, Claimant assigned to the Commissioner of the Bureau of Labor and Industries, in trust for Claimant, all wages due from Respondent Steensland. However, Soto did not sign his wage claim and assignment of wages. On September 16, 2003, he filed a second wage claim covering the same work that included a signed wage claim and assignment of wages.

7) On October 2, 2003, Claimants Jose Toledo Cordoba and Raymundo Rodriguez-Flores filed wage claims with the Agency alleging that Respondent Steensland and Sergio Sanchez had employed them and failed to pay wages earned and due to them. At the time they filed their wage claims, Claimants assigned to the Commissioner of the Bureau of Labor and Industries, in trust for Claimants, all wages due from Respondent Steensland.

8) On October 2, 2003, Claimant Juan Carlos Cordoba filed a wage claim with the Agency alleging that Sergio Sanchez had employed him and failed to pay wages earned and due to him. At the time he filed his wage claim, Claimant assigned to the Commissioner of the Bureau of Labor and Industries, in trust for Claim-

ant, all wages due. At hearing, Juan Carlos Cordoba testified that his father, Jose Toledo Cordoba, had signed his wage claim and assignment of wages. The ALJ allowed Juan Carlos Cordoba to amend his wage claim and assignment of wages by signing and dating copies of the original documents and admitted those amended documents.

9) On October 27, 2003, Claimant Gilberto R. Soto filed a wage claim with the Agency alleging that Respondent Pacific Yew Products ("Respondent PYP") had employed him and failed to pay wages earned and due to him. At the time he filed his wage claim, Claimant assigned to the Commissioner of the Bureau of Labor and Industries, in trust for Claimant, all wages due from Respondent PYP.

10) On March 12, 2004, Claimant Alberto E. Ruiz filed a wage claim with the Agency alleging that Respondent Pacific Yew Products LLC had employed him and failed to pay wages earned and due to him. At the time he filed his wage claim, Claimant assigned to the Commissioner of the Bureau of Labor and Industries, in trust for Claimant, all wages due from Respondent PYP.

11) Claimants brought their wage claims within the statute of limitations.

12) On July 1, 2004, the Agency issued Order of Determination No. 03-2609 based upon the wage claims filed by the aforementioned 14 wage claim-

ants. The Order of Determination alleged that the wage claimants had been employed in Oregon by Pacific Yew Products, LLC and John Steensland on specific dates in 2003, that they performed work, labor, and services, and that they were paid all wages due and owing to them except the sum of \$9,778.77. The Order also alleged that Respondents willfully failed to pay that those wages, that more than 30 days had elapsed since the wages became due and owing, that the wage claimants' daily rate of pay was \$55.20 per day (based on an hourly rate of \$6.90 per hour), and that Respondents owed the wage claimants \$23,184 in penalty wages. Finally, the Agency alleged that that Respondents paid the wage claimants less than the wages to which they were entitled under ORS 653.010 to 653.261 and that Respondents were liable to the wage claimants for civil penalties pursuant to the provisions of ORS 653.055(1)(b) in the amount of \$23,184. The Order of Determination required that, within 20 days, Respondents either pay these sums in trust to the Agency, request an administrative hearing and submit an answer to the charges, or demand a trial in a court of law.

13) The Order of Determination sought the following specific amounts of unpaid wages for each claimant for the dates listed below:

a) Joel Hernandez: \$605.01 (7/08/03 to 7/25/03);

b) Ruben Hernandez: \$824.71 (7/08/03 to 7/25/03);

c) Rene V. Hernandez: \$824.71 (7/08/03 to 7/25/03);

d) Fidel Perez: \$158.10 (7/24/03 to 7/25/03);

e) Jose Valles: \$605.16 (7/20/03 to 7/25/03);

f) Jose V. Leobardo: \$605.16 (7/20/03 to 7/25/03);

g) Serafin R. Garduno: \$141.00 (7/08/03 to 7/25/03);

h) Heladio R. Soto: \$960.15 (7/06/03 to 7/29/03);

i) Santana R. Soto: \$960.15 (7/06/03 to 7/29/03);

j) Jose Toledo Cordoba: \$1,009.37 (7/08/03 to 7/29/03);

k) Raymundo Rodriguez-Flores: \$543.31 (7/08/03 to 7/25/03);

l) Juan Carlos Cordoba: \$465.12 (7/08/03 to 7/25/03);

m) Gilberto R. Soto: \$1,129.29 (7/06/03 to 7/29/03);

n) Alberto E. Ruiz: \$947.53 (5/26/03 to 7/06/03).

14) On August 18, 2004, Respondent Steensland filed a request for hearing. On August 23, 2004, the Agency sent him a notice stating that his answer was insufficient because it did not include "an admission or denial of each fact alleged in the [Notice or Order] and a statement of each relevant defense to the allegations." In response, Respondent Steensland filed an answer on September 30, 2004. Summa-

rized, his answer included the following defenses:

- a) Steensland denied responsibility for the wages allegedly owed to the wage claimants.
- b) His crews did not begin working on location until June 3, 2004.
- c) Steensland did everything possible to help to get everyone paid when there was payment.
- d) Loyd Mixion also ran a crew, but bailed out and turned the crew over to Sergio. Steensland paid Sergio 25 cents a pound and Sergio paid his workers 20 cents a pound.
- e) On August 1, Steensland paid Sergio \$6,000 and paid all his crews some money.
- f) Steensland paid his crew that did not file wage claims and trusted they would be paid.
- g) On September 1, Steensland paid Raul [Ramirez] \$25,000 in wages owed and also paid Sergio \$5,000.
- h) On September 18, Steensland paid Sergio in full. Steensland and Sergio had a meeting with the Labor Board and were told that everyone who filed a claim would be paid through the state. When Steensland received money, he paid the Labor Board.
- i) Steensland thinks Sergio took the money and left town.

j) Steensland should not be held responsible for money that he has already paid out.

15) On July 27, 2004, Respondent PYP, through attorney Dan Clark, filed an answer and request for hearing. In the answer, Respondent PYP raised the following defenses:

- a) The wage claimants were not employed by PYP during the alleged wage claim periods.
- b) BOLI incorrectly determined that PYP willfully failed to pay the unpaid wages alleged in the Order of Determination.
- c) BOLI incorrectly determined that PYP paid the wage claimants less than wages to which they were entitled under "ORS 653.0102" and 653.261.
- d) The wage claimants were not the employees of PYP. PYP contracted with Respondent Steensland to harvest yew bark; Steensland had complete control over hiring and firing his harvest crew; PYP did not interview or select any of Steensland's crew; and PYP had no authority to terminate any of Steensland's crew.
- e) PYP had no control over how Steensland conducted the yew harvest.
- f) PYP paid Steensland according to the contract, and Steensland was responsible for paying his harvest crew. PYP paid Steensland \$220,686.15 by making periodic transfers to Steensland's

account at Klamath First Federal Bank and only Steensland issued checks to or paid any wages to the harvest crew.

16) On March 20, 2007, the Agency filed a "BOLI Request for Hearing" with the forum.

17) On March 21, 2007, the Hearings Unit issued a Notice of Hearing to Respondents, the Agency, and the Claimants stating the time and place of the hearing as April 24, 2007, at the office of the Oregon Employment Dept, 119 N. Oakdale Avenue, Medford, Oregon. Together with the Notice of Hearing, the forum sent a copy of the Order of Determination, a document entitled "Summary of Contested Case Rights and Procedures" containing the information required by ORS 183.413, a document entitled "Servicemembers Civil Relief Act (SCRA) Notification, and a copy of the forum's contested case hearings rules, OAR 839-050-000 to 839-050-0440.

18) On April 17, 2007, Dan Clark, the attorney who filed an answer and request for hearing on Respondent PYP's behalf, sent a letter to the Commissioner in which he stated that he "is no longer registered agent for Pacific Yew Products, LLC as of April 3, 2007." Clark enclosed the copy of the Agency's case summary that the agency case presenter had mailed to him on April 13, 2007.

19) At the time set for hearing, neither Respondent had appeared and had not previously announced that they would not

appear. Pursuant to OAR 839-050-0330(2), the ALJ waited 30 minutes before commencing the hearing. When Respondents did not appear or contact the hearings unit by telephone during that time, the ALJ declared both Respondents in default at 9:30 a.m. and commenced the hearing. Statement of ALJ)

20) At the outset of the hearing, the ALJ explained the issues involved in the hearing, the matters to be proved, and the procedures governing the conduct of the hearing.

21) At the end of the hearing, the Agency moved to dismiss the charges in the Order of Determination that sought civil penalties for the 14 claimants. The ALJ granted the motion.

22) The ALJ issued a proposed order on June 20, 2007, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. No exceptions were filed.

#### **FINDINGS OF FACT – THE MERITS**

1) On November 1, 2002, the Swanson Group, Inc. granted a "Specialized Forest Products Permit" to "Pacific Yew Products." The permit gave Pacific Yew Products ("Permittee") the "non-exclusive right, license and permission to enter and be upon Swanson Group Lands \* \* \* for the purpose of collecting and removing Pacific yew limbs and needles (Yew Pruning) for Taxol extrac-

tion.” The Permit contained the following terms and provisions:

**“1. Terms**

“Permittee may begin product removal by November 1, 2002 and shall complete product removal by October 31, 2003.

**“2. Consideration**

“Consideration shall be **2.5 cents** per pound (green) of Pacific yew removed from the permitted premises. Permittee shall submit copies of trip tickets on a monthly basis to the Landowner. Payment shall be due within 15 days of submission of the trip tickets.

**“3. Harvest Provisions**

Permittee shall notify landowner at the onset and completion of activity in each area.

No Yew harvest within 60’ of either side of riparian management areas or stream zones as defined by the Oregon Department of Forestry [sic].

Permittee shall be responsible for any taxes due and payable as a result of the yew harvest activity.

Comply with all Oregon Department of Forestry Fire regulations. In addition, no smoking will be permitted inside forested areas.

Maintain or repair all damage to roads caused by Permittee’s actions and shall confine the

use of all-terrain vehicles to existing roads or skid trails.

Shall not damage reproduction including but not limited to seedlings and poles, during harvest or haul of yew products.

Shall not harvest Yew trees limbs greater the [sic] ½ inch in diameter and shall leave at least 50% of the crown unpruned.

Permittee shall identify those areas harvested on the provided permit maps.

Permittee shall mark all material removed from grantor’s property with a unique tag or marker and submit a summary of daily production by unit at the end of each month.

**“4. Assignment**

“This Permit and performance required of Permittee hereunder are personal in nature and may not be assigned or sublet by it without written consent of landowner, and any violation or attempted violation shall constitute a material breach of the permit.

**“5. Fire Liability**

“Permittee shall, at it’s [sic] expense, exercise the highest degree of care to prevent fires from originating upon, spreading from and coming upon said premises from other premises. Permittee or [sic] shall, at it’s [sic] expense, use every effort at it’s [sic] command to suppress, control and prevent fires

arising upon said premises, spreading from said premises and spreading to said premises from other premises.

“Permittee shall immediately report to Landowner any such fire.

“Permittee shall do all things required by law and the rules and regulations of any federal, state, county or other governing body or bureau or department thereof which are required to be done for the suppression, control and prevention of any such fire. Permittee shall immediately, upon request by Landowner, furnish necessary men and equipment to suppress or prevent fires endangering lands under Landowner control. Permittee will be reimbursed by state or Landowner using rates for labor and equipment as established by State Board of Forestry. Permittee shall provide and maintain, in good order, sufficient fire fighting tools, pumps and other fire fighting equipment at it's [sic] place of operations hereunder at all times.

#### **“6. Indemnity and Insurance**

“Permittee shall indemnify and hold Landowner harmless from and against all of the following arising or originating during the course of or on account of any of Permittee's operations hereunder:

- a) All losses, costs, liabilities, obligations, damages, debts, liens and claims

whatsoever (including but not limited to the expense of suppression or control of any fire); and

- b) All liability to third persons (including but not limited to Landowner's employees) for all personal injury and death; and

- c) All loss or damage of property of Landowner's as well as third persons.

“Before commencing operations under this Permit, Permittee [sic] at his own expense and cost, shall procure such policies in a company satisfactory to Landowner, indemnifying and insuring Permittee against liabilities enumerated and particularly:

- a) For personal injuries to or death of any one person for not less than \$1,000,000.00, and for personal injuries to or death of more than one person for not less than \$1,000,000.00 arising out of each occurrence, whether such person or persons is or are employees of Landowner or other third persons; and

- b) For injury to or destruction of property of others, including Landowner and other third persons, for not less than \$1,000,000.00 each occurrence in respect to claims arising out of occurrences other than automobile hazards; and

c) For injury to or destruction of property of others, including Landowner and other third persons, for not less than \$1,000,000.00 each occurrence in respect to claims arising from ownership, maintenance, operation or use of automobiles; and

d) Such policies shall contain provisions for **thirty day written** notice to each Landowner and Permittee of cancellation, termination or any reduction in coverage.

"The coverage, of all said insurance obtained by Contractor shall be written on a Loggers Broad Form Comprehensive Liability\* policy, including automobile and all of Permittee's operations other than automobile including coverage for Loggers Broad Form Comprehensive Liability, Products and Completed Operations. Landowner shall be named as additionally insured on such policies. Landowner shall at all times during the term of the contract maintain such policy(s) in force.

#### **"7. Remedy and Right for Default or Breach**

"In the event of any default by Permittee, if such default is not fully repaired and remedied, and no other default exists, within ten days after mailing of written notice from Landowner to Permittee, this contract, at

Landowner's option, may be canceled, without waiver of damages for any defaults preceding the effective date of cancellation. In addition, Landowner shall be entitled to every other right and remedy in law, equity, or otherwise, and no specified or exercised right or remedy shall be exclusive, but rather cumulative.

"Time is of the essence of this agreement and strict performance by Permittee of every term, condition and stipulation is expressly declared to be required under this agreement.

#### **"8. Suspension of Operations**

"Despite anything in this Permit to the contrary, Landowner may at any time or times during the life of this agreement, direct Permittee to cease all or any part of its operations hereunder.

"Permittee agrees to follow such instructions implicitly and to discontinue all of such part of its operations in accordance with Landowner's instructions and to resume such operations at the time and in the manner as may be instructed by Landowner.

#### **"9. Miscellaneous Provisions**

"Reference to Company herein includes its successors and assigns.

"In the event of any suit, action or other proceeding between the parties hereto on account of any term or provision hereof

or anything arising hereunder, it is understood and agreed that Landowner shall be entitled to such sum as and for attorney fees as the Court shall deem reasonable, in addition to costs and disbursements provided by statute. The same shall also apply to any appeal.

“Permittee agrees to insure that all aspects of operations covered by this agreement comply with the most current OSHA regulations and that employee safety is the primary concern.”

2) Around the same time the Specialized Forest Products Permit was granted to Pacific Yew, Ed Reed contacted Respondent Steensland to see if he would “run some crews for him harvesting yew boughs and later bark.”

3) Ed Reed and Respondent Steensland had previously done business together from May 1996 through May 1998 under the assumed business name of Reed Secondary Forest Products. When registering with the Oregon Corporations Division, Reed Secondary Forest Products named “Harold Reed” as its authorized representative. “Ed Reed,” “Harold Reed,” and “Harold E. Reed,” referred to in this Order are the same person.

4) On May 4, 1998, Reed Secondary Forest Products, Inc., registered with the Corporations Division as a domestic corporation, with Harold Reed listed as its registered agent. On July 1,

1999, it was involuntarily dissolved.

5) On May 23, 2003, Harold E. Reed signed a “Supplemental Agreement” on behalf of Pacific Yew Products that modified the Specialized Forest Products Permit. It contained the following terms and provisions:

**“1. WORK TO BE PERFORMED**

“In Addition to yew bark and limbs Permittee may also harvest bark from Pacific yew trees. Permittee shall submit copies of trip tickets for both Bark harvest and Limb and Needle harvest removed from permitted area as detailed in the attached exhibit.

**“2. CONSIDERARION [sic]**

“\$.25 per pound (green) of Pacific yew bark. Needles and limbs may be removed at **no cost** to the Permittee. Trip or load tickets shall be submitted on a monthly basis to the landowner. Payment shall be due within 15 days of submission of the trip tickets.

**“3) HARVEST PROVISIONS**

“Permittee shall not harvest yew trees smaller the [sic] 5” or lager [sic] then [sic] 20” inches or harvest within 100’ of either side of a riparian management area or stream zone as defined by the Oregon Department of Forestry.”

“All other terms of this Permit shall remain enforce [sic].”

6) Effective May 12, 2003, Respondent Steensland purchased a Loggers Broad Form liability insurance policy with Hometown Insurance Center for the following coverage:

Each occurrence: \$1,000,000  
 Damage to rented premises (each occurrence): \$200,000  
 Med Exp (Any one person): \$10,000  
 Personal & Adv Injury: \$1,000,000  
 General Aggregate: \$2,000,000  
 Products – Comp/Op Agg: \$2,000,000

The policy was in effect until May 12, 2004, and the certificate holder was Swanson Group, Inc.

7) On May 15, 2003, Respondent Steensland and Ed Reed, acting on behalf of Pacific Yew Products, LLC, signed a contract that contained the following terms:

“This agreement is entered into between Pacific Yew Products, LLC (hereafter “Owner”) and John Steensland<sup>1</sup> (hereafter “Contractor”).

“Owner and Contractor have agreed that Contractor shall harvest bark, limbs and needles from Pacific yew trees for Owner subject to the harvest conditions attached hereto. Owner agrees to pay Contractor .90 bark/.27 boughs – boughs shall be no larger than 1/4” in dia. per pound of yew biomass collected and delivered to Owner.

“Contractor shall confine its harvest operation to the following areas: See attached.

“Contractor shall furnish all labor, materials, equipment, tools, and incidentals that are necessary for proper performance of the harvest operation. Contractor will be responsible for the means and methods used for the harvest operation. Contractor shall provide and supervise qualified workers.

“Contractor shall take reasonable precautions to prevent injury to persons and damage to property that may result from Contractor’s harvest operations and comply with the Fire Supervision conditions attached hereto. Contractor shall insure that all aspects of its harvest operations comply with the most current OSHA regulations.

“Before commencing operations under this agreement, Contractor at his own expense shall have the following insurance in place and provide Owner with copies of policies showing the following minimum coverage:

“a. For personal injuries to or death of any one person for not less than \$1,000,000 and for personal injuries to or death of more than one person for not less than \$1,000,000 arising out of each occurrence, whether such person or persons is or are employees of Contractor or other third persons; and

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<sup>1</sup> Underlined text was handwritten.

"b. For injury to or destruction of property of others for not less than \$1,000,000 each occurrence;

"c. Such policies shall contain provisions for at least [sic] ten (10) days written notice to Owner of cancellation, termination or any reduction in coverage.

"The coverage of all insurance obtained by Contractor shall be written on a Loggers Broad Form Comprehensive Liability policy, including automobiles. Owner shall be named as additionally insured on such policies. Contractor shall at all times during the term of this contract maintain such policy(s) in force.

"Owner will not withhold any employer or employee taxes whatsoever from any payment made under this agreement. Contractor is solely responsible for paying all payroll taxes subject to withholding under state or federal regulations.

"Contractor agrees to defend and indemnify Owners from any claims arising from Contractor's performance of the services hereunder including claims arising from injury to any person or damage to property. Contractor will not be responsible for claims resulting solely from the negligence of the Owner.

"Contractor may be a 'subject employer' for purposes of maintaining worker's compensation coverage. It is

Contractor's responsibility, not Owner's, to determine the need for and provide worker's compensation coverage. If Contractor fails to provide worker's compensation insurance, Contractor shall defend[,] indemnify[,] and hold harmless the Owner from any claims, actions, damages, and costs arising out of injuries suffered by Contractor or Contractor's employees that would have been abrogated by the worker's compensation provisions of Oregon law.

"In the event of any default by Contractor, if such default is not fully repaired and remedied and no other default exists, within ten days after mailing of written notice from Owner to Contractor, this contract, at Owners [sic] option, may be canceled, without waiver of damages for any defaults preceding the effective date of cancellation. In addition, Owner shall be entitled to every other right and remedy in law, equity, or otherwise and no specified or exercised right or remedy shall be exclusive, but rather cumulative. Strict performance by Contractor of every term, condition and stipulation is expressly declared to be required under this agreement. Despite anything in this contract to the contrary, if the Owner is directed by the Landowner to cease or suspend harvest operations, then in that event, the Owner will direct Contractor to cease and

suspend all or any part of its operations hereunder.

"In the event of any suit, action or other proceeding between the parties hereto on account of any term or provision hereof or anything arising hereunder, it is understood and agreed that the prevailing party shall be entitled to recover those attorney fees the Court may deem reasonable, in addition to costs and disbursements provided by statute. The same shall also apply to any appeal."

The contract contained three attachments, two related to "Harvest Conditions," "Fire Suppression," and the third a chart providing the legal description for the area in which yew was to be harvested. Printed on the chart were the words "Permittee: Reed Secondary Forest Products."

8) On June 30, 2003, Pacific Yew Products, LLC, registered as a limited liability company with the Corporations Division.

9) Workers began harvesting yew products on the property that was the subject of the permit issued by Swanson (the "yew harvest") as early as June 3, 2003. The workers worked in groups. Most of the workers harvested the yew branches and bark, then bundled and sacked it. The remaining workers transported the harvested product to electronic scales to be weighed and loaded into a truck.

10) Workers who harvested the yew branches and bark were told they would be paid either \$.20

per pound or \$.25 per pound. Workers who transported the harvested product were told they would be paid \$75 per day and \$.05 per pound.

11) A worker named Sergio Sanchez who spoke English and Spanish acted as an interpreter for Respondent Steensland and the workers. Sergio's primary job was transporting the harvested product. Sergio also maintained a tally sheet book in which he wrote the number of pounds harvested, by date and group, for the workers.

12) The number of workers on the job varied daily and some of the worker groups had different members on different days, depending on who showed up for work. Some workers showed up to work after being told about the yew harvest by their friends and did not know for whom they were working.

13) Respondent Steensland was an independent contractor who operated his own business during the yew harvest in June and July 2003. During the yew harvest, he had the ultimate responsibility for directing and controlling the workers, including the wage claimants. He had the responsibility and authority to hire and fire the workers. He told the workers that they worked for him and the workers understood that he was the boss. He provided the workers with equipment, including some hardhats, electronic scales for weighing the bark, shovels, fire extinguishers, earplugs, chaps, chain saws, and fuel, and vehicles

for obtaining the yew bark and transferring it to trailers.

14) During the yew harvest, PYP held the harvest permit and contracted with Respondent Steensland, in his capacity as an independent contractor, to harvest the bark. Reed also provided some earplugs and hardhats to workers, as well as two portable toilets on the jobsite. He purchased bags for storing yew bark and gave them to Steensland. He also contracted with Ashland Towing to haul refrigerated trailers loaded with yew product to Portland.

15) During the yew harvest, PYP made payments to Respondent Steensland, who then wrote checks to the workers on his personal account.

16) Some workers were paid at first on a daily basis, then a weekly basis, then not paid at all. Some workers were never paid anything while they worked on the yew harvest. Some workers were unable to cash their paychecks.

17) Some of the paychecks written by Respondent Steensland were made out to one person, who was supposed to cash it and distribute the money. For example, Respondent Steensland made out one check for \$5,000 to Sergio Sanchez. Others only had an amount written in, but the name of the person was left blank. No deductions were taken from the checks.

18) Neither Steensland nor Reed carried workers' compensa-

tion insurance during the yew harvest.

19) Joel Hernandez was hired to harvest yew needles and bark at the piece rate of \$.20 per pound. He worked July 8-11, 14-16, and 23-25, 2003, and harvested a total of 4969 pounds, earning gross wages of \$993.80. He worked in a group that included Ruben and Rene Hernandez and they all worked the same dates and hours. He was paid \$150 while he worked on the yew harvest, leaving \$843.80 in wages due and owing when he stopped working on the yew harvest.

20) Ruben Hernandez was hired to harvest yew needles and bark at the piece rate of \$.20 per pound. He worked the same dates and in the same group as Joel Hernandez, harvested 4969 pounds, and earned gross wages of \$993.80.<sup>2</sup> He was paid \$317.00 while he worked on the yew harvest, leaving \$676.80 in wages due and owing when he stopped working on the yew harvest.

21) Rene Hernandez was hired to harvest yew needles and

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<sup>2</sup> The Agency calculated his wages earned as \$1,467.20, based on the same number of pounds picked as Joel Hernandez. However, the Agency mistakenly calculated that Ruben Hernandez earned \$844.00 for the 1853 pounds picked during his first week of work. In contrast, the same program correctly calculated that Joel Hernandez earned \$370.60 (1853 pounds x \$.20 = \$370.60).

bark at the piece rate of \$.20 per pound. He worked the same dates and in the same group as Joel and Ruben Hernandez, harvested 4969 pounds, and earned gross wages of \$993.80.<sup>3</sup> He was paid \$317.00 while he worked on the yew harvest, leaving \$676.80 in wages due and owing when he stopped working on the yew harvest.

22) Fidel Perez was hired to harvest yew needles and bark at the piece rate of \$.20 per pound. He worked July 24-25, 2003, in the same group as Joel, Ruben, and Rene Hernandez, and harvested a total of 882 pounds, earning gross wages of \$176.40.<sup>4</sup> He was not paid any wages prior to filing his wage claim, leaving \$176.40 in wages due and owing when he stopped working on the yew harvest.

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<sup>3</sup> The Agency calculated his wages earned as \$1,467.20, based on the same number of pounds picked as Joel and Ruben Hernandez. However, the Agency mistakenly calculated that Rene Hernandez earned \$844.00 for the 1853 pounds picked during his first week of work, instead of the correct amount of \$370.60 (1853 pounds x \$.20 = \$370.60).

<sup>4</sup> The Agency calculated his wages earned as \$220.50, based on harvesting 882 pounds. However, the Agency apparently arrived at this sum by multiplying 882 pounds by \$.25 (882 pounds x \$.25 = \$220.50). The correct calculation is 882 pounds x \$.20 (Perez's agreed piece rate) = \$176.40.

23) Jose Valles was hired to harvest yew needles and bark at the piece rate of \$.20 per pound. He worked in a group with and worked the same hours as Jose V. Leobardo, his cousin, from July 20 to July 25, 2003, and harvested a total of 4220 pounds, earning gross wages of \$844.00. He was not paid any wages while he worked on the yew harvest, leaving \$844.00 in wages due and owing when he stopped working on the yew harvest.

24) Jose V. Leobardo was hired by Respondent Steensland to harvest yew needles and bark at the piece rate of \$.20 per pound. He was told he would be paid every two weeks. He worked in a group with and worked the same hours as Jose Valles, his cousin, from July 20 to July 25, 2003, and harvested a total of 4220 pounds, earning gross wages of \$844.00. He was supervised by Sergio and was told that everything picked by the group would be divided equally. He was not paid any wages while he worked on the yew harvest, leaving \$844.00 in wages due and owing when he stopped working on the yew harvest.

25) Serafin R. Garduno stated on his wage claim form that he worked for Respondent Steensland from 8 a.m. to 6 p.m. on July 14-16, 2003, at the piece rate of \$.20 per hour, and that he was paid nothing. Because there is no evidence in the record to show the number of pounds he picked dur-

ing his employment,<sup>5</sup> the Agency sought unpaid wages for 28.5 hours of work, calculated at the applicable minimum wage of \$6.90 per hour.<sup>6</sup> He did not testify at hearing and no other witnesses testified concerning the specifics of his employment. The only evidence in the record supporting his wage claim is the unsworn written statements he submitted as part of his claim.

26) Heladio R. Soto stated on his wage claim form and accompanying calendar that he worked for Respondent Steensland on July 6-8, 13-15, 17-19, 21, 23-26, and 29, 2003, at the piece rate of \$.20 per pound. Based on tally sheets and H. Soto's calendar, the Agency calculated that he harvested a total of 6695.5 pounds and earned \$1,339.10. H. Soto stated on his wage claim form that he had been paid nothing. He did not testify at hearing and no other witnesses testified concerning the specifics of his employment. The only evidence in the record supporting his wage claim is the unsworn written statements he submitted as part of his claim, and 12 tally sheets. H. Soto's name is written on all 12 tally sheets and is the only name written on them. Three of those tally sheets contains the notation "2 men."

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<sup>5</sup> He did not state the number of pounds and his name does not appear on any tally sheets in evidence.

<sup>6</sup> Oregon's statutory minimum wage in 2003 was \$6.90 per hour. ORS 653.025(1)(d).

27) Santana R. Soto stated on his wage claim form and accompanying calendar that he worked for Respondent Steensland on July 6-7, 9-10, 13-15, 17-19, 21, 23-26, and 29, 2003, at the piece rate of \$.20 per pound. Based on tally sheets and S. Soto's calendar, the Agency calculated that he harvested a total of 6695.5 pounds and earned \$1,339.10. S. Soto stated on his wage claim form that he had been paid nothing. He did not testify at hearing and no other witnesses testified concerning the specifics of his employment. The only evidence in the record supporting his wage claim is the unsworn written statements he submitted as part of his claim, and eight tally sheets. S. Soto's name is written on seven of those tally sheets and is the only name written on them. One of those tally sheets contains the notation "2 men."

28) Gilberto R. Soto stated on his wage claim form and accompanying calendar that he worked for Respondent PYP on July 6-7, 9-10, 13-15, 17-19, 21, 23-26, and 29, 2003, at a per pound piece rate, and harvested a total of 7876.5 pounds. Based on G. Soto's calendar and a \$.20 per pound piece rate, the Agency calculated that he harvested a total of 7876.5 pounds and earned \$1,575.30. G. Soto stated on his wage claim form that he had been paid nothing. He did not testify at hearing and no other witnesses testified concerning the specifics of his employment. His name does not appear on any tally sheets in evidence, and the only

evidence in the record supporting his wage claim is the unsworn written statements he submitted as part of his claim.

29) Jose Toledo Cordoba was hired to transport harvested yew needles and bark from the harvest site to Respondent's weigh station at the rate of \$75 per day and \$.05 per pound. He worked for Respondent Steensland in a group that included his son, Juan Carlos Cordoba, Raymundo Rodriguez-Flores, and Sergio Sanchez, the individual mentioned in Finding of Fact 11 – The Merits. His son worked the same hours and days as himself. He worked July 8-19, 21, and 23-25, 2003, earning gross wages of \$2,645.25 ( $\$75 \times 14\frac{1}{2}$  days = \$1,087.50; 31,115 pounds x \$.05 = \$1,557.75; \$1,087.50 + \$1,557.75 = \$2,645.25). He worked approximately 6 a.m. to 6 p.m. each day. He was paid \$1,350 while he worked for Respondent, leaving \$1,295.25 in wages due and owing when he stopped working on the yew harvest.

30) Juan Carlos Cordoba was hired to transport harvested yew branches and bark from the harvest site to Respondent's weigh station and to load trucks with the harvested product. He got the job through friends who were already working at the harvest site. He reported to Respondent Steensland, who told him he would be paid \$75 per day and \$.05 per pound for all harvested product that he transported to the weigh station. He worked

on a team with his father, Jose Cordoba, Raymundo Rodriguez-Flores, and Sergio Sanchez. He worked July 8-19, 21, and 23-25, 2003, earning gross wages of \$2,645.25 ( $\$75 \times 14\frac{1}{2}$  days = \$1,087.50; 31,115 pounds x \$.05 = \$1,557.75; \$1,087.50 + \$1,557.75 = \$2,645.25). He worked approximately 6 a.m. to 6 p.m. each day. He worked from approximately 6 a.m. to 6 p.m. each day. He was paid \$2,150.00 while he worked for Respondent, leaving \$495.25 in wages due and owing when he stopped working on the yew harvest.

31) Raymundo Rodriguez-Flores was hired to transport harvested yew needles and bark from the harvest site to Respondent's weigh station at the rate of \$75 per day and \$.05 per pound. He worked for Respondent Steensland. He worked in a group that included the Cordobas and Sergio Sanchez, and they all worked the same hours each day that they worked together. He worked July 8-19, 21, and 23-25, 2003, earning gross wages of \$2,645.25 ( $\$75 \times 14\frac{1}{2}$  days = \$1,087.50; 31,115 pounds x \$.05 = \$1,557.75; \$1,087.50 + \$1,557.75 = \$2,645.25). He worked approximately 6 a.m. to 6 p.m. each day. He worked from approximately 6 a.m. to 6 p.m. each day. He was paid \$2,000.00 while he worked for Respondent, leaving \$645.25 in wages due and owing when he stopped working on the yew harvest.

32) Alberto E. Ruiz stated on his wage claim form and ac-

companying calendar that he worked for Respondent PYP on May 26-31, June 2-7, 9-14, 16-21, 23-28, 30, and July 1-6, 2003, at a \$.25 per pound piece rate, and that he was paid \$300.00 for his work. He did not specify the number of pounds he harvested, but claimed to have worked a total of 235 hours on the different dates of his employment, working from 5-8 hours per day. Based on Ruiz's calendar showing his hours worked, the Agency calculated that Ruiz had earned \$1,621.50 (235 hours x \$6.90 per hour). Ruiz did not testify at hearing and no other witnesses testified concerning the specifics of his employment. His name did not appear on any tally sheets in evidence, and the only evidence in the record supporting his wage claim is the unsworn written statements he submitted as part of his claim.

33) On July 25, 2003, workers employed on the yew harvest began filing wage claims with BOLI in which they alleged they had not paid them as agreed.

34) Raul Ramirez, a bilingual (English/Spanish) compliance specialist employed by BOLI in its Medford office, was assigned to conduct an investigation of the wage claims. Ramirez decided the best course of action was to conduct an onsite inspection.

35) Ramirez followed some of the claimants out to the yew harvest worksite because they could not give him good directions. When he arrived, he heard

chain saws running and observed a large number of workers. He talked to workers as they came out of the woods in groups of three to six and observed the yew harvest being weighed. He saw that workers were receiving one tally sheet for each group of workers to show what they had harvested, that each tally sheet usually had the full name of one worker and the first names of the others in the group, and that workers were given carbon copies of the tally sheets. While at the worksite, Ramirez handed out wage claim forms to workers who had not filed wage claims.

36) While at the worksite on July 25, 2003, Ramirez interviewed Ed Reed and some workers. Reed acknowledged that the workers were due money and that he and Steensland currently had a cash flow problem, but expected to pay the workers by August 1, 2003. Reed acknowledged that the workers were paid on a piece rate basis and told Raul Ramirez that he "pays Steensland and Steensland pay[s] the workers."

37) While at the worksite on July 25, 2003, Ramirez observed health and safety problems. Based on his observations, he called OR-OSHA to report possible OSHA violations.

38) As a result of Ramirez's complaint, OR-OSHA safety compliance officers, including Randy Nice, visited the Respondent's worksite on several occasions between July 29 and September 5, 2003. While there, they inter-

viewed Ed Reed, John Steensland, and several workers. On September 23, 2003, OR-OSHA issued a written citation and fines totaling \$760 to John Steensland for five serious violations related to health and safety.

39) On July 30, 2003, Ramirez met with Respondent Steensland, who acknowledged that wages were owed to workers. Steensland stated that the workers hadn't been paid because a buyer from Czechoslovakia had backed out on the deal and "they" were trying to sell the harvest to someone in China. Steensland said that he and Reed would pay the wages due once they sold the product. Steensland claimed that Reed was the actual employer and he was just an employee, and told Ramirez that Reed "pays [him] with a personal check and [he] pays the workers."

40) Eventually, 41 workers filed wage claims. As more wage claims were filed, Ramirez calculated the wages due by correlating the information on the wage claims with the tally sheets he had received from the claimants.

41) On August 26, 2003, Ramirez mailed a "Notice of Wage Claims" that was addressed to "HAROLD REED, ED REED AND JOHN STEENSLAND, REED SECONDARY FOREST PRODUCTS, 190 MICHEAL RANCH LN, DAYS CREEK, OR 97429." In pertinent part, the notice read:

"NOTICE OF WAGE CLAIM"

"You are hereby notified that GERALDO MANZANO, ET AL

have filed wage claims with the Bureau of Labor and Industries alleging:

"SEE ATTACHED

"IF THE CLAIMS ARE CORRECT, you are required to IMMEDIATELY make negotiable checks or money orders payable to the claimants for the amounts of wages claimed, less deductions required by law, and send the payments to the Bureau of Labor and Industries at the above address.

"IF YOU DISPUTE THE CLAIMS, complete the enclosed "Employer Response" form and return it together with the documentation which supports your position, as well as payment of any amounts which you concede are owed the claimants to the BUREAU OF LABOR AND INDUSTRIES within ten (10) days of the date of this Notice.

"If your response to the claims are [sic] not received on or Before SEPTEMBER 5, 2003, the Bureau may initiate action to collect these wages in addition to penalty wages, plus costs and attorney fees."

The attachment to the Notice listed 41 wage claimants, including the following:

"Joel Hernandez claims unpaid wages of \$800.00 at the rate of .25 cents per pound for all pounds picked during the time period of July 8, 2003 to July 25, 2003.

"Ruben Hernandez claims unpaid wages of \$610.00 at the rate of .25 cents per pound for all pounds picked during the time period of July 8, 2003 to July 25, 2003.

"Rene V. Hernandez claims unpaid wages of \$800.00 at the rate of .25 cents per pound for all pounds picked during the time period of July 8, 2003 to July 25, 2003.

"Fidel Perez claims unpaid wages of \$200.00 at the rate of .25 cents per pound for all pounds picked during the time period of July 24, 2003 to July 25, 2003.

"Jose Valles claims unpaid wages of \$1,055.00 at the rate of .25 cents per pound for all pounds picked during the time period of July 20, 2003 to July 25, 2003.

"Jose V. Leobardo claims unpaid wages of \$1,055.00 at the rate of .25 cents per pound for all pounds picked during the time period of July 20, 2003 to July 25, 2003.

42) On August 29, 2003, Dan W. Clark, Respondent PYP's attorney, sent a letter to Raul Ramirez in which he stated, in pertinent part:

"Neither Pacific Yew Products nor Mr. Reed hired any of the individuals listed in the Geraldo Manzano, et al wage claims nor did they direct or control their work at the job sites. John Steensland directed the work of the people listed in the

Wage Claim Notice and provided tools and materials to complete the job. Mr. Steensland exercised the power to hire and fire workers to complete his obligation under the contract with Pacific Yew Products. Mr. Reed and Mr. Steensland did not undertake the project on the Superior Group property or Davenhauer property as partners. Mr. Reed and Mr. Steensland have not been partners since 1997."

43) On or about September 18, 2003, Steensland provided 77 pages of records to Raul Ramirez that reflected the harvest of yew product by wage claimants and wage payments made. The earliest records were for June 28 and the latest for July 25, 2003. The records were primarily kept by group – each group was denoted by a color – and many did not state the name of any individual. The records were vague and incomplete and Ramirez was unable to determine, from those records alone, the amount of wages paid to any specific worker or the number of pounds picked by any specific worker. Several randomly selected examples that follow are illustrative of the records provided. Each example contains the information handwritten on the record:

"9-1-03. Sergio Sanchez. Check 1190 – payment for Sergio's crew - \$500.00"

"Orange crew. 8-22-03. Check #. Pay for 7/9-7/10-7/11-7/12-7/14. 11,113 lbs x

.25 of boughs and bark. \$2,778.25. Javier Suarez.”

“7-11-03. Yellow Dot. 4 Men. Bows [sic]. 55-48-45-59-63-62-32-37-39-35-34-34-47-35-10-29-56-31-32-40-25-40-30-20-31-21. Total lbs = 980. 1<sup>st</sup> trailer left 7-11-03 8. Bark 37-39-42=118. 4<sup>th</sup> trailer left 7-12-03. Total lbs = 1098. 68.62 each. \$274.50.”

“11 truck. 7-16-03. Red & White. Bows [sic] 15 22 22 19 44 48 52 46. 305. Bark 44. Total 349. \$87.25.”

The records provided by Steensland did not show the hours and dates worked by individual workers, the number of pounds of yew products harvested by individual workers, or the amount of wages, if any, that had been paid to individual workers.

44) Based on all the information Ramirez was able to gather from his interviews with the workers, inspection of documents that he received from Steensland, and information contained in the actual wage claims, he calculated the approximate wages due to each employee based on the number of pounds of yew product harvested and, in the case of workers who were paid \$75 per day, the number of days worked. Alberto Ruiz was the only exception, and Ramirez calculated Ruiz’s wages based on the minimum wage because he had a record of the hours Ruiz claimed to have worked, but no record of the total pounds harvested by Ruiz.

45) On September 18, 2003, Steensland wrote a check out to BOLI for unpaid wages in the amount of \$25,000. From this sum, Ramirez caused full payment to be made to 27 wage claimants who had earned \$.25 per pound. On March 24, 2004, he caused prorated, partial payments to be made from the remainder to the 14 wage claimants who are the subjects of this proceeding. Checks were issued to those claimants in the following amounts:

Joel Hernandez:	\$238.79
Ruben Hernandez:	\$325.49
Rene Hernandez:	\$325.49
Fidel Perez:	\$62.40
Jose Valles:	\$238.84
Jose V. Leobardo:	\$238.84
Serafin R. Garduno:	\$55.65
Heladio R. Soto:	\$378.95
Santana R. Soto:	\$378.95
Jose T. Cordoba:	\$398.38
Raymundo Rodriguez-Flores:	\$214.44
Juan Carlos Cordoba:	\$183.58
Gilberto R. Soto:	\$445.71
Alberto E. Ruiz:	\$373.97

46) After those payments, nine of the wage claimants<sup>7</sup> were owed the following amounts:

Joel Hernandez:	\$605.01
Ruben Hernandez:	\$351.31
Rene Hernandez:	\$351.31
Fidel Perez:	\$114.00

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<sup>7</sup> For reasons stated in the Opinion, the forum has not awarded any unpaid wages to wage claimants Serafin R. Garduno, Heladio R. Soto, Santana R. Soto, Gilberto R. Soto, or Alberto Ruiz.

Jose Valles: \$605.16  
 Jose V. Leobardo: \$605.16  
 Jose T. Cordoba: \$896.87  
 Raymundo Rodriguez-Flores:  
 \$430.81  
 Juan Carlos Cordoba: \$311.67

testimony regarding his total earnings, but disbelieved his testimony that he had not been paid the \$2,150 because it conflicted with the contemporaneous statement made on his wage claim. Accordingly, the forum has subtracted \$2,150 from his earnings.

47) On October 10, 2003, Ramirez sent a letter to Steensland, in which he requested additional records of the hours worked by claimants and the wages paid.

48) On October 29, 2003, Steensland visited Raul Ramirez with copies of returned personal checks from his personal Klamath First bank account # [REDACTED] that were related to the yew harvest. In all, there were checks made out to Sergio for \$21,233.50, \$23,880 in checks made out to several workers, and the \$25,000 check made out to BOLI. Steensland and Roxanne Malone's names were printed on each check and Steensland signed them all.

49) Jose V. Leobardo and Rene Hernandez were credible witnesses and the forum has credited all their testimony.

50) Juan Carlos Cordoba was only partly credible. On his wage claim he stated that he was paid \$2,150. He initially testified that he was only paid the amount that he received from Raul Ramirez and denied he had been paid the \$2,150. His earnings were credible, corroborated by his father and Raymundo Rodriguez-Flores, his co-workers, and tally sheets. The forum credited his

51) Jose Cordoba was only partly credible. On his wage claim he stated that he was paid \$1,250. When he testified, he twice denied that he had received any wages from Respondent Steensland. He testified he had received a check for less than \$300 from Raul Ramirez and BOLI, but the letter Raul Ramirez sent to him with that check shows it was for \$398.38. He also testified that he had forgotten some things related to his employment during the yew harvest and his wage claim, which is not surprising since that employment took place four years before the hearing. The forum finds that the contemporaneous written statements he made on his wage claim are more reliable and concludes that his earnings were credible, and that he was paid \$1,250 and has subtracted that amount from his earnings.

52) Raymundo Rodriguez-Flores, who testified by telephone from Mexico, was only partly credible. On his wage claim he stated that he was paid \$2,000. Like the Cordobas, he testified that he had not received any wages from Respondent Steensland and had only received the money that Raul Ramirez sent to him. Other than that, his testimony was credible and consistent

with the hours and pounds reported by the Cordobas, his immediate co-workers. There was no evidence and no basis from which to infer that he and the Cordobas had conspired to testify that they had not received any pay from Respondent Steensland. The forum concludes that his earnings claimed are credible, and that he was paid \$2,000 and has subtracted that amount from his earnings.

53) Ruben Hernandez seemed confused during his testimony. At first, he was uncertain about why he was being asked to testify before the Agency case presenter reminded him of his wage claim. He did not recall receiving the \$325.49 that BOLI mailed to him in 2004. However, his claim for earnings was consistent with the claims made by Joel Hernandez, his son, and Rene Hernandez, his nephew, and he acknowledged being paid \$300 while on the job, which was the approximate amount he wrote on his wage claim form.<sup>8</sup> The forum has credited his testimony regarding his earnings and the amount that Respondent Steensland paid him, but disbelieved his testimony that he did not receive any money from BOLI.

54) Raul Ramirez was an experienced bilingual compliance officer who credibly described the somewhat complex methodology he was forced to use for computing wages due to the 41 workers

owed wages for their work on the yew harvest, due to Respondent's failure to maintain individual records for each worker. His computations were based on contemporaneous records available at the jobsite, contemporaneous interviews, the tally sheet showing the dates and pounds harvested that was kept by Sergio Sanchez, and records provided by Respondent Steensland. These records were the most reliable evidence available and considerably more reliable than the wage claimants' four year old recollections. Due to Respondent Steensland's poor record keeping and practice of maintaining "group" tally sheets, it became obvious to the forum that some of the wage claimants had no way to calculate the wages due to them without Ramirez's assistance. In the extreme case, Ruben Hernandez's testimony established that he would not even have known who his employer was without Ramirez's assistance. The forum has relied on Ramirez's expertise and calculations for all of the wage claims except when the wrong factor was used in his mathematical computations or, in the case of Serafin Garduno, Alberto Ruiz, and the three Sotos, the absence of reliable evidence to support the hours or pounds claimed in their wage claims that Ramirez used in his calculations.

55) Respondent Steensland willfully failed to pay wage claimants Joel Hernandez, Ruben Hernandez, Rene Hernandez, Fidel Perez, Jose Valles, Jose V. Leobardo, Jose T. Cordoba, Juan Carlos Cordoba, and Raymundo

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<sup>8</sup> The actual figure that he wrote was \$317.

Rodriguez-Flores all earned, due, and payable wages within five business days, excluding Saturdays, Sundays, and holidays, after they left Respondent's employment and more than 30 days have elapsed from the date their wages were due.

56) Penalty wages are computed for claimants, in accordance with ORS 652.150, by multiplying the minimum wage in effect in 2003 x 8 hours x 30 days ( $\$6.90 \times 8 \times 30 = \$1,656.00$ ).

#### ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent John Steensland did business in Oregon and engaged the personal services of one or more employees.

2) In November 2002, the Swanson Group, Inc., granted a permit to Pacific Yew Products to harvest Pacific yew limbs and needles for taxol extraction. In May, 2003, the permit was modified through an agreement signed by Ed Reed on behalf of Pacific Yew Products.

3) On May 15, 2003, Respondent Steensland entered into a contract with Respondent Pacific Yew Products, LLC to provide labor, materials, equipment, and tools for the harvesting yew bark and branches.

4) Respondent Pacific Yew Products, LLC did not employ any of the wage claimants.

5) Joel Hernandez was employed by Respondent Steensland to harvest yew bark and branches at the piece rate of \$.20 per

pound. He worked July 8-11, 14-16, and 23-25, 2003, and harvested a total of 4969 pounds, earning gross wages of \$993.80. He was paid \$150 during his employment and \$238.79 after his employment ended, leaving a total of \$605.01 in unpaid wages due and owing to him. Respondent Steensland willfully failed to pay him his earned, due, and payable wages within five business days, excluding Saturdays, Sundays, and holidays, after he left Respondent Steensland's employment and more than 30 days have elapsed since his wages were due. Penalty wages, computed in accordance with ORS 652.150, equal \$1,656.00.

6) Ruben Hernandez and Rene Hernandez were employed by Respondent Steensland to harvest yew bark and branches at the piece rate of \$.20 per pound. Both worked July 8-11, 14-16, and 23-25, 2003, and both harvested a total of 4969 pounds, each earning gross wages of \$993.80. Both were paid \$317.00 during their employment and \$325.49 after their employment ended, leaving a total of \$351.31 in unpaid wages due and owing to each of them. Respondent Steensland willfully failed to pay them their earned, due, and payable wages within five business days, excluding Saturdays, Sundays, and holidays, after they left Respondent Steensland's employment and more than 30 days have elapsed since their wages were due. Penalty wages, computed in accordance with ORS 652.150, equal \$1,656.00.

7) Fidel Perez was employed by Respondent Steensland to harvest yew bark and branches at the piece rate of \$.20 per pound. He worked July 24-25, 2003, and harvested a total of 882 pounds, earning gross wages of \$176.40. He was paid nothing during his employment and \$62.40 after his employment ended, leaving a total of \$114.00 in unpaid wages due and owing to him. Respondent Steensland willfully failed to pay him his earned, due, and payable wages within five business days, excluding Saturdays, Sundays, and holidays, after he left Respondent Steensland's employment and more than 30 days have elapsed since his wages were due. Penalty wages, computed in accordance with ORS 652.150, equal \$1,656.00.

8) Jose Valles and Jose V. Leobardo were both employed by Respondent Steensland to harvest yew needles and bark at the piece rate of \$.20 per pound. Both worked from July 20 to July 25, 2003, and both harvested a total of 4220 pounds, earning gross wages of \$844.00 each. Both were paid nothing during their employment and \$238.84 each after their employment ended, leaving \$605.16 in unpaid wages due and owing to each. Respondent Steensland willfully failed to pay them their earned, due, and payable wages within five business days, excluding Saturdays, Sundays, and holidays, after they left Respondent Steensland's employment and more than 30 days have elapsed since their wages were due. Penalty wages, com-

puted in accordance with ORS 652.150, equal \$1,656.00.

9) Jose Toledo Cordoba was employed by Respondent Steensland transport harvested yew needles and bark from the harvest site to Respondent's weigh station at the rate of \$75 per day and \$.05 per pound. He worked July 8-19, 21, and 23-25, 2003, earning gross wages of \$2,645.25. He was paid \$1,350 while he worked for Respondent and \$398.38 after his employment ended, leaving \$896.87 in unpaid wages due and owing to him. Respondent Steensland willfully failed to pay him his earned, due, and payable wages within five business days, excluding Saturdays, Sundays, and holidays, after he left Respondent Steensland's employment and more than 30 days have elapsed since his wages were due. Penalty wages, computed in accordance with ORS 652.150, equal \$1,656.00.

10) Juan Carlos Cordoba was employed by Respondent Steensland transport harvested yew needles and bark from the harvest site to Respondent's weigh station at the rate of \$75 per day and \$.05 per pound. He worked July 8-19, 21, and 23-25, 2003, earning gross wages of \$2,645.25. He was paid \$2,150.00 while he worked for Respondent and \$183.58 after his employment ended, leaving \$311.67 in wages due and owing to him. Respondent Steensland willfully failed to pay him his earned, due, and payable wages within five business days, exclud-

ing Saturdays, Sundays, and holidays, after he left Respondent Steensland's employment and more than 30 days have elapsed since his wages were due. Penalty wages, computed in accordance with ORS 652.150, equal \$1,656.00.

11) Raymundo Rodriguez-Flores was employed by Respondent Steensland transport harvested yew needles and bark from the harvest site to Respondent's weigh station at the rate of \$75 per day and \$.05 per pound. He worked July 8-19, 21, and 23-25, 2003, earning gross wages of \$2,645.25. He was paid \$2,000.00 while he worked for Respondent and \$214.44 after his employment ended, leaving \$430.81 in wages due and owing to him. Respondent Steensland willfully failed to pay him his earned, due, and payable wages within five business days, excluding Saturdays, Sundays, and holidays, after he left Respondent Steensland's employment and more than 30 days have elapsed since his wages were due. Penalty wages, computed in accordance with ORS 652.150, equal \$1,656.00.

12) There was insufficient reliable evidence to establish that Respondent Steensland employed Serafin R. Garduno, Gilberto R. Soto, or Alberto E. Ruiz.

13) Heladio R. Soto and Santana R. Soto were employed by Respondent Steensland. However, there is insufficient reliable evidence in the record to establish their dates and hours of

work or number of pounds harvested.

14) On August 14, 2004, Respondent Steensland was personally served with the Agency's Order of Determination that included a written notice of nonpayment of all the wages sought by the Agency on behalf of the wage claimants. Respondent Steensland has not paid the full amount of the wages owed to wage claimants Joel Hernandez, Ruben Hernandez, Rene Hernandez, Fidel Perez, Jose Valles, Jose V. Leobardo, Jose T. Cordoba, Juan Carlos Cordoba, and Raymundo Rodriguez-Flores.

#### **CONCLUSIONS OF LAW**

1) During all times material herein, Respondent John Steensland was an employer and Claimants were employees subject to the provisions of ORS 652.110 to 652.200, 652.310 to 652.405, and 653.010 to 653.261. During all times material, Respondent employed wage claimants Joel Hernandez, Ruben Hernandez, Rene Hernandez, Fidel Perez, Jose Valles, Jose V. Leobardo, Jose T. Cordoba, Juan Carlos Cordoba, and Raymundo Rodriguez-Flores.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and the Respondents herein. ORS 652.310 to 652.414, ORS 653.040, ORS 653.256, ORS 653.261.

3) Respondent Pacific Yew Products, LLC did not employ claimants and the charges against

Respondent Pacific Yew Products, LLC are hereby dismissed

4) Respondent Steensland violated ORS 652.140(2) by failing to pay claimants Joel Hernandez, Ruben Hernandez, Rene Hernandez, Fidel Perez, Jose Valles, Jose V. Leobardo, Jose T. Cordoba, Juan Carlos Cordoba, and Raymundo Rodriguez-Flores all wages earned and unpaid within five days after they left Respondent's employment, excluding Saturdays, Sundays and holidays. Respondent owes these claimants a total of \$4,217.30 in unpaid, due and owing wages.

5) Respondent Steensland is liable for \$1,656 in penalty wages each to claimants Joel Hernandez, Ruben Hernandez, Rene Hernandez, Fidel Perez, Jose Valles, Jose V. Leobardo, Jose T. Cordoba, Juan Carlos Cordoba, and Raymundo Rodriguez-Flores, for a total of \$14,904. ORS 652.150.

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

## OPINION

### INTRODUCTION

Both Respondents defaulted when they did not show up at the hearing. When a respondent de-

faults, the Agency needs only present a prima facie case on the record to support the allegations of its charging document in order to prevail. *In the Matter of Okechi Village & Health Center*, 27 BOLI 156, 161 (2006). The Agency's prima facie case consists of credible evidence showing: 1) Respondents employed Claimants; 2) The pay rate upon which Respondents and Claimants agreed, if it exceeded the minimum wage; 3) Claimants performed work for which they were not properly compensated; and 4) The amount and extent of work Claimants performed for Respondents. *In the Matter of Barbara Coleman*, 19 BOLI 230, 262-63 (2000).

### RESPONDENT STEENSLAND WAS CLAIMANTS' EMPLOYER

In its Order of Determination, the Agency named John Steensland and Pacific Yew Products, LLC as employers. At hearing, the Agency argued that Steensland and PYP had entered into a *de facto* partnership for purposes of the yew harvest and should be held jointly liable as employers.

In response, in their respective answers and unsworn statements accompanying those answers, PYP claimed that Steensland was the employer and Steensland claimed that he was not the employer. When a respondent fails to appear at hearing and its only contribution to the record is a request for hearing and an answer that contains only unsworn and unsubstantiated assertions, those assertions are overcome when-

ever they are contradicted by other credible evidence in the record. *In the Matter of Landco Enterprises, Inc.*, 22 BOLI 62, 67 (2001).

In a claim for wages based on ORS 652.140, an "employer" is "any person who in this state, directly or through an agent, engages personal services of one or more employees \* \* \* so far as such employer has not paid employees in full." ORS 652.310; *In the Matter of Kilmore Enterprises*, 26 BOLI 111, 119 (2004). The Agency has the burden of proving that a respondent was the employer. *Id.*

Through credible sworn testimony, the Agency established the following pertinent facts related to Respondent Steensland's alleged status as the claimants' employer:

- i He was an independent contractor who operated his own business during the yew harvest in June and July 2003.
  - i He contracted with PYP on May 15, 2003, to provide labor, material, equipment, and tools for the yew harvest, to be responsible for the means and methods used for the harvest operation, and to provide and supervise the workers.
  - i During the yew harvest, PYP paid Steensland pursuant to the May 15, 2003,
- contract and Steensland wrote checks on his personal account to pay wages to the workers on the yew harvest.
  - i During the yew harvest, he had the ultimate responsibility for directing and controlling the workers, including the wage claimants.
  - i He had the responsibility and authority to hire and fire the workers.
  - i He told the workers that they worked for him and the workers understood that he was the boss.
  - i He provided the workers with equipment, including some hard hats, electronic scales for weighing the bark, shovels, fire extinguishers, earplugs, chaps, chain saws, and fuel, and vehicles for obtaining the yew bark and transferring it to trailers.

Based on these facts, the forum concludes that Respondent Steensland was an employer of the wage claimants.

In contrast, the evidence established that PYP's primary role was as the legal entity that held the permit to harvest the yew on Swanson's property. Once PYP

obtained the permit, it contracted with Respondent Steensland to provide the labor, material, equipment, and tools necessary to conduct the harvest and to provide the insurance coverage required in the permit issued to PYP by Swanson. PYP paid Steensland for yew that was harvested, and Steensland in turn wrote personal checks to the workers. PYP did provide portable toilets and a limited amount of equipment to workers, as well as refrigerated trailers to store the harvested yew bark and branches in and a means of transporting the trailers elsewhere. These actions are not indicative, by themselves, of an employment relationship, but tend to show that a business relationship existed between PYP and Respondent Steensland that was akin to a general contractor/subcontractor relationship.<sup>9</sup> Finally, there was no evidence that PYP directly paid the workers or controlled their work in any way. These facts support PYP's argument that it did not employ the wage claimants, but was merely the holder of the permit

that made the yew harvest possible.

The Agency argues that PYP was the wage claimants' employer because it was a *de facto* partner with Respondent Steensland during the yew harvest. In Oregon, a partnership is "an association of two or more persons to carry on as co-owners a business for profit created under ORS 67.055 \* \* \*." ORS 67.005(7). A partnership may be created whether or not the persons intend to create a partnership. ORS 67.055(1). A partnership is never presumed and the Agency bears the burden of proof to show that co-named respondents are partners. *In the Matter of Stan Lynch*, 23 BOLI 34, 43 (2002). ORS 67.055(4) includes the following relevant rules for determining whether a partnership has been created:

"(a) Factors indicating that persons have created a partnership include:

"(A) Their receipt of or right to receive a share of profits of the business;

"(B) Their expression of an intent to be partners in the business;

"(C) Their participation or right to participate in control of the business;

"(D) Their sharing or agreeing to share losses of the business or liability for claims by third parties against the business; and

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<sup>9</sup> Cf. *In the Matter of Staff, Inc.*, 16 BOLI 97, 114-16 (1997) (when two respondents jointly employed a wage claimant pursuant to an employee leasing agreement between them and each respondent retained sufficient control of the terms and conditions of employment to be considered a joint employer, the commissioner held that each joint employer was required to comply with Oregon's wage and hour laws and each employer was liable, both individually and jointly, for any violation of those laws).

“(E) Their contributing or agreeing to contribute money or property to the business.”

In this case, the Agency presented evidence that Ed Reed and Respondent Steensland had operated as a partnership in the late 1990s in the same type of business operation. Because of that fact and their shared interest in connection with the yew harvest, the Agency asked the forum to find that a partnership existed between PYP and Respondent Steensland. If so, that would create joint and several liability for payment of the wages and penalty wages. ORS 67.105; *In the Matter of Sylvia Montes*, 11 BOLI 268, 275 (1993).

The forum finds that none of the criteria in ORS 67.055(4) are satisfied by evidence in the record. First, there is no evidence that PYP and Respondent Steensland received or had a right to share in any profits. Rather, the evidence shows they were separate businesses that contracted with one another to perform different parts of the yew harvest. Any compensation Respondent Steensland received from PYP was contractually based solely on the amount of yew harvested by his employees, he had no opportunity to earn a greater profit, and there is no evidence that the two Respondents agreed to share the profits. Second, there is no evidence of any expression of intent to form a partnership. The fact that a partnership may have existed in the past to conduct the same business is not an expres-

sion of intent. Third, the evidence indicates that PYP and Respondent Steensland each controlled the parts of the yew harvest that they were contractually responsible for, but there is no evidence to show that either had the right to control aspects of the other’s business. Fourth, there is no evidence of any agreement to share losses or liability for claims by third parties. Finally, there is no evidence that PYP or Respondent Steensland contributed or agreed to invest money or property in each other’s business, other than Reed’s contribution of some earplugs and hardhats to some workers and provision of two portable toilets. The forum concludes that PYP and Respondent Steensland were not partners in the yew harvest venture.<sup>10</sup>

**CLAIMANTS JOEL HERNANDEZ,  
RUBEN HERNANDEZ, RENE  
HERNANDEZ, FIDEL PEREZ,  
JOSE VALLES, JOSE V. LEO-  
BARDO, JOSE T. CORDOBA,  
JUAN CARLOS CORDOBA, AND  
RAYMUNDO RODRIGUEZ-**

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<sup>10</sup> Cf. *In the Matter of Barbara and Robert Blair*, 24 BOLI 89, 96 (2002) (in a default case when claimants credibly testified that both respondents owned and operated the business under an assumed business name, that one respondent hired them, and that claimants performed work for the business, and respondents’ answer appeared on company letterhead and was signed by both respondents, the forum concluded that respondents were partners and both were claimants’ employers.)

**FLORES WERE EMPLOYED BY  
RESPONDENT STEENSLAND**

Ruben Hernandez, Rene Hernandez, Jose V. Leobardo, Jose T. Cordoba, Juan Carlos Cordoba, and Raymundo Rodriguez-Flores all testified credibly that they were employed by Respondent Steensland on the yew harvest and that one or more of them worked with Joel Hernandez, Fidel Perez, and Jose Valles.

**CLAIMANTS JOEL HERNANDEZ,  
RUBEN HERNANDEZ, RENE  
HERNANDEZ, FIDEL PEREZ,  
JOSE VALLES, JOSE V. LEO-  
BARDO, JOSE T. CORDOBA,  
JUAN CARLOS CORDOBA, AND  
RAYMUNDO RODRIGUEZ-  
FLORES WERE PAID AT A PIECE  
RATE**

The claimants credibly testified that they were hired to work at \$.20 per pound of yew product harvested or \$75 per day plus \$.05 per pound harvested, depending on the type of work they performed. This evidence was undisputed and the forum concludes that Joel Hernandez, Ruben Hernandez, Rene Hernandez, Fidel Perez, Jose Valles, Jose V. Leobardo were entitled to be paid at the rate of \$.20 per pound of yew product harvested, and Jose T. Cordoba, Juan Carlos Cordoba, and Raymundo Rodriguez-Flores were entitled to be paid at the rate of \$75 per day plus \$.05 per pound harvested.

**CLAIMANTS JOEL HERNANDEZ,  
RUBEN HERNANDEZ, RENE  
HERNANDEZ, FIDEL PEREZ,**

**JOSE VALLES, JOSE V. LEO-  
BARDO, JOSE T. CORDOBA,  
JUAN CARLOS CORDOBA, AND  
RAYMUNDO RODRIGUEZ-  
FLORES PERFORMED WORK  
FOR WHICH THEY WERE NOT  
PROPERLY COMPENSATED**

The Agency presented credible testimonial and documentary evidence that established the amount of yew product harvested by each of the claimants and the number of days worked by the Cordobas and Rodriguez-Flores, the three workers who worked at the agreed rate of \$75 per day and \$.05 per pound. The Agency also proved, through documentary evidence and the credible testimony of Raul Ramirez, Ruben Hernandez, Rene Hernandez, Jose V. Leobardo, Jose T. Cordoba, Juan Carlos Cordoba, and Raymundo Rodriguez-Flores that Fidel Perez, Jose Valles, and Jose V. Leobardo were paid nothing for their work and that the other claimants were not fully paid.

**THE AMOUNT AND EXTENT OF  
WORK CLAIMANTS JOEL HER-  
NANDEZ, RUBEN HERNANDEZ,  
RENE HERNANDEZ, FIDEL  
PEREZ, JOSE VALLES, JOSE V.  
LEOBARDO, JOSE T. CORDOBA,  
JUAN CARLOS CORDOBA, AND  
RAYMUNDO RODRIGUEZ-  
FLORES PERFORMED FOR RE-  
SPONDENT.**

The final element of the agency's prima facie case requires proof of the amount and extent of work performed by claimant. The agency's burden of

proof can be met by producing sufficient evidence from which a just and reasonable inference may be drawn. A claimant's credible testimony may be sufficient evidence. *In the Matter of Ilya Simchuk*, 22 BOLI 186, 196 (2001). When the forum concludes that an employee was employed and improperly compensated, the burden shifts to the employer to produce evidence of the precise amount of work performed or with evidence to negate the reasonableness of the inference to be drawn from the employee's evidence. *In the Matter of David Creager*, 17 BOLI 102, 109 (1998). In this case, the forum has concluded that nine employees were employed by Respondent Steensland and improperly compensated, and the tally sheets produced by Respondent Steensland do not show the precise amount of work performed by individual claimants or the amount that was been paid to them.<sup>11</sup>

This is an unusual case for several reasons. First, the employment setting was chaotic. It involved a yew harvest in the mountains of southern Oregon with continually expanding and contracting work groups of Spanish-speaking workers who learned of the job from friends who were already employed and who typically just showed up and started working. Second, the employer apparently spoke only English and

used one of his workers as an interpreter. Third, many of the workers were itinerant laborers. Fourth, the work took place four years prior to the hearing. Fifth, Respondent Steensland's "group" method of recording the number of pounds harvested by his workers was extremely vague and would have left the forum with an impossible task of trying to calculate wages due to the claimants if the Agency, through Raul Ramirez, had not intervened when the claims were first filed and done the work necessary to determine the approximate amount owed to each claimant. Sixth, Respondent Steensland wrote paychecks for large sums to several different individuals instead of issuing individual paychecks, expecting those few individuals to cash their checks and fairly divide it among the workers. As a result, there is no documentary evidence of how much each claimant was paid, and the forum has been forced to rely on the testimony of claimants and Ramirez.

For all the reasons stated above and further explained in Finding of Fact 54 – The Merits, the forum has relied on the calculations that Ramirez made, except when the wrong factor was used in his mathematical calculations, to determine the approximate amount of work performed and amount of wages earned by claimants Joel Hernandez, Ruben Hernandez, Rene Hernandez, Fidel Perez, Jose Valles, Jose V. Leobardo, Jose T. Cordoba, Juan Carlos Cordoba, and Raymundo Rodriguez-Flores, and the amount

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<sup>11</sup> See Findings of Fact 17, 43, 48 – The Merits.

of wages still due and owing to them.<sup>12</sup> The amount of work performed and wages earned by each is set out in Findings of Fact 19-24, 29-31 – The Merits. The wages still due and owing to them are set out in Finding of Fact 46 – The Merits.

**CLAIMANTS ALBERTO RUIZ, SANTANA R. SOTO, GILBERTO R. SOTO, HELADIO R. SOTO, AND SERAFIN R. GARDUNO ARE NOT ENTITLED TO ANY UNPAID WAGES**

The forum has historically rejected wage claims in cases when claimants do not testify at hearing and no witnesses testify to support their claims of employment and unpaid wages.<sup>13</sup> In this case, the five workers listed above did not testify at hearing. The forum has concluded that Santana R. Soto and Heladio R. Soto were employed by Respondent Steen-

sland because their names appear on tally sheets provided by Steensland. However, because no one testified that they observed the Sotos at the yew harvest, the only evidence as to the amount and extent of work they performed were their own unsworn calendars and incomplete tally sheets. Although Ramirez undoubtedly exercised his best effort at making a contemporary calculation of the amount and extent of the Soto's work, the Agency's unfortunate inability to provide complete production records for the Sotos and the absence of any witnesses to corroborate their production record dooms their wage claims to failure. The forum has been unable to conclude that Alberto Ruiz, Gilberto R. Soto, and Serafin R. Garduno were even employed by Respondent Steensland because their names do not appear on any tally sheets and there was no witness testimony corroborating their presence at the yew harvest. Ruiz's claim is particularly suspect because he claimed to have started work on May 26, 2003, a full month before any of the other claimants.

**PENALTY WAGES**

An employer is liable for penalty wages when it willfully fails to pay any wages or compensation of any employee whose employment ceases. Willfulness does not imply or require blame, malice, wrong, perversion, or moral delinquency, but only requires that that which is done or omitted is intentionally done with knowledge of what is being done and that the

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<sup>12</sup> See, e.g., *In the Matter of Debbie Frampton*, 19 BOLI 27, 38-39 (1999) (the forum will rely on a claimant's evidence regarding the number of hours worked even where it is only approximate so as not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work when such inability is based on an employer's failure to keep proper records, in conformity with his statutory duty.)

<sup>13</sup> See *In the Matter of Catalogfinder, Inc.*, 18 BOLI 242, 260-64 (1999) for a detailed discussion of the forum's approach to evaluating the wage claims of claimants who did not appear at hearing to testify.

actor or omittor be a free agent. *In the Matter of Carl Odoms*, 27 BOLI 232, 240-41 (2006).

In this case, Respondent Steensland stated in his answer he paid the workers by writing checks to Sergio, a worker whom he used as an interpreter, trusting that Sergio would pay the workers, and that he also paid workers when he was paid. It was Respondent Steensland's responsibility to make sure that accurate records were kept of each worker's earnings and to see that each worker was individually paid. His abdication of that responsibility to a bilingual worker was a voluntary decision, made as a free agent, and Sergio's alleged failure to pay the workers is not a defense to the Agency's charge that Respondent Steensland willfully failed to pay the wages to the wage claimants.<sup>14</sup>

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<sup>14</sup> See, e.g., *In the Matter of TCS Global*, 24 BOLI 246, 260 (2003) (when respondent knew claimant was performing work as a dispatcher and made no apparent effort to confirm whether claimant was recording the time on his time cards, and the time cards clearly denoted the nature of the work being recorded and respondent knew or should have known claimant was not recording his hours as a dispatcher, the forum inferred respondent voluntarily and as a free agent failed to pay claimant all of the wages he earned as a dispatcher and concluded that respondent acted willfully and was liable for penalty wages); *In the Matter of Usra A. Vargas*, 22 BOLI 212, 222 (2001) (respondent's argument that she intended to pay claimants when her

By serving the Order of Determination, the Agency also gave written notice to Respondent Steensland of all the wage claims in this proceeding and Respondent Steensland did not pay any additional wages after receiving that notice. Therefore, penalty wages are not limited to 100% of each wage claimants' unpaid wages.

ORS 652.150(1) provides that penalty wages are to be calculated based on an employee's hourly wage or rate of compensation. In this case, all the employees were paid, at least in part, by piece rate and there is no way of calculating their average hourly rate of pay because no accurate record of hours worked exists for any of the wage claimants. Because of this, the Agency has asked that penalty wages be calculated based on the Oregon's 2003 minimum wage of \$6.90 per hour. Under the circumstances, the forum agrees that this is an appropriate way to calculate penalty wages. It eliminates the need for any speculation on the forum's part and it is an hourly wage that Respondent Steensland was legally required to pay, no matter what his agreement may have been with the wage claimants. ORS 653.025.

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"customer" against whom she had legal action pending paid her was not a defense, but instead showed that she voluntarily and as a free agent failed to pay two claimants all the wages they earned).

The forum calculates penalty wages for claimants Joel Hernandez, Ruben Hernandez, Rene Hernandez, Fidel Perez, Jose Valles, Jose V. Leobardo, Jose T. Cordoba, Juan Carlos Cordoba, and Raymundo Rodriguez-Flores in the following manner: \$6.90 per hour x 8 hours x 30 days = \$1,656.00 due and owing to each claimant as penalty wages.

#### ORDER

NOW, THEREFORE, as authorized by ORS 652.332 and as payment of the unpaid wages and penalty wages he owes as a result of his violations of ORS 652.140(2), the Commissioner of the Bureau of Labor and Industries hereby orders **John Steensland** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, the following:

(1) A certified check payable to the Bureau of Labor and Industries in trust for Joel Hernandez in the amount of TWO THOUSAND TWO HUNDRED SIXTY ONE DOLLARS AND ONE CENT (\$2,261.01), less appropriate lawful deductions, representing \$605.01 in gross earned, unpaid, due, and payable wages and \$1,656 in penalty wages, plus interest at the legal rate on the sum of \$605.01 from September 1, 2003, until paid, and interest at the legal rate on the sum of \$1,656 from October 1, 2003, until paid.

(2) A certified check payable to the Bureau of Labor and Industries in trust for Ruben Hernandez in the amount of TWO THOUSAND SEVEN DOLLARS AND THIRTY ONE CENTS (\$2,007.31), less appropriate lawful deductions, representing \$351.31 in gross earned, unpaid, due, and payable wages and \$1,656 in penalty wages, plus interest at the legal rate on the sum of \$351.31 from September 1, 2003, until paid, and interest at the legal rate on the sum of \$1,656 from October 1, 2003, until paid.

(3) A certified check payable to the Bureau of Labor and Industries in trust for Rene Hernandez in the amount of TWO THOUSAND SEVEN DOLLARS AND THIRTY ONE CENTS (\$2,007.31), less appropriate lawful deductions, representing \$351.31 in gross earned, unpaid, due, and payable wages and \$1,656 in penalty wages, plus interest at the legal rate on the sum of \$351.31 from September 1, 2003, until paid, and interest at the legal rate on the sum of \$1,656 from October 1, 2003, until paid.

(4) A certified check payable to the Bureau of Labor and Industries in trust for Fidel Perez in the amount of ONE THOUSAND SEVEN HUNDRED AND SEVENTY DOLLARS (\$1,770.00), less appropriate lawful deductions, representing \$114.00 in gross earned, un-

paid, due, and payable wages and \$1,656 in penalty wages, plus interest at the legal rate on the sum of \$114.00 from September 1, 2003, until paid, and interest at the legal rate on the sum of \$1,656 from October 1, 2003, until paid.

(5) A certified check payable to the Bureau of Labor and Industries in trust for Jose Valles in the amount of TWO THOUSAND SIX HUNDRED SIXTY ONE DOLLARS AND SIXTEEN CENTS (\$2,661.16), less appropriate lawful deductions, representing \$605.16 in gross earned, unpaid, due, and payable wages and \$1,656 in penalty wages, plus interest at the legal rate on the sum of \$605.16 from September 1, 2003, until paid, and interest at the legal rate on the sum of \$1,656 from October 1, 2003, until paid.

(6) A certified check payable to the Bureau of Labor and Industries in trust for Jose V. Leobardo in the amount of TWO THOUSAND SIX HUNDRED SIXTY ONE DOLLARS AND SIXTEEN CENTS (\$2,661.16), less appropriate lawful deductions, representing \$605.16 in gross earned, unpaid, due, and payable wages and \$1,656 in penalty wages, plus interest at the legal rate on the sum of \$605.16 from September 1, 2003, until paid, and interest at the legal rate on the sum of \$1,656 from October 1, 2003, until paid.

(7) A certified check payable to the Bureau of Labor and Industries in trust for Jose T. Cordoba in the amount of TWO THOUSAND FIVE HUNDRED FIFTY TWO DOLLARS AND EIGHT SEVEN CENTS (\$2,552.87), less appropriate lawful deductions, representing \$896.87 in gross earned, unpaid, due, and payable wages and \$1,656 in penalty wages, plus interest at the legal rate on the sum of \$896.87 from September 1, 2003, until paid, and interest at the legal rate on the sum of \$1,656 from October 1, 2003, until paid.

(8) A certified check payable to the Bureau of Labor and Industries in trust for Raymundo Rodriguez-Flores in the amount of TWO THOUSAND EIGHT SIX DOLLARS AND EIGHTY ONE CENTS (\$2,086.81), less appropriate lawful deductions, representing \$896.87 in gross earned, unpaid, due, and payable wages and \$1,656 in penalty wages, plus interest at the legal rate on the sum of \$896.87 from September 1, 2003, until paid, and interest at the legal rate on the sum of \$1,656 from October 1, 2003, until paid.

(9) A certified check payable to the Bureau of Labor and Industries in trust for Juan Carlos Cordoba in the amount of ONE THOUSAND NINE HUNDRED SIXTY SEVEN DOLLARS AND SIXTY SEVEN CENTS (\$1,967.67), less appropriate

lawful deductions, representing \$311.67 in gross earned, unpaid, due, and payable wages and \$1,656 in penalty wages, plus interest at the legal rate on the sum of \$311.67 from September 1, 2003, until paid, and interest at the legal rate on the sum of \$1,656 from October 1, 2003, until paid.

ORS 652.140; ORS 652.150; ORS 653.055.

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**In the Matter of  
CREATIVE CARPENTERS  
CORPORATION**

**Case No. 18-06  
Final Order of Commissioner  
Dan Gardner**

**Issued October 5, 2007**

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**SYNOPSIS**

Respondent employed Claimant to perform construction work at the agreed rate of \$20 per hour. From January 14 through 25, 2005, Claimant worked 63.5 hours. At the agreed rate of \$20 per hour, Claimant earned \$1,270 and was paid \$800. Respondent was ordered to pay the remaining amount of \$470 in unpaid, due and owing wages. Respondent's failure to pay was willful and he was ordered to pay \$4,800 in penalty wages. Respondent did not owe Claimant overtime wages and was found not liable for civil penalties under ORS 653.055.

The above-entitled case came on regularly for hearing before Linda A. Lohr, designated as Administrative Law Judge ("ALJ") by Dan Gardner, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on August 28, 2007, in the W. W. Gregg Hearing Room of the Bureau of Labor and Industries, located at 800 NE Oregon Street, Portland, Oregon.

Jeffrey Burgess, an Agency employee, represented the Bureau of Labor and Industries ("BOLI" or "the Agency"). Kurt King ("Claimant") was present throughout the hearing and was not represented by counsel. Creative Carpenters Corporation ("Respondent") failed to appear for hearing through counsel or an authorized representative.

The Agency called as witnesses: Margaret Trotman, BOLI Wage and Hour Division compliance specialist; Jerry Walton, Construction Contractors Board compliance officer; and Claimant.

The forum received as evidence:

a) Administrative exhibits X-1 through X-5;

b) Agency exhibits A-1 through A-26 (filed with the Agency's case summary) and A-27 (offered at hearing).

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

**FINDINGS OF FACT –  
PROCEDURAL**

1) On February 21, 2005, Claimant filed a wage claim with the Agency alleging Respondent had employed him from January 14 through January 25, 2005, and failed to pay all of his wages for hours he worked during that period.

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

3) On July 18, 2005, the Agency issued Order of Determination No. 05-0517. In the Order, the Agency alleged Respondent had employed Claimant during the period January 14 through January 25, 2005, failed to pay him for all hours worked in that period, including overtime hours pursuant to OAR 839-020-0030, and was liable to him for \$1,302.50 in unpaid wages, plus interest. The Agency also alleged Respondent's failure to pay all of Claimant's wages when due was willful and Respondent was liable to him for \$4,800 as penalty wages, plus interest. In addition to the penalty wages, the Agency

alleged Respondent paid Claimant less than the wages to which he was entitled under ORS 653.010 to 653.261 and was therefore liable to him for \$4,800 as civil penalties, pursuant to ORS 653.055(1)(b), plus interest. The Order gave Respondent 20 days to pay the sums, request an administrative hearing and submit an answer to the charges, or demand a trial in a court of law. A true copy of the Order of Determination was served on Respondent at 10647 SE Lexington Street, Portland, Oregon, on August 17, 2005.

4) On September 7, 2005, the Agency issued a Notice of Intent to Issue Final Order by Default. In the notice, the Agency observed that Respondent had not filed an answer and request for hearing within the time specified in the Order of Determination. The notice stated that "if [an answer and request for hearing] is not received by September 19, 2005, the Agency will issue a Final Order by Default in this matter."

5) On September 12, 2005, Respondent filed an answer and request for hearing. In its answer, Respondent, through its authorized representative Warren Matti, admitted Claimant performed work for Respondent at the rate of \$20 per hour, denied Claimant was an "employee," and alleged Claimant was an independent contractor acting in his capacity as a licensed and bonded construction contractor.

6) On July 27, 2007, the Agency submitted a request for hearing. On July 30, 2007, the

Hearings Unit issued a Notice of Hearing stating the hearing would commence at 9 a.m. on August 28, 2007. With the Notice of Hearing, the forum included copies of the Order of Determination, a language notice, a Service-members Civil Relief Act notification, and copies of the Summary of Contested Case Rights and Procedures and the Contested Case Hearing Rules, OAR 839-050-0000 to 839-050-0440. The hearing notice was mailed to Respondent and Respondent's registered agent at 10647 SE Lexington Street, Portland, Oregon, the address provided by Respondent in its answer to the Order of Determination. In the hearing notice, Respondent was advised: "If you cannot participate in the scheduled hearing at the time set, you must notify the Hearings Unit IMMEDIATELY and request a postponement." The Hearings Unit did not receive any notification from Respondent's authorized representative or any other Respondent representative indicating Respondent could not or would not appear at the scheduled hearing.

7) On August 1, 2007, the ALJ ordered the Agency and Respondent each to submit a case summary that included: a list of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; and, for the Agency only, a brief statement of the elements of the claim and any wage and penalty calculations. The ALJ ordered the participants to submit

their case summaries by August 17, 2007, and notified them of the possible sanctions for failure to comply with the case summary order.

8) On August 1, 2007, the ALJ issued a notice pertaining to fax filings and timelines.

9) On August 15, 2007, the Agency timely filed a case summary. Respondent did not file a case summary.

10) Respondent did not appear at the time and place set for hearing and no one appeared on its behalf or advised the ALJ of any reason for the failure to appear. The ALJ ruled that Respondent was in default, having been properly served with the Notice of Hearing and having failed to appear at the hearing.

11) The ALJ advised the Agency of the issues to be addressed in order to establish a prima facie case for the record.

12) At the start of hearing, the Agency moved to amend the Order of Determination to correct a typographical error. The Agency's motion was granted and the Order was amended to change the date in paragraph III from "March 1, 2004" to "March 1, 2005."

13) The ALJ issued a proposed order on September 10, 2007, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. Neither the Agency nor Respondent filed exceptions.

**FINDINGS OF FACT – THE MERITS**

1) At times material, Respondent was an Oregon corporation conducting business in Oregon as a licensed residential construction contractor. Respondent was licensed with the Construction Contractors Board (“CCB”) as “Exempt (Cannot Have Employees Has No Workers’ Comp Coverage).”

2) In January 2005, Respondent’s corporate president Warren Matti hired Claimant to do some carpentry and framing on a residential building site. Although Claimant was a licensed construction contractor at the time, he was experiencing some personal and professional setbacks and needed work. Claimant and Matti had renewed their previous acquaintance through a Christian fellowship program and during one of the meetings Claimant asked Matti for a job. Matti agreed to hire Claimant at the rate of \$20 per hour.

3) Claimant’s first day of work was on Friday, January 14, 2005. Claimant’s work days began at 8 a.m. and ended at 5 or 5:30 p.m. Matti established Claimant’s work hours, including a one hour lunch period each day. Claimant brought some of his framing tools, but Respondent or the general contractor supplied other necessary tools and materials Claimant used on the job. Matti supervised Claimant’s work and, on at least one occasion, instructed Claimant on how he wanted the job done. Claimant was hired for an indefi-

nite period and was not performing work for anyone else while working for Respondent.

4) Respondent paid Claimant \$800 after his first full week of work. The pay did not include wages for Claimant’s first work day on January 14. After he was paid, Claimant worked two additional days. Claimant’s employment ended on January 25, 2005, following a disagreement with Matti.

5) Claimant’s last work day was January 25, 2005. That evening, he gave Matti a time sheet that showed his daily work hours and documented the \$800 he received from Matti as wages. Between January 14 and January 25, 2005, Claimant recorded the following work hours on his time sheet:

- Friday, January 14 – 8.5 hours
- Monday, January 17 – 8 hours
- Tuesday, January 18 – 8 hours
- Wednesday, January 19 – 8.25 hours
- Thursday, January 20 – 5.75 hours
- Friday, January 21 – 8.75 hours
- Saturday, January 22 – 4.5 hours
- Monday, January 24 – 8.25 hours
- Tuesday, January 25 – 3.5 hours

From January 14 through January 25, 2005, Claimant worked 63.5 hours. Claimant earned \$1,270 and was paid \$800. At the time Claimant’s employment terminated, Respondent owed him \$470.

6) On January 26, 2005, Claimant filed a complaint with the

CCB alleging that Respondent's corporate president Matti had hired and agreed to pay him \$20 per hour, treated him as an employee, and told him that Respondent had workers' compensation coverage. He also alleged that Respondent fired him after a disagreement, refused to respond to his requests for a final paycheck, and after Claimant's threat "to take action" told him to "go ahead and take action." After investigating Claimant's complaint, the CCB found that "[o]n or about January 14, 2005 to January 25, 2005, [Respondent] had an employee while licensed as an exempt contractor," in violation of ORS 701.035(3). Based on its finding, the CCB issued a notice of intent to assess a \$1,000 civil penalty and suspend Respondent's license. In lieu of a hearing on the notice, Respondent entered into a settlement agreement and admitted that it had an employee while licensed as an exempt contractor during the time specified in the CCB notice of intent. The CCB issued a final order "in the amount of \$1,000 and license suspension of which \$500 and imposition of the license suspension shall be suspended conditioned on the Respondent's completion of the terms of [the] agreement." Respondent agreed "not to perform any work that violates any provision of [ORS chapter 701], within a three-year period from issuance of the Final Order," and "to change CCB license number 120904 from 'exempt' to 'non-exempt.'" Respondent also agreed to pay the

remaining \$500 of the civil penalty before April 5, 2005.

7) Claimant filed a wage claim and thereafter, on March 7, 2005, BOLI sent Respondent a Notice of Wage Claim ("Notice") that stated, in pertinent part:

"You are hereby notified that KURT T. KING has filed a wage claim with the Bureau of Labor and Industries alleging:

"Unpaid wages of \$470.00 at the rate of \$20.00 per hour from January 14, 2005 to January 25, 2005.

"IF THE CLAIM IS CORRECT, you are required to IMMEDIATELY make a negotiable check or money order payable to the claimant for the amount of wages claimed, less deductions required by law, and send it to the Bureau of Labor and Industries at the above address."

The Notice was mailed to Creative Carpenters Corporation at 10647 SE Lexington, Portland, Oregon 97266.

8) After reviewing Claimant's time sheet and the calendar documenting his hours worked, BOLI computed Claimant's earnings to include 3.25 overtime hours he accrued from Monday, January 17 through Saturday, January 22, 2005. By letter dated June 3, 2005, Respondent was notified that:

"To resolve this matter now, you must submit payment of \$502.50 to the Bureau's Portland office address no later

than June 16, 2005. Alternatively, you must submit the following records to support any position that these wages are not due:

"1. Any and all records and documents including, but not limited to timecards, which show the hours worked each day by claimant by day [sic] from January 14, 2005 through January 25, 2005.

"2. Any and all records documenting wages paid for work performed from January 14, 2005 through January 25, 2005, including, but not limited to pay stubs (itemized deductions), copies of cancelled checks, and signed records of draws taken and any other record of payment.

"3. Any other documentation of information which you feel pertains to this investigation."

Although Respondent's president subsequently admitted during a telephone interview that he hired Claimant at the \$20 per hour rate, Respondent otherwise did not respond to the June 3 letter and did not provide documents or submit payment for the unpaid wages.

9) Claimant was a credible witness. His testimony was straightforward and unembellished. The forum credited Claimant's testimony in its entirety.

10) Trotman and Walton were credible witnesses.

### ULTIMATE FINDINGS OF FACT

1) At times material, Respondent conducted business in Oregon and employed one or more persons in the operation of that business.

2) Respondent employed Claimant from January 14 through January 25, 2005.

3) Respondent agreed to pay Claimant \$20 per hour.

4) Between January 14 and January 25, 2005, Claimant worked 63.5 hours.

5) Claimant's last day of work was January 25, 2005.

6) From January 14 through January 25, 2005, Claimant earned \$1,270. Respondent paid Claimant \$800 and owes Claimant the remaining amount of \$470 in due and unpaid wages.

7) On Claimant's behalf, BOLI sent Respondent written notice of nonpayment of wages on March 7, 2005, before issuing an Order of Determination on July 18, 2005.

8) Respondent willfully failed to pay Claimant the \$470 in earned, due and payable wages. Respondent has not paid the wages owed and more than 30 days have elapsed from the date the wages were due.

9) Penalty wages for Claimant, computed pursuant to ORS 652.150, equal \$4,800.

### CONCLUSIONS OF LAW

1) At all times material herein, Respondent was an employer and Claimant was an employee sub-

ject to the provisions of ORS 652.110 to 652.200, 652.310 to 652.405, and ORS 653.010 to 261.

2) The actions, inaction, statements, and motivations of Warren Matti, Respondent's president, are properly imputed to Respondent.

3) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and the Respondent herein. ORS 652.310 to 652.414.

4) Respondent violated ORS 652.140 by failing to pay Claimant all wages earned and unpaid after Claimant's employment terminated.

5) Respondent is liable for penalty wages under ORS 652.150 for willfully failing to pay all wages or compensation earned and due to Claimant when his employment terminated, as provided in ORS 652.140.

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

#### OPINION

Respondent failed to appear at hearing and was found in default pursuant to OAR 839-050-0330. Consequently, the Agency was required to establish a prima facie case on the record to support the allegations in the Order of Deter-

mination. *In the Matter of MAM Properties, LLC*, 28 BOLI 172, 187 (2007). Unsworn and unsubstantiated assertions contained in Respondent's answer may be considered when making factual findings, but are overcome whenever they are contradicted by credible evidence in the record. *Id.*

#### WAGE CLAIM

The Agency's prima facie case must include credible evidence showing: 1) Respondent employed Claimant during the period claimed; 2) the pay rate upon which Respondent and Claimant agreed, if it exceeded the minimum wage; 3) Claimant performed work for which he was not properly compensated; and 4) the amount and extent of work Claimant performed for Respondent. *Id.* at 18.

There is credible evidence showing Claimant performed work for which he was not properly compensated and the amount and extent of the work he performed for Respondent. The evidence was not refuted. Additionally, credible evidence shows and Respondent's answer confirms that Respondent agreed to pay Claimant \$20 per hour for work he performed in January 2005. The only issue is whether Respondent employed Claimant and therefore is liable for the unpaid wages owed to him.

Respondent's unsworn and unsubstantiated contention that Claimant was working as a licensed independent contractor

between January 14 and January 25, 2005, is contradicted by Claimant's credible testimony that 1) he was hired at an hourly rate for an indefinite period to perform carpentry and framing work for Respondent; 2) he was told "what to do and when to do it"; and 3) most of the tools and all of the materials Claimant used to perform his job were provided by Respondent. Claimant's testimony was bolstered by Respondent's admission to BOLI that it agreed to pay Claimant an hourly rate and its admission in a settlement agreement with CCB that "[o]n or about January 14, 2005, to January 25, 2005, [Respondent] had at least one employee." There is no evidence in the record that supports Respondent's affirmative defense that Claimant was an independent contractor. Consequently, Respondent was an employer during times material herein and is liable for unpaid wages in the amount of \$470.

**PENALTY WAGES - ORS  
652.150**

The forum may award penalty wages when it determines that a respondent's failure to pay wages was willful. Willfulness does not imply or require blame, malice, or moral delinquency. A respondent commits an act or omission "willfully" if the respondent acts or fails to act intentionally, as a free agent, and with knowledge of what is being done or not done. *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976).

Respondent did not dispute Claimant's pay rate, hours worked, or that Claimant was owed wages. Claimant credibly testified that he presented a time sheet to Respondent's president that indicated Claimant worked 63.5 hours during the wage claim period. The time sheet also shows that Matti acknowledged paying Claimant \$800 for one 40 hour work week. Those facts demonstrate that Respondent voluntarily, intentionally, and as a free agent failed to pay Claimant all of the wages he earned between January 14 and January 25, 2005. Consequently, Respondent is liable to Claimant for penalty wages in the amount of \$4,800 (\$20 x 8 hours per day x 30 days). See ORS 652.150 and OAR 839-001-0470.

**CIVIL PENALTIES - ORS  
653.055**

If an employer pays an employee "less than the wages to which an employee is entitled under ORS 653.010 to 653.261," the forum may award civil penalties to the employee. ORS 653.055. The Agency alleged Respondent failed to compensate Claimant at one and one half times his regular rate of pay for each hour he worked over 40 hours in a given work week between January 14 and January 25, 2005. The Commissioner's rules governing overtime requirements were promulgated pursuant to ORS 653.261 and are within the range of wage entitlements encompassed by ORS 653.055.

In this case, for purposes of computing Claimant's overtime entitlement, there is no evidence that Respondent had an established work week. See OAR 839-020-0030(2)(a)(defining "work week" as "any seven (7) consecutive twenty four (24) hour period as determined by the employer"). Consequently, any overtime Claimant earned during the wage claim period must be computed in accordance with Agency policy which deems that in the absence of a work week determined by the employer, a claimant's work week begins the first day the claimant commences work during the wage claim period at issue. *In the Matter of Burrito Boy, Inc.*, 16 BOLI 1, 13 (1997). Evidence shows Claimant began working for Respondent on Friday, January 14, 2005. Accordingly, his work week for purposes of computing overtime was Friday through Thursday.<sup>1</sup> When computed pursuant to Agency policy, Claimant's work hours never exceeded 40 in a given work week during the wage claim period.<sup>2</sup> As a result, Claimant is not owed overtime wages and Respondent is not liable for civil penalties under ORS 653.055.

### ORDER

NOW, THEREFORE, as authorized by ORS 652.332, and as payment of the unpaid wages,

penalty wages, and civil penalties, Respondent **Creative Carpenters Corporation** is hereby ordered to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, the following:

A certified check payable to the Bureau of Labor and Industries, in trust for Claimant Kurt King, in the amount of FIVE THOUSAND TWO HUNDRED SEVENTY DOLLARS (\$5,270), less appropriate lawful deductions, representing \$470 in gross earned, unpaid, due and payable wages, and \$4,800 in penalty wages, plus interest at the legal rate on the sum of \$470 from February 1, 2005, until paid, and interest at the legal rate on the sum of \$4,800 from March 1, 2005, until paid.

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<sup>1</sup> The Agency erroneously computed Claimant's overtime hours based on a Monday through Sunday work week.

<sup>2</sup> See Finding of Fact – The Merits 5.