

PREVAILING WAGE RATE (PWR)

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1.0 GENERALLY

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To "intentionally" falsify information in a certified payroll reports, an employer must be aware of the correct information required to be included in the certified payroll report and make a conscious choice to include other, incorrect information. A negligent or otherwise inadvertent failure to include the correct information, while sufficient to invoke civil penalties, is not sufficient to impose debarment. Rather, a culpable mental state must be shown for the forum to conclude that a certified payroll report was "intentionally" falsified. ---- *In the Matter of Green Thumb Landscape and Maintenance, Inc., 35 BOLI 178, 250, 264 (2017).*

The forum regarded the testimony of respondent's corporate officers that they never "intentionally" failed to pay the prevailing wage rate as asserting a legal conclusion, not a fact. -- *In the Matter of Green Thumb Landscape and Maintenance, Inc., 35 BOLI 178, 253 (2017).*

- 1.1.6 --- "Locality"
- 1.1.7 --- "Prevailing Rate of Wage"
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1.1.9 --- "Public Contract"

1.1.10 --- "Public Works"

When a project involved the new construction of a building that was contracted for by Beaverton School District #48, a public agency in the amount of \$7,790,000, the forum concluded that the project was a public works. --- ***In the Matter of Brown's Architectural Sheetmetal, Inc. and Brun Metals Company, LLC, 35 BOLI 68, 96 (2016).***

1.1.11 --- "Public Works Project"

The forum first tried to determine the meaning of the term "project" from the statutory text and found it was not defined in the statute or in appellate case law interpreting the statute. In the context of an earlier version of the prevailing wage statutes, the commissioner found that a "project" would include "a multi-phase endeavor that may encompass more than one contract." - --- ***In the Matter of NW Housing Alternatives, Inc., 33 BOLI 165, 170 (2014).***

The forum applied the dictionary definition of "project" as "an undertaking devised to effect the reclamation or improvement of a particular area of land." It was clear from the history of the board's consideration, as reflected in its minutes, that the reclamation of the subject parcel was considered as a unitary project from the beginning, and that the final reality will be a single redevelopment of the Requester's campus, with all three components — office, building, homeless shelter/community building, and affordable housing — designed by the same architect and built by the same general contractor at the same time. ----- ***In the Matter of NW Housing Alternatives, Inc., 33 BOLI 165, 171 (2014).***

A "project" -- which is now a completely separate statutory sub-set of "public works" — may be much more all-encompassing than a single building. ----- ***In the Matter of NW Housing Alternatives, Inc., 33 BOLI 165, 172 (2014).***

The forum concluded that, notwithstanding the presence of several different buildings in requester's campus redevelopment, and even though those buildings served various interests in the over-all mission of requester, the over-all redevelopment constituted a single project. ----- ***In the Matter of NW Housing Alternatives, Inc., 33 BOLI 165, 172 (2014).***

1.1.12 --- "Retainage"

1.1.13 --- "Subcontractor"

Respondents, who had an oral agreement with the prime contractor to perform work on a public works, argued that they could not be subcontractors because the prime contractor paid respondents directly from the prime contractor's "private funds." The forum rejected this argument, stating that allowing respondents to avoid paying its workers the prevailing wage rate because the prime contractor paid respondents directly would mean that no subcontractor on a public works project would have to pay its workers the prevailing wage rate if it was paid directly by the prime contractor instead of the contracting public agency, and this was not the law. --- ***In the Matter of Brown's Architectural Sheetmetal, Inc. and Brun Metals Company, LLC, 35 BOLI 68, 97-98 (2016).***

Respondents argued that they were not subcontractors because they did not bid on the work and there was an oral agreement, but no written contract between the prime contractor and respondents. Contrary to respondents' argument, an oral agreement does not need to be in writing to be an enforceable contract, so long as it satisfies the other elements of a contract and its subject matter does not fall within the statute of frauds, which it did not in this case. Whether or not respondents bid on the work is irrelevant. In this case, the prime contractor made an oral agreement with respondents to perform "quality assurance" work at a public works on the prime contractor's behalf, in exchange for which the prime contractor agreed to reimburse respondents for their "time and materials." Respondents performed that work and received reimbursement. This constituted a valid contract, making respondents a subcontractor under Oregon's prevailing wage laws. --- ***In the Matter of Brown's Architectural Sheetmetal, Inc. and Brun Metals Company, LLC, 35 BOLI 68, 97 (2016).***

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In reviewing a motion for summary judgment, this forum draws all inferences of fact from the record against the party filing the motion for summary judgment and in favor of the participant opposing the motion. Given the related ownership interests and addresses of the companies and when drawing all inferences of fact in favor of the non-moving party, the forum found that there was a question of fact as to whether three named respondents had a “financial interest” in a subcontractor and declined to award summary judgment as to respondents’ argument that the three respondents did not have a financial interest. ---- ***In the Matter of Portland Flagging, LLC (#14-14), 35 BOLI 11, 25 (2016).***

On the whole, the evidence -- from the contract of sale, from a non-respondent’s exercise of ownership of the assets, and from the understanding of the claimants who engaged in business with -- established that the subcontractor on the public works contract was not respondent, but the individual non-respondent. ---- ***In the Matter of Zoom Contracting, LLC dba Zoom Garage Door, Inc., 33 BOLI 111, 119-20 (2014).***

1.1.14 --- "Trade or Occupation"

Respondents argued that they were not required to pay the prevailing wage rate to four workers on two public works projects because their activities on the projects were “consulting,” “remedial and repair,” “diagnostic,” and “safety compliance.” The forum called this argument a “red herring” and stated that, although these activities may not be listed trade classifications, claimants credibly testified that they performed manual and physical labor on respondents’ behalf on the projects and, based on the workers’ daily reports, the veracity of which was not questioned by respondents, the agency’s compliance specialist credibly testified that most of the actual work claimants performed was appropriately classified as one of four trades – Sheet Metal Worker, Laborer Group 1, Carpenter Group 1, or Bricklayer/Stonemason. ---- ***In the Matter of Brown’s Architectural Sheetmetal, Inc. and Brun Metals Company, LLC, 35 BOLI 68, 98 (2016).***

1.1.15 --- "Warranty work"

“Warranty work,” by definition, means work performed within the scope of a warranty. Without such a warranty, work cannot be said to be “warranty” work. ---- ***In the Matter of Brown’s Architectural Sheetmetal, Inc. and Brun Metals Company, LLC, 35 BOLI 68, 102 (2016).***

When the original warranty applicable to a public works had expired at the time respondents employed workers on the project, the forum held that respondents’ work could not be considered “warranty” work subject to the prevailing wage rate unless a separate warranty existed. ---- ***In the Matter of Brown’s Architectural Sheetmetal, Inc. and Brun Metals Company, LLC, 35 BOLI 68, 102 (2016).***

When the original warranty applicable to a public works had expired at the time respondents employed workers on the project, but a separate warranty existed that brought respondents’ work within the scope of Oregon’s prevailing wage rate laws, respondents were required to pay the prevailing wage rate assigned to their trade classification to four wage claimants who performed work on the project. ---- ***In the Matter of Brown’s Architectural Sheetmetal, Inc. and Brun Metals Company, LLC, 35 BOLI 68, 102 (2016).***

In the absence of a written rule or statutory definition of “warranty work” in the context of a public works, the forum applied the agency’s stated unwritten practice and policy that it follows regarding “warranty work” and its application in the prevailing wage rate context to determine whether the work performed by four wage claimants was subject to the prevailing wage rate. ---- ***In the Matter of Brown’s Architectural Sheetmetal, Inc. and Brun Metals Company, LLC, 35 BOLI 68, 105-06 (2016).***

Respondents argued that the ALJ lacked jurisdiction to determine whether “warranty work” on a public works was subject to the prevailing wage rate because there was no statute or regulation defining warranty work and the agency is asking the forum to engage in rulemaking process without following established rulemaking procedures.” Respondents argued that, in the

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absence of an existing administrative rule defining “warranty work,” the ALJ must necessarily engage in rulemaking to determine whether or not claimants’ work was “warranty work” subject to the prevailing wage rate. The forum found that respondents were correct that neither Oregon’s prevailing wage laws nor BOLI’s administrative rules defined “warranty work” in the prevailing wage context and there was no Oregon case law defining “warranty work” in this context. However, the forum concluded that the forum had jurisdiction to adjudicate whether or not claimants’ work was “warranty work” for which they were entitled to be paid the prevailing wage rate because “agencies generally may express their interpretation of the laws they are charged with administering either by adjudication or by rulemaking, or both.” ---- ***In the Matter of Brown’s Architectural Sheetmetal, Inc. and Brun Metals Company, LLC, 35 BOLI 68, 105-06 (2016).***

1.1.16 --- "Worker"

1.1.17 --- "Other"

2.0 AUTHORITY OF COMMISSIONER

Respondents argued that the ALJ lacked jurisdiction to determine whether “warranty work” on a public works was subject to the prevailing wage rate because there was no statute or regulation defining warranty work and the agency is asking the forum to engage in rulemaking process without following established rulemaking procedures.” Respondents argued that, in the absence of an existing administrative rule defining “warranty work,” the ALJ must necessarily engage in rulemaking to determine whether or not claimants’ work was “warranty work” subject to the prevailing wage rate. The forum found that respondents were correct that neither Oregon’s prevailing wage laws nor BOLI’s administrative rules defined “warranty work” in the prevailing wage context and there was no Oregon case law defining “warranty work” in this context. However, the forum concluded that the forum had jurisdiction to adjudicate whether or not claimants’ work was “warranty work” for which they were entitled to be paid the prevailing wage rate because “agencies generally may express their interpretation of the laws they are charged with administering either by adjudication or by rulemaking, or both.” ---- ***In the Matter of Brown’s Architectural Sheetmetal, Inc. and Brun Metals Company, LLC, 35 BOLI 68, 105-06 (2016).***

It is the responsibility of the commissioner to determine the prevailing rate of wage for workers in each trade or occupation in each locality. ---- ***In the Matter of Hard Rock Concrete, Inc. and Rocky Evans, 33 BOLI 77, 96 (2014), aff’d without opinion, Hard Rock Concrete, Inc. and Rocky Evans v. Oregon Bureau of Labor and Industries, 278 Or App 625 (2016).***

3.0 TRADE OR OCCUPATION

It is impossible to determine the correct prevailing wage without determining the “trade or occupation” that work falls into. In other words, the statutory obligation to determine the amount of the prevailing rate of wage is, inextricably, a function of the proper classification of the work. ---- ***In the Matter of Hard Rock Concrete, Inc. and Rocky Evans, 33 BOLI 77, 96 (2014), aff’d without opinion, Hard Rock Concrete, Inc. and Rocky Evans v. Oregon Bureau of Labor and Industries, 278 Or App 625 (2016).***

4.0 APPRENTICES/TRAINEES

5.0 ART, INSTALLATION

6.0 BASIC HOURLY RATE OF WAGE

7.0 FRINGE BENEFITS

To make late contributions, employers must follow a specific set of steps, which includes notice and potential repayment of investment losses, in order to validly contribute to a retirement plan. When there was no evidence that the late contributions made to the accounts of the 36 workers followed an appropriate delinquent contribution payback method and it appeared that only the amounts deducted from the wage claimants’ paychecks during those time periods were deposited into the contractor’s plan several months later, the forum found that the fringe benefit

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contributions made to the retirement accounts of the wage claimants on that date did not satisfy the requirements of ORS 279C.840(1) and ORS 279C.800(1)(a), and granted the agency's motion for summary judgment. ---- ***In the Matter of Portland Flagging, LLC (#14-14), 35 BOLI 11, 20 (2016).***

In a prevailing wage rate case, it is the agency's burden to prove that an employer did not pay all deducted fringe benefits into the employer's fringe benefit plan. ---- ***In the Matter of Portland Flagging, LLC (#14-14), 35 BOLI 11, 15, 18, 31 (2016).*** See also *In the Matter of Portland Flagging, LLC (#37-13), 34 BOLI 270, 276 (2016).*

At hearing, the agency presented undisputed evidence that wages deducted from the paycheck of a wage claimant in the fourth quarter of 2011 were not deposited into his fringe benefit until January 31, 2012, 16 days after the due date of January 15, 2012. Thus, the agency sustained its burden of proof in demonstrating that the untimely deposit of funds into the fringe benefit accounts of 13 workers violated the requirement to pay the prevailing wage rate. -- ***In the Matter of Portland Flagging, LLC (#37-13), 34 BOLI 270, 283-84 (2016).***

ORS 279C.800(1)(a) defines prevailing wage fringe benefit payments as the "rate of contribution a contractor or subcontractor makes irrevocably to a trustee or to a third person under a plan, fund or program." Payments must be made on the 15th day following the end of a calendar quarter. ---- ***In the Matter of Portland Flagging, LLC (#37-13), 34 BOLI 270, 283 (2016).***

Contributions to fringe benefit plans must be made on a regular basis and not less often than quarterly. ---- ***In the Matter of Portland Flagging, LLC (#37-13), 34 BOLI 270, 283 (2016).*** See also *In the Matter of Portland Flagging, LLC (#28-15), 34 BOLI 244, 253 (2016).*

When there was no evidence that the late fringe benefit contributions made to the accounts of the respondents' twelve workers for the second quarter of 2012 followed an appropriate delinquent contribution payback method, the forum held that the contributions respondents made on October 1, 2012, did not satisfy the requirements of ORS 279C.840(1) and ORS 279C.800(1)(a) and granted the agency summary judgment on that issue. ---- ***In the Matter of Portland Flagging, LLC (#37-13), 34 BOLI 270, 277 (2016).***

To make late contributions to a retirement plan, employers must follow a specific set of steps, which includes notice and potential repayment of investment losses, in order to validly contribute to a retirement plan. ---- ***In the Matter of Portland Flagging, LLC (#37-13), 34 BOLI 270, 277 (2016).***

Prevailing wage payments must be made to employees "in cash [or] by the making of contributions of a type referred to in ORS 279C.800(1)(a)." ORS 279C.800(1)(a) defines prevailing wage fringe benefit payments as the "rate of contribution a contractor or subcontractor makes irrevocably to a trustee or to a third person under a plan, fund or program." It is clear that any timely (*i.e.* "not less often than quarterly") contributions made to The Contractors' Plan would be valid. ---- ***In the Matter of Portland Flagging, LLC (#37-13), 34 BOLI 270, 277 (2016).***

In its summary judgment motion, the agency argued that respondents violated ORS 279C.840 by withholding fringe benefit amounts from the paychecks of the wage claimants listed in Exhibit A to the amended NOI and then failing to deposit the withdrawn amounts into a fringe benefit plan as required by ORS 279C.800(1)(a). In a prevailing wage rate case, it is the agency's burden to prove that an employer did not pay all deducted fringe benefits into the employer's fringe benefit plan. ---- ***In the Matter of Portland Flagging, LLC (#37-13), 34 BOLI 270, 276 (2016).***

When all of the arguments in the agency's motion for summary judgment were based on the allegation that respondents withdrew fringe benefit amounts from the paychecks of "workers," but failed to deposit those amounts into a fringe benefit plan, but the NOI did not identify the names of the "workers" or the amounts that were allegedly withheld and not

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deposited into a fringe benefit plan, the forum held that, even if some violations could be inferred from the agency's evidence submitted in support of its motions for summary judgment, the agency could not prevail time because the violations were not identified in the NOI. ---- ***In the Matter of Portland Flagging, LLC (#37-13), 34 BOLI 270, 274 (2016).***

When calculating the amount of remaining prevailing wage payments owed to workers, the agency has a practice of subtracting the amounts deposited into fringe benefit accounts when the agency receives reliable documentation verifying the amounts of the deposits. Accordingly, the forum credited respondents' late benefit plan contributions in calculating unpaid wages due to claimants. ---- ***In the Matter of Portland Flagging, LLC (#28-15), 34 BOLI 244, 266 (2016).***

An agency's interpretation of its own rule is entitled to deference "if that interpretation is plausible and is not inconsistent with the rule in its context or with some other source of law." When the agency's interpretation of a "calendar quarter" was consistent with other Oregon laws that define a "calendar quarter" as "the period of three consecutive months ending on March 31, June 30, September 30 or December 31," the forum applied the agency's interpretation of its rule to the facts of the case because it was "plausible and . . . not inconsistent with the rule in its context or with some other source of law." ---- ***In the Matter of Portland Flagging, LLC (#28-15), 34 BOLI 244, 262 (2016).***

The forum has previously recognized that factors such as fluctuating market conditions can account for differences between retirement account statement balances and the amounts contributed by an employer. In a prevailing wage rate case in which the agency alleged that an employer paid contributions untimely into its employee's retirement accounts, the forum found the evidence to be unclear as to the amounts contributed and the dates on which contributions were made without sworn testimony from witnesses knowledgeable about the contributions to the employee's retirement accounts and, viewing the evidence submitted by both sides in the light most favorable to respondents, denied summary judgment to the agency as to whether there were any unpaid wages owing to a claimant. ---- ***In the Matter of Portland Flagging, LLC (#28-15), 34 BOLI 244, 253 (2016).***

In a prevailing wage case, when the evidence was that the employer paid an ascertained amount of money to a 401(k) plan, the stock market had crashed while the claimant's funds were invested in the account, the crash was of a severity that could explain the difference between the amount paid in and the ultimate payout, and neither the agency nor the employer could demonstrate what happened to the particular funds credited to the claimant's account, the agency failed to satisfy its burden to prove that the employer did not pay all of the claimant's deducted fringe benefits into the 401(k) plan. ---- ***In the Matter of Green Thumb Landscape and Maintenance, Inc., 32 BOLI 185, 198 (2013).***

8.0 RECORDS

When the agency alleged in its NOI that respondents filed inaccurate and incomplete certified statements for work performed on a project and failed to certify the accuracy of the payroll, the allegation in the applicable exhibit to the NOI was that respondent failed to keep records for 11 weeks before the project had begun and make them available to BOLI, and there was no evidence of respondent's submissions of certified payroll for the listed weeks, the forum dismissed the allegation based on the agency's failures to identify the violations correctly in the exhibit or to move to amend the NOI at hearing. ---- ***In the Matter of Green Thumb Landscape and Maintenance, Inc., 32 BOLI 185, 201-02 (2013).***

9.0 RECORDS AVAILABILITY

When the agency alleged in its NOI that respondents filed inaccurate and incomplete certified statements for work performed on a project and failed to certify the accuracy of the payroll, the allegation in the applicable exhibit to the NOI was that respondent failed to keep records for 11 weeks before the project had begun and make them available to BOLI, and there

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was no evidence of respondent's submissions of certified payroll for the listed weeks, the forum dismissed the allegation based on the agency's failures to identify the violations correctly in the exhibit or to move to amend the NOI at hearing. ----- ***In the Matter of Green Thumb Landscape and Maintenance, Inc., 32 BOLI 185, 201-02 (2013).***

10.0 PUBLIC AGENCY LIABILITY

11.0 FEE FOR COSTS OF ADMINISTERING LAW

12.0 EMPLOYMENT RELATIONSHIP

12.1 --- Sole Employer

If records of the Secretary of State had been offered into evidence by way of a certification from the Secretary of State, ORS 56.110 would require the forum to find them to constitute prima facie evidence of the fact that anything done by Zoom Garage Door can be attributed to respondent. As prima facie evidence, that fact would be entitled to a presumption that it is true. ORS 40.135(2). When there was no evidence produced casting any doubt whatsoever on the authenticity of the records from the secretary of state' office, the forum accepted those records as establishing the prima facie case -- the presumption that Zoom Garage Door was, at the times material to this case, the business name of Zoom Contracting, LLC, and that Zoom Contracting, LLC was therefore legally responsible for any violations of the prevailing wage laws by Zoom Garage Door. ----- ***In the Matter of Zoom Contracting, LLC dba Zoom Garage Door, Inc., 33 BOLI 111, 118 (2014).***

12.2 --- Joint Employment Relationship

In a case in which the agency's NOI alleged a joint employment relationship between respondents GTL, GTM, and CJ, the forum found that GTL, having been administratively dissolved on before a bid was made on the public works contract, played no part in the project. In contrast, GTM bid on and was awarded the contract and the workers were actually paid by CJ, a company that was set up to handle GTM's general contracting and construction labor. There was no evidence that CJ was set up as an independent payroll service. These facts, taken together, indicated that GTM and CJ were joint employers. ----- ***In the Matter of Green Thumb Landscape and Maintenance, Inc., 35 BOLI 178, 258 (2017).***

The forum relies on the provisions of the FLSA, specifically 29 CFR § 791.2, to determine whether respondents are joint employers. Under the FLSA, the forum's inquiry necessarily "depends upon all the facts" in the particular case. ----- ***In the Matter of Green Thumb Landscape and Maintenance, Inc., 35 BOLI 178, 257 (2017).***

A joint employment relationship cannot exist unless each alleged "joint" employer is also an individual employer. ----- ***In the Matter of Green Thumb Landscape and Maintenance, Inc., 35 BOLI 178, 257 (2017).***

A joint employment relationship is established under the FLSA when employers have an agreement to share the services of an employee that is mutually beneficial to the employer(s), where one employer acts directly or indirectly in the interest of the other employer with respect to the employee, where the employers share direct or indirect control of the employee, or where one employer controls the other employer. ----- ***In the Matter of Green Thumb Landscape and Maintenance, Inc., 35 BOLI 178, 256 (2017).*** See also *In the Matter of Portland Flagging, LLC (#28-15), 34 BOLI 244, 264 (2016).*

In general, a joint employment relationship exists when two associated employers share control of an employee. Joint or co-employers are responsible, both individually and jointly, for compliance with all applicable provisions of Oregon's wage and hour laws. Based on the testimony of GTM's president that respondents GTM and GTL were "interchangeable" entities during the performance of a public works project, the forum concluded that GTM and GTL were joint employers on the project and were jointly and severally liable for any civil penalties assessed. ----- ***In the Matter of Green Thumb Landscape and Maintenance, Inc., 35 BOLI 178, 219-20, 256 (2017).*** See also *In the Matter of Portland Flagging, LLC (#14-14), 35 BOLI*

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11, 30 (2016); *In the Matter of Portland Flagging, LLC (#28-15), 34 BOLI 244, 264 (2016)*.

When the notice of public works for the subject project: (a) reflected that Portland Flagging was the flagging subcontractor; (b) Portland Flagging previously admitted that it operated under the assumed business name of "AD Traffic"; (c) time sheets, payroll records and retirement plan contribution statements for claimant all used some form of the name "AD Traffic"; (d) the statement for claimant's retirement account was addressed to "AD Traffic Control Services, LLC"; and (e) throughout the contested case process, Portland Flagging and AD Traffic shared the same business address, the forum found that the agency had sustained its burden in establishing that claimant was jointly employed by both Portland Flagging and AD Traffic Control and held that both corporate entities were responsible for the wages owing to her. ---- *In the Matter of Portland Flagging, LLC (#28-15), 34 BOLI 244, 264-65 (2016)*.

13.0 FAILURE TO PAY PREVAILING WAGE RATE

Respondent did not fail to pay the appropriate prevailing wage rate to three workers when the agency did not meet its burden of proof to show that the workers should have been classified differently and paid at a higher rate than the rate they were actually paid. ---- *In the Matter of Green Thumb Landscape and Maintenance, Inc., 35 BOLI 178, 259 (2017)*.

The agency and respondents stipulated that respondents committed 22 violations of ORS 279C.540(1) and OAR 839-025-0050 by not paying prevailing wage rate overtime hours worked on a public works project to nine workers for 22 weeks. In its NOI, the agency asked the forum to impose a civil penalty of \$5,000 per violation and alleges several aggravating factors, citing ORS 279C.540, OAR 839-025-0050, OAR 839-025-0520, OAR 839-025-0530(1), and OAR 839-025-0540(1)&(5) as the statute and rules establishing the violation and authorizing the imposition of civil penalties. The forum held that ORS 279C.865(1) only authorizes the assessment of a civil penalty for violations of ORS 279C.800 to 279C.870 or administrative rules corresponding to those statutory provisions and that the commissioner has no authority to assess a civil penalty for violations of ORS 279C.540 because it is outside the scope of the statutory provisions listed in ORS 279C.865(1). ---- *In the Matter of Green Thumb Landscape and Maintenance, Inc., 35 BOLI 178, 225-26 (2017)*.

Respondents and the agency stipulated that respondents paid ten workers less than the prevailing wage rate they were entitled to be paid on their regular paydays. However, the agency did not meet its burden of proof on its allegations to which there was no stipulation. ---- *In the Matter of Green Thumb Landscape and Maintenance, Inc., 35 BOLI 178, 220-22 (2017)*.

Subcontractors who fail to pay prevailing wages are liable to the workers affected for the unpaid wages and liquidated damages. ---- *In the Matter of Portland Flagging, LLC (#28-15), 34 BOLI 244, 263 (2016)*.

Subcontractors required by ORS 279C.540 to pay overtime wages must pay overtime wages for all hours worked on Saturdays. Those wages must be paid on the subcontractor's "regular payday." ---- *In the Matter of Portland Flagging, LLC (#28-15), 34 BOLI 244, 263 (2016)*.

It is the agency's burden to prove that an employer did not pay all deducted fringe benefits into the employer's fringe benefit plan. Contributions to fringe benefit plans must be made on a regular basis and not less often than quarterly. ---- *In the Matter of Portland Flagging, LLC, 34 BOLI 208, 211 (2015)*.

When making late contributions to the employer's fringe benefit plan, an employer must follow a specific set of steps, which includes notice and potential repayment of investment losses, in order to validly contribute to a retirement plan. When there was no evidence that the employer's late contributions followed an appropriate delinquent contribution payback method and it appeared that only the amounts deducted from the wage claimants' paychecks in 2012 were deposited in 2013, the forum held that respondents' 2013 contributions did not satisfy the

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requirements of ORS 279C.840(1) and ORS 279C.800(1)(a). ---- ***In the Matter of Portland Flagging, LLC, 34 BOLI 208, 212 (2015).***

Although respondent contended that a worker did not perform work on disputed dates based on the daily reports maintained by the prime contractor on the project, the forum concluded that the worker did in fact perform work for the respondent on the project on those days. By not paying the worker for that work, respondent violated ORS 279C.840(1) and OAR 839-025-0035. ---- ***In the Matter of High Mountain Plumbing and Diane Marie Cina, 33 BOLI 40, 47 (2014).***

A contractor's or subcontractor's obligation to pay the prevailing rate of wage includes the obligation to pay overtime. Overtime pay is required when labor is employed by a state or a county, school district, municipality, municipal corporation or subdivision thereof through a contractor. Community colleges are formed through the creation of a "community college district" that are funded by tax levies assessed in their respective districts and, as such, are "school districts." Accordingly, respondent was required to pay overtime wages. ---- ***In the Matter of High Mountain Plumbing and Diane Marie Cina, 33 BOLI 40, 47 (2014).***

Subcontractors required by ORS 279C.540 to pay overtime wages must pay overtime wages for all hours worked on Saturdays. Those wages must be paid on the subcontractor's "regular payday." The forum concluded that by not paying the overtime wages to its workers for their overtime work on November 26, 2011, until a year after it was due, respondent committed a violation. ---- ***In the Matter of High Mountain Plumbing and Diane Marie Cina, 33 BOLI 40, 47 (2014).***

Christmas Day and New Year's Day are legal holidays on which overtime wages must be paid. When those days fall on a Sunday, the succeeding Monday shall be recognized as a legal holiday. December 25, 2011, and January 1, 2012, both fell on Sunday, thereby requiring respondent to pay its workers overtime for work performed on the succeeding Mondays of December 26, 2011, and January 2, 2012. Respondent committed a violation by failing to do so. ---- ***In the Matter of High Mountain Plumbing and Diane Marie Cina, 33 BOLI 40, 48 (2014).***

When respondent admitted underpaying its workers on a project over several weekly pay periods and its records listed four of the claimants as having worked on the project during those pay periods, the forum found four violations of prevailing wage laws. ---- ***In the Matter of Green Thumb Landscape and Maintenance, Inc., 32 BOLI 185, 199-200 (2013).***

When respondent admitted underpaying its workers on a project over several weekly pay periods, but there was no evidence that the first worker was employed on the project during the applicable pay periods and the only evidence of the second worker's employment was a statement to that effect in a letter from the agency's compliance specialist to the respondent and respondent's subsequent payment to that worker of \$22.40, the forum did not find any violations regarding payment of prevailing wages to either of the two workers. ---- ***In the Matter of Green Thumb Landscape and Maintenance, Inc., 32 BOLI 185, 199-200(2013).***

The quality of the work is not the issue; it is the character or type of work that is legally significant for purposes of paying the minimum prevailing wage. ---- ***In the Matter of Hard Rock Concrete, Inc. and Rocky Evans, 33 BOLI 77, 103 (2014), aff'd without opinion, Hard Rock Concrete, Inc. and Rocky Evans v. Oregon Bureau of Labor and Industries, 278 Or App 625 (2016).***

14.0 FAILURE TO POST PREVAILING WAGE RATE

The forum found that respondent did not fail to post the prevailing wage rate when respondent's president and respondent's foreman credibly testified that respondent's work schedule and the prevailing wage rate were posted on the wall inside respondent's jobsite trailer that respondent's foreman opened every morning, that respondent's foreman held daily meetings inside the trailer with workers to give work instructions for the day, and that respondent's workers ate lunch in the trailer and also went into trailer every day to get job

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supplies, and BOLI's compliance specialist testified that posting in a job trailer is acceptable, so long as workers are allowed to enter the job trailer while they are working on a prevailing wage rate project. ----- ***In the Matter of Green Thumb Landscape and Maintenance, Inc., 35 BOLI 178, 227 (2017).***

The forum did not find a separate violation for failing to post prevailing wage fringe benefits. As a general rule, fringe benefits are considered to be a part of the prevailing wage. Due to the absence of authority suggesting or mandating otherwise, the forum found that failure to post the amount of fringe benefits was part and parcel of a failure to post the amount of the prevailing wage and did not constitute a separate violation. If respondent had been a participant in a separate health and welfare or pension plan, it would have been required to post a notice describing the plan. ----- ***In the Matter of Diamond Concrete, Inc. and Eric James O'Malley and Marnie Leanne O'Malley, 33 BOLI 68, 73 (2014).***

15.0 OTHER VIOLATIONS

15.1 --- Taking Action to Circumvent the PWR Laws

15.2 --- Dividing a Public Works Project for the Purpose of Avoiding Compliance with the PWR Laws

15.3 --- Failure to Make and Maintain Necessary Records

15.4 --- Failure to Make Records Available to Wage and Hour Division

Respondent argued that it did not violate ORS 279C.850 and OAR 839-025-0030 because the agency did not request to inspect records at respondent's business premises. Historically, the forum has interpreted the "make available" provisions of both ORS 279C.850(1)-(2) and ORS 653.045 as requiring contractors and subcontractors to submit documents to BOLI upon BOLI's written request. The forum concluded that its precedent, not the interpretation advanced by respondents' counsel, was the correct interpretation of the statute and rule. When respondent did not provide the information and records the agency needed to determine if respondent had paid its workers the prevailing wage rate until almost eight months after the agency's initial records request, and then only after subpoenaing those records, respondent's failure to provide those records in a timely manner violated ORS 279C.850 and OAR 839-025-0030. ----- ***In the Matter of Green Thumb Landscape and Maintenance, Inc., 35 BOLI 178, 245-46 (2017).***

15.5 --- Failure to Complete and Return PWR Survey

15.6 --- Filing Incomplete, Inaccurate, or Untimely Certified Payroll Statements

Respondent's certified payroll report for the week ending 2/7/15 violated ORS 279C.845(1)-(3) and OAR 839-025-0010(1)-(3) when the correct hours and work classifications are reported for all workers, but the days and hours actually worked all erroneously showed that the work was done one day earlier than it was actually performed and one worker was reported as having earned \$321.98, the amount he was actually paid, whereas he actually earned only \$320.12 when his weighted overtime was accurately calculated. ----- ***In the Matter of Green Thumb Landscape and Maintenance, Inc., 35 BOLI 178, 260 (2017).***

Respondent's certified payroll report for the week ending 3/7/15 violated ORS 279C.845(1)-(3) and OAR 839-025-0010(1)-(3) when respondent's daily jobsite report showed that a worker worked 5 hours on a prevailing wage rate project performing work in the Laborer classification, the worker's name did not appear on respondent's corresponding certified payroll report, and respondent sent BOLI an amended certified payroll report an amended certified payroll report for the week ending 3/7/15 showing that the worker worked 5 hours as a Laborer on 3/5/15, but did not include a certified statement. ----- ***In the Matter of Green Thumb Landscape and Maintenance, Inc., 35 BOLI 178, 260 (2017).***

Respondent's certified payroll report for the week ending 3/24/15 violated ORS 279C.845(1)-(3) and OAR 839-025-0010(1)-(3) when respondent's certified payroll report showed that a worker worked 8 hours on 3/24/15 as a Laborer, but his name did not appear on

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respondent's corresponding certified payroll report, which only listed one other person as having worked on respondent's prevailing wage rate project that week. ----- ***In the Matter of Green Thumb Landscape and Maintenance, Inc., 35 BOLI 178, 261 (2017).***

In its NOI, the agency alleged submitted 30 untimely certified payroll reports, but the forum only found 25 because respondent's certified payroll reports showed that no workers were employed on the relevant public works project during five of the weeks in which the alleged violations occurred and ORS 279C.845(4) does not require contractors and subcontractors to submit certified payroll reports for weeks in which they employ no workers on a public works. ---- ***In the Matter of Green Thumb Landscape and Maintenance, Inc., 35 BOLI 178, 230, 237 (2017).***

Respondent, a subcontractor, proved that it submitted a payment application and corresponding certified payroll report once a month to the prime contractor during respondent's work on a public works project. The agency provided no evidence to show that respondent did not submit its certified payroll report once a month to the prime contractor in a timely manner, i.e. "by the fifth business day of the following month." The forum found it was also clear that the prime contractor sent some, if not all, of respondent's certified payroll reports to the contracting agency. Respondent argued that it should prevail because its timely submission of all the certified payroll reports listed in the Agency's NOI to the prime contractor met the requirements of ORS 279C.845(4) and OAR 839-025-0010(3) and because the agency did not meet its burden of proof to show that the prime contractor did not provide all of respondent's certified payroll reports to the contracting agency in a timely manner. The forum found that respondent's argument failed because it contradicted the clear language of the statute and rule. ORS 279C.845(4) states that the "contractor or subcontractor shall deliver or mail each certified statement required by subsection (1) of this section to the public agency." ORS 279C.845(1) states that the "contractor or the contractor's surety and every subcontractor or the subcontractor's surety shall file certified statements with the public agency in writing[.]" Read together, these provisions require each contractor and subcontractor to submit certified payroll reports directly to the contracting agency, regardless of the contracting agency's preference to have subcontractors submit them through the contractor or a contractual provision between the subcontractor and contractor that requires the subcontractor to submit certified payroll reports to the contractor. ----- ***In the Matter of Green Thumb Landscape and Maintenance, Inc., 35 BOLI 178, 230, 236 (2017).***

The forum found that respondents' nine violations fell into three different categories: (1) respondent's 10/6/12, and 10/27/12 violations for which the forum could not determine how the violation occurred except for the stipulation of inaccuracy by the agency and respondents; (2) respondent's 8/25/12, 9/1/12, 9/15/12, 9/22/12, 9/29/12, and 10/13/12 certified payroll reports that were inaccurate and incomplete because they failed to show that prevailing wage rate overtime was earned by one or more workers; and (3) respondent's 9/8/12 certified payroll report that was inaccurate and incomplete because it failed to show that prevailing wage rate overtime was earned by three workers and one of those workers – Ricardo Zuniga – did not even appear on the certified payroll report. ----- ***In the Matter of Green Thumb Landscape and Maintenance, Inc., 35 BOLI 178, 230 (2017).***

The agency and respondents stipulated that respondents committed nine violations of ORS 279C.845(1)-(3) and OAR 839-025-0010(1)-(3) by filing inaccurate certified payroll reports for work performed on a public works project for the weeks ending 8/25/12, 9/1/12, 9/8/12, 9/15/12, 9/22/12, 9/29/12, 10/6/12, 10/13/12, and 10/27/12. ----- ***In the Matter of Green Thumb Landscape and Maintenance, Inc., 35 BOLI 178, 229 (2017).***

The agency alleged that respondents failed to file a certified payroll statement on the fifth business day of the following month for the pay period ending December 8, 2012. When respondent's president testified that a certified payroll statement was prepared for this week, but no such statement was submitted as an exhibit or provided to the investigator upon request, the forum concluded that the Agency had sustained its burden in proving that this violation occurred

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and assessed a civil penalty of \$1,000. ---- *In the Matter of Portland Flagging, LLC (#14-14), 35 BOLI 11, 35 (2016).*

On the agency's motion for summary judgment, because there was a question of fact as to whether the January 31, 2012, contribution made on behalf of a wage claimant was timely, there was also a question of fact as to whether there was a violation for submitting inaccurate certified payroll statements. ---- *In the Matter of Portland Flagging, LLC (#37-13), 34 BOLI 270, 279 (2016).*

Because the fringe benefit contributions made by respondents on October 1, 2012, for the second quarter of 2012, on behalf of the wage claimants were not in compliance with the law, it followed that the certified payroll statements associated with the second quarter of 2012 violated ORS 279C.845 and OAR 839-025-0010. ---- *In the Matter of Portland Flagging, LLC (#37-13), 34 BOLI 270, 279 (2016).*

Respondent's certified payroll reports for the weeks ending August 13, 20, and 27, September 3, 17, and 26, 2011, all omitted the hours that one employee worked on August 12, 19, and 26, and September 2, 16 and 23. The forum held that respondent's omission of those hours constituted six violations. ---- *In the Matter of High Mountain Plumbing and Diane Marie Cina, 33 BOLI 40, 49 (2014).*

Respondent's certified payroll report for the week ending November 26, 2011, stated that four of its employees were all paid straight time for the work on November 26, a Saturday. However, respondent was required to pay them overtime for that work. By reporting that these four workers were paid straight time, respondent failed to report the gross wages these four workers actually earned, thereby violating ORS 279C.845 and OAR 839-025-0010(1). ---- *In the Matter of High Mountain Plumbing and Diane Marie Cina, 33 BOLI 40, 49 (2014).*

Respondent's certified payroll reports for the weeks ending December 31, 2011, and January 7, 2012, reported three workers being paid straight time for their work on December 26, 2011 and January 2, 2012. Under ORS 279C.540, those days are considered to be legal holidays, and workers must be paid overtime for any work performed on those days. By reporting that three workers were paid straight time for their work on those two days, respondent failed to report the gross wages these four workers actually earned, thereby committing two violations of ORS 279C.845 and OAR 839-025-0010(1). ---- *In the Matter of High Mountain Plumbing and Diane Marie Cina, 33 BOLI 40, 49 (2014).*

When an employee's pay stub showed that he worked 8 hours on each of two days on a project and respondent's certified payroll report did not list that employee as having worked on the project, the payroll report was inaccurate and incomplete, constituting one violation of ORS 279C.845(3) and OAR 839-025-0010. ---- *In the Matter of Green Thumb Landscape and Maintenance, Inc., 32 BOLI 185, 201-02 (2013).*

When the only evidence of a worker's employment was a statement to that effect in a letter from the agency's compliance specialist to the respondent, that evidence was insufficient to prove the worker worked on the prevailing wage project and should have been listed on the WH-38s. ---- *In the Matter of Green Thumb Landscape and Maintenance, Inc., 32 BOLI 185, 201 (2013).*

15.7 --- Failure to File Certified Payroll Statements

15.8 --- Failure to Pay Fee for Costs of Administering Law

15.9 --- Failure to Give Written Notice of Work Schedule

The forum finds no violation of OAR 839-025-0034 when respondent's president credibly testified that respondent gave written notice of its original work schedule and its changed work schedule to its workers and copies of the written notices were received into evidence without objection, no credible testimony to the contrary was offered, and the agency did not prove by a preponderance of the evidence that respondent's October 15, 2012, schedule change was designed for the purpose of evading the overtime requirements of ORS 279C.540

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and OAR 839-025-0050. ----- *In the Matter of Green Thumb Landscape and Maintenance, Inc.*, 35 BOLI 178, 226-27 (2017).

16.0 CIVIL PENALTIES

16.1 --- Generally

When determining the appropriate amount of civil penalties, the existence of intent is irrelevant. ---- *In the Matter of Portland Flagging, LLC (#37-13)*, 34 BOLI 270, 284 (2016). See also *In the Matter of Diamond Concrete, Inc. and Eric James O'Malley and Marnie Leanne O'Malley*, 33 BOLI 68, 73 (2014).

The criteria used to determine the amount of penalties are “the actions of the employer in responding to previous violations, prior violations, opportunity and degree of difficulty to comply, magnitude and seriousness of the violation, and whether the employer knew or should have known of the violation.” ---- *In the Matter of Portland Flagging, LLC (#37-13)*, 34 BOLI 270, 284 (2016).

Civil penalties may be imposed against employers who do not comply with Oregon's prevailing wage statutes. ---- *In the Matter of Portland Flagging, LLC (#37-13)*, 34 BOLI 270, 284 (2016).

The criteria used to determine the amount of penalties are: the actions of the employer in responding to previous violations, prior violations, opportunity and degree of difficulty to comply, magnitude and seriousness of the violation, and whether the employer knew or should have known of the violation. ----- *In the Matter of Hard Rock Concrete, Inc. and Rocky Evans*, 33 BOLI 77, 103 (2014), *aff'd without opinion, Hard Rock Concrete, Inc. and Rocky Evans v. Oregon Bureau of Labor and Industries*, 278 Or App 625 (2016).

With respect to civil penalties, the existence of intent is irrelevant. ----- *In the Matter of Diamond Concrete, Inc. and Eric James O'Malley and Marnie Leanne O'Malley*, 33 BOLI 68, 73 (2014).

16.2 --- Failure to Pay PWR

When the agency's NOI asked the forum to assess civil penalties “at an amount two times the amount of the unpaid wages or \$3,000, whichever is less,” an assessment corresponding to the provisions of OAR 839-025-0540(3)(b) for first repeated violations, and the forum found that respondent had previously failed to pay the prevailing wage rate, the forum assessed \$8,352.03 in civil penalties based on respondent's failure to pay the appropriate prevailing wage rate and corresponding violations of ORS 279C.840(1). ----- *In the Matter of Green Thumb Landscape and Maintenance, Inc.*, 35 BOLI 178, 222-23 (2017).

When determining the appropriate amount of civil penalties for failure to pay the prevailing wage rate, the existence of intent is irrelevant. ---- *In the Matter of Portland Flagging, LLC (#14-14)*, 35 BOLI 11, 32 (2016).

Civil penalties may be imposed against employers who do not comply with Oregon's prevailing wage statutes. The agency may assess a civil penalty in the amount of the unpaid wages or \$1,000, whichever is lesser. The criteria used to determine the amount of penalties are “the actions of the employer in responding to previous violations, prior violations, opportunity and degree of difficulty to comply, magnitude and seriousness of the violation, and whether the employer knew or should have known of the violation. ---- *In the Matter of Portland Flagging, LLC (#14-14)*, 35 BOLI 11, 31 (2016).

When the fringe benefit contributions made by respondents were not in compliance with the law, the forum found it necessarily followed that respondents' certified payroll statements associated with the workers listed in the agency's amended notice of intent were inaccurate and in violation of ORS 279C.845 and OAR 839-025-0010 and granted summary judgment on that issue. The forum denied summary judgment on the agency's motion for a civil penalty of \$1,000 for each late contribution made on behalf of a worker because, viewed in the light most favorable to respondents, it appeared that respondents had “addressed at least some of the

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mitigating circumstances set forth in OAR 839-025-0520 which may warrant a reduction of the amount of civil penalty.” ---- ***In the Matter of Portland Flagging, LLC (#14-14), 35 BOLI 11, 21 (2016).***

When the agency presented evidence of respondents' previous violations of the prevailing wage statutes, respondents' knowledge of the violations, and that, at times, respondents did not respond to the agency's requests, these factors weighed in favor of assessing a civil penalty up to the full amount each underpayment or \$1,000, whichever was lesser. ---- ***In the Matter of Portland Flagging, LLC (#37-13), 34 BOLI 270, 284 (2016).***

The agency may assess a civil penalty in the amount of the unpaid wages or \$1,000, whichever is lesser. ---- ***In the Matter of Portland Flagging, LLC (#37-13), 34 BOLI 270, 284 (2016).***

Civil penalties may be imposed against employers who do not comply with Oregon's prevailing wage statutes. The agency may assess a civil penalty in the amount of the unpaid wages or \$1000, whichever is lesser. On a motion for summary judgment, when the agency sought civil penalties of \$1000 for each late contribution on behalf of a wage claimant, respondents argued that this amount was "excessive and egregious due to the fact that all wages were paid." Viewing the evidence in the light most favorable to respondents, it appeared that respondents had addressed at least some of the mitigating circumstances set forth in OAR 839-025-0520 which may warrant a reduction of the amount of civil penalty, and the agency's motion for summary judgment on this issue was denied. ---- ***In the Matter of Portland Flagging, LLC (#37-13), 34 BOLI 270, 277-78 (2016).***

When respondents admitted that Portland Flagging LLC dba AD Traffic Control was not timely in submitting the fringe benefit payments of two workers, but denied the liability of the remaining respondents and the record on the agency's motion for summary judgment did not demonstrate the liability of the remaining respondents, the forum held that only Portland Flagging LLC dba AD Traffic Control was liable for civil penalties, with liability as to the remaining respondents to be addressed in the proposed order at the conclusion of the hearing in these matters. ---- ***In the Matter of Portland Flagging, LLC, 34 BOLI 208, 213 (2015).***

When that the amount of fringe benefit payments owed to two wage claimants exceeded \$1,000 each, the forum assessed a \$1,000 civil penalty against respondent for claimant, totaling \$2,000. ---- ***In the Matter of Portland Flagging, LLC, 34 BOLI 208, 212 (2015).***

When seven workers were underpaid prevailing wages the forum imposed penalties for the underpayments in the total amount of \$4,800. ---- ***In the Matter of Hard Rock Concrete, Inc. and Rocky Evans, 33 BOLI 77, 105 (2014), aff'd without opinion, Hard Rock Concrete, Inc. and Rocky Evans v. Oregon Bureau of Labor and Industries, 278 Or App 625 (2016).***

Respondent's failure to pay wages on six Fridays in August and September 2011 was partially mitigated by undisputed evidence that the wage claimant did not disclose hours he worked on those Fridays until he filed his wage claim and respondent's prompt payment of overtime wages to three other workers when BOLI made demand for the wages. Respondent's subsequent refusal to pay the due and owing wages to the claimant after being informed by BOLI that wages were due overcame the mitigation. Under these circumstances, an appropriate civil penalty was \$1,000 per violation, for a total of \$4,000. ---- ***In the Matter of High Mountain Plumbing and Diane Marie Cina, 33 BOLI 40, 49 (2014).***

When respondent's first incident of violation of the prevailing wage laws consisted of four violations, with a total underpayment of wages of \$261.29 that were promptly paid upon BOLI's notification, and there were aggravating circumstances connected to a consent order with no mitigating circumstances, a penalty of \$1250 was imposed for each of the four violations. ---- ***In the Matter of Green Thumb Landscape and Maintenance, Inc., 32 BOLI 185, 200 (2013).***

A negligent or otherwise inadvertent failure to pay the prevailing wage is sufficient to require the repayment of the back wages and liquidated damages to the employee and to invoke civil penalties. ---- ***In the Matter of Green Thumb Landscape and Maintenance, Inc.,***

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32 BOLI 185, 204 (2013).

16.3 --- Failure to Post PWR Rules

16.4 --- Failure to Pay Fee for Costs of Administering Law

16.5 --- Failure to File Certified Payroll Statements

The agency alleged that respondents failed to file a certified payroll statement on the fifth business day of the following month for the pay period ending December 8, 2012. When respondent's president testified that a certified payroll statement was prepared for this week, but no such statement was submitted as an exhibit or provided to the investigator upon request, the forum concluded that the Agency had sustained its burden in proving that this violation occurred and assessed a civil penalty of \$1,000. --- ***In the Matter of Portland Flagging, LLC (#14-14), 35 BOLI 11, 35 (2016).***

16.6 --- Filing Incomplete, Inaccurate, or Untimely Certified Payroll Statements

Based on aggravating and mitigating factors, prior final orders, and the proposed civil penalties for respondent's certified payroll report violations, the forum assessed civil penalties of \$500, \$3,000, and \$3,000, respectively, for respondent's three violations. --- ***In the Matter of Green Thumb Landscape and Maintenance, Inc., 35 BOLI 178, 263 (2017).***

Respondents' failure to timely submit certified payroll reports was aggravated by facts showing that: (1) respondents have worked on public works projects before and knew or should have known that they were required to timely submit accurate incomplete certified payroll reports to the contracting agency on the public works; (2) respondents had the opportunity to timely submit certified statements and it would not have been difficult for Respondents to have done so; (3) respondents' violations were serious because the requirement to timely submit accurate and complete certified statements to the contracting agency helps ensure that workers are being paid appropriately on the public works; and (4) the magnitude was such that respondents failed to timely submit certified statements to the contracting agency on 25 occasions. Respondent's failure was mitigated by: (1) respondent timely submitted certified payroll reports to the prime contractor; (2) the contracting agency, on a previous public works, had instructed respondent to submit certified payroll reports directly to the contractor instead of the contracting agency; (3) On the relevant public works project, the contracting agency expected subcontractors to submit certified payroll reports directly to the prime contractor; (4) It is a common practice for subcontractors to submit certified payroll reports to the general contractor; (5) The prime contractor submitted some, if not all, of respondent's certified payroll reports to the contracting agency; and (6) This was respondent's first violation of the "timely" submission requirement of ORS 279C.854(4). Based on the aggravating and mitigating factors and prior final orders involving certified payroll report violations, the forum concluded that a civil penalty of \$500 for each violation was appropriate, totaling \$12,500 for 25 violations. --- ***In the Matter of Green Thumb Landscape and Maintenance, Inc., 35 BOLI 178, 230, 237-38 (2017).***

The forum found that respondents' nine violations fell into three different categories: (1) respondent's 10/6/12, and 10/27/12 violations for which the forum could not determine how the violation occurred except for the stipulation of inaccuracy by the agency and respondents; (2) respondent's 8/25/12, 9/1/12, 9/15/12, 9/22/12, 9/29/12, and 10/13/12 certified payroll reports that were inaccurate and incomplete because they failed to show that prevailing wage rate overtime was earned by one or more workers; and (3) respondent's 9/8/12 certified payroll report that was inaccurate and incomplete because it failed to show that prevailing wage rate overtime was earned by three workers and one of those workers did not even appear on the certified payroll report. Based on the forum's precedents, described in detail in the final order, and the aggravating circumstances, the forum assessed \$8,500 in civil penalties, calculated as follows: (1) a civil penalty of \$250 for each of respondent's 10/6/12 and 10/27/12 violations, totaling \$500; (2) a civil penalty of \$1,000 each for respondent's 8/25/12, 9/1/12, 9/15/12, 9/22/12, 9/29/12, and 10/13/12 violations, totaling \$6,000; and (3) a civil penalty of \$2,000 for

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respondent's 9/8/12 violation. ---- *In the Matter of Green Thumb Landscape and Maintenance, Inc., 35 BOLI 178, 230, 235 (2017).*

The agency asked for the imposition of 51 penalties in the amount of \$1,000 for each of respondent's 52 violations. ORS 279C.865 also allows imposition of a penalty for each filing of an inaccurate or incomplete payroll record, which are required to be filed by ORS 279C.845 and OAR 839-025-0010. Given the nature of the violations and the criteria of OAR 839-025-0520, the forum determined that a penalty of \$1,000 for each inaccurate certified payroll statement was appropriate, resulting in a total penalty of \$51,000. ---- *In the Matter of Portland Flagging, LLC (#14-14), 35 BOLI 11, 34 (2016).*

Given the nature of the respondents' violations and the criteria of OAR 839-025-0520 previously discussed, the forum found that a penalty of \$1,000 for each inaccurate WH-38 payroll statement was appropriate, resulting in a total penalty of \$16,000 for these violations. ---- *In the Matter of Portland Flagging, LLC (#37-13), 34 BOLI 270, 286 (2016).*

The agency sought \$1,000.00 penalties for each of separate inaccurate WH-38 form. Twenty-two inaccurate WH-38 forms were filed. Given the nature of the violations and the aggravating and mitigating criteria, a penalty of \$400.00 for each inaccurate WH-38 form filed was appropriate, resulting in a total penalty for filing inaccurate or certified payroll of \$8,800. ---- *In the Matter of Hard Rock Concrete, Inc. and Rocky Evans, 33 BOLI 77, 105 (2014), aff'd without opinion, Hard Rock Concrete, Inc. and Rocky Evans v. Oregon Bureau of Labor and Industries, 278 Or App 625 (2016).*

In its NOI, the agency asked the forum to assess a civil penalty of \$1,000 for each of respondent's six certified payroll report violations. However, due to an agreement that one worker would only work 32 hours a week, respondent justifiably relied on the worker to report his hours worked, and the worker failed to contemporaneously report the hours he worked on those days. Respondent also paid the worker for working more than 32 hours a week when he reported working more than that number of hours. Although respondent should have known all the hours the worker was working, the worker's contemporaneous misrepresentation of those hours and respondent's justifiable reliance on those misrepresentations led the forum to conclude that \$500 was a more appropriate civil penalty for respondent's six violations, for a total of \$3,000 in civil penalties. ---- *In the Matter of High Mountain Plumbing and Diane Marie Cina, 33 BOLI 40, 50 (2014).*

The civil penalty for failure to list one covered employee on a WH-38, aggravated by the fact that the employer knew or should have known of it, and without mitigating circumstances, is \$1,000. ---- *In the Matter of Green Thumb Landscape and Maintenance, Inc., 32 BOLI 185, 201-02 (2013).*

16.7 --- Failure to Complete and Return PWR Survey

16.8 --- Failure to Make Records Available to Wage and Hour Division

The commissioner is authorized to assess a civil penalty of up to \$5,000 for violations of ORS 279C.850 and OAR 839-025-0030. The agency alleged and proved the same aggravating circumstances it alleged with regard to respondents' violation of ORS 653.045(1)-(2) and OAR 839-020-0083(3) and there were no mitigating circumstances. Considering these circumstances and BOLI precedent, the assessed a \$2,500 civil penalty for respondent's violations of ORS 279C.850 and OAR 839-025-0030. ---- *In the Matter of Green Thumb Landscape and Maintenance, Inc., 35 BOLI 178, 246 (2017).*

16.9 --- Penalties for Other Violations

16.10 --- Aggravating Circumstances

16.10.1 --- Response to Prior Violations of Statutes and Rules

16.10.2 --- Prior Violations of Statutes and Rules

Respondent's single prior violation of ORS 279C.845(3) was an aggravating factor. ---- *In the Matter of Green Thumb Landscape and Maintenance, Inc., 35 BOLI 178, 230, 232*

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(2017).

In a prevailing wage case in which the agency sought civil penalties for respondents' failure to pay the prevailing wage rate, the forum took official notice of respondents' previous violations of the prevailing wage statutes, respondents' knowledge of the violations, and that, at times, respondents did not respond to the agency's requests in 2011 or early 2012. --- *In the Matter of Portland Flagging, LLC (#14-14), 35 BOLI 11, 32 (2016).*

16.10.3 --- Opportunity and Degree of Difficulty to Comply

Respondents had the opportunity to initially submit complete and accurate certified statements and did so with all of their certified payroll reports except for the weeks ending 2/7/15, 3/7/15, and 3/28/15. After BOLI informed respondent that respondent's certified payroll reports for the weeks ending 3/7/15 and 3/28/15 were inaccurate, Respondents timely submitted amended payroll reports to BOLI on July 22, 2015, for those two weeks that were accurate but lacked certified statements. That same day, respondents submitted an amended certified payroll report to the contracting agency for the week ending 3/28/15 that included a certified statement. Respondents' certified payroll report for the week ending 2/7/15 was inaccurate because of respondent's transposition error that could have been avoided, had respondent been more careful. Respondents offered no explanation for the absence of a worker's name from their certified payroll report for the week ending 3/28/15, other than respondent's statement that the worker "was not included on the original submission in error." --- *In the Matter of Green Thumb Landscape and Maintenance, Inc., 35 BOLI 178, 262 (2017).*

The forum found that respondent had the opportunity to initially submit complete and accurate certified payroll reports and nothing prevented respondent from doing so except for the apparent confusion caused by respondent's two payroll systems and misunderstanding of how to properly calculate weighted average overtime. ---- *In the Matter of Green Thumb Landscape and Maintenance, Inc., 35 BOLI 178, 230, 232 (2017).*

16.10.4 --- Magnitude and Seriousness of Violation

The requirement to submit accurate and complete certified statements helps ensure the worker is receiving the appropriate prevailing wages. The forum considered that the nine inaccurate and incomplete certified payroll reports submitted by respondents resulted in seven workers not being paid the correct prevailing wage rate until a year after they earned the unpaid wages. ---- *In the Matter of Green Thumb Landscape and Maintenance, Inc., 35 BOLI 178, 230, 232, 262 (2017).*

16.10.5 --- Knowledge of Violation

Respondents knew or should have known that they were required to submit accurate and complete certified payroll reports, in that all employers are charged with the knowledge of wage and hour laws governing their activities as employers. When respondent's president and bookkeeper both signed BOLI compliance agreements on 10/17/10 and the president signed a second compliance agreement on 5/30/11 in which they acknowledged awareness of BOLI's certified payroll report requirements, the forum concluded that respondents knew or should have known of the accurate certified payroll report requirement. ---- *In the Matter of Green Thumb Landscape and Maintenance, Inc., 35 BOLI 178, 262 (2017).*

When respondent's president and secretary both signed BOLI compliance agreements on 10/17/10 and respondent's president signed a second compliance agreement on 5/30/11 in which they acknowledged awareness of BOLI's certified payroll report requirements, and the forum found that "it is a given that respondents knew or should have known that they were required to submit accurate and complete certified payroll reports, in that all employers are charged with the knowledge of wage and hour laws governing their activities as employers," the forum found that respondents knew or should have known of the accurate certified payroll report requirement. ---- *In the Matter of Green Thumb Landscape and Maintenance, Inc., 35 BOLI 178, 230, 232 (2017).*

In a prevailing wage case in which the agency sought civil penalties for respondents'

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failure to pay the prevailing wage rate, the forum took official notice of respondents' previous violations of the prevailing wage statutes, respondents' knowledge of the violations, and that, at times, respondents did not respond to the agency's requests in 2011 or early 2012. ---- ***In the Matter of Portland Flagging, LLC (#14-14), 35 BOLI 11, 32 (2016).***

Respondent's knowing failure to pay Cement Mason 1 wages to those workers who earned them by doing finish work during the sidewalk phase was a final aggravating factor. ---- ***In the Matter of Hard Rock Concrete, Inc. and Rocky Evans, 33 BOLI 77, 105 (2014), aff'd without opinion, Hard Rock Concrete, Inc. and Rocky Evans v. Oregon Bureau of Labor and Industries, 278 Or App 625 (2016).***

Misclassifying jack hammer work and underpaying a worker for his first day on the job constituted two more aggravating circumstances based on knowledge that these classifications were improper, moderated by the relatively low amounts of money involved and the fact that the violations seemed to derive, as did other violations, from a knowledge arising from incorrigible inattention, rather than malevolent intent. ---- ***In the Matter of Hard Rock Concrete, Inc. and Rocky Evans, 33 BOLI 77, 102-03 (2014), aff'd without opinion, Hard Rock Concrete, Inc. and Rocky Evans v. Oregon Bureau of Labor and Industries, 278 Or App 625 (2016).***

The forum found a violation of failure to pay prevailing wages to be aggravated because the circumstances surrounding a prior consent order indicated respondent knew or should have known of the violation. ---- ***In the Matter of Green Thumb Landscape and Maintenance, Inc., 32 BOLI 185, 200 (2013).***

The civil penalty for failure to list one covered employee on a WH-38, aggravated by the fact that the employer knew or should have known of it, and without mitigating circumstances, is \$1000. ---- ***In the Matter of Green Thumb Landscape and Maintenance, Inc., 32 BOLI 185, 201-02 (2013).***

16.10.6 --- Other

Respondent's underpayment of \$518.24 to seven workers that was due to nine inaccurate and incomplete CPRs was \$518.24 was an aggravating factor. ---- ***In the Matter of Green Thumb Landscape and Maintenance, Inc., 35 BOLI 178, 230, 232 (2017).***

Prevailing wage underpayment of any kind is serious. Even though the amount of underpayment for one worker was only \$11.76, it was an aggravating factor with respect to the violations based upon an inaccurate certified payroll. ---- ***In the Matter of Hard Rock Concrete, Inc. and Rocky Evans, 33 BOLI 77, 103 (2014), aff'd without opinion, Hard Rock Concrete, Inc. and Rocky Evans v. Oregon Bureau of Labor and Industries, 278 Or App 625 (2016).***

16.11 --- Mitigating Circumstances

In assessing civil penalty, the forum considered the following facts as mitigating factors: Respondent began doing prevailing wage rate work in 2010; when BOLI has investigated respondent, respondent has paid all demands for wages; respondent's president has signed several compliance agreements at BOLI's request and has attempted to increase his understanding of prevailing wage rate law; respondent's corporate secretary has also signed a compliance agreement at BOLI's request; respondent has changed its payroll/certified payroll report system on public works projects by revising its job ticket to make it "more robust in its information and tracking" and with the exception of the case at hand, now uses its computer to generate certified payroll reports; and respondent has eliminated 4x10 schedules and now works exclusively 5x8 schedules to eliminate overtime computation problems. ---- ***In the Matter of Green Thumb Landscape and Maintenance, Inc., 35 BOLI 178, 263 (2017).***

Civil penalties may be imposed against employers who do not comply with Oregon's prevailing wage statutes. The agency may assess a civil penalty in the amount of the unpaid wages or \$1000, whichever is lesser. On a motion for summary judgment, when the agency sought civil penalties of \$1000 for each late contribution on behalf of a wage claimant, respondents argued that this amount was "excessive and egregious due to the fact that all

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wages were paid.” Viewing the evidence in the light most favorable to respondents, it appeared that respondents had addressed at least some of the mitigating circumstances set forth in OAR 839-025-0520 which may warrant a reduction of the amount of civil penalty, and the agency’s motion for summary judgment on this issue was denied. ---- ***In the Matter of Portland Flagging, LLC (#37-13), 34 BOLI 270, 277-78 (2016).***

The difficulty in determining whether “mucking concrete” was covered by the Laborer 2 classification prevented a finding of knowledge that would aggravate a penalty. The agency compliance specialist’s difficulty in describing how mucking concrete fits within the classification demonstrated the difficulty an employer, such as respondents, might have figuring out the proper classification. This difficulty mitigated the amount of the penalty for violations arising solely from misclassifying mucking concrete. ---- ***In the Matter of Hard Rock Concrete, Inc. and Rocky Evans, 33 BOLI 77, 104 (2014), aff’d without opinion, Hard Rock Concrete, Inc. and Rocky Evans v. Oregon Bureau of Labor and Industries, 278 Or App 625 (2016).***

Determining the proper classification for the work of laying or setting out stakes could have been confusing and difficult, and was a mitigating factor as to whether there was a finding of knowledge that would aggravate the penalty. ---- ***In the Matter of Hard Rock Concrete, Inc. and Rocky Evans, 33 BOLI 77, 104 (2014), aff’d without opinion, Hard Rock Concrete, Inc. and Rocky Evans v. Oregon Bureau of Labor and Industries, 278 Or App 625 (2016).***

By itself, inexperience is not a mitigating factor. ---- ***In the Matter of Hard Rock Concrete, Inc. and Rocky Evans, 33 BOLI 77, 104 (2014), aff’d without opinion, Hard Rock Concrete, Inc. and Rocky Evans v. Oregon Bureau of Labor and Industries, 278 Or App 625 (2016).***

The forum did not credit respondent Evans’s testimony or his claim in his letter to the agency that his classification decision was based on the fact that an agency “PWR worksheet” made it clear that the disputed tasks were Laborer 1 tasks. His letter purported to quote from the worksheet that “set stakes, set grade stakes, spreads concrete w/hand tools” are L1 tasks. This would be a strong point in mitigation but for the fact that respondent Evans never produced a copy of the “PWR worksheet” or introduced it into evidence. The definition for Laborer 1, the closest thing to the “worksheet” in evidence, does not contain those words. ---- ***In the Matter of Hard Rock Concrete, Inc. and Rocky Evans, 33 BOLI 77, 104 (2014), aff’d without opinion, Hard Rock Concrete, Inc. and Rocky Evans v. Oregon Bureau of Labor and Industries, 278 Or App 625 (2016).***

Respondents asked that their dire financial circumstances be a mitigating factor. However, the evidence on financial inability was inconsistent and unconvincing. Assuming, without deciding, that financial circumstances can be a mitigating factor, the evidence on that point failed. ---- ***In the Matter of Hard Rock Concrete, Inc. and Rocky Evans, 33 BOLI 77, 104-05 (2014), aff’d without opinion, Hard Rock Concrete, Inc. and Rocky Evans v. Oregon Bureau of Labor and Industries, 278 Or App 625 (2016).***

17.0 JOINT EMPLOYER

In a case in which the agency’s NOI alleged a joint employment relationship between respondents GTL, GTM, and CJ, the forum found that GTL, having been administratively dissolved on before a bid was made on the public works contract, played no part in the project. In contrast, GTM bid on and was awarded the contract and the workers were actually paid by CJ, a company that was set up to handle GTM’s general contracting and construction labor. There was no evidence that CJ was set up as an independent payroll service. These facts, taken together, indicated that GTM and CJ were joint employers. ---- ***In the Matter of Green Thumb Landscape and Maintenance, Inc., 35 BOLI 178, 258 (2017).***

The forum relies on the provisions of the FLSA, specifically 29 CFR § 791.2, to determine whether respondents are joint employers. Under the FLSA, the forum’s inquiry necessarily “depends upon all the facts” in the particular case. ---- ***In the Matter of Green Thumb Landscape and Maintenance, Inc., 35 BOLI 178, 257 (2017).***

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A joint employment relationship cannot exist unless each alleged “joint” employer is also an individual employer. ---- ***In the Matter of Green Thumb Landscape and Maintenance, Inc., 35 BOLI 178, 256 (2017).***

In general, a joint employment relationship exists when two associated employers share control of an employee. 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 Green Thumb Landscape and Maintenance, Inc., 35 BOLI 178, 256 (2017).*** See also ***In the Matter of Portland Flagging, LLC (#14-14), 35 BOLI 11, 30 (2016).***

A joint employment relationship is established when employers have an agreement to share the services of an employee that is mutually beneficial to the employer(s), where one employer acts directly or indirectly in the interest of the other employer with respect to the employee, where the employers share direct or indirect control of the employee, or where one employer controls the other employer. ---- ***In the Matter of Portland Flagging, LLC (#14-14), 35 BOLI 11, 30 (2016).***

The forum took official notice of the fact that the commissioner previously held that Portland Flagging and A D Traffic operated as joint employers during 2011 and 2012 when (1) Portland Flagging operated under the assumed business name of “A D Traffic;” (2) time sheets, payroll records and retirement plan contribution statements for two workers during 2011 and 2013 all used some form of the name “A D Traffic;” (3) the statement for a workers’ account with respondents’ fringe benefit plan was addressed to “A D Traffic Control Services, LLC;” and (4) Portland Flagging and A D Traffic shared the same business address. When the evidence also showed that both Portland Flagging and A D Traffic shared the same business address, time labor reports initially used the name “A D Traffic Control” and then in 2013 referred to the employer as “A D Traffic Control Services, LLC,” the forum found that Portland Flagging and A D Traffic were joint employers of the workers on the subject project. ---- ***In the Matter of Portland Flagging, LLC (#14-14), 35 BOLI 11, 30 (2016).***

When respondent Tri-Star also operated at the same business address as Portland Flagging and A D Traffic, Evan Williams was the “manager and President” of both A D Traffic and Tri-Star, approximately, 61% of the workers listed in the agency’s amended NOI performed work as flaggers on the subject project for both A D Traffic and Tri-Star, these facts demonstrated that Tri-Star operated as a joint employer with Portland Flagging and A D Traffic. ---- ***In the Matter of Portland Flagging, LLC (#14-14), 35 BOLI 11, 31(2016).***

18.0 PLACEMENT ON INELIGIBLE LIST

18.1 --- Generally

The agency’s NOI asked that respondent CJ be debarred based on the financial interest of individual respondents S. and J. Friedman in CJ. Based on the plain wording of ORS 279C.860(1), the forum held that the commissioner can only bar a corporation in which a “contractor” or “subcontractor” has a financial interest. When the evidence in the record showed that respondent CJ was a separate corporate entity and the agency did not allege that either S. or J. Friedman were contractors and subcontractors and there was no evidence of the record that GTM or GTL, the other debarred respondent contractors/subcontractors, had any financial interest in CJ, the forum held it lacked the authority to debar CJ under the provisions of ORS 279C.860(1). ---- ***In the Matter of Green Thumb Landscape and Maintenance, Inc., 35 BOLI 178, 267 (2017).***

A corporate officer or agent responsible for the failure or refusal to pay can only be debarred if the corporation’s failure or refusal to pay was “intentional.” ---- ***In the Matter of Green Thumb Landscape and Maintenance, Inc., 32 BOLI 185, 205, fn. 11 (2013).***

18.2 --- Intentional Failure to Pay PWR

The forum cannot debar a respondent who neither intentionally nor unintentionally fails to pay the prevailing rate of wage to any worker. ---- ***In the Matter of Green Thumb***

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Landscape and Maintenance, Inc., 35 BOLI 178, 264 (2017).

To “intentionally” fail to pay the prevailing rate of wage, an employer must either consciously choose not to determine the prevailing wage or know the prevailing wage but consciously choose not to pay it. A negligent or otherwise inadvertent failure to pay the prevailing wage, while sufficient to require the repayment of the back wages and liquidated damages to the employee and to invoke civil penalties, is not sufficient to impose debarment. --- ***-- In the Matter of Green Thumb Landscape and Maintenance, Inc., 35 BOLI 178, 251 (2017).***

The forum found that respondent’s misclassification of bricklayers as landscape laborer/technicians (LL/T) and subsequent underpayment of three workers who were misclassified was intentional when:

- (1) Respondent’s president reviewed the project specifications and, before bidding, made an effort to determine the appropriate labor classifications based on the project specifications, his prior experience on PWR jobs, and references to BOLI’s publication containing definitions of covered occupations for public works contracts in Oregon.
- (2) The definitions of covered occupations in BOLI’s publication list the primary purpose and typical duties of each occupation. The LL/T definition contained no reference to setting pavers, whereas setting stones or brick in mortar is listed as a typical duty for a Bricklayer.
- (3) The definitions of covered occupations in BOLI’s publication list the primary purpose and typical duties of each occupation. The LL/T definition contains no reference to setting pavers, whereas setting stones or brick in mortar is listed as a typical duty for a Bricklayer.
- (4) BOLI’s publication included a cross reference to covered occupations that described specific job duties and the trade classification they fell within to help employers determine the appropriate trade classification for specific types of work. The cross reference stated that the appropriate trade classification for workers setting pavers in mortar was “Bricklayer/Stonemason” and the appropriate trade classification for workers setting pavers in sand with no mortar was Laborer -- Group 1.
- (5) The bid submitted by respondent’s president on behalf of respondent included a quote for “Stepstone Modular Concrete pavers, mortar set with edging” and “Stone Paving Columbia River special pavers, mortar set, no edging.”
- (6) The subcontract between the prime contractor and respondent, signed several months before respondent commenced work on the project, was signed by respondent’s president. Among other things, the line items included labor and material costs of almost \$50,000 related to “pavers.” Included in the descriptions of the work to be performed was the following: “Stepstone Modular Concrete pavers, mortar set with edging” and “Stone Paving Columbia River special pavers, mortar set, no edging.”
- (7) Respondent’s Daily Job Site Reports showed that: (a) “Stone pavers” was the only activity performed by respondent on a day when two workers classified as LL/T were the only workers on the project that day; and (b) two workers classified as LL/T worked at the project during nine weeks on days when there was work activity that included “pavers.”
- (8) In a preconstruction meeting held before work on the project commenced that was attended by respondent’s president, representatives of the contracting agency, the prime contractor, and the other subcontractors, there was a discussion about the classification of respondent’s workers in which it was determined that the work to be done with pavers was not “apprenticeable” work within the contract requirements. ---- ***In the Matter of Green Thumb Landscape and Maintenance, Inc., 35 BOLI 178, 254-55 (2017).***

Respondent’s failure to pay the prevailing wage rate to three workers was unintentional when the forum was unable to determine the reason for their underpayment. ---- ***In the Matter***

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of Green Thumb Landscape and Maintenance, Inc., 35 BOLI 178, 252-53 (2017).

The forum regarded the testimony of respondent's corporate officers that they never "intentionally" failed to pay the prevailing wage rate as asserting a legal conclusion, not a fact. -- *--- In the Matter of Green Thumb Landscape and Maintenance, Inc., 35 BOLI 178, 253 (2017).*

Respondent's underpayment of a worker was inadvertent when it was caused by the failure of respondent's onsite supervisor to write down the worker's name on the reports that respondent's bookkeeper used to compute respondent's prevailing wage rate payroll. ---- *In the Matter of Green Thumb Landscape and Maintenance, Inc., 35 BOLI 178, 253 (2017).*

Respondent's underpayment of a worker was inadvertent when it was caused by respondent's negligence, possibly caused by respondent's "two payroll" system for prevailing wage rate and non-prevailing wage rate work. ---- *In the Matter of Green Thumb Landscape and Maintenance, Inc., 35 BOLI 178, 253 (2017).*

The forum concluded that respondent's failure to pay prevailing wage rate overtime to a worker was inadvertent when respondent failed to calculate prevailing wage rate overtime on the basis of a 5x8 hour day week instead of a 4x10 hour day week when the worker worked a 4x10 hour week on Tuesday-Friday and a 4x10 hour week Monday-Thursday during the following week, these were the only two weeks that the worker worked on the public works project before respondent reverted to a 5x8 hour day week schedule, and the agency's compliance specialist testified that determining whether there are sufficient irregularities between weeks so that the worker's schedule defaults to a 5x8 hour schedule for the purpose of calculating prevailing wage rate overtime is a "judgment call" for BOLI investigators. ---- *In the Matter of Green Thumb Landscape and Maintenance, Inc., 35 BOLI 178, 253 (2017).*

There was no evidence presented at hearing to explain why a worker's name appeared on respondent's certified payroll report for the week ending 3/16/13 but the worker was not paid the prevailing wage rate for any of his 23 hours of work. Although respondent's corporate secretary was responsible for respondent's certified payroll reports and respondent's payroll, the burden was on the Agency to show she made a conscious, intentional choice not to pay the worker the prevailing wage rate and the agency did not meet that burden. With no evidence as to the reason for the underpayment, the forum concluded that the underpayment was negligent, as opposed to intentional, because the corporate secretary knew the prevailing wage rate, knew the worker had worked on the prevailing wage rate project, and knew or should have known that the worker was being underpaid. ---- *In the Matter of Green Thumb Landscape and Maintenance, Inc., 35 BOLI 178, 253-54 (2017).*

The agency argued that respondents should be placed on the list of ineligible because respondents' president directed his staff to sign false statements certifying that employees' full wages were paid. Respondents argued that it was the president's intent to make the quarterly fringe benefit deposits when the weekly certified statements were completed and that the agency did not establish the element of "intent" which was necessary to place respondents on the list of ineligible. Although the forum categorized respondents' evidence as to a "good faith" intention as "weak," when viewing it in the light most favorable to respondents, the forum concluded it was unable to grant the agency's motion for summary judgment on this issue and denied the motion. ---- *In the Matter of Portland Flagging, LLC (#14-14), 35 BOLI 11, 21 (2016).*

The forum found respondents made a "deliberate and conscious choice" to fail to correct the inaccurate certified statements. Notably, the certified statements were not amended after respondent Williams admittedly made a conscious choice to fail to timely fund the fringe benefit accounts. Those inaccurate statements were then sent on to the compliance specialist without making her aware that the statements falsely represented that all prevailing wages had been paid and that the deposits were made only after the compliance specialist sent a letter to Williams on September 28, 2012, notifying him that the "the Bureau will take action to collect

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fringe benefit wages from the [primary contractor's] Payment Bond" if evidence of fringe benefit deposits was not provided by October 12, 2012. Moreover, because no effort was made to correct the false certified statements or inform the compliance specialist of the inaccuracies, she was originally led to believe that the deposits had actually been made. Therefore, regardless of what the intent was at the time the weekly certified statements were signed, the actions taken thereafter demonstrated intent to falsify information in the certified statements. Based on that intentional falsification, respondents were placed on BOLI's list of ineligible to receive contracts or subcontracts for public works for a period of three years. --- ***In the Matter of Portland Flagging, LLC (#37-13), 34 BOLI 270, 288 (2016).***

To "intentionally" fail to pay the prevailing rate of wage, the employer must either consciously choose not to determine the prevailing wage or know the prevailing wage but consciously choose not to pay it. A negligent or otherwise inadvertent failure to pay the prevailing wage, while sufficient to require the repayment of the back wages and liquidated damages to the employee and to invoke civil penalties, is not sufficient to impose debarment. Rather, a culpable mental state must be shown for the forum to conclude that respondent "intentionally" failed to pay the prevailing wage rate. --- ***In the Matter of Portland Flagging, LLC (#37-13), 34 BOLI 270, 287 (2016).*** See also *In the Matter of High Mountain Plumbing and Diane Marie Cina*, 33 BOLI 40, 51 (2014); *In the Matter of Green Thumb Landscape and Maintenance, Inc.*, 32 BOLI 185, 204 (2013).

On the agency's motion for summary judgment, the agency argued that, pursuant to ORS 279C.860 and OAR 839-025-0010, that respondents should be placed on the list of ineligible because respondent Williams directed his staff to sign false statements certifying that employees' full wages were paid. Respondents argue that it was Williams's intent to make the quarterly fringe benefit deposits when the weekly certified statements were completed and that the Agency thereby failed to establish the element of "intent" necessary to place respondents on the list of ineligible. Although the evidence submitted by respondents as to a 'good faith' intention to submit fringe benefit contributions was weak, when viewing it in the light most favorable to respondents, the forum found it was unable to grant the agency's motion on this issue and denied the motion. --- ***In the Matter of Portland Flagging, LLC (#37-13), 34 BOLI 270, 278 (2016).***

A good-faith failure to pay, even if negligent and even if based on a legal mistake, is insufficient to establish intent. Evidence of intent was lacking with respect to (1) the classification decision regarding mucking concrete, as well as the decision regarding Cement Mason 1 wages for laying out or setting out stakes; and (2) the culpable mental state required to establish intent on account of the failure to pay Laborer 2 wages for jack-hammering. ---- ***In the Matter of Hard Rock Concrete, Inc. and Rocky Evans*, 33 BOLI 77, 106-07 (2014), aff'd without opinion, *Hard Rock Concrete, Inc. and Rocky Evans v. Oregon Bureau of Labor and Industries*, 278 Or App 625 (2016).**

The evidence was sufficient to establish that respondent intentionally failed to pay Cement Mason 1 wages to workers who earned it by performing finish work during the sidewalk construction phase of respondent's project. Respondent's testimony that he was on the job site every day and was nearly always doing the work with them made his testimony that he never saw any worker perform the finish concrete work incredible. Respondent likewise acted intentionally in failing to pay one worker at the Cement Mason 1 rate for his first day on the job, when he set the forms for pouring sidewalk. ---- ***In the Matter of Hard Rock Concrete, Inc. and Rocky Evans*, 33 BOLI 77, 107 (2014), aff'd without opinion, *Hard Rock Concrete, Inc. and Rocky Evans v. Oregon Bureau of Labor and Industries*, 278 Or App 625 (2016).**

Respondent's intentional failure to pay the prevailing wage to its employees working on a public works constituted adequate grounds for placing it on the List of Ineligibles. The facts establishing that violation were alleged in the NOI and admitted in the Answer. ---- ***In the Matter of Diamond Concrete, Inc. and Eric James O'Malley and Marnie Leanne O'Malley*, 33 BOLI 68, 74 (2014).**

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Respondent High Mountain was incorporated by Cina, its corporate president, for the specific reason of taking over a bookkeeping client's subcontract on the project and bailing the client out. Respondent Cina knew the project was a prevailing wage rate job, as shown by the filing of certified payroll reports on her behalf through her work on the project. Cina also knew the correct straight time prevailing wage rate for plumbers on the project and paid that rate for all hours contemporaneously reported to her. In addition, Cina was the person responsible for payment of wages to High Mountain's employees. From Cina's testimony, the forum concluded that the failure to pay overtime wages to four employees on the regular payday on which they were due was an oversight based on her inexperience, and she initially did not pay one employee anything for his work on various dates because he did not tell the Cina he had worked those days. However, Cina's continuing failure to pay those wages after BOLI's notification that those wages were due and owing, based on her belief that the employee did not work those hours, was a deliberate and conscious choice on her part and converted her inadvertent failure to pay into an intentional failure to pay. Based on that intentional failure, the commissioner was required to place High Mountain and Cina on BOLI's list of ineligible to receive contracts or subcontracts for public works for a period of three years. ----- ***In the Matter of High Mountain Plumbing and Diane Marie Cina, 33 BOLI 40, 51-52 (2014).***

When respondent's bookkeeper erroneously determined the amount of the prevailing wage and there was no evidence that a respondent corporate officer or the bookkeeper chose not to determine the prevailing wage rate or knew the correct rate and chose not to pay it, the agency failed to prove that respondent corporate officers were responsible for underpaying the four workers during the project, and the corporate respondent promptly paid the wages and liquidated damages when informed by the agency of the underpayment, the agency did not prove the employer "intentionally" failed or refused to pay its four workers the prevailing wage rate under ORS 279C.860(1)(a). ----- ***In the Matter of Green Thumb Landscape and Maintenance, Inc., 32 BOLI 185, 203 (2013).***

18.3 --- Intentional Failure to Post PWR

18.4 --- Intentional Falsification of Certified Payroll Statements

When the only evidence of respondents omitted a worker's name from a certified payroll report was respondent's statement in a letter to BOLI that stated that the worker's name "was not included on the original submission in error" and the worker was timely paid his wages for the relevant work, the forum held that the evidence was insufficient to allow the forum to infer "a culpable mental state" on the part of respondent's president or bookkeeper or any other employee and, at worst, the forum could only infer that respondents' omission was "a negligent or otherwise inadvertent failure to include the correct information" and not an intentional falsification. ----- ***In the Matter of Green Thumb Landscape and Maintenance, Inc., 35 BOLI 178, 265 (2017).***

When respondent presented credible testimony that a worker was not listed on respondent's certified payroll report for the week ending 3/7/15 due to the contracting agency's reporting system that prevented respondent's bookkeeper from entering the worker's information into the system's certified payroll report and the agency presented no evidence to the contrary, the worker was timely paid his wages and respondent sent BOLI an amended payroll report for the week ending 3/7/15 showed that the worker worked 5 hours as a laborer on 3/5/15, and there was no evidence of "a culpable mental state" on the part of respondent's president or bookkeeper or any other employee of Respondents with respect to the inaccuracies and the forum held that respondent's certified payroll report was not intentionally falsified. ----- ***In the Matter of Green Thumb Landscape and Maintenance, Inc., 35 BOLI 178, 265 (2017).***

When the inaccuracies in respondent's certified payroll report for the week ending 2/7/15 were due to respondent's bookkeeper's negligence in notating respondents' worker's hours a day earlier than they were actually worked, the certified payroll report system of reporting required by the contracting agency that respondent had no control over, there was no evidence that respondent's certified payroll report was falsified for the purpose of overpaying a worker,

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and there was no evidence of “a culpable mental state” on the part of respondent’s president and bookkeeper or any other employee of respondents with respect to the certified payroll report inaccuracies, the forum held that respondent’s certified payroll report was not intentionally falsified. ---- ***In the Matter of Green Thumb Landscape and Maintenance, Inc., 35 BOLI 178, 265 (2017).***

To “intentionally” falsify information in a certified payroll reports, an employer must be aware of the correct information required to be included in the certified payroll report and make a conscious choice to include other, incorrect information. A negligent or otherwise inadvertent failure to include the correct information, while sufficient to invoke civil penalties, is not sufficient to impose debarment. Rather, a culpable mental state must be shown for the forum to conclude that a certified payroll report was “intentionally” falsified. ---- ***In the Matter of Green Thumb Landscape and Maintenance, Inc., 35 BOLI 178, 250, 264 (2017).***

Although the forum assessed civil penalties for nine falsified certified payroll reports, the only way the forum was able to conclude that eight of the nine certified payroll reports were inaccurate or incomplete is because the agency and respondents stipulated that unpaid prevailing wage rate overtime occurred in those weeks, with the only exception being a certified payroll report for the week ending 9/8/12 that omits a worker’s name who worked that week. However, there was no evidence that this omission was based on “a conscious choice” by respondent or one of respondent’s employees or agents or that respondent’s corporate officers possessed a “culpable mental state” in making the omission. Rather, the omission appeared to have been caused a “negligent or otherwise inadvertent failure.” Negligence, while sufficient to invoke civil penalties, is not sufficient to impose debarment. Accordingly, the forum did not impose debarment based on these nine falsified certified payroll reports. ---- ***In the Matter of Green Thumb Landscape and Maintenance, Inc., 35 BOLI 178, 251 (2017).***

Respondent’s corporate secretary and bookkeeper completed all of respondent’s certified payroll reports, including 10 that listed three workers as landscape laborers when they performed work as bricklayers. There was no evidence that respondent’s president played any role in the completion or submission of respondent’s certified payroll reports. There is also no evidence that respondent’s bookkeeper was actually aware that these three workers had worked as bricklayers when she wrote their job classification as landscape laborer on the 10 inaccurate certified payroll reports or as to her state of mind when she completed those certified payroll reports. Lacking evidence that respondent’s bookkeeper had a culpable state of mind when she misclassified the three workers as landscape laborers, omitted writing any job classification for a worker, and omitted listing any hours for that worker in the certified payroll report for the week ending 3/19/13, the forum could not conclude that respondent’s 10 faulty certified payroll reports were intentionally falsified and did not impose debarment on those grounds. ---- ***In the Matter of Green Thumb Landscape and Maintenance, Inc., 35 BOLI 178, 251 (2017).***

Before the forum could determine whether respondent’s certified payroll reports were “intentionally” falsified, the forum had to first determine the meaning of the word “falsified,” as the fact that the certified payroll reports were “inaccurate” or “incomplete” under ORS 279C.845(3) does not *ipso facto* mean that they were “falsified” under ORS 279C.860 and OAR 839-025-0085. ---- ***In the Matter of Green Thumb Landscape and Maintenance, Inc., 35 BOLI 178, 248 (2017).***

The forum relied on *Webster’s* to determine the meaning of “falsify.” *Webster’s* defines “falsify” as “to represent falsely: MISREPRESENT, DISTORT. * * * : to engage in misrepresentation or distortion.” “Misrepresent,” in turn, can mean ‘to represent incorrectly: to give a false, imperfect, or misleading representation’ or it can ‘impl[y] intent, suggesting deliberate falsification, injustice, bias, or prejudice.’” Based on this interpretation, the forum examined the reasons for respondent’s inaccuracies and incomplete certified payroll reports to determine if those certified payroll reports contained misrepresentations. ---- ***In the Matter of Green Thumb Landscape and Maintenance, Inc., 35 BOLI 178, 249 (2017).***

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When the forum was unable to determine why to certified payroll reports were inaccurate or incomplete and only determined they were inaccurate because the agency and respondents stipulated to their accuracy, the forum was unable to conclude that those certified payroll reports contain misrepresentations or were falsified. ---- *In the Matter of Green Thumb Landscape and Maintenance, Inc., 35 BOLI 178, 249 (2017).*

When respondent's certified payroll reports were inaccurate and/or incomplete because of omissions, in that they included all hours worked, but failed to categorize some of the hours worked as prevailing wage rate overtime, the forum found that these categorical omissions constituted "erroneous representations," which fits under the definition of "falsify." ---- *In the Matter of Green Thumb Landscape and Maintenance, Inc., 35 BOLI 178, 249 (2017).*

When respondent's certified payroll report completely omitted mention of the worker who worked that week and the agency and respondents stipulated that the worker was to unpaid prevailing rate wages for his work that week, this omission fits squarely within Webster's definition of "falsify," in that it gave "a false, imperfect, or misleading representation." ---- *In the Matter of Green Thumb Landscape and Maintenance, Inc., 35 BOLI 178, 249 (2017).*

When 10 of respondent's certified payroll reports misrepresented the job classification for three workers by stating that they were landscape laborers in weeks when they actually performed bricklayer work, the forum found that those reports were falsified. ---- *In the Matter of Green Thumb Landscape and Maintenance, Inc., 35 BOLI 178, 249-50 (2017).*

The agency's amended NOI asserted that respondents should be placed on the list of ineligible because Williams, their president, directed his staff to sign false statements certifying that employees' full wages were paid. OAR 839-025-0085(1)(d) provides that the commissioner may place a subcontractor on the list of those ineligible to receive public contracts when "[t]he contractor or subcontractor has intentionally falsified information in the certified statements the contractor or subcontractor submitted under ORS 279C.845." Williams testified at the hearing that he made a "business decision" to use the funds deducted for fringe benefits to "make payroll" and that he "got behind" in making the fringe benefit deposits. The commissioner has previously found that, at the direction of Williams, Portland Flagging and A D Traffic were responsible for intentionally falsifying certified payroll statements. Similarly, in this case, Williams made a conscious choice to fail to make fringe benefit deposits and neither corrected certified payroll statements that inaccurately stated deposits were made nor instructed his staff to do so. Based on those intentional decisions, respondents Portland Flagging and A D Traffic were placed on BOLI's list of ineligible to receive contracts or subcontracts for public works for a period of three years. --- *In the Matter of Portland Flagging, LLC (#14-14), 35 BOLI 11, 34-35 (2016).*

18.5 --- Payment of subcontractor's employee's wages by contractor

When the agency proved that the prime contractor paid wages due to respondent's workers, respondent was placed on the list of those ineligible to receive public works contracts for a period of three years. ---- *In the Matter of Portland Flagging, LLC (#14-14), 35 BOLI 11, 33 (2016).*

The agency asserted that placement on the commissioner's list of ineligible was appropriate, regardless of intent, because the general contractor paid the wages to respondent's employees. ORS 279C.860(1)(b) provides for such placement when the subcontractor has failed to pay to the subcontractor's employees the required amounts and the contractor has paid those amounts on the subcontractor's behalf. The NOI and the Answer established that respondent failed to pay its employees and that a "prime" contractor paid them on its behalf. However, the NOI did not allege that respondent was a subcontractor on the project but merely alleged that respondent was a contractor, thereby leaving open the possibility that it was a general contractor, perhaps one of two or more. Accordingly, the requirements of ORS 279C.860(1)(b) were not established. ---- *In the Matter of Diamond Concrete, Inc. and Eric James O'Malley and Marnie Leanne O'Malley, 33 BOLI 68, 74 (2014).*

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18.6 --- Liability of Corporate Officers or Agents

When a corporate respondent's president was directly responsible for respondent's intentional failure to pay the prevailing wage rate, the forum is required to debar that person for three years. ---- ***In the Matter of Green Thumb Landscape and Maintenance, Inc., 35 BOLI 178, 256 (2017).***

When respondent intentionally failed to pay the prevailing wage rate and respondent's corporate secretary was the person responsible for respondent's certified payroll reports and payroll, role made her responsible for respondent's intentional failure to pay the prevailing wage rate under ORS 279C.860(3) and OAR 839-025-0085(3) and the forum was required to debar her for three years. ---- ***In the Matter of Green Thumb Landscape and Maintenance, Inc., 35 BOLI 178, 256 (2017).***

Respondent Williams identified himself as the authorized representative and "president" of all the companies who were respondents in this matter and, thus, was the corporate officer or manager responsible for intentionally falsifying information in the certified statements. Williams also testified that he made the decision to use the fringe benefit withholdings to "make payroll" and did not have the inaccurate certified payroll statements amended to reflect this. Accordingly, Williams was placed on the list of ineligible for a period of three years. --- ***In the Matter of Portland Flagging, LLC (#14-14), 35 BOLI 11, 34-35 (2016).***

Respondent Williams identified himself as the authorized representative and "president" of all the companies who were respondents, and thus was the corporate officer or manager responsible for intentionally falsifying information in the certified statements. In that capacity, Williams was placed on the list of ineligible for a period of three years. ---- ***In the Matter of Portland Flagging, LLC (#37-13), 34 BOLI 270, 288 (2016).***

A corporate officer responsible for a subcontractor's failure to pay is also personally placed on the List of Ineligibles if the failure or refusal to pay prevailing wages was intentional or if the wages are ultimately paid by a contractor, presumably the general or prime contractor on the project. ---- ***In the Matter of Hard Rock Concrete, Inc. and Rocky Evans, 33 BOLI 77, 106 (2014), aff'd without opinion, Hard Rock Concrete, Inc. and Rocky Evans v. Oregon Bureau of Labor and Industries, 278 Or App 625 (2016).***

The corporate respondent was a subcontractor, and it failed to pay all the wages due its employees. The general contractor ultimately paid the wages in dispute. It was undisputed that respondent Evans was the corporate officer responsible for failing to pay the wages owed by the corporate respondent. Accordingly, under ORS 279C.860 (1) (b), the corporate respondent must be debarred from contracting on public works. Under ORS 279C.860(3), respondent Evans was also debarred. ---- ***In the Matter of Hard Rock Concrete, Inc. and Rocky Evans, 33 BOLI 77, 106 (2014), aff'd without opinion, Hard Rock Concrete, Inc. and Rocky Evans v. Oregon Bureau of Labor and Industries, 278 Or App 625 (2016).***

A corporate officer responsible for the intentional failure to pay the prevailing wage was placed on the list of ineligible. ---- ***In the Matter of Diamond Concrete, Inc. and Eric James O'Malley and Marnie Leanne O'Malley, 33 BOLI 68, 74 (2014).***

Respondent High Mountain was incorporated by Cina, its corporate president, for the specific reason of taking over a bookkeeping client's subcontract on the project and bailing the client out. Respondent Cina knew the project was a prevailing wage rate job, as shown by the filing of certified payroll reports on her behalf through her work on the project. Cina also knew the correct straight time prevailing wage rate for plumbers on the project and paid that rate for all hours contemporaneously reported to her. In addition, Cina was the person responsible for payment of wages to High Mountain's employees. From Cina's testimony, the forum concluded that the failure to pay overtime wages to four employees on the regular payday on which they were due was an oversight based on her inexperience, and she initially did not pay one employee anything for his work on various dates because he did not tell the Cina he had worked those days. However, Cina's continuing failure to pay those wages after BOLI's notification that

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those wages were due and owing, based on her belief that the employee did not work those hours, was a deliberate and conscious choice on her part and converted her inadvertent failure to pay into an intentional failure to pay. Based on that intentional failure, the commissioner was required to place High Mountain and Cina on BOLI's list of ineligible to receive contracts or subcontracts for public works for a period of three years. ---- ***In the Matter of High Mountain Plumbing and Diane Marie Cina, 33 BOLI 40, 51-52 (2014).***

18.7 --- Aggravating Circumstances

18.8 --- Mitigating Circumstances

Respondent High Mountain was incorporated by Cina, its corporate president, for the specific reason of taking over a bookkeeping client's subcontract on the project and bailing the client out. Respondent Cina knew the project was a prevailing wage rate job, as shown by the filing of certified payroll reports on her behalf through her work on the project. Cina also knew the correct straight time prevailing wage rate for plumbers on the project and paid that rate for all hours contemporaneously reported to her. In addition, Cina was the person responsible for payment of wages to High Mountain's employees. From Cina's testimony, the forum concluded that the failure to pay overtime wages to four employees on the regular payday on which they were due was an oversight based on her inexperience, and she initially did not pay one employee anything for his work on various dates because he did not tell the Cina he had worked those days. However, Cina's continuing failure to pay those wages after BOLI's notification that those wages were due and owing, based on her belief that the employee did not work those hours, was a deliberate and conscious choice on her part and converted her inadvertent failure to pay into an intentional failure to pay. Based on that intentional failure, the commissioner was required to place High Mountain and Cina on BOLI's list of ineligible to receive contracts or subcontracts for public works for a period of three years. ---- ***In the Matter of High Mountain Plumbing and Diane Marie Cina, 33 BOLI 40, 51-52 (2014).***

18.9 --- Length of Debarment

When a respondent intentionally fails to pay the prevailing wage rate, the forum is required to debar the respondent for three years. ---- ***In the Matter of Green Thumb Landscape and Maintenance, Inc., 35 BOLI 178, 255 (2017).***

Even though OAR 839-025-0085, the rule in effect at the time of the violations in this case, had not been amended to conform to the statute and still referred to debarment for a "period not to exceed three years," if debarment must be imposed, it cannot be imposed for any period less than three years, the amount set forth in the current statute. ---- ***In the Matter of Hard Rock Concrete, Inc. and Rocky Evans, 33 BOLI 77, 106 (2014), aff'd without opinion, Hard Rock Concrete, Inc. and Rocky Evans v. Oregon Bureau of Labor and Industries, 278 Or App 625 (2016).***

19.0 LIQUIDATED DAMAGES

When respondents violated ORS 279.840(1) by not paying four wage claimants the prevailing wage rate for their work on two public works projects, the forum found that respondents were liable to pay liquidated damages to claimants pursuant to ORS 279C.855. ---- ***In the Matter of Brown's Architectural Sheetmetal, Inc. and Brun Metals Company, LLC, 35 BOLI 68, 99 (2016).***

Subcontractors who fail to pay prevailing wages are liable to the workers affected for the unpaid wages and liquidated damages. ---- ***In the Matter of Portland Flagging, LLC (#28-15), 34 BOLI 244, 263 (2016).***

When the agency had not yet established whether any of the respondents violated ORS 279C.840, there was a question of fact as to whether respondents were responsible for liquidated damages pursuant to ORS 279C.855(1) and the agency's motion for summary judgment requesting liquidated damages was denied. ---- ***In the Matter of Portland Flagging, LLC (#28-15), 34 BOLI 244, 254 (2016).***

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20.0 AFFIRMATIVE DEFENSES

20.1 --- Equitable Estoppel

20.2 --- Ignorance of the Law

20.3 --- Other

Respondents' knowledge of the underlying agreement between prime contractor and contracting agency was irrelevant to the issue of whether respondents were required to pay the prevailing wage rate. --- ***In the Matter of Brown's Architectural Sheetmetal, Inc. and Brun Metals Company, LLC, 35 BOLI 68, 104 (2016).***

Respondents argued that they were not required to pay the prevailing wage rate to four workers on two public works projects because their activities on the projects were "consulting," "remedial and repair," "diagnostic," and "safety compliance." The forum called this argument a "red herring" and stated that, although these activities may not be listed trade classifications, claimants credibly testified that they performed manual and physical labor on respondents' behalf on the projects and, based on the workers' daily reports, the veracity of which was not questioned by respondents, the agency's compliance specialist credibly testified that most of the actual work claimants performed was appropriately classified as one of four trades – Sheet Metal Worker, Laborer Group 1, Carpenter Group 1, or Bricklayer/Stonemason. --- ***In the Matter of Brown's Architectural Sheetmetal, Inc. and Brun Metals Company, LLC, 35 BOLI 68, 98 (2016).***

Respondents, who had an oral agreement with the prime contractor to perform work on a public works, argued that they could not be subcontractors because the prime contractor paid respondents directly from the prime contractor's "private funds." The forum rejected this argument, stating that allowing respondents to avoid paying its workers the prevailing wage rate because the prime contractor paid respondents directly would mean that no subcontractor on a public works project would have to pay its workers the prevailing wage rate if it was paid directly by the prime contractor instead of the contracting public agency, and this was not the law. --- ***In the Matter of Brown's Architectural Sheetmetal, Inc. and Brun Metals Company, LLC, 35 BOLI 68, 97-98 (2016).***

Respondents argued that they were not subcontractors because they did not bid on the work and there was an oral agreement, but no written contract between the prime contractor and respondents. Contrary to respondents' argument, an oral agreement does not need to be in writing to be an enforceable contract, so long as it satisfies the other elements of a contract and its subject matter does not fall within the statute of frauds, which it did not in this case. Whether or not respondents bid on the work is irrelevant. In this case, the prime contractor made an oral agreement with respondents to perform "quality assurance" work at a public works on the prime contractor's behalf, in exchange for which the prime contractor agreed to reimburse respondents for their "time and materials." Respondents performed that work and received reimbursement. This constituted a valid contract, making respondents a subcontractor under Oregon's prevailing wage laws. --- ***In the Matter of Brown's Architectural Sheetmetal, Inc. and Brun Metals Company, LLC, 35 BOLI 68, 97 (2016).***

Respondents argued that the ALJ lacked jurisdiction to determine whether "warranty work" on a public works was subject to the prevailing wage rate because there was no statute or regulation defining warranty work and the agency is asking the forum to engage in rulemaking process without following established rulemaking procedures." Respondents argued that, in the absence of an existing administrative rule defining "warranty work," the ALJ must necessarily engage in rulemaking to determine whether or not claimants' work was "warranty work" subject to the prevailing wage rate. The forum found that respondents were correct that neither Oregon's prevailing wage laws nor BOLI's administrative rules defined "warranty work" in the prevailing wage context and there was no Oregon case law defining "warranty work" in this context. However, the forum concluded that the forum had jurisdiction to adjudicate whether or not claimants' work was "warranty work" for which they were entitled to be paid the prevailing

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wage rate because “agencies generally may express their interpretation of the laws they are charged with administering either by adjudication or by rulemaking, or both.” ---- *In the Matter of Brown’s Architectural Sheetmetal, Inc. and Brun Metals Company, LLC, 35 BOLI 68, 105-06 (2016).*

The weight of the evidence showed that Zoom Garage Door was not owned by respondent at the times material to the case. The contract for the purchase of the business was signed and appeared by its terms to be effective, prior to the subcontract and prevailing wage law violations at issue. No evidence was presented suggesting this contract was not authentic or that it was a sham. ---- *In the Matter of Zoom Contracting, LLC dba Zoom Garage Door, Inc., 33 BOLI 111, 119-20 (2014).*

21.0 EXEMPTIONS

22.0 PREVAILING WAGE RATE DETERMINATION

22.1 --- Generally

22.2 --- ALJ Order for Prehearing Written Statements

The ALJ issued an interim order requiring the parties to file written statements containing the names of all persons they proposed to call as witnesses at the hearing, along with a statement of how each person’s testimony would help the ALJ understand the materials provided, no later than 20 days before the date set for hearing. The requester was required to file a written statement identifying all of its reasons for contesting the agency’s determination and the agency was required to file a copy of its determination, all materials provided by the requester under OAR 839-025-005(1)-(4), and any other materials the agency relied upon to reach its determination. ---- *In the Matter of Oregon State Building & Construction Trades Council, 35 BOLI 271, 278 (2017).*

Pursuant to an order issued by the ALJ, the agency submitted a copy of the determination, the name of its proposed witness, and materials provided by the requester and material relied upon by the agency in reaching its determination. ---- *In the Matter of NW Housing Alternatives, Inc., 33 BOLI 165, 166 (2014).*

Pursuant to an order issued by the ALJ, the requester designated its witness and submitted a pre-hearing statement identifying its reasons for contesting the determination. ---- *In the Matter of NW Housing Alternatives, Inc., 33 BOLI 165, 166 (2014).*

22.3 --- List of Witnesses

22.4 --- Effective Date of HB 2140

22.5 --- Exemptions from HB 2140

22.6 --- Agency’s Duty in Making Prevailing Wage Rate Determination

The commissioner is authorized and directed to issue a “determination” as to whether prevailing wages must be paid to workers who will perform the labor in the demolition of the old buildings and the construction of the new ones and whether that construction fits within the definition of a “public works” such that the project is subject to the prevailing wage requirements. The determination can be issued if certain procedural pre-requisites are met, including the obligation to provide all the needed documents, records or other information. ---- *In the Matter of NW Housing Alternatives, Inc., 33 BOLI 165, 169 (2014).*

22.7 --- Dividing a Project

If it is an undivided single public works project, there is no question that prevailing wages must be paid because when total public funds in the project exceed \$750,000 and there is no applicable exemption, even though the requester is a private entity and private funds are being used. ---- *In the Matter of NW Housing Alternatives, Inc., 33 BOLI 165, 172 (2014).*

If a project is a “public works,” the commissioner shall divide the project, if appropriate, after applying the considerations set forth in ORS 279C.827(1)(c) to separate the parts of the project that include funds of a public agency from the parts of the project that do not include

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funds of a public agency. ----- *In the Matter of NW Housing Alternatives, Inc., 33 BOLI 165, 172 (2014).*

22.8 --- Definitions

22.8.1 --- "Apartment Building"

22.8.2 --- "Carried On"

The forum's first step in interpreting the phrase "carried on *** by any public agency" was to review the plain text of the statute and construe common phrases "in accordance with their plain natural and ordinary meaning." The applicable definition of the phrase "carried on" is "to conduct, manage (carry on the new enterprise)." Using that definition, the forum agreed with the agency that a public contracting agency would not be conducting or managing the construction of the new hospital under the terms of a contract addendum. ----- *In the Matter of Oregon State Building & Construction Trades Council, 35 BOLI 271, 287 (2017).*

Because the agency offered legislative history regarding the phrase "carried on," it was considered by the forum. ----- *In the Matter of Oregon State Building & Construction Trades Council, 35 BOLI 271, 287 (2017).*

When a non-public agency controlled the details of the construction of a new hospital, with the public agency providing financial support and having the ability to provide oversight, the construction of a new hospital, the forum determined that the construction of the new hospital would not be "carried on" by the public agency. ----- *In the Matter of Oregon State Building & Construction Trades Council, 35 BOLI 271, 287-88 (2017).*

While the ownership of the property and financing are factors to be considered in determining who will carry on a project, the most important factor is who exercises the most control over the project. ----- *In the Matter of Oregon State Building & Construction Trades Council, 35 BOLI 271, 295 (2017).*

22.8.3 --- "Construction"

22.8.4 --- "Contracted For"

The forum found that, in interpreting the phrase "contracted for * * * any public agency," in the context of a contract addendum, the phrase could possibly mean "contracted for" the public agency because it would own the new hospital or it could mean "contracted for" the non-public agency that controlled the details of the construction of a new hospital, with the public agency providing financial support and having the ability to provide oversight. ----- *In the Matter of Oregon State Building & Construction Trades Council, 35 BOLI 271, 288 (2017).*

The forum concluded that a public agency had not "contracted for" the construction of a new hospital when a binding commitment for a third party construction contract did not exist and, if the project proceeded, the third party would be engaging the contractor. ----- *In the Matter of Oregon State Building & Construction Trades Council, 35 BOLI 271, 289-90 (2017).*

A contract addendum that was a contract that governed circumstances in the event a third party – not the public agency -- entered into a contract for the construction of the new hospital, did not establish that the public agency had "contracted with a third party to perform" construction of the new hospital on behalf of the public agency. ----- *In the Matter of Oregon State Building & Construction Trades Council, 35 BOLI 271, 296 (2017).*

22.8.5 --- "Dormitory"

22.8.6 --- "Major Renovation"

22.8.7 --- "Public Contract"

22.8.8 --- "Project"

The forum first tried to determine the meaning of the term "project" from the statutory text and found it was not defined in the statute or in appellate case law interpreting the statute. In the context of an earlier version of the prevailing wage statutes, the commissioner found that a

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“project” would include “a multi-phase endeavor that may encompass more than one contract.” -
---- *In the Matter of NW Housing Alternatives, Inc., 33 BOLI 165, 170 (2014).*

The forum applied the dictionary definition of “project” as “an undertaking devised to effect the reclamation or improvement of a particular area of land.” It was clear from the history of the board’s consideration, as reflected in its minutes, that the reclamation of the subject parcel was considered as a unitary project from the beginning, and that the final reality will be a single redevelopment of the requester’s campus, with all three components — office, building, homeless shelter/community building, and affordable housing — designed by the same architect and built by the same general contractor at the same time. ---- *In the Matter of NW Housing Alternatives, Inc., 33 BOLI 165, 171 (2014).*

A “project” -- which is now a completely separate statutory sub-set of “public works” -- may be much more all-encompassing than a single building ---- *In the Matter of NW Housing Alternatives, Inc., 33 BOLI 165, 172 (2014).*

The forum concluded that, notwithstanding the presence of several different buildings in requester’s campus redevelopment, and even though those buildings serve various interests in the over-all mission of requester, the over-all redevelopment constituted a single project. ---- *In the Matter of NW Housing Alternatives, Inc., 33 BOLI 165, 172 (2014).*

22.8.9 --- "Public Works"

The construction of a single building may constitute a “public works.” ---- *In the Matter of NW Housing Alternatives, Inc., 33 BOLI 165, 172 (2014).*

22.8.10 --- "Reconstruction"

22.8.11 --- "Residential Construction"

22.9 --- Local Ordinances and Codes

22.10 --- All Agency Memorandum No. 130

22.11 --- Contract Interpretation

The forum did not find any relevant portion of a contract addendum to contain ambiguous terms, so looked to the text of the addendum itself, rather than to extrinsic evidence and/or witness testimony. In the absence of any ambiguity, the forum’s analysis ends and it must construe the words of a contract as a matter of law. ---- *In the Matter of Oregon State Building & Construction Trades Council, 35 BOLI 271, 285 (2017).*

23.0 STATUTORY INTERPRETATION

Because the agency offered legislative history regarding the phrase “carried on,” it was considered by the forum. ---- *In the Matter of Oregon State Building & Construction Trades Council, 35 BOLI 271, 287 (2017).*

The forum’s first step in interpreting the phrase “carried on *** by any public agency” was to review the plain text of the statute and construe common phrases “in accordance with their plain natural and ordinary meaning.” The applicable definition of the phrase “carried on” is “to conduct, manage (carry on the new enterprise).” Using that definition, the forum agreed with the agency that a public contracting agency would not be conducting or managing the construction of the new hospital under the terms of a contract addendum. ---- *In the Matter of Oregon State Building & Construction Trades Council, 35 BOLI 271, 287 (2017).*

In interpreting a statute, the forum’s task is to give effect to the legislative intent behind the statute. The forum examines the text and context of the statute and, to the extent that it is helpful to the analysis, legislative history. ---- *In the Matter of Oregon State Building & Construction Trades Council, 35 BOLI 271, 287 (2017).*

ORS chapter 279C and OAR 839, Division 25 do not define “falsified.” To determine legislative intent, and in the absence of a statutory definition, Oregon courts assume that the legislature intended to give words of common usage their “plain, natural, and ordinary meaning.” “Falsified” is a word of common usage. In determining its “plain, natural, and ordinary meaning,”

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the forum used *Webster's Third New International Dictionary*. ----- ***In the Matter of Green Thumb Landscape and Maintenance, Inc., 35 BOLI 178, 248-49 (2017).***

In interpreting a statute, the forum looks first to the text and context of the statute; pertinent legislative history may also be consulted. ----- ***In the Matter of NW Housing Alternatives, Inc., 33 BOLI 165, 170 (2014).***

"Project" is a word of common meaning, and generally, one turns to dictionary definitions to determine the ordinary meaning of undefined statutory terms. ----- ***In the Matter of NW Housing Alternatives, Inc., 33 BOLI 165, 170 (2014).***

24.0 AGENCY RULE INTERPRETATION

An agency's interpretation of its own rule is entitled to deference "if that interpretation is plausible and is not inconsistent with the rule in its context or with some other source of law." When the agency's interpretation of a "calendar quarter" was consistent with other Oregon laws that define a "calendar quarter" as "the period of three consecutive months ending on March 31, June 30, September 30 or December 31," the forum applied the agency's interpretation of its rule to the facts of the case because it was "plausible and * * * not inconsistent with the rule in its context or with some other source of law." ---- ***In the Matter of Portland Flagging, LLC (#28-15), 34 BOLI 244, 262 (2016).***

The forum concluded that the Agency's interpretation of the definition was more plausible than the interpretation advanced by respondent. Respondents' appeal to the principle that ambiguous documents are construed against the drafter was of no avail. The agency's Definitions of Covered Occupations, like rules or statutes, are not drafted for the agency's benefit but they are drafted for the guidance of building contractors and the benefit of workers. In that commercial context, a greater burden was placed on the respondent to resolve possible vagueness or ambiguity. Similarly, a greater burden was placed on respondents when they had the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process. ----- ***In the Matter of Hard Rock Concrete, Inc. and Rocky Evans, 33 BOLI 77, 98 (2014), aff'd without opinion, Hard Rock Concrete, Inc. and Rocky Evans v. Oregon Bureau of Labor and Industries, 278 Or App 625 (2016).***