

ADMINISTRATIVE PROCESS

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1.0 JURISDICTION (see also Ch. III, sec. 91.0)

2.0 COMMISSIONER, ADMINISTRATIVE LAW JUDGE

2.1 --- Duties and Authority

2.1.1 --- Generally

□ After the hearing was postponed, the ALJ issued an interim order requiring witnesses previously served with subpoenas to compel their appearance on the date originally set for hearing to that subpoena on the reset hearing date. The ALJ ordered that notice “of the duty of each witness to comply with the previously served subpoena on this new hearing date shall be given to each witness by means of respondent and the agency sending a copy of this ruling by regular mail to the witness’s mailing address.” ---- *In the Matter of From the Wilderness, Inc., 30 BOLI 227, 249 (2009).*

Appeal pending.

□ After the ALJ granted the agency’s motion to amend its formal charges, the agency amended the formal charges and served them on respondents. The amended charges contained allegations of retaliation that were not contained in the original formal charges and not addressed in the motion to amend. On his own motion, the ALJ struck the allegations in the amended charges that were not contained in the original formal charges and not referred to in the agency’s motion to amend. ---- *In the Matter of From the Wilderness, Inc., 30 BOLI 227, 242-45 (2009).*

Appeal pending.

□ After postponing the hearing, the ALJ issued an interim order stating that, when the hearing was reset, he would issue an order requiring persons already served with subpoenas to honor that subpoena by appearing at the time, date, and place set for the rescheduled hearing. ---- *In the Matter of From the Wilderness, Inc., 30 BOLI 227, 242 (2009).*

Appeal pending.

□ The ALJ cancelled and rescheduled a hearing due to inclement weather. ---- *In the Matter of Linda Marie Morgan, 30 BOLI 133, 135 (2009).*

□ The ALJ, on her own motion, amended the caption in the notice of hearing to include respondent’s full name as it appeared in the agency’s order of determination. --- *In the Matter of Linda Marie Morgan, 30 BOLI 133, 135 (2009).*

□ The ALJ may issue commissions for out-of-state depositions, but whether the authority to do so extends

to out-of-state detainees in a federal facility under Homeland Security jurisdiction has not been clearly established. ---- *In the Matter of Mountain Forestry, Inc., 29 BOLI 11, 20 (2007).*

Affirmed without opinion, *Mountain Forestry, Inc. v. Bureau of Labor and Industries*, 229 Or App 504, 213 P3d 590 (2009).

□ The commissioner has no authority to hear and decide a defamation claim based on allegations that an agency investigator made false and misleading statements that caused an insurer to decline to do business with respondents and that allegedly caused respondents economic damage and damage to their reputations. ---- *In the Matter of Mountain Forestry, Inc., 29 BOLI 11, 25 (2007).*

Affirmed without opinion, *Mountain Forestry, Inc. v. Bureau of Labor and Industries*, 229 Or App 504, 213 P3d 590 (2009).

□ The ALJ properly exercised her discretion when she did not permit counsel’s law clerk to represent respondents during the hearing. ---- *In the Matter of Mountain Forestry, Inc., 29 BOLI 11, 157 (2007).*

Affirmed without opinion, *Mountain Forestry, Inc. v. Bureau of Labor and Industries*, 229 Or App 504, 213 P3d 590 (2009).

□ The commissioner’s authority to regulate farm/forest labor contractors who recruit workers to perform reforestation work out of state under federal contracts is well established. ---- *In the Matter of Mountain Forestry, Inc., 29 BOLI 11, 45 (2007).*

Affirmed without opinion, *Mountain Forestry, Inc. v. Bureau of Labor and Industries*, 229 Or App 504, 213 P3d 590 (2009).

□ When respondents contended in their exceptions to the proposed order that the agency had no standing to pursue claimant’s wage claim because he had not assigned his wages to the commissioner prior to hearing and by that time claimant had already been paid so there was no claim to pursue, the forum concluded that respondents failed to produce any credible evidence that claimant was paid any wages for the work he performed during the wage claim period and, for reasons already stated in the order, failed to persuade the forum that a wage assignment must be taken before the commissioner may initiate enforcement proceedings. ---- *In the Matter of Kurt E. Freitag, 29 BOLI 164, 209 (2007).*

Affirmed without opinion, *Freitag v. Bureau of Labor and Industries*, 243 Or App 389, 256 P3d 1099 (2011).

2.1.2 --- Threats, Dangerous Weapons

□ An officer from the City of Newport Police Department was present throughout the hearing based on security concerns by the agency. ---- *In the Matter of Mark A. Frizzell, 31 BOLI 178, 182 (2011).*

□ Based on respondent’s demonstrated hostility toward government process and as a precautionary measure following instances of repeated verbal abuse toward agency staff members, the ALJ arranged to have an Oregon State Police officer present at the scheduled

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hearing. ---- *In the Matter of Kurt E. Freitag, 29 BOLI 164, 175 (2007).*

Affirmed without opinion, *Freitag v. Bureau of Labor and Industries, 243 Or App 389, 256 P3d 1099 (2011).*

2.2 --- Conflict of Interest, Bias, Prejudice

2.3 --- Ex Parte Communications

□ The ALJ issued an interim order disclosing a post-hearing ex parte communication from a non-party, non-participant that was sent to and read by the commissioner and forwarded to the ALJ. In the order, the ALJ found that the communication had no relevance to the issues before the forum, but issued an order disclosing the communication and giving the requester the opportunity to rebut its substance. The requester filed a response to the ex parte communication, and the agency case presenter and the agency's legal counsel filed affidavits disclaiming knowledge of the ex parte communication until after it was delivered to the agency. ---- *In the Matter of Central City Concern, 30 BOLI 94, 97 (2008)*

3.0 ATTORNEYS, CASE PRESENTERS, AND AUTHORIZED REPRESENTATIVES

3.1 --- Attorneys (see also 17.0, 24.6)

□ The ALJ denied an unrepresented respondent's request, made during the second day of hearing, that he be given the opportunity to retain an attorney. ---- *In the Matter of Mark A. Frizzell, 31 BOLI 178, 182 (2011).*

□ When respondents sought to be represented by out-of-state counsel, the ALJ issued an order requiring respondents' out-of-state counsel to submit an application to appear on respondents' behalf *pro hac vice*. Respondents' counsel filed a notice of appearance and advised the forum by letter that he was a member in good standing with the Oregon State Bar and had been a Bar member since 1980. ---- *In the Matter of Best Concrete and Gravel LLC, 31 BOLI 54, 56 (2010).*

□ An out-of-state attorney filed a motion for *pro hac vice* to allow him to represent, a corporation, at hearing. The attorney represented that he is an attorney licensed to practice in Massachusetts who has been corporate counsel for respondent and personal counsel to respondent's president. The ALJ issued an interim order denying the attorney's motion on two grounds: (1) He did not state that he had associated himself with an active member in good standing of the Oregon State Bar; and (2) he certified to the Massachusetts Board of Bar Overseers of the Supreme Judicial Court that he was not covered by professional liability insurance. ---- *In the Matter of From the Wilderness, Inc., 30 BOLI 227, 229 (2009).*

Appeal pending.

3.2 --- Case Presenters/Authorized Representatives

□ The ALJ required respondent, a corporation, to provide a letter authorizing its president, who filed an answer and request for hearing on respondent's behalf, to appear as its authorized representative at hearing and stated that the forum would disregard any motions,

filings, or other communications from respondent unless they were filed by an attorney or authorized representative. ---- *In the Matter of J & S Moving & Storage, Inc., 31 BOLI 286, 288 (2012).*

□ When the attorney for a corporate respondent withdrew prior to the hearing, and respondent's president attended the hearing and requested to represent respondent as its authorized representative, the ALJ required him to write and sign a statement giving himself the authority to represent respondent at hearing as its authorized representative before the hearing commenced. ---- *In the Matter of From the Wilderness, Inc., 30 BOLI 227, 257(2009).*

Appeal pending.

□ The ALJ issued an order requiring respondent that was a nonprofit corporation to obtain counsel or file a letter authorizing a corporate officer or employee to represent respondent at the hearing. ---- *In the Matter of Forestry Action Committee, 30 BOLI 63, 65 (2008).*

3.3 --- Attorney's Fees

3.4 --- Legal Memorandums, Briefs (see also 26.0)

3.5 --- Certified Law Students

□ A certified law student may appear before the forum with a client's consent and under an attorney's supervision subject to the ALJ's approval. ---- *In the Matter of Mountain Forestry, Inc., 29 BOLI 11, 39 (2007).*

Affirmed without opinion, *Mountain Forestry, Inc. v. Bureau of Labor and Industries, 229 Or App 504, 213 P3d 590 (2009).*

□ Although the forum wholly supports the underlying policy of the Law Student Appearance Rules, each case presents different circumstances that a presiding officer must consider before approving a law student's appearance before the forum. ---- *In the Matter of Mountain Forestry, Inc., 29 BOLI 11, 40 (2007).*

Affirmed without opinion, *Mountain Forestry, Inc. v. Bureau of Labor and Industries, 229 Or App 504, 213 P3d 590 (2009).*

□ Although respondents submitted documentation establishing that their counsel's legal assistant was eligible to practice under the Law Student Appearance Rules, the ALJ withheld approval after considering the complexities of the case which included an extensive pre-hearing record, multiple issues, voluminous exhibits submitted with the participants' case summaries, and the necessity for a full time interpreter for the hearing's anticipated 10-day duration. The ALJ found that under those circumstances, allowing a law student to present any part of respondents' case at hearing was not conducive to ensuring the orderly and timely development of the hearing record, and denied respondents' request for approval. ---- *In the Matter of Mountain Forestry, Inc., 29 BOLI 11, 40-41 (2007).*

Affirmed without opinion, *Mountain Forestry, Inc. v. Bureau of Labor and Industries, 229 Or App 504, 213 P3d 590 (2009).*

□ When respondents contended in their exceptions to

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the proposed order that they were denied the “right to be represented by counsel of their choosing” amounting to a “denial of a fair hearing,” and that they were entitled to representation by a certified law student throughout the hearing under ORS 183.415(3), the commissioner found that neither ORS 183.415(3) nor OAR 839-050-0020(9) confers a right to counsel of choice and that certified law students are not included in the statutory definition of counsel. The commissioner concluded that the ALJ properly exercised her discretion when she did not permit counsel’s law clerk to represent respondents during the hearing. ---- *In the Matter of Mountain Forestry, Inc., 29 BOLI 11, 157 (2007).*

Affirmed without opinion, *Mountain Forestry, Inc. v. Bureau of Labor and Industries*, 229 Or App 504, 213 P3d 590 (2009).

4.0 PARTICIPANTS

5.0 CIVIL RIGHTS COMPLAINT (see also Ch. III, sec. 60.0)

6.0 CIVIL RIGHTS ADMINISTRATIVE DETERMINATION (see also Ch. III, sec. 62)

6.1 --- Generally

6.2 --- Amendments

6.3 --- Date of Determination

6.4 --- Date of Issuance

□ When the agency’s formal charges alleged that the agency issued a substantial evidence determination setting forth its findings more than one year after complainant filed her verified complaint, the ALJ issued an interim order noting there was a jurisdictional issue in the case and ordered the agency to provide a copy of complainant’s verified complaint with a legible date stamp showing the date of filing and a copy of the agency’s substantial evidence determination and any other documentation that was issued showing the date the agency issued it. The agency subsequently provided documents showing that the complaint was filed on March 8, 2004, and the substantial evidence determination issued on March 8, 2005. The ALJ subsequently issued an interim order concluding that the forum had jurisdiction to hear the case. ---- *In the Matter of Northwestern Title Loans LLC, 30 BOLI 1, 3-4 (2008).*

6.5 --- Reconsideration

6.6 --- Service

6.7 --- Substantial Evidence

7.0 CIVIL RIGHTS CONCILIATION

8.0 CIVIL RIGHTS FORMAL CHARGES (see also Ch. III, sec. 63.1)

8.1 --- Generally

8.2 --- Relationship to Administrative Determination

8.3 --- Amendments

8.3.1 --- Prehearing Amendments

□ The ALJ granted the agency’s motion to amend the formal charges to correctly identify the location of

respondent’s business as the address admitted by respondent in his answer to the formal charges. ---- *In the Matter of Charles Edward Minor, 31 BOLI 88, 90 (2010).*

□ The statutory scheme found in ORS 659A.820 through 659A.850 provides that a complaint of unlawful discrimination must be filed and a finding of substantial evidence issued before the commissioner can issue formal charges. When a complaint containing the post-termination allegations of retaliation that the agency introduced in its amended formal charges was never filed, so far as the forum was aware, the agency could not bootstrap these new allegations into the existing formal charges. ---- *In the Matter of From the Wilderness, Inc., 30 BOLI 227, 245 (2009).*

Appeal pending.

□ After the ALJ granted the agency’s motion to amend its formal charges, the agency amended the formal charges and served them on respondents. The amended charges contained allegations of retaliation that were not contained in the original formal charges and not addressed in the motion to amend. On his own motion, the ALJ struck the allegations in the amended charges that were not contained in the original formal charges and not referred to in the agency’s motion to amend. ---- *In the Matter of From the Wilderness, Inc., 30 BOLI 227, 242-45 (2009).*

Appeal pending.

□ The agency filed a motion to amend its formal charges to name an individual as a respondent successor in interest to a corporate respondent and to increase by \$20,000 the amount of damages sought for emotional, physical and mental suffering. The ALJ granted the agency’s motion to amend the formal charges to name the individual as respondent’s successor in interest, but denied the agency’s request to increase the amount of damages sought by \$20,000 because the motion did “not include a substantive recital of any continued retaliation other than what is already set out in the formal charges and did not state why those allegations already set out in the formal charges supported \$20,000 more in emotional distress damages than the amount originally plead.” The agency was ordered to reissue the amended formal charges “with the amended language incorporated into it and underlined so it can be clearly identified, then to serve the individual respondent with the amended formal charges. The ALJ postponed the hearing to give the agency an opportunity to serve the individual respondent and noted that respondent’s objection that the forum lacked jurisdiction over the individual respondent was premature because the agency had not yet attempted to serve him. ---- *In the Matter of From the Wilderness, Inc., 30 BOLI 227, 241-42 (2009).*

Appeal pending.

8.3.2 --- Amendments at Hearing

□ At hearing, respondent moved to amend its answer to affirmatively allege that ERISA preempted the agency’s OFLA case. Respondent acknowledged that its affirmative defense was waivable, but argued that the defense was not viable until complainant gave specific

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testimony that implicated ERISA. However, the agency did not move to amend its pleading “to conform to the evidence and to reflect issues presented” as required under OAR 839-050-0140. Consequently, form held that the only issues properly before it were the ones raised in the agency’s formal charges and none of those issues relate to or are in any way connected with ERISA. Without an amended charging document, complainant’s brief testimony did not constitute a proper claim for relief, and respondent had no viable basis for amending its answer and raising an additional affirmative defense. Respondent’s motions to amend the answer and to dismiss the formal charges were denied. ---- ***In the Matter of Income Property Management, 31 BOLI 18, 21-22 (2010).***

□ At hearing, the agency moved to amend its formal charges to change the word “much” to “must.” Respondent did not object and the ALJ granted the motion. ---- ***In the Matter of Northwestern Title Loans LLC, 30 BOLI 1, 8 (2008).***

□ At hearing, the agency moved to amend its formal charges to allege that complainant filed her complaint with the Civil Rights Division on March 8, 2004, instead of March 3, 2004. Respondent did not object and the ALJ granted the agency’s motion. ---- ***In the Matter of Northwestern Title Loans LLC, 30 BOLI 1, 8 (2008).***

8.4 --- Date of Issuance

8.5 --- Notice

8.6 --- Election of Remedies

8.7 --- Exhaustion of Administrative Remedies

8.8 --- Respondents

8.9 --- Service

□ An individual respondent who resided out of state was properly served when the agency mailed the amended formal charges to him, by certified mail, to his correct address and he was also personally served with the same document. Both types of service are authorized by OAR 839-050-0030. ---- ***In the Matter of From the Wilderness, Inc., 30 BOLI 227, 247-48 (2009).***

Appeal pending.

□ Service of the amended formal charges on an individual respondent’s attorney, when that attorney specifically stated he would not accept service on behalf of respondent, did not constitute proper service of the amended formal charges. ---- ***In the Matter of From the Wilderness, Inc., 30 BOLI 227, 247-48 (2009).***

Appeal pending.

8.10 --- Sufficiency of Pleadings

8.11 --- Waiver

9.0 ORDERS OF DETERMINATION AND NOTICES OF INTENT

9.1 --- Generally

9.2 --- Amendments

9.2.1 --- Prehearing Amendments

□ The ALJ granted the agency’s prehearing motion to amend the order of determination to reduce the amount of the unpaid wages sought from \$1,889.10 to \$873.50. ---- ***In the Matter of Letty Lee Seshier, 31 BOLI 255, 256 (2011)***

□ Prior to the hearing, the agency filed a motion to amend the order of determination to reduce the wages claimed from \$1404.38 to \$1,245.00 and to delete the sentence alleging that the employer was required by the provisions of OAR 839-020-0030 to compensate the wage claimant at one and one half times the regular rate of pay for each hour worked over 40 hours in a given work week, stating that claimant was not eligible for overtime as an employee subject to the overtime exemptions pertaining to employers regulated under the Federal Fair Labor Standards Act. The agency further stated that respondents’ counsel would not oppose the motion. The ALJ granted the agency’s motion at the start of the hearing. ---- ***In the Matter of Best Concrete and Gravel LLC, 31 BOLI 54, 56-57 (2010).***

□ The ALJ issued an order granting the agency’s prehearing motion to amend the order of determination by interlineation to lower the amount of wages and penalty sought and to include a reference to overtime wages. Subsequently, the ALJ issued an addendum to the order pointing out that, although respondent did not object to the agency’s amendment, the allegations were deemed denied for the purpose of hearing and respondent was not required to file an amended answer. ---- ***In the Matter of Forestry Action Committee, 30 BOLI 63, 65 (2008).***

□ The ALJ granted the agency’s prehearing motion to amend its order of determination to correct the caption spelling of respondent’s name from “Pet Works, LLC” to “Petworks, LLC” and increase the amount of unpaid wages sought from \$958.25 to \$987.25. ---- ***In the Matter of Petworks LLC, 30 BOLI 35, 37 (2008).***

□ The agency’s prehearing motion to amend the order of determination to include additional respondents, on grounds that the status of the potential respondents was unclear and there was evidence that both may have employed the wage claimant, was granted. ---- ***In the Matter of Kurt E. Freitag, 29 BOLI 164, 167 (2007).***

Affirmed without opinion, *Freitag v. Bureau of Labor and Industries*, 243 Or App 389, 256 P3d 1099 (2011).

□ Respondents’ objection to the agency’s motion to amend the order of determination to include additional respondents was treated as a motion for reconsideration of the ALJ’s order granting the motion and was denied as to the request for reconsideration, but based on individual respondent’s assertion that service on the individual respondent did not constitute service on the corporate respondent, the ALJ ordered the agency to serve the additional respondents with the amended order of determination and file proof of service; respondents were granted leave to file an amended answer within 20 days of their receipt of the amended order. ---- ***In the Matter of Kurt E. Freitag, 29 BOLI 164, 168-69 (2007).***

Affirmed without opinion, *Freitag v. Bureau of Labor*

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and Industries, 243 Or App 389, 256 P3d 1099 (2011).

□ Prior to issuing a notice of hearing, the ALJ granted the agency's motion to amend the order of determination to correct a misspelling in the caption and to include attachments that were inadvertently omitted when the agency submitted a request for hearing. ---- ***In the Matter of Pavel Bulubenchii, 29 BOLI 222, 224 (2007).***

9.2.2 --- Amendments at Hearing

□ After the evidentiary part of the hearing was concluded, the agency moved to amend its order of determination to lower the amount of wages sought to \$2,088.90 and the agency granted the agency's motion. ---- ***In the Matter of J & S Moving & Storage, Inc., 31 BOLI 286, 290 (2012).***

□ At a default hearing, the ALJ granted the agency's motion to amend the order of determination to reduce the wages sought from \$11,725 to \$11,710. ---- ***In the Matter of Paul Samuels, 31 BOLI 146, 149 (2010).***

□ At hearing, the agency move to amend its order of determination to change the date of the issuance of the order to March 14, 2008, instead of March 14, 2007; change the wage claim period to March 26, 2007 through May 15, 2007; and increase the total number of hours worked by claimant to by .5 hours to 211 and the unpaid wages sought by \$5.00 to \$2,067.50. The ALJ granted the agency's motion to change the date of issuance of the order of determination and reserved ruling on the other two proposed amendments for the proposed order. The ALJ granted the other two proposed amendments in the proposed order. ---- ***In the Matter of Mass Tram America, Inc., 31 BOLI 42, 45 (2010).***

□ During the hearing, respondent moved to amend its answer to add the affirmative defense that the claimants were independent contractors. The ALJ ruled that affirmative defenses must be raised in the pleadings and denied respondent's motion. ---- ***In the Matter of Blachana, LLC, 30 BOLI 197, 202 (2009).***

Appeal pending.

□ The ALJ, on her own motion, amended the caption in the notice of hearing to include respondent's full name as it appeared in the agency's order of determination. --- ***In the Matter of Linda Marie Morgan, 30 BOLI 133, 135 (2009).***

□ During closing argument in a default case, the agency made separate motions to amend the order of determination to lower the number of hours worked in two claimants' wage claim periods from 128 to 120 and 266 to 255, respectively. The ALJ granted both motions. ---- ***In the Matter of Village Café, Inc., 30 BOLI 80, 83 (2008).***

□ At the end of the evidentiary portion of a default hearing, and before the agency rested its case, the agency moved to amend the order of determination to increase the amount of wages sought by \$450. The ALJ denied the motion because there could be no express or implied consent by respondent under OAR 839-050-0140 due to respondent's absence from the hearing. ---- ***In the Matter of Petworks LLC, 30 BOLI 35, 37, 42***

(2008).

□ At the start of hearing, the agency made an oral motion to amend the notice of intent to correct citation errors in the notice. Respondent did not object and the ALJ granted the agency's motion. ---- ***In the Matter of Arjae Sheet Metal Company, Inc., 29 BOLI 1, 3 (2007).***

9.3 --- Service

□ When denying respondents' motion to reconsider order granting the agency's motion to amend the order of determination to add additional respondents, the ALJ concluded that proper service upon the added respondents was not adequately demonstrated and ordered the agency to serve the additional respondents with the amended order of determination and provide proof of service to the hearings unit. ---- ***In the Matter of Kurt E. Freitag, 29 BOLI 164, 168-169 (2007).***

Affirmed without opinion, *Freitag v. Bureau of Labor and Industries*, 243 Or App 389, 256 P3d 1099 (2011).

9.4 --- Notice

□ Based on the agency's timing of its request for a hearing on child labor issues related to a wage claim case that was previously set for hearing and later consolidated with the child labor case, the ALJ concluded that respondents' notice of the child labor issues was not sufficient to allow adequate preparation and the hearing was subsequently bifurcated and hearing on the child labor issues was deferred to a later date. ---- ***In the Matter of Kurt E. Freitag, 29 BOLI 164, 169-171 (2007).***

Affirmed without opinion, *Freitag v. Bureau of Labor and Industries*, 243 Or App 389, 256 P3d 1099 (2011).

9.5 --- Sufficiency of Pleadings

□ When respondent did not use the specific term "independent contractor" in its answer but affirmatively alleged that claimant was an "Independent Business Owner selling our GPS devices" and that claimant "bought an independent business distributorship" and "was his own business owner." Relying on ORCP 12, the forum held that respondent had raised the affirmative defense of independent contractor. ---- ***In the Matter of Horizon Technologies, LLC, 31 BOLI 229, 241 (2011).***

□ At a default hearing, the agency presented considerable evidence to rebut respondent's claim, made during the investigation, that claimants were independent contractors. The forum did not address this issue because "independent contractor" is an affirmative defense in wage claim cases and respondent did not plead it as a defense in its answers and requests for hearing. Respondent's self-labeled "affirmative defense" that claimants "were never employees of [respondent]" was merely a denial of the first element of the agency's prima facie case, and not an affirmative assertion that claimants were "independent contractors." ---- ***In the Matter of Computer Products Unlimited, Inc., 31 BOLI 209, 22-24 (2011).***

□ In their respective answers, respondents alleged that claimant was self-employed and that they did not owe claimant any wages because he did not earn any

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wages. The forum treated these pleadings as a denial that respondents employed claimant and an affirmative assertion that claimant was an independent contractor. -
---- *In the Matter of Mark A. Frizzell, 31 BOLI 178, 193 (2011).*

□ The forum did not award claimant \$29 in overtime wages that respondent owed here because the agency's order of determination lacked a citation to the overtime statute and rule allegedly violated. ---- *In the Matter of Petworks LLC, 30 BOLI 35, 46 (2008).*

10.0 ANSWER

10.1 --- Generally

□ In a child labor case, respondent's authorized representative initially filed an answer and request for hearing. Subsequently, respondent obtained counsel, who filed a second answer to the charges on February 27, 2009, in which respondent admitted the substantive allegations, and alleged 11 affirmative defenses pertaining to mitigating circumstances and that the agency's proposed civil penalties were "excessive, unreasonable, and inconsistent with the guidelines outlined in OAR 839-019-0025 and ORS 653.370." On March 9, 2009, respondent's counsel filed a third "amended answer" that was identical to its February 27 answer except that it denied the allegations in paragraph 5 of the charges. Before the evidentiary portion of the hearing commenced, the agency sought to clarify the status of respondent's multiple answers to the charges. Respondent's counsel stated that initially she was unaware of respondent's first answer and believed the answer she filed on respondent's behalf was the first answer to the agency's charges and that the "amended" answer she filed on respondent's behalf was the second. Respondent was entitled to amend its answer once as a matter of course before a responsive pleading was filed. OAR 839-050-0140(1). For that reason, the ALJ determined that the answer filed on February 27, 2009, was respondent's amended answer and controlling for the purpose of hearing, and the third answer filed on March 9, 2009, was disregarded. ---- *In the Matter of Spud Cellar Deli, Inc., 30 BOLI 185, 186-88 (2009).*

10.2 --- Evidentiary Significance (see also 20.24, 24.3)

□ In a default case, the forum may consider any unsworn and unsubstantiated assertions contained in respondent's answer, but those assertions are overcome whenever they are contradicted by other credible evidence in the record. ---- *In the Matter of Village Café, Inc., 30 BOLI 80, 88 (2008).* See also *In the Matter of J. Guadalupe Campuzano-Cazares LLC, 30 BOLI 48, 59 (2008).*

□ In their answer, respondents did not deny they entered into legal and valid agreements with the Oregon Department of Forestry from 2000 through 2004 while jointly acting in their capacity as a licensed farm/forest labor contractor and the forum deemed those facts admitted by respondents. ---- *In the Matter of Mountain Forestry, Inc., 29 BOLI 11, 125 (2007).*

Affirmed without opinion, *Mountain Forestry, Inc. v. Bureau of Labor and Industries*, 229 Or App 504, 213 P3d 590 (2009).

□ When a respondent fails to appear at hearing and its only contribution to the record is a request for hearing and an answer that contains only unsworn and unsubstantiated assertions, those assertions are overcome whenever they are contradicted by other credible evidence in the record. ---- *In the Matter of John Steensland, 29 BOLI 235, 261-62 (2007).*

10.3 --- Affirmative Defense

□ During the hearing, respondent moved to amend its answer to add the affirmative defense that the claimants were independent contractors. The ALJ ruled that affirmative defenses must be raised in the pleadings and denied respondent's motion. ---- *In the Matter of Blachana, LLC, 30 BOLI 197, 202 (2009).*

Appeal pending.

□ Respondent waived its independent contractor defense with respect to two wage claimants by not raising it in her answer. ---- *In the Matter of Laura M. Jaap, 30 BOLI 110, 122 (2009).*

11.0 NOTICE OF HEARING

12.0 CONSOLIDATION OF CASES (see 14.9)

□ The ALJ consolidated a wage claim case with a related child labor case against the same respondents after determining that the cases involved common questions of fact and "perhaps some related questions of law." ---- *In the Matter of Kurt E. Freitag, 29 BOLI 164, 169-171 (2007).*

Affirmed without opinion, *Freitag v. Bureau of Labor and Industries*, 243 Or App 389, 256 P3d 1099 (2011).

13.0 EXPEDITED HEARINGS

14.0 MOTIONS

14.1 --- Motion to Postpone (see 17.0)

14.2 --- Motion for Summary Judgment (see 15.0)

14.3 --- Motion for Discovery Order (see 19.0)

14.4 --- Motion for Change of Hearing Location

14.5 --- Motion to Dismiss

□ When respondents' case summary included a request that the forum dismiss the case because the claimant had fabricated his hours and the agency had not yet filed its case summary, the forum treated respondents' request as a motion to dismiss. Specifically, respondent's motion asked the forum to dismiss the case on the grounds that respondents' exhibit showing the hours claimant worked made it "obvious" that claimant's record was fabricated after the fact. The ALJ denied respondents' motion, stating: "Until the agency files its case summary, I have no way of knowing, aside from reading the allegations in the order of determination, which specific dates and times the agency contends that claimant * * * worked. I note respondents' exhibits appear to concede that claimant did work some hours, albeit less than the amount claimed in the order of determination. Even then, the potential existence of a partial discrepancy is not

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grounds for dismissing the case, as it is possible that a claim may be valid in some respects and not others.” --- ***In the Matter of Mark A. Frizzell, 31 BOLI 178, 182 (2011).***

□ The ALJ granted respondent’s motion for partial summary judgment and dismissed respondent as a successor in interest when, looking at the record in a manner most favorable to the agency, the ALJ concluded that the agency failed to raise sufficient genuine material issues of fact to survive respondent’s motion. ---- ***In the Matter of From the Wilderness, Inc., 30 BOLI 227, 249-57 (2009).***

Appeal pending.

□ An individual who was added as a respondent successor in interest in the agency’s amended formal charges filed a motion to dismiss on the grounds of lack of jurisdiction, arguing that there are no allegations contained within the amended formal charges which provided any factual allegations of any activities by the individual respondent that would establish sufficient activity within the state of Oregon within the requisite statute of limitations that would allow this agency to find jurisdiction. Respondent also argued that there had been no service upon the individual sufficient for jurisdiction, and that until there had been lawful service upon the individual respondent and a determination that the individual had engaged in activities over which the agency has jurisdiction, there could be no hearing relating to the individual. The forum held that the only relevant facts related to the individual’s liability concerned whether or not his activities make him a successor in interest, a question that was up to the agency to prove at hearing. Since the alleged unlawful discrimination only involved actions alleged to have taken place in Oregon, the individual’s argument that the agency could not acquire jurisdiction over him because he did not engage in any of the alleged unlawful activities in Oregon failed. To acquire jurisdiction, the agency only needed to serve the individual in a manner consistent with the provisions of OAR 839-050-0030. ---- ***In the Matter of From the Wilderness, Inc., 30 BOLI 227, 242-47 (2009).***

Appeal pending.

□ After opening statements, and before any witnesses were called, respondent moved to dismiss the case on the grounds that the agency had submitted an “inadequate” case summary, in that the agency’s case summary failed to detail all the elements of the specific successor in interest test the agency intended to apply to the case. The ALJ’s case summary order had required, among other things, that the agency submit “a brief statement of the elements of the claim.” The agency’s case summary stated that “Respondent, as successor in interest, is liable to the Wage Security Fund for reimbursement of \$7,047.62 in wages paid to Claimants and for a penalty of 25% of those wages in the amount of \$1,841.91 plus interest until paid.” The ALJ ruled that the agency’s case summary met the requirements of OAR 839-050-0210 and overruled respondent’s objection. ---- ***In the Matter of Blachana, LLC, 30 BOLI 197, 201 (2009).***

Appeal pending.

□ Respondents objected to the admission of a wage claimant’s wage assignment that was made and offered at the start of hearing and moved to dismiss the order of determination with prejudice on the ground that the assignment was procedurally flawed, that allowing the assignment *nunc pro tunc* could affect respondents’ rights “to pursue that particular matter,” and that a wage assignment was a prerequisite to issuing an order of determination. Respondents’ motion was denied after the forum concluded that the wage assignment *nunc pro tunc* was in accordance with applicable statutes and rules and respondents were not prejudiced by the timing of the assignment. ---- ***In the Matter of Kurt E. Freitag, 29 BOLI 164, 171-72 (2007).***

Affirmed without opinion, *Freitag v. Bureau of Labor and Industries, 243 Or App 389, 256 P3d 1099 (2011).*

□ When respondents moved for dismissal with prejudice on the grounds that the agency did not make available information pursuant to the ALJ’s discovery order and that respondents did not receive the agency’s case summary, and after the agency produced a five page document entitled “Agency Response to Discovery Request” and certificates of service for the response to discovery request and the case summary, and neither document was returned to the agency as undeliverable, the forum concluded that respondents were properly served by U.S. mail and denied respondents’ motion to dismiss. ---- ***In the Matter of Kurt E. Freitag, 29 BOLI 164, 175 (2007).***

Affirmed without opinion, *Freitag v. Bureau of Labor and Industries, 243 Or App 389, 256 P3d 1099 (2011).*

14.6 --- Motion to Strike

□ BOLI’s contested case hearing rules do not limit the agency’s or a respondent’s ability to file a motion to strike even though the rules do not include a procedure for filing such a motion. ---- ***In the Matter of Mountain Forestry, Inc., 29 BOLI 11, 22-23 (2007).***

Affirmed without opinion, *Mountain Forestry, Inc. v. Bureau of Labor and Industries, 229 Or App 504, 213 P3d 590 (2009).*

□ When the agency’s motion to strike was filed well over two months before the hearing date and respondents failed to establish how they were “severely prejudiced” if the motion was granted, the ALJ found the agency’s motion was timely filed and granted the motion. ---- ***In the Matter of Mountain Forestry, Inc., 29 BOLI 11, 23 (2007).***

Affirmed without opinion, *Mountain Forestry, Inc. v. Bureau of Labor and Industries, 229 Or App 504, 213 P3d 590 (2009).*

□ In response to the agency’s motion to strike, respondents urged the forum to apply the Oregon Rules of Civil Procedure and hold the agency to a 10-day limitation from the date the answer was filed, even though respondents acknowledged that the forum is “not necessarily bound” by the 10-day limitation. The ALJ held that under the contested case hearing rules, filing dates may be set or changed by the ALJ, and since the agency’s motion was filed well over two months before

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the hearing date, and respondents failed to establish how they were prejudiced, the ALJ found the motion was timely filed. ---- ***In the Matter of Mountain Forestry, Inc., 29 BOLI 11, 23 (2007).***

Affirmed without opinion, *Mountain Forestry, Inc. v. Bureau of Labor and Industries*, 229 Or App 504, 213 P3d 590 (2009).

14.7 --- Motion for Telephonic Hearing

□ The ALJ granted respondents' motion for a telephonic hearing in which respondents and their witnesses would participate by telephone and the agency and its witnesses would be physically present at the hearing. ---- ***In the Matter of Laura M. Jaap, 30 BOLI 110, 113 (2009).***

14.8 --- Motion for Protective Order

□ The agency filed a motion for a protective order regarding complainant's "medical, psychological, counseling, and therapy records" that the agency might introduce as evidence at the hearing or that respondent "may obtain during this contested case process." In response, the ALJ issued a protective order covering all "individually identifiable health information pertaining to complainant that the agency provides in its case summary or offers as evidence at the contested case hearing currently set in this matter * * * as well as any medical, psychological, counseling and therapy records of complainant that respondents obtain during this contested case process." ---- ***In the Matter of From the Wilderness, Inc., 30 BOLI 227, 242, 249 (2009).***

Appeal pending.

14.9 --- Motion to Consolidate

□ The agency moved to consolidate two cases for hearing on the grounds that the cases involved four wage claims with claimants who worked for the same employer, doing the same work, and all alleged unpaid wages in the same general period of time. Respondent did not object and the ALJ granted the agency's motion on the grounds that they involved common questions of law and fact. ---- ***In the Matter of Computer Products Unlimited, Inc., 31 BOLI 209, 212 (2011).***

□ The agency's motion to consolidate two "related" cases (a wage claim case and a child labor case) against the same respondents was granted after the ALJ determined that the cases involved common questions of fact and "perhaps some related questions of law in the two cases." ---- ***In the Matter of Kurt E. Freitag, 29 BOLI 164, 169-171 (2007).***

Affirmed without opinion, *Freitag v. Bureau of Labor and Industries*, 243 Or App 389, 256 P3d 1099 (2011).

14.10 --- Motion for Extension of Time

□ The ALJ granted the agency's motion for extension of time to file exceptions to the proposed order in which the agency case presenter cited his workload and noted that requester's counsel did not object. ---- ***In the Matter of Blanchet House of Hospitality, 31 BOLI 73, 76 (2010).***

□ The ALJ granted the agency's motion to extend the time for complying with the ALJ's discovery order in

which the agency represented that respondent's counsel did not oppose extending time to the date requested. ---- ***In the Matter of Income Property Management, 31 BOLI 18, 20-21 (2010).***

□ When respondent retained an attorney after the agency's motion for default was denied, the attorney requested a 10-day extension of time in which to file an answer to the formal charges and a postponement of the hearing and the agency did not object, the ALJ granted both requests. ---- ***In the Matter of From the Wilderness, Inc., 30 BOLI 227, 234 (2009).***

Appeal pending.

□ In a prevailing wage rate determination hearing, the requester moved for an extension of time to file a response to the agency's motion for summary judgment. The agency did not object and the ALJ granted the motion. ---- ***In the Matter of Central City Concern, 30 BOLI 94, 96 (2008)***

□ When the agency case presenter provided specific evidence proving she was otherwise encumbered by previously scheduled hearings and events that were impracticable, if not impossible, to change and, as such, her ability to prepare a proper response to respondents' motion to dismiss was impeded, and when respondents, in the meantime, filed a supplement to their motion to dismiss citing case law the agency could address only through legal counsel, the ALJ found that the requested due date was reasonable under those circumstances and granted the agency's motion for an extension of time to file its response to respondents' motion. ---- ***In the Matter of Mountain Forestry, Inc., 29 BOLI 11, 17-18 (2007).***

Affirmed without opinion, *Mountain Forestry, Inc. v. Bureau of Labor and Industries*, 229 Or App 504, 213 P3d 590 (2009).

□ When the agency case presenter established she would suffer undue hardship if the agency's motion for extension of time was denied, and the ALJ previously had granted respondents' motion to postpone the hearing based on counsel's showing that he would suffer undue hardship if the motion for postponement was denied, the ALJ, over respondents' objection, afforded the agency the same courtesy extended to respondents and granted the agency's motion. ---- ***In the Matter of Mountain Forestry, Inc., 29 BOLI 11, 17-18 (2007).***

Affirmed without opinion, *Mountain Forestry, Inc. v. Bureau of Labor and Industries*, 229 Or App 504, 213 P3d 590 (2009).

□ The ALJ granted the agency's motion for an extension of time to respond to respondents' motion for a discovery order when respondents did not file a response and the ALJ inferred from the lack of response that respondents did not oppose the motion. ---- ***In the Matter of Mountain Forestry, Inc., 29 BOLI 11, 22 (2007).***

Affirmed without opinion, *Mountain Forestry, Inc. v. Bureau of Labor and Industries*, 229 Or App 504, 213 P3d 590 (2009).

14.11 --- Generally

□ The ALJ denied an unrepresented respondent's

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request, made during the second day of hearing, that he be given the opportunity to retain an attorney. ---- ***In the Matter of Mark A. Frizzell, 31 BOLI 178, 182 (2011).***

□ The ALJ denied respondent's request, made during the second day of hearing, for a court trial with a jury. ---- ***In the Matter of Mark A. Frizzell, 31 BOLI 178, 182 (2011).***

□ The ALJ denied respondent's request, made during the second day of hearing, that the case be removed to federal court. ---- ***In the Matter of Mark A. Frizzell, 31 BOLI 178, 182 (2011).***

□ Respondents filed a motion by facsimile transmission for a discovery order compelling the agency to furnish discovery previously requested but not provided. Subsequently, also by facsimile transmission, respondents sent the ALJ copies of affidavits in response to the ALJ's discovery order. The ALJ issued an order pertaining to fax filings citing the contested case rules and stating that documents sent by facsimile transmission would not be considered unless verbal approval was obtained beforehand. ---- ***In the Matter of Best Concrete and Gravel LLC, 31 BOLI 54, 57 (2010).***

□ At the conclusion of the hearing, and prior to closing argument, respondent moved for a directed verdict. The ALJ denied the motion. ---- ***In the Matter of Blachana, LLC, 30 BOLI 197, 203 (2009).***

Appeal pending.

15.0 SUMMARY JUDGMENT

□ In a case involving seven wage claims and three respondents, when the second respondent was named as a successor in interest, the forum granted summary judgment to the agency against the first respondent, a corporation, with regard to six wage claimants based on the first respondent's admission that it owed the unpaid wages alleged in the agency's order of determination. The forum denied the agency's motion for summary judgment against the first respondent with regard to the seventh claimant based on undisputed evidence that she did not begin work until 18 days after the first respondent went out of business. The forum granted summary judgment against the second respondent, an individual, for the unpaid wages alleged to be due to the seventh wage claimant based on the second respondent's admission that it employed the seventh wage claimant. The forum denied summary judgment against the third respondent, the spouse of the second respondent, based on evidence that the second respondent was a sole proprietorship. The forum denied summary judgment against the second respondent as to unpaid wages due to the first six wage claimants when the agency's argument that the second respondent was a successor in interest to the first respondent was based solely on conjecture. ---- ***In the Matter of Fraser's Restaurant & Lounge, 31 BOLI 167, 170-74 (2011).***

□ A motion for summary judgment may be granted where no genuine issue as to any material fact exists and a participant is entitled to a judgment as a matter of law, as to all or any part of the proceedings. No genuine issue as to a material fact exists if, based upon the record before the court viewed in a manner most

favorable to the adverse party, no objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject of the motion for summary judgment. The adverse party has the burden of producing evidence on any issue raised in the motion as to which the adverse party would have the burden of persuasion at hearing. ---- ***In the Matter of Fraser's Restaurant & Lounge, 31 BOLI 167, 169-70 (2011).*** See also ***In the Matter of David W. Lewis, 31 BOLI 160, 162 (2011).***

□ In a WSF case, the forum granted the agency's motion for summary judgment that it had made a valid determination for the sums paid out of the WSF to seven wage claimants based on the allegations in the order of determination, respondent's admissions, and the presumption that "official duty has been regularly performed. ---- ***In the Matter of David W. Lewis, 31 BOLI 160, 163 (2011).***

□ The ALJ granted respondent's motion for partial summary judgment and dismissed respondent as a successor in interest when, looking at the record in a manner most favorable to the agency, the ALJ concluded that the agency failed to raise sufficient genuine material issues of fact to survive respondent's motion. ---- ***In the Matter of From the Wilderness, Inc., 30 BOLI 227, 249-57 (2009).***

□ A participant in a BOLI contested case hearing is entitled to summary judgment only if the participant demonstrates that "no genuine issue as to any material fact exists and the participant is entitled to a judgment as a matter of law." ---- ***In the Matter of Tailor Made Fencing & Decking, Inc., 30 BOLI 151, 154 (2009).*** See also ***In the Matter of Pavel Bulubenchii, 29 BOLI 222, 226 (2007).***

□ In reviewing a motion for summary judgment, this forum draws all inferences of fact from the record against the participant filing the motion for summary judgment and in favor of the participant opposing the motion. ---- ***In the Matter of Tailor Made Fencing & Decking, Inc., 30 BOLI 151, 154 (2009).***

□ In considering summary judgment motions, this forum gives some evidentiary weight to unsworn assertions contained in the participants' pleadings and other filings. ---- ***In the Matter of Tailor Made Fencing & Decking, Inc., 30 BOLI 151, 154 (2009).*** See also ***In the Matter of Pavel Bulubenchii, 29 BOLI 222, 226 (2007).***

□ In a motion for summary judgment, the nonmoving participant has the burden of producing evidence on any issue raised in the motion as to which the nonmoving participant has the burden of persuasion at hearing. ---- ***In the Matter of Tailor Made Fencing & Decking, Inc., 30 BOLI 151, 157 (2009).***

□ The forum decides no factual issues in ruling on a summary judgment motion. ---- ***In the Matter of Tailor Made Fencing & Decking, Inc., 30 BOLI 151, 157 (2009).***

□ In a wage claim case, the agency filed a motion for summary judgment. Based on undisputed facts in the record, the forum granted the agency's motion. ---- ***In***

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the Matter of Tailor Made Fencing & Decking, Inc., 30 BOLI 151, 153-54 (2009).

□ The agency, through counsel, filed a motion for summary judgment. The ALJ issued an order denying the agency's motion for summary judgment. ---- ***In the Matter of Central City Concern, 30 BOLI 94, 96-97 (2008).***

□ Although the amount and extent of work performed by a wage claimant is a factual question that cannot be resolved by summary judgment when disputed, when a respondent admits owing a specific amount of wages, there is no genuine issue of fact regarding the respondent's obligation to pay that amount in unpaid wages, and the agency is entitled to partial summary judgment on that issue as a matter of law. ---- ***In the Matter of Pavel Bulubenchii, 29 BOLI 222, 227 (2007).***

□ When the record showed respondent admitted to owing a specific amount of wages to each claimant and that he did not pay those amounts, the forum found that respondent acted willfully by withholding claimants' wages, knowingly, intentionally and as a free agent, and when the undisputed evidence showed that more than 30 days had passed since respondent withheld the wages, the ALJ granted partial summary judgment on the issue of penalty wages because under those circumstances, "as a penalty for such nonpayment," claimants' wages "shall continue" as a matter of law. ---- ***In the Matter of Pavel Bulubenchii, 29 BOLI 222, 227-28 (2007).***

□ When the record showed respondent admitted to owing a specific amount of wages to each claimant and that he did not pay those amounts, the forum found that respondent acted willfully by withholding claimants' wages, knowingly, intentionally and as a free agent, and when the undisputed evidence showed that more than 30 days had passed since respondent withheld the wages, the ALJ granted partial summary judgment on the issue of penalty wages because under those circumstances, "as a penalty for such nonpayment," claimants' wages "shall continue" as a matter of law. ---- ***In the Matter of Pavel Bulubenchii, 29 BOLI 222, 227-28 (2007).***

16.0 CLAIM AND ISSUE PRECLUSION

16.1 --- Generally

16.2 --- Claim Preclusion

16.3 --- Issue Preclusion

17.0 POSTPONEMENTS

□ The ALJ granted respondent's motion for postponement based on emergency medical treatment required by the wife of respondent's authorized representative that could not be put off. ---- ***In the Matter of Computer Products Unlimited, Inc., 31 BOLI 209, 212-13 (2011).***

□ The forum granted the agency's motions for a postponement of the hearing and an extension of time to file case summaries based on the fact that respondent's counsel had been traveling out of state due to a death in her family and was unable to adequately prepare for hearing. ---- ***In the Matter of Spud Cellar Deli, Inc., 31***

BOLI 106, 111 (2010).

□ At the agency's request, the ALJ conducted a prehearing conference to discuss the agency's oral motion to postpone the hearing. Respondent did not oppose the agency's request for postponement and the agency's motion was granted. ---- ***In the Matter of Income Property Management, 31 BOLI 18, 20 (2010).***

□ The agency case presenter filed a motion to postpone the hearing indefinitely due to a family emergency. Respondents did not object to the motion and requested that the hearing be reset after October 31, 2008, and that the deadline for filing case summaries be vacated and reset after the new hearing date was set. The agency's motion was granted and the ALJ issued an order resetting the hearing on November 19, 2008 and extending the case summary due date to November 7, 2008. ---- ***In the Matter of Best Concrete and Gravel LLC, 31 BOLI 54, 57 (2010).***

□ Respondents sought a postponement so they could complete discovery before the hearing. Respondents' previous motion for a postponement had been granted to give respondents' newly retained attorney time to prepare for the hearing. The forum found that respondents had delayed three months after the forum granted the first postponement before seeking discovery, that the agency was not responsible for respondent's delay, and that respondents' present need for a postponement could have been obviated if respondents had timely sought discovery. The forum denied respondents' motion. ---- ***In the Matter of From the Wilderness, Inc., 30 BOLI 227, 240 (2009).***

Appeal pending.

□ When respondent retained an attorney after the agency's motion for default was denied, the attorney requested a 10-day extension of time in which to file an answer to the formal charges and a postponement of the hearing and the agency did not object, the ALJ granted both requests. ---- ***In the Matter of From the Wilderness, Inc., 30 BOLI 227, 234 (2009).***

Appeal pending.

□ When respondent filed an answer and request for hearing through its authorized representative. Subsequently, respondent obtained counsel, who filed an amended request for hearing, an amended answer, and a motion for postponement so that he could "obtain further discovery to adequately prepare and serve the interests of my clients." The agency filed objections to respondent's request for a postponement, and the ALJ issued an interim order denying respondent's request for postponement on the grounds that inability to complete discovery is not good cause for a postponement and respondent had not demonstrated that its need for additional preparation was due to circumstances beyond respondent's control. Respondent renewed its motion for a postponement and, upon reconsideration, the ALJ granted respondent's motion. ---- ***In the Matter of Blachana, LLC, 30 BOLI 197, 200-01 (2009).***

Appeal pending.

□ The agency moved for a postponement of the hearing and an extension of time to file case summaries

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because respondent's counsel had been traveling out of state due to a death in her family and was unable to adequately prepare for hearing, stating that the motion was made "as a courtesy" to counsel and respondent. Following a prehearing conference, the ALJ granted the agency's motion, extended the due date for filing case summaries, and rescheduled the hearing date. ---- *In the Matter of Spud Cellar Deli, Inc.*, 30 BOLI 185, 187 (2009).

□ On the morning of December 15, 2008, the ALJ cancelled the hearing set for the next day due to inclement weather and notified the participants. The hearing was rescheduled and the case summary deadline extended. ---- *In the Matter of Linda Marie Morgan*, 30 BOLI 133, 135 (2009).

□ The agency moved to postpone the hearing based on the agency case presenter's involvement in a family member's wedding scheduled close to the hearing date. Based on the agency's representation that respondent had no objection to a postponement, the ALJ granted the agency's motion and the hearing was reset to commence on a later date. ---- *In the Matter of Forestry Action Committee*, 30 BOLI 63, 65 (2008).

□ Prior to hearing, the agency filed a letter stating that the parties had agreed in principal to settlement and asked that the hearing be reset to give respondent and the agency an opportunity to finalize the settlement. Respondent did not object and the ALJ granted the motion, resetting the hearing. ---- *In the Matter of Northwestern Title Loans LLC*, 30 BOLI 1, 7 (2008).

□ Respondent filed a motion to postpone the hearing based on the unavailability of a key witness on the date set for hearing. The agency did not object and the ALJ granted respondent's motion. ---- *In the Matter of Northwestern Title Loans LLC*, 30 BOLI 1, 3, (2008).

18.0 INFORMAL DISPOSITIONS, SETTLEMENT (see also 25.3)

19.0 DISCOVERY

19.1 --- Generally

□ Respondent filed a motion for discovery order compelling complainant and the agency to produce all medical information and documents respondent requested through an informal discovery request an agency objected to respondent's motion based on relevance. The ALJ granted respondent's motion and issued a discovery order compelling the agency to produce complainant's medical and psychological records and provide them to respondent. On the same date, the ALJ issued a protective order governing the classification, acquisition, and use of complainant's medical and psychological records. ---- *In the Matter of Income Property Management*, 31 BOLI 18, 20 (2010).

□ The agency moved for a discovery order compelling respondents to furnish discovery previously requested but not provided, and the ALJ issued a discovery order requiring respondents to provide the requested discovery. ---- *In the Matter of 82nd Street Mall, Inc.*, 30 BOLI 140, 142 (2009).

□ When respondents moved for dismissal with prejudice on the grounds that the agency did not

respond to the ALJ's discovery order and that respondents did not receive the agency's case summary, and after the agency produced a five page document entitled "Agency Response to Discovery Request" and certificates of service for the response to discovery request and the case summary, and neither document was returned to the agency as undeliverable, the forum concluded that respondents were properly served with both by U.S. mail and denied respondents' motion to dismiss. ---- *In the Matter of Kurt E. Freitag*, 29 BOLI 164, 175 (2007).

Affirmed without opinion, *Freitag v. Bureau of Labor and Industries*, 243 Or App 389, 256 P3d 1099 (2011).

□ When the agency offered paycheck stubs that were not provided to respondents in accordance with the ALJ's discovery order, the ALJ admitted the paycheck stubs as evidence and left the record open to allow respondents additional time to produce evidence to rebut the paycheck stub evidence. ---- *In the Matter of Kurt E. Freitag*, 29 BOLI 164, 176-77 (2007).

Affirmed without opinion, *Freitag v. Bureau of Labor and Industries*, 243 Or App 389, 256 P3d 1099 (2011).

19.2 --- Documents

□ The forum granted respondents' request for a discovery order for all documents showing hourly wages claimant received while working on commercial fishing boats during 2009 on the grounds that respondents' defenses alleged that commercial fishermen, including claimant, are paid on a percentage basis only, not hourly wage, and are considered self-employed, making the discovery requested by respondents reasonably likely to produce information generally relevant to respondents' defense. ---- *In the Matter of Mark A. Frizzell*, 31 BOLI 178, 181-82 (2011).

□ When the agency moved for a discovery order and respondents did not file a response to the motion, the ALJ issued a discovery order requiring respondents to produce documents responsive to the agency's informal discovery requests. ---- *In the Matter of Best Concrete and Gravel LLC*, 31 BOLI 54, 57 (2010).

□ Respondents filed a motion by facsimile transmission for a discovery order compelling the agency to furnish discovery previously requested but not provided. Subsequently, also by facsimile transmission, respondents sent the ALJ copies of affidavits in response to the ALJ's discovery order. The ALJ issued an order pertaining to fax filings citing the contested case rules and stating that documents sent by facsimile transmission would not be considered unless verbal approval was obtained beforehand. ---- *In the Matter of Best Concrete and Gravel LLC*, 31 BOLI 54, 57 (2010).

□ The agency objected to respondents' motion for discovery order on the ground that the information sought was irrelevant and overbroad, and the ALJ issued an order denying respondents' motion on the grounds that respondents' request for copies of all wage claims claimant had filed in the previous 10 years was not relevant to the issues before the forum. ---- *In the*

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Matter of Best Concrete and Gravel LLC, 31 BOLI 54, 57 (2010).

□ The agency filed a motion for a discovery order seeking answers or documents in five categories, stating that it sought relevant and admissible evidence, that it had previously requested this information on an informal basis, and that respondent had not responded. The ALJ issued a discovery order that required respondent to provide the requested documents and information. ---- ***In the Matter of Allen Belcher, 31 BOLI 1, 3 (2009).***

□ The ALJ denied respondents' motion for a discovery order requiring the agency to provide respondents with copies of any interviews with the complainant or any other witness specifically conducted by the agency case presenter, but granted respondents' motion to require the agency to produce copies of any notes made by an agency investigator of interviews with the complainant, including any interviews conducted at the direction of the agency case presenter. ---- ***In the Matter of From the Wilderness, Inc., 30 BOLI 227, 236 (2009).***

Appeal pending.

□ The agency filed a motion for a discovery order requiring respondent to provide documents related to the interrelationship between respondent, respondent's alleged predecessor, and the company that leased the building in which respondent conducted business to respondent's predecessor. The agency provided documentation that it had made a written request for this information 20 days earlier and represented that respondent had not responded to the request. One day later, the ALJ granted the agency's motion for a discovery order, noting that if respondent filed objections within seven days she would construe those objections as a motion for reconsideration of the order and "give them the same consideration [she] would have given them had they been filed before this order issued." ---- ***In the Matter of Blachana, LLC, 30 BOLI 197, 201 (2009).***

Appeal pending.

19.3 --- Interrogatories

□ Respondents filed a motion for a discovery order to depose the complainant based on complainant's alleged inadequate response to respondents' interrogatories, arguing that they were deficient in two ways – complainant did not sign them under oath, rendering them useless to respondent for impeachment purposes; and complainant's responses were either nonresponsive or partially responsive to some of the interrogatories. The ALJ denied respondents' motion and required the agency to provide respondent with interrogatory responses that were signed by complainant and complete responses to the other interrogatories, concluding that respondents had not demonstrated that taking complainant's deposition was the only alternative to obtaining the requested discover, and that the additional sought in response to respondents' interrogatories could be obtained by this forum's requirement that complainant respond to them completely. The ALJ ordered complainant to respond to the interrogatories with complete answers and under oath by a date specific. ---- ***In the Matter of From the***

Wilderness, Inc., 30 BOLI 227, 236-40 (2009).

Appeal pending.

19.4 --- Requests for Admissions

19.5 --- Depositions

□ Respondents filed a motion for a discovery order to depose the complainant based on complainant's alleged inadequate response to respondents' interrogatories, arguing that they were deficient in two ways – complainant did not sign them under oath, rendering them useless to respondent for impeachment purposes; and complainant's responses were either nonresponsive or partially responsive to some of the interrogatories. The ALJ denied respondents' motion and required the agency to provide respondent with interrogatory responses that were signed by complainant and complete responses to the other interrogatories, concluding that respondents had not demonstrated that taking complainant's deposition was the only alternative to obtaining the requested discover, and that the additional sought in response to respondents' interrogatories could be obtained by this forum's requirement that complainant respond to them completely. The ALJ ordered complainant to respond to the interrogatories with complete answers and under oath by a date specific. ---- ***In the Matter of From the Wilderness, Inc., 30 BOLI 227, 236-40 (2009).***

Appeal pending.

□ Respondents sought to depose the agency case presenter to learn the content of any conversations he had with complainant regarding her allegations of harassment and the merits of the case and because the case presenter had not provided any notes he may have taken related to statements given to him by complainant. Respondents asserted they were entitled to obtain to the case presenter's testimony because he was not entitled to a work product exception and the privileged communications relative to attorneys do not apply. The ALJ denied respondents' request, reasoning that the attorney general has consented for agency employees to representative BOLI at hearings, that the case presenter is authorized to perform every function related to litigation that the attorney general would perform except presenting legal argument, that an essential component of litigation is that the attorney or case presenter representing the client communicate candidly with the client regarding all facts within the client's knowledge that are relevant to the case, and it is illogical to assume that the legislature and the attorney general intended for an agency employee to perform all the essential functions of an attorney except for presenting legal argument and simultaneously intended to place this employee in the untenable position of being subject to examination, either by deposition or during a contested case hearings, as to the substance of any conversations between the employee and the complainant whose case is being heard. This interpretation of the law would effectively hamstring the agency case presenter in performing the very task the legislature delegated to the case presenter to perform. ---- ***In the Matter of From the Wilderness, Inc., 30 BOLI 227, 234-36 (2009).***

Appeal pending.

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□ Respondent subpoenaed complainant for a deposition, then filed a motion for a discovery order to depose complainant, arguing that the agency's "obfuscatory" responses to respondent's interrogatories demonstrated the need for a deposition and further asserting that denial of respondent's motion constituted reversible error. Respondent argued that because its attorney had the authority to issue subpoenas for the purpose of discovery, and depositions are a form of discovery, then respondent had the unconditional right, under BOLI's own hearing rules, to issue a subpoena to depose complainant and to depose complainant. The forum denied respondent's motion, finding that respondent had not yet demonstrated that interrogatories to complainant were such an inadequate means of determining what complainant's testimony will be at hearing that respondent would be substantially prejudiced by its inability to depose complainant. The ALJ noted in the interim order that if respondent decided to serve written interrogatories on complainant and determined (1) that complainant's responses are inadequate so that respondent would be substantially prejudiced if not allowed to depose complainant, or (2) that complainant was not responding timely, respondent could renew its motion for a discovery order to depose complainant. ---- ***In the Matter of Northwestern Title Loans LLC, 30 BOLI 1, 4-7 (2008).***

□ Under OAR 839-050-0200(9), counsel may issue a subpoena in support of discovery. However, OAR 839-050-0200(3) creates an exception for depositions, providing that depositions will be allowed only when the requesting participant demonstrates that other methods of discovery are so inadequate that the participant will be substantially prejudiced by the denial of a motion to depose a particular witness. This rule requires a party seeking a deposition to file a motion for a discovery order to depose a particular witness and to establish that substantial prejudice will occur if the deposition is not allowed. ---- ***In the Matter of Northwestern Title Loans LLC, 30 BOLI 1, 5-6 (2008).***

□ When respondent issued a subpoena to depose complainant, the agency moved to quash the subpoena. The ALJ granted the agency's motion to quash on the grounds that respondent had not filed a motion to take complainant's deposition nor demonstrated that other methods of discovery were so inadequate that respondent would be substantially prejudiced by the denial of a motion to depose complainant. ---- ***In the Matter of Northwestern Title Loans LLC, 30 BOLI 1, 3-4 (2008).***

□ When respondents moved for leave to depose two persons detained in an out-of-state federal facility governed by Homeland Security and failed to show that the requested depositions were likely to produce information generally relevant to the case, the ALJ denied the motion. ---- ***In the Matter of Mountain Forestry, Inc., 29 BOLI 11, 20 (2007).***

Affirmed without opinion, *Mountain Forestry, Inc. v. Bureau of Labor and Industries*, 229 Or App 504, 213 P3d 590 (2009).

□ Responding to respondents' assertion that "state investigators have alleged [respondent] knowingly hires

illegal aliens, and makes personal loans to pay their way into this country * * * and [the deposition] testimony may be crucial to rebut similar allegations raised by other witnesses or by the agency," the ALJ determined that employing illegal aliens was not an issue before the forum and short of amending the notice of intent the agency was precluded from raising similar allegations through other witnesses for respondents to rebut. ---- ***In the Matter of Mountain Forestry, Inc., 29 BOLI 11, 19-20 (2007).***

Affirmed without opinion, *Mountain Forestry, Inc. v. Bureau of Labor and Industries*, 229 Or App 504, 213 P3d 590 (2009).

□ The ALJ found that even if requested depositions were reasonably likely to produce relevant information, the logistics of arranging out-of-state depositions in a federal facility was unduly burdensome because, as a practical matter, the potential witnesses were inaccessible and although the forum may issue commissions for out-of-state depositions, it has not been clearly established that the forum's authority to do so extends to detainees in a federal facility under Homeland Security jurisdiction. ---- ***In the Matter of Mountain Forestry, Inc., 29 BOLI 11, 20 (2007).***

Affirmed without opinion, *Mountain Forestry, Inc. v. Bureau of Labor and Industries*, 229 Or App 504, 213 P3d 590 (2009).

□ Citing OAR 839-050-0200(3), the ALJ determined that depositions are only permitted in this forum under very limited circumstances and that respondents failed to show, among other things, that other methods of discovery were so inadequate that they would be substantially prejudiced if their motion was denied. ---- ***In the Matter of Mountain Forestry, Inc., 29 BOLI 11, 20-21 (2007).***

Affirmed without opinion, *Mountain Forestry, Inc. v. Bureau of Labor and Industries*, 229 Or App 504, 213 P3d 590 (2009).

□ In addition to finding respondents failed to establish that the requested depositions were reasonably likely to produce relevant information, the ALJ found that respondents failed to show they complied with OAR 839-050-0200(4) that requires participants to seek discovery through an informal exchange of information before requesting a discovery order. ---- ***In the Matter of Mountain Forestry, Inc., 29 BOLI 11, 21 (2007).***

Affirmed without opinion, *Mountain Forestry, Inc. v. Bureau of Labor and Industries*, 229 Or App 504, 213 P3d 590 (2009).

19.6 --- Public Records

19.7 --- Failure to Produce

□ When the agency failed to respond to a letter from respondents that was written based on a mutual agreement reached during a prehearing conference to expedite discovery resolution, the ALJ allowed respondents some concessions to be determined at the time of hearing that included leaving the record open for additional evidence, if necessary. ---- ***In the Matter of Kurt E. Freitag, 29 BOLI 164, 175 (2007).***

Affirmed without opinion, *Freitag v. Bureau of Labor*

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and Industries, 243 Or App 389, 256 P3d 1099 (2011).

19.8 --- Subpoenas

□ After granting the agency's motion for postponement, the ALJ ruled that persons served with subpoenas were ordered to honor that subpoena at the new hearing date and that it was the responsibility of respondent and the agency to send a copy of the ALJ's interim order containing this ruling to their respective witnesses. ---- **In the Matter of Northwestern Title Loans LLC, 30 BOLI 1, 7 (2008).**

□ When respondent issued a subpoena to depose complainant, the agency moved to quash the subpoena. The ALJ granted the agency's motion to quash on the grounds that respondent had not filed a motion to take complainant's deposition nor demonstrated that other methods of discovery were so inadequate that respondent would be substantially prejudiced by the denial of a motion to depose complainant. ---- **In the Matter of Northwestern Title Loans LLC, 30 BOLI 1, 4-7 (2008).**

□ Respondent's request to subpoena "any agency employee or personnel with knowledge of this matter" was denied because it lacked specificity. ---- **In the Matter of Kurt E. Freitag, 29 BOLI 164, 169 (2007).**

Affirmed without opinion, *Freitag v. Bureau of Labor and Industries*, 243 Or App 389, 256 P3d 1099 (2011).

19.9 --- Case Summaries

□ The agency timely filed three addendums to its case summary. ---- **In the Matter of Income Property Management, 31 BOLI 18, 21 (2010).**

□ During the hearing, respondent asked to call one of the agency's witnesses as a witness in support of its case in chief. The agency objected on the basis that respondent had not listed the witness as a witness in its case summary, and the ALJ sustained the agency's objection on that basis. At the time he made his ruling, the ALJ instructed respondent's authorized representative that he could make an offer of proof during respondent's case in chief as to what he believed the witness's testimony would have been, had respondent been allowed to question him.. ---- **In the Matter of From the Wilderness, Inc., 30 BOLI 227, 257(2009).**

Appeal pending.

□ After opening statements, and before any witnesses were called, respondent moved to dismiss the case on the grounds that the agency had submitted an "inadequate" case summary, in that the agency's case summary failed to detail all the elements of the specific successor in interest test the agency intended to apply to the case. The ALJ's case summary order had required, among other things, that the agency submit "a brief statement of the elements of the claim." The agency's case summary stated that "Respondent, as successor in interest, is liable to the Wage Security Fund for reimbursement of \$7,047.62 in wages paid to Claimants and for a penalty of 25% of those wages in the amount of \$1,841.91 plus interest until paid." The ALJ ruled that

the agency's case summary met the requirements of OAR 839-050-0210 and overruled respondent's objection. ---- **In the Matter of Blachana, LLC, 30 BOLI 197, 201 (2009).**

Appeal pending.

□ The agency filed two addendums to its case summary prior to hearing. ---- **In the Matter of Sehat Entertainment, Inc., 30 BOLI 170, 173 (2009).** See also *In the Matter of 82nd Street Mall, Inc.*, 30 BOLI 140, 142 (2009).

□ When respondents submitted documents more fitting for their case in chief instead of evidence that rebutted the agency's paycheck stub evidence that had been admitted as evidence but not previously produced to respondents pursuant to the ALJ's discovery order, the forum found that the agency was prejudiced by respondents' failure to provide the documents prior to hearing pursuant to the ALJ's case summary order and the documents were not admitted into the record as substantive evidence. ---- **In the Matter of Kurt E. Freitag, 29 BOLI 164, 176-77 (2007).**

Affirmed without opinion, *Freitag v. Bureau of Labor and Industries*, 243 Or App 389, 256 P3d 1099 (2011).

19.10 --- Medical Records (see also 14.8)

20.0 EVIDENCE

20.1 --- Generally

20.2 --- Admissibility

20.3 --- Admissions (see also 10.2)

□ Respondent admitted she employed claimant at the agreed upon rate of \$9 per hour and acknowledged claimant was improperly compensated. ---- **In the Matter of Linda Marie Morgan, 30 BOLI 133, 138 (2009).**

□ Respondent's admission in its answer that claimant worked at least 143 hours for which she was not paid established unequivocally that claimant performed work for which she was not properly compensated. ---- **In the Matter of Forestry Action Committee, 30 BOLI 63, 77-78 (2008).**

□ When respondent did not dispute the claims for overtime and admitted claimants collectively were owed at least \$15,306, albeit less certain setoffs, for the wage claim period, the forum found that the amount owed necessarily included the overtime amounts alleged in the order of determination and the admission was sufficient to prove respondent failed to pay claimants overtime wages for the hours they worked in excess of 40 hours per week, and on that basis found respondent liable for civil penalties. ---- **In the Matter of Pavel Bulubenchii, 29 BOLI 222, 228 (2007).**

□ In their answer, respondents did not deny they entered into legal and valid agreements with the Oregon Department of Forestry from 2000 through 2004 while jointly acting in their capacity as a licensed farm/forest labor contractor and the forum deemed those facts admitted by respondents. ---- **In the Matter of Mountain Forestry, Inc., 29 BOLI 11, 125 (2007).**

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Affirmed without opinion, *Mountain Forestry, Inc. v. Bureau of Labor and Industries*, 229 Or App 504, 213 P3d 590 (2009).

20.4 --- Affidavits

□ The agency provided an unsigned declaration of a witness with its case summary. After opening statements, and before any witnesses were called, the agency offered the same declaration, signed by the witness, into evidence. Respondent did not request cross examination of the witness before the hearing, requested cross examination of the witness and objected to the introduction of her declaration without the opportunity to cross examine her. The ALJ conditionally admitted the signed declaration, contingent on the agency making the witness available for cross examination within two weeks. The ALJ based the ruling on the grounds that the signature on the witness's declaration made it a different document than the unsigned declaration submitted with the agency case summary and respondent had had no prior opportunity to request cross examination based on that particular document. The agency then called the witness as a telephone witness on the second day of hearing, and respondent had an opportunity to cross examine her. During cross examination, the witness testified that the case presenter had drafted the affidavit and that she had reviewed drafts of the affidavit before signing the final version. She did not testify that she reviewed those drafts in preparation for hearing. During the witness's cross examination, respondent requested the production of the drafts the purpose of cross examining the witness on their contents. The ALJ reserved ruling on respondent's request until after the hearing, and concluded in the proposed order that respondent was not entitled to production of the drafts prepared by the agency's case presenter and denied respondent's request. ---- *In the Matter of Blachana, LLC, 30 BOLI 197, 202 (2009)*.

Appeal pending.

20.5 --- Confidential Business Records

20.6 --- Credibility (see also 22.0)

□ The ALJ found it inherently improbable that not one of five consecutive mailings, including three 2005 prevailing wage rate surveys, all properly addressed and mailed separately by two different state agencies, was delivered to respondent's business and gave no weight to witness testimony that respondent did not receive the 2005 prevailing wage rate survey. ---- *In the Matter of Arjae Sheet Metal Company, Inc., 29 BOLI 1, 7 (2007)*.

□ The ALJ found that witness testimony claiming there is "not a chance" that an article placed in the mail will reach its destination further strained respondent's credibility when claiming it did not receive the 2005 prevailing wage rate survey. ---- *In the Matter of Arjae Sheet Metal Company, Inc., 29 BOLI 1, 7 (2007)*.

□ The ALJ found that it was not logically credible that respondent received the notice of intent to assess civil penalties and not the five previous mailings from two different agencies related to the same matter and mailed to the same business address. ---- *In the Matter of Arjae Sheet Metal Company, Inc., 29 BOLI 1, 9 (2007)*.

□ Although respondent ultimately admitted he was a subcontractor on a particular construction project, had hired claimant to work on the project, and had known a witness for 14 years, respondent's prior statements to an agency compliance specialist denying any knowledge of the project, claimant or the witness, demonstrated his willingness to prevaricate when it suited his purpose, which was to deter the wage claim investigation and, at hearing, to reduce his potential liability by denying he agreed to pay claimant \$18 per hour and by challenging the number of claimant's work hours. ---- *In the Matter of Joseph Francis Sanchez, 29 BOLI 211, 218 (2007)*.

□ Based on his prior false statements to the agency compliance specialist and his failure to provide any evidence to support his claims at hearing, the ALJ did not credit respondent's testimony unless it was an admission, statement against interest, or corroborated by other evidence. ---- *In the Matter of Joseph Francis Sanchez, 29 BOLI 211, 218 (2007)*.

20.7 --- Cross Examination

□ The agency filed a request for cross examination in which the agency asked that the forum require respondent "make available for cross examination at hearing each and every author, preparer or transcriber" of any of the five affidavits submitted with respondent's case summary that respondent intended to offer or refer to at hearing. When respondent did not make those witnesses available for cross examination at the hearing, the forum did not admit the five affidavits. ---- *In the Matter of From the Wilderness, Inc., 30 BOLI 227, 228, 236-40 (2009)*.

Appeal pending.

□ The agency provided an unsigned declaration of a witness with its case summary. After opening statements, and before any witnesses were called, the agency offered the same declaration, signed by the witness, into evidence. Respondent did not request cross examination of the witness before the hearing, requested cross examination of the witness and objected to the introduction of her declaration without the opportunity to cross examine her. The ALJ conditionally admitted the signed declaration, contingent on the agency making the witness available for cross examination within two weeks. The ALJ based the ruling on the grounds that the signature on the witness's declaration made it a different document than the unsigned declaration submitted with the agency case summary and respondent had had no prior opportunity to request cross examination based on that particular document. The agency then called the witness as a telephone witness on the second day of hearing, and respondent had an opportunity to cross examine her. During cross examination, the witness testified that the case presenter had drafted the affidavit and that she had reviewed drafts of the affidavit before signing the final version. She did not testify that she reviewed those drafts in preparation for hearing. During the witness's cross examination, respondent requested the production of the drafts the purpose of cross examining the witness on their contents. The ALJ reserved ruling on respondent's request until after the hearing, and concluded in the proposed order that respondent was

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not entitled to production of the drafts prepared by the agency's case presenter and denied respondent's request. ---- *In the Matter of Blachana, LLC, 30 BOLI 197, 202 (2009).*

Appeal pending.

20.8 --- Exclusion (see also 19.7, 22.4)

□ The forum found a requester's attempt to provide declarations of witnesses who collaborated with the agency prior to the passage of HB 2140 as purported evidence of legislative intent as misguided because of PGE and its progeny, which have held that the best evidence of legislative intent is the statute itself. ---- *In the Matter of Central City Concern, 30 BOLI 94, 109 (2008).*

20.9 --- Failure to Produce

□ The forum concluded that two claimants were owed unpaid wages based on their credible testimony, including testimony that they maintained a written record of their hours worked and that respondents had access to those records, as well as respondents' failure to produce independent records that they claimed refuted claimants' allegations and inadequate explanation for that failure. ---- *In the Matter of 82nd Street Mall, Inc., 30 BOLI 140, 148 (2009).*

□ When respondents contended in their exceptions to the proposed order that the wage claimant had already been paid the full amount of the wage claim prior to hearing and there was no basis for a judgment, the forum found that respondents failed to produce credible evidence in the record, including cancelled checks or other documentation, that contradicted evidence showing claimant was not paid any wages during the wage claim period and respondents' exceptions were denied. ---- *In the Matter of Kurt E. Freitag, 29 BOLI 164, 209 (2007).*

Affirmed without opinion, *Freitag v. Bureau of Labor and Industries, 243 Or App 389, 256 P3d 1099 (2011).*

20.10 --- Habit, Routine Practice

20.11 --- Hearsay

20.12 --- Inferences

□ Evidence includes inferences. There may be more than one inference to be drawn from the basic fact found; it is the forum's task to decide which inference to draw. ---- *In the Matter of Income Property Management, 31 BOLI 18, 39 (2010).* See also *In the Matter of Northwestern Title Loans LLC, 30 BOLI 1, 34 (2008).*

□ When claimant's testimony and contemporaneous record he claimed he maintained were not credible, the forum declined to speculate or draw inferences about wages owed to him. ---- *In the Matter of J. Guadalupe Campuzano-Cazares, 30 BOLI 48, 59-60 (2008).*

□ The forum has previously accepted, and will accept, the credible testimony of a claimant as sufficient evidence to prove work was performed and from which to draw an inference of the extent of that work. ---- *In the Matter of Joseph Francis Sanchez, 29 BOLI 211, 221 (2007).*

□ A preponderance of credible evidence showed that the corporate respondent, who shared an interest in a townhouse development property with the individually named respondent, advertised in the newspaper for laborers on the townhouse construction site, maintained an office where claimant and other laborers submitted their time sheets for their work on the site, and controlled, to some extent, how, when, and whether claimant would be paid. Evidence also showed the individually named respondent controlled and directed the work performed by claimant and the other laborers on the construction site and signed their paychecks, which he paid to them as a sole proprietor using an assumed business name. The forum inferred from those facts that claimant was under the simultaneous control of respondents and simultaneously rendered services for both. Also, based on those facts and inferences, the forum found that each named respondent actively participated in the townhouse development, both engaged the personal services of claimant and other laborers to perform work at the construction site, and both benefited from the personal services that claimant and other laborers rendered at the construction site in furtherance of its development. ---- *In the Matter of Kurt E. Freitag, 29 BOLI 164, 299-201 (2007).*

Affirmed without opinion, *Freitag v. Bureau of Labor and Industries, 243 Or App 389, 256 P3d 1099 (2011).*

20.13 --- Inspection of Documents Referred to During Testimony

20.14 --- Judicial & Official Notice

□ The ALJ granted the agency's motion that the forum take judicial notice of ORS 443.725(2) and 443.735(3)(e), both statutes relating to licensing and compliance in adult foster care homes in Oregon. ---- *In the Matter of Letty Lee Seshier, 31 BOLI 255, 257 (2011).*

□ The ALJ granted the agency's motion to take judicial notice of ORS 135.335 and 135.345 pertaining to pleadings in criminal matters, and that judgment following entry of a no contest plea is a conviction of the offense to which the plea is entered. ---- *In the Matter of Charles Edward Minor, 31 BOLI 88, 90-91 (2010).*

□ During a bifurcated hearing, the ALJ took official notice of the entire record of the first proceeding involving a wage claim to avoid duplicating testimony and evidence in the second proceeding involving child labor violations. ---- *In the Matter of Kurt E. Freitag, 29 BOLI 164, 175 (2007).*

Affirmed without opinion, *Freitag v. Bureau of Labor and Industries, 243 Or App 389, 256 P3d 1099 (2011).*

20.15 --- Objections

□ When respondent, acting individually and as the corporate respondent's authorized representative, appeared at the hearing and stated he did not intend to stay and participate in the hearing and was present only to make certain evidentiary objections, the ALJ advised respondent that any objections to agency exhibits must be made when offered during the hearing. ---- *In the Matter of Kurt E. Freitag, 29 BOLI 164, 176 (2007).*

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Affirmed without opinion, *Freitag v. Bureau of Labor and Industries*, 243 Or App 389, 256 P3d 1099 (2011).

20.16 --- Presumptions

20.17 --- Privileges

20.18 --- Rebuttal and Impeachment

□ When reviewing documents that respondents submitted after the record was kept open to allow them additional time to produce evidence rebutting paycheck stubs that were admitted as evidence but not previously provided to respondents pursuant to a discovery order, the ALJ determined that none of the documents served as rebuttal to the paycheck stubs and for that reason were not admitted into the record as substantive evidence. ---- *In the Matter of Kurt E. Freitag*, 29 BOLI 164, 176-77 (2007).

Affirmed without opinion, *Freitag v. Bureau of Labor and Industries*, 243 Or App 389, 256 P3d 1099 (2011).

20.19 --- Relevancy

20.20 --- Reliability

□ In a case in which respondent asserted that claimant was an independent contractor, the forum disregarded a document sent to the agency by respondent entitled "Independent Contractor's and Confidential Information Agreement" that bore a printed name and signature purporting to be claimant's because (1) claimant credibly testified that he had never seen and did not sign the document; and (2) claimant's purported signature and hand printed name on the Agreement were substantially dissimilar from claimant's acknowledged signature and hand printed name on the wage claim form and assignment of wages he submitted to the agency when claimant presumably had no idea that the authenticity of his handwriting would be subject to scrutiny by the forum. ---- *In the Matter of Paul Samuels*, 31 BOLI 146, 154-55 (2010).

□ During the hearing, the agency offered two one-page print-outs from Willamette Week's internet site describing local entertainment in Portland in May and December 2006. The May printout contained information about the closure of the business by respondent's alleged predecessor and respondent's anticipated reopening. The December printout described upcoming musical events at the respondent's business. Respondent objected to the admission of the print-outs on the basis that they were unreliable, that its prejudice outweighed its probative value, and that there was no foundational testimony showing how the information was gathered. At the time the objection was made, the ALJ reserved ruling until the proposed order. One of respondent's members subsequently testified that a woman from Willamette Week had talked with him in May 2006 and that he provided some of the information in the print-outs. He also verified the accuracy of some of the other information contained in the print-outs. The forum received into evidence the printed information on the print-outs that respondent's member either acknowledged providing to Willamette Week or that the member admitted was accurate information. ---- *In the Matter of Blachana, LLC*, 30

BOLI 197, 202-03 (2009).

Appeal pending.

20.21 --- Stipulations

□ At hearing, respondent and the agency stipulated that complainant worked 12 hours for respondent for which she was not paid. ---- *In the Matter of Charles Edward Minor*, 31 BOLI 88, 91 (2010).

□ In a prevailing wage rate determination hearing, the agency and requester stipulated that the project in question was intended to be privately owned and the apartment units that would be created during the hotel remodel would provide affordable housing under the income limits set forth in the definition of "predominantly." ---- *In the Matter of Central City Concern*, 30 BOLI 94, 103 (2008)

□ In a prevailing wage rate determination hearing, the ALJ issued an order proposing stipulations for consideration by the participants. The requester timely opposed the ALJ's proposed stipulations and offered a modified version. The agency did not object to requester's modifications and the ALJ issued an order that included the stipulations made by the participants. -- *In the Matter of Central City Concern*, 30 BOLI 94, 96-97 (2008)

20.22 --- Sufficiency

20.23 --- Witnesses (see also 22.0)

□ When a potential witness presumably could have been called as a witness by respondent to support respondent's defense that claimants worked fewer hours than they claimed, and respondent did not call that witness, despite listing him as a potential witness on her motion for a telephone hearing, the forum inferred that his testimony would not have aided respondent's case. -- *In the Matter of Laura M. Jaap*, 30 BOLI 110, 130 (2009).

20.24 --- Unsworn Statements (see also 10.2, 24.3)

□ In a default case, the forum may consider any unsworn and unsubstantiated assertions contained in respondent's answer, but those assertions are overcome whenever they are contradicted by other credible evidence in the record. ---- *In the Matter of Village Café, Inc.*, 30 BOLI 80, 88 (2008). See also *In the Matter of J. Guadalupe Campuzano-Cazares LLC*, 30 BOLI 48, 59 (2008).

□ When a respondent fails to appear at hearing and its only contribution to the record is a request for hearing and an answer that contains only unsworn and unsubstantiated assertions, those assertions are overcome whenever they are contradicted by other credible evidence in the record. ---- *In the Matter of John Steensland*, 29 BOLI 235, 261-62 (2007).

20.25 --- Evidence Requested by Forum (see also 2.1)

□ In a whistleblower case involving the interpretation of DCBS's administrative rules, the ALJ issued a post-hearing order requiring the Agency to submit copies of DCBS's relevant rules in effect at the time of the alleged

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discriminatory action. ---- *In the Matter of Northwestern Title Loans LLC, 30 BOLI 1, 8 (2008).*

21.0 PROOF

21.1 --- Generally

21.2 --- Standard of Proof

21.3 --- Burden of Proof

21.3.1 --- Generally

21.3.2 --- Wage & Hour Cases

□ To establish claimants' wage claims, the agency must prove the following elements by a preponderance of the evidence: 1) respondent employed claimants; 2) The pay rate upon which respondent and claimants agreed, if other than the minimum wage; 3) claimants performed work for which they were not properly compensated; and 4) The amount and extent of work claimants performed for respondent. ---- *In the Matter of Computer Products Unlimited, Inc., 31 BOLI 209, 222 (2011).*

□ A partnership is never presumed and the agency bore the burden of proof to show that co-named respondents were partners. ---- *In the Matter of Mark A. Frizzell, 31 BOLI 178, 194 (2011).* See also *In the Matter of John Steensland, 29 BOLI 235, 263 (2007).*

□ The agency had the burden of proving that one or respondents were claimant's employer. ---- *In the Matter of Mark A. Frizzell, 31 BOLI 178, 193 (2011).*

□ The agency has the burden of proof to show a respondent in a wage claim case was claimants' employer and that claimants were employees. ---- *In the Matter of Laura M. Jaap, 30 BOLI 110, 125 (2009).*

21.3.3 --- Civil Rights Cases

21.4 --- Burden of Production

21.5 --- Mitigation

21.6 --- Civil Rights Cases, Generally

21.7 --- Wage & Hour Cases, Generally

□ Proving the first element of the agency's prima facie case – that respondent employed claimant -- necessarily proves that claimant was not an independent contractor. Likewise, evidence that establishes by a preponderance of the evidence that claimant was an independent contractor necessarily proves that respondent did not employ claimant. Although the burdens of proof for these two propositions respectively rest on the agency and respondent, it is immaterial who presents the evidence on which the forum relies for its conclusion. --- *In the Matter of Horizon Technologies, LLC, 31 BOLI 229, 243 (2011).*

□ To establish claimants' wage claims, the agency must prove the following elements by a preponderance of the evidence: 1) respondent employed claimants; 2) The pay rate upon which respondent and claimants agreed, if other than the minimum wage; 3) claimants performed work for which they were not properly compensated; and 4) The amount and extent of work claimants performed for respondent. ---- *In the Matter of Computer Products Unlimited, Inc., 31 BOLI 209, 222 (2011).*

21.8 --- Affirmative Defenses

21.8.1 --- Generally

□ The forum rejected the agency's argument that it should ignore any evidence in a default case not presented by respondent that tended to prove respondent's affirmative defense of independent contractor. ---- *In the Matter of Horizon Technologies, LLC, 31 BOLI 229, 242 (2011).*

□ A respondent must prove the defense of independent contractor by a preponderance of the evidence in order to prevail. ---- *In the Matter of Horizon Technologies, LLC, 31 BOLI 229, 242 (2011).* See also *In the Matter of Laura M. Jaap, 30 BOLI 110, 121-22 (2009).*

□ Respondents had the burden of proving that claimant was an independent contractor. ---- *In the Matter of Mark A. Frizzell, 31 BOLI 178, 193 (2011).*

□ Respondent had the burden of proving its affirmative defenses that claimant was an independent contractor during the wage claim period. ---- *In the Matter of Forestry Action Committee, 30 BOLI 63, 74 (2008).*

□ The ALJ determined that respondents' contention in its first affirmative defense that the agency refused to renew their farm/forest labor contracting license without proper notice and procedure had no basis in fact when the record showed respondents timely applied for renewal and continued to operate under a license that, by law, had not expired and would not expire "until a formal order of grant or denial of such renewal" issued following the hearing that was scheduled in response to respondents' "demand for contested case hearing." ---- *In the Matter of Mountain Forestry, Inc., 29 BOLI 11, 23 (2007).*

Affirmed without opinion, *Mountain Forestry, Inc. v. Bureau of Labor and Industries*, 229 Or App 504, 213 P3d 590 (2009).

□ When the issues raised in the agency's notice of intent were (1) whether respondents complied with the terms and conditions of lawful agreements or contracts; (2) whether respondents willfully made a false, fraudulent, or misleading representation to the agency and the Oregon Department of Forestry; (3) whether respondents failed to obtain an annual employment certificate to employ minors; and (5) whether respondents employed a minor in a hazardous occupation in violation of Oregon farm labor contracting and child labor laws, the ALJ found that the length and scope of the agency's investigation had no bearing on the truth of the matters alleged and granted the agency's motion to strike respondents' first affirmative defense. ---- *In the Matter of Mountain Forestry, Inc., 29 BOLI 11, 24 (2007).*

Affirmed without opinion, *Mountain Forestry, Inc. v. Bureau of Labor and Industries*, 229 Or App 504, 213 P3d 590 (2009).

□ The ALJ held that the agency's proof of its allegations in the notice of intent was not dependent on the Oregon Department of Forestry's (ODF) reasons for terminating its contract with respondents and granted the

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agency's motion to strike respondents' second and third affirmative defenses that contended respondents were "entitled to judgment in their favor" because ODF terminated its contract with one respondent without providing a "pre-termination hearing" and ODF's motivation to terminate the contract with another respondent was based on that respondent's "race or ethnicity." ---- ***In the Matter of Mountain Forestry, Inc., 29 BOLI 11, 24 (2007).***

Affirmed without opinion, *Mountain Forestry, Inc. v. Bureau of Labor and Industries*, 229 Or App 504, 213 P3d 590 (2009).

□ When respondents alleged that a substantial factor in the commissioner's decision to refuse to renew and revoke respondents' license was that respondents had submitted a notice of claim for damages to the State of Oregon that reserved respondents' right to bring a civil action against the state for ODF's alleged constitutional violations, the ALJ found that respondents had not alleged facts that constitute an affirmative defense and granted the agency's motion to strike respondents' fourth affirmative defense. ---- ***In the Matter of Mountain Forestry, Inc., 29 BOLI 11, 24 (2007).***

Affirmed without opinion, *Mountain Forestry, Inc. v. Bureau of Labor and Industries*, 229 Or App 504, 213 P3d 590 (2009).

□ The ALJ found that respondents' defamation claim, based on allegations that an agency investigator made false and misleading statements that caused the insurer to decline to do business with respondents, which in turn allegedly caused respondents economic damage and damage to their reputations, constituted a civil matter that belongs in another forum and granted the agency's motion to strike respondents' fifth affirmative defense, also finding that the commissioner had no authority to hear and decide the defamation claim as alleged. ---- ***In the Matter of Mountain Forestry, Inc., 29 BOLI 11, 24 (2007).***

Affirmed without opinion, *Mountain Forestry, Inc. v. Bureau of Labor and Industries*, 229 Or App 504, 213 P3d 590 (2009).

□ The ALJ found that Respondents' allegation that "the commissioner has failed to plead ultimate facts sufficient to constitute a claim for relief" was a proper pleading and denied the agency's motion to strike respondents' sixth affirmative defense. ---- ***In the Matter of Mountain Forestry, Inc., 29 BOLI 11, 25 (2007).***

Affirmed without opinion, *Mountain Forestry, Inc. v. Bureau of Labor and Industries*, 229 Or App 504, 213 P3d 590 (2009).

□ When respondents simply stated that the agency "is not taking similar action to similarly situated regulated entities," the ALJ found they did not allege facts that constituted an affirmative defense and for that reason granted the agency's motion to strike respondents' seventh affirmative defense. ---- ***In the Matter of Mountain Forestry, Inc., 29 BOLI 11, 25 (2007).***

Affirmed without opinion, *Mountain Forestry, Inc. v. Bureau of Labor and Industries*, 229 Or App 504, 213 P3d 590 (2009).

21.8.2 --- Financial Inability to Pay Wages (see Ch. IX, sec. 13.1.6)

□ An employer bears the burden of proving the affirmative defense of financial inability to pay wages at the time they accrue. ---- ***In the Matter of Forestry Action Committee, 30 BOLI 63, 79 (2008).***

21.8.3 --- Civil Rights Cases (see Ch. III, sec. 80-98)

21.9 --- Offers of Proof

□ At hearing, respondent offered a two-page chart showing trip expenses by respondent's drivers in December 2010 that was not included with respondent's case summary. The agency objected to its admission. The ALJ accepted the chart and testimony concerning it as an offer of proof and stated he would rule on its admissibility in the proposed order. In the proposed order, the ALJ sustained the agency's objection on the grounds the exhibit was properly part of respondent's case-in-chief, it had no probative value with regard to the number of hours claimant worked, the amount of wages claimant earned, or whether respondent's failure to pay claimant the wages he is owed was willful, and respondent failed to offer a satisfactory reason for including it in respondent's case summary. ---- ***In the Matter of J & S Moving & Storage, Inc., 31 BOLI 286, 290 (2012).***

□ Respondents offered several exhibits that were not received, including two exhibits consisting of photos taken on respondents' cell phones of which no copy had been made. The ALJ gave respondents the opportunity to make an offer of proof for each exhibit that was offered but not received. ---- ***In the Matter of Mark A. Frizzell, 31 BOLI 178, 179 (2011).***

□ During the hearing, respondent asked to call one of the agency's witnesses as a witness in support of its case in chief. The agency objected on the basis that respondent had not listed the witness as a witness in its case summary, and the ALJ sustained the agency's objection on that basis. At the time he made his ruling, the ALJ instructed respondent's authorized representative that he could make an offer of proof during respondent's case in chief as to what he believed the witness's testimony would have been, had respondent been allowed to question him.. ---- ***In the Matter of From the Wilderness, Inc., 30 BOLI 227, 257(2009).***

Appeal pending.

□ The ALJ allowed respondent's counsel to make an oral offer of proof as to what the testimony of two witnesses would have been, had respondent been allowed to question them regarding whether or not claimants were independent contractors. ---- ***In the Matter of Blachana, LLC, 30 BOLI 197, 202 (2009).***

Appeal pending.

□ In a prevailing wage rate determination hearing, the requester, by avowal of counsel, made offers of proof to show that certain witness testimony that was excluded as irrelevant would be consistent with the declarations admitted as exhibits into the record. ---- ***In the Matter of Central City Concern, 30 BOLI 94, 97 (2008)***

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□ In a prevailing wage rate determination hearing, the requester, by avowal of counsel, made offers of proof describing the testimony of certain witnesses whose testimony was excluded as irrelevant. ----- *In the Matter of Central City Concern*, 30 BOLI 94, 97 (2008)

22.0 WITNESSES

22.1 --- Generally

□ During the hearing, respondent asked to call one of the agency's witnesses as a witness in support of its case in chief. The agency objected on the basis that respondent had not listed the witness as a witness in its case summary, and the ALJ sustained the agency's objection on that basis. At the time he made his ruling, the ALJ instructed respondent's authorized representative that he could make an offer of proof during respondent's case in chief as to what he believed the witness's testimony would have been, had respondent been allowed to question him. ----- *In the Matter of From the Wilderness, Inc.*, 30 BOLI 227, 257(2009).

Appeal pending.

□ After the hearing was postponed, the ALJ issued an interim order requiring witnesses previously served with subpoenas to compel their appearance on the date originally set for hearing to honor that subpoena on the reset hearing date. The ALJ ordered that notice "of the duty of each witness to comply with the previously served subpoena on this new hearing date shall be given to each witness by means of respondent and the agency sending a copy of this ruling by regular mail to the witness's mailing address." ----- *In the Matter of From the Wilderness, Inc.*, 30 BOLI 227, 249 (2009).

Appeal pending.

□ After postponing the hearing, the ALJ issued an interim order stating that, when the hearing was reset, he would issue an order requiring persons already served with subpoenas to honor that subpoena by appearing at the time, date, and place set for the rescheduled hearing. ----- *In the Matter of From the Wilderness, Inc.*, 30 BOLI 227, 242 (2009).

Appeal pending.

22.2 --- Credibility

22.2.1 --- Generally

□ The forum considered claimant's multiple inconsistencies and admissions that contradicted previous statements made to the agency and claimant's admission that he had been convicted of tampering with witness testimony, which demonstrates a proclivity for dishonesty, in determining that claimant's testimony was not believable, in some instances, even when it was not contradicted by other credible evidence. ----- *In the Matter of Best Concrete and Gravel LLC*, 31 BOLI 54, 64, 72 (2010).

□ The ALJ found it inherently improbable that not one of five consecutive mailings, including three 2005 prevailing wage rate surveys, all properly addressed and mailed separately by two different state agencies, was delivered to respondent's business and gave no weight to witness testimony that respondent did not receive the

2005 prevailing wage rate survey. ----- *In the Matter of Arjae Sheet Metal Company, Inc.*, 29 BOLI 1, 7 (2007).

□ The ALJ found that witness testimony claiming there is "not a chance" that an article placed in the mail will reach its destination further strained respondent's credibility when claiming it did not receive the 2005 prevailing wage rate survey. ----- *In the Matter of Arjae Sheet Metal Company, Inc.*, 29 BOLI 1, 7 (2007).

□ Based on his prior false statements to an agency compliance specialist and his failure to provide any evidence to support his claims at hearing, the ALJ did not credit respondent's testimony unless it was an admission, statement against interest, or corroborated by other evidence. ----- *In the Matter of Joseph Francis Sanchez*, 29 BOLI 211, 218 (2007).

22.2.2 --- ALJ's Credibility Findings

22.2.3 --- Prior Convictions

□ The forum considered claimant's admission that he had been convicted of tampering with witness testimony, which demonstrates a proclivity for dishonesty, in determining that claimant's testimony was not believable. ----- *In the Matter of Best Concrete and Gravel LLC*, 31 BOLI 54, 72 (2010).

22.3 --- Cross-Examination

□ The agency filed a request for cross examination in which the agency asked that the forum require respondent "make available for cross examination at hearing each and every author, preparer or transcriber" of any of the five affidavits submitted with respondent's case summary that respondent intended to offer or refer to at hearing. When respondent did not make those witnesses available for cross examination at the hearing, the forum did not admit the five affidavits. ----- *In the Matter of From the Wilderness, Inc.*, 30 BOLI 227, 228, 236-40 (2009).

Appeal pending.

22.4 --- Exclusion (see also 20.8)

□ At the outset of the hearing in which an LLC was the respondent and was represented by counsel, Steve Miller, respondent's vice president of operations, and Michael Reed, respondent's in-house counsel when the alleged discriminatory actions took place, were both present. Respondent's counsel stated that they would both be witnesses and asked that they both be allowed to be present throughout the hearing. The ALJ ruled that either Miller or Reed could be present and the other would have to leave the hearing room. ----- *In the Matter of Northwestern Title Loans LLC*, 30 BOLI 1, 8 (2008).

22.5 --- Expert Witnesses

22.6 --- Failure to Testify (see also 20.9)

□ When a potential witness presumably could have been called as a witness by respondent to support respondent's defense that claimants worked fewer hours than they claimed, and respondent did not call that witness, despite listing him as a potential witness on her motion for a telephone hearing, the forum inferred that his testimony would not have aided respondent's case. -- *In the Matter of Laura M. Jaap*, 30 BOLI 110, 130 (2009).

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22.7 --- Interpreters (see also 23.0)

22.8 --- Witness Tampering

22.9 --- Telephone Witnesses

22.10 --- Confidentiality

22.11 --- Other

□ The forum gave little weight to the testimony of two witnesses who had no personal knowledge of relevant events. ----- *In the Matter of Best Concrete and Gravel LLC, 31 BOLI 54, 65 (2010).*

□ After the hearing was postponed, the ALJ issued an interim order requiring witnesses previously served with subpoenas to compel their appearance on the date originally set for hearing to honor that subpoena on the reset hearing date. The ALJ ordered that notice "of the duty of each witness to comply with the previously served subpoena on this new hearing date shall be given to each witness by means of respondent and the agency sending a copy of this ruling by regular mail to the witness's mailing address." ----- *In the Matter of From the Wilderness, Inc., 30 BOLI 227, 249 (2009).*

Appeal pending.

□ After postponing the hearing, the ALJ issued an interim order stating that, when the hearing was reset, he would issue an order requiring persons already served with subpoenas to honor that subpoena by appearing at the time, date, and place set for the rescheduled hearing. ----- *In the Matter of From the Wilderness, Inc., 30 BOLI 227, 242 (2009).*

Appeal pending.

23.0 INTERPRETERS

□ When the ALJ was informed that respondent's corporate president had telephoned the agency case presenter and stated that he needed a Korean interpreter at the hearing, the ALJ telephoned the president that same day to confirm that an interpreter was required. The president told the ALJ that he planned to testify in Korean and needed an interpreter to translate his testimony and that he also wanted an interpreter to interpret the entire proceedings to him. In addition, he told the ALJ that he did not understand everything in the ALJ's interim orders. The ALJ told respondent's president that all of the orders related to respondent's case and that it was important for him to find someone to explain those orders to him, particularly the case summary order and order requiring respondent to officially appoint an authorized representative or obtain the services of an attorney. ----- *In the Matter of J & S Moving & Storage, Inc., 31 BOLI 286, 288 (2012).*

24.0 DEFAULTS

24.1 --- Generally

□ In a wage claim default case, the agency needs only to establish a prima facie case supporting the allegations of its order of determination in order to prevail. ----- *In the Matter of Letty Lee Seshier, 31 BOLI 255, 261 (2011).* See also *In the Matter of Horizon Technologies, LLC, 31 BOLI 229, 239 (2011).*

□ At the time set for hearing, when respondent did not

appear and had not previously notified the forum that it would not appear, the ALJ waited 30 minutes before commencing the hearing. When respondent did not appear or contact the hearings unit by telephone during that time, the ALJ declared respondent in default and commenced the hearing. ----- *In the Matter of Letty Lee Seshier, 31 BOLI 255, 257 (2011).* See also *In the Matter of Horizon Technologies, LLC, 31 BOLI 229, 231 (2011); In the Matter of Computer Products Unlimited, Inc., 31 BOLI 209, 212-13 (2011); In the Matter of Paul Samuels, 31 BOLI 146, 149 (2010); In the Matter of Mass Tram America, Inc., 31 BOLI 42, 44 (2010); In the Matter of Ryan Allen Hite, 31 BOLI 10, 12 (2009); In the Matter of Allen Belcher, 31 BOLI 1, 3 (2009); In the Matter of Sehat Entertainment, Inc., 30 BOLI 170, 181 (2009); In the Matter of Robert J. Thomas, 30 BOLI 160, 162 (2009); In the Matter of Village Café, Inc., 30 BOLI 80, 82 (2008); In the Matter of J. Guadalupe Campuzano-Cazares LLC, 30 BOLI 48, 59 (2008); In the Matter of Petworks LLC, 30 BOLI 37 (2008).*

□ The agency filed a motion for default based on respondent's purported failure to file a complete answer to the allegations in the formal charges and failure to request a hearing in the answer that respondent did file but later moved to withdraw its motion and the ALJ granted the motion. ----- *In the Matter of Charles Edward Minor, 31 BOLI 88, 90 (2010).*

□ When a respondent defaults, the agency must present a prima facie case on the record to support the allegations of its charging document in order to prevail. -- *In the Matter of Horizon Technologies, LLC, 31 BOLI 229, 239).* See also *In the Matter of Allen Belcher, 31 BOLI 1, 7 (2009); In the Matter of Sehat Entertainment, Inc., 30 BOLI 170, 181 (2009); In the Matter of J. Guadalupe Campuzano-Cazares LLC, 30 BOLI 48, 59 (2008); In the Matter of Petworks LLC, 30 BOLI 41 (2008); In the Matter of John Steensland, 29 BOLI 235, 261 (2007).*

□ The agency moved for an order of default based on a corporate respondent's failure to timely file an answer. The ALJ denied the agency's motion on the grounds that it was not clear when the formal charges had been served and because the agency case presenter stated that he gave respondent an extension of time to respond to the charges but did not state the deadline at which the extension expired. ----- *In the Matter of From the Wilderness, Inc., 30 BOLI 227, 229-34 (2009).*

Appeal pending.

□ When respondents did not appear at the time and place set for hearing and no one appeared on their behalf or advised the ALJ of any reason for their failure to appear, the ALJ ruled that respondents were in default, having been properly served with the notice of hearing, and having failed to appear at the hearing. ----- *In the Matter of Sehat Entertainment, Inc., 30 BOLI 170, 174 (2009).*

□ When respondent did not appear at the time and place set for hearing and no one appeared on his behalf or advised the ALJ of any reason for his failure to appear, the ALJ ruled that respondent was in default, having been properly served with the notice of hearing and having failed to appear at the hearing. ----- *In the*

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Matter of J. Guadalupe Campuzano-Cazares LLC, 30 BOLI 48, 50-51 (2008).

□ Both respondents defaulted by failing to appear at the hearing. ---- **In the Matter of John Steensland, 29 BOLI 235, 261 (2007).**

□ In a default case involving a wage claim, the agency's prima facie case consists of credible evidence showing: 1) respondents employed claimants; 2) the pay rate upon which respondents and claimants agreed, if it exceeded the minimum wage; 3) claimants performed work for which they were not properly compensated; and 4) the amount and extent of work claimants performed for respondents. ---- **In the Matter of John Steensland, 29 BOLI 235, 261 (2007).**

24.2 --- Amendments

24.3 --- Answer as Evidence (see also 10.2, 20.24)

□ In a default case, the forum may consider any unsworn and unsubstantiated assertions contained in respondent's answer, but those assertions are overcome whenever they are contradicted by other credible evidence in the record. ---- **In the Matter of Computer Products Unlimited, Inc., 31 BOLI 209, 222 (2011).** See also **In the Matter of Paul Samuels, 31 BOLI 146, 149 (2010); In the Matter of Ryan Allen Hite, 31 BOLI 10, 12 (2009); In the Matter of Sehat Entertainment, Inc., 30 BOLI 170, 181 (2009); In the Matter of Village Café, Inc., 30 BOLI 80, 88 (2008); In the Matter of J. Guadalupe Campuzano-Cazares LLC, 30 BOLI 48, 59 (2008).**

□ When a respondent fails to appear at hearing and its only contribution to the record is a request for hearing and an answer that contains only unsworn and unsubstantiated assertions, those assertions are overcome whenever they are contradicted by other credible evidence in the record. ---- **In the Matter of Letty Lee Seshier, 31 BOLI 255, 261 (2011).** See also **In the Matter of John Steensland, 29 BOLI 235, 261-62 (2007).**

24.4 --- Forum's Responsibility

□ The forum rejected the agency's argument that it should ignore any evidence in a default case not presented by respondent that tended to prove respondent's affirmative defense of independent contractor. ---- **In the Matter of Horizon Technologies, LLC, 31 BOLI 229, 242 (2011).**

□ The forum's responsibility in a default case is to determine whether the agency has established a prima facie case supporting the allegations of the charging document. ---- **In the Matter of Horizon Technologies, LLC, 31 BOLI 229, 242 (2011).**

24.5 --- Limits on Damages/Relief

□ Although the agency proved that \$1,874.65 in unpaid, due, and owing wages was owed to a wage claimant when she left respondent's employment, the forum only awarded \$1,735.90, the amount sought in the order of determination, for the reason that the charging document sets a limit on the damages that the forum can award in a default case. ---- **In the Matter of Village Café, Inc., 30 BOLI 80, 91 (2008).**

24.6 --- Representation by Counsel (see also 3.0, 10.0)

24.7 --- Relief from Default

25.0 RECORD OF HEARING

25.1 --- Reopening the Record (see also 27.0)

□ The ALJ re-opened the record on his own motion to obtain a copy of claimant's original 2008-2009 planner for inspection. At hearing, copies of that planner showing entries for September 21 through November 29, 2009, had been offered and received into evidence. At hearing, the agency had proffered the original planner for inspection, but the ALJ declined the agency's offer at that time. ---- **In the Matter of Mark A. Frizzell, 31 BOLI 178, 183 (2011).**

□ When respondents objected to the ALJ's ruling on their motion to reopen the record to admit additional evidence and contended that a denial was tantamount to denying respondents' rights to submit rebuttal evidence under ORS 183.450(3), the forum held that respondents' right to submit rebuttal evidence after the record has closed is limited by the contested case hearing rule that authorizes the ALJ to admit new evidence if the ALJ determines that it is necessary to fully and fairly adjudicate the case and if good cause is shown for not having submitted it before the record closed. ---- **In the Matter of Mountain Forestry, Inc., 29 BOLI 11, 158-59 (2007).**

Affirmed without opinion, *Mountain Forestry, Inc. v. Bureau of Labor and Industries*, 229 Or App 504, 213 P3d 590 (2009).

□ When respondents moved to reopen the record to admit a federal audit that purportedly showed the prevalence of records discrepancies throughout the firefighting industry and that the Oregon Department of Forestry did not have specific training requirements prior to 2003, and that purportedly negated certain inferences drawn from witness testimony, the forum found that notwithstanding respondents' failure to submit an affidavit showing they had no knowledge of the audit prior to its release in March 2006, the audit did not contain any information relevant to the issues in the case or that mitigated respondents' violations and therefore the additional evidence was not necessary to fully and fairly adjudicate the case. ---- **In the Matter of Mountain Forestry, Inc., 29 BOLI 11, 48-50 (2007).**

Affirmed without opinion, *Mountain Forestry, Inc. v. Bureau of Labor and Industries*, 229 Or App 504, 213 P3d 590 (2009).

25.2 --- Reconvenement

25.3 --- Settlement (see also 18.0)

25.4 --- Transcription

25.5 --- Leaving the Record Open

□ When the agency offered paycheck stubs that were not provided to respondents in accordance with the ALJ's discovery order, the ALJ admitted the paycheck stubs as evidence and left the record open to allow respondents additional time to produce evidence to rebut the paycheck stub evidence. ---- **In the Matter of Kurt**

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E. Freitag, 29 BOLI 164, 176-77 (2007).

Affirmed without opinion, *Freitag v. Bureau of Labor and Industries*, 243 Or App 389, 256 P3d 1099 (2011).

□ When respondents objected to a wage claimant's wage assignment that was made at the start of hearing and offered as an exhibit, the ALJ admitted the exhibit but held the record open to allow briefing on the issue of whether a wage assignment is required before the agency may proceed on a wage claim and, if so, whether a wage assignment may be made *nunc pro tunc*. ---- *In the Matter of Kurt E. Freitag, 29 BOLI 164, 171-72 (2007)*.

Affirmed without opinion, *Freitag v. Bureau of Labor and Industries*, 243 Or App 389, 256 P3d 1099 (2011).

25.6 --- Other

26.0 LEGAL MEMORANDUMS, BRIEFS, STATEMENTS OF AGENCY POLICY

26.1 --- Briefs and Memorandums

□ After the hearing, the ALJ ordered respondent to submit a legal brief analyzing the application of the applicable law in this case to the facts and the agency to submit a legal brief or, at the agency's option, a statement of agency policy analyzing the application of the applicable law in this case to the facts. ---- *In the Matter of Northwestern Title Loans LLC, 30 BOLI 1, 8 (2008)*.

26.2 --- Statements of Agency Policy

□ After the hearing, the ALJ ordered respondent to submit a legal brief analyzing the application of the applicable law in this case to the facts and the agency to submit a legal brief or, at the agency's option, a statement of agency policy analyzing the application of the applicable law in this case to the facts. ---- *In the Matter of Northwestern Title Loans LLC, 30 BOLI 1, 8 (2008)*.

26.3 --- Written Closing Arguments

27.0 FULL AND FAIR INQUIRY (see also 25.1)

□ When respondents moved to reopen the record to admit a federal audit that purportedly showed the prevalence of records discrepancies throughout the firefighting industry and that the Oregon Department of Forestry did not have specific training requirements prior to 2003, and that purportedly negated certain inferences drawn from witness testimony, the forum found that the audit did not contain any information relevant to the issues in the case or that mitigated respondents' violations and therefore the additional evidence was not necessary to fully and fairly adjudicate the case. ---- *In the Matter of Mountain Forestry, Inc., 29 BOLI 11, 48-50 (2007)*.

Affirmed without opinion, *Mountain Forestry, Inc. v. Bureau of Labor and Industries*, 229 Or App 504, 213 P3d 590 (2009).

28.0 PROPOSED ORDERS

28.1 --- Generally

28.2 --- Exceptions

□ The agency filed exceptions to the proposed order. Subsequently, requester filed a response to the agency's exceptions and the agency objected to requester's response. The ALJ issued an order stating that requester's response would not be considered because there is no provision in OAR 839-050-0000 *et seq* allowing a response to exceptions. ---- *In the Matter of Blanchet House of Hospitality, 31 BOLI 73, 76 (2010)*.

Appeal pending.

□ The ALJ granted the agency's motions for a two-week extension of time to file exceptions the proposed order and for an audio copy of the hearing to review for the purpose of filing exceptions. ---- *In the Matter of Mass Tram America, Inc., 31 BOLI 42, 45 (2010)*.

□ The agency filed an exception objecting to the forum rendering an opinion about whether handwriting on the wage claim forms was genuine without an exemplar from the wage claimant whom the agency put forth as the purported author. When another witness testified that she filled out the forms, she authenticated her handwriting, and the handwriting on the forms and the purported "signatures" by the wage claimant were sufficiently similar that any reasonable person could conclude that they were written by the same person, with or without the wage claimant's knowledge and consent, the forum rejected the agency's exception. ---- *In the Matter of J. Guadalupe Campuzano-Cazares LLC, 30 BOLI 48, 57, fn. 5 (2008)*.

29.0 CONSTITUTIONALITY

30.0 CONDUCT OF HEARING

30.1 --- Generally

30.2 --- Security

□ Based on respondent's demonstrated hostility toward government process and as a precautionary measure following instances of repeated verbal abuse toward agency staff members, the ALJ arranged to have an Oregon State Police officer present at the scheduled hearing. ---- *In the Matter of Kurt E. Freitag, 29 BOLI 164, 175 (2007)*.

Affirmed without opinion, *Freitag v. Bureau of Labor and Industries*, 243 Or App 389, 256 P3d 1099 (2011).

32.0 DECLARATORY JUDGMENT

□ The IAFF filed a petition for a declaratory ruling on the issue of whether or not the City of Grants Pass was required to include vacation and sick leave in calculating overtime pay for firefighters. The IAFF alleged that the City currently does not include vacation and sick leave in calculating overtime pay for firefighters. The Commissioner responded, stating that he had reviewed the petition and planned to issue a ruling on it. The City filed a petition to intervene and the commissioner instructed the City to file an amended petition that addressed all the provisions in OAR 137-002-0025. The City filed an amended petition to intervene that was granted by the Commissioner. ---- *In the Matter of Petition for Declaratory Ruling, International Association of Fire Fighters, Local 3564, Petitioner,*

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and City of Grants Pass, Intervenor, 31 BOLI 267, 268 (2012).

Appeal pending.

□ When the IAFF filed a petition for a declaratory ruling and the City of Grants Pass filed a motion to intervene that was granted, the commissioner issued a notice of hearing that set a hearing date and appointed BOLI's ALJ to be the presiding officer in the proceeding. ---- ***In the Matter of Petition for Declaratory Ruling, International Association of Fire Fighters, Local 3564, Petitioner, and City of Grants Pass, Intervenor, 31 BOLI 267, 268 (2012).***

Appeal pending.

□ During the course of a prehearing conference, the IAFF and the City orally agreed to stipulate to three facts that the ALJ, the IAFF's attorney, and the City's attorney considered necessary to resolve the legal issue in the case – whether the City was required to include vacation and sick leave in calculating overtime pay for its firefighters who were members of the IAFF. The ALJ issued an interim order setting out those facts, and the City and IAFF stipulated in writing to those facts. ---- ***In the Matter of Petition for Declaratory Ruling, International Association of Fire Fighters, Local 3564, Petitioner, and City of Grants Pass, Intervenor, 31 BOLI 267, 268-69 (2012).***

Appeal pending.

□ In a prehearing conference, the IAFF and City both asked if the hearing could be conducted in writing, anticipating that their oral argument at the hearing would differ little in substance from the written briefs that they planned to submit prior to the hearing, and that written briefs be simultaneously filed a week later than the date set for hearing. The ALJ granted both requests. The ALJ also ruled that the agency could elect to file a statement of agency policy, a written brief by its counsel, or both, on that same date. The ALJ ordered the IAFF, the City, and the agency to address two specific issues, based on the stipulated facts. ---- ***In the Matter of Petition for Declaratory Ruling, International Association of Fire Fighters, Local 3564, Petitioner, and City of Grants Pass, Intervenor, 31 BOLI 267, 268-69 (2012).***

Appeal pending.

□ The IAFF filed a written objection to the City's enclosure of and reference to documents related to the legislative history of the statutes at issue in its written brief. The IAFF based its objection on two grounds. First, the City's reference to the documents included facts not stipulated to by the City and IAFF, in contravention of OAR 839-050-0280(1), which states that the ALJ is bound by any prehearing stipulation of facts, whether made orally or in writing. Second, the City's inclusion of the exhibits and any argument related to that evidence constitutes introduction of new evidence and violated the "ALJ's order, [OAR 137-002-0040(2)] and the stipulated fact agreement between the parties." The ALJ held that the "facts" referred to in OAR 839-050-0280(1), as applied to the declaratory ruling, consisted of any substantive facts related to the actual payment or nonpayment of overtime wages to the IAFF

firefighters by the City, including any history related to collective bargaining between the City and IAFF. In contrast, legislative history related to adoption or amendment of the statutes at issue is neither a non-stipulated fact nor "other evidence" that is subject to exclusion. The ALJ held that the forum is required to consider legislative history when it is offered by a party as an aid to interpreting a statute and would do so in this ruling, giving it appropriate weight. However, the forum would not consider any substantive facts that were not among the previously stipulated facts. ---- ***In the Matter of Petition for Declaratory Ruling, International Association of Fire Fighters, Local 3564, Petitioner, and City of Grants Pass, Intervenor, 31 BOLI 267, 269-70 (2012).***

Appeal pending.

□ The ALJ's proposed declaratory ruling stated that petitioner, intervenor, and the agency had the right to present oral argument to the commissioner before the commissioner issued a Declaratory Ruling, and that such request must be made in writing and filed within 10 days of the issuance of the proposed declaratory ruling. Intervenor, through counsel, timely requested oral argument. Petitioner and the agency did not request oral argument. The ALJ issued an interim order setting the time, date, and location for oral argument and noted that oral argument did not include presentation of any additional exhibits were not part of the record to date. Subsequently, Intervenor, filed written notification with the commissioner stating that Intervenor "does not seek oral argument in this matter." The ALJ telephoned petitioner and intervenor's counsel and gave them official notice that oral argument was cancelled. ---- ***In the Matter of Petition for Declaratory Ruling, International Association of Fire Fighters, Local 3564, Petitioner, and City of Grants Pass, Intervenor, 31 BOLI 267, 270 (2012).***

Appeal pending.