In the Matter of

JO-EL, INC.,

Case No. 15-01

Final Order of the Commissioner Jack Roberts

Issued May 20, 2001

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SYNOPSIS

Respondent suffered or permitted Claimant to work 198 hours between June 3 and August 13, 1999, and did not pay him for 166.25 hours worked. Respondent was ordered to pay Claimant $1,082.25 in due and unpaid wages, calculated at the state minimum wage rate of $6.50 per hour. Respondent's failure to pay the wages was willful and Respondent was ordered to pay $1,560.00 in civil penalty wages. ORS 652.140(1), 652.150; OAR 839-020-0030.

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The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on April 3, 2001, at the Salem office of the Bureau of Labor and Industries, located at 3865 Wolverine NE, Building E, Salem, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Peter McSwain, an employee of the Agency. Claimant Billy Parker was present throughout the hearing and was not represented by counsel. Respondent was represented by Ken L. Yee, its corporate president and authorized representative

The Agency called the following witnesses: Billy Parker, the wage claimant, and Rose Brundage, claimant's former supervisor. Respondent called Ken Yee as its only witness.

The forum received into evidence:

a) Administrative exhibits X-1 through X-5 (submitted or generated prior to hearing) and X-6 (generated at hearing);

b) Agency exhibits A-1 through A-4 (submitted prior to hearing);

c) Respondent exhibits R-1 and R-2 (submitted at hearing).

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

FINDINGS OF FACT – PROCEDURAL

1) On May 9, 2000, Claimant filed a wage claim with the Agency. He alleged that Respon-

dent had employed him and failed to pay wages earned between June 3 and August 13,1999, and due to him.

2) At the time he filed his wage claim, Claimant assigned to the Commissioner of Labor and Industries, in trust for Claimant, all wages due from Respondent.

3) Claimant brought his wage claim within the statute of limitations.

4) On July 17, 2000, the Agency served Order of Determination No. 00-1854 on Ken Yee, Respondent's registered agent, based upon the wage claim filed by Claimant and the Agency's investigation. The Order of Determination alleged that Respondent owed a total of $1,082.25 in unpaid wages and $1,560.00 in civil penalty wages, plus interest, and required that, within 20 days, Respondent either pay these sums in trust to the Agency, request an administrative hearing and submit an answer to the charges, or demand a trial in a court of law.

5) On August 1, 2000, the Agency received an answer and written request for hearing from Respondent. It was written and signed by "Ken L. Yee, The Pier Restaurant & Lounge."

6) On January 25, 2001, the Agency served a "BOLI Request for Hearing" on the forum.

7) On February 7, 2001, the Hearings Unit issued a Notice of Hearing to Respondent, the Agency, and the Claimant stating the time and place of the hearing as April 3, 2001, and successive days thereafter, at 9:00 a.m., at BOLI's Salem office, 3865 Wolverine NE, Building E, Salem, Oregon. Together with the Notice of Hearing, the forum sent a document entitled "Summary of Contested Case Rights and Procedures" containing the information required by ORS 183.413, and a copy of the forum's contested case hearings rules, OAR 839-050-000 to 839-050-0440.

8) On February 12, 2001, the ALJ issued a case summary order requiring the Agency and Respondent each to submit a list of witnesses to be called, copies of documents or other physical evidence to be introduced, and a statement of any agreed or stipulated facts. The Agency was additionally ordered to submit wage and penalty calculations and a brief statement of the elements of the claim. Respondent was additionally ordered to submit a brief statement of any defenses to the claim. The ALJ ordered the participants to submit case summaries by March 22, 2001, and notified them of the possible sanctions for failure to comply with the case summary order.

9) On February 13, 2001, the forum issued an interim order informing Respondent that, as a corporation, it must be represented at all stages of the proceeding either by counsel or an authorized representative.

10) The Agency timely filed its case summary, with attached

exhibits, on March 7, 2001. Respondent did not file a case summary.

11) Because of a family emergency, the ALJ did not arrive at the hearing until 9:45 a.m. on April 3, 2001. The hearing commenced at 10 a.m.

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

13) Before opening statements, the ALJ asked Yee if he intended to act as Respondent's authorized representative. Yee identified himself as Respondent's corporate president, and stated it was his intent to act as Respondent's authorized representative. Because Respondent had not previously submitted a written statement authorizing Yee to be Respondent's authorized representative, the ALJ required Yee to write and submit a brief statement authorizing himself to be Respondent's authorized representative before proceeding with the hearing.

14) On April 24, 2001, the ALJ issued a proposed order that included an Exceptions Notice that allowed ten days for filing exceptions to the proposed order. The forum received no exceptions.

FINDINGS OF FACT – THE MERITS

1) During all times material herein, Respondent Jo-El, Inc., an Oregon corporation, did business in Woodburn, Oregon as a restaurant and lounge under the assumed business name of The Pier. Ken Yee is Respondent's president.

2) Sometime prior to June 1999, Yee and Claimant went to Mexico together. During their trip, Yee and Claimant discussed Claimant's interest in the restaurant business. Respondent and Claimant agreed that Claimant would "train" at The Pier until September 1, 1999, to learn the business, and would then go on Respondent's payroll.

3) Claimant started work for Respondent sometime before June 3, 1999, working as a kitchen helper. Prior to June 3, 1999, Respondent paid Claimant's wages in full in the form of meals and drinks.

4) Between June 3 and August 13, 1999, Claimant's hours of work were scheduled by Rose Brundage, Respondent's kitchen manager, who wrote out Claimant's work schedule on Respondent's calendar. Claimant worked the hours scheduled by Brundage on the calendar.

5) Claimant made a written record of the hours he worked during his employment by copying his work schedule from Respondent's calendar.

6) Between June 3 and August 13, 1999, Claimant worked 198 hours for Respondent.

7) Respondent did not maintain any written record of the hours worked by Claimant between June 3 and August 13, 1999. There was no testimonial or documentary evidence offered concerning the value of meals and drinks consumed by Claimant during that time period, other than Yee's unsupported assertion that Claimant's meals and drinks more than offset the wages he earned during that time period.

8) Claimant was paid a total of $204.75 in cash for 31.5 of his 198 hours of work between June 3 and August 13, 1999. He was paid at the rate of $6.50 per hour. Claimant received $100 of this total on August 16, 1999, and the remaining $104.75 on August 17, 1999.

9) Calculated at the wage rate of $6.50 per hour, Claimant earned a total of $1,287.00 between June 3, 1999 and August 13, 1999.

10) Claimant became Respondent's general manager on September 1, 1999, and went on salary. Claimant continued working for Respondent until January 3, 2000, when Yee terminated him

11) Claimant was paid in full for all his work as Respondent's general manager, but has not been paid any additional wages for the hours he worked between June 3 and August 13, 1999.

12) At the time of Claimant's termination, Respondent owed Claimant $1,082.25 in unpaid wages.

13) Civil penalty wages are computed as follows for Claimant, in accordance with ORS 652.150: $6.50 per hour multiplied by 8 hours per day equals $52.00; $52.00 multiplied by 30 days equals $1,560.00.

14) Between June 23 and July 7, 2000, Claimant wrote $100.00 in NSF checks to Respondent.

15) Claimant's testimony and record concerning the number of hours he worked between June 3 and August 13, 1999, and the sum he was paid for working those hours was credible and the forum has credited this testimony and supporting documentation in its entirety.

16) Brundage's testimony that she wrote Claimant's work schedule on Respondent's calendar, and that Claimant worked the hours she wrote down as his schedule on the calendar was credible and the forum has credited this testimony in its entirety.

17) Yee's testimony that the value of meals and drinks consumed by Claimant between June 3 and August 13, 1999, exceeded any wages earned by Claimant was not credible and the forum has not given it any weight.

ULTIMATE FINDINGS OF FACT

1) During all times material herein, Respondent was an Oregon corporation that operated The

Pier restaurant and lounge in Woodburn, Oregon.

2) Prior to June 1999, Claimant began training to work in the restaurant business by performing work in The Pier's kitchen. Respondent and Claimant did not agree on a specific rate of pay.

3) Prior to June 3, 1999, Claimant was fully paid for his work with meals and drinks at The Pier.

4) Between June 3 and August 13, 1999, Claimant worked 198 hours for Respondent. Claimant was paid $204.75 in cash for 31.5 hours of those hours, calculated at the rate of $6.50 per hour. Claimant has not been paid anything for the remaining 166.5 hours.

5) Calculated at $6.50 per hour, Claimant earned $1,287.00 in wages during his employment with Respondent between June 3 and August 13, 1999.

6) Respondent terminated Claimant's employment on or about January 3, 2000.

7) Respondent willfully failed to pay Claimant $1,082.25 in earned, due, and payable wages on or about January 3, 2000, the date Claimant was terminated, and more than 30 days have elapsed from the date Claimant's wages were due.

CONCLUSIONS OF LAW

1) ORS 653.010 provides, in pertinent part:

> "(3) 'Employ' includes to suffer or permit to work * * *.
>
> "(4) 'Employer' means any person who employs another person * * *."

Respondent employed Claimant by suffering or permitting him to work at The Pier.

2) ORS 653.025 provides, in pertinent part:

> "Except as provided by ORS 652.020 and the rules of the Commissioner of the Bureau of Labor and Industries issued under ORS 653.030 and 653.261, for each hour of work time that the employee is gainfully employed, no employer shall employ or agree to employ any employee at wages computed at a rate lower than:
>
> "* * * * *
>
> "(3) For calendar years after December 31, 1998, $6.50. * * *"

Respondent was required to pay Claimant at least $6.50 for each hour he rendered personal services to Respondent between June 3 and August 13, 1999.

3) ORS 653.055(1) provides, in pertinent part:

> "(1) Any employer who pays an employee less than the wages to which the employee is entitled under ORS 653.010 to 653.261 is liable to the employee affected:
>
> "(a) For the full amount of the wages, less any amount actually paid to the employee by the employer; and

"(b) For civil penalties provided in ORS 652.140.

"* * * * *

"(3) The Commissioner of the Bureau of Labor and Industries has the same powers and duties in connection with a wage claim based on ORS 653.010 to 653.261 as the commissioner has under ORS 652.310 to 652.445 * * *."

Respondent is liable to Claimant for $1,082.25 in unpaid wages (166.5 hours x $6.50 per hour) plus penalty wages.

4) At times material, ORS 652.140(1) provided:

"Whenever an employer discharges an employee or where such employment is terminated by mutual agreement, all wages earned and unpaid at the time of such discharge or termination shall become due and payable not later than the end of the first business day after the discharge or termination."

Respondent violated ORS 652.140(1) by failing to pay Claimant all wages earned and unpaid not later than January 3, 2000, the day Claimant was terminated.

5) ORS 652.150 provides:

"If an employer willfully fails to pay any wages or compensation of any employee whose employment ceases, as provided in ORS 652.140 and 652.145, then, as a penalty for such nonpayment, the wages or compensation of such employee shall continue from the due date thereof at the same hourly rate for eight hours per day until paid or until action therefor is commenced; provided, that in no case shall such wages or compensation continue for more than 30 days from the due date; and provided further, the employer may avoid liability for the penalty by showing financial inability to pay the wages or compensation at the time they accrued."

Respondent is liable for $1,560.00 in civil penalties under ORS 652.150 for willfully failing to pay all wages or compensation to Claimant when due as provided in ORS 652.140(2).

6) Under the facts and circumstances of this record, and according to the law applicable to this matter, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondent to pay Claimant his earned, unpaid, due and payable wages and the civil penalty wages, plus interest on both sums until paid. ORS 652.332.

OPINION

INTRODUCTION

The Agency alleged in its Order of Determination that Claimant was not paid for 166.5 hours of work he performed for Respondent between June 3 and August 13, 1999. The Agency further alleged that Claimant was entitled to the minimum wage of $6.50 per hour and is owed a total of

$1,082.25 in unpaid wages and $1,560.00 in penalty wages.

PRIMA FACIE CASE

In this wage claim case, the Agency's prima facie case consists of proof of the following elements: (1) Respondent employed Claimant; (2) any pay rate upon which Respondent and Claimant agreed, if it exceeded the minimum wage; (3) Claimant performed work for which he was not properly compensated; and (4) the amount and extent of work performed by Claimant. *In the Matter of Contractor's Plumbing Service, Inc.,* 20 BOLI 257, 270 (2000).

A. Respondent Employed Claimant

For purposes of chapter 653, a person is an "employee" of another if that other "suffer[s] or permit[s]" the person to work. *In the Matter of Bubbajohn Howard Washington, 21 BOLI 91, 101 (2000); In the Matter of Barbara Coleman,* 19 BOLI 230, 234 (2000. It is undisputed that Claimant performed work at The Pier, related to the business of The Pier, between June 3 and August 13, 1999 with Yee's knowledge and acquiescence. This makes Claimant Respondent's employee under ORS Chapter 653.

B. Claimant's Rate of Pay

There was no agreement between Claimant and Yee as to Claimant's rate of pay during Claimant's "training" period prior to September 1, 1999. However, the forum notes that Claimant was paid $6.50 per hour for 31.5 hours work between June 3 and August 13, 1999. Where there is no agreed upon rate of pay, an employer is required to pay at least the minimum wage, which was $6.50 per hour in 1999. *Coleman*, 19 BOLI at 262-63. Claimant was entitled to be paid $6.50 per hour for his work for Respondent between June 3 and August 13, 1999.

C. Claimant Performed Work for Which He was not Properly Compensated

Claimant testified credibly that he worked 198 hours for Respondent between June 3 and August 13, 1999, and was only paid for 31.5 hours. His testimony as to his work hours was supported by the credible testimony of Brundage, who scheduled his hours and observed Claimant working those scheduled hours. Respondent concedes that Claimant was paid in cash for only 31.5 hours, but argues that Claimant was fully paid for those hours by the meals and drinks he consumed, based on an alleged agreement between Yee and Claimant that Claimant's wages would consist solely of meals and drinks. Assuming such an agreement existed, the forum would consider the value of the meals and drinks as a deduction from Claimant's wages for the purpose of determining if they could be considered as a legitimate offset against Claimant's earned wages.

ORS 653.035 permits the "fair market value" of meals furnished

by the employer for the private benefit of the employee to be deducted from the minimum wage. OAR 839-020-0025 defines "fair market value" as "[t]he amount actually and customarily charged for comparable meals, lodging, facilities or services to consumers who are not employees of the employer; or [t]he actual cost to the employer in purchasing, preparing or providing the meals, lodging or other facilities or services." The employer has the burden of establishing the fair market value. OAR 839-020-0025(1) & (2). In addition, the deduction of these costs from the employee's wages must have been authorized by the employee in writing, the deduction must have been for the private benefit of the employee, and the deduction must be recorded in the employer's books, or the deduction of these costs must be authorized by a collective bargaining agreement, in accordance with the provisions of ORS 652.610. Finally, "[f]ull settlement of sums owed to the employer by the employee because of meals * * *" must be made on each regular payday. Respondent, who has the burden of proof, did not establish the "fair market value" of any meals or drinks consumed by Claimant or any other of the conditions that must be met before meals and drinks can be deducted from the minimum wage.

Respondent also asserts the defense that it was exempt from the minimum wage requirement because Claimant was in "training" during the wage claim period. OAR 839-020-0044 excepts employers from the minimum wage requirement during a training program if four criteria are met:

> "(a) Attendance is outside of the employee's regular working hours;
>
> "(b) Attendance is voluntary;
>
> "(c) The course, lecture, or meeting is not directly related to the employee's job;
>
> "(d) The employee does not perform any productive work during such attendance."

In this case, none of those criteria are met.

Finally, Respondent argues that Claimant's NSF checks should act as an offset against any unpaid wages. As with meals and drinks, the forum analyzes this potential offset as a deduction. ORS 652.610 regulates this type of deduction. In pertinent part, that statute reads as follows:

> "(3) No employer may withhold, deduct or divert any portion of an employee's wages unless:
>
> "(a) The employer is required to do so by law;
>
> "(b) The deductions are authorized in writing by the employee, are for the employee's benefit, and are recorded in the employer's books;
>
> "(c) The employee has voluntarily signed an authorization for a deduction for any other item, provided that the ultimate recipient of the money

withheld is not the employer, and that such deduction is recorded in the employer's books;

"(d) The deduction is authorized by a collective bargaining agreement to which the employer is a party[.]"

None of these circumstances apply here. Even if they did, ORS 652.610, together with ORS 652.360, require that an employer pay an employee the wages that are due and seek to resolve any claims the employer may have against the employee by other means. *In the Matter of Ken Taylor*, 11 BOLI 139, 144 (1992) (*citing Garvin v. Timber Cutters, Inc.*, 61 Or App 497 (1983)).

Based on the above, the forum concludes that Claimant performed work for Respondent for which he was not paid.

D. The Amount and Extent of Work Performed by Claimant

The final element of the Agency's prima facie case requires proof of the amount and extent of work performed by Claimant. The Agency's burden of proof can be met by producing sufficient evidence from which "a just and reasonable inference may be drawn." *In the Matter of Majestic Construction, Inc.,* 19 BOLI 59, 58 (1999). A claimant's credible testimony may be sufficient evidence. *In the Matter of Ann L. Swanger,* 19 BOLI 42, 56 (1999).

Claimant testified credibly that he worked 198 hours for Respondent and the dates he worked those hours during the wage claim period. The credibility of his testimony was enhanced by the record he kept of his hours, taken directly from his work schedule, and the testimony of his supervisor, Brundage, that Claimant worked the hours on the work schedule she posted for him. Respondent provided no credible evidence that Claimant did not work those hours. This is sufficient evidence to establish the amount and extent of Claimant's work.

PENALTY WAGES

An award of penalty wages turns on the issue of willfulness. Willfulness does not imply or require blame, malice, wrong, perversion or moral delinquency, but only requires that that which is done or omitted is intentionally done with knowledge of what is being done and that the actor or omittor be a free agent. *Contractor's Plumbing Service,* 20 BOLI at 274. Respondent, as an employer, had a duty to know the amount of wages due its employees. *In the Matter of Robert N. Brown,* 20 BOLI 157, 163 (2000). Based on Claimant's credible testimony that Claimant's work schedule was written on Respondent's calendar and Claimant worked those hours, the forum infers that Yee, Respondent's president, knew Claimant's hours of work. There is no evidence that Yee, as Respondent's agent, acted other than voluntarily or as

a free agent in not paying Claimant for all hours worked between June 3 and August 13, 1999. Respondent's alleged agreement to pay Claimant meals and drinks for work during his "training" period, even if true, is not a defense to penalty wages. *See, e.g., In the Matter of Anna Pache*, 13 BOLI 249, 269 (1994). Accordingly, the forum concludes that Respondent acted willfully and assesses penalty wages in the amount of $1,560.00, the amount sought in the Order of Determination. This figure is computed by multiplying $6.50 per hour x 8 hours per day x 30 days, pursuant to ORS 652.150 and OAR 839-001-0470.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, and as payment of the unpaid wages and civil penalty wages it owes as a result of its violation of ORS 652.140, the Commissioner of the Bureau of Labor and Industries hereby orders **Jo-El, Inc.** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, the following:

A certified check payable to the Bureau of Labor and Industries in trust for Billy Parker in the amount of TWO THOUSAND SIX HUNDRED FORTY-TWO DOLLARS AND TWENTY-FIVE CENTS ($2,625,25), less appropriate lawful deductions, representing $1,082.25 in gross earned, unpaid, due, and payable wages and $1,560.00 in penalty wages, plus interest at the legal rate on the sum of $1,082.25 from September 1, 1999, until paid and interest at the legal rate on the sum of $1,560.00 from October 1, 1999, until paid.

In the Matter of

HICKOX ENTERPRISES, INC.,

Case No. 104-01

Final Order of the Commissioner Jack Roberts

Issued June 27, 2001

SYNOPSIS

Respondent owed $46,602.37 in unpaid wages to 50 wage claimants when it ceased doing business. BOLI determined that the wage claimants were entitled to receive payment from the Wage Security Fund and paid the claimants in full. The Commissioner found Respondent liable to reimburse the Wage Security Fund for the $46,602.37 in wages paid out, plus a 25 percent penalty of $11,650.59. ORS 652.140, 652.310, 652.332, 652.414.

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Jack Roberts, Commissioner of

the Bureau of Labor and Industries for the State of Oregon. The hearing was conducted in writing. The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by David K. Gerstenfeld, case presenter and an employee of the Agency. Respondent was represented by Kevin O'Connell, attorney at law.

The forum received into evidence:

a) Administrative exhibits X-1 through X-5 (submitted or generated prior to hearing).

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

FINDINGS OF FACT – PROCEDURAL

1) On November 29, 2000, the Agency issued Order of Determination No. 00-4692 in which it alleged the following:

(a) Fifty (50) separate wage claimants filed wage claims with the Agency and assigned those claims to the Agency, alleging that Respondent employed them all in Oregon between March 1 and April 1, 2000, and that they performed work, labor and services for Respondent and were paid all sums due and owing except the sum of $46,602.37, which is due and owing along with interest at the legal rate per annum from May 1, 2000, until paid. The names of the claimants and amounts alleged due and owing were as follows:

Ashton, Victoria:	$ 834.75
Barrie, Kimberly:	1,045.46
Bidgood, Alysia:	705.34
Budd, Darby:	498.96
Butenschoen, Jennifer:	678.56
Christensen, Penelope:	1,155.70
Clark, Jessica:	698.70
Clift, Susanne:	1,292.30
Collins, Mary:	613.29
Davis, Nina:	325.80
Diego, Juana:	162.00
Edwards, Valarie:	1,362.38
Ensey, Kristy:	1,214.67
Gedrose, Mary:	740.83
Gehrig, Jennifer	1,241.35
Georgeades, Julieta:	315.90
Gessman, Melissa:	604.09
Hall, Julie:	852.06
Hardin, Monica:	1,228.02
Hathaway, Tamara:	710.06
Hiatt, Sheila:	986.39
Houk, Carly:	593.25
Kerr, Grace:	1,080.41
Kraner, Nicole:	1,332.18
Laske, Heidi:	2,873.07
Lemke, Gina:	185.50
Lucas, Kristen:	326.70

Luczkow, Alyse:	373.53
Madsen, Britt:	433.13
Miller, Mary:	236.00
Milne, Kristen:	635.88
Mobley, David:	484.62
Montgomery, Ryan:	955.92
Morton, Cha:	1,146.07
Mull, Josh:	1,118.44
Odegaard, Robert:	759.19
Olsen, Kristen:	1,564.10
Petersen, Philip:	435.05
Rabizadeh, F.:	3,041.34
Richardson, D.:	4,000.00
Riley, Miyuki:	727.85
Rutledge, Jesse:	126.00
Sabin, Angela:	985.50
Segui, Jennie:	808.57
Steele, Troy:	808.70
Tavus, Anne:	274.95
Thomas, Jennifer:	1,765.37
Webster, Lynne:	495.72
Wingfield, Candice:	889.87
Zapata, Christy:	878.10

(b) Pursuant to ORS 652.414, the Agency determined that the wage claimants were entitled to receive payment from the Wage Security Fund ("WSF") in the sum of $46,602.37.

(c) The wage claimants received payment in the amount of $46,602.37 from the WSF.

(d) The Commissioner of the Bureau of Labor and Industries is entitled by ORS 652.414(2) to recover from the employer the amount paid from the WSF, together with a penalty of 25 percent of the sum paid from the Fund, which amount is $11,650.59, along with interest at the legal rate per annum from June 1, 2000, until paid.

2) The Order of Determination was served on Respondent on December 5, 2000. On January 5, 2001, the Agency sent Respondent a Notice of Intent to Issue Final Order by Default, stating that no answer or request for hearing or court trial had been received and that if none was received by January 15, 201, the Agency would issue a Final Order by Default.

3) On January 12, 2001, Respondent, through counsel, filed an answer and request for hearing that stated: "Employer contests the assertion of a penalty in the amount of $11,650.59 and he requests a hearing on that issue."

4) On March 1, 2001, the Agency filed a "BOLI Request for Hearing" with the forum.

5) On April 5, 2001, the Hearings Unit issued a Notice of Hearing to Respondent and the Agency stating the time and place of the hearing as September 11, 2001, at 9:00 a.m., at the Hearings Room, 10th Floor, State Office Building, 800 NE Oregon Street, Portland, Oregon. Together with the Notice of Hearing, the forum sent a copy of the Order

of Determination, a document entitled "Summary of Contested Case Rights and Procedures" containing the information required by ORS 183.413, and a copy of the forum's contested case hearings rules, OAR 839-050-000 to 839-050-0440.

6) On April 9, 2001, the Agency filed a motion for summary judgment, contending that Respondent's failure to dispute any facts in the Order of Determination except for the Agency's entitlement to a 25 percent penalty on the sum paid out from the WSF entitled the Agency to summary judgment on all issues as a matter of law.

7) On April 12, 2001, the forum issued an interim order notifying Respondent that it had seven days after service of the Agency's motion to file a written response. Respondent did not file a response.

8) On April 26, 2001, the forum issued an interim order granting the Agency's motion for summary judgment, ruling in pertinent part as follows:

"**INTRODUCTION**

"This action arises from an Order of Determination issued by the Agency on November 29, 2000, seeking reimbursement for $46,602.37 paid out by the Wage Security Fund ('WSF'), along with a 25 percent penalty of $11,650.59 on that sum. The Order of Determination alleges that the $46,602.37 paid out by the WSF was to compensate wage claimants for wages earned, due and owing to them from Respondent. Respondent filed an answer and request for hearing on January 12, 2001. Respondent's answer consisted of a one-sentence assertion – 'Employer contests the assertion of a penalty in the amount of $11,650.59 and he requests a hearing on that issue.'

"On April 6, 2001, the Agency filed a motion for summary judgment, contending that undisputed facts from the pleadings entitle the Agency to judgment as a matter of law. Respondent filed no objections to the motion.

"**SUMMARY JUDGMENT STANDARD**

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

' * * * No genuine issue as to a material fact exists if, based upon the record before the court viewed in a manner most favorable to the adverse party, no objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject of the motion for summary judgment. The adverse party has the

burden of producing evidence on any issue raised in the motion as to which the adverse party would have the burden of persuasion at [hearing*].'*

In the Matter of Cox and Frey Enterprises, Inc., 21 BOLI 175, 178 (2000).

"RECOVERY OF WSF FUNDS

"In the Order of Determination, the Agency plead the following relevant facts:

> 1) Between March 1 and April 1, 2000, Respondent employed the 50 wage claimants listed in Exhibit A to the Order of Determination and paid them wages owing for their services except the sum of $46,602.37.
>
> 2) BOLI made a determination that these 50 wage claimants were entitled to payment from the WSF in the amount of $46,602.37.
>
> 3) BOLI paid these 50 wage claimants $46,602.37 from the WSF.
>
> 4) 25 percent of $46,602.37 is $11,650.59.

Respondent's failure to deny any of these alleged facts constitutes an admission to all of them, including an admission to the validity of the underlying wage claims. OAR 839-050-0130(2). These alleged facts constitute a prima facie case under ORS 652.414, as well as 652.140, where Respondent has admitted the validity of the underlying wage claims. The Agency's motion for summary judgement regarding recovery of the $46,602.37 paid out from the WSF to reimburse Respondent's employees for wages due and owing is **GRANTED**.

"WSF 25 PERCENT PENALTY

"The Agency contends that recovery of a 25 percent penalty on the sum paid out of the WSF should be automatic, once liability for recovery of the primary sum has been established. ORS 652.414(3) provides, in pertinent part:

> 'The commissioner may commence an appropriate * * * proceeding to recover from the employer * * * liable for the unpaid wages, amounts paid from the Wage Security Fund under subsection (1) of this section. In addition to costs and disbursements, the commissioner is entitled to recover * * * a penalty of 25 percent of the amount of wages paid from the Wage Security Fund or $200, whichever amount is the greater.'

A plain reading of the statute shows that the only condition precedent to recovering this 25 percent penalty is a determination that the Agency is entitled to recover wages paid from the WSF. In this case, the forum has made a determination that the Agency is entitled to re-

cover $46,602.37 paid out by the WSF. 25 percent of that sum is $11,650.59. The Agency's motion for summary judgement regarding whether the commissioner is entitled to recover a 25 percent penalty in the amount of $11,650.59 is **GRANTED**.

"CONCLUSION

"This ruling resolves all issues raised in the pleadings. Since there is no longer any necessity for hearing, the hearing set for September 11, 2001, is cancelled. This interim order will become part of a Proposed Order that will be issued by the undersigned ALJ."

9) On May 21, 2001, the ALJ issued a proposed order that notified the participants that they were entitled to file exceptions to the proposed order within ten days of its issuance. No exceptions were filed.

FINDINGS OF FACT – THE MERITS

1) From March 1 to April 1, 2000, Respondent was an employer in Oregon. During that time, the 50 persons listed in Finding of Fact – Procedural 1 performed work, labor and services for Respondent.

2) From March 1 to April 1, 2000, these 50 employees earned $46,602.37 in wages that Respondent has not paid to them. The specific amounts earned by each employee are listed in Finding of Fact – Procedural 1.

3) When Respondent ceased business operations, those 50 persons filed wage claims and the commissioner determined that the wage claims were valid. Subsequently, the commissioner caused the $46,602.37 claimed by the 50 wage claimants to be paid to those claimants from the WSF.

4) Twenty-five percent of $46,602.37 is $11,650.59.

ULTIMATE FINDINGS OF FACT

1) From March 1 to April 1, 2000, Respondent was an employer in Oregon. During that time, the 50 persons listed in Finding of Fact – Procedural 1 performed work, labor and services for Respondent.

2) From March 1 to April 1, 2000, these 50 employees earned $46,602.37 in wages that Respondent has not paid to them. The specific amounts earned by each employee are listed in Finding of Fact – Procedural 1.

3) When Respondent ceased business operations, those 50 persons filed wage claims and the commissioner determined that the wage claims were valid. Subsequently, the commissioner caused the $46,602.37 claimed by the 50 wage claimants to be paid to those claimants from the WSF.

4) Twenty-five percent of $46,602.37 is $11,650.59.

CONCLUSIONS OF LAW

1) ORS 652.310 provides, in pertinent part:

> "(1) 'Employer' means any person who in this state, directly or through an agent, engages personal services of one or more employees * * *."

During all times material herein, Respondent was an employer is subject to the provisions of ORS 652.110 to 652.200 and 652.310 to 652.414 and the 50 wage claimants listed in Finding of Fact – Procedural 1 were Respondent's employees.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and Respondent herein. ORS 652.310 to 652.414.

3) ORS 652.140(1) and (2) provide:

> "(1) Whenever an employer discharges an employee or where such employment is terminated by mutual agreement, all wages earned and unpaid at the time of such discharge or termination shall become due and payable not later than the end of the first business day after the discharge or termination."
>
> "(2) When an employee who does not have a contract for a definite period quits employment, all wages earned and unpaid at the time of quitting become due and payable immediately if the employee has given to the employer not less than 48 hours' notice, excluding Saturdays, Sundays and holidays, of intention to quit employment. If notice is not given to the employer, the wages shall be due and payable within five days, excluding Saturdays, Sundays and holidays, after the employee has quit, or at the next regularly scheduled payday after the employee has quit, whichever event first occurs."

Respondent violated ORS 652.140 by failing to pay the 50 wage claimants listed in Finding of Fact – Procedural 1 all wages earned and unpaid not later than the end of the business day on April 7, 2000, five days, excluding Saturdays, Sundays and holidays, after termination of the wage claimants' employment.

4) ORS 652.414 provides, in pertinent part:

> "Notwithstanding any other provision of law:
>
> (1) When an employee files a wage claim under this chapter for wages earned and unpaid, and the Commissioner of the Bureau of Labor and Industries determines that the employer against whom the claim was filed has ceased doing business and is without sufficient assets to pay the wage claim and the wage claim cannot otherwise be fully and promptly paid, the commissioner, after determining that the claim is valid, shall pay the claimant, to the extent provided in subsection (2) of this section:

"(a) The unpaid amount of wages earned within 60 days before the date of the cessation of business; or

"(b) If the claimant filed a wage claim before the cessation of business, the unpaid amount of wages earned within 60 days before the last day the claimant was employed.

"(2) The commissioner shall pay the unpaid amount of wages earned as provided in subsection (1) of this section only to the extent of $4,000 from such funds as may be available pursuant to ORS 652.409 (2).

"(3) The commissioner may commence an appropriate action, suit or proceeding to recover from the employer, or other persons or property liable for the unpaid wages, amounts paid from the Wage Security Fund under subsection (1) of this section. In addition to costs and disbursements, the commissioner is entitled to recover reasonable attorney fees at trial and on appeal, together with a penalty of 25 percent of the amount of wages paid from the Wage Security Fund or $200, whichever amount is the greater. All amounts recovered by the commissioner under this subsection and subsection (4) of this section are appropriated continuously to the commissioner to carry out the provisions of this section."

Under the facts and circumstances of this record, and according to the law applicable to this matter, the Commissioner of the Bureau of Labor and Industries may recover from Respondent the $46,602.37 paid to the 50 wage claimants from the Wage Security Fund and sought in the Order of Determination, along with a 25 percent penalty of $11,650.59 assessed on that sum, plus interest until paid. ORS 652.332, ORS 652.414(2).

OPINION

The facts in this case are undisputed, and the issue of liability for both the principal sum of $46,602.37 paid out by the WSF and the 25 percent penalty of $11,650.59 on that sum were resolved in the ALJ's interim order granting the Agency's motion for summary judgment. That ruling is confirmed.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332 and ORS 652.414 and as payment of the unpaid wages and penalty assessed as a result of Respondent's violations of ORS 652.140, the Commissioner of the Bureau of Labor and Industries hereby orders **Hickox Enterprises, Inc.** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, the following:

A certified check payable to the Bureau of Labor and Industries in the amount of FIFTY EIGHT THOUSAND TWO HUNDRED FIFTY TWO DOLLARS AND NINETY SIX

CENTS ($58,252.96), representing $46,602.37 paid out of the Wage Security Fund to the 50 wage claimants listed in Finding of Fact – Procedural 1 and $11,650.59 as a 25 percent penalty on the sum of $46,602.37, plus interest at the legal rate on the sum of $46,602.37 from May 1, 2000, until paid and interest at the legal rate on the sum of $11,650.59 from June 1, 2000, until paid.

In the Matter of

WB PAINTING AND DECORATING, INC.,

Case No. 69-01

Final Order of the Commisioner Jack Roberts

Issued June 29, 2001

SYNOPSIS

Respondent failed to complete and return BOLI's 2000 prevailing wage rate survey by the date BOLI had specified. The Commissioner imposed a $750 civil penalty for Respondent's violation of ORS 279.359(2). ORS 279.359, ORS 279.370; OAR 839-016-0520; OAR 839-016-0530; OAR 839-016-0540.

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on April 24, 2001, in the 10th floor hearings room, State Office Building, 800 NE Oregon, Portland, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Peter McSwain, case presenter, an employee of the Agency. WB Painting & Decorating, Inc. ("Respondent") did not appear at the hearing.

The Agency called Mary Wood, Oregon Employment Department ("Employment Department") project leader, as its only witness.

The forum received into evidence:

a) Administrative exhibits X-1 through X-5 (submitted or generated prior to hearing);

b) Agency exhibit A-1 (submitted prior to hearing).

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

FINDINGS OF FACT – PROCEDURAL

1) On January 9, 2001, the Agency issued a Notice of Intent to Assess Civil Penalties in which it alleged that Respondent unlawfully failed to complete and return the 2000 Construction Industry Occupational Wage Survey ("wage survey") by September 15, 2000, in violation of ORS 279.359(2). The Agency alleged the violation was aggravated by Respondent's failure to complete the 1998 wage survey as required by law, and by the effect Respondent's failure to complete the survey had on the commissioner's ability to accurately determine the prevailing wage rates, including potential skewing of the established rates. The Agency sought a civil penalty of $1,000 for the single alleged violation.

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

3) The Agency served the Notice of Intent on Respondent's agent, Jody Van Damme, on or about January 10, 2001, by certified mail.

4) On January 10, 2001, Michael Bratcher, Respondent's vice president, sent the Agency a letter that included the following unsworn statements:

> "I am responding by denying this information as our firm did indeed complete and submit this survey back on August 23, 2000. This survey was photo copied (sic) and kept in our Boli file. This is my timely written answer to your request and I am re submitting (sic) a photo copy (sic) of the survey which was originally submitted back in August. According to your instructions, I am also requesting a hearing on my receipt of this notice and authorizing, Jody Van Damme, who completed this survey, to appear as W.B. Painting and Decorating, Inc. representative at all stages of the hearing."

Bratcher enclosed a copy of a completed 2000 wage survey for the week of August 9, 2000. It bore the purported signature of "Jody Van Damme" and a handwritten date of "8/23/2000" next to the signature.

5) The Agency filed a request for hearing with the Hearings Unit on March 27, 2001.

6) On March 28, 2001, the Hearings Unit served Respondent with: a) a Notice of Hearing that set the hearing for April 24, 2001; b) a Summary of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case hearing process; and d) a copy of the Notice of Intent.

7) On March 30, 2001, the forum ordered the Agency and Respondent each to submit a case summary including: lists of

all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; and any civil penalty calculations (for the Agency only). The forum ordered the participants to submit their case summaries by April 16, 2001, and notified them of the possible sanctions for failure to comply with the case summary order. The forum also provided a form that Respondent could use to prepare a case summary.

8) The Agency filed a case summary on April 10, 2001, and a supplemental case summary on April 16, 2001. Respondent did not file a case summary.

9) Respondent did not appear at the time set for hearing and nobody appeared on Respondent's behalf. No one had notified the forum that Respondent would not be appearing at the hearing. Pursuant to OAR 839-050-0330(2), the ALJ waited thirty minutes past the time set for hearing. When no one had appeared on Respondent's behalf, the ALJ declared Respondent to be in default and commenced the hearing.

10) Pursuant to ORS 183.415(7), the ALJ verbally advised the Agency of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

11) On May 21, 2001, the ALJ issued a proposed order that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. On May 22, 2001, the Agency filed exceptions to the proposed order. Those exceptions are discussed in the Opinion section of this Final Order.

FINDINGS OF FACT – THE MERITS

1) At all material times, Respondent was a construction contractor based in Gresham, Oregon and employed workers on construction projects. Respondent engaged in non-residential construction during 2000.

2) The Research and Analysis section of the Employment Department contracted with BOLI in 1998, 1999, and 2000 to conduct wage surveys. The BOLI Commissioner planned to, and did use the survey to aid in the determination of the prevailing wage rates in Oregon.

3) As part of its contract with BOLI, the Employment Department maintained electronic files showing the name of each business contractor to whom wage survey packets were sent, the address where the packets were sent, whether it was returned, the date the packet was sent for the respective year in which it was sent, whether or not it was timely returned, and when the survey was returned if it was.

4) On September 8, 1998, the Employment Department sent Respondent a wage survey packet, which included a postage paid envelope for return of the survey. The packet clearly gave notice that its completion and return was required by law and violation could result in the assessment of

civil penalties. The packet instructed Respondent to complete and return the survey within two weeks of receiving it.

5) Respondent did not complete and return the 1998 wage survey packet.

6) On August 28, 2000, the Employment Department sent Respondent a 2000 wage survey packet, which included a postage paid envelope for return of the survey. The packet clearly gave notice that its completion and return was required by law and violation could result in the assessment of civil penalties. The packet instructed Respondent to complete and return the survey by September 15, 2000. Reminder cards were sent to Respondent on September 26 and October 16, 2000, indicating that the wage survey had not been received, that Respondent was required to complete and return it by law, and that penalties could be imposed. The second reminder card was also stamped "Final Notice."

7) On January 9, 2001, the Agency issued the Notice of Intent to Assess Civil Penalty against Respondent for its failure to return the 2000 wage survey. In a cover letter accompanying the Notice, the Agency stated that it still had not received the completed survey. The letter further stated that "[T]he penalty amount is based on the premise that you will be completing the enclosed 2000 survey and returning the completed, accurate form to the Bureau on or before February 2, 2001. If you fail to complete and return the 2000 survey, the Bureau will move to amend the Notice of Intent to substantially increase the amount of civil penalties."

8) The Employment Department received a completed 2000 wage survey packet from Respondent on January 17, 2001. That survey form listed multiple workers who were paid prevailing wage rate on non-residential construction jobs during the week of August 9, 2000. By this time, data received from 2000 wage survey packets had already been processed and Respondent's data could not be used in the commissioner's determination of prevailing wage rates.

9) In the year 2000, the Employment Department sent out all wage survey packets on August 28, 2000. It received no requests from any construction contractor, including Respondent, to receive the packet before that date.

10) The Employment Department received a completed 2000 wage survey from Respondent on January 17, 2001. It had not received a completed survey from Respondent before that date.

11) The Employment Department and the Agency sent all the above-mentioned documents to Respondent's correct address by first-class or certified mail.

12) Respondent knew or should have known of its failure to timely complete and return the 2000 wage survey.

ULTIMATE FINDINGS OF FACT

1) Respondent is an Oregon employer.

2) The commissioner conducted a wage survey in 2000 that required persons receiving the surveys to make reports or returns to the Agency for the purpose of determining the prevailing rates of wage.

3) Respondent received the 2000 wage survey packet.

4) Respondent failed to return the completed survey by September 15, 2000, the date specified by the commissioner. Respondent did not return the completed survey until January 17, 2001, by which time the commissioner's prevailing wage rate determination based on the 2000 wage survey was already completed.

CONCLUSIONS OF LAW

1) ORS 279.359 provides, in pertinent part:

> "(2) A person shall make such reports and returns to the Bureau of Labor and Industries as the commissioner may require to determine the prevailing rates of wage. The reports and returns shall be made upon forms furnished by the bureau and within the time prescribed therefor by the commissioner. The person or an authorized representative of the person shall certify to the accuracy of the reports and returns.
>
> "* * * * *
>
> "(5) As used in this section, 'person' includes any employer, labor organization or any official representative of an employee or employer association."

Respondent was a person required to make reports and returns under ORS 279.359(2). Respondent's failure to return a completed 2000 wage survey by September 15, 2000, violated ORS 279.359(2).

2) ORS 279.370 provides, in pertinent part:

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

OAR 839-016-0520 provides:

> "(1) The commissioner shall consider the following mitigating and aggravating circumstances when determining the amount of any civil penalty to be assessed against a contractor, subcontractor or contracting agency and shall cite those the commissioner finds to be applicable:
>
> "(a) The actions of the contractor, subcontractor, or contracting agency in responding to previous violations of statutes and rules.
>
> "(b) Prior violations, if any, of statutes and rules.

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

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

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

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

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

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

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

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

"* * * * *

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

"* * * * *

"(i) Failure to submit reports and returns in violation of ORS 279.359(2)[.]"

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

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

"* * * * *

"(5) The civil penalty for all * * * violations [other than violations of ORS 279.350 regarding payment of the prevailing wage] shall be set in accordance with the determinations and considerations referred to in OAR 839-016-0530."

The Commissioner has exercised his discretion appropriately by imposing a $500.00 civil penalty for Respondent's violation of ORS 279.359(2).

OPINION

DEFAULT

Respondent failed to appear at hearing and was held in default pursuant to OAR 839-050-0330. When a respondent defaults, the Agency must establish a prima facie case to support the allegations

of the charging document. *In the Matter of Vision Graphics and Publishing, Inc., 16 BOLI 124, 136 (1997).* The Agency met that burden in this case, as discussed *infra*.

THE AGENCY'S PRIMA FACIE CASE

To prove a violation of ORS 279.359(2), the Agency must show that:

> (1) Respondent is a "person;"
>
> (2) The commissioner conducted a survey in 2000 that required persons receiving the surveys to make reports or returns to the Agency for the purpose of determining the prevailing rates of wage;
>
> (3) Respondent received the commissioner's 2000 survey; and
>
> (4) Respondent failed to make the required reports or returns within the time prescribed by the commissioner.

In the Matter of F.R. Custom Builders, 20 BOLI 102, 109-10 (2000). The completed 2000 wage survey form that was submitted by Respondent on January 17, 2001, establishes that Respondent had employees during 2000 and that Respondent was a "person" for purposes of ORS 279.359. The Agency's uncontested evidence establishes that the Commissioner conducted a wage survey in 2000 requiring people to return completed survey forms by September 15, 2000. Respondent's failure to deny that it received the forms constitutes an admission that Respondent received the forms. OAR 839-050-0130(2). Respondent's actual submission of the forms cements this conclusion. The only question at issue is whether Respondent failed to make the required reports or returns by September 15, 2000.

In Respondent's answer, Respondent's vice president Bratcher asserts that Respondent completed and returned the 2000 wage survey forms on August 23, 2000. Bratcher enclosed a completed copy of those forms bearing the purported signature of "Jody Van Damme" and a handwritten date of "8/23/2000" next to the signature. In a default situation, the forum may give some weight to unsworn assertions contained in a respondent's answer. Such assertions are overcome whenever they are controverted by other credible evidence. *In the Matter of Jack Mongeon, 6 BOLI 194, 200 (1987).* The Agency rebutted Respondent's assertion by providing credible testimony from Mary Wood of the Employment Department, an affidavit from James Lee, a research analyst in the Employment Department, and a print-out of records routinely maintained by the Employment Department establishing that no wage survey forms were mailed out prior to August 28, 2000, and that Respondent's wage survey was received on January 17, 2001. This evidence is sufficient to overcome Respondent's unsworn assertion that it returned

completed 2000 wage survey forms on August 23, 2000. By failing to return a completed survey by September 15, 2000, Respondent violated ORS 279.359(2).

CIVIL PENALTY

The Commissioner may impose a penalty of up to $5,000 for Respondent's violation of ORS 279.359(2). In this case, the Agency seeks a $1,000 civil penalty. In determining the appropriate size of the penalty, the forum must consider the factors set out in OAR 839-016-0520. In this case, there are several aggravating circumstances alleged and proved by the Agency. First, Respondent also failed to complete and return the survey in 1998. *See In the Matter of Rogelio Loa*, 9 BOLI 139, 146 (1990). Second, it would have been relatively easy for Respondent to comply with the law by returning the wage survey, and the Agency gave Respondent several opportunities to comply before issuing the Notice of Intent. Third, because it received warnings from the Agency and because of the 1998 mailing, Respondent knew or should have known of the violation. There are no mitigating factors. The forum does not consider Respondent's eventual submission of the 2000 wage survey forms as a mitigating factor for the reason that the submission came too late to be included in the data used in the Commissioner's prevailing wage rate determinations.

In previous cases where a Respondent has performed nonresidential construction work and untimely submitted the Commissioner's wage survey form or not submitted it at all, the Agency sought a $500 civil penalty for each violation and did not allege any prior failures to complete and return the Commissioner's wage survey as aggravating circumstances. With one exception,[1] in each of those cases the forum imposed the sought-after $500 penalty. *In the Matter of Green Planet Landscaping, Inc*., 21 BOLI 130 (2000); *In the Matter of Schneider Equipment, Inc*., 21 BOLI 60 (2000); *In the Matter of Martha Morrison*, 20 BOLI 275, 287 (2000); *F.R.Custom Builders*, 20 BOLI at 111. In this case, the Agency seeks $1,000 for one violation and has alleged Respondent's failure to complete and return the Commissioner's 1998 wage survey as an aggravating circumstance, rather than seeking a separate penalty for it. Under these circumstances, the forum finds that a $750 civil penalty is appropriate.

THE AGENCY'S EXCEPTIONS

In its exceptions, the Agency raised several issues.

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[1] *See In the Matter of Martha Morrison*, 20 BOLI 275, 286 (2000) ($250 penalty imposed for contractor's 1998 violation where she employed no construction workers in 1998 and her failure to return the 1998 wage survey would have had no impact on the accuracy of the Agency's prevailing wage rate determination.)

First, that the ALJ's conclusion that the 1999 wage survey was received on time was erroneous. In response, the forum has deleted its finding of fact related to that survey and has not relied on it as an aggravating or mitigating factor.

Second, the Agency asserted that the statement in James Lee's affidavit that the 2000 survey "was to be used * * * to aid in the determination of the prevailing wage rates in Oregon and was, in fact, used for such a purpose" carries with it the unavoidable conclusion that failure to submit the survey "could result in skewing of the established rates." In prior wage survey cases before this forum, the Agency introduced evidence that the absence of a single contractor's data could adversely affect the accuracy of the Agency's prevailing wage determination. *See, e.g.*,*Schneider*, 21 BOLI at 73. In this case, no such evidence was presented. In its absence, the forum declines to take what amounts to official notice of the conclusion sought by the Agency.

Third, the Agency contends that the submission of a completed survey by Respondent with a false date is an aggravating factor. Because this was not alleged as an aggravating factor in the Agency's Notice of Intent, the forum will not consider it as an aggravating factor.[2]

The Agency's fourth, fifth, and sixth exceptions provide different reasons why the forum should increase the $500 civil penalty proposed in the proposed order. In response to those exceptions, the forum has increased its civil penalty assessment to $750.

ORDER

NOW, THEREFORE, as authorized by ORS 279.370 and as payment of the penalty assessed as a result of Respondent's violation of ORS 279.359(2), the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **WB Painting and Decorating, Inc.** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232, a certified check payable to the Bureau of Labor and Industries in the amount of SEVEN HUNDRED AND FIFTY DOLLARS ($750.00), plus any interest that accrues at the legal rate on that amount from a date ten days after issuance of the Final Order and the date Respondent complies with the Final Order.

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[2] Respondent had not yet submitted its survey at the time the Notice of Intent was issued.

In the Matter of

WB PAINTING AND DECORATING, INC.,

Case No. 69-01
Amended Final Order of the Commissioner Jack Roberts
Issued July 13, 2001

Ed.: The final order in this case initially was issued on June 29, 2001, and published at 22 BOLI 18 (2001). The Commissioner later discovered that the order had been issued with a typographical error in the sentence immediately preceding the Opinion section. On July 13, 2001, the Commissioner issued an amended final order identical to the original order except that a Finding of Fact was added to the Procedural Findings of Fact and the aforementioned typographical error was corrected. The editors have decided to publish only these changes rather than reprinting the entire order. The final order should be cited as: 21 BOLI 18, *as amended* 21 BOLI 27 (2001). Persons wishing a complete copy of the amended final order should contact the Hearings Unit of the Bureau of Labor and Industries.

The added Procedural Finding of Fact is:

"12) On June 29, 2001, the Commissioner issued a Final Order. This Amended Final Order corrects the figure "$500.00" where it appears on page 8, line 23 of the Final Order to $750.00," the civil penalty actually assessed in the Final Order."

The sentence immediately preceding the Opinion section was changed to read:

"The Commissioner has exercised his discretion appropriately by imposing a $750.00 civil penalty for Respondent's violation of ORS 279.359(2).

In the Matter of

WAL-MART STORES EAST, INC. dba Wal-Mart

Case No. 16-00
Final Order of the Commissioner Jack Roberts
Issued July 13, 2001

SYNOPSIS

Where the Agency failed to establish by a preponderance of the evidence that Complainant, a married woman dating an unmarried male co-worker, had been subjected to harassment because of her marital status and the marital status of the co-worker with whom she associated, or that Respondent discharged Complainant because of her marital status and the marital status of the co-worker

with whom she associated, the Commissioner dismissed the complaint and specific charges. ORS 659.030(1)(a) and (b); OAR 839-007-0550.

———————

The above-entitled case came on regularly for hearing before Linda A. Lohr, designated as Administrative Law Judge ("ALJ") by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on December 12 and 13, 2000, at the Medford office of the Bureau of Labor and Industries, located at 700 East Main, Suite 105, Medford, Oregon.

David K. Gerstenfeld, an employee of the Agency, represented the Bureau of Labor and Industries ("BOLI" or "the Agency"). Cathleen Ann Sliger ("Complainant") was present throughout the hearing and was not represented by counsel. David G. Hosenpud, Attorney at Law, represented Wal-Mart Stores East, Inc. ("Respondent"). Tom Cornehlsen, Respondent's district manager, was present throughout the hearing as Respondent's corporate representative.

In addition to Complainant, the Agency called as witnesses: Kim Powell, a Respondent store customer; Respondent's Medford store manager Michael Daulton; Respondent's district manager Tom Cornehlsen; Respondent's former assistant store manager Blaine Woodard; current store employees: Nancy Mahan, Johanna Johnson, Rebecca Medina; former store employees: Hope Meek and Matthew Medina; Judy Ann Frazier, Complainant's mother; Beverly Smith, an adjudicator for the Oregon State Employment Department (by telephone); and, Peter Martindale, a BOLI civil rights investigator.

Respondent called as witnesses: Respondent's Medford store manager Michael Daulton; Respondent's district manager Tom Cornehlsen; Respondent's former assistant store manager Blaine Woodard; and, current store employees: Ray Volkers, June Keith, Lorena Miller, and Sally Montgomery.

The forum received as evidence:

a) Administrative exhibits X-1 through X-35;

b) Agency exhibits A-1, A-3, A-5, A-6 through A-9, and A-30 (stipulation of the participants) and A-2, A-4, A-10 through A-24, and A-26 through A-40 (submitted at hearing);

c) Respondent exhibits R-8, R-9, R-42 through R-44, and R-46 (stipulation of the participants) and R-1 through R-7, R-10 through R-41, and R-45 (submitted at hearing).

Having fully considered the entire record in this matter, I, Jack Roberts, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact (Procedural and on the Merits), Ultimate Findings of

Fact, Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) On February 13, 1998, Complainant filed a verified complaint with the Agency's Civil Rights Division ("CRD") alleging she was the victim of the unlawful employment practices of Respondent based on Respondent's termination of Complainant on November 2, 1997. After investigation and review, the CRD issued a Notice of Substantial Evidence Determination finding substantial evidence supporting the allegations regarding Respondent's discharge of Complainant.

2) On November 22, 1999, the Agency submitted to the forum specific charges alleging Respondent discriminated against Complainant by discharging her based on her marital status and marital status of the person with whom she associated, in violation of ORS 659.030(1)(a) and ORS 659.029. The Agency also requested a hearing.

3) On November 29, the forum served on Respondent the Specific Charges, accompanied by the following: a) a Notice of Hearing setting forth March 14, 2000, in Medford, Oregon, as the time and place of the hearing in this matter; b) a notice of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case process; and d) a separate copy of the specific administrative rule regarding responsive pleadings.

4) On December 29, 1999, Respondent, through counsel, filed a timely answer to the specific charges.

5) On January 21, 2000, the forum ordered the Agency and Respondent each to submit a case summary including: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a brief statement of the elements of the claim (for the Agency only); a brief statement of any defenses to the claim (for Respondent only); a statement of any agreed or stipulated facts; and any damages calculations (for the Agency only). The ALJ ordered the participants to submit case summaries by March 3, 2000, and notified them of the possible sanctions for failure to comply with the case summary order.

6) On January 31, 2000, the Agency filed a motion requesting partial summary judgment as to Respondent's First Affirmative Defense that "Complainant was an at-will employee and could be terminated at any time and for any reason."

7) On February 3, 2000, BOLI Legal Policy Advisor Marcia Ohlemiller notified Respondent of Division 50 rule changes and provided Respondent a copy of the amended Contested Case Hearing Rules, OAR 839 Division 50, which were effective January 27, 2000.

8) On February 9, 2000, Respondent filed an amended answer to the specific charges withdrawing its First Affirmative Defense and included its "first request for production." The Agency subsequently withdrew its motion for partial summary judgment.

9) On February 14, 2000, the Agency moved for a discovery order requesting that Respondent produce 18 categories of documents.

10) On February 17, 2000, Respondent moved to postpone the hearing based on its need to complete discovery and coordinate out of state witness testimony. The Agency did not object to a postponement. Accordingly, the ALJ granted the motion and the hearing was reset to commence on June 13, 2000.

11) On February 25, 2000, Respondent filed a response to the Agency's motion for discovery order indicating it had already produced documents responsive to some of the categories of requested documents and that there were no relevant documents responsive to other categories. Respondent had specific objections to three categories of the requested documents.

12) On February 29, 2000, the ALJ conducted a prehearing conference with Respondent's counsel and the Agency case presenter regarding the Agency's motion for discovery order. At the conclusion of the conference, after narrowing the scope of the Agency's request, the ALJ ordered Respondent to provide to the Agency three categories of documents that included records showing other Respondent employees in Oregon who have been disciplined for creating a "hostile work environment," "for spreading rumors and lies," and those disciplined in any manner between June 1, 1995, and June 1, 1998. The ALJ issued an interim order on March 1, 2000, summarizing the previous day's oral ruling.

13) On March 3, 2000, the ALJ amended the interim order ruling on the Agency's motion for discovery order to conform to OAR 839-050-0200(1) that requires the ALJ to notify participants of the possible sanction, pursuant to OAR 839-050-0200(11), for failure to provide the discovery ordered.

14) On May 12, 2000, in response to the Agency's May 9, 2000, letter requesting clarification of the case summary filing deadline, the ALJ issued a case summary order extending the deadline for filing case summaries to June 1, 2000.

15) Respondent and the Agency filed timely case summaries on May 30 and June 1, 2000, respectively. On June 5, 2000, Respondent filed an amended case summary. On June 7, 2000, Respondent filed a second amended case summary that included an additional exhibit.

16) On June 8, 2000, the Agency copied the Hearings Unit with a letter from the Agency case

presenter to Respondent's counsel requesting that Respondent make available for cross-examination the "document preparers" of certain exhibits submitted with Respondent's case summary.

17) On June 9, 2000, Respondent copied the Hearings Unit with a letter dated June 8, 2000, directed to the Agency case presenter, opposing the Agency's request that Respondent make available for cross-examination 27 different witnesses whose signatures appear on documents Respondent submitted as exhibits in its case summary.

18) On June 8, 2000, the Agency case presenter notified the ALJ and Respondent, in writing, of his grandmother's serious health condition and stated, in part: "Because of this, I may be asking for an emergency postponement of the hearing currently scheduled to begin next Tuesday." On June 9, 2000, Respondent copied the Hearings Unit with a letter dated June 8, 2000, directed to the Agency case presenter stating, in part: "I am sorry to hear about your grandmother's serious medical condition. If you intend to ask for a postponement of the hearing scheduled for June 13, 2000, please let me know as soon as possible. I have relevant witnesses who were part of the decision making management group flying in to Oregon from different parts of the country. * * *"

19) On June 9, 2000, the ALJ contacted the Agency case presenter and Respondent's counsel, separately, to schedule a prehearing conference regarding the likelihood of postponement. The same day, pursuant to OAR 839-050-0310, the ALJ issued an interim order memorializing his separate oral communications.

20) On June 9, 2000, the ALJ conducted a prehearing conference with Respondent's counsel and the Agency case presenter to discuss postponement of the hearing based on the serious medical condition of the case presenter's grandmother. As a result of the prehearing conference, the ALJ issued an interim order rescheduling the hearing to begin on December 12, 2000.

21) On November 22, 2000, the Agency filed a supplemental case summary.

22) On November 27, 2000, the Agency filed a second supplemental case summary.

23) On December 5, 2000, the ALJ assigned was changed from Alan McCullough to Linda Lohr.

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

25) On March 16, 2001, the ALJ issued a proposed order and notified the participants they were entitled to file exceptions to the proposed order. After receiving an extension of time to file its exceptions, the Agency filed timely

exceptions which are addressed in the opinion section of this Final Order.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Wal-Mart Stores East, Inc. was a foreign corporation operating retail establishments under the assumed business name Wal-Mart ("Respondent"), and was an Oregon employer utilizing the personal services of one or more persons.

2) At all times material herein, Complainant was a married female.

3) Respondent employed Complainant as a cashier on or about May 7, 1997. She was an hourly employee in Respondent's Medford, Oregon, store ("Medford store") and earned $6.24 per hour. Complainant worked initially as a seasonal employee in the Medford store's garden center until the season ended, sometime in August or September, when she was transferred to a sales cashier position for a short time and then to the cosmetics department.

4) Sometime in July 1997, Complainant began dating Chris Bagg, an unmarried male co-worker, who worked as an hourly employee in the Medford store's garden center. It was common knowledge among Complainant's co-workers that she and Bagg were dating.

5) Sometime after Complainant began dating Bagg, Respondent's personnel manager, Lorene Miller, observed Complainant and Bagg quickly letting go of each other's hands as Miller approached them. Complainant and Bagg were grinning and Miller said: "Hey, hey, hey, I saw that. That's a married woman, you know." Complainant responded, "Not for long. I'm almost divorced," whereby Miller quipped: "Being almost divorced is like being almost pregnant, you're not until you are."

6) As personnel manager, Miller was an hourly employee whose primary responsibilities were preparing payroll, hiring employees, and processing workers' compensation claims. She did not have authority to fire or discipline employees. Although her comments to Complainant were made in jest, she believes "adulterous relationships are morally inappropriate" and expressed that sentiment once during a casual conversation with Respondent's assistant store manager, Blaine Woodard. Her comment to Woodard was not made in reference to Complainant or Bagg.

7) Complainant lived intermittently with her husband, Sean Sliger, during her employment with Respondent. On or about July 3, 1997, Complainant obtained a temporary restraining order ("TRO") against Sliger because he was abusive and she feared for her safety. She had experienced ongoing domestic problems and the TRO was one of many she filed throughout her nine-year marriage to Sliger. She discussed her marital troubles and

the resultant TRO with some of her co-workers and Woodard.

8) Woodard spoke with Sliger once in person and had two telephone conversations with him. During each conversation, Sliger used profanity and accused Woodard of allowing Complainant and Bagg's relationship to continue. Woodard advised Sliger that anything that happened off the store's premises was not Woodard's business.

9) Store personnel, particularly Woodard, were very supportive of Complainant after the TRO issued and made efforts to protect Complainant from Sliger while she was at the Medford store.

10) Sometime during her employment with Respondent, Complainant filed a written complaint that co-worker Gary Bass sexually harassed her by making inappropriate comments. Six other female employees also complained, at least verbally, that Bass made inappropriate comments in the workplace. Respondent immediately conducted an investigation and Bass admitted verbally harassing the female employees. After the investigation, Respondent terminated Bass on September 21, 1997, for "serious harassment" and "inappropriate conduct."

11) During the Bass investigation, store manager Michael Daulton interviewed Complainant and Bass. Based on comments made by Bass and Complainant about Chris Bagg, Daulton asked Complainant if she was dating Bagg.

12) Respondent's fraternization policy, published in Respondent's corporate employee handbook and in effect at times material, stated in part:

> "The intent of this policy is to support the Company's commitment to provide all Associates a workplace free of sexual misconduct or behaviors that hinder our objective to serve our Customers and to maintain a safe and productive workplace. It is also intended to ensure that Associates are not improperly disadvantaged because of a romantic relationship between a Supervisor and another Associate.
>
> "Wal-Mart Associates are expected to conduct themselves in a manner that promotes respect, trust, safety, and efficiency in the workplace. It is against Company policy for a Supervisor to become romantically involved with an Associate he or she supervises or with an Associate whose terms and conditions of employment he or she may have the ability to influence. Romantic relationships between a member of the facility's Management team and a Vendor's Associate that work within the same facility are also prohibited. Associates who violate this policy will be subject to immediate termination."

13) Respondent's policy does not forbid romantic relation-

ships between hourly, non-supervisory associates.

14) Respondent's policy does forbid socializing among the employees during work hours, including romantic displays of affection, irrespective of the marital status of the employees.

15) While employed with Respondent, Complainant had read the corporate employee handbook and was aware of the fraternization policies contained therein.

16) Respondent's harassment policy, published in the corporate employee's handbook and in effect at times material, stated in pertinent part:

> "Harassment/inappropriate conduct is defined broadly and includes but is not limited to: welcome or unwelcome conduct which causes fear or intimidation, creates an offensive or hostile work environment, or interferes with an Associate's work performance.
>
> " * * * * *
>
> "Gossiping or spreading rumors or lies about other Associates can also create a hostile environment by interfering with an individual's job performance.
>
> " * * * * *
>
> "If the conduct complained of was harassment/inappropriate conduct, appropriate disciplinary action will be taken. Such action may range from coaching to immediate termination. * * * "

At all times material, Complainant was aware of the harassment policy and knew employees could be terminated for gossiping or spreading rumors or lies about other employees.

17) Between February 1996 and October 1997, Respondent terminated at least 26 employees in Oregon for violations of company policies including, but not limited to: sexual harassment, creating a hostile work environment by use of foul language in front of customers, inappropriate and unacceptable conduct in the workplace, fraternization between a manager and an hourly employee, public display of romantic behavior, and offensive language toward other employees. In January 1997, Respondent terminated an Oregon employee for "starting rumors and creating problems between other associates in the workplace."

18) Sometime in October 1997, a rumor began circulating in the workplace that store manager Michael Daulton and an hourly non-supervisory employee, Sally Montgomery, were seen kissing and hugging in the store's parking lot on or about October 7, 1997. At all times material, Daulton and Montgomery were married, but not to each other.

19) Throughout October 1997, store employee Chris Bagg told numerous co-workers, including Complainant, that he was in the store's parking lot smoking a

cigarette when he observed Daulton and Montgomery kissing. Many of those co-workers repeated to others what Bagg related to them about Daulton and Montgomery.

20) During the same time period, another store employee, Hope Meek, told at least two co-workers, including Complainant, some version of having seen Daulton and Montgomery with their "arms on each other" in the parking lot while Meek was waiting for her husband to finish his shift at the store.

21) During October 1997, Complainant repeated what she was told by Bagg and Meek to at least one other co-worker, Johanna Johnson, who also heard Complainant discussing the rumor with others in the workplace. Complainant also discussed the parking lot incident with store customer, Kim Manbeck.

22) Around October 11, 1997, store employee Nancy Mahan told Daulton that "June" of the garden center told her five employees had seen Daulton and Montgomery kissing in the parking lot. Daulton appeared to Mahan to be "shocked and hurt" at the information. Daulton immediately told his wife what he had been told about the rumor. He was upset and concerned about the damage that type of rumor could cause to his family and career. He reported his concerns to Respondent's district manager Tom Cornehlsen, denied a romantic relationship with Montgomery, and requested an investigation into the matter.

23) About the same time, Cornehlsen received an undated letter, signed: "Hattie Joens, that is pronounced Gins, everyone gets it wrong." The writer said she was an offended customer who saw Daulton and Montgomery "last Tuesday at approximately 7:30 p.m. * * * engaging in some very heavy kissing and petting." The writer claimed there were four or five other store employees who witnessed the incident. She concluded by stating she would "continue to be a Wal-Mart customer for many years to come if the good Lord permits this old lady to live." Cornehlsen was unable to verify the letter writer's name.

24) On October 25, 1997, Cornehlsen went to the Medford store to interview employees about their knowledge of the alleged kissing incident. Numerous employees were interviewed, including Complainant. Blaine Woodard was present during most of the interviews, including Complainant's. Before the meeting, Woodard had previously obtained written statements from some of the employees who had been told about the alleged incident by co-workers. Only Bagg and Meek could be identified as employees who purportedly witnessed Daulton and Montgomery kissing in the parking lot. Cornehlsen, accompanied by Woodard, first interviewed Bagg and Meek to determine the validity of the comments being made about Daulton and Montgomery.

25) During the interview, Bagg denied actually observing Daulton and Montgomery kissing or embracing and told Cornehlsen that Meek "saw what happened." Meek claimed to be unsure of what she saw because of the angle from which she was making her observation and told Woodard and Cornehlsen she saw Daulton and Montgomery "touching" and "assumed" the two were kissing.

26) Based on Daulton's denial and the results of the Bagg and Meek interviews, Cornehlsen and Woodard determined there was no evidence to substantiate the rumor and focused the remaining investigation on squelching the rumor. All employees interviewed, including Complainant, were asked what they knew and who told them. All were told to stop spreading the rumor, including Complainant.

27) During her interview, neither Cornehlsen nor Woodard asked Complainant about her relationship with Bagg. Complainant was only asked what she knew about the alleged kissing incident and how she knew it. She was told there would be consequences for anyone who continued to spread the rumor. All of the employees interviewed were told the same thing.

28) Sometime during the investigation, Complainant reported to Woodard she had overheard store employee, Ray Volkers, discussing the rumor with five or six other employees in the break room. Woodard interviewed Volkers and the other employees and found no evidence to support Complainant's allegation.

29) On or about October 26, 1997, seven employees submitted written statements, two unsigned, implicating Complainant, Bagg, and Meek in continuing to discuss the rumor about Daulton and Montgomery in the Medford store on October 26.

30) In an unsigned statement dated October 26, 1997, the writer stated:

> "Sunday afternoon. Today when I came to work there was a "Buzz" about the associates. I had been off for a couple of days and wondered what was going on. While on my lunch hour I asked Linda Reed what was going on – she very politely responded that she 'couldn't talk about it!' I respected that and dropped the conversation. I went into the break room, where Hope Meek, Bonnie (Toys), Shannon [illegible last name], and Cathleen (Cosmetics) were located. Bonnie & Hope were having a conversation. Bonnie was reasurring [*sic*] Hope that something was not her fault. Hope replied that she didn't want to be the one to tell on him. Him who, I wondered, but didn't ask. Shannon sat quietly & did not include herself in the conversation. Bonnie left.
>
> "Hope looked upset. I asked Hope if she was O.K. She said 'You don't know what's going on, do you?' I replied no, but was hoping someone would

tell me. Hope replied 'I don't want to be the one to tell you. Cathleen, you tell her!' Cathleen whispered in my ear that we might be getting a new store manager. I shrugged my shoulders, not knowing what to say. She then whispered to me that Mike was caught making out with Sally.

"I was shocked. I took Cathleen out into the hall and asked her if she was serious or just kidding. I thought it was a joke. She said that Hope was sitting in her car waiting for Ken and saw Mike and Sally kissing. She also said that Chris in garden center had watched Mike and Sally kissing in the parking lot. She said that Mike was trying to fire Chris because of that. She mentioned that Cornehlsen told Mike to resign or be fired and Sally was fired already. Hope then came out and repeated the story. At the end of my break my friend in electronics asked me what was going on – Between the 2 of us we decided this information was too damaging and we wouldn't discuss it any further."

31) Another statement dated October 26, 1997, and signed "Toni cashier," read: "I heard it from Hope [and] Kathleen bits and pieces about what they saw and what happened [illegible] they were kissing, making out in the parking lot. That is all I heard."

32) A statement dated October 26, 1997, signed Martin Garcia read:

"Chris from garden came up to me in McDonald's & basically said that he saw Mike & Sally kissing in parking lot & that is why Tom C. was here yesterday. He also said that Tom had Hope demonstrate what she had [seen] and at the time Hope was walking by and said that is what happened and expressed concern about loosing [*sic*] her job. I told her that if Tom asked her then she had nothing to worry about."

33) A statement dated October 26, 1997, "From Stockman Shane" read:

"I heard from cashier Krystal at about 4:15 p.m. on Sunday October 26 that she heard that Mike and Sally had an affair out in the parking lot about 3 weeks ago."

34) A statement dated "10/26" and unsigned read:

"To whom it may concern – I was approached by an associate tonight and was told some things I shouldn't know or want to know.

"I was told Sally was fired and Mike was on his way out too. The cameras captured everything – she didn't exactly say what 'everything' was – and there were 5 witnesses.

"This was told to me by Terry in shoes."

35) A statement dated October 26, 1997, signed "Cashier Linda," read:

"I was told on the 25th by cashier Hope that she was called into the office to talk to Tom C. It was about seeing Mgr. Mike and Sally in the parking lot doing you know what (making out) and that it was on camera.

"I told her to not say anything to anyone else, she did the right thing by telling what she saw. She has spoken to me at least 4 times today. I know she has told cashier Tony and Tony came to me about this also. Hope said that there were other people that Tom C. called into the office."

36) A statement dated October 26, 1997, signed "Krystal [illegible last name] read:

"I called Hope at her register to find out if everything was O.K. because I saw that yesterday she was pulled into the office with Blaine. She told me that it didn't have anything to do with her. She then told me that it had to do with Mike. Then she told me to come to her register and she would tell me. It took me about 10 min. to get over their [*sic*]. The first thing she said was just 'Mike and Sally' I asked her what about them and she said that Mgt. wanted to know about something she had seen. Basically, she was waiting for her husband one night about 3 weeks ago and that she saw Mike and Sally, she didn't elaborate as to what she saw. But she did say that she didn't even tell her husband so she didn't know how anyone knew unless the security cameras saw her standing outside the same time whatever happened. Then the conversation ended because I had a customer at my register."

37) Based on their employee interviews and the written statements cited in Findings of Fact – the Merits, numbered 30 through 36, Cornehlsen and Woodard concluded Bagg and Complainant continued to spread the same rumor about Daulton and Montgomery after they were told to stop. Cornehlsen and Woodard believed the two conspired to perpetrate and perpetuate the rumor and were more culpable than Meek, who Cornehlsen believed had been "duped" by Complainant and Bagg.

38) On November 2, 1997, Cornehlsen terminated Complainant and Bagg for "violation of company policy" and "creating a hostile work environment" by continuing to spread the rumor about Daulton and Montgomery. Meek was not disciplined or terminated for her part in perpetuating the rumor.

39) During Complainant's exit interview, Cornehlsen told Complainant she was being terminated because she and Bagg had continued to spread the rumor about Daulton and Montgomery despite being told to stop. Complainant signed the exit interview form on November 2, 1997.

40) Beverly Smith, an unemployment insurance adjudicator for the Oregon State Employment

Department in Medford, Oregon, was assigned to administer Complainant's claim for unemployment benefits filed after Respondent terminated her employment. On November 19, 1997, Smith interviewed Complainant by telephone about the termination of her employment and the events preceding the termination. Smith documented Complainant's statement on her computer at the same time Complainant related her story. The statement in its entirety says:

> "I got a call from a coworker, Hope. She told me she had witnessed managers in the parking lot embracing. She didn't say who [*sic*]. I told her that Chris (my boyfriend) had seen the same thing. She was upset. I went to work and was in the breakroom and support mgr. Ray was in there and some other associates were talking about Mike and Sally in the parking lot. Someone asked Ray if he knew about the rumor and he said, which one? There are at least 6 rumors flying around this place. They said, you know, Mike and Sally. He said we are supposed to keep that one hush hush. Then he proceeded to sit down and talk about it quietly to one of the associates. Several hrs later he asked people to sign statements about what they had heard. I didn't feel that was right since he had participated in it. I told my manager, Blaine. He said I should talk w/Mike, the store mgr. I didn't feel that was right since he was the one people were talking about. Everyone in the store was talking about it. On 10/29 the district mgr, Tom came in and wanted to talk with me about what I knew. I told him. I told everything I knew. He asked where Chris (my boyfriend and coworker) fit in. I said he saw the same thing. I told him that Hope had called me. He asked me about Chris and I told him that Chris had been at my house when Hope called. He asked whether my divorce was finalized. I told him not yet. He clearly didn't think it was right I was dating Chris before my divorce was finalized. He wanted to know if we were intimate. I told him I didn't feel it was any of his business.
>
> "Later, Blaine who is a mgr. told me that mgmt didn't agree with the fact that I was still legally married and dating. He said that they were going to blame Chris and myself for the rumors and would probably be fired. That's why when they fired me I wasn't surprised. Tom told me that I was let go for telling a lie about a manager gossiping. They couldn't find that it had happened so I created a hostile work environment.
>
> "I never had any warning other than what Blaine told me was going to happen to me. I have called corporate office, spoke with Jane. She told me that it was Wal-Mart managers who

> created a hostile work environment by making people fear for their jobs and they were going to look into it and see that something gets done. I have filed a discrimination suit. They didn't even pay us for two weeks after escorting us out."

41) For several reasons, the forum finds Complainant's testimony on the material allegations not credible. On key points, her testimony was internally inconsistent, contradicted by other more credible testimony or by her prior statements to the Agency and other entities, and, in some instances, logically incredible. For example, she testified unequivocally that Hope Meek called her late one evening and was very upset because she had witnessed Daulton and Montgomery kissing in the parking lot. She further stated Bagg was present when Meek called and had related having observed the same details as Meek. On cross-examination she reiterated positively that Meek "described what she had seen and named names." When Respondent's counsel pointed out to her that she had told Agency investigator Martindale in a March 1998 interview that Meek did not give her details or name names, Complainant claimed confusion and, after reviewing her statement, said she couldn't recall making that statement to the investigator. She went on to claim, consistent with her statement to investigator Martindale, that Bagg had not discussed the alleged parking lot incident with her on the evening Meek called. She became "confused" again when Respondent's counsel pointed out that her testimony was now at odds with her earlier direct testimony that Bagg had given her details that evening about his purported observations in the parking lot. Neither version about what she was told by Bagg or Meek is consistent with the statement she gave during her interview with the Employment Department's adjudicator, Beverly Smith: "I got a call from a co-worker, Hope. She told me she had witnessed managers in the parking lot embracing. She didn't say who [*sic*]. I told her that Chris, my boyfriend, had seen the same thing." She explained the discrepancies in her testimony by stating "there are details and there are detail details." She further explained she had received the "detail details" from Kim Manbeck who had come into the store after finishing an ice cream cone at McDonald's and had just witnessed the kissing incident. None of the versions, however, are independently corroborated by Meek. Meek's only testimony about a conversation with Complainant was that she believed Complainant had asked her "on the phone" about the alleged parking lot incident. Although there was opportunity to do so, Meek did not testify about who initiated the call, when it took place, or what she told Complainant in response to her inquiry.

42) In addition, Complainant's story changed significantly over time. In her initial complaint filed with the Agency, the only harassing comment she attributed

to district manager, Tom Cornehlsen, was an alleged question about whether her relationship with Bagg went beyond Bagg providing her with a ride home. In the Agency's Specific Charges, however, the only harassing comment attributed to Cornehlsen was a question to Complainant about whether her divorce was final and if it was appropriate for her to be dating Bagg while still legally married. During her testimony, however, Complainant testified that during the interview with Cornehlsen she was questioned about her sexual relationship with Bagg and that he justified his inquiry by telling her that an intimate relationship with Bagg "reflected poorly on Wal-Mart's family values" because she was a married woman. She also stated she said nothing in response to Cornehlsen's alleged questioning. She told Beverly Smith of the Employment Department, however, that when Cornehlsen asked if she were intimate with Bagg she told him it was none of his business. For reasons stated elsewhere herein, Woodard and Cornehlsen's testimony that Cornehlsen did not ask Complainant any questions about Bagg during the October 25 interview or any other time was more credible and the forum did not believe Complainant's shifting and contradictory allegations about Cornehlsen's alleged comments or questions.

43) Regarding her termination, Complainant testified Cornehlsen and Woodard gave her no reasons for her termination and that during the exit interview she was confused about what was happening and did not understand the papers they had asked her to sign. In her statement to Beverly Smith, however, she stated she wasn't surprised she was fired because Blaine Woodard had told her beforehand she and Bagg would probably be fired because "they were going to blame Chris and myself for the rumors * * *." She also told Smith that Cornehlsen told her she was being let go "for telling a lie about a manager gossiping. They couldn't find that it had happened so I created a hostile work environment." There was no testimony from Complainant that Woodard had told her beforehand she was going to be blamed for the rumors and probably fired.

44) Complainant's testimony regarding her mental suffering was exaggerated, internally inconsistent, and, for the most part, not believable. For example, she testified to having to rely solely on her family for food before she received food stamps and that her family and friends were "constantly bringing food" and other necessities. Later, she testified her young children, ages three and four years old, had no food to eat for a month before she received food stamps. When pressed on cross-examination, she emphatically stated her children did not eat for one month and that she was too proud to ask her family for anything because they had their own financial problems. Her unbelievable and self-serving testimony in this regard

was characteristic of her testimony as a whole.

45) Finally, Complainant provided testimony that cast doubt on her ability to recollect anything pertaining to her claims. Explaining her inability to recall anything she told the Agency investigator in 1998, particularly when it conflicted with her direct testimony, Complainant stated: "I can't remember topics of conversation from last night at work much less 1998." For the reasons stated herein, the forum did not believe Complainant's testimony unless it was corroborated by other credible testimony.

46) Blaine Woodard was the most credible witness with knowledge of material facts. He has not worked for Respondent since November 1997 and his testimony reflected no bias toward his former employer. He showed no animosity toward Complainant and Complainant herself acknowledged he was always kind and supportive of her during her employment with Respondent. Woodard's testimony was straightforward with no embellishment. He was confident regarding the events that had taken place but readily admitted he could not recall exact dates on which certain events occurred. The forum relied entirely on Woodard's testimony regarding the rumor investigation, Respondent's reasons for terminating Complainant, and every other material fact for which he had knowledge.

47) Tom Cornehlsen's testimony was, in some respects, unreliable because of his inability to recollect certain material events and inconsistencies with other credible testimony. He had a faulty memory due, in part, to his brief role in the investigation and Complainant's termination and his reliance primarily on Blaine Woodard to obtain witness statements and coordinate interviews. In addition, he did not take notes during all of the interviews and those he did take were selective and sparse and he was unable to satisfactorily recall the substance of those interviews. He denied a friendship with Daulton even though Daulton testified credibly that he considered Cornehlsen his friend at the time the rumor started. He claimed to have interviewed Sally Montgomery though she credibly testified she was never interviewed by anyone. He has worked for Respondent for 25 years and his bias was demonstrated when he was reluctant to make any statement that would reflect poorly on Respondent or the harassment investigation he conducted with Woodard. His testimony that he did not ask Complainant questions about her relationship with Bagg during his interviews was credible, however, and bolstered by Woodard's credible testimony. The forum has accepted Cornehlsen's testimony only where it was inherently credible or corroborated by credible testimony or inference.

48) Kim Powell's testimony was not credible.[1] Powell acknowledged she was the author of the letter sent to District Manager Tom Cornehlsen and signed "Hattie Joens." She claimed she wrote the letter as a result of a phone call from a store employee who said, "You're not going to believe what is going on." She testified that after the phone call she decided to write the letter to "squelch everything that was going on so that no would lose [his or her] job." She claimed to have lied about her name and age in the letter because she was a regular store customer, knew Montgomery well and "absolutely love[d] her," and thought if she sent the letter "anonymously" it would help restore order to the workplace. Powell also claimed she witnessed the alleged kissing incident in the parking lot on a Tuesday around 7:30 p.m. while finishing an ice cream cone from McDonald's. She claimed that immediately afterward she went inside the store and told Bagg and other employees about her purported observation. Powell's story was puzzling and illogical and her motives questionable. As a result, the forum has discredited her statements in the "Hattie Joens" letter and her testimony that she observed Daulton and Montgomery romantically involved in the parking lot.

49) Hope Meek's testimony was not wholly credible. Although she appeared straightforward and direct, her testimony was internally inconsistent and, in the end, did not substantiate the workplace rumor that was circulating in the Medford store. She initially insisted she told no one about her observation in the parking lot until she was called in for an interview with Cornehlsen. Her later testimony was that she had talked to three others before she was called in to talk to Cornehlsen – Complainant, Matthew Medina, and Rebecca Medina. When testifying about her purported observation she was vague and stated she saw only "their arms on each other." She had the opportunity to go into detail about what she observed. Because she did not, the forum concludes she either did not see anything or she did not accurately testify about what she did see. Moreover, evidence suggests Meek was not even in the parking lot at the time of the alleged incident. Meek testified she was waiting for her husband's shift to end when she saw Daulton and Montgomery about 7:30 in the evening. She also testified she usually waited for her husband because they had only one car and lived an hour away from the store, but that the longest she ever waited was two or three hours maximum. Meek's time card for that day, however, shows she clocked out at 2:10 p.m. Her husband's time card shows he clocked out at 8:27 p.m. that day. By her testimony, she had already been waiting for over five hours by

[1] On cross-examination, Powell admitted that at times material to this proceeding she was known as Kim Manbeck.

the time she observed Daulton and Montgomery and still had another hour to wait before her husband clocked out. The forum, consequently, has given little weight to Meek's testimony and none to her testimony regarding her observation in the parking lot.

50) Michael Daulton's testimony was generally credible. He answered all questions in a straightforward manner with no embellishment. Although he still works for Respondent, Daulton did not appear to slant his testimony to either favor or harm either Respondent or Complainant. He readily acknowledged he considered Cornehlsen a friend who was influential in Respondent's decision to make Daulton the store manager. He also acknowledged asking Complainant about her relationship with Bagg as a result of her comments about Bagg during the Bass sexual harassment investigation. The forum has credited his testimony in its entirety.

51) Lorene Miller's testimony was generally credible. Though her initial written statements to Respondent in preparation for litigation were substantially the same as her testimony, she acknowledged she initially omitted her comment about how being "almost divorced is like being almost pregnant" from the earlier written statements. She voluntarily acknowledged that comment on direct examination, however, and testified candidly that she held a strong opinion regarding adulterous relationships. Her characterization of her encounter with Complainant and Bagg was more believable than Complainant's version and the forum relied on her testimony to determine whether the comment was related to Complainant's marital status.

52) The testimony of Nancy Mahan, Johanna Johnson, Rebecca Medina, Matthew Medina, Judy Frazier, Ray Volkers, and Peter Martindale was credible. Even given individual biases, for instance, Frazier was Complainant's mother, the testimony of each appeared to be honestly conveyed as to what he or she had perceived at the time relevant events occurred.

ULTIMATE FINDINGS OF FACT

1) At all times material, Respondent Wal-Mart Stores East was a foreign corporation operating retail establishments under the assumed business name of Wal-Mart, and engaged the personal services of one or more persons in the state of Oregon.

2) At all times material, Respondent employed Complainant at the Wal-Mart store located in Medford, Oregon.

3) At all times material, Complainant was a married female.

4) At all times material, Complainant was dating an unmarried male co-worker.

5) At all times material, Respondent had in place a written policy prohibiting supervisory employees from becoming romantically involved with non-

supervisory employees. Respondent's policy did not prohibit romantic relationships between non-supervisory employees. Respondent's policy prohibited inappropriate conduct in the workplace, romantic or otherwise, irrespective of job title and marital status

6) At all times material, Respondent had in place a written policy prohibiting harassment in the workplace, including gossiping or spreading rumors about other co-workers, that would create an offensive or hostile work environment.

7) Complainant was not harassed because of her marital status or the marital status of the co-worker she was dating.

8) Respondent discharged Complainant on November 2, 1997, because she created a hostile work environment by continuing to gossip and spread rumors about two other employees after she was told to stop, in violation of Respondent's written policy.

CONCLUSIONS OF LAW

1) At all material times, Respondent Wal-Mart Stores East dba Wal-Mart was an employer subject to the provisions of ORS 659.010 to ORS 659.110.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter herein and the authority to eliminate the effects of any unlawful employment practices found. ORS 659.022; ORS 659.040; ORS 659.050.

3) The actions, inaction, statements and motivations of Tom Cornehlsen, Blaine Woodard, and Michael Daulton described herein are properly imputed to Respondent.

4) ORS 659.030(1) states, in pertinent part:

> "For the purposes of ORS 659.010 to 659.110 * * * it is an unlawful employment practice:
>
> " * * * * *
>
> "(b) For an employer, because of an individual's * * * marital status, * * * to * * * discriminate against such individual in compensation or in terms, conditions or privileges of employment."

Former OAR 839-05-010(3) stated:

> "Harassment on the basis of protected class is an unlawful employment practice if the employer knew or should have known both of the harassment and that it was unwelcome. Unwelcome conduct of a verbal or physical nature relating to employee's protected class is unlawful when such conduct is directed toward an individual because of the individual's protected class and
>
> "a) Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment; or
>
> "b) Submission to or rejection of such conduct by an individ-

ual is used as the basis for employment decisions affecting such individual; or

"c) Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment.

'd) The standard for determining harassment will be what a reasonable person would conclude if placed in the circumstances of the person alleging harassment.

"e) In cases of sexual harassment see also OAR 839-07-550(4)."

Current OAR 839-005-0010(4) states, in pertinent part:

"Harassment in employment based on an individual's protected class is a type of intentional unlawful discrimination. In cases of alleged unlawful sexual harassment see OAR 839-005-0030.

"(a) Conduct of a verbal or physical nature relating to protected classes other than sex is unlawful when substantial evidence of the elements of intentional discrimination, as described in section (1) of this rule, is shown and:

"(A) Such conduct is sufficiently severe or pervasive to have the purpose of effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment[.] * * *

"(a) The standard for determining whether harassment is sufficiently severe or pervasive to create a hostile, intimidating or offensive working environment is whether a reasonable person in the circumstances of the complaining individual would so perceive it."

" * * * * *

"(f) Harassment by Coworkers or Agents: An employer is liable for harassment by the employer's employees or agents who do not have immediate or successively higher authority over the complaining individual when the employer knew or should have known of the conduct, unless the employer took immediate and appropriate corrective action."

Respondent did not subject Complainant to discriminatory treatment in terms and conditions of her employment because of her marital status and the marital status of the co-worker with whom she associated and did not violate ORS 659.030(1)(b).

5) ORS 659.030(1) states, in pertinent part:

"For the purposes of ORS 659.010 to 659.110 * * * it is an unlawful employment practice:

" * * * * *

"(a) For an employer, because of an individual's * * * marital status, * * * to * * * dis-

charge from employment such individual. * * *"

Respondent did not discharge Complainant due to her marital status and the marital status of the co-worker with whom she associated and did not violate ORS 659.030(1)(a).

6) Under ORS 659.060(3), the Commissioner of the Bureau of Labor and Industries shall issue an order dismissing the charge and complaint against any respondent not found to have engaged in any unlawful practice charged.

OPINION

In its Specific Charges, the Agency alleged "Complainant's superiors at Respondent" harassed Complainant about her relationship with a single male co-worker because of her status as a married woman and his status as an unmarried man. The Agency characterized certain comments made by personnel manager Lorene Miller, an assistant manager from the garden center, store manager Michael Daulton, and district manager Tom Cornehlsen, as harassment so severe and pervasive as to subject Complainant to a hostile, intimidating and offensive work environment. Additionally, the Agency alleged Respondent terminated Complainant's employment based on her marital status and the marital status of the co-worker she was dating. The evidence in the record does not support the Agency's allegations.

HOSTILE ENVIRONMENT

With one exception, the forum finds the alleged comments were not directed toward Complainant because of her marital status. The comment that was arguably related to her marital status was not severe or pervasive enough to create a hostile, intimidating, or offensive work environment as a matter of law.

LORENE MILLER'S ALLEGED COMMENT

Undisputed evidence shows that during a brief casual encounter with Bagg and Complainant, Miller remarked to Bagg that Complainant "is a married woman, you know," and to Complainant that "being almost divorced is like being almost pregnant, you're not until you are." Miller was an hourly employee with some low-level management duties and was in no position to affect Complainant's employment status with Respondent.

OAR 839-005-0010(4)(f) addresses harassment by co-workers and provides:

> "An employer is liable for harassment by the employer's employees or agents who do not have immediate or successively higher authority over the complaining individual when the employer knew or should have known of the conduct, unless the employer took immediate and appropriate corrective action."

There is no credible evidence that Miller's comment to Bagg and

Complainant was made for any reason other than in jest during a chance meeting. While Complainant may have perceived the comment as moralistic censure, it was not severe enough that she felt compelled to tell anyone about it nor did she file a complaint even though she was aware of and had previously made use of Respondent's harassment procedures. There were no witnesses to the comment and there is no evidence Miller continued to make remarks about or pass judgment on Complainant's relationship with Bagg. The forum concludes that, although Miller's comment was related to Complainant's protected class, it was not severe or pervasive enough to create a hostile, intimidating, and offensive work environment.

ASSISTANT MANAGER'S ALLEGED COMMENT

Complainant testified that, "Sherry," an assistant manager in the Medford store's garden center, told her that as long as her boyfriend worked there Complainant could not be transferred back to the garden center. Complainant also testified that, at a later date, Sherry asked Complainant to work in the garden center during another employee's lunch hour and reminded her "there are cameras back there and you are working" and then admonished Complainant and Bagg to "behave themselves." Even if the forum believes Complainant's uncorroborated testimony that Sherry, a purported supervisor with temporary immediate or successively higher authority over Complainant, made the comments, the Agency produced no evidence showing the comments were made because of the marital status of Bagg and Complainant. Considering Respondent's policy prohibiting romantic conduct in the workplace, irrespective of an employee's marital status, the forum concludes the purported comments do not create an inference they were directed toward Complainant because of her marital status and the marital status of the co-worker she was admittedly dating.

STORE MANAGER MICHAEL DAULTON'S ALLEGED COMMENT

Complainant testified that during an interview related to a sexual harassment investigation involving Complainant and another employee, Daulton started to ask her if she was dating Bagg and then said, "Never mind, I don't want to go there." Daulton acknowledged asking Complainant if she was dating Bagg, but testified credibly that his query had nothing to do with Complainant's marital status or that of Bagg's. There is no discriminatory animus inherent in Daulton's comment and the Agency produced no evidence whatsoever showing his comment to Complainant was motivated by a perception that she was engaging in an adulterous relationship. The forum has concluded, therefore, that Daulton's comment was not related to Complainant's or Bagg's marital status.

DISTRICT MANAGER TOM CORNEHLSEN'S ALLEGED COMMENTS

Credible evidence in the record supports Cornehlsen's testimony that at no time did he inquire or make any comments about Complainant's relationship with Bagg. Blaine Woodard was present each time Cornehlsen interviewed Complainant and he credibly and emphatically testified the discussions were entirely professional and devoid of any mention of Complainant's relationship with Bagg. Moreover, even without Woodard's credible testimony, the forum found Complainant's shifting and contradictory allegations that Cornehlsen asked her discriminatory questions self-serving and unbelievable. The burden of proof rests with the Agency and it did not carry that burden. The forum cannot hold Respondent liable for comments attributed to Cornehlsen that he did not make.

TERMINATION

In order to prevail, the Agency must show by a preponderance of the credible evidence that Complainant's protected class, her marital status, was the reason for her termination. The Agency, at all times, has the burden of proving Complainant was terminated for unlawful reasons. The Agency's theory is that but for Complainant's marital status, as it related to her relationship with an unmarried male co-worker, she would not have been terminated. To support its theory, the Agency relied on the alleged comments made by Respondent's management as demonstrating a corporate culture that is intolerant of any perceived adulterous relationships in the workplace. In essence, the Agency argues that Respondent's intolerance for adulterous relationships was the motive for terminating Complainant and the effect was discrimination on the basis of marital status.

The Agency presented no evidence, however, that Complainant would not have been fired for violating the company's harassment policy had she been unmarried and having a romantic relationship with the same co-worker. As noted elsewhere in this opinion, the alleged comments made to her, with one exception, analyzed individually or collectively, do not reveal a discriminatory motive. The one exception proved to be an isolated observation by someone who had no authority over Complainant and was not involved in any way with the decision to terminate Complainant. There is no direct or circumstantial evidence to substantiate the Agency's theory.

The Agency argued, alternatively, Respondent's reason for terminating Complainant was a pretext for the discriminatory reason because Respondent knew Hope Meek had violated the same harassment policy as Complainant and did not terminate her. To establish a case of different or unequal treatment, OAR 839-005-0010 provides, in pertinent part:

> "There must be substantial evidence that the complainant was harmed by an action of the respondent under circumstances that make it appear that the respondent treated the complainant differently than comparably situated individuals who were not members of the complainant's protected class. * * * "

Though she was treated differently, evidence shows Meek was a member of Complainant's protected class and, therefore, not a proper comparator. Moreover, Respondent articulated a believable reason, right or wrong, why Meek was not terminated for violating company policy. Woodard testified credibly that a pattern emerged during the investigation that made it obvious to management Complainant and Bagg were the principals responsible for perpetuating the rumor and Meek appeared less culpable. Complainant's pattern of inconsistent and exaggerated testimony during hearing only served to bolster Woodard's statements. The Agency did not prove by a preponderance of the evidence that Complainant would not have been terminated for violating Respondent's harassment policy had she been unmarried and dating an unmarried co-worker. The forum concludes, therefore, Complainant's marital status played no role in her termination and Respondent did not violate the provisions of ORS 659.030(1)(a).

EXCEPTIONS

The Agency excepts to the introductory portion of the proposed order, several factual findings, certain credibility findings, and the opinion as it pertains to the forum's analysis of the individual elements comprising a hostile work environment and the forum's conclusion that Complainant's termination was not based on her protected class. In response to the Agency's exceptions, the introductory portion of the order has been modified to correctly list Respondent's witnesses. All other exceptions are addressed below.

A. Findings of Fact – The Merits

Finding of Fact – 7: There is no credible evidence to support the Agency's contention that Complainant discussed her marital troubles or TRO with any supervisors other than Blaine Woodard. The Agency's exception is denied.

Finding of Fact – 10: This finding of fact has been modified to more accurately reflect Woodard's testimony that "a half dozen" female employees complained about Bass and that he was uncertain whether anyone other than Complainant filed a formal complaint.

B. Credibility Findings

The Agency's exceptions to the ALJ's credibility findings, although extensive, are without merit. Not only is each credibility finding supported by substantial evidence in the record, but the ultimate facts found in this matter rely principally on the testimony of

the one witness whose credibility the Agency does not question, Blaine Woodard. The Agency's exceptions to the credibility findings are denied.

C. Opinion

1. Hostile Work Environment

The Agency asserts the forum erroneously analyzed each comment alleged to comprise a hostile work environment discretely and without considering the context of each in the aggregate. As such, the Agency posits, the forum reached the wrong conclusion as to whether the comments constituted a hostile work environment. To the contrary, each comment was evaluated to determine first whether the comment was related to Complainant's marital status and, if so, whether the comment was severe or pervasive enough to create a hostile work environment. Only one comment was found to be related to Complainant's protected class and, thus, subject to the "severe or pervasive" analysis. Because the other comments, evaluated singly and in context with each other, did not meet the threshold criterion of being related to Complainant's marital status, it was not necessary to take them into account when determining whether the one comment created a hostile work environment. The Agency's analysis of each comment relies on facts not in evidence, misstatements of the facts in evidence, and on testimony the forum has found not credible. The Agency's exception on this issue is denied.

2. Termination Based on Marital Status

The Agency's exception to the forum's conclusion regarding Complainant's termination cites three issues that the Agency asserts affect the credibility of Respondent's reason for terminating Complainant: (1) Respondent's failure to investigate the truth of the rumor circulated in the workplace in violation of its own policies, (2) Respondent's failure to terminate another employee who circulated the rumor, and (3) Respondent's denial that Complainant's relationship with employee Bagg was a factor in its decision to terminate Complainant. As to the first issue, the Agency's assertion that "there were allegations of inappropriate fraternization between Daulton and Montgomery" that Respondent did not investigate is not supported by evidence in the record. In fact, evidence shows no one ever complained to management about Daulton and Montgomery. The investigation that took place began with Daulton's complaint to management that false rumors were being circulated in the workplace about him. After investigating Daulton's complaint, including interviewing two purported eyewitnesses who did not affirm that Daulton and Montgomery were "kissing and hugging" in the parking lot, Respondent found no justification for the rumors. Evidence in the record supports that conclusion. Second, the Agency asserts the forum erred by not determining Complainant was treated differ

ently than employee Meek based on Complainant's marital status. While acknowledging that both claimed the same marital status, the Agency distinguishes Complainant's situation by asserting that "Meek was not having a relationship with someone other than her husband so was not in the same position as Complainant." There is no evidence in the record to support that statement and, even if true, its relevance is dubious. The Agency has alleged Respondent treated Complainant differently because she is married and a person she associated with in a social context is not. The burden is on the Agency to prove its allegation and it has not done so. Finally, Respondent acknowledged that it believed Complainant and Bagg had conspired to spread false rumors about Daulton and Montgomery and both were terminated on that basis. While the evidence does show, and Respondent does not deny, that Complainant's social relationship with Bagg influenced Respondent's belief the two were acting in concert when spreading the rumors, it does not establish that each one's particular marital status played any role in Respondent's decision to terminate them.

ORDER

NOW, THEREFORE, as Respondent has not been found to have engaged in any unlawful practice charged, the Complaint and the Specific Charges filed against Respondent are hereby dismissed according to the provisions of ORS 659.060(3).

In the Matter of

M. CARMONA PAINTING, INC.

Case No. 98-01

Final Order of the Commissioner Jack Roberts

Issued July 19, 2001

SYNOPSIS

Respondent failed to complete and return BOLI's 2000 prevailing wage rate survey by the date BOLI had specified. The commissioner imposed a $500 civil penalty for Respondent's violation of ORS 279.359(2). ORS 279.359, ORS 279.370; OAR 839-016-0520; OAR 839-016-0530; OAR 839-016-0540.

The above-entitled case came on regularly for hearing before Linda A. Lohr, designated as Administrative Law Judge ("ALJ") by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on April 26, 2001, in the hearing room of the Bureau of Labor and Industries, located at 800 NE Oregon Street, Portland, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Peter McSwain, case presenter, an employee of the Agency. M. Carmona Painting, Inc. ("Respon-

dent") after being duly notified of the time and place of this hearing, failed to appear for hearing through an authorized representative or counsel.

The Agency called Mary Wood, Oregon Employment Department ("Employment Department") project leader, as its only witness.

The forum received into evidence:

a) Administrative exhibits X-1 through X-5 (submitted or generated prior to hearing);

b) Agency exhibits A-1 (submitted prior to hearing) and A-2 (submitted at hearing).

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

FINDINGS OF FACT – PROCEDURAL

1) On January 9, 2001, the Agency issued a Notice of Intent to Assess Civil Penalties in which it alleged that Respondent unlawfully failed to complete and return the 2000 Construction Industry Occupational Wage Survey ("wage survey") by September 15, 2000, in violation of ORS 279.359(2). The Agency alleged the violation was aggravated by Respondent's failure to complete the 1998 and 1999 wage surveys as required by law, and by the effect Respondent's failure to complete the survey had on the commissioner's ability to accurately determine the prevailing wage rates and the potential skewing of the established rates. The Agency sought a civil penalty of $1,500 for the single alleged violation. The Notice of Intent gave Respondent 20 days to file an answer and make a written request for a contested case hearing.

2) The Agency served the Notice of Intent on Respondent's agent, Miguel Carmona, on or about January 20, 2001, by certified mail.

3) On February 5, 2001, Miguel Carmona, Respondent's president and authorized representative, sent the Agency a letter that included the following unsworn statements:

> "I am writing in response to your Notice of Intent to Assess Civil Penalties, a copy of which is attached. The Construction Industry Occupational Wage Survey 2000 (2000 Survey) has subsequently been responded to – first to you by fax & also by mail.
>
> "Your Notice indicates that we have the right to request a hearing on this matter. This letter is my request for such a hearing.
>
> "In answer to the charge, my response is simply that I thought it was not necessary. In the past, I had called the Bureau when I received the Survey & was told that it didn't

> apply to my company, since we only do residential work. In filling out the survey this year, the 'compliance' consisted of returning the form, stating that it didn't apply to me. While I understand the importance of the information you are attempting to gather, it does not pertain to my business. Isn't there a way of establishing a list of commercial contractors, in order to avoid these kinds of misunderstandings?
>
> "In answer to the 'aggravating factors,' the fact is that I responded by phone & was told by a bureau employee that the survey didn't apply to residential contractors who don't do any commercial work."

4) On March 28, 2001, the Agency filed a request for hearing. On March 30, 2001, the Hearings Unit served Respondent with: a) a Notice of Hearing that set the hearing for April 26, 2001; b) a Summary of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case hearing process; and d) a copy of the Notice of Intent.

5) On March 30, 2001, the forum issued a case summary order requiring the Agency and Respondent to submit case summaries that included: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; and any civil penalty calculations (for the Agency only). The forum ordered the participants to submit their case summaries by April 16, 2001, and notified them of the possible sanctions for failure to comply with the case summary order. The forum also provided Respondent with a form to use for preparing its case summary.

6) The Agency filed a timely case summary. Respondent did not file a case summary.

7) On April 13, 2001, the ALJ assigned was changed from Alan McCullough to Linda Lohr.

8) Respondent did not appear at the time and place set for hearing and no one appeared on its behalf. Respondent had not notified the forum it would not be appearing at the hearing. Pursuant to OAR 839-050-0330(2), the ALJ waited 30 minutes past the time set for hearing. When Respondent failed to appear, the ALJ found Respondent to be in default and commenced the hearing.

9) Pursuant to ORS 183.415(7), the ALJ verbally advised the Agency of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

10) On May 21, 2001, the ALJ issued a proposed order that notified the participants they were entitled to file exceptions to the proposed order. The Agency filed timely exceptions which are addressed in the opinion section of this Final Order.

FINDINGS OF FACT – THE MERITS

1) At all material times, Respondent was an Oregon employer who engaged in "residential work" during 2000.

2) The Research and Analysis section of the Employment Department contracted with BOLI in 1998, 1999, and 2000 to conduct wage surveys. The BOLI Commissioner used the survey results to aid in the determination of the prevailing wage rates in Oregon.

3) As part of its contract with BOLI, the Employment Department maintained electronic files showing the "firm name" of each business entity to whom wage survey packets were sent, the address where each survey was sent, whether each survey was returned and whether it was timely returned, the date on which each survey was sent, and whether and when reminders were mailed to each business entity.

4) On September 8, 1998, the Employment Department sent Respondent a wage survey packet, which included a postage paid envelope for return of the survey. The packet gave notice that failure to return a completed survey form could result in civil penalties. The packet instructed Respondent to complete and return the survey within two weeks of receiving it. The Employment Department did not receive from Respondent a completed 1998 wage survey packet.

5) In 1999 and 2000, before sending the wage survey packets, the Employment Department sent selected business entities a postcard to determine if they had contracted to do any non-residential construction work during the preceding year. This "prescreening" was not done in 1998. The Employment Division did not mail the wage survey packets to those who sent back the postcard indicating they performed only residential construction during 2000. For those entities that responded affirmatively or failed to respond, the Employment Division mailed a wage survey packet to the addresses listed for the entity.

6) The Employment Department mailed the 1999 wage survey packet to Respondent on August 13, 1999. Respondent was instructed to complete and return the survey by September 15, 1999. Reminder cards were sent to Respondent on September 24 and October 14, 1999, indicating that the wage survey had not been received, that Respondent was required to complete and return it by law, and that penalties could be imposed. The Employment Department did not receive from Respondent a completed 1999 wage survey packet.

7) On August 28, 2000, the Employment Department sent Respondent a 2000 wage survey packet that included a postage paid envelope for return of the survey. The survey packet also included a notice that failure to return a completed survey form could result in a monetary fine of up to $5,000. The packet in-

cluded instructions to complete and return the survey by September 15, 2000. The instructions refer firms who do residential construction only to page four of the survey packet where it states:

> "**PLEASE NOTE: THIS SURVEY DOES NOT COVER RESIDENTIAL CONSTRUCTION WORKERS.** If all of your work for the survey period was done on residential construction, please answer NO to Question 2 on the cover survey, then return the survey to our office in the postage paid envelope."[1] (Emphasis added)

The wage survey form twice directs firms who do not employ workers at a non-residential construction site thusly: "Do not complete the wage data form which is only for non-residential construction data." Those firms are directed to sign the cover form and return it in the postage paid envelope.

8) Reminder cards were sent to Respondent on September 26 and October 16, 2000, indicating that the wage survey had not been received, that Respondent was required to complete and return it by law, and that penalties could be imposed. The second reminder card was also stamped "Final Notice." Respondent's president and authorized representative, Miguel Carmona, did not believe the wage survey pertained to his business and Respondent did not complete and return the survey packet.

9) On January 9, 2001, the Agency issued the Notice of Intent to Assess Civil Penalty against Respondent for its failure to return the 2000 wage survey. In a cover letter accompanying the Notice, the Agency stated that it still had not received the completed survey. The letter further stated "[T]he penalty amount is based on the premise that you will be completing the enclosed 2000 survey and returning the completed, accurate form to the Bureau on or before February 2, 2001. If you fail to complete and return the 2000 survey, the Bureau will move to amend the Notice of Intent to

[1] On the cover survey, "Question 2" is directed to those who did not employ an hourly worker at a non-residential construction site and asks whether the firm did any residential construction during the survey period in Oregon. If the answer is "YES" to Question 2, the firm is directed to "sign and return this form in the postage paid envelope. Do not complete the wage data form which is only for non-residential data." Those who answer "NO" to that question are instructed to proceed to "Question 3" which is directed to firms that did no construction work in Oregon during the survey period and those firms are asked to answer additional questions not relevant to firms whose work during the survey period was limited to residential construction. The forum notes the instructions are misleading and could be quite confusing for those firms who, though not required to complete the wage data form because their work is residential only, are diligent in attempting to follow the instructions that pertain to them.

substantially increase the amount of civil penalties."

10) The Employment Department received the 2000 wage survey form from Respondent on February 6, 2001. Carmona returned the form on behalf of Respondent and stated on the form that the survey did not apply to his business.

11) The Employment Department and the Agency mailed all of the documents, including the 1998 and 1999 wage survey packets, to Respondent's correct address by first-class or certified mail.

ULTIMATE FINDINGS OF FACT

1) Respondent is an Oregon employer.

2) The Commissioner conducted a wage survey in 2000 that required persons receiving the surveys to make reports or returns to the Agency for the purpose of determining the prevailing rates of wage.

3) Respondent received the 2000 wage survey packet.

4) Respondent failed to return the completed survey by September 15, 2000, the date specified by the Commissioner.

CONCLUSIONS OF LAW

1) ORS 279.359 provides, in pertinent part:

> "(2) A person shall make such reports and returns to the Bureau of Labor and Industries as the commissioner may require to determine the prevailing rates of wage. The reports and returns shall be made upon forms furnished by the bureau and within the time prescribed therefor by the commissioner. The person or an authorized representative of the person shall certify to the accuracy of the reports and returns.
>
> "* * * * *
>
> "(5) As used in this section, 'person' includes any employer, labor organization or any official representative of an employee or employer association."

Respondent was a person required to make reports and returns under ORS 279.359(2). Respondent's failure to return a completed 2000 wage survey by September 15, 2000, violated ORS 279.359(2).

2) ORS 279.370 provides, in pertinent part:

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

OAR 839-016-0520 provides:

> "(1) The commissioner shall consider the following mitigating and aggravating circumstances when determining the amount of any civil penalty to be assessed against

a contractor, subcontractor or contracting agency and shall cite those the commissioner finds to be applicable:

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

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

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

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

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

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

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

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

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

> "(1) The commissioner may assess a civil penalty for each violation of any provision of the Prevailing Wage Rate Law (ORS 279.348 to 279.380) and for each violation of any provision of the administrative rules adopted under the Prevailing Wage Rate Law.
>
> "* * * * *
>
> "(3) The commissioner may assess a civil penalty against a contractor or subcontractor for any of the following violations:
>
> "* * * * *
>
> "(i) Failure to submit reports and returns in violation of ORS 279.359(2)[.]"

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

> "(1) The civil penalty for any one violation shall not exceed $5,000. The actual amount of the civil penalty will depend on all the facts and on any mitigating and aggravating circumstances.
>
> "* * * * *
>
> "(5) The civil penalty for all * * * violations [other than violations of ORS 279.350 regarding payment of the prevailing wage] shall be set in accordance with the determinations and considerations referred to in OAR 839-016-0530."

The commissioner has exercised his discretion appropriately by im-

posing a $500.00 civil penalty for Respondent's violation of ORS 279.359(2).

OPINION

DEFAULT

Respondent failed to appear at hearing and was held in default pursuant to OAR 839-050-0330. When a respondent defaults, the Agency must establish a prima facie case to support the allegations of the charging document. *In the Matter of Vision Graphics and Publishing, Inc*., 16 BOLI 124, 136 (1997). The Agency met that burden in this case, as discussed *infra*.

THE AGENCY'S PRIMA FACIE CASE

To prove a violation of ORS 279.359(2), the Agency must show that:

(1) Respondent is a "person;"

(2) The commissioner conducted a survey in 2000 that required persons receiving the surveys to make reports or returns to the Agency for the purpose of determining the prevailing rates of wage;

(3) Respondent received the commissioner's 2000 survey; and

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

In the Matter of F.R. Custom Builders, 20 BOLI 102, 109-10 (2000). The Agency alleged Respondent was an employer in 2000 and Respondent did not deny the allegation in its answer. OAR 839-050-0130 provides in part:

> "(2) Except for good cause shown to the administrative law judge, factual matters alleged in the charging document, and not denied in the answer, shall be deemed admitted by the party. * * * "

The forum concludes, therefore, that Respondent had employees during 2000 and was a "person" for purposes of ORS 279.359. The Agency's uncontested evidence establishes that the commissioner conducted a wage survey in 2000 requiring people to return completed survey forms by September 15, 2000. Respondent does not deny receiving the survey and, in fact, admits to eventually returning the 2000 survey, which the Employment Department received on February 6, 2001, well past the time prescribed by the Commissioner. By failing to return the survey by September 15, 2000, Respondent violated ORS 279.259(2).

In Respondent's answer, its president and authorized representative states he understood from a past telephone conversation with a "bureau employee" that the survey did not pertain to those who only perform residential work. Respondent's unsworn and uncorroborated assertion is controverted by other credible evidence on the record and, consequently, is given no weight by this forum. Although the wage survey form makes it very clear the survey does not cover resi-

dential construction workers, those firms who did only residential construction during the wage survey period and did not respond to the prescreening were still required to sign and return the survey cover form.[2] Respondent's defense fails and the only issue is the appropriate civil penalty.

CIVIL PENALTY

In this case, the Agency seeks a $1,500 civil penalty and alleges several aggravating circumstances. In determining an appropriate penalty, the forum must consider Respondent's history, including prior violations and Respondent's actions in responding to the prior violations, the seriousness of the current violation, and whether Respondent knew it was violating the law. The forum must also consider any mitigating circumstances offered by Respondent. OAR 839-016-0520. Evidence shows the Employment Department sent Respondent wage surveys in 1998 and 1999 and the forum infers from the evidence in the record that Respondent received them. The Employment Department did not receive completed surveys from Respondent for either year. There is no evidence the Agency ever investigated or cited Respondent for wage survey violations in 1998 or 1999, and the facts giving rise to those violations are outside the substantive allegation in the charging document.[3] However, because they show Respondent knew or should have known of the violation, they constitute aggravating circumstances that may be weighed in determining an appropriate penalty. *In the Matter of Rogelio Loa*, 9 BOLI 139, 146 (1990). In this case, the forum gives some weight to those circumstances, but is mindful that Respondent's lackadaisical attitude toward returning the survey may have been inadvertently aided by the Agency because Respondent was never held accountable for its failure to return the 1998 and 1999 surveys. While not a defense to its inaction during the 2000 survey, Respondent's characterization of its failure to return the wage survey as a "misunderstanding" is not wholly unreasonable and has some support in the record.

The Agency further argues that the accuracy of the commissioner's prevailing wage determinations depends on receiving completed surveys from all contractors and a contractor's failure to comply could result in skewing the established rates. Here, however, Respondent performed only residential work and

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[2] *See* ORS 279.359(5) (defining "persons" required to respond) and Findings of Fact – the Merits 7 (referring to the wage survey packet, which on page four provides instructions on how persons performing only residential construction should respond to the survey).

[3] ORS 183.415 requires formal notice of the "matters asserted or charged." Here, the only matter asserted or charged for which penalties are sought is the 2000 violation.

the Agency did not offer evidence to show how Respondent, who was not required to provide any data for the survey, could adversely affect the accuracy of the commissioner's prevailing wage rate determinations by not signing and returning the wage survey form. Additionally, even if Respondent had been a commercial contractor required to complete the entire survey, this forum has found the violation not as serious as violations involving the failure to pay or post the prevailing wage rates. *F.R. Custom Builders*, 20 BOLI at 111. In previous cases where a respondent has performed non-residential construction work and untimely submitted the wage survey form or not submitted it at all, the forum has imposed a $500 civil penalty. *In the Matter of Green Planet Landscaping, Inc*., 21 BOLI 130 (2000); *In the Matter of Schneider Equipment, Inc*., 21 BOLI 60 (2000); *In the Matter of Martha Morrison*, 20 BOLI 275, 287 (2000); *F.R.Custom Builders*, 20 BOLI 102 (2000). In a previous case where a respondent performed residential construction only and failed to return a completed wage survey form, the forum imposed a $250 penalty. *Martha Morrison*, 20 BOLI at 286. In this case, Respondent would never have received the wage survey packet had it signed and returned the initial post card designed to screen out those who were not subject to the survey and, thus, could have avoided the violation altogether. Respondent did not do so and, as a consequence, violated the law. Having considered the circumstances in this case and other cases in which this forum has imposed penalties for violation of ORS 279.359(2), the forum finds a $500 penalty appropriate.

AGENCY'S EXCEPTIONS

The Agency filed extensive exceptions challenging the forum's evaluation of the aggravating and mitigating circumstances in this case. Fundamentally, the Agency argues that the penalties the forum assessed lack sufficient strength to ensure future compliance. While this case does not involve a willful act of defiance as the Agency suggests, there is merit to the Agency's argument regarding the inadequacy of the civil penalty. The forum has modified its opinion to clarify its reasoning with respect to the Agency's exceptions and has increased Respondent's civil penalty liability to more accurately reflect the seriousness of the violation.

ORDER

NOW, THEREFORE, as authorized by ORS 279.370 and as payment of the penalty assessed as a result of Respondent's violation of ORS 279.359(2), the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **M. Carmona Painting, Inc.** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232, a certified check payable to the Bureau

of Labor and Industries in the amount of FIVE HUNDRED DOLLARS ($500.00), plus any interest that accrues at the legal rate on that amount from a date ten days after issuance of the Final Order and the date Respondent complies with the Final Order.

In the Matter of

LANDCO ENTERPRISES, INC.

Case No. 96-01

Final Order of the Commisioner Jack Roberts

Issued July 19, 2001

SYNOPSIS

Respondent failed to complete and return BOLI's 2000 prevailing wage rate survey by the date BOLI had specified. The Commissioner imposed a $500 civil penalty for Respondent's violation of ORS 279.359(2). ORS 279.359, ORS 279.370; OAR 839-016-0520; OAR 839-016-0530; OAR 839-016-0540.

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

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Peter McSwain, case presenter, an employee of the Agency. LandCo Enterprises, Inc. ("Respondent") after being duly notified of the time and place of this hearing, failed to appear for hearing through authorized representative or counsel.

The Agency called no witnesses.

The forum received into evidence:

a) Administrative exhibits X-1 through X-12 (submitted or generated prior to hearing);

b) Agency exhibits A-1 and A-2 (submitted at hearing).

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

FINDINGS OF FACT – PROCEDURAL

1) On January 9, 2001, the Agency issued a Notice of Intent to Assess Civil Penalties in which it alleged that Respondent unlawfully failed to complete and return the 2000 Construction Industry Occupational Wage Survey

("wage survey") by September 15, 2000, in violation of ORS 279.359(2). The Agency alleged aggravating circumstances and sought a civil penalty of $1,000 for the single alleged violation. The Notice of Intent gave Respondent 20 days to file an answer and make a written request for a contested case hearing.

2) The Agency served the Notice of Intent on Respondent's agent, Wendel Belknap, on or about January 10, 2001, by certified mail.

3) On February 12, 2001, Cari Herber, Respondent's office manager/ treasurer and authorized representative, sent the Agency a letter that included the following unsworn statement:

> "I received your notice of intent to assess civil penalties in regard to the BOLI survey. This was the first notification that I received that you did not receive my 2000 survey. Upon notification I immediately recompleted the survey and mailed it in. I would like to contest these fines for these reasons. I have complied and sent in my 2000 survey (twice now). I do not feel that I should receive penalties when I completed the survey and mailed it in a timely fashion and was unaware that you did not receive it. * * * "

4) On March 28, 2001, the Agency filed a request for hearing. On March 30, 2001, the Hearings Unit served Respondent with: a) a Notice of Hearing that set the hearing for May 8, 2001; b) a Summary of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case hearing process; and d) a copy of the Notice of Intent.

5) On April 4, 2001, the forum issued a case summary order requiring the Agency and Respondent to submit case summaries that included: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; and any civil penalty calculations (for the Agency only). The forum ordered the participants to submit their case summaries by April 27, 2001, and notified them of the possible sanctions for failure to comply with the case summary order.

6) The Agency filed a timely case summary. The Hearings Unit did not receive a case summary from Respondent.

7) Respondent did not appear at the time and place set for hearing and no one appeared on its behalf. Respondent had not notified the forum it would not be appearing at the hearing. Pursuant to OAR 839-050-0330(2), the ALJ waited 30 minutes past the time set for hearing. When Respondent failed to appear, the ALJ found Respondent to be in default and commenced the hearing.

8) The Agency waived the ALJ's recitation of the issues to be addressed, the matters to be

proved, and the procedures governing the conduct of the hearing.

9) On June 28, 2001, the ALJ issued a proposed order that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. No exceptions were filed.

FINDINGS OF FACT – THE MERITS

1) At all material times, Respondent was an Oregon employer.

2) The Research and Analysis section of the Employment Department contracted with BOLI in 1998, 1999, and 2000 to conduct wage surveys. The BOLI Commissioner used the survey results to aid in the determination of the prevailing wage rates in Oregon.

3) As part of its contract with BOLI, the Employment Department maintained electronic files showing the "firm name" of each business entity to whom wage survey packets were sent, the address where each survey was sent, whether each survey was returned and whether it was timely returned, the date on which each survey was sent, and whether and when reminders were mailed to each business entity.

4) On August 28, 2000, the Employment Department sent Respondent a 2000 wage survey packet that included a postage paid envelope for return of the survey. The survey packet also included a notice that its completion and return was required by law and violation could result in the assessment of civil penalties. The packet included instructions to complete and return the survey by September 15, 2000.

5) Reminder cards were sent to Respondent on September 26 and October 16, 2000, indicating that the wage survey had not been received, that Respondent was required to complete and return it by law, and that penalties could be imposed. The second reminder card was also stamped "Final Notice."

6) On January 9, 2001, the Agency issued the Notice of Intent to Assess Civil Penalty against Respondent for its failure to return the 2000 wage survey. In a cover letter accompanying the Notice, the Agency stated that it still had not received the completed survey. The letter further stated "[T]he penalty amount is based on the premise that you will be completing the enclosed 2000 survey and returning the completed, accurate form to the Bureau on or before February 2, 2001. If you fail to complete and return the 2000 survey, the Bureau will move to amend the Notice of Intent to substantially increase the amount of civil penalties."

7) The Employment Department received the completed 2000 wage survey form from Respondent on January 18, 2001 and depicted the submission as "late" in its electronic record.

8) In 1999, the Employment Department mailed a wage survey packet to Respondent. On De-

cember 17, 1999, Respondent completed and returned the 1999 wage survey form after the Employment Department sent two reminders in September and October 1999. Respondent's 1999 submission was not described as "late" in the Employment Department's electronic file.

ULTIMATE FINDINGS OF FACT

1) Respondent is an Oregon employer.

2) The Commissioner conducted a wage survey in 2000 that required persons receiving the surveys to make reports or returns to the Agency for the purpose of determining the prevailing rates of wage.

3) Respondent received the 2000 wage survey packet.

4) Respondent failed to return the completed survey by September 15, 2000, the date specified by the commissioner.

CONCLUSIONS OF LAW

1) ORS 279.359 provides, in pertinent part:

> "(2) A person shall make such reports and returns to the Bureau of Labor and Industries as the commissioner may require to determine the prevailing rates of wage. The reports and returns shall be made upon forms furnished by the bureau and within the time prescribed therefor by the commissioner. The person or an authorized representative of the person shall certify to the accuracy of the reports and returns.
>
> "* * * * *
>
> "(5) As used in this section, 'person' includes any employer, labor organization or any official representative of an employee or employer association."

Respondent was a person required to make reports and returns under ORS 279.359(2). Respondent's failure to return a completed 2000 wage survey by September 15, 2000, violated ORS 279.359(2).

2) ORS 279.370 provides, in pertinent part:

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

OAR 839-016-0520 provides:

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

ing to previous violations of statutes and rules.

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

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

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

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

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

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

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

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

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

"* * * * *

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

"* * * * *

"(i) Failure to submit reports and returns in violation of ORS 279.359(2)[.]"

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

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

"* * * * *

"(5) The civil penalty for all * * * violations [other than violations of ORS 279.350 regarding payment of the prevailing wage] shall be set in accordance with the determinations and considerations referred to in OAR 839-016-0530."

The Commissioner has exercised his discretion appropriately by imposing a $500.00 civil penalty for Respondent's violation of ORS 279.359(2).

OPINION

DEFAULT

Respondent failed to appear at hearing and was held in default pursuant to OAR 839-050-0330. When a respondent defaults, the Agency must establish a prima facie case to support the allegations of the charging document. *In the Matter of Vision Graphics and Publishing, Inc*., 16 BOLI 124, 136 (1997). The Agency met that burden in this case, as discussed *infra*.

PRIMA FACIE CASE

To prove a violation of ORS 279.359(2), the Agency must show that:

(1) Respondent is a "person;"

(2) The commissioner conducted a survey in 2000 that required persons receiving the surveys to make reports or returns to the Agency for the purpose of determining the prevailing rates of wage;

(3) Respondent received the commissioner's 2000 survey; and

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

In the Matter of F.R. Custom Builders, 20 BOLI 102, 109-10 (2000). The Agency alleged Respondent was an employer in 2000 and Respondent did not deny the allegation in its answer. OAR 839-050-0130 provides in part:

> "(2) Except for good cause shown to the administrative law judge, factual matters alleged in the charging document, and not denied in the answer, shall be deemed admitted by the party. * * * "

The forum concludes, therefore, that Respondent had employees during 2000 and was a "person" for purposes of ORS 279.359. Uncontested evidence establishes that the Commissioner conducted a wage survey in 2000 requiring people to return completed survey forms by September 15, 2000. Respondent does not deny receiving the survey and, in fact, claims in its answer to have returned it "twice."

The Employment Department records show the survey was returned on January 18, 2001, well past the time prescribed by the Commissioner. In its answer, Respondent contended it returned the survey timely and that the Agency's notice was the first Respondent knew the survey had not been received. Where a respondent fails to appear at hearing and its total contribution to the record is a request for hearing and an answer that contains only unsworn and unsubstantiated assertions, those assertions are overcome wherever they are contradicted by other credible evidence in the record. *In the Matter of Tina Davidson,* 16 BOLI 141, 148 (1997). Respondent did not appear at hearing to defend its position and credible evidence in the record controverts Respondent's unsworn, uncorroborated

statement. By failing to return the survey by September 15, 2000, Respondent violated ORS 279.259(2). The only issue, therefore, is the appropriate civil penalty.

CIVIL PENALTY

The Agency seeks a $1,000 civil penalty for the single violation of ORS 279.359(2). In determining an appropriate penalty, the forum must consider Respondent's history, including prior violations and Respondent's actions in responding to the prior violations, the seriousness of the current violation, and whether Respondent knew it was violating the law. The forum must also consider any mitigating circumstances offered by Respondent. OAR 839-016-0520.

Two factors favor a somewhat lighter penalty in this case. First, there is no evidence Respondent has previously violated the prevailing wage rate laws. Evidence shows the Employment Department sent Respondent a wage survey packet in 1999 and received the completed survey from Respondent after sending the October 1999 reminder. There is no evidence the Agency investigated or cited Respondent for untimely return of the 1999 survey. In fact, evidence shows the Employment Department did not even consider Respondent's submission officially late.[1] Absent evidence that the September 15 deadline for submission in 1999 was strictly enforced, the forum declines to consider Respondent's 1999 wage survey response, submitted after an October reminder, as an aggravating circumstance. Second, in previous cases this forum has found wage survey violations not as serious as violations involving the failure to pay or post the prevailing wage rate. *See F.R.Custom Builders*, 20 BOLI at 111. However, it would have been relatively easy for Respondent to comply with the law by simply returning the wage survey, and Respondent was given several opportunities to comply. Moreover, because it received at least two reminders, Respondent knew of the violation before the Agency issued its Notice of Intent. In previous cases where a Respondent has performed nonresidential construction work and untimely submitted the commissioner's wage survey form or not submitted it at all, the forum has imposed a $500 civil penalty. *In the Matter of Green Planet Landscaping, Inc*., 21 BOLI 130 (2000); *In the Matter of Schneider Equipment, Inc*., 21 BOLI 60 (2000); *In the Matter of Martha Morrison*, 20 BOLI 275, 287 (2000); *F.R.Custom Builders*, 20 BOLI at 111. Having considered the circumstances in this case and other cases in which this forum has im

[1] The Employment Department's electronic file (*See* Findings of Fact – The Merits 3, 7 & 8) submitted by the Agency specifically notes Respondent's 2000 submission as having been submitted "late" but does not so designate the 1999 submission.

posed penalties for violation of ORS 279.359(2), the forum finds $500 an appropriate penalty.

ORDER

NOW, THEREFORE, as authorized by ORS 279.370 and as payment of the penalty assessed as a result of Respondent's violation of ORS 279.359(2), the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **LandCo Enterprises, Inc.** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232, a certified check payable to the Bureau of Labor and Industries in the amount of FIVE HUNDRED DOLLARS ($500.00), plus any interest that accrues at the legal rate on that amount from a date ten days after issuance of the Final Order and the date Respondent complies with the Final Order.

In the Matter of

THE LANDSCAPE COMPANY OF PORTLAND, LLC, dba The Landscape Company

Case No. 108-01

Final Order of the Commissioner Jack Roberts

Issued July 19, 2001

SYNOPSIS

Respondent failed to complete and return BOLI's 2000 prevailing wage rate survey by the date BOLI had specified. The commissioner imposed a $1000 civil penalty for Respondent's violation of ORS 279.359(2). ORS 279.359, ORS 279.370; OAR 839-016-0520; OAR 839-016-0530; OAR 839-016-0540.

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

Case Presenter Peter McSwain, an employee of the Agency, represented the Bureau of Labor and Industries ("BOLI" or "the Agency"). Troy B. Clayton, Respondent's authorized representative, did not appear at the time and place set for hearing. Cynthia McNeff, Attorney at Law, appeared at hearing on behalf of The Landscape Company of Portland, LLC, dba The Landscape Company ("Respondent").

The Agency called no witnesses.

Respondent called Jason Castro, a co-owner of Respondent, as its only witness.

The forum received into evidence:

a) Administrative exhibits X-1 through X-12 (submitted or generated prior to hearing), X-13 and X-14 (submitted after hearing);

b) Agency exhibits A-1 and A-2 (submitted at hearing)

c) Respondent exhibit R-1 (submitted after hearing).

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

FINDINGS OF FACT – PROCEDURAL

1) On January 9, 2001, the Agency issued a Notice of Intent to Assess Civil Penalties in which it alleged that Respondent unlawfully failed to complete and return the 2000 Construction Industry Occupational Wage Survey ("wage survey") by September 15, 2000, in violation of ORS 279.359(2). The Agency alleged aggravating circumstances and sought a civil penalty of $1,500 for the single alleged violation. The Notice of Intent gave Respondent 20 days to file an answer and make a written request for a contested case hearing.

2) The Agency served the Notice of Intent on Respondent's agent, Troy B. Clayton, on or about January 18, 2001, by certified mail.

3) On February 20, 2001, Troy B. Clayton sent the Agency two letters, one designating himself as Respondent's authorized representative, and another that included the following unsworn statement:

> "I am responding to a Notice of Intent to Assess Civil Penalties for failure to complete the 2000 Construction Industry Occupational Wage Survey. I understand that penalties have been assessed and that The Landscape Company has been out of compliance since 1998. I would like to request a hearing regarding this matter.
>
> "The Landscape Company has contracted out its Payroll preparation since 1998 and with the understanding was that these types of reports were being completed. I have had problems with the service in the past for other reasons and have since change [*sic*] to a new Payroll service.
>
> "I am also better informed about the surveys and importance of them. I have completed and returned the 2000 survey. I will guarantee that all Surveys will be completed and returned in a timely manner in the future.
>
> " * * * * * "

4) On March 28, 2001, the Agency filed a request for hearing. On March 30, 2001, the Hearings Unit served Respondent with: a) a Notice of Hearing that set the hearing for May 8, 2001; b) a Summary of Contested Case

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

5) On April 4, 2001, the forum issued a case summary order requiring the Agency and Respondent to submit case summaries that included: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; and any civil penalty calculations (for the Agency only). The forum ordered the participants to submit their case summaries by April 27, 2001, and notified them of the possible sanctions for failure to comply with the case summary order.

6) The Agency filed a timely case summary. The Hearings Unit did not receive a case summary from Respondent.

7) Respondent's authorized representative, Troy B. Clayton, did not appear at the time and place set for hearing. Cynthia McNeff, attorney at law, appeared at hearing on Respondent's behalf.

8) The Agency and Respondent waived the ALJ's recitation of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

9) At the close of hearing, the record remained open until 5:00 p.m., May 14, 2001, for Respondent, through its counsel, to submit to the Hearings Unit a Washington County police report.

10) On May 9, 2001, the Agency case presenter submitted a copy of Washington County Sheriff's Office Property-Evidence Report Receipt # 1271 that was faxed to the Agency by Respondent's counsel. The Agency had no objection to the report being admitted into the record and the document was marked and received into the record as Respondent's exhibit R-1.

11) On May 14, 2001, the Agency case presenter submitted for the record a letter he received from Respondent's counsel that included the following statement:

> "The Landscape Company, LLC respectfully request [*sic*] abatement assessment [*sic*] due to The Landscape Company, LLC failing to file wage reports as required based on the following:
>
> > "1. Troy Clayton was a principle [*sic*] in the LLC and it was his duty to maintain filings required by the various agencies.
> >
> > "2. Unknown to the others [*sic*] partners, Mr. Clayton was embezzling from the company and failed in his obligations. Due to that, not only is the LLC out of compliance with L & I, but with just about every other agency, both Federal and State. Mr. Clayton hid all notices from the other partners and so they were

> unable to mend the situation.
>
> "3. Charges have been filed against Mr. Clayton and he is no longer a partner in the company. Unfortunately, the remaining partners are left with a considerable mess to clean up.
>
> "4. But for the negligence and criminal activity of Mr. Clayton, the LLC would not now be left with the damage assessment from L & I.
>
> " * * * * * "

In its cover letter, the Agency stipulated that "charges were filed and there is not, as yet, a police report because it is being drafted by Detective Fischer of the Washington County Sheriff's Office."

12) On June 12, 2001, the forum issued an interim order to correct a clerical error and amend the caption to correspond with the Agency's Notice of Intent to Assess Civil Penalties.

13) On June 28, 2001, the ALJ issued a proposed order that notified the participants they were entitled to file exceptions to the proposed order. No exceptions were filed.

FINDINGS OF FACT – THE MERITS

1) At all material times, Respondent was an Oregon employer. (Exhibits X-5)

2) The Research and Analysis section of the Employment Department contracted with BOLI in 1998, 1999, and 2000 to conduct wage surveys. The BOLI Commissioner used the survey results to aid in the determination of the prevailing wage rates in Oregon.

3) As part of its contract with BOLI, the Employment Department maintained electronic files showing the "firm name" of each business entity to whom wage survey packets were sent, the address where each survey was sent, whether each survey was returned and whether it was timely returned, the date on which each survey was sent, and whether and when reminders were mailed to each business entity.

4) On August 28, 2000, the Employment Department sent Respondent a 2000 wage survey packet that included a postage paid envelope for return of the survey. The survey packet also included a notice that its completion and return was required by law and violation could result in the assessment of civil penalties. The packet included instructions to complete and return the survey by September 15, 2000.

5) Reminder cards were sent to Respondent on September 26 and October 16, 2000, indicating that the wage survey had not been received, that Respondent was required to complete and return it by law, and that penalties could be imposed. The second reminder card was also stamped "Final Notice."

6) On January 9, 2001, the Agency issued the Notice of Intent to Assess Civil Penalty against Respondent for its failure to return

the 2000 wage survey. In a cover letter accompanying the Notice, the Agency stated that it still had not received the completed survey. The letter further stated "[T]he penalty amount is based on the premise that you will be completing the enclosed 2000 survey and returning the completed, accurate form to the Bureau on or before February 2, 2001. If you fail to complete and return the 2000 survey, the Bureau will move to amend the Notice of Intent to substantially increase the amount of civil penalties."

7) The Employment Department received the 2000 wage survey form from Respondent on January 23, 2001.

8) In 1998 and 1999, the Employment Department mailed wage survey packets to Respondent. The Employment Department did not receive completed 1998 and 1999 wage surveys from Respondent as a result of those mailings.

9) In 1998, 1999, and 2000, the Employment Department and the Agency mailed all of the documents related to wage surveys to Respondent's correct address by first-class or certified mail.

10) Respondent's three principals - Jason Castro, Castro's wife, and Troy Clayton - operated the business for about five years. All of the company trucks, equipment, and credit were in Castro's name. Castro handled the physical work and Clayton did the office work and bookkeeping for the business. Standard procedure for dealing with company paperwork was to place incoming bills and other papers in a box and pay creditors only when they became demanding. Castro was aware of the procedure. Clayton left the business in March 2001 leaving bills unpaid and paperwork undone. Before he left, Clayton filed an answer to the Agency's charging document and completed and filed the wage survey. After Clayton left, Castro hired a certified public accountant to determine any monetary losses the business suffered due to Clayton's departure and to straighten out the company records. In April 2001, Castro filed a police report alleging Clayton absconded with company funds.

ULTIMATE FINDINGS OF FACT

1) Respondent is an Oregon employer.

2) The commissioner conducted a wage survey in 2000 that required persons receiving the surveys to make reports or returns to the Agency for the purpose of determining the prevailing rates of wage.

3) Respondent received the 2000 wage survey packet.

4) Respondent failed to return the completed survey by September 15, 2000, the date specified by the commissioner.

CONCLUSIONS OF LAW

1) The actions, inaction, and statements of Troy Clayton and Jason Castro are properly imputed to Respondent.

2) ORS 279.359 provides, in pertinent part:

"(2) A person shall make such reports and returns to the Bureau of Labor and Industries as the commissioner may require to determine the prevailing rates of wage. The reports and returns shall be made upon forms furnished by the bureau and within the time prescribed therefor by the commissioner. The person or an authorized representative of the person shall certify to the accuracy of the reports and returns.

"* * * * *

"(5) As used in this section, 'person' includes any employer, labor organization or any official representative of an employee or employer association."

Respondent was a person required to make reports and returns under ORS 279.359(2). Respondent's failure to return a completed 2000 wage survey by September 15, 2000, violated ORS 279.359(2).

3) ORS 279.370 provides, in pertinent part:

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

OAR 839-016-0520 provides:

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

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

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

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

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

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

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

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

"(4) Notwithstanding any other section of this rule, the

commissioner shall consider all mitigating circumstances presented by the contractor, subcontractor or contracting agency for the purpose of reducing the amount of the civil penalty to be assessed."

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

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

"* * * * *

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

"* * * * *

"(i) Failure to submit reports and returns in violation of ORS 279.359(2)[.]"

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

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

"* * * * *

"(5) The civil penalty for all * * * violations [other than violations of ORS 279.350 regarding payment of the prevailing wage] shall be set in accordance with the determinations and considerations referred to in OAR 839-016-0530."

The Commissioner has exercised his discretion appropriately by imposing a $1000.00 civil penalty for Respondent's violation of ORS 279.359(2).

OPINION

PRIMA FACIE CASE

To prove a violation of ORS 279.359(2), the Agency must show that:

(1) Respondent is a "person;"

(2) The commissioner conducted a survey in 2000 that required persons receiving the surveys to make reports or returns to the Agency for the purpose of determining the prevailing rates of wage;

(3) Respondent received the commissioner's 2000 survey; and

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

In the Matter of F.R. Custom Builders, 20 BOLI 102, 109-10 (2000). Respondent did not dispute that it was subject to ORS 279.359(2) and that it failed to comply with the requirement to complete and return the 2000 wage survey by September 15, 2000. The only issue, therefore, is the appropriate civil penalty.

CIVIL PENALTY

The Agency seeks a $1,500 civil penalty for the single violation of ORS 279.359(2). In determining an appropriate penalty, the forum must consider Respondent's history, including prior violations and Respondent's actions in responding to the prior violations, the seriousness of the current violation, and whether Respondent knew it was violating the law. The forum must also consider any mitigating circumstances offered by Respondent. OAR 839-016-0520.

First, although Respondent has no history of prior violations, it admits that in two previous years it neglected to complete and return the wage survey form as required by the Commissioner. Such facts, although outside the scope of the charging document,[1] are aggravating circumstances that may be weighed in determining an appropriate sanction. *In the Matter of Rogelio Loa*, 9 BOLI 139, 146 (1990). In this case, Respondent's acknowledgement of its past failure to comply with the statutory requirement demonstrates knowledge of the violation. The forum does not accept as mitigation Respondent's claim that one principal was ignorant of the other's failure to timely complete and return the 2000 wage survey and that therefore the civil penalty should be abated. While evidence shows Respondent's internal affairs were in disarray, this forum has never given that defense any weight. Employers cannot avoid their legal responsibilities by selective ignorance or inattention. *In the Matter of Sealing Technology, Inc.*, 11 BOLI 241, 251 (1993) (citing *In the Matter of Jet Insulation*, 7 BOLI 135, 142 (1988)).

Second, in previous cases this forum has found wage survey violations not as serious as violations involving the failure to pay or post the prevailing wage rate. *See F.R.Custom Builders*, 20 BOLI at 111. However, it would have been relatively easy for Respondent to comply with the law by simply returning the wage survey, and Respondent was given several opportunities to do so. Moreover, because it received at least two reminders, Respondent knew of the violation before the Agency issued its Notice of Intent. In previous cases where a Respondent has performed nonresidential construction work and untimely submitted the commissioner's wage survey form or not submitted it at all, the forum has imposed a $500 civil penalty. *In the Matter of Green Planet Landscaping, Inc*., 21 BOLI 130 (2000); *In the Matter of Schneider Equipment, Inc*., 21 BOLI 60 (2000); *In the Matter of Martha Morrison*, 20 BOLI 275, 287 (2000); *F.R.Custom Builders*, 20 BOLI at 111. Having considered the circumstances in this case and other cases in which this forum has imposed penalties for violation of

[1] ORS 183.415 requires formal notice of the "matters asserted or charged." Here, the only matter asserted or charged for which penalties are sought is the 2000 violation.

ORS 279.359(2), the forum finds $1000 an appropriate penalty.

ORDER

NOW, THEREFORE, as authorized by ORS 279.370 and as payment of the penalty assessed as a result of Respondent's violation of ORS 279.359(2), the Commissioner of the Bureau of Labor and Industries hereby orders **The Landscape Company of Portland, LLC** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232, a certified check payable to the Bureau of Labor and Industries in the amount of ONE THOUSAND DOLLARS ($1000.00), plus any interest that accrues at the legal rate on that amount from a date ten days after issuance of the Final Order and the date Respondent complies with the Final Order.

In the Matter of

BARRETT BUSINESS SERVICES, INC.

Case No. 20-01

Final Order of the Commissioner Jack Roberts

Issued August 8, 2001

SYNOPSIS

Complainant applied for work with Respondent as a medical transcriptionist. As part of the job application process and as a condition of employment, Respondent required Complainant to complete forms that made inquiries as to whether Complainant was a disabled person and to the nature and extent of any disability. By making these inquiries, Respondent violated ORS 659.447(1) and ORS 659.436. The forum found that Respondent did not violate ORS 659.436(2)(c) & (g) or ORS 659.448(1) because Complainant was neither a disabled person nor an "employee" at the time the inquiries were made. The forum also found that Respondent did not subject Complainant to a medical examination or evaluation and did not violate the provisions of ORS 659.447(1), 659.448(1), or *former* OAR 839-006-0242(1) that prohibit medical examinations or evaluations. Complainant was awarded $15,000 in mental suffering damages. ORS 659.400(1), 659.400(2)(a), (b), & (d), 659.436, 659.447, 659.448, 658.449, OAR 839-006-0242.

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Jack Roberts, Commissioner of the Bureau of Labor and Industries ("BOLI") for the State of Oregon. The hearing was held on April 10, 2001, in BOLI's Bend office located at 1250 NE 3rd, #B-105, Bend, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by David K. Gerstenfeld, a case presenter employed by of the Agency. Complainant Marie Annette was present throughout the evidentiary portion of the hearing and was not represented by counsel. Respondent was represented by David J. Sweeney, attorney at law. Jary Winstead, branch manager of Respondent's Bend office, was present throughout the hearing as the person designated to assist Respondent's case.

The Agency called Complainant and Dr. John Corso, Complainant's physician, as witnesses. Respondent called Jary Winstead as its only witness.

The forum received into evidence:

a) Administrative exhibits X-1 through X-10 (submitted or generated prior to hearing), and X-11 (Respondent's "Hearing Memorandum" that was submitted at hearing without objection);

b) Agency exhibits A-3 through A-11 (submitted prior to hearing); and a portion of A-12 (submitted at hearing);

c) Respondent exhibits R-5, R-6, and R-10 (submitted prior to hearing).

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

FINDINGS OF FACT – PROCEDURAL

1) On July 6, 1999, Complainant filed a verified complaint with the Agency's Civil Rights Division alleging that she was the victim of the unlawful employment practices of Respondent. After investigation, the Agency found substantial evidence of an unlawful employment practice and issued an Administrative Determination on July 6, 2000.

2) On October 31, 2000, the Agency issued Specific Charges alleging that Respondent discriminated against Complainant by requiring her, at the time of her application for employment with Respondent and prior to a job offer being made, to provide medical information, including a signed medical release form, that was not job-related or consistent with business necessity, in violation of ORS 659.436(c) and (g) and OAR 839-006-0200(3)(c), (f)[1] and 839-006-0242. The Agency sought $5,000 in lost wages and benefits and $15,000 in damages for mental, emotional and physical suffering.

3) On October 31, 2000, the forum served on Respondent the Specific Charges, accompanied by the following: a) a Notice of

[1] The provisions of OAR 839-006-0200(3)(c) and (f) did not go into effect until August 11, 2000. Because they did not exist in May 1999, the forum has not applied them.

Hearing setting forth April 10, 2001, in Bend, Oregon, as the time and place of the hearing in this matter; b) a Summary of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case process; and d) a separate copy of the specific administrative rule regarding responsive pleadings.

4) On November 13, 2000, Respondent, through attorney David J. Sweeney, filed an answer to the Specific Charges.

5) On November 30, 2000, the forum ordered the Agency and Respondent each to submit a case summary including: a list of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a statement of any agreed or stipulated facts; a brief statement of the elements of the claim and any damage calculations (for the Agency only); and a brief statement of any defenses to the claim (for Respondent only). The forum ordered the participants to submit case summaries by March 30, 2001, and notified them of the possible sanctions for failure to comply with the case summary order.

6) On February 9, 2001, the Agency filed a motion for a discovery order seeking numerous documents related to Complainant's application for employment with Respondent and Respondent's hiring procedures. The Agency attached documentation that the same documents had been requested informally on two occasions and a statement showing how the documents requested were likely to produce information generally relevant to the case. Respondent did not object to the Agency's motion and the forum granted it in its entirety on February 23, 2001.

7) On March 12, 2001, the Agency filed a motion to amend the Specific Charges to include an allegation that the facts alleged also constituted a violation of ORS 659.447 and 659.448. Respondent did not object, and the forum granted the Agency's motion on March 29, 2001.

8) On March 30, 2001, the Agency and Respondent timely filed their case summaries.

9) At the commencement of the hearing, the ALJ verbally advised the Agency and Respondent of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

10) Prior to opening statements, Respondent provided the forum with a supplemental case summary. The Agency did not object and it was received as an administrative exhibit.

11) Prior to opening statements, the Agency and Respondent made a number of factual stipulations.

12) Prior to opening statements, the Agency moved to amend the Specific Charges to delete its request for lost wages.

Respondent did not object and the motion was granted.

13) The ALJ issued a proposed order on July 17, 2001, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. Respondent filed exceptions on July 27, 2001. The Agency filed no exceptions. Respondent's exceptions are discussed in the Opinion section of this Final Order.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent was a foreign corporation doing business in Oregon, including providing staffing services to employers in Deschutes County, Oregon through its Bend branch office, and was an employer that employed six or more persons in Oregon.

2) Respondent is a temporary staffing and staff leasing service that provides employees to other employers. Respondent receives job orders from other employers, then solicits and screens applicants to fill those job orders. Applicants whom Respondent refers to other employers to fill job orders are hired as Respondent's employees and remain Respondent's employees when placed with another employer in response to a job order.

3) Respondent's Bend branch office placed advertisements in *The Bend Bulletin* for two medical transcriptionist positions on May 2 and May 5, 1999. The advertisement on May 2 read as follows:

> "MEDICAL TRANSCRIPTIONIST: Experienced medical transcriptionist with dictation background needed for 2-3-wk. period."

The advertisement on May 5 read as follows:

> "Medical Transcriptionist: Part time temp-to-hire position. Flexible work schedule. Must type 65-80 wpm. May go to fulltime for ideal candidate with reception experience. $7.50-$8.50/hr."

4) In response to the advertisements, Complainant visited Respondent's Bend office on May 18, 1999, to apply for the medical transcriptionist positions.

5) Complainant received an associate's degree in Applied Science/Health Information Technology from Central Oregon Community College ("COCC") in 1997 or 1998. Along with her degree, Complainant received certification in transcription. In late 1998, Complainant was nationally accredited as a medical transcriptionist when she took and passed a test administered by the American Health Information Management Association ("AHIMA"), the organization responsible for accrediting medical transcriptionists.

6) When Complainant arrived at Respondent's office, Stephanie Fountain, a coordinator employed by Respondent, conducted a brief interview with Complainant. Complainant told Fountain that she was interested in a medical transcriptionist position and was

responding to Respondent's advertisement. After asking Complainant about her typing speed and education, Fountain gave Complainant a number of forms to fill out that included an application, an "Essential Functions" form, Respondent's Alcohol and Drug Policy, an Alcohol and Drug Screen Consent form, and a Medical History Information ("MHI") form.

7) Complainant completed the application, but neglected to sign it.

8) The "Essential Functions" form required Complainant to check one of three boxes with regard to her ability to perform various physical activities and physical functions and work in a variety of physical environments. Complainant was to check "I CAN DO THIS," "I CAN DO THIS WITH ACCOMMODATIONS (EXPLAIN)," or "I CAN NOT DO THIS" for each activity, function, and environment listed on the form. The physical activities listed included Complainant's ability to carry weights of 0-100 pounds, and her ability to perform nine different activities for "8 TO 10 HOURS" that were "FIGURED PER DAY IN A 40 + HOUR WEEK." Specifically, the activities were "standing," "sitting," "walking, bending," "squatting," "kneeling," "crawling," "twisting," and "lifting." The environments listed were "in or on high areas," "wood dust or pollen," "fiberglass or fumes," "close quarters," "crowds of people," "fast paced," and "other." The physical functions were defined as "PHYSICAL FUNCTIONS CONTINUOUS FOR 8 HOURS PER DAY AT A 40 + HR WEEK." The functions listed were "repetitive finger movement," "repetitive wrist movement," "repetitive lifting," "eye focusing screens/monitors," and "other." After each section, there was a line where Complainant was asked to "EXPLAIN." At the bottom of the form, just above the signature line, there was a final question that asked "TO THE BEST OF YOUR KNOWLEDGE ARE THERE ANY PHYSICAL, ENVIRONMENTAL OR INDUSTRIAL WORK REQUIREMENTS YOU WOULD FEEL UNCOMFORTABLE WITH, OR UNABLE TO DO WITHOUT ACCOMMODATIONS? EXPLAIN." Respondent uses this form to match employees to job descriptions received from clients.

9) Based on her education, Complainant believed that some of the questions on the form might not be legal, and asked Fountain about this. Fountain responded that Respondent needs to ask everyone the same questions, even though all tasks are not performed by all people. Complainant then completed the form.

10) Respondent's two page MHI form asked Complainant to respond in writing to the following questions pertinent to her:

> "1. If the job(s) you are applying for require <u>HAND OR ARM USE</u> (such as keyboard * * *) answer these questions:

"a) How long can you perform repetitive motion tasks with both hands? _____ hours each day

"b) How long can you perform simple grasping of hand or power tools? _____ hours each day

"c) What work have you done that involved repetitive use of your hands, wrists, or arms?

"d) Have you ever had pain, numbness, tingling, or problems with your hands, wrists, arms, shoulders or neck? ☐ Yes ☐ No

"If yes, describe what and when?

"If yes, describe medical treatment you received?

"If yes, describe any hands, wrists, arms, shoulders or neck restrictions or limitations you **now** have?

"* * * * *

"3. If the job(s) you are applying for requires use of the LOWER BODY (such as: * * *extended sitting * * *" answer these questions:

"* * * * *

"b) What work have you done that involved * * * extensive sitting * * *?

"c) Have you **ever** had pain, strains, sprains or problems with your legs, knees, feet or pelvic areas? ☐ Yes ☐ No

"If yes, describe what and when?

"If yes, describe medical treatment you received?

"If yes, describe any legs, knees, feet or pelvic areas restrictions or limitations you **now** have? ☐ Yes ☐ No

"* * * * *

"ALL APPLICANTS ANSWER THE FOLLOWING QUESTIONS

"7) Are you now taking any <u>medications</u> that may affect the quality, quantity, or safety of your work? ☐ Yes ☐ No If yes, please list:

"8) Are you presently under the <u>care of a physician</u> of any type for any physical ailment or illness that may affect the quality, quantity, or safety of your work? ☐ Yes ☐ No If yes, please explain:

"9) Do you presently have a condition that may require a special <u>work place accommodation</u>? ☐ Yes ☐ No If yes, please describe:

"10) Have you ever received <u>medical or first-aid treatment</u> for any injury or illness that occurred while you were on a job? ☐ Yes ☐ No If yes, please describe:

"11) Have you ever been <u>unable to work</u> on a job or unable to perform an assigned task because of an inability to per-

form certain motions, assume certain positions, or any other medical reason? ☐ Yes ☐ No If yes, please describe:

"12) How physically fit are you now? Poor Not Bad Average Good Very Good What activities do you regularly perform to help keep physically fit?

"MEDICAL RECORDS RELEASE

"For purposes of assisting in safe job placement, supervision, and injury claim prevention and management, I give my consent to any health care provider * * * to disclose upon request to Barrett Business Services, Inc. * * * any and all information concerning past, present and future medical conditions, evaluations or treatments including, but not limited to, claim reports, medical records, medical records, x-rays, all diagnostic tests and reports, consultations, examinations, prescriptions or treatments. This authorization applies to any prior or future employer, insurance carrier, government agency, Social Security Administration, Veterans Administration, or medical service provider of any type.

"* * * I understand and agree that falsification of information, misleading statements, misrepresentation, or omission of facts called for anywhere on this form is cause for denial of employment, or if employed, cause for dismissal regardless of when discovered. This release is valid for seven years from the date signed below or the date of my termination from employment with Barrett, whichever is later.

"APPLICANT SIGNATURE
TODAY'S DATE"

11) Complainant believed that Respondent's MHI form was "a total invasion" of her privacy and contained illegal questions concerning her medical history. She was especially offended, upset, and taken aback by the requirement that she sign the "MEDICAL RECORDS RELEASE" at the bottom of the form.

12) Complainant told Fountain that she didn't think Respondent could legally require her to complete and sign the MHI form. Fountain told Complainant it was a required part of Respondent's application process that had been approved by Respondent's lawyers and that Respondent wouldn't be checking Complainant's medical records unless she "indicate[d] restrictions, allergies, or other possible medical restrictions that we would want a doctor's consent to work from."

13) Complainant became extremely upset with Fountain's statements, including her assertion that she had to sign the MEDICAL RECORDS RELEASE. Fountain then asked Shannon, one of Respondent's management employees, to provide assistance. Shannon reiterated to Complainant and Fountain that the MHI

form was a required form and that Complainant would not be considered a Barrett employee if she refused to sign the form. Shannon also told Complainant that she could become a Barrett employee if she later chose to sign the MHI form and application.

14) Complainant remained at Respondent's Bend office for about five minutes after being given the MHI form.

15) Complainant received no safety training from Respondent and did not see or sign Respondent's "Employee Safety Handbook."

16) Complainant was in disbelief that Respondent's employees were requiring her to sign the MHI form and became very upset over the incident. She was depending on Respondent to help her "get her foot in the door" for employment as a medical transcriptionist because it is a hard field to get into and felt Fountain's and Shannon's actions indicated that "the door was shut" to her in the Bend area where she lived. Complainant then left Respondent's office. She became more upset about her visit as the day went on until she was "shaking upset" and probably couldn't have driven back to Respondent's office, even if she had tried. Later that day, Complainant called Respondent and asked Shannon what statute allowed Respondent to ask the information contained on the MHI form, but Shannon could not give her a statute. Shannon did tell Complainant "if it's that much of a problem, maybe we could let it slide." Complainant declined to return to Respondent's office, distrusting Shannon's sincerity after her experience earlier that day.

17) Complainant has fibromyalgia and was diagnosed as having fibromyalgia in 1994. Dr. Corso has been treating Complainant for her fibromyalgia since September 1999.

18) Fibromyalgia is a chronic medical disorder that causes pain, stiffness, and fatigue. It is a widespread pain syndrome with pain in multiple areas of the body. Stress and negative emotions can exacerbate these symptoms.

19) In the year prior to May 18, 1999, and up to her interview at Respondent's office, Complainant had experienced fluctuations in the intensity and location of pain from fibromyalgia, including periods of remission. She was able to sit and type at the time she applied for employment with Respondent.

20) Complainant was emotionally upset for a couple of days after her visit to Respondent's office. Over the next two and one-half weeks following her interview at Respondent's office, Complainant experienced an acceleration in pain, with no accompanying remissive symptoms. Complainant became unable to sit. Her feet then became sore from standing. She was unable to sit and type. Two and one-half weeks after her interview with Respondent, Complainant took a medical

transcription test as part of the application process for another job and was unable to complete it due to pain from fibromyalgia that prevented her from sitting for the time necessary to complete the test. Prior to her interview with Respondent, Complainant could have completed this test. Complainant has been disabled from working because of pain due to her fibromyalgia and inability to sit for any extended period of time since shortly after applying for work with Respondent and believes that her current level of disability is connected to Respondent's rejection of her application due to her refusal to complete Respondent's MHI form.

21) On May 18, 1999, both medical transcriptionist positions advertised by Respondent had been filled internally through the client doctors' offices. Respondent was unaware on May 18, 1999, that the positions had been filled.

22) In 1999, Respondent's written hiring policy stated that Respondent would take the following steps with all applicants before making a hiring decision:

a) All applicants were required to complete and sign Respondent's application form;

b) All applicants were to given the following forms: Application, Safety Handbook, Alcohol & Drug Policy, Drug Screen Consent Form, Disclosure Statement, Policies for Termination, and Benefit Sheet.

c) Respondent's service representative would review the paperwork, interview the applicant, conduct safety training, and have the "employee" sign "check list." The service representative would also ask "how repetitious" their former work was and "how much weight" was involved.

23) After these steps are listed in Respondent's written hiring policy, Respondent's policy states "You now must make the decision to hire the applicant at your desk or not. If your decision is to hire, welcome them and advise them that they have been hired."

24) Complainant was not given safety training, did not sign a "check list," and was not told that she was hired.

25) When Respondent decides to hire an applicant, Respondent places them in a "job pool" to be considered for future job openings if there is not an immediate job opening in which to place the applicant. Respondent considers that an applicant is "hired" at the time an applicant is either placed with a client or placed in Respondent's job pool, whichever comes first.

26) Respondent has a job pool of applicants to draw from so that client job orders can be filled quickly.

27) Applicants placed in Respondent's job pool who are not immediately referred to a job assignment with one of Respondent's clients do not know

where they will be working, their rate of pay, who their supervisor will be, or whether they will ever be placed in a job. Some applicants placed in Respondent's job pool are never referred to a job assignment. If these applicants apply for unemployment benefits, their previous employer, not Respondent, is responsible for those benefits. Applicants placed in Respondent's job pool never receive any pay before being referred to a job assignment.

28) Winstead, who was safety manager in Respondent's Bend office in May 1999 and became branch manager in July 2000, testified that that applicants are considered employees of Respondent as soon as they are placed in Respondent's job pool and that in May 1999 all applicants were given Respondent's MHI form only after placement in Respondent's job pool. This testimony was directly contradicted by Stephanie Fountain's contemporaneous handwritten notes related to Complainant's interview stating that Complainant was given Respondent's MHI form to complete before Complainant was considered an employee, leading the forum to conclude that Winstead was either untruthful in this part of his testimony or testified to facts to which he lacked accurate knowledge. Because of this, the forum finds his testimony to be unreliable and has only credited it where it is unopposed or supported by other credible evidence in the record.

29) Complainant and Corso were credible witnesses.

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent was an employer in the business of providing temporary staffing and leasing staff that employed six or more persons in Oregon.

2) On May 2 and May 5, 1999, Respondent's Bend branch office placed advertisements in a local newspaper seeking applicants for two medical transcriptionist positions.

3) Complainant has fibromyalgia, a medical condition that has disabled her from working, and was first diagnosed as having it in 1994.

4) Complainant obtained an associate's degree in Applied Science/Health Information Technology and certification as a transcriptionist from COCC in 1997. In 1998, she was nationally accredited as a medical transcriptionist.

5) On May 18, 1999, Complainant visited Respondent's Bend office to apply for the advertised medical transcriptionist positions.

6) During the application process, Complainant was asked to complete an "Essential Functions" form that inquired about her ability to perform a number of activities and functions unrelated to the position of medical transcriptionist in a number of environments equally unrelated to the position of medical transcriptionist. Before

completing it, Complainant asked Stephanie Fountain, Respondent's employee, if some of the questions on the form were legal. Complainant completed the form after Fountain told her that Respondent needed to ask everyone the same questions.

7) During the application process, Complainant was asked to complete a MHI form that specifically inquired about her medical history, including any problems with her hands, wrists, arms, shoulders, neck, legs, knees, feet, or pelvic areas, if she was presently under the care of a physician for any physical ailment or illness that might affect her work, whether she presently had a condition that might require a special work place accommodation, and if she had ever been unable to work on a job or perform an assigned task because of any medical reason. She was also asked to sign a Medical Records Release included on the MHI form authorizing Respondent to obtain information from any health care provider regarding any medical condition Complainant had ever experienced in the past or within seven years after signing the Release.

8) Complainant refused to sign the Release and was told by Fountain and Shannon, both employees of Respondent, that she would not be considered Respondent's employee without her signature. As a result, Complainant left Respondent's office without signing the form and was not placed in Respondent's job pool nor referred to either advertised position.

9) Complainant was not a disabled person on May 18, 1999.

10) Complainant experienced substantial emotional suffering as a result of Respondent's requirement that she complete the MHI form and sign the Release as a condition of being placed in Respondent's job pool or being referred to a specific job.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent was an employer subject to the provisions of ORS 659.010 to 659.110 and 659.400 to 659.449.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the persons and of the subject matter herein and the authority to eliminate the effects of any unlawful employment practice found. ORS 659.040, 659.050, and 659.436.

3) The actions of employees Stephanie Fountain and Shannon, described herein, are properly imputed to Respondent.

4) ORS 659.436 provides, in pertinent part:

> "(1) It is an unlawful employment practice for any employer to refuse to hire, employ or promote, to bar or discharge from employment or to discriminate in compensation or in terms, conditions or privileges of employment be-

cause an otherwise qualified person is a disabled person.

"(2) An employer violates subsection (1) of this section if the employer does any of the following:

" * * * * *

"(c) The employer utilizes standards, criteria or methods of administration that have the effect of discrimination on the basis of disability, or that perpetuate the discrimination of others who are subject to common administrative control.

" * * * * *

"(g) The employer uses qualification standards, employment tests or other selection criteria that screen out or tend to screen out a disabled person or a class of disabled persons unless the standard, test or other selection criterion, as used by the employer, is shown to be job-related for the position in question and is consistent with business necessity."

ORS 659.447 provides, in pertinent part:

"(1) Except as provided in this section, an employer violates ORS 659.436 if the employer conducts a medical examination of a job applicant, makes inquiries of a job applicant as to whether the applicant is a disabled person or makes inquiries as to the nature or severity of any disability of the applicant.

"(2) An employer may make inquiries into the ability of a job applicant to perform job-related functions."

ORS 659.448 provides, in pertinent part:

"(1) Except as provided in this section, an employer may not require that an employee submit to a medical examination, may not make inquiries of an employee as to whether the employee is a disabled person, and may not make inquiries of an employee as to the nature or severity of any disability of the employee, unless the examination or inquiry is shown to be job-related and consistent with business necessity.

"(2) An employer may conduct voluntary medical examinations, including voluntary medical histories, that are part of an employee health program available to employees at that work site. An employer may make inquiries into the ability of an employee to perform job-related functions."

Former OAR 839-006-0242 provided, in pertinent part:[2]

"(1) An employer may not require of any applicant any medical examination or evaluation prior to an offer of employment.

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[2] This version of the rule was in effect in May 1999.

> "(2) An employer may require a medical examination or evaluation after an offer of employment but before the individual commences work only if a medical examination or evaluation is required of all employees hired into that same job category."

ORS 659.449 provides:

> "ORS 659.436 to 659.449 shall be construed to the extent possible in a manner that is consistent with any similar provisions of the federal Americans with Disabilities Act of 1990, as amended."

Respondent made inquiries of Complainant, a job applicant, concerning whether she was a disabled person and as to the nature or severity of any disability. By doing so, Respondent violated ORS 659.447(1) and ORS 659.436. Respondent did not violate the provisions of ORS 659.448(1) prohibiting inquiries of an employee as to whether Complainant was a disabled person or as to the nature or severity of her disability for the reason that Complainant was never hired by Respondent and did not become an "employee." Respondent did not conduct a medical examination of Complainant or require a medical examination or evaluation and did not violate the prohibitions against those actions contained in ORS 659.447(1), 659.448(1), and *former* OAR 839-006-0242. Although Respondent required Complainant, a job applicant, to provide information concerning her physical ability to perform functions that were not job-related, Respondent did not violate ORS 659.436(2)(c) and (g) because Complainant was not a disabled person at the time of her application.

5) Pursuant to ORS 659.060(3) and by the terms of ORS 659.010(2), the Commissioner of the Bureau of Labor and Industries has the authority under the facts and circumstances of this case to award Complainant money damages for emotional distress suffered as a result of Respondent's unlawful employment practice and to protect the rights of Complainant and others similarly situated. The sum of money awarded and the other actions required of Respondent in the Proposed Order below are appropriate exercises of that authority.

OPINION

The Agency alleges that Respondent violated Oregon's disability laws in several ways. First, that Respondent violated ORS 659.436 and 659.447 by making an inquiry of Complainant, prior to employment with Respondent, concerning whether she was a disabled person, the nature or severity of any disability she might have, and by inquiring into her abilities to perform non-job-related functions. Second, that Respondent violated OAR 839-002-0242(1) by requiring Complainant, prior to an offer of employment, to undergo a medical examination or evaluation. Third, that Respondent violated ORS 659.448 by requiring her to provide medical

information and undergo a medical examination as a condition of employment. Fourth, that Respondent violated ORS 659.436(2)(c) and (g) by requiring Complainant to fill out forms that sought medical information that was not job-related and had the effect of discrimination on the basis of disability. The Agency seeks $15,000 in mental suffering damages to compensate Complainant for Respondent's alleged unlawful employment practices.

RESPONDENT DID NOT MAKE AN OFFER OF EMPLOYMENT TO COMPLAINANT

ORS 659.447 and OAR 839-006-0242(1) only apply to actions to which an employer subjects a job applicant prior to an actual job offer. In defense, Respondent contends that a job offer was made to Complainant and she was placed in Respondent's job pool, thereby justifying the inquiries made into Complainant's medical history on the MHI form. Winstead, Respondent's branch manager, also testified that job applicants became employees as soon as they were placed in Respondent's job pool.

Complainant testified credibly that Respondent did not offer her the medical transcriptionist jobs for which she applied for or placement in Respondent's job pool. Respondent's written policy and the contemporaneous handwritten notes of Stephanie Fountain both support Complainant's testimony. Among other things, the policy states that applicants must sign Respondent's application form, sign a "check list," and undergo safety training before Respondent's representative could make a hiring decision. Complainant did none of these things. Fountain's note lends unequivocal support to Complainant's testimony. In pertinent part, it reads:

> "[Shannon] reiterated that [the MHI form] was a required form, the necessity of the form, and that if [Complainant] didn't want to sign it that was ok, but she wouldn't be considered a Barrett employee. If she chose to later sign the form and her application, then we could continue with the process."

Based on this evidence, the forum concludes that Respondent did not offer Complainant either the medical transcriptionist positions or placement in Respondent's job pool.

Even if Respondent had offered Complainant placement in Respondent's job pool, this would not constitute an offer of employment that made Complainant an "employee" under the provisions of ORS 659.448. Neither ORS chapter 659 nor the Agency's administrative rules[3] interpreting those statutes defines what an offer of employment is that elevates a job applicant to "employee" status upon acceptance of the offer. ORS 659.449 provides interpretive guidance by requiring that "ORS 659.436 to 659.449

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[3] OAR 839-006-0200 through 839-006-0265.

shall be construed to the extent possible in a manner that is consistent with any similar provisions of the [ADA], as amended." The ADA, in turn, contains provisions almost identical to ORS 659.447[4] and ORS 659.448.[5] Those provisions have been interpreted by the EEOC in guidelines applicable to workers employed by temporary staffing agencies such as Respondent.[6] Those guidelines state that a "staffing firm's offer to place an individual on its roster for possible consideration in the future for temporary work assignments with its clients" does not constitute an "offer of employment" under the ADA.[7] The guidelines also state that an offer of employment "[generally] occurs when a staffing firm worker is given an assignment with a particular client." Based on these provisions, the forum concludes that placement of Complainant or any other job applicant in Respondent's job pool does not constitute an offer of employment that entitles Respondent, under ORS 659.447(3) or 659.448, to conduct medical examinations, make inquiries as to whether a person is disabled, or make inquiries of as to the nature or severity of a person's disability when the examination or inquiry is shown to be job-related and consistent with business necessity.

SCOPE OF ORS 659.447(1), 659.448(1), AND 659.436(2).

ORS 659.447 protects all job applicants, *regardless of whether or not they have a disability*, from medical examinations, inquiries as to whether the applicant is a disabled person, and inquiries as to the nature or severity of any disability of the applicant. An employer is allowed to inquire into the ability of a job applicant to perform job-related functions. ORS 659.448 extends the same protections to all employees, unless the examination or inquiry is shown to be job-related and consistent with business necessity. Again, it is irrelevant whether or not the employee has a disability.

In contrast, the provisions of ORS 659.436(2) prohibit an employer from taking certain specific actions based on the disability of an applicant or employee.[8] It necessarily follows that a person must be disabled or associated with a disabled person to come under the umbrella of protection afforded by ORS 659.436(2).

RESPONDENT VIOLATED ORS 659.436 AND 659.447(1) BY

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[4] 42 U.S.C. § 12112(d)(2)(A) & (B).

[5] 42 U.S.C. § 12112(d)(4)(A) & (B).

[6] Enforcement Guidance: Application of the ADA to Contingent Workers Placed By Temporary Agencies And Other Staffing Firms, 8 FEP Manual (BNA) 405:7551 (1997). This document may be found on the internet at www.eeoc.gov/docs/guidance-contingent.html (visited April 2, 2001).

[7] *Id*.

[8] The exception is ORS 659.436(2)(d), which prohibits discrimination on the basis of "relationship or association" with a disabled person.

REQUIRING COMPLAINANT TO COMPLETE THE "ESSENTIAL FUNCTIONS" AND "MEDICAL HISTORY INFORMATION" FORMS.

A. Respondent made inquiries of Complainant as to whether she was a disabled person and violated ORS 659.447(1) and 659.436.

EEOC Guidelines define a "disability-related inquiry" as "a question that is likely to elicit information about a disability."[9] The Guidelines provide examples of disability-related inquiries that include the following:[10]

> 1) asking a job applicant whether s/he has (or ever had) a disability or how s/he became disabled or inquiring about the nature or severity of an employee's disability;
>
> 2) asking about a job applicant's prior workers' compensation history;
>
> 3) asking a job applicant whether s/he currently is taking any prescription drugs or medications, whether s/he has taken any such drugs or medications in the past * * *;
>
> 4) asking a job applicant a broad question about his/her impairments that is likely to elicit information about a disability (e.g., What impairments do you have?)."

Respondent's MHI form made an indirect inquiry about Complainant's workers' compensation history ("Have you ever received medical or first-aid treatment for any injury or illness that occurred while you were on a job?")[11] and a direct inquiry as to the medications Complainant was taking ("Are you now taking any medications that may affect the quality, quantity, or safety of your work?"). Other questions on the MHI form specific to the job Complainant applied for inquire if Complainant had ever had "pain * * * or problems with [her] hands * * * neck," "any hands * * * or neck restrictions or limitations you now have." Those questions, along with the

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[9] Enforcement Guidance: Preemployment Disability-Related Questions and Medical Examinations Under the Americans with Disabilities Act of 1990, 8 FEP Manual (BNA) 405:7192 (1995). This document may be found on the internet at www.eeoc.gov/docs/preemp.html (visited April 2, 2001).

[10] Enforcement Guidance: Disability-Related Inquiries and Medical Examinations Under the Americans with Disabilities Act (ADA) (2000). This document may be found on the Internet at www.eeoc.gov/docs/guidance-inquiries.html (visited April 2, 2001).

[11] The forum considers this an inquiry about Complainant's workers' compensation history because persons answering affirmatively to the question were directed to "please describe" the treatment for the "injury or illness" and the resultant probability that the affirmative answer and resultant description would elicit information from which Respondent could infer or conclude that the injury or illness was a compensable injury or illness under the workers' compensation system.

other questions contained in the section on the MHI form that Respondent required all applicants to complete, fit into the category of prohibited inquiries 1 and 4 cited above[12] and violated ORS 659.447(1) and ORS 659.436. The Essential Functions form made broad inquiries into Complainant's ability to lift different amounts and perform a wide variety of physical activities and functions, and work in various environments. If Complainant indicated an inability to lift a specific amount, perform any activity or function, or work in an environment, the form then asked if Complainant could do it "with accommodations" and asked for a specific explanation. The form's final sweeping question asked Complainant to state any "physical, environmental or industrial work requirements" she "would feel uncomfortable with, or unable to do without accommodations" and asked for a explanation. These questions fit within the category of questions "likely to elicit information about a disability." By requiring Complainant to answer them, Respondent violated ORS 659.447(1) and ORS 659.436.

B. Respondent made inquiries as to the nature or severity of any disability of Complainant and violated ORS 659.447(1) and 659.436.

Respondent's MHI form asked Complainant to "explain" if she answered "yes" to the question of whether she was "under the care of a physician of any type for any physical ailment or illness that may affect the quality, quantity or safety of [her] work." The form also asked Complainant to "describe" if she "presently ha[d] a condition that may require a special work place accommodation." The forum interprets these open-ended questions as seeking specific information as to the nature and severity of any disability that Complainant had. Had Complainant completed the form and answered the questions truthfully, she would have had no choice but to provide details about her fibromyalgia. These inquiries violated ORS 659.447(1) and ORS 659.436.

C. Respondent did not violate ORS 659.436(2)(c) and (g).

As stated earlier, the provisions of ORS 659.436(2)(c) and (g) prohibit an employer from taking certain specific actions based on the disability of an applicant or employee. In pertinent part, ORS 659.400(1) defines a "disabled" person as:

> "a person who has a physical or mental impairment which substantially limits one or more

[12] *See* Finding of Fact – The Merits 10, *supra*.

> major life activities, [or] has a record of such an impairment * * *."

"Physical impairment" is defined in *former* OAR 839-006-0205(3)[13] as:

> "any physiological disorder or condition * * * affecting one or more of the following body systems: neurological, musculoskeletal * * *."

"Major life activity" is defined in ORS 659.400(2)(a) as:

> "includ[ing] but not limited to self-care, ambulation, communication, transportation, education, socialization, employment and ability to acquire, rent or maintain property."

"Has a record of such an impairment" is defined in ORS 659.400(2)(b) as:

> "[H]as a history of, or has been misclassified as having, a mental or physical impairment that substantially limits one or more major life activities."

"Major life activity" is defined in *former* OAR 839-006-0205(2)[14] as:

> "[I]n addition to the activities listed in ORS 659.400(2)(a), [major life activity] includes but is not limited to speaking, performing manual tasks, walking, seeing, hearing, breathing, learning, sleeping and working. When working is the major life activity in which the person is substantially limited, the person must be significantly restricted in the ability to perform a class of jobs or a broad range of jobs in various classes when compared to the ability of an average person with comparable skill, experience, education or other job related requirements needed to perform those same jobs."

"Substantially limits" is defined in ORS 659.400(2)(d)(A) and (B) as:

> "(A) The impairment renders the person unable to perform a major life activity that the average person in the general population can perform; or
>
> "(B) The impairment significantly restricts the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner or duration under which the average person in the general population can perform the same major life activity."

Dr. Corso, who has been treating Complainant for fibromyalgia since September 1999, testified that Complainant's fibromyalgia is a chronic disorder that causes widespread pain, stiffness, fatigue, and sleep problems. Complainant testified that she experiences those symptoms. This evidence established that Complainant's fibromyalgia is a "physical impairment." Complain-

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[13] Currently renumbered as OAR 839-006-0205(10).

[14] This version of the rule was in effect in May 1999.

ant further testified that fibromyalgia has made it impossible for her to sit in one position for any appreciable length of time without experiencing extreme discomfort and that, as a result, she is unable to work at any job that requires sitting, including working in her chosen profession. This testimony established that Complainant is "significantly restricted in the ability to perform a class of jobs or broad range of jobs"[15] and is "substantially limit[ed]" in the "major life activity" of working. Consequently, the forum concludes that Complainant was a "disabled person" *at the time of the hearing* based on her physical impairment that substantially limits one or more major life activities *and* has a record of a physical impairment that substantially limits or more major life activities.

In this case, for Respondent to have violated ORS 659.436(2)(c) and (g), the evidence must show that Complainant was a disabled person who had a physical impairment or record of a physical impairment that substantially limited one or more major life activities as of May 18, 1999, the date of her job application with Respondent. There is insufficient evidence in the record to establish either. The forum has concluded that Complainant was disabled at the time of the hearing based on her substantial limitation, caused by her fibromyalgia, in the major life activity of working. However, the record does not disclose that she fit within the statutory definition of a "disabled person" at the time of her application with Respondent. She testified that she was able to work as a medical transcriptionist when she applied for work with Respondent and, in her opinion, became disabled from working based on her inability to sit for any extended period of time, in the two and one-half weeks following her application. Although Complainant testified as to her fibromyalgia-related symptoms since 1994, the Agency did not present any substantial evidence that, prior to Complainant's application for work with Respondent, Complainant's fibromyalgia substantially limited her in any major life activity, including working, or that Complainant had a record of being substantially limited in a major life activity because of her fibromyalgia. Because the evidence in the record did not establish that Complainant was substantially limited in a major life activity at the time of her job application with Respondent, the forum may not conclude that Complainant was a "disabled person" at that time or that Respondent violated ORS 659.436(2)(c) or (g).[16]

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[15] *Former* OAR 839-006-0205(2).

[16] If Complainant had met the statutory definition of "disabled person" at the time of her application with Respondent, the forum would have concluded that Respondent violated ORS 659.436(2)(c) and (g).

D. Summary

In Jary Winstead's testimony and Respondent's closing argument, Respondent argued that a job pool and the application process Complainant was subjected to is necessary so Respondent can provide next-day service and successfully operate its business. As the Agency pointed out in its closing argument, having people in a job pool does not put Respondent in a unique category. Respondent's practices, if upheld, would gut Oregon's employment disability laws and the ADA, in that employers would be able to evade the law by the simple expedient of utilizing a temporary staffing agency like Respondent as the source for its employees. This is neither the intent nor letter of the law.

COMPLAINANT WAS NOT REQUIRED TO UNDERGO A MEDICAL EXAMINATION OR EVALUATION.

The Agency's allegation that *former* OAR 839-006-0242 was violated carries with it the necessary inference that Respondent required a "medical examination" or "medical evaluation" of Complainant prior to making an offer of employment. In this case, any violation of *former* OAR 839-006-0242 would also constitute a violation of ORS 659.436 and 659.447.[17] The issue is whether Respondent's requirement that Complainant complete the Essential Functions and MHI forms constituted a "medical examination" or "medical evaluation."

OAR 839-006-0205(7) defines "medical" as "authored by or originating with a licensed health care professional." There is no evidence that Respondent's Essential Functions or MHI forms were authored by or originated with a "licensed health care professional." Therefore, even if Respondent's requirement that Complainant complete the Essential Functions and MHI forms was construed as an "examination," by definition it would not be a "medical examination." Accordingly, the forum concludes that Respondent did not violate OAR 839-006-0242 and the language in ORS 659.447(1) prohibiting pre-employment "medical examinations."

COMPLAINANT'S MENTAL SUFFERING DAMAGES

In determining mental distress awards, the commissioner considers a number of things, including the type of discriminatory conduct, and the duration, frequency, and pervasiveness of that conduct. *In the Matter of James Breslin*, 16 BOLI 200, 219 (1997), *aff'd without opinion*, *Breslin v. Bureau of Labor and Industries*, 158 Or App 247, 972 P2d 1234 (1999). Awards for mental suffering damages depend on the facts presented by each complainant. A complainant's testimony about the effects of a respondent's conduct, if believed, is sufficient to support a claim for

[17] Respondent could not have violated ORS 659.448 because Complainant never became an "employee."

mental suffering damages. *In the Matter of Sears, Roebuck and Company*, 18 BOLI 47, 77 (1999).

In this case, Complainant was asked to complete two forms that made unlawful inquiries concerning whether she had a disability and, if so, the nature and severity of it. At the time Complainant was asked to complete the forms, she believed they made unlawful inquiries. Complainant refused to complete and sign Respondent's MHI form and was told she couldn't be hired unless she completed and signed it. This made her very upset, and she became more upset about Respondent's behavior as the day went on, perceiving it as an indicator that she would not be able to get work as a medical transcriptionist in the Bend area where she lived. She was upset for at least two more days after that over Respondent's behavior. Over the next two and one-half weeks, her fibromyalgia increased in intensity, without any remission, and she lost her ability to sit for any extended period of time and was unemployable in her chosen field from the date she lost her ability to sit for any extended period of time until the date of the hearing.[18] Complainant expressed her belief that the emotional upset she experienced as a result of Respondent's behavior caused her fibromyalgia to accelerate because of the close connection in time. Although there was no evidence of any other intervening factors and Dr. Corso testified that stress and negative emotions can aggravate the symptoms of fibromyalgia, Dr. Corso was unable to testify that Respondent's behavior caused Complainant's fibromyalgia to accelerate because he did not see Complainant until September 14, 1999. Complainant's testimony alone is not enough to prove that the acceleration in her fibromyalgia was caused by Respondent's behavior. Considering all of these factors, the forum concludes that $15,000 is an appropriate award of mental suffering damages.

CEASE AND DESIST ORDER

The commissioner of BOLI is authorized to issue an appropriate cease and desist order reasonably calculated to eliminate the effects of any unlawful practice found. *In the Matter of A.L.P. Incorporated*, 15 BOLI 211, 213-14 (1997), *aff'd* 161 Or App 417, 984 P2d 883 (1999). In this case, a cease and desist order is of particular significance, as Respondent's practices concerning inquiries regarding job applicant's disabilities and ability to perform functions that were not job-related, at the time of Complainant's application for employment with Respondent, violated ORS 659.436 and 659.447(1) with respect to every job applicant, and ORS 659.436(2)(c) and (g)[19] with re-

[18] As Respondent correctly pointed out in its exceptions, there was no evidence presented that Complainant's fibromyalgia has led to a permanent inability to be employed.

[19] *See* footnote 15, supra.

spect to every disabled job applicant. This problem in part stemmed from Respondent's policy of treating all applicants as employees prior to placing them with a client. Consequently, the forum has crafted a cease and desist order designed to constrain Respondent from these practices in the future.

RESPONDENT'S EXCEPTIONS

A. Proposed Finding of Fact – The Merits 28.

Respondent excepts to the finding that Winstead's testimony was contradicted by Fountain's notes and requests that Finding 28 be withdrawn because it has no evidentiary foundation. Respondent is partially correct, and Finding 28 has been modified to reflect Respondent's exception.

B. Proposed Ultimate Findings of Fact 6, 7, and 10.

Respondent excepted to the ALJ's use of the word "required" in Findings 6 and 7 to describe the process Respondent used in getting Complainant to fill out the Essential Functions and MHI forms. Respondent also excepted to the ALJ's finding that Complainant experienced substantial "physical" suffering. Both of Respondent's exceptions are well taken and Ultimate Findings of Fact 6, 7, and 10 have been modified in response. The word "required" has also been changed to "asked" in the body of the Opinion discussing Complainant's mental suffering damages.

C. Respondent's MHI form: inquiries about Complainant's workers' compensation history.

Respondent excepted to the ALJ's statement in the Proposed Opinion that "Respondent's MHI form made specific inquiries about Complainant's worker's compensation history." This portion of the Order has been revised in response.

D. Complainant's unemployability due to her fibromyalgia.

Respondent excepted to the ALJ's conclusory statement in the Proposed Opinion that Complainant "became unemployable in her chosen field." Respondent's point is well taken and the Opinion has been modified to reflect this.

E. Complainant's mental suffering damages.

Respondent excepts to the ALJ's recommendation that Complainant be awarded $15,000 in mental suffering damages, arguing that it is "excessive, unwarranted and unsupported by evidence." The forum disagrees with Respondent's assessment of Complainant's damages and concludes that Complainant's testimony concerning her emotional upset experienced as a result of Respondent's unlawful acts is sufficient to support the proposed award of $15,000.

F. Requirement of certified check.

Respondent excepts to the requirement that the damages

awarded be paid by certified check on the basis that there is no evidence that Respondent is in any way fiscally irresponsible and dent's exception is overruled. The requirement of a certified check in no way implies that Respondent is fiscally irresponsible; it is merely the Commissioner's standard means by which payment of damages, wages, or penalties is ordered in every case in which a respondent incurs a financial liability.

ORDER

NOW, THEREFORE, as authorized by ORS 659.010(2) and ORS 659.060(3), and in order to eliminate the effects of the unlawful practices found in violation of ORS 659.436 and 659.447, and as payment of the damages awarded, and in order to eliminate the effects of the unlawful practices found in violation of ORS 659.436 and 659.447, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **Barrett Business Services, Inc.** to:

1) Deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162,a certified check payable to the Bureau of Labor and Industries, in trust for Complainant Marie Annette, in the amount of:

a) FIFTEEN THOUSAND DOLLARS ($15,000.00), representing compensatory damages for mental and emotional suffering as a result of Respondent's the requirement of a certified check does not relate to eliminating any effect of an unlawful employment practice. Respon unlawful practices found herein, plus

b) Interest at the legal rate on the sum of $15,000.00 from the date of the Final Order until Respondent complies herewith.

2) Cease and desist from:

a) Making inquiries of any job applicant as to whether the applicant is a disabled person;

b) Making inquiries of any job applicant as to the nature or severity of any disability of the applicant;

c) Making inquiries of any disabled job applicant as to the applicant's ability to perform functions that are not job-related;

d) For the purposes of ORS 659.447 and 659.448, regarding any applicant as an employee until such time as such applicant is given an job assignment with a particular client.

In the Matter of

ARTHUR LEE dba Safe Dry Cleaner

Case No. 50-01

Final Order of the Commissioner Jack Roberts

Issued August 8, 2001

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SYNOPSIS

Respondent failed to pay Claimant all wages earned and due upon termination, in violation of ORS 652.140(1). Respondent withheld Claimant's wages upon termination for the repayment of a loan and did not meet the conditions for making the deduction, in violation of ORS 652.610(3)(e). Respondent's failure to pay the wages was willful and Respondent was ordered to pay civil penalty wages, pursuant to ORS 652.150. ORS 653.010; ORS 652.140; ORS 652.150; ORS 652.610.

_____

The above-entitled case came on regularly for hearing before Linda A. Lohr, designated as Administrative Law Judge ("ALJ") by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on July 3, 2001, in the hearing room of the Bureau of Labor and Industries, located at 800 NE Oregon Street, Portland, Oregon.

David K. Gerstenfeld, an employee of the Agency, represented the Bureau of Labor and Industries ("BOLI" or "the Agency"). Fenny Pearson ("Claimant") was present throughout the hearing and was not represented by counsel. Arthur Lee ("Respondent") failed to appear for hearing in person or through counsel.

The Agency called Claimant as its only witness.

The forum received as evidence:

a) Administrative exhibits X-1 through X-23;

b) Agency exhibits A-1 through A-8 (filed with the Agency's case summary).

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

FINDINGS OF FACT – PROCEDURAL

1) On June 30, 2000, Claimant filed a wage claim form stating Respondent had employed him from December 1999 until May 8, 2000, and failed to pay him the agreed upon rate of $10.00 for all hours worked.

2) At the time he filed his wage claim, Claimant assigned to the Commissioner of the Bureau of Labor and Industries, in trust for Claimant, all wages due from Respondent.

3) On October 3, 2000, the Agency issued an Order of Determination, numbered 00-2828. The Agency alleged Respondent had employed Claimant during the period December 1, 1999, through May 8, 2000, at the rate of $10.00

per hour and had unlawfully deducted a portion of Claimant's wages in the amount of $712.50. The Agency also alleged Respondent's failure to pay all of Claimant's wages when due was willful and Respondent, therefore, was liable to Claimant for $2,400 as penalty wages, plus interest. The Order of Determination gave Respondent 20 days to pay the sums, request an administrative hearing and submit an answer to the charges, or demand a trial in a court of law.

4) The Agency issued a Notice of Intent to Issue Final Order by Default on October 24, 2000. On November 2, 2000, Matthew C. Daily, attorney at law, filed an appearance on behalf of Respondent and requested a hearing alleging "the Employer has paid all compensation due the Wage Claimant." The Agency thereafter issued a Notice of Insufficient Answer to Order of Determination requesting that Respondent specifically admit or deny the allegations and provide a statement of any relevant defenses. Respondent, through counsel, filed an answer and second request for hearing. In its answer, Respondent generally denied all of the allegations.

5) On December 19, 2000, the Agency requested a hearing. On January 9, 2001, the Hearings Unit issued a Notice of Hearing stating the hearing would commence at 9:00 a.m. on July 3, 2001. With the Notice of Hearing, the forum included a copy of the Order of Determination, a "SUMMARY OF CONTESTED CASE RIGHTS AND PROCEDURES" and a copy of the forum's contested case hearings rules, OAR 839-050-0000 to 839-050-0440. The Notice of Hearing and accompanying documents were mailed to Arthur Lee dba Safe Dry Cleaner at 747 SW 12th Avenue, Portland, Oregon 97205 and to Respondent's counsel.

6) On February 27, 2001, the Agency moved for a discovery order that required Respondent to produce seven categories of documents. The Agency provided a statement indicating the relevance of the documents requested. Respondent filed no response to the Agency's motion. On March 19, 2001, the forum issued an interim order that granted the Agency's motion and required Respondent to produce all of the requested documents to the Agency no later than Monday, April 2, 2001.

7) On May 1, 2001, the forum issued a case summary order requiring the Agency and Respondent to submit case summaries that included: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a brief statement of the elements of the claim (for the Agency only); a brief statement of any defenses to the claim (for Respondent only); a statement of any agreed or stipulated facts; and any wage and penalty calculations (for the Agency only). The forum ordered the participants to submit their case summaries by

June 22, 2001, and advised them of the possible sanctions for failure to comply with the case summary order. The Agency filed a timely case summary. Respondent did not file a case summary.

8) On June 12, 2001, the Agency moved for a second discovery order deeming certain facts as admitted or, in the alternative, prohibiting Respondent from introducing evidence contrary those facts. The Agency based its motion on Respondent's failure to respond to the Agency's previous informal request for admissions or denial of certain facts at issue. Respondent did not respond to the Agency's motion.

9) On June 18, 2001, the Agency delivered to the Hearings Unit a letter to the ALJ stating:

> "Today when I came to my office I had a telephone message from Matthew Daily, Respondent's counsel. In that message, he indicated that "Safe Dry Cleaner" had filed for bankruptcy a little less than a month ago and that, accordingly, this action was barred by the automatic bankruptcy stay. He did not, however, leave a case number. I attempted to confirm that a bankruptcy was filed by using both the Bankruptcy Court's automated telephone information system and also using the public records search engine available to the Agency. I do not know how current the records were, but I was unable to find, using either system, a bankruptcy proceeding that seemed to be filed by Respondent. I left a telephone message with Mr. Daily early this morning asking that he provide me with proof of the filing, such as a copy of the Bankruptcy Petition.
>
> "I have not yet received any response, but wanted to inform you of the information Mr. Daily provided to me. If I receive confirmation of a stay being in effect, I will so notify the forum. Thank you for your assistance in this matter.
>
> "Sincerely, David K. Gerstenfeld, Case Presenter"

10) On June 29, 2001, the forum issued a discovery order on behalf of the Agency requiring Respondent to admit or deny the following facts no later than July 2, 2001:

a) Respondent employed Fenny Pearson ('Claimant') in Oregon for the period of approximately December 1, 1999, through May 8, 2000.

b) At the time Claimant's employment with Respondent terminated, on May 8, 2000, he was earning $10 per hour.

c) Claimant's final paycheck from Respondent should have been for a gross amount of $712.50.

d) Respondent withheld Claimant's final paycheck claiming Claimant owed money to Respondent.

e) Respondent has not yet paid Claimant his final paycheck.

11) At approximately 8:25 a.m., on July 3, 2001, the date set for hearing, Respondent's counsel telephoned the Hearings Unit Coordinator and informed her that neither Respondent nor counsel would be appearing at the hearing because they were appearing in bankruptcy court at 9:00 a.m. Counsel indicated that "Safe Dry Cleaner Corporation" had filed for bankruptcy on May 26, 2001, case number 301-35057TMB7, and all of its assets were being liquidated. Counsel further stated he no longer represented Respondent in this matter because Respondent owed him money and had "scrounged up" only enough money for the bankruptcy action. Counsel left a cell phone number where he could be reached if the ALJ had questions.

12) At approximately 8:45 a.m., on July 3, 2001, the ALJ spoke with Respondent's counsel by telephone and he confirmed that neither he nor Respondent would be appearing at the scheduled hearing. The ALJ advised counsel that if neither he nor Respondent appeared at the hearing and the Hearings Unit did not receive a facsimile transmission showing the Agency's action was subject to an automatic bankruptcy stay by 9:30 a.m., the forum would find Respondent in default and commence the hearing. Counsel stated Respondent had not yet filed for bankruptcy. He also stated he no longer represented Respondent and that he represented Safe Dry Cleaner Corporation only in the bankruptcy proceeding. Counsel indicated he was "late" for a "treasurer's meeting" that was to convene at 9:00 a.m. to discuss the corporation's bankruptcy. The ALJ reiterated that Respondent risked defaulting if he or his counsel failed to appear. Counsel stated he would stipulate that there were wages owed and again stated that neither he nor Respondent intended to appear at the scheduled hearing.

13) Respondent did not appear at the time and place set for hearing and no one appeared on his behalf. The ALJ placed the substance of the prehearing contact with Respondent's counsel on the record, found Respondent to be in default, and commenced the hearing.

14) At the start of hearing, the Agency represented that Respondent did not reply to the ALJ's discovery order requiring Respondent to respond to the Agency's request for admissions. The ALJ, relying on ORCP 45 for guidance, deemed as admitted the facts set forth in Findings of Fact – Procedural 10.

15) The Agency waived the ALJ's recitation of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

16) The ALJ issued a proposed order on July 11, 2001, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. Neither the Agency nor Respondent filed exceptions.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent Arthur Lee operated a laundry, cleaning and garment service under the assumed business name, Safe Dry Cleaner, and employed one or more individuals in Oregon.

2) Respondent employed Claimant as a presser from approximately December 1999 until he was terminated from employment on May 8, 2000.

3) Claimant's rate of pay at the time he was terminated was $10.00 per hour.

4) Between April 24 and May 8, 2000, Claimant worked 71.25 hours and earned $712.50.

5) Respondent withheld Claimant's final paycheck for the hours worked between April 24 and May 8, 2000, claiming Claimant owed him money. Claimant did not sign an authorization for a deduction from his wages.

6) Claimant's wages remain unpaid.

ULTIMATE FINDINGS OF FACT

1) Respondent at all times material herein conducted a business in the state of Oregon and engaged the personal services of one or more employees in the operation of that business.

2) Respondent employed Claimant between April 24 and May 8, 2000.

3) Respondent and Claimant agreed Claimant would be paid $10.00 per hour.

4) Claimant did not sign an authorization for a deduction from his wages.

5) Respondent terminated Claimant's employment on May 8, 2000.

6) Claimant worked 71.25 hours between April 24 and May 8, 2000. At the agreed upon rate of $10.00 per hour, Claimant earned $712.50 in wages.

7) Respondent owes Claimant $712.50 for wages earned.

8) Respondent willfully failed to pay Claimant the $712.50 in earned, due and payable wages. Respondent has not paid the wages owed and more than 30 days have elapsed from the date the wages were due.

9) Civil penalty wages, computed pursuant to ORS 652.150, equal $2,400.

CONCLUSIONS OF LAW

1) During all times material herein, Respondent was an employer and Claimant was an employee subject to the provisions of ORS 652.110 to 652.200 and 652.310 to 652.405.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and the Respondent herein. ORS 652.310 to 652.414.

3) ORS 652.140(1) provides in part:

> "Whenever an employer discharges an employee or where such employment is terminated by mutual agreement, all wages earned and unpaid at the time of such discharge or termination shall become due and payable not later than the end of the first business day after the discharge or termination."

Respondent violated ORS 652.140(1) by failing to pay Claimant all wages earned and unpaid not later than the end of the first business day after Claimant was terminated on May 8, 2000.

4) ORS 652.150 provides:

> "If an employer willfully fails to pay any wages or compensation of any employee whose employment ceases, as provided in ORS 652.140 and 652.145, then, as a penalty for such nonpayment, the wages or compensation of such employee shall continue from the due date thereof at the same hourly rate for eight hours per day until paid or until action therefor is commenced; provided, that in no case shall such wages or compensation continue for more than 30 days from the due date, and provided further, the employer may avoid liability for the penalty by showing financial inability to pay the wages or compensation at the time they accrued."

Respondent is liable for $2,400 in civil penalties under ORS 652.150 for willfully failing to pay all wages or compensation to Claimant when due as provided in ORS 652.140(1).

5) ORS 652.610 provides in part:

> "(3) No employer may withhold, deduct or divert any portion of an employee's wages unless:
>
> "(a) The employer is required to do so by law;
>
> "(b) The deductions are authorized in writing by the employee, are for the employee's benefit, and are recorded in the employer's books;
>
> "(c) The employee has voluntarily signed an authorization for a deduction for any other item, provided that the ultimate recipient of the money withheld is not the employer; and that such deduction is recorded in the employer's books;
>
> "(d) The deduction is authorized by a collective bargaining agreement to which the employer is a party; or
>
> "(e) The deduction is made from the payment of wages upon termination of employment and is authorized pursuant to a written agreement between the employee and employer for the repayment of a loan made to the employee by the employer, if all of the following conditions are met:

"(A) The employee has voluntarily signed the agreement;

"(B) The loan was paid to the employee in cash or other medium permitted by ORS 652.110;

"(C) The loan was made solely for the employee's benefit and was not used, either directly or indirectly, for any purpose required by the employer or connected with the employee's employment with the employer;

"(D) The amount of the deduction at termination of employment does not exceed the amount permitted to be garnished under ORS 23.185(1)(a) or (d); and

"(E) The deduction is recorded in the employer's books."

Respondent violated ORS 652.610(3) by withholding Claimant's final paycheck without Claimant's written authorization.

6) Under the facts and circumstances of this record, and according to the applicable law, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondent to pay Claimant his earned, unpaid, due and payable wages and the civil penalty wages, plus interest on both sums until paid. ORS 652.332.

OPINION

DEFAULT

Before the hearing, Respondent's counsel of record notified the forum by telephone that he no longer represented Respondent and that neither he nor his former client would be appearing at the hearing for reasons that remain unclear. When Respondent failed to appear and no one appeared on his behalf at hearing, the forum found Respondent in default pursuant to OAR 839-050-0330. The Agency, therefore, needed only to establish a prima facie case on the record to support the allegations in its charging document. *In the Matter of Sealing Technology*, Inc., 11 BOLI 241 (1993). Other than a general denial in his answer, Respondent contributed nothing to the record for the forum to consider. Having considered all of the evidence in the record, the forum concludes the Agency presented a prima facie case in support of its claim that Respondent unlawfully withheld Claimant's final paycheck. The forum further concludes Respondent's failure to pay Claimant his wages earned and owed upon Claimant's termination was willful.

AGENCY'S PRIMA FACIE CASE

The Agency was required to prove: 1) that Respondent employed Claimant; 2) Respondent agreed to pay Claimant $10.00 per hour; 3) that Claimant performed work for which he was not properly compensated; and 4) the amount and extent of work Claimant performed for Respondent. *In the Matter of Barbara Coleman*, 19 BOLI 230 (2000). In this case, those elements are not in dispute. Pursuant to OAR 839-050-

0200(2)(e), the Agency requested admissions from Respondent as to those facts relevant to each element. Respondent, despite an informal and formal request for admissions, failed to respond. The rules governing this forum do not provide a sanction where a participant fails to respond to a request for admissions. The forum draws guidance from the Oregon Rules of Civil Procedure (ORCP) where a matter is not addressed in the administrative rules. *In the Matter of United Grocers, Inc.*, 7 BOLI 1 (1987). Here, the forum relied on ORCP 45 to determine an appropriate sanction, deeming the facts[1] set forth by the Agency as admitted by Respondent. The forum notes that those facts deemed admitted are also supported by credible evidence in the record. The remaining issue is whether Respondent was permitted by law to withhold Claimant's final paycheck as repayment for a loan Respondent claimed to have made to Claimant.

UNAUTHORIZED DEDUCTIONS

Undisputed evidence establishes Respondent withheld Claimant's final paycheck claiming Claimant owed him an amount of money that exceeded the amount Claimant earned during the time period at issue. ORS 652.610(3) permits an employer to deduct from the payment of wages amounts owed as a result of a loan by the employer to the employee only as follows:

> "(e) The deduction is made from the payment of wages upon termination of employment and is authorized pursuant to a written agreement between the employee and employer for the repayment of a loan made to the employee by the employer, if all of the following conditions are met:
>
> "(A) The employee has voluntarily signed the agreement;
>
> "(B) The loan was paid to the employee in cash or other medium permitted by ORS 652.110;
>
> "(C) The loan was made solely for the employee's benefit and was not used, either directly or indirectly, for any purpose required by the employer or connected with the employee's employment with the employer;
>
> "(D) The amount of the deduction at termination of employment does not exceed the amount permitted to be garnished under ORS 23.185(1)(a) or (d); and
>
> "(E) The deduction is recorded in the employer's books."

In this case, Claimant credibly testified that he never entered into a written agreement with Respondent or signed an authorization for deductions from his wages. Respondent did not appear or proffer evidence to dispute or contradict

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[1] *See* Findings of Fact – Procedural 10.

the Agency's credible evidence. In the absence of a written agreement between Respondent and Claimant, meeting the requirements set forth in ORS 652.610(3)(e) and voluntarily signed by Claimant, the forum finds Respondent unlawfully withheld Claimant's wages.

CIVIL PENALTIES

An award of penalty wages turns on the issue of willfulness. Willfulness does not imply or require blame, malice, wrong, perversion, or moral delinquency, but only requires that that which is done or omitted is intentionally done with knowledge of what is being done and that the actor or omittor be a free agent. *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976). Respondent, as an employer, had a duty to know the amount of wages due to his employee. *McGinnis v. Keen*, 189 Or 445, 221 P2d 907 (1950); *In the Matter of Jack Coke*, 3 BOLI 238 (1983). Credible evidence establishes Respondent intentionally withheld Claimant's final paycheck to cover amounts Respondent claimed was owed on a loan he made to Claimant. From that fact, the forum infers Respondent voluntarily and as a free agent failed to pay Claimant all of the wages he earned between April 24 through May 8, 2000. Respondent acted willfully and is liable for penalty wages under ORS 652.150.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, and as payment of the unpaid wages, Respondent **Arthur Lee** is hereby ordered to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, the following:

> A certified check payable to the Bureau of Labor and Industries, in trust for Fenny Pearson, in the amount of THREE THOUSAND ONE HUNDRED TWELVE DOLLARS AND FIFTY CENTS ($3,112.50), less appropriate lawful deductions, representing $712.50 in gross earned, unpaid, due and payable wages and $2,400 in penalty wages, plus interest at the legal rate on the sum of $712.50 from May 8, 2000, until paid and interest at the legal rate on the sum of $2,400 from June 8, 2000, until paid.

In the Matter of

SREEDHAR THAKKUN,

Case No. 68-01

Final Order of the Commissioner Jack Roberts

Issued August 29, 2001

SYNOPSIS

Respondent failed to pay Claimant all wages earned and due upon termination, in violation of ORS 652.140(2). Respondent's failure to pay the wages was willful and Respondent was ordered to pay civil penalty wages, pursuant ORS 652.150. ORS 652.140(2); ORS 652.150; OAR 839-001-0470(1).

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Jack Roberts, Commissioner of the Bureau of Labor and Industries ("BOLI") for the State of Oregon. The hearing was held on July 10, 2001, at BOLI's office located at 1400 Executive Parkway, Suite 200, Eugene, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter Cynthia Domas, an employee of the Agency. Christopher Callender ("Claimant") was present throughout the hearing and was not represented by counsel. Sreedhar Thakkun ("Respondent") was present throughout the hearing and was not represented by counsel.

The Agency called Claimant and Margaret Pargeter, BOLI Wage & Hour Division compliance specialist as witnesses. Respondent called himself as his only witness.

The forum received into evidence:

a) Administrative exhibits X-1 through X-18 (submitted or generated prior to hearing);

b) Agency exhibits A-1 through A-5 and A-7 through A-10 (submitted prior to hearing).

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

FINDINGS OF FACT – PROCEDURAL

1) On September 13, 2000, Claimant filed a wage claim with the Agency alleging that Respondent had employed him and failed to pay wages earned and due to him.

2) At the time he filed his wage claim, Claimant assigned to the Commissioner of the Bureau of Labor and Industries, in trust for Claimant, all wages due from Respondent.

3) Claimant brought his wage claim within the statute of limitations.

4) On November 14, 2000, the Agency issued Order of Determination No. 00-3921 based upon the wage claim filed by Claimant and the Agency's investigation. The Order of Determination alleged that Respondent owed a total of $199.38 in unpaid wages earned by Claimant between August 14 through August 25, 2000, and $3,300.00 in civil penalty

wages, plus interest, and required that, within 20 days, Respondent either pay these sums in trust to the Agency, request an administrative hearing and submit an answer to the charges, or demand a trial in a court of law.

5) On December 4, 2000, Respondent filed an answer and request for hearing. Respondent's answer alleged that Claimant was paid up to and through August 25, 2000.

6) On February 22, 2001, the Agency filed a "BOLI Request for Hearing" with the forum.

7) On March 14, 2001, 2000, the Hearings Unit issued a Notice of Hearing to Respondent, the Agency, and the Claimant stating the time and place of the hearing as July 10, 2001, at 9:00 a.m., at 165 E. 7th, Suite 220, Eugene, Oregon (State Office Building). Together with the Notice of Hearing, the forum sent a copy of the Order of Determination, a document entitled "Summary of Contested Case Rights and Procedures" containing the information required by ORS 183.413, and a copy of the forum's contested case hearings rules, OAR 839-050-000 to 839-050-0440. These documents were mailed to Respondent at 988 River Road, Eugene, OR 97404, Respondent's business address. None of these documents were returned to the Hearings Unit by the U.S. Postal Service.

8) On June 4, 2001, the ALJ ordered the Agency and Respondent each to submit a case summary including: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a brief statement of the elements of the claim (for the Agency only); a brief statement of any defenses to the claim (for Respondent only); a statement of any agreed or stipulated facts; and any wage and penalty calculations (for the Agency only). The forum ordered the participants to submit case summaries no later than July 29, 2001, and notified them of the possible sanctions for failure to comply with the case summary order. The interim order included a case summary form designed to assist *pro se* Respondents and authorized representatives in filing a case summary.

9) On June 6, 2001, the ALJ issued an amended case summary order changing the due date for case summaries from July 29 to June 29, 2001.

14) On June 18, 2001, the Agency filed a motion for a discovery order seeking six categories of documents. The Agency identified the relevancy of the documents in its motion.

15) On June 18, 2001, the ALJ issued an interim order informing Respondent that he had seven days after the service of the Agency's motion for a discovery order to file a written response.

16) The Agency filed its case summary, with attached exhibits, on June 28, 2001.

17) At the outset of the hearing, pursuant to ORS 183.415(7), the ALJ made an opening statement in which he verbally advised the Agency and Respondent of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

18) During the ALJ's opening statement, and again during the testimony of Pargeter, Respondent requested that the hearing be recessed so he could obtain legal counsel to assist him in understanding the legal ramifications of the exhibits and the forum's procedures. Respondent stated he had a limited ability to comprehend and communicate in English. The ALJ put Respondent under oath and asked him a number of questions to determine Respondent's ability to comprehend and communicate in English and the circumstances of Respondent's "breakdown" that allegedly prevented him from filing a case summary.[1] For reasons stated in the Opinion, Respondent's request was denied.

19) At the outset of the hearing, Respondent stated that he wanted to call Linda Edwards and April[2] as witnesses. Both were present at the hearing during the ALJ's opening statement. Respondent stated that Edwards would testify as to his character, and April to testify that he did not open his mail for a long time because he had a "breakdown." The Agency objected to the testimony of both individuals on the grounds of relevancy and that Respondent had not filed a case summary naming them as witnesses. The ALJ sustained the Agency's objection and Edwards and April left the hearing together.

20) Prior to the Agency's opening statement, the Agency case presenter noted that the ALJ had not issued a discovery order in response to the Agency's June 18, 2001, motion for a discovery order. The Agency case presenter requested a ruling on the Agency's motion. In response, the ALJ granted the Agency's motion and ordered Respondent to turn over to Ms. Domas, for inspection and copying, any documents he brought with him to the hearing that were responsive to the discovery order. Respondent stated that he had no such documents with him, but had information in his shop computer that was responsive to the discovery order.

21) During the presentation of his case, Respondent attempted to call Michael Cortez as a telephonic witness to testify that Cortez had actually performed the work that the Agency alleged Claimant had performed and was not paid for. Respondent represented that Cortez had done the work after Claimant left Respondent's employment. The Agency objected on the grounds that Respondent had not filed a case

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[1] *See* Findings of Fact – Procedural 19 and 21, *infra*.

[2] Respondent stated that he did not know April's last name.

summary naming Cortez as a witness and the Agency would be unduly prejudiced if Cortez was allowed to testify. For reasons stated in the Opinion, the ALJ did not allow Cortez to testify.

22) The ALJ issued a proposed order on July 24, 2001, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. Neither the Agency nor Respondent filed exceptions.

FINDINGS OF FACT – THE MERITS

1) Respondent employed Claimant as an auto mechanic between July 8 and August 28, 2000.

2) Between August 14 and August 25, 2000, Claimant, at Respondent's direction, performed work on three vehicles – a 1986 Mazda 626 ("Mazda") owned by Respondent, a 1989 Dodge Caravan ("Dodge"), and a 1990 Volkswagen Jetta ("VW") – for which he was not paid by Respondent.

3) Neither Respondent nor Claimant kept a record of the specific number of hours that Claimant worked on the Dodge, Mazda, and VW.

4) Claimant worked on the Dodge for a total of eight hours over three separate days between August 14 and August 25, 2000. Claimant, who had been an auto mechanic for ten years at the time of his employment with Respondent, used an industry guide that states how long it should take to perform specific auto repairs to estimate the number of hours that he worked on the Dodge. Claimant estimated his hours conservatively.

5) Claimant worked on the Mazda for a total of four hours between August 14 and August 25, 2000. Claimant used the industry guide to estimate his hours and estimated his hours conservatively.

6) Claimant worked on the VW for a total of 2.5 hours between August 14 and August 25, 2000. Claimant used the industry guide to estimate his hours and estimated his hours conservatively.

7) Respondent was present at Respondent's workplace when Claimant worked on the Dodge, Mazda, and Jetta.

8) Claimant quit Respondent's employment on August 28, 2000. Respondent's next regular payday was September 8, 2000.

9) When Claimant quit Respondent's employment, Respondent owed him $199.38 in gross, unpaid wages. At the time of the hearing, Respondent had not paid Claimant any of those wages.

10) Respondent was aware that he owed Claimant unpaid wages when Claimant quit, but refused to pay Claimant based on his perception that Claimant had stolen Respondent's digital fuel pressure gauge.

11) The forum computed civil penalty wages as follows for Claimant, in accordance with ORS

652.150: $13.75 per hour multiplied by 8 hours equals $110; $110 multiplied by 30 days equals $3,300.

12) Respondent's testimony was not credible because of significant internal inconsistencies and the forum has not credited it except where corroborated by other credible evidence. Respondent testified that he performed the work on the VW, then minutes afterward, on cross-examination, testified that he did not work on the VW. In support of his motion for a recess to obtain legal counsel and an interpreter, he testified that he had a limited ability to read and understand written English. However, the ALJ observed him taking notes in English and cross-examining Claimant from those notes. Respondent was also able to read Claimant's wage claim and handwritten notes aloud at the hearing. Again related to his reading ability, Respondent testified that he self-diagnosed his depression from reading and research he had done. Pargeter, the Agency compliance specialist who spoke with Respondent during her investigation of the claim, testified that Respondent never indicated that he did not understand the letters she mailed to him or any part of their conversations.

13) Claimant testified in a straightforward manner. His testimony was internally consistent and consistent with documents he provided the Agency in support of his wage claim. In convincing detail, he described the work that he performed on the Dodge, Mazda, and Jetta. The forum has credited his testimony wherever it conflicted with Respondent's.

ULTIMATE FINDINGS OF FACT

1) During all times material herein, Respondent Sreedhar Thakkun was a person who engaged the personal services of one or more employees in the State of Oregon.

2) Respondent employed Claimant as an auto mechanic between July 8 and August 28, 2000.

3) Between August 14 and August 25, 2000, Claimant worked 14.5 hours for Respondent at the agreed rate of $13.75 per hour for which he has not been paid.

4) Claimant quit Respondent's employment on August 28, 2000. At that time, Respondent owed him $199.38 in gross, unpaid wages. At the time of the hearing, Respondent had not paid Claimant any of those wages.

5) Respondent's failure to pay Claimant's wages was willful and more than 30 days have passed since Claimant's wages became due.

CONCLUSIONS OF LAW

1) During all times material herein, Respondent Sreedhar Thakkun was an employer and Claimant was an employee subject to the provisions of ORS 652.110 to 652.200 and 652.310 to 652.405. During all times material, Respondent employed Claimant.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and the Respondent herein. ORS 652.310 to 652.414.

3) At times material, ORS 652.140(2) provided:

> "When an employee who does not have a contract for a definite period quits employment, all wages earned and unpaid at the time of quitting become due and payable immediately if the employee has given to the employer not less than 48 hours' notice, excluding Saturdays, Sundays and holidays, of intention to quit employment. If notice is not given to the employer, the wages shall be due and payable within five days, excluding Saturdays, Sundays and holidays, after the employee has quit, or at the next regularly schedule payday after the employee has quit, whichever event first occurs."

Respondent violated ORS 652.140(2) by failing to pay Claimant all wages earned and unpaid not later than September 1, 1999, five business days after Claimant quit. Those wages amount to $199.38.

4) ORS 652.150 provides:

> "If an employer willfully fails to pay any wages or compensation of any employee whose employment ceases, as provided in ORS 652.140 and 652.145, then, as a penalty for such nonpayment, the wages or compensation of such employee shall continue from the due date thereof at the same hourly rate for eight hours per day until paid or until action therefor is commenced; provided, that in no case shall such wages or compensation continue for more than 30 days from the due date; and provided further, the employer may avoid liability for the penalty by showing financial inability to pay the wages or compensation at the time they accrued."

OAR 839-001-0470(1) provides:

> "(1) When an employer willfully fails to pay all or part of the wages due and payable to the employee upon termination of employment within the time specified in OAR 839-001-0420, 839-001-0430 and 839-001-0440, the employer shall be subject to the following penalty:
>
> "(a) The wages of the employee shall continue from the date the wages were due and payable until the date the wages are paid or until a legal action is commenced, whichever occurs first;
>
> "(b) The rate at which the employee's wages shall continue shall be the employee's hourly rate of pay times eight (8) hours for each day the wages are unpaid;
>
> "(c) Even if the wages are unpaid for more than 30 days, the maximum penalty shall be no greater than the employee's hourly rate of pay times 8 hours per day times 30 days."

Respondent is liable for $3,300.00 in civil penalties under ORS 652.150, computed by multiplying Claimant's hourly rate ($13.75 per hour) x 8 hours per day x 30 days = $3,300.00, for willfully failing to pay all wages or compensation to Claimant when due as provided in ORS 652.140(2).

5) Under the facts and circumstances of this record, and according to the law applicable to this matter, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondent to pay Claimant his earned, unpaid, due and payable wages and the civil penalty wages, plus interest on both sums until paid. ORS 652.332.

OPINION

PRIMA FACIE CASE

To establish a prima facie case for wage claims, the Agency must establish the following elements: (1) Respondent employed Claimant; (2) Claimant's agreed upon rate of pay, if it was other than minimum wage; (3) Claimant performed work for which he was not properly compensated; and (4) the amount and extent of work performed by Claimant. *In the Matter of Contractor's Plumbing Service, Inc., 20 BOLI 257, 270 (2000).*

The Agency established the first two elements by Respondent's stipulation that he employed Claimant and Claimant's undisputed credible testimony that Respondent agreed to pay Claimant $13.75 per hour for the work he performed between August 14 and August 25, 2000.

The third element of the Agency's prima facie case requires proof that Claimant performed work for which he was not properly compensated. In this case, that proof consists of Claimant's credible testimony that he worked on the Dodge, Mazda, and VW and was not paid for that work.

The final element consists of proof of the amount and extent of work performed by Claimant. The Agency's burden of proof can be met by producing sufficient evidence from which "a just and reasonable inference may be drawn." *In the Matter of Majestic Construction, Inc.,* 19 BOLI 59, 58 (1999). A claimant's credible testimony may be sufficient evidence. *In the Matter of Ann L. Swanger,* 19 BOLI 42, 56 (1999).

Respondent testified that Claimant performed no work on the VW or Jetta, and would not admit that Claimant did any work on the Dodge. In contrast, Claimant credibly testified that he worked 14.5 hours on those vehicles and testified as to the particular repairs he performed with specificity. Although he kept no contemporaneous records of the hours he worked, the method he used to estimate his hours – an industry guide that states how long it should take to perform specific auto repairs – was a credible means of estimating his time, given that Claimant was an experienced auto mechanic and there was no testimony indicating

that that he worked at a different speed than the average experienced auto mechanic. This is sufficient evidence to establish the amount and extent of Claimant's work.

PENALTY WAGES

An award of penalty wages turns on the issue of willfulness. Willfulness does not imply or require blame, malice, wrong, perversion or moral delinquency, but only requires that that which is done or omitted is intentionally done with knowledge of what is being done and that the actor or omittor be a free agent. *Contractor's Plumbing Service,* 20 BOLI at 274. Respondent, as an employer, had a duty to know the amount of wages due its employees. *In the Matter of Robert N. Brown,* 20 BOLI 157, 163 (2000). Based on Claimant's credible testimony that he worked on the Dodge, Mazda, and Jetta at Respondent's request, and that Respondent was at the workplace while Claimant worked on those vehicles, the forum concludes that Respondent knew Claimant's hours of work. There is no evidence that Respondent acted other than voluntarily or as a free agent in not paying Claimant for the 14.5 hours he worked on the Dodge, Mazda, and Jetta. Accordingly, the forum concludes that Respondent acted willfully and assesses penalty wages in the amount of $3,300.00, the amount sought in the Order of Determination. This figure is computed by multiplying $13.75 per hour x 8 hours per day x 30 days, pursuant to ORS 652.150 and OAR 839-001-0470.

RESPONDENT'S MOTION TO RECESS HEARING TO OBTAIN LEGAL COUNSEL

During the ALJ's opening statement, and again during Pargeter's testimony, Respondent sought a recess to obtain legal counsel. Respondent also alluded to the need for an interpreter. Respondent's request was made on the basis that he did not understand the legal significance of the administrative or agency exhibits or the forum's procedures, and that he had a limited ability to read and comprehend written English. Respondent testified that his native tongue is an Indian dialect for which there is no written language. When placed under oath and questioned by the ALJ, Respondent testified that he had consulted counsel prior to the hearing and had been advised to come to the hearing and attempt to settle the case.

OAR 839-050-0110(6) provides, in pertinent part:

> "Once the contested case hearing has begun, no party will be allowed a recess to obtain the services of counsel."

Here, Respondent consulted counsel prior to the hearing and made a conscious choice to come to the hearing without counsel. Respondent also demonstrated his ability to comprehend and communicate in English, to understand the allegations of the wage

claim, to cross-examine the Claimant,[3] using notes he wrote in English during the Claimant's direct testimony, and to testify as to facts surrounding Claimant's allegations. Under these circumstances, the forum is under no obligation to provide an interpreter or to recess the hearing to allow Respondent to obtain the services of counsel. The forum's ruling on this issue is affirmed.

THE FORUM'S RULING DENYING RESPONDENT'S REQUEST TO CALL MIKE CORTEZ AS A WITNESS

Respondent attempted to call Mike Cortez as a telephone witness, stating that Cortez would testify he did the work on Respondent's Mazda for which Claimant is claiming compensation. The Agency objected on the dual grounds that Respondent did not file a case summary and the Agency would be unduly prejudiced if Cortez was allowed to testify.

The ALJ's case summary order, issued on June 4, 2001, required that both participants submit "[a] list of all persons to be called as witnesses, according to the requirements of OAR 839-050-0210(1)(a)." OAR 839-050-0210(1)(a) includes "[a] list of all persons to be called as witnesses * * * at the hearing, except that impeachment or rebuttal witnesses need not be included on the witness list." In this case, Cortez's testimony, if allowed, would clearly have been part of Respondent's case-in-chief and not impeachment or rebuttal evidence. Consequently, his testimony was subject to OAR 839-050-0210(5), which governs admission of evidence that has not been disclosed pursuant to a case summary order. In pertinent part, it states:

> "The administrative law judge may refuse to admit evidence that has not been disclosed in response to a case summary order, unless the participant that failed to provide the evidence offers a satisfactory reason for having failed to do so or unless excluding the evidence would violate the duty to conduct a full and fair inquiry under ORS 183.415(10)."

The forum first determines if Respondent's reason was "satisfactory." Respondent testified that he had not filed a case summary because he had not opened any of his mail except bills for the last two years due to his "breakdown" and was unaware of the case summary order and, even if he had been aware of the order, he would have been unable to comply with it because of his limited ability to comprehend English. Respondent acknowledged that his address is the same to which the forum's interim orders were mailed. The forum found this was an unsatisfactory reason for two reasons. First, because a re-

[3] For example, in response to an Agency objection as to the relevancy of Respondent's question, he stated he was asking it for the purpose of "refreshing recollection."

spondent cannot escape his legal obligations by failing or refusing to open his mail. Second, because the forum determined that Respondent was able to read and comprehend English.

Having determined that Respondent did not provide a "satisfactory" reason for not filing a case summary that listed Cortez as a witness, the forum must also determine whether excluding the evidence violated the ALJ's duty to conduct "a full and fair inquiry" under ORS 183.415(10). In this case, the forum concludes it did not violate the duty to conduct a "fair" inquiry. Based either on a conscious choice to ignore his mail or ignore the contents of his mail, Respondent did not file a case summary despite a clearly worded order from the forum that required both participants to file a summary that included a witness list. As a result, the Agency was placed in the untenable and unfair position of trying to cross-examine, by telephone, an important witness who it had no opportunity to interview or gather information about prior to the hearing. The forum's ruling is affirmed.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332 and as payment of the unpaid wages and civil penalty wages he owes as a result of his violations of ORS 652.140, the Commissioner of the Bureau of Labor and Industries hereby orders **Sreedhar Thakkun** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, the following:

> A certified check payable to the Bureau of Labor and Industries in trust for Christopher Allen Callender in the amount of THREE THOUSAND FOUR HUNDRED NINETY NINE DOLLARS AND THIRTY-EIGHT CENTS ($3,499.38), less appropriate lawful deductions**,** representing $199.38 in gross, unpaid, due, and payable wages and $3,300.00 in penalty wages, plus interest at the legal rate on the sum of $199.38 from October 1, 2000, until paid, and interest at the legal rate on the sum of $3,300.00 from November 1, 2000, until paid.

In the Matter of

LARSON CONSTRUCTION CO., INC.,

Case No. 114-00

Final Order of the Commissioner Jack Roberts

Issued August 30, 2001

SYNOPSIS

Respondent Larson Construction Co. ("LCCI") intentionally failed to post the applicable prevailing wage rates during the performance of two contracts for public works and filed an untimely certified payroll report for the same contracts. The Commissioner imposed $4,000 in penalties for these violations of Oregon's prevailing wage rate laws. The Commissioner found that Respondent David Larson, LCCI's corporate president, was responsible for Respondent LCCI's failure to post the applicable prevailing wage rate, and ordered that both Respondents and any firm, corporation, partnership or association in which Respondents have a financial interest be placed on the list of those ineligible to receive public works contracts or subcontracts for a period of one month. The Commissioner additionally placed Howard Johnson & Sons Construction on the list of ineligibles for one month based on Respondent David Larson's financial interest in that company. The Commissioner also found that Respondents did not take actions that circumvented payment of the prevailing wage rate. ORS 279.350, ORS 279.354, ORS 279.361, ORS 279.370, OAR 839-016-0010, OAR 839-016-0033, OAR 839-016-0085, 839-016-0090, OAR 839-016-0340, OAR 839-016-0520, OAR 839-016-0530, OAR 839-016-0540.

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The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on March 20-21, 2001, at the offices of Oregon Adult and Family Services, 450 Marine Drive, Astoria, Oregon, and on March 26, 2001, in Room 1004 of the Portland State Office Building, 800 NE Oregon Street, Portland, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by David K. Gerstenfeld, an employee of the Agency. Respondent David M. Larson ("Larson") was present throughout the hearing. Respondents Larson Construction Co., Inc. ("LCCI"), Larson, and Howard E. Johnson & Sons Construction Co., Inc. ("HJSCCI") were represented by Christine M. Meadows, attorney at law. Tony Ewing was present throughout the hearing as the individual designated to assist in the presentation of LCCI's case. Respondents Michael Sarin and Ewing were represented by Thomas J. Murphy, attorney at law. Sarin, Ewing, and Murphy were all present at the start of the hearing. Sarin and Murphy left after Murphy and Gerstenfeld submitted a fully executed settlement document resolving the issues raised in the Agency's Notice of Intent as to Respondents Sarin and Ewing.

The Agency called the following witnesses: Lois Banahene, leadworker in BOLI's Wage & Hour Division Prevailing Wage Rate Unit; Tyrone Jones, Wage &

Hour Division Compliance Specialist; L. Alan Johansson, City of Warrenton Director of Public Works and city engineer; and David Larson, Tony Ewing, and Michael Sarin, Respondents.

Respondents called the following witnesses: Respondents Larson, Sarin, and Ewing; Julie Stanley, LCCI's office manager; Gilbert G. Gramson, former City of Warrenton city manager; and Gary Cokley, building contractor.

The forum received into evidence:

a) Administrative exhibits X-1 through X-12 and X-16 (submitted or generated prior to hearing), X-13 (submitted during the hearing), and X-14 and X-15 (generated after the hearing);

b) Agency exhibits A-1 through A-6, A-9 through A-22, and A-25 through A-28 (submitted prior to hearing), A-29 through A-31 (submitted at hearing), and A-32 (submitted after hearing);

c) Respondent exhibits R-4 through R-23 (submitted prior to hearing), and R-25, R-26, R-27, R-29 (submitted at hearing), and R-30 (submitted after hearing);

d) Exhibits ALJ-1, ALJ-2, ALJ-3 (submitted at hearing at the ALJ's request).

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

FINDINGS OF FACT – PROCEDURAL

1) On October 3, 2000, the Agency issued a Notice of Intent to Place on List of Ineligibles and to Assess Civil Penalties in which it made the following charges against Respondents LCCI, Larson, Sarin, and Ewing:

a) In February 2000, Respondent LCCI provided manual labor on the Fire Station Demolition Contract ("FSD contract"), a public works project subject to regulation under Oregon's prevailing wage rate laws and intentionally failed to pay at least $133.33 in prevailing wages to two employees, in violation of ORS 279.350 and OAR 839-016-0035. The Agency sought a $10,000 penalty for these two alleged violations.

b) Respondent LCCI failed to file certified payroll reports within 15 days of starting the FSD contract, in violation of ORS 279.354 and OAR 839-016-0010. The Agency sought a $5000.00 penalty for this alleged violation.

c) Respondent LCCI intentionally failed to post the prevailing wage rates in a conspicuous and easily accessible place at the work site on the FSD contract, in violation of ORS 279.350(4) and OAR 839-016-0033(1). The Agency sought a $5,000 penalty for this alleged violation.

d) Respondents LCCI and David M. Larson were each placed on the list of those ineligible to receive contracts or subcontracts for public works on July 22, 1998 and are to remain on the list until July 21, 2001. While on the list of ineligibles, Respondent LCCI intentionally entered into the FSD contract, one that is regulated under Oregon's prevailing wage rate laws. The Agency sought a $5,000 penalty for this alleged violation.

e) In February 2000, while on the list of ineligibles, Respondent LCCI intentionally entered into the Fire Station Rock contract ("FSR contract"), which was part of a public works project subject to regulation under Oregon's prevailing wage rate laws. The Agency sought a $5,000 penalty for this alleged violation.

f) Respondents Larson, Sarin, and Ewing were corporate officers or corporate agents responsible for the failure and refusal to pay the prevailing wage rate on, and the failure to adequately post the prevailing wage rates on the FSD contract.

g) The Agency also asked that Respondents LCCI, Larson, Sarin, and Ewing, and any firm, corporation, partnership or association in which they had a financial interest be placed on the list of those ineligible to receive contracts or subcontracts for public works ("List of Ineligibles") for a period of three years.

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

3) The Agency served the Notice of Intent on Respondents Larson, Sarin, and Ewing in person, together with a document providing information on how to respond to a notice of intent. The Agency served the Notice of Intent on Respondent LCCI by personal service on Larson, LCCI's registered agent.

4) Respondents Sarin and Ewing, through counsel, mailed an answer and request for hearing on October 19, 2000, which the Agency received on October 23, 2000.

5) Respondents Larson and LCCI, through counsel E. Andrew Jordan of Tarlow, Jordan & Schrader, mailed an answer and request for hearing on October 24, 2000, which the Agency received on October 24, 2000.

6) The Agency filed a request for hearing with the Hearings Unit on October 26, 2000.

7) On December 7, 2000, the Hearings Unit served Respondents with: a) a Notice of Hearing in Case Number 114-00 that set the hearing for March 20, 2001; b) a Summary of Contested Case Rights and Procedures containing

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

8) On January 8, 2001, the ALJ ordered the Agency and Respondents each to submit a case summary including: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; and any civil penalty calculations (for the Agency only). The ALJ ordered the participants to submit their case summaries by March 9, 2001, and notified them of the possible sanctions for failure to comply with the case summary order.

9) On January 12, 2001, the Agency filed a motion to amend the Notice of Intent to include Howard E. Johnson & Sons Construction Co., Inc. ("HJSCCI") as a named respondent in the proceeding and to add the following allegations:

a) Respondent Larson and any firm, corporation, partnership or association in which he has a financial interest was placed on the List of Ineligibles on July 22, 1998 and is to remain on that list until July 21, 2001. Respondent Larson has a financial interest in HJSCCI, which should also be placed on the List of Ineligibles through July 21, 2001.

b) Respondent Larson has a financial interest in HJSCCI, which should also be placed on the List of Ineligibles to receive contracts or subcontracts for public works for the same period(s) of time as Respondent Larson in this proceeding.

10) On January 16, 2001, the ALJ issued an interim order stating that Respondents had seven days after service of the Agency's motion to file a written response.

11) Respondents did not file any response to the Agency's motion, and on February 2, 2001, the ALJ granted the Agency's motion to amend to add HJSCCI as a named respondent. In order to expedite matters and avoid possible postponement, the ALJ required the Agency to serve HJSCCI with the following documents and to inform the forum when service was accomplished and provide a mailing address for HJSCCI:

1) The Notice of Intent;

2) The Answers and Requests for Hearing filed by the other Respondents;

3) BOLI's Multi-Language Notice;

4) BOLI's Notice of Rights and Responsibilities;

5) BOLI's Division 50 Rules re: Contest Case Hearings;

6) ALJ's Interim Order for Case Summary;

7) The Agency's Motion to Amend Notice of Intent;

8) ALJ's Interim Order entitled "Timeline for Responding to Agency's Motion to Amend";

9) ALJ's Interim Order granting Agency's Motion to Amend.

12) On February 28, 2001, the Agency filed a letter notifying the forum that HJSCCI had been served with all the documents required in the ALJ's interim order granting the Agency's motion to amend.

13) On March 9, 2001, HJSCCI, through counsel Christine M. Meadows of Tarlow, Jordan & Schrader, filed an answer to the Agency's Amended Notice and request for hearing. HJSCCI's answer included an admission that "David M. Larson has a financial interest in Respondent Howard E. Johnson & Sons Construction Co., Inc."

14) The Agency and Respondents filed timely case summaries on March 9, 2001.

15) On March 12, 2001, the Agency filed a supplemental case summary.

16) On March 19, 2001, Respondents filed a supplemental case summary.

17) On March 19, 2001, the Agency submitted a letter stating that Respondents Ewing and Sarin had reached an informal resolution with the Agency. The Agency's letter enclosed a partially executed copy of a Consent Order signed by Respondents Sarin and Ewing.

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

19) Prior to opening statements, Mr. Gerstenfeld and Mr. Murphy jointly submitted a fully executed Consent Order reflecting a complete resolution of the matters alleged in the Notice as to Respondents Sarin and Ewing. The ALJ received the Consent Order as Exhibit X-13 and Mr. Murphy was excused from the hearing.

20) Prior to opening statements, the Agency moved to amend paragraphs 12 and 13 of its amended Notice of Intent to substitute "Larson Construction Co., Inc." for "David M. Larson" based on evidence acquired in discovery. Respondents did not object and the Agency's motion was granted.

21) Prior to opening statements, the Agency moved to delete paragraph 3 and subsection (1) of paragraph 10 from the Notice of Intent, and to reduce civil penalties sought to $20,000. Respondents did not object and the Agency's motion was granted.

22) On March 20, the hearing was adjourned at approximately 5 p.m. Immediately afterwards, in the company of Mr. Gerstenfeld, Ms. Meadows, and Mr. Ewing, the ALJ visited and made observations at the City of

Warrenton's municipal building, the site of the FSD and FSR Contracts. At the conclusion of the site visit, the ALJ asked Mr. Gerstenfeld and Ms. Meadows to each take photographs of the municipal building and its adjacent parking lot and to submit them to the forum by April 6, 2001.

23) The evidentiary portion of the hearing was concluded at 5 p.m. on March 21. Due to conflicting schedules, closing arguments were scheduled and held at 1 p.m. on March 26 in the Portland State Office Building. The ALJ, Mr. Gerstenfeld, Mr. Larson, and Ms. Meadows were present during closing argument.

24) On March 27, 2001, the ALJ issued a Final Order Based on Informal Disposition reflecting the Consent Order executed between the Agency and Respondents Sarin and Ewing.

25) On April 5, 2001, the Agency and Respondent each submitted photographs of the municipal building and its adjacent parking lot. Neither objected to the other's submission.

26) The ALJ issued a proposed order on June 25, 2001, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. Respondent and the Agency both filed timely exceptions. Those exceptions are discussed in the Opinion section of this Final Order.

FINDINGS OF FACT – THE MERITS

1) Respondent David Larson has been involved with the construction business since 1976 on the Oregon coast. He has been engaged in public works construction for 20 years. He is corporate president and a shareholder of LCCI and has a financial interest in HJSCCI. There was no evidence that LCCI has a financial interest in HJSCCI.

2) On October 24, 1997, the Agency issued a Notice of Intent to LCCI and David M. Larson alleging that Respondents had violated Oregon's prevailing wage rate laws from 1995 to 1997and proposing to assess civil penalties in the amount of $58,522 and to place Respondents on the List of Ineligibles for a period of three years from the date of publication of their names on the List of Ineligibles. On July 22, 1998, after hearing, the Commissioner issued a final order concluding that Respondents had performed a subcontract on a public works project and intentionally failed to pay 29 workers the prevailing wage rate, in violation of ORS 279.350(1), intentionally failed to post the prevailing wage rates at the project, in violation of ORS 279.350(4), filed inaccurate and incomplete certified statements, in violation of ORS 279.354, and took action to circumvent payment of the prevailing wage rate by requiring workers to accept less than the prevailing wage rate as part of a bogus apprenticeship program, in violation of ORS 279.350(7). The Commissioner placed both Respondents on the List of Ineligibles for three years

and assessed $59,993.72 in civil penalties for those violations.

3) Respondents' names were first published on the List of Ineligibles on July 22, 1998, with a "Removal Date" of July 21, 2001.

4) On August 26, 1998, the Agency sent a letter to Mitch Mitchum, the Public Works Director of the City of Astoria, regarding the scope of LCCI's and Larson's debarment. Among other things, the letter stated:

> "The debarment makes Larson ineligible to receive public works contracts. This ineligibility extends to public works contracts generally, not just to those contracts over $25,000 or those regulated by the prevailing wage requirements. * * * "

5) On August 31, 1998, in response to the Agency's letter, Joseph Tripi, legal counsel for LCCI, Larson, and Johnson Brothers Rock Co. sent a letter to BOLI demanding a retraction letter from the Agency that stated that LCCI, Larson, and companies affiliated with Larson or Johnson Brothers were not debarred from public works contracts under $25,000.

6) On September 1, 1998, the Commissioner responded with a letter that rejected LCCI's demand for a retraction of the Agency's letter.

7) On September 25, 1998, Tripi filed a lawsuit on behalf on LCCI, Larson, and HJSCCI seeking damages of approximately one million dollars based on the issuance of the Agency's August 26, 1998, letter and the Agency's refusal to retract that letter.

8) On November 13, 1998, the Agency sent another letter to Mitchum informing him of "a change in the Bureau's interpretation of the debarment laws." In pertinent part, it stated:

> "The debarment extends to 'public works' generally. There are, however, two categories of contracts which are exempt and which, accordingly, a debarred contractor may enter into: (1) contracts when the total project cost is less than $25,000; and 2) projects regulated under the federal Davis-Bacon Act. * * * Regarding the $25,000 threshold, it applies the same way in this context as it does in the general application of the prevailing wage rate laws. This means that if a *project* is being performed for less than $25,000, it is not covered – in this case it means a debarred contractor could work on it. It is important, however, to recognize the distinction between the amount of the project and the amount of a contract: the threshold applies to the entire project, not just isolated contracts. Thus, if your agency were engaging in a project which would cost $50,000 it would be covered by the prevailing wage rate laws, and debarred contractors could not work on that project, even if the agency let three separate contracts to three separate

contractors to perform the work, with none of the individual contracts being in excess of $25,000. In summary, a debarred contractor can receive a contract or subcontract for a public work if the total project cost is less than $25,000 or if the project is being regulated under the federal Davis-Bacon Act."

9) LCCI, Larson, and HJSCCI dismissed their lawsuit against BOLI based on the Agency's issuance of the November 13, 1998, letter.

10) In November 1998, the Agency published its interpretation of the "scope of debarment" when a contractor is placed on the List of Ineligibles.[1] In pertinent part, it reads as follows:

"Debarment extends to 'public works' generally. There are, however, two categories of contracts which are exempt and which, accordingly, a debarred contractor may enter into:

"(1) contracts when the total project cost is less than $25,000; and

"2) projects regulated under the federal Davis-Bacon Act.

"The $25,000 threshold applies the same way in this context as it does in the general application of the prevailing wage rate laws. This means that if a *project* is being performed for less than $25,000, it is not covered and a debarred contractor may work on it. It is important, however, to distinguish between the amount of a project and the amount of a contract: The threshold applies to the entire project, not just isolated contracts. Thus, if an agency were engaging in a project which would cost $50,000, it would be covered by the prevailing wage rate laws, and debarred contractors could not work on that project, even if the agency let three separate contracts to three separate contractors to perform the work, with none of the individual contracts being in excess of $25,000.

"If neither of the above two exceptions apply, a debarred contractor may not work on a public works project, either as a prime contractor or a subcontractor."

"* * * * *"

11) Larson and LCCI have relied on BOLI's November 13, 1998, interpretation of "scope of debarment" for the purpose of determining if LCCI or Larson was eligible to work on a contract since BOLI's letter containing that interpretation was issued.

12) The Agency's Field Operations Manual ("FOM"), Volume VI – Prevailing Wage Rate, includes an "Interpretation" entitled "Criteria used to Determine PWR

[1] *Wage and Hour Division Field Operations Manual, Vol. VI, (Prevailing Wage Rate), Interpretation* section, p. 218.

Coverage." In pertinent part, it contains the following language:[2]

"Generally

"The Prevailing Wage Rate Law, ORS 279.348 to 279.363, requires that the prevailing rate of wage, as determined by the Labor Commissioner, must be paid to workers upon all public works contracts. ORS 277.348(1);[3] 279.350(1). "Public works" are defined very broadly to include roads, highways, buildings, structures and improvements of all types, the construction, reconstruction, major renovation or painting of which is carried on by a public agency to serve the general public interest and is not limited to those public works listed. ORS 279.348(3). The only public works projects excluded are projects * * * of $25,000 or less * * *. ORS 279.357(1) and (2); 261.345.

"Criteria

"1. Does the particular project in question involve improvement of "public works?" A single public works project may include several types of improvements or structures. ORS 279.348(3)

"2. What is the ultimate intent of the parties to the particular project? Precisely what did the parties contemplate their project or entity would finally look like? It must be underscored that what is meant by this criteria is not the desire to avoid the effect of law, but the anticipated outcome of the particular improvements the agency plans to fund. * * *

"3. Are the particular projects, alleged to be separate and distinct, in actuality, one project? A project encompassing several structures or distinct improvements may be one project if the structures or improvements are similar to one another and combine to form a single, logical entity having an overall purpose or function.

"4. Is the timing of each particular project, alleged to be a separate and distinct project, indicative of one project or several projects? Improvements performed in one time period or in several phases as components of a larger entity will generally be considered a single project.

"5. Are the contractor, subcontractor and their respective workers either the same or substantially the same throughout the particular project or, if different, part of a continuum providing distinct improvements that complete the public agency's ultimate intent?

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[2] *Wage and Hour Division Field Operations Manual, Vol. VI, (Prevailing Wage Rate), Interpretation* section, *Criteria Used to Determine PWR Coverage*, adopted 06-27-89, p. 208.

[3] ORS 277.348(1) is apparently a typographical error in the FOM, as the correct statutory cite is ORS 279.348(1).

"6. How do the public agency and contractors administer and perform the improvements alleged to be separate and distinct?

"7. Does the total value of all anticipated improvements to the public works exceed $25,000? * * *"

14) Subsequent to the issuance of the final order summarized in Finding of Fact – The Merits 2, BOLI issued a Notice of Intent to LCCI proposing to assess $500 in civil penalties based on LCCI's alleged failure to complete the Commissioner's 1999 wage survey. That case was resolved prior to hearing when LCCI sent BOLI a check for $500 on February 24, 2000.

15) On January 20, 1999, the City of Warrenton ("City") awarded a contract in the amount of $1,600,373 to C.A. Taggart Construction for a project entitled the "Warrenton Municipal Complex" ("WMC project"). This project involved construction of a new municipal complex for the City containing a fire station, adjoining city offices, a police station, and a large parking lot to service the complex. The project was considered a public works contract requiring payment of the prevailing wage rate. The City also awarded two related contracts, in the amount of $70,000 and $45,000, to Jim Wilkins to do site work. These two contracts were considered public works contracts requiring payment of the prevailing wage rate.

16) The WMC project was planned to take place on a rectangular city block in Warrenton containing 16 lots of the same size. The block was bordered on its two longer sides by S. Main St. and S.W. Main St. One shorter side of the block was bordered by S.W. 2nd St. The project involved eight adjacent lots numbered 1-4 and 13-16. It divided the block down the middle, and covered the half of the block that faced S.W. 2nd St. Lots 1-4 bordered S.W. Main on one side, with lot 1 being the corner lot facing S. Main and S.W. 2nd. Lots 13-16 bordered S.W. Main on one side, with lot 16 being the corner lot facing S.W. Main and S.W. 2nd. Abutting were the back sides of lots 1-6, 2-15, 3-13, and 4-12.[4]

17) At the time the WMC project was bid, the City's existing fire station covered most of lot 16. A house and garage, known together as the "Hamilton house," occupied lot 4.

18) The WMC project included plans for a single L-shaped building containing a fire station and police station on opposite ends of the "L," with city offices in between that would together occupy lots 1-3 and 16, and a large paved parking lot that would occupy lots 4, and 13-15.

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[4] The city's map shows an alleyway between these lots that runs parallel to S. and S.W. Main, but there is no sign of this alleyway on the completed project.

19) Because the City's existing fire station was located on the site where the new police station would be built, the City planned that the WMC project would be performed in two phases. Phase one of the plan involved the construction of a new fire station and adjoining city offices on lots 1-3. When the first phase was completed, it was planned that the fire department would move into the new station. Phase two of the plan involved demolishing the old fire station located on lot 16 to make room for the new police station, and removal of the Hamilton house to make room for paved parking.

20) The WMC project could not have been completed without the demolition or removal of the City's old fire station and the Hamilton house and its adjoining garage. Demolition of the old firehouse was originally contemplated as necessary in order to complete WMC project. Demolition of the Hamilton house was only planned after the project began due to the City's acquisition of the house in the spring of 1999, after the WMC project had already begun.

21) By January 2000, phase one of the WMC project was nearing completion, and the old fire station and Hamilton house had to be demolished before phase two could begin.

22) The City originally planned that the Army National Guard would demolish the old fire station and Hamilton house, charging only for fuel and dump fees. However, in January 2000, the City learned that local contractors were interested in performing the demolition and that the Guard was prohibited from performing the job if local contractors were interested in bidding on it.

23) When City officials learned that the Guard could not perform the demolition work, Gilbert Gramson, the City's manager, instructed Alan Johansson, the City's director of public works and city engineer, to personally solicit bids from five local contractors - LCCI, Jim Wilkins Co., Taggart, Cokley Excavation, and Carlson Contracting. The scope of the bids was to be was limited to demolition of the old fire station and Hamilton house ("FSD contract"). The City did not publicly advertise the FSD contract for bid. At that point, Gramson regarded the FSD contract as a separate contract from the WMC project.

24) When Johansson called LCCI, he spoke with Tony Ewing, LCCI's estimator. Johansson described the FSD contract and asked Ewing to submit a bid. Johansson told Ewing that the old fire station was being demolished because it was no longer needed, and the Hamilton house was being torn down because it was an eyesore and a liability. There was no discussion about any construction activity that might take place in the future where the old fire station and Hamilton house were presently located. Johansson did not tell Ewing that the job was subject to the prevailing wage rate or that it was part of a larger project.

25) Before submitting a bid, Ewing visited the FSD contract site with Michael Sarin, LCCI's project manager. During their visit, there were job trailers on the lots that would later become paved parking for the WMC project. There were construction materials piled between the old fire station and the Hamilton house. The L-shaped portion of the municipal complex building that had already been constructed was completely sided except for a wall faced with plywood and tarpaper that was about ten feet away from the old fire station. The municipal building appeared to be "substantially complete" except for the unfinished wall facing the old fire station.

26) Before Ewing submitted LCCI's bid, Ewing and Johansson discussed the fact that LCCI was on the List of Ineligibles. Ewing told David Larson that Johansson had some concerns about LCCI's eligibility to work on the FSD contract. Larson instructed Ewing to forward BOLI's November 13, 1998, letter to the City and let the City determine if LCCI was eligible to work on the job.

27) On January 26, 2000, Ewing submitted a written bid to Johansson for the FSD contract in the amount of $8,000. Along with the bid, he submitted a copy of a letter LCCI had received from BOLI (the "BOLI letter") describing the scope of a debarment. Ewing was familiar with the contents of that letter at the time he submitted it. It read as follows:

"A debarment extends to 'public works' generally. There are, however, two categories of contracts which are exempt and which accordingly, a debarred contractor may enter into: 1) contracts when the total project cost is less than $25,000; and 2) projects regulated under the federal Davis-Bacon Act. I believe the second of these is self-explanatory. Regarding the $25,000 threshold, it applies the same way in this context as it does in the general application of the prevailing wage rate laws. This means that if a project is being performed for less than $25,000, it is not covered – in this case it means a debarred contractor could work on it. It is important, however, to recognize the distinction between the amount of a project and the amount of a contract: the threshold applies to the entire project, not just isolated contracts. Thus, if your agency were engaging in a project which would cost $50,000 it would be covered by the prevailing wage rate laws, and debarred contractors could not work on that project, even if the agency let three separate contracts to three separate contractors to perform the work, with none of the individuals (sic) contracts being in excess of $25,000. In summary, a debarred contractor can receive a contract or subcontract for a public work if the total project cost is less than $25,000 or if the project is be-

ing regulated under the Davis-Bacon Act."[5]

Johansson received the letter containing the bid and the letter quoted above prior to January 31, 2000.

28) LCCI's bid on the FSD contract only included the demolition of the old fire station and the Hamilton house. The bid did not include constructing a "haul" road to provide access to the Hamilton house.

29) Ewing and Larson expected that the City would determine whether or not LCCI was eligible for the FSD contract.

30) Gramson instructed Johansson to contact BOLI, determine LCCI's eligibility to work on the FSD contract, and to put his recommendations in writing. On January 28, 2000, Johansson telephoned BOLI to determine if LCCI was eligible to work on the FSD contract. He was unable to reach anyone at BOLI and reported this to Gramson. Johansson took no additional actions to determine if LCCI was eligible to work on the FSD contract.

31) LCCI, Cokley, and Wilkins all submitted bids on the FSD contract by 1/31/00. Taggart and Carlson declined to enter bids. Johansson never told Cokley, who has been a contractor for eight years, that the FSD contract was subject to the prevailing wage rate or that it was part of a larger project. Cokley believed it was a "stand alone"[6] project and bid the job based on straight wage, not prevailing wage rate.

32) On January 31, 2000, Johansson submitted a draft memorandum to Gramson regarding "Demolition of Old Fire Station and Hamilton House." In pertinent part, it read as follows:

> "Larson Construction has proposed to do the demolition for $8,000 total cost. Larson is under a debarment from the State for prevailing wage violation. They can work on projects under $25,000. The total project is considered under the debarment. They are therefor excluded from this work since the entire project has to consider all work at the Municipal Center."

33) On February 1, 2000, Johansson submitted a second draft memorandum to Gramson on the same subject. The only reference to Larson read as follows:

> "Larson Construction has proposed to do the demolition for $8,000 total cost."

The remainder of the memorandum, in pertinent part, stated:

> "Cokley Excavation has quoted $8,000 to demolish the old fire

[5] This letter is identical in all substantive respects to BOLI's letter described in Finding of Fact – The Merits 8, *supra*.

[6] Cokley testified that this term meant "not a portion of another contract or a subsidiary to another job."

station and the Hamilton house.

"Both Larson and Cokely (sic) excavation have quote (sic) $8,000 as the low price for this project. It is a tie low price. I recommend that the City select one Contractor for this work and then if the two are tie low prices on another job that the City select the other Contractor. I recommend that the City select Cokley Excavation to remove the old fire station and Hamilton house. I recommend that the City select Larson Construction rather than Cokely (sic) excavation on the next tie low price."

34) At some point between the time LCCI submitted its bid and the date the Contract was awarded to LCCI, Ewing told Johansson that LCCI would contest it if the City awarded the contract to Cokley without determining if LCCI was eligible for the job.

35) On February 2, 2000, Ewing and Gary Cokley were called by Johansson and asked to come to city office and draw lots to determine who would perform the work on the Contract. Ewing won the drawing and asked Johansson if it was okay for LCCI to start on the job. Johansson said he had checked into it and it was all right for LCCI to move in its equipment and begin the demolition.

36) On February 2, 2000, Johansson submitted a third memorandum to Gramson regarding the FSD contract. In pertinent part, it read as follows:

"Larson Construction has proposed to do the demolition for $8,000 total cost. * * *

"* * * * *

"Cokley Excavation has quoted $8,000 to demolish the old fire station and the Hamilton house.

"Both Larson Construction and Cokely (sic) Excavation have quoted $8,000 as the low price for this project. It is a tie low price. The Oregon Model Contracting rules require that in a tie that lots are drawn and the winning be determined by the draw. We had a drawing with both Contractors present. Larson Construction was the winner of the drawing. I recommend the City select Larson Construction to remove the old fire station and Hamilton house."

37) On February 2, 2000, Johansson sent Ewing a letter that officially awarded the FSD contract to LCCI and also stated it was LCCI's "**NOTICE TO PROCEED**." (emphasis in original). The letter said a Purchase Order would be issued to LCCI in the amount of $8,000 and that the work encompassed by the LCCI's bid included "the demolition of the existing fire station and the demolition of the Hamilton house and garage. The work also includes the removal and disposal of all demolition debris." The same day, the City sent Ewing a letter

assigning number 2259 to the FSD contract Purchase Order.

38) LCCI commenced work on the FSD contract on February 7, 2000. At that time, no one had informed Ewing or any other representative of LCCI that the FSD contract was subject to the prevailing wage rate or that it was part of a larger project.

39) After the FSD contract was awarded to LCCI, LCCI and the City determined a "haul"[7] road would need to be constructed before LCCI could demolish the Hamilton house. This was because of unstable, soft ground and standing water on the project site. Phase two of the WMC project included ground stabilization and drainage work in the area where the "haul" road needed to be located, and Johansson decided it would be expeditious to ask LCCI to perform the already planned ground stabilization and drainage work in that area.[8] Johansson and Sarin discussed this situation, including the fact that the area would become a parking lot, and Johansson asked for LCCI to submit a bid for work that included building a "haul" road for LCCI's equipment to travel over, putting down some rock, removing some material, and putting in some drainage pipe and a catch basin. The catch basin and drainpipe were to be in the middle of lot 4, where the Hamilton house stood. The "haul" road was located on the border of lots 4 and 5, and entered the project from S.W. Main St. in lot 13.

40) On February 7, 2000, Ewing submitted a letter bid to Johansson on LCCI's behalf for the additional work ("FSR contract") discussed by Sarin and Johansson. The letter read, in pertinent part:

> "RE: Fire Station Rock and Catch Basin
>
> "Dear Alan:
>
> "We are pleased to provide this quote for the work to be done on the above mentioned project. The lump sum quote for this project is $1,867.00. This is for the installation of seventy feet of four inch 3034 storm line,[9] one type one catch ba-

[7] Johansson and Ewing both used this term in referring to the road that LCCI constructed that provided access for LCCI's excavator to the Hamilton house.

[8] It was undisputed that the drainage work and ground stabilization for the parking lot were planned as part of phase two of the WMC project, and that the drainage work and some ground stabilization for the parking lot would have eventually been performed by another contractor. It was not clear whether or not the construction of a haul road to allow the excavator access to Hamilton house would have been required if another contractor besides LCCI had demolished the Hamilton house.

[9] During testimony, this "storm line" was most commonly referred to as a "drainpipe," and the forum has opted to use the term "drainpipe" when referring to the "storm line" described in Ewing's letter.

sin, the removal of brush on the site, and the mobilization cost for the equipment needed. For the placement of rock, sand and removal of sand and sod refer to the unit prices below. Any permits, fencing, etc. to be supplied by the city, or us for an additional fee. We exclude the removal of any hazardous materials.

"Sod, and Sand Removal
$6.50 c.y.

"Rock Placement
$13.00 c.y.

Sand Placement
$7.00 c.y.

"(all items include trucking, dump fees etc.)"

None of this work was included in the bid LCCI submitted to the City on January 26 and was not included in the purchase order 2259.

41) On February 7, 2000, LCCI commenced work on the FSD contract. On that day, Les Hannah, an LCCI employee, worked 8.5 hours on the FSD contract performing demolition, and John Holtzheimer, an HJSCCI employee,[10] worked from 8:50 am. until 4:24 p.m. hauling demolition refuse away from the FSD job site. Respondent Larson was on the FSD job site briefly on February 7, instructing Hannah to salvage some materials from the old fire station. During the week beginning February 7, Sarin visited the FSD job site periodically to see how work was progressing. Ewing also visited the FSD job site briefly on one or two occasions while work was going on.

42) On February 8, 2000, Johansson gave oral authorization to Ewing to begin work on the FSR contract.

43) On February 8, 2000, Hannah worked 8.5 hours on the FSD contract performing demolition, and Holtzheimer worked 9.5 hours hauling demolition refuse away from the FSD contract.

44) On February 9, 2000, the City sent Ewing a letter that read, in pertinent part:

"Subject: Fire Station Rock & Catch Basin

"Dear Mr. Ewing:

"The following is the Purchase Order # for the above mentioned request. Purchase Order # 2268 is in the amount of $1867.00, per your quoted price. Please use this Purchase Order Number on all correspondence and invoices for this additional work."

45) Some of Taggart's building materials were in the way and had to be moved before LCCI could complete the demolition of the old fire station. Johansson directed Sarin to contact Taggart's site superintendent to get the materials moved. The materials were subsequently moved. Johansson

[10] The forum infers that Holtzheimer was an HJSCCI employee from the fact that his time is recorded on an HJSCCI timesheet, whereas Hannah's is recorded on an LCCI timesheet.

did not ask Taggart's site superintendent to move the materials.

46) On February 9, 2000, Hannah worked 9 hours on the FSD contract performing demolition, and Holtzheimer worked 9.5 hours hauling demolition refuse away from the FSD contract, hauling mud away from the FSR contract,[11] and hauling 24 yards of rock to the FSR contract.[12] Grant Seal, an HJSCCI employee,[13] spent 2 ¼ hours hauling 42 yards of concrete away from the FSD contract, and Scotty Stough, an HJSCCI employee,[14] worked from 11:30 a.m. until 1:15 p.m. hauling 30.3 yards of rock and 24 yards of sand to the FSR contract.[15]

47) On February 10, 2000, Hannah worked 7.5 hours building the "haul" road, and Holtzheimer worked 8.5 hours hauling demolition refuse away from the FSD job site and hauling 40 yards of rock to the FSR job site.[16] Seal spent 25 minutes moving LCCI's "91 Tilt," a piece of equipment used by LCCI on the FSD contract to another location.

48) On February 10, 2000, Gary Timmerman, an employee of the Fair Contracting Foundation, visited the WMC project site. He told Hannah that, in his opinion, LCCI's work was subject to the prevailing wage rate. Hannah told this to Ewing.

49) Timmerman also visited Johansson on February 10 and told Johansson that, in his opinion, the work LCCI was doing was subject to the prevailing wage rate and that LCCI was in violation.

50) On February 11, 2000, Hannah spent 6 hours demolishing the Hamilton house. Holtzheimer spent 8 ¾ hours hauling debris and mud from the FSD and FSR job sites.

51) On February 14, 2000, Johansson called BOLI and spoke with Lois Banahene, leadworker in BOLI's prevailing wage rate unit. Banahene advised him that the FSD and FSR contracts were subject to the prevailing wage rate, and that the contracts with LCCI needed to be amended to conform to prevailing wage rate regulations. That same day, Johansson

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[11] The forum concludes that the mud hauling was related to the FSR contract based on LCCI's billing to the City for 96 units of mud removed from the WMC project site related to Purchase Order 2268. LCCI did not bill the City for any mud removal related to the FSD contract.

[12] The forum infers that Holtzheimer hauled the rock for the FSR Contract based on LCCI's billing to the City for 95 yards of rock delivered related to building the "haul road."' LCCI did not bill the City for any rock delivery related to the FSD Contract.

[13] The forum infers that Seal was an HJSCCI employee from the fact that his time is recorded on an HJSCCI timesheet. *See supra* text accompanying note 9.

[14] *Id.*

[15] *See supra* text accompanying note 12.

[16] *Id*.

sent an amended contract to Ewing that stated, in pertinent part:

> "I discussed this project with Lois Banahene, Oregon State Bureau of Labor and Industries, BOLI. Since prevail (sic) wage construction will occur on the site where the old fire station was demolished, the State of Oregon prevailing wage requirements apply to the demolition, also.
>
> "**You are notified that your Contract is now amended to include the following**:
>
> "**Wage Rates shall be governed by the latest edition of "Prevailing Wage Rates for Public Works Contracts in Oregon" as compiled by Oregon Bureau of Labor and Industries. Attached BOLI publication effective January 01, 2000.**
>
> **"You are required to utilize State of Oregon, Bureau of Labor and Industries Public Works Contractor Wage Certification (Form WH-38S) and file as directed by ORS 279.**
>
> "I observed three workers on the project, Excavator Operator, Truck Driver, and a Project Forman (sic). You are required to provide Certified Payroll for those workers who provided Labor on the demolition."

On February 14, 2000, Johansson also telephoned Ewing and told him that he had spoken with a representative of BOLI, who had informed him that the FSR and FSD contracts were subject to the prevailing wage rate. Johansson's contemporaneous notes reflect that he spoke with Ewing at 5 p.m. By that time, LCCI had completed its work on the FSD and FSR contracts.

52) Prior to 5 p.m. on February 14, 2000, the City did not inform Larson, Ewing, Sarin, or any other representative of LCCI that the FSD and FSR contracts were subject to the prevailing wage rate or that they were part of the WMC project or any other larger project.[17]

53) Prior to 5 p.m. on February 14, 2000, no one from LCCI asked Johansson or anyone else at the City if the FSD or FSR contracts were part of the WMC project, and no one from LCCI sought BOLI's advice regarding whether or not LCCI was barred from performing work on the FSD or FSR contracts.

54) Prior to 5 p.m. on February 14, 2000, Larson, Ewing, and Sarin did not believe that the FSD and FSR contracts were subject to the prevailing wage rate or that they were part of a larger project that was subject to the prevailing wage rate, thus making LCCI ineligible to work on the contracts.

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[17] Johansson did tell that the City intended to put a parking lot where the "haul" road would be constructed when Johansson asked him to put in a bid for constructing the "haul" road, catch basin, and drainpipe line. *See* Finding of Fact – The Merits 39, *supra*.

55) LCCI installed the drainpipe and catch basin for the FSR contract prior to 5 p.m. on February 14, 2000. Jim Wilkins began the site work for phase 2 of the WMC project shortly thereafter.

56) LCCI did not post the applicable prevailing wage rates during the performance of the FSD or FSR contracts. Prior to being placed on the list of ineligibles, LCCI had posted prevailing wage rates on job trailers located on job sites or by putting them on the stake and driving the stake into the ground on the job site.

57) Sarin called Lois Banahene the day after the City told Sarin that the FSD contract was subject to the prevailing wage rate. Banahene reiterated that the FSD and FSR contracts were subject to the prevailing wage rate.

58) Sarin then spoke with Tyrone Jones, BOLI Wage & Hour Division compliance specialist. Jones said LCCI needed to submit certified payroll reports and a public work contract fee and stated he would call Sarin when he needed more information.

59) On February 29, 2000, LCCI submitted four invoices to the City, described as follows:

a) Invoice #1552 in the amount of $8,000.00 for purchase order 2259;

b) Invoice #1553 in the amount of $624.00 for purchase order 2268;

c) Invoice #1554 in the amount of $1,689.00 for purchase order 2268;

d) Invoice #1555 in the amount of $662.48.

60) The employees who worked on the FSD and FSR contracts for LCCI and HJSCCI who were entitled to be paid the applicable prevailing wage rate for their work were paid the applicable prevailing wage rate for their work on those contracts in checks issued March 6, 2000, the first regular payday after the contracts were completed.

61) On March 3, 2000, Stanley sent a completed WH-38[18] to the City and Jones. On the form, Stanley wrote that the project name was "Demolition of Existing Fire Station & the Hamilton House, PO#2259." She indicated that Hannah had worked a total of 39.5 hours and Holtzheimer 5 hours on the project between February 7 and 11, 2000. The WH-38 did not list Seal or Stough.

62) Stanley enclosed a completed "Public Work Contract Fee Information Form" and a check made out to BOLI, from LCCI, in the amount of $100.00 with the WH-38. On the Form, Stanley described the project as "demolition of existing fire station & the Hamilton House, PO#2259" in "Warrenton, OR." On March 8, 2000, BOLI sent LCCI a "Certificate of Payment" in return.

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[18] A WH-38 is a form created by BOLI for contractors to use in submitting certified payroll reports that comply with the requirements of ORS 279.354.

63) Taggart began actual construction on the police station on or around March 15, 2000. The police station was constructed on the site of the old fire station.

64) On April 5, 2000, the City of Warrenton issued a check to Larson Construction in the amount of $10,975.48. A document created by the City that accompanied the check showed payment to Larson Construction for Invoice ##s 1552, 1553, 1554, and 1555. Invoice #1555 was in the amount of $662.48 and was described on the check stub as "INSTALLATION OF STORM LINE & CATCH BASIN."

65) The completed WMC complex consists of a singled, L-shaped building that houses the City's fire department, city offices, and police department, and has paved parking. The building and parking occupy the lots described in Finding of Fact – The Merits 18.

66) On May 1, 2000, Banahene sent a letter to Stanley requesting additional information and documents regarding the FSD and FSR contracts no later than May 10, 2000. Stanley provided that information and documents in a letter to Banahene dated May 9, 2000.

67) On or about October 3, 2000, BOLI served the City with a Notice of Intent charging it with failure to provide proper notification that the FSD demolition contract was a prevailing wage rate job. The City settled the case with BOLI prior to hearing.

68) The placement of LCCI and Larson on the List has "devastated" LCCI's business and has put LCCI's ability to exist as a viable business in jeopardy. Larson expected to make a profit on the FSD Contract, but that job alone would not have substantially reduced LCCI's financial stress.

69) As of the date of hearing, LCCI still had not paid all the civil penalties assessed in the final order described in Finding of Fact – The Merits 2.

70) BOLI holds seminars around the state of Oregon to educate contractors on Oregon's prevailing wage rate laws. Julie Stanley, LCCI's office manager, is LCCI's only employee who has attended such a seminar. She attended a seminar prior to April 21, 1998.

71) Julie Stanley is economically dependent on LCCI, as she and her husband both work for LCCI. David Larson is her uncle, and she has another uncle who also works for LCCI. Despite this inherent bias, the forum found her to be a credible witness.

72) David Larson's testimony was unbelievable on two key points. First, he testified that he had visited the FSD contract site the first day of work and was aware that a new fire station was being constructed by the City and familiar with that construction, but he had no idea how close the FSD contract was to the new fire station. This contrasts starkly with the ALJ's personal observations when visiting the FSD contract

site and the credible testimony of Ewing, Sarin, and Johansson. Second, he testified that he saw no sign of any other construction activity on the day of his visit. This contradicts the credible testimony of Ewing, who testified there was a job trailer on the site, and Sarin, who testified that there were construction materials on the site, as well as a job trailer, during the performance of the FSD contract. Because of this testimony, the forum has only believed Larson's testimony where it was supported by other credible evidence.

73) Michael Sarin was a named Respondent in this case, is LCCI's general manager, and had a strong financial interest in the outcome of the case against LCCI. His testimony was internally consistent, and he answered questions directly and candidly. Despite his inherent bias, the forum found his testimony credible, with two exceptions. Those exceptions were his testimony that LCCI did not install the catch basin or drainpipe on the FSR contract, which the forum has discredited based on LCCI's submission of an invoice and receipt of payment for that very work, and his testimony that overstated how close the WMC project was to completion at the time LCCI bid the FSD contract.

74) Tony Ewing was a named Respondent in this case and, like Sarin, had a strong financial interest in the outcome. He was also present throughout the hearing to assist Respondent LCCI's case. His demeanor throughout the hearing was somewhat cavalier, as though he did not take the proceedings seriously. Despite this, the forum has credited his testimony wherever it was not contradicted by more credible evidence. As with Sarin, the forum has specifically discredited his testimony that LCCI did not install the catch basin or drainpipe on the FSR contract, based on LCCI's submission of an invoice and receipt of payment for that very work and his testimony that overstated how close the WMC project was to completion at the time he bid the FSD contract. The forum has also rejected his testimony that LCCI posted the applicable prevailing wage rates for the FSD contract.

75) Gary Cokley's testimony was credible. Although he was called as LCCI's witness, he had no motive to shade his testimony in LCCI's behalf. He is in direct competition with LCCI and stands to gain if LCCI goes out of business. In contrast to Sarin and Larson, he testified that the WMC project looked substantially complete, but not complete or finished when he visited it prior to his FSD bid, emphasizing his lack of bias in Respondents' favor. The forum has also attached considerable significance to his testimony that Johansson never told him that the FSD contract was subject to the prevailing wage rate or was part of a larger project.

76) Alan Johansson was not a credible witness for several reasons.

First, he suffered from a suspect inability to recall when asked specific questions on cross examination regarding what representations he made or didn't make to LCCI representatives concerning whether or not the FSD contract was a prevailing wage rate job.

Second, his testimony on important points was contradicted by more credible documentary evidence – some of which Johansson himself created - and the inferences to be drawn from it. One example is his testimony that he was unaware, at the time the FSD contract was bid, that it was subject to the prevailing wage rate. This testimony was directly contradicted by his memorandum of January 31 stating that LCCI was "excluded from this work."[19] There would be no reason to exclude LCCI from the work unless it was a prevailing wage rate job. When asked by the ALJ to explain why he changed his mind between January 31 and February 1, 2000, from a conclusion that LCCI was excluded from the FSD contract to the opposite conclusion, Johansson claimed he based his change of mind on the BOLI letter sent by Ewing and Ewing's statement that the letter qualified LCCI to do the work. In fact, Ewing had submitted this letter when he faxed LCCI's original bid to Johansson on January 26, and Johansson had it in his possession when he wrote his January 31 memorandum to Gramson stating that LCCI was "therefore excluded from [the FSD contract] since the entire project has to consider all work at the Municipal Center." Johansson's January 31 memorandum also directly contradicts his testimony that he did not make an independent interpretation of the BOLI letter as applied to LCCI. That memorandum relies on the very factors outlined in the BOLI letter in proposing to exclude LCCI from the FSD contract. In addition, it is notable that he claimed Ewing told him that the BOLI letter proved LCCI was qualified for the contract, but made no reference to this statement in his letter awarding the contract to LCCI. Finally, like Ewing and Sarin, his testimony that LCCI did not install the catch basin or storm drain on the FSR contract was contradicted by LCCI's submission of an invoice and receipt of payment for that very work,

Third, at least one significant part of his testimony was inherently improbable. That was his claim that he made no independent determination of whether or not LCCI was eligible to work on the FSD contract and that he relied totally on Ewing's alleged statement that the BOLI letter proved LCCI was eligible. It makes no sense whatsoever that a City engineer in charge of a major construction project would rely totally on the purported representations of a debarred contractor in determining the contractor's eligibility for a contract. As stated earlier, it is also clear that he did

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[19] *See* Finding of Fact – The Merits 32, *supra*.

rely on the BOLI letter to make an earlier independent preliminary determination that LCCI was not eligible.

Based on all of the above, the forum has only credited Johansson's testimony where it is supported by other credible evidence in the record. In addition, the forum has relied on Ewing's testimony wherever it conflicted with Johansson's.

77) Gilbert Gramson was a credible witness. His testimony was forthcoming and responsive to questions on direct and cross-examination and was not impeached by other more credible testimonial or documentary evidence. The forum has credited his testimony in its entirety.

78) Lois Banahene and Tyrone Jones were credible witnesses.

79) On April 14, 1995, the Agency published an interpretation of ORS 279.348(3) and OAR 839-016-004(17) regarding demolition projects that reads as follows:

> "Demolition, alone, is not subject to the prevailing wage rate requirements. For example, the demolition of a building because such structure is no longer needed would not in itself be a covered construction activity. However, where an existing building is being demolished in preparation to/contemplation of further construction activity at the site, the demolition work and all components of the project would be covered under Oregon's prevailing wage rate law."[20]

ULTIMATE FINDINGS OF FACT

1) Respondent LCCI is an Oregon corporation and Respondent Larson is corporate president and a shareholder of LCCI. Both Respondents' names were first published on the List of Ineligibles on July 22, 1998, with a "Removal Date" of July 21, 2001.

2) Respondent Larson has a financial interest in HJSCCI. There was no evidence that LCCI has a financial interest in HJSCCI.

3) On January 20, 1999, the City awarded a contract in the amount of $1,600,373 to C.A. Taggart Construction for the WMC project. This project involved construction of a new municipal complex for the City containing a fire station, adjoining city offices, a police station, and a large parking lot to service the complex. The WMC project took place on half of a city block that involved eight adjacent city lots numbered 1-4 and 13-16. The project was a public works contract requiring payment of the prevailing wage rate.

4) Alan Johansson, the City engineer and public works director, acted as the City's representative during the WMC project.

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[20] *Wage and Hour Division Field Operations Manual, Vol. VI, (Prevailing Wage Rate)*, *Interpretation section*, p. 213.

5) Because the City's existing fire station was located on the site where the new police station would be built, the City planned that the WMC project would be performed in two phases. Phase one of the plan involved the construction of a new fire station and adjoining city offices on lots 1-3. When the first phase was completed, it was planned that the fire department would move into the new station. Phase two of the plan involved demolishing the old fire station located on lot 16 to make room for the new police station, removal of the Hamilton house, an existing structure on lot 4, to make room for paved parking, and construction of a paved parking lot on lots 4 and 13-15.

6) In late January 2000, the City solicited bids from five contractors, including LCCI, for the FSD contract. That contract involved demolition of the City's old fire station, located on lot 16, and the Hamilton house, a house and garage standing on lot 4 that was planned to become part of a paved parking lot for users of the City's new municipal complex.

7) Tony Ewing, LCCI's estimator, and Michael Sarin, LCCI's project manager, visited the FSD job site prior to making a bid. At that time, phase one of the WMC project was nearing completion. At least one Taggart job trailer was parked on the WMC project site and there were construction materials stacked on that site.

8) Before Ewing submitted LCCI's bid, Ewing and Johansson discussed the fact that LCCI was on the List. Ewing told Larson about Johansson's concerns, and Larson instructed Ewing to forward a letter from BOLI dated November 13, 1998, that defined the scope of prevailing wage rate debarments and let the City determine if LCCI was eligible to work on the job.

9) On January 26, 2000, Ewing submitted LCCI's bid, in the amount of $8,000, for the FSD contract, along with the BOLI letter. LCCI's bid only included the demolition of the old fire station and the Hamilton house. Johansson received this prior to January 31, 2000.

10) On January 31, 2000, Johansson made a determination, based on the BOLI letter, that LCCI was not eligible for the FSD contract because it was part of a larger project. Johansson did not convey this determination to anyone but the City Manager.

11) At some point between the time LCCI submitted its bid and the date the Contract was awarded to LCCI, Ewing told Johansson that LCCI would contest it if the City awarded the contract to Cokley without determining if LCCI was eligible for the job.

12) On February 2, 2000, Johansson awarded the FSD contract to LCCI, assigning purchase order #2259 to the contract. That same day, Johansson told Ewing that LCCI could move its equipment in and start the job.

13) After the FSD contract was awarded to LCCI, LCCI and the City determined a "haul" road

was needed before LCCI's demolition equipment could access and demolish the Hamilton house. Since phase two of the WMC project included ground stabilization and drainage work in the area where the "haul" road would be located, Johansson asked LCCI to perform the already planned ground stabilization and drainage work in that area. Johansson and Sarin discussed this work ("FSR contract"), including the fact that the area would become a parking lot, and Johansson asked for LCCI to submit a bid for work that included building a "haul" road for LCCI's equipment to travel over, putting down some rock, removing some material, and putting in a drainpipe and a catch basin.

14) LCCI submitted a bid on the FSR contract on February 7, 2000. On February 8, 2000, Johansson gave oral authorization to Ewing to begin work on the FSR contract. On February 9, 2000, the City sent Ewing a letter assigning purchase order #2268 to the FSR contract.

15) LCCI commenced work on the FSD contract on February 7, 2000. One LCCI and one HJSCCI employee worked on the FSD contract on February 7 and 8. On February 9, one LCCI and three HJSCCI employees performed work related to the FSD and FSR contracts. On February 10, one LCCI and two HJSCCI employees performed work related to the FSD and FSR contracts. On February 11, one LCCI and one HJSCCI employee performed work related to the FSD and FSR contracts.

16) On February 10, 2000, an employee of the Fair Contracting Foundation told LCCI's employee on the FSR contract and Johansson that, in his opinion, LCCI's work was subject to the prevailing wage rate. LCCI's employee told this to Ewing.

17) On February 14, 2000, LCCI completed the FSR contract.

18) The WMC project could not have been completed without the demolition of the old fire station and Hamilton house and installation of the drainage pipe and catch basin on the FSR contract.

19) On February 14, 2000, Johansson called BOLI and was told by a BOLI employee that the FSD and FSR contracts were subject to the prevailing wage rate. At 5 p.m. on February 14, 2000, Johansson called LCCI and told Ewing what the BOLI employee had said. On February 14, 2000, Johansson also mailed an amended contract to Ewing that included notification that wage rates for the FSD contract must be the applicable prevailing wage rates, that LCCI must file a BOLI Public Works Contractor Wage Certification, and that LCCI must provide certified payroll reports.

20) At no time prior to 5 p.m. on February 14, 2000, did Johansson or anyone else from the City or BOLI inform LCCI, Larson, or any other contractor who bid on the FSD contract that the FSD or FSR contracts were subject to the

prevailing wage rate. Prior to that time, Larson, Ewing, and Sarin did not believe that the FSD and FSR contracts were subject to prevailing wage rate or that they were part of a larger project that was subject to the prevailing wage rate, thus making LCCI ineligible to work on the contracts.

21) At no time prior to February 14, 2000, did any employee of LCCI ask Johansson if the FSD or FSR contracts were related to a larger project.

22) LCCI did not post the applicable prevailing wage rates during the performance of the FSD or FSR contracts.

23) On February 15, 2000, a representative of BOLI told Sarin that the FSD and FSR contracts were subject to the prevailing wage rate.

24) On March 3, 2000, LCCI mailed certified payroll reports for the FSD contract to the City and BOLI. The same day, LCCI mailed a completed "Public Work Contract Fee Information Form" to BOLI, along with a check made out to BOLI in the amount of $100.00.

CONCLUSIONS OF LAW

1) ORS 279.348(3) provides:

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

OAR 839-016-0004(17) provides:

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

ORS 279.348(5) provides:

> "'Public agency' means the State of Oregon or any political subdivision thereof or any county, city, district, authority, public corporation or entity and any of their instrumentalities organized and existing under law or charter."

See also OAR 839-016-0004(16) (same). The WMC project and FSD and FSR contracts were public works projects.

2) ORS 279.357 provides, in pertinent part:

> "(1) ORS 279.348 to 279.380 do not apply to:

"(a) Projects for which the contract price does not exceed $25,000.

"(b) Projects regulated under the Davis-Bacon Act (40 U.S.C. 276a). * * *

"(2)(a) No public contracting agency shall divide a public works project into more than one contract for the purpose of avoiding compliance with ORS 279.348 to 279.380."

"* * * * *

"(c) In making determinations under this subsection, the commissioner shall consider:

"(A) The physical separation of the project structures.

"(B) The timing of the work on project phases or structures.

"(C) The continuity of project contractors and subcontractors working on project parts or phases.

"(D) The manner in which the public contracting agency and the contractors administer and implement the project."

OAR 839-016-0310 further provides, in pertinent part:

"(1) Public contracting agencies shall not divide a public works project into more than one contract for the purpose of avoiding compliance with ORS 279.348 to 279.380.

"(2) When making a determination of whether the public agency divided a contract to avoid compliance with ORS 279.348 to 279.380, the commissioner shall consider the facts and circumstances in any given situation including, but not limited to, the following matters:

"(a) The physical separation of project structures;

"(b) Whether a single public works project includes several types of improvements or structures;

"(c) The anticipated outcome of the particular improvements or structures the agency plans to fund;

"(d) Whether the structures or improvements are similar to one another and combine to form a single, logical entity having an overall purpose or function;

"(e) Whether the work on the project is performed in one time period or in several phases as components of a larger entity;

"(f) Whether a contractor or subcontractor and their employees are the same or substantially the same throughout the particular project;

"(g) The manner in which the public contracting agency and the contractors administer and implement the project;.

"(h) Other relevant matters as may arise in any particular case[.]"

The WMC, FSD and FSR contracts combined to form a single

public works project, the total cost of which exceeded $25,000.00. Consequently, the FSD and FSR contracts did not fall within the exemption created by ORS 279.357(1)(a).

3) ORS 279.354 provides, in pertinent part:

> "(1) The contractor or the contractor's surety and every subcontractor or the subcontractor's surety shall file certified statements with the public contracting agency in writing in form prescribed by the Commissioner of the Bureau of Labor and Industries, certifying the hourly rate of wage paid each worker which the contractor or the subcontractor has employed upon such public work, and further certifying that no worker employed upon such public work has been paid less than the prevailing rate of wage or less than the minimum hourly rate of wage specified in the contract, which certificate and statement shall be verified by the oath of the contractor or the contractor's surety or subcontractor or the subcontractor's surety that the contractor or subcontractor has read such statement and certificate and knows the contents thereof and that the same is true to the contractor or subcontractor's knowledge. The certified statements shall set out accurately and completely the payroll records for the prior week including the name and address of each worker, the worker's correct classification, rate of pay, daily and weekly number of hours worked, deductions made and actual wages paid.
>
> "(2) Each certified statement required by subsection (1) of this section shall be delivered or mailed by the contractor or subcontractor to the public contracting agency. Certified statements shall be submitted as follows:
>
> "(a) For any project 90 days or less from the date of award of the contract to the date of completion of work under the contract, the statements shall be submitted once before the first payment and once before final payment is made of any sum due on account of a contract for a public work."

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

> "(1) The form required by ORS 279.354 shall be known as the Payroll and Certified Statement, Form WH-38. The Form WH-38 shall accurately and completely set out the contractors or subcontractor's payroll for the work week immediately preceding the submission of the form to the public contracting agency by the contractor or subcontractor.
>
> "* * * * *
>
> "(4) Each Payroll and Certified Statement form shall be delivered or mailed by the contractor or subcontractor to the

public contracting agency. Payroll and certified statement forms shall be submitted as follows:

"(a) For any public works project of 90 days or less from the date of award of the contract to the date of completion of work under the contract, the form shall be submitted once within 15 days of the date the work first began on the project and once before the agency makes its final inspection of the project[.]"

By failing to submit a certified payroll statement within 15 days of the date the work first began on the FSD contract, Respondent LCCI committed one violation of ORS 279.354 and OAR 839-016-0010(4)(a).

4) ORS 279.350(4) provides:

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

OAR 839-016-0033(1) provides:

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

Respondent LCCI did not post the prevailing wage rate applicable to the FSD and FSR contracts during the performance of those contracts and committed one violation of ORS 279.350(4) and OAR 839-016-0033(1).

5) ORS 279.370 provides, in pertinent part:

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

OAR 839-016-0530(3) provides, in pertinent part:

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

"* * * * *

"(e) Filing inaccurate or incomplete certified statements in violation of ORS 279.354;

"(f) Paying the prevailing rate of wage in violation of ORS 279.350(6);

"* * * * *

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

ORS 279.350(7) provides:

> "(7) No person shall take any action that circumvents the payment of the prevailing rate of wage to workers employed on a public works contract, including, but not limited to, reducing an employee's regular rate of pay on any project not subject to ORS 279.348 to 279.380 in a manner that has the effect of offsetting the prevailing wage on a public works project."

OAR 839-016-0300 provides:

> "No person shall take any action which circumvents the payment of the prevailing wage rate to workers on public works projects."

LCCI's entering into the FSD and FSR contracts with the City did not violate ORS 279.350(7) or OAR 839-016-0300.

6) ORS 279.370 provides, in pertinent part:

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

OAR 839-016-0500 provides:

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

OAR 839-016-0520 provides:

> "(1) The commissioner shall consider the following mitigating and aggravating circumstances when determining the amount of any civil penalty to be assessed against a contractor, subcontractor or contracting agency and shall cite those the commissioner finds to be applicable:
>
> "(a) The actions of the contractor, subcontractor, or contracting agency in responding to previous violations of statutes and rules.
>
> "(b) Prior violations, if any, of statutes and rules.
>
> "(c) The opportunity and degree of difficulty to comply.
>
> "(d) The magnitude and seriousness of the violation.
>
> "(e) Whether the contractor, subcontractor or contracting agency knew or should have known of the violation.

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

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

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

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

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

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

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

"* * * * *

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

"* * * * *

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

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

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

"* * * * *

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

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

The Commissioner's imposition of the penalties in this case is an appropriate exercise of his discretion.

7) ORS 279.361 provides, in pertinent part:

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

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

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

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

"* * * * *

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

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

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

"(a) The corporate president;

"(b) The corporate vice president;

"(c) The corporate secretary;

"(d) The corporate treasurer;

"(e) Any other person acting as an agent of a corporate officer or the corporation.

"(4) The Wage and Hour Division shall maintain a written list of the names of those contractors, subcontractors and other persons who are ineligible to receive public works contracts and subcontracts. The list shall contain the name of contractors, subcontractors and other persons, and the name of any firms, corporations, partnerships or associations in which the contractor, subcontractor or other persons have a financial interest. Except as provided in OAR 839-016-0095, such names will remain on the list for a period of three (3) years from the date such names were first published on the list."

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

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

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

Respondent LCCI intentionally failed to post the prevailing wage rates during the performance of the FSD and FSR contracts. Respondent Larson was responsible for this failure and should have known that the prevailing wage rates must be posted. For these reasons, the Commissioner must place Respondents LCCI and Larson on the List of Ineligibles for a period not to exceed three years. Although there was no evidence that LCCI has a financial interest in HJSCCI, Respondent Larson does have a financial interest in Respondent HJSCCI. The Commissioner's decision to place LCCI, Larson, and HJSCCI on the List for one month is an appropriate exercise of his discretion.

OPINION

In this case, the Agency seeks to assess $20,000 in civil penalties against Respondent LCCI, a debarred contractor, based on its participation in two public works projects for the City of Warrenton. The Agency also seeks to debar Respondents LCCI and Larson for an additional three years, and to debar a third Respondent, HJSCCI, for three years based on LCCI's alleged financial interest in HJSCCI.

THE FSD AND FSR CONTRACTS WERE TWO SEPARATE CONTRACTS.

The Agency alleged in its Notice that the FSD and FSR contracts were two separate contracts. Respondents denied this allegation in their answer. At hearing, undisputed evidence established that the two contracts, though related, involved two different offers and acceptances, two separate purchase orders, two separate bids that took place on two different dates and involved two disparate bidding processes, two distinct jobs, and two distinct billings. Based on this evidence, the forum concludes that the FSD and FSR contracts were two separate contracts.

THE FSD AND FSR CONTRACTS WERE "PUBLIC WORKS."

The City of Warrenton is a "city" in the state of Oregon, bringing it within the definition of a "public agency." ORS 279.348(5). The FSD and FSR contracts were contracted for by the City "to serve the public interest." ORS 279.348(3). They involved two different types of work. The FSR contract involved construction of a road and installation of a drainpipe and catch basin, both of which are encompassed by the plain meaning of the language contained within the statutory definition of "public works."[21] In contrast, the FSD contract involved only demolition. On its face, ORS 279.348(3) and OAR 839-016-0004(17) do not appear to include demolition. However, in 1995, the Agency published its interpretative explanation of the statute and rule regarding demolition. That interpretative explanation was offered and received as an exhibit during the hearing and reads as follows:

> "Demolition, alone, is not subject to the prevailing wage rate requirements. For example, the demolition of a building because such structure is no longer needed would not in itself be a covered construction activity. However, where an existing building is being demolished in preparation to/contemplation of further construction activity at the site, the demolition work and all components of the project would be covered under Oregon's prevailing wage rate law."[22]

This forum and Oregon's appellate courts have previously held that an agency may apply a policy interpretation established at a contested case hearing to matters that are the subject of the case. *In the Matter of Centennial School District*, 18 BOLI 176, 198 (1999), *aff'd Centennial School District No. 28J v. Oregon Bureau of Labor and Industries,* 169 Or App 489, 508 (2000), *rev den* 332 Or

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[21] Building the "haul" road involved "construction" of a "road[s]." Installation of a drainpipe and catch basin involved "construction" fitting in the category of "improvements of all types."

[22] *See* Finding of Fact – The Merits 79*, supra*.

56 (2001). The Oregon Supreme Court has stated that when an agency's interpretation of its own rule is plausible and cannot be shown to be inconsistent with the wording of the rule itself, or with any other source of law, the agency's interpretation is entitled to deference. *Don't Waste Oregon Com. v. Energy Facility Siting*, 320 Or 132, 142 (1994). The agency's interpretation of its rule draws a common sense distinction between demolition that is merely destruction of a structure and demolition that is connected with construction, reconstruction, or renovation subject to prevailing wage rate laws that cannot occur until an existing structure has been demolished. This is a plausible interpretation that is neither inconsistent with the wording of the rule or any other source of law. Consequently, the forum relies on the agency's interpretation regarding when demolition work is subject to Oregon's prevailing wage rate laws in determining whether the FSD contract falls within the category of "public works."

The evidence is undisputed that the old fire station was demolished to make room for the City's new police station, and the Hamilton house was demolished to create space for the WMC's parking lot. Based on the agency's interpretation that demolition is subject to Oregon's prevailing wage rate laws when it is conducted in preparation to or contemplation of further construction activity at the site, the forum concludes that the FSD contract also falls within the definition of "public works" contained in ORS 279.348(3).

THE FSD AND FSR CONTRACTS DID NOT FALL WITHIN THE EXEMPTIONS IN ORS 279.357.

Projects "for which the contract price does not exceed $25,000" and projects "regulated under the Davis-Bacon Act" are exempt from the provisions of ORS 279.348 to 279.380. There was no evidence presented showing that the FSD and FSR contracts were regulated by the Davis-Bacon Act. However, both the FSD and FSR contracts involved individual contracts for less than $25,000, a fact which would make them exempt from Oregon's prevailing wage rate laws unless they were part of a larger "project" costing more than $25,000. ORS 279.357(1)(a).[23]

The forum has previously defined a public works "project" as "a large, multiphase endeavor that may encompass more than one contract." *In the Matter of City of Klamath Falls*, 19 BOLI 266, 282 (2000). The criteria for determining whether a prohibited division has occurred are set out in ORS 279.357(2)(A)-(D) and related

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[23] *See also In the Matter of City of Klamath Falls*, 19 BOLI 266, 283 (2000) ("the ORS 279.357(1)(a) exemption for '[p]rojects for which the contract price does not exceed $25,000.00' applies only where the cost of the *entire* project – not just a single contract – is $25,000.00 or less." (emphasis in original)

Agency administrative rules and published "Interpretations."[24] This language contemplates that the commissioner will examine various smaller public works undertakings – phases, parts, and structures – to determine whether they are, in fact, part of a single larger endeavor – a public works "project." *Id*. at 282-83. Flowing from this prohibition is the logical corollary that any contract for less than $25,000 that is part of a larger public works "project" involving more than $25,000 does not fall within the ORS 279.357(1)(a) exemption.

Comparison of the facts in this case with the criteria contained in the statute, administrative rules, and interpretations results in the following analysis:

A. <u>The physical separation of the project structures.</u>

The work performed by LCCI on the FSD and FSR contracts was on the same project site as the WMC project, which involved a contract for $1,600,373. This is indicative of a single public works project.

B. <u>The timing of the work on project phases or structures and whether the work is performed in one time period or in several phases as components of a larger entity.</u>

The work performed by LCCI on the FSD and FSR contracts constituted the first step of phase two of the WMC project and phase two could not have taken place without it. The timing of the contracts indicates they were part of a single public works project.

C. <u>The continuity of project contractors and subcontractors working on project parts or phases and whether a contractor or subcontractor and their employees are the same or substantially the same throughout the particular project or, if different, part of a continuum providing distinct improvements that complete the public agency's ultimate intent.</u>

Although the extent of Respondents' knowledge concerning whether or not the FSD and FSR contracts were part of a larger contract is disputed, from a purely objective point of view there is no dispute over the fact that the FSD and FSR contracts were part of a continuum that completed the City's ultimate intent – completion of a new municipal complex. This is indicative of a single public works project.

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[24] The statutory language is contained in Conclusion of Law 2, *supra*. *See also* OAR 839-016-0310(2), which provides useful guidance to contracting agencies that must determine whether their contracts form part of a public works project; BOLI's interpretation of that rule, cited in Finding of Fact 13, *supra*; and BOLI's interpretation of the "Scope of Debarment," cited in Finding of Fact 10, *supra.*

D. The manner in which the public contracting agency and the contractors administer and implement the project.

The evidence relevant to this criterion is inconclusive.

E. Whether a single public works project includes several types of improvements or structures and whether the structures are similar to one another and combine to form a single, logical entity having an overall purpose or function.

The demolition of the old fire station was a prerequisite to the construction of the new police station, and demolition of the Hamilton house and installation of the storm line and catch basin were integral to the construction of the parking lot. This is indicative of a single public works project.

F. The anticipated outcome of the particular improvements or structures the agency plans to fund.

The anticipated outcome of the WMC project was completion of a new municipal complex for the City that housed city offices, a fire station, and police station, with an adjacent paved parking lot. LCCI's performance of the FSD and FSR contracts helped further this goal. This is indicative of a single public works project.

The facts of this case, evaluated against the six relevant criteria cited above, point to a conclusion that the WMC complex was a single public works project for more than $25,000 that included the FSD and FSR contracts. Consequently, the FSD and FSR contracts were not exempt from the provisions of ORS 279.348 to 279.380.

RESPONDENTS FAILED TO POST THE APPLICABLE PREVAILING WAGE RATES DURING THE PERFORMANCE OF THE FSD AND FSR CONTRACTS.

A. Respondent violated ORS 279.350(4).

Sarin, LCCI's project manager, testified that LCCI did not post the applicable prevailing wage rates during the performance of the FSD and FSR contracts. Based on Sarin's credible testimony, the forum has drawn the same conclusion. The only issue is to the amount of civil penalty, if any, that should be assessed against LCCI for this violation.

B. Civil Penalty.

In determining the amount of civil penalty, the forum must consider all aggravating and mitigating factors. OAR 839-016-0520(1). Respondent bears the burden of proving mitigating circumstances. OAR 839-016-0520(2). In its Notice, the Agency seeks to assess the maximum $5,000 civil penalty based on LCCI's failure to post the applicable prevailing wage rates. The forum examines the aggravating and mitigating factors present to

determine an appropriate civil penalty.

1. Aggravating factors.

There are several aggravating factors in this case. First, LCCI could have easily complied with the law by having an employee attach them to a stake and drive the stake into the ground on the job site, a practice LCCI had used in the past. Second, based on the language of OAR 839-016-0500, the forum concludes that LCCI, Larson, Ewing, and Sarin should have known of the violation, in that the circumstances of the project[25] were such that a reasonable person would have made a more diligent inquiry, including taking the initiative to ask Johansson if the proposed FSD and FSR contracts were part of a larger project, then calling BOLI if there was any question that the FSD and FSR contracts were subject to the prevailing wage rate before entering into the contracts. No such inquiries were made prior to the completion of the contracts. Third, LCCI committed a number of violations of Oregon's prevailing wage rate laws, including a violation of ORS 279.350(4), between 1995 and 1997 and was placed on the List of Ineligibles and assessed substantial civil penalties as a result. LCCI also violated ORS 279.359 in 1999.[26] Fourth, LCCI's response to its previous violations has not been overwhelming. Since the final order was issued regarding those violations, LCCI has not sent any of its employees to BOLI's prevailing wage rate seminars to obtain additional education in the law. Fifth, the forum considers failure to post prevailing wage rates as a serious violation. *In the Matter of Larson Construction Co., Inc*., 17 BOLI 54, 78 (1998).

2. Mitigating factors.

Based on OAR 839-016-0500, the forum has concluded that LCCI should have known of its violation, which is an aggravating factor. However, OAR 839-016-0520(4) mandates that "the commissioner *shall* consider all mitigating circumstances presented by the contractor * * * for the purpose of reducing the amount of the civil penalty to be assessed." (emphasis added) LCCI cannot be wholly excused from its failure to make a more diligent inquiry into the circumstances of the project.[27] However, the forum cannot ignore Johansson's twin assurances to LCCI, made after examining LCCI's proffered letter from BOLI defining the scope of debarment, consisting of the contract award to LCCI and instructions to Ewing to go ahead with the work. Under these unique circumstances, the forum considers LCCI's lack of actual knowledge that the FSD and FSR contracts were subject to Ore-

[25] *See* Findings of Fact – The Merits 25 and 39, *supra*.

[26] *See* Finding of Fact – The Merits 14, *supra*.

[27] The forum has assessed a $3,000 civil penalty against LCCI based on this conclusion.

gon's prevailing wage rate laws as a mitigating factor.

Additionally, the evidence does not support a conclusion that LCCI influenced the City to award the FSD contract to it. Although Ewing told Johansson that LCCI would contest it if the City awarded the FSD contract to Cokley without first determining if LCCI was eligible for the contract, there is no evidence that Ewing or anyone else at LCCI knew of Johansson's conclusion that LCCI was ineligible. The contract itself was actually awarded on the basis of drawing lots, a purely objective system that was not influenced by LCCI.

3. Amount of civil penalty.

The commissioner has imposed civil penalties for a violation of ORS 279.350(4) in only one previous case. *Id*. In that case, a $4,000 civil penalty was imposed on the same Respondent LCCI where LCCI: took no action to correct its failure to post prevailing wage rates after the agency informed it of a similar violation on another site; failed to post prevailing wage rates for many months; did not show the rates to workers who asked about them; knew or should have known of their duty to post the rates; did show some cooperation with the agency's investigation; and sent their office manager to prevailing wage rate training.

Factors in common here are: LCCI should have known of its obligation to post the prevailing wage rates on the FSD and FSR job sites and LCCI cooperated with the Agency's investigation. Based on the prior case and the aggravating and mitigating factors present in this case, the forum determines that a $3,000 civil penalty is appropriate.

FAILURE TO TIMELY FILE CERTIFIED PAYROLL STATEMENT

A. LCCI failed to timely file a certified payroll statement.

The Agency seeks a $5,000 civil penalty based on LCCI's failure to *timely* file certified payroll statements. ORS 279.354(2)(a) requires that certified payroll statements must be filed "once before the first payment and once before final payment is made of any sum due on account of a contract for a public work" for "any project 90 days or less from the date of the award of the contract to the date of completion of work under the contract." For contracts of this duration, OAR 839-016-0010 requires that "the [certified payroll statement] shall be submitted once within 15 days of the date the work first began on the project * * *."

LCCI commenced work on the FSD contract on February 7 and the FSR contract on February 9, 2000. Sarin, Respondent's project manager, acquired actual knowledge from the City on February 14, 2000, that both contracts were subject to the prevailing wage rate and that LCCI was required to provide "Certified Payroll for those workers who provided Labor on the demolition." On Feb-

ruary 15, 2000, a BOLI representative also told Sarin that the FSD and FSR contracts were subject to the prevailing wage rate. LCCI actually provided a certified payroll statement to BOLI and the City on March 3, 2000.

Fifteen days after February 7 is February 21, and 15 days after February 9 is February 23. Both dates fall well before March 3. Even if the forum adopts LCCI's argument that the 15 days should not begin running until LCCI acquired actual knowledge that the FSD and FSR contracts were subject to the prevailing wage rate, 15 days from February 14 is February 28, four days before the statements were actually submitted. Either way, the forum has no choice but to conclude that LCCI violated ORS 279.354 and OAR 839-016-0010.

B. Civil penalty.

Again, in determining the amount of civil penalty, the forum must consider all aggravating and mitigating factors, with Respondent bearing the burden of proving mitigating circumstances.

1. Aggravating factors.

There are several aggravating factors in this case. First, LCCI had seven days to timely submit certified payroll reports after Sarin acquired actual knowledge that they were required. The submitted report only has two names on it and Respondent presented no evidence to show that it could not have been completed and submitted in that period of time. Second, LCCI and its employees knew of the violation. Third, LCCI committed a number of violations of Oregon's prevailing wage rate laws, including a violation of ORS 279.350(4), between 1995 and 1997 and was placed on the list of ineligibles and assessed substantial civil penalties as a result. LCCI also violated ORS 279.359 in 1999.[28] Fourth, LCCI's response to its previous violations has not been overwhelming.

2. Mitigating factors.

The Agency did not allege that the submitted certified payroll report was incomplete or inaccurate. The only issue is its untimely submission, which did not result in underpayment of wages to any workers. Johansson's deliberate failure to inform LCCI that the FSD and FSR contracts were subject to the prevailing wage rate is not a mitigating factor because LCCI had adequate time to comply after it acquired actual knowledge of the requirement.

3. Amount of civil penalty.

Besides the aggravating and mitigating factors discussed above, the forum also considers recent actions it has taken against other contractors, including Respondent LCCI, for violations of ORS 279.354 in determining the appropriate amount of civil penalty.

In the prior case against LCCI, LCCI was assessed a $5,000 civil penalty for filing multiple inaccu-

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[28] *See* Finding of Fact – The Merits 14, *supra*.

rate and incomplete certified payroll reports by failing to report workers, hours and dates of work on a public works project that lasted from on or about September 12, 1995, to on or about January 6, 1997. *Larson* at 57.

In the second case, the respondent contractor was assessed a $1,000 civil penalty for one violation for submitting a certified payroll report that inaccurately stated that five workers on a project were laborers when, in fact, their correct classification was boilermakers. *In the Matter of Northwest Permastore*, 18 BOLI 1, 20 (1999), *order withdrawn for reconsideration, order on reconsideration* 20 BOLI 37 (2000), *aff'd Northwest Permastore Systems, Inc. v. Bureau of Labor and Industries*, 172 Or App 427 (2001).

Next came *In the Matter of Southern Oregon Flagging*, 18 BOLI 138 (1999), where the forum imposed a civil penalty of $250 for each of respondent's 24 violations of ORS 279.354 where respondent should have known that their payroll methods, as reflected in their certified statements, were illegal. *Id*. at 166-67. Those violations also resulted in two wage claims and payment to four other workers of over $900. However, respondent committed no more violations after receiving a warning letter from BOLI.

Next, the forum imposed a $1,000 civil penalty for each of respondent's three violations of ORS 279.354(1) where respondent had previously been warned about other violations of the prevailing wage rate laws, where it would not have been difficult for respondent to complete the certified payroll report forms accurately, and where each report contained a relatively serious misstatement or omission. *In the Matter of Keith Testerman*, 20 BOLI 112, 128-29 (2000).

In *Johnson Builders, Inc*., 21 BOLI 103, 127 (2000), the forum imposed civil penalties of $1,250 for each of respondent's 23 violations of ORS 279.354(1) where respondent misclassified workers or submitted certified statements without accompanying payroll, and $2,000 each for respondent's nine additional violations of ORS 279.354(1) where no certified payroll reports were submitted. There were no mitigating factors and numerous aggravating factors, including seven violations of ORS 279.350 and one violation of ORS 279.355(2). *Id.* at 126.

Most recently, the forum assessed civil penalties of $1,000 each for two separate violations of ORS 279.354(1) where two certified payroll reports filed by respondent did not state the hours two employees worked each day and the violations were similar in magnitude to those committed in *Testerman*. *In the Matter of William George Allmendinger*, 21 BOLI 151, 170, 172 (2001).

When the forum takes all the aggravating and mitigating factors into account and measures them against civil penalties assessed in *Larson, Southern Oregon, Northwest Permastore*, *Testerman*,

Johnson Builders, and *Allmendinger*, a civil penalty of $1,000 is appropriate.

LCCI DID NOT TAKE ACTION THAT CIRCUMVENTED THE PAYMENT OF THE PREVAILING WAGE TO WORKERS

In its Notice, the Agency alleged that, by "intentionally entering into the [FSD and FSR] contracts" while on the List of Ineligibles, LCCI intentionally circumvented Oregon's prevailing wage rate laws and committed two violations of ORS 279.370 and OAR 839-016-0530(3)(h). The Agency sought a $5,000 civil penalty for each violation. At hearing, the Agency case presenter further clarified the Agency's position, stating that each violation occurred at the time LCCI entered into the contracts, and that by entering into prevailing wage rate contracts while on the List of Ineligibles and by intending to treat them as a non-prevailing wage rate contract, LCCI intended to pay less than the prevailing wage rate, thus intending to circumvent payment of the prevailing wage rate. The Agency does not allege there was any actual underpayment of wages, and there was no evidence of any actual underpayment. However, the Agency argues that is only because the violation was caught before the first regular payday after work on the FSD and FSR contracts. In short, the Agency argues that Respondent's intent, not the actual result, created the violation, and that Respondent's intent to violate the statute can be inferred from Respondent's entering into the FSD and FSR contracts while on the List of Ineligibles.[29]

In order to determine whether the alleged violations occurred, the forum examines the language of the pertinent statute, the Agency's administrative rules that provide interpretative guidelines to the statute, and a prior case heard by the forum in which a violation of ORS 279.350(7) was found.

ORS 279.350(7), the statute that gives rise to the alleged violation, reads as follows:

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

OAR 839-016-0300, the related substantive administrative rule adopted by the Agency, states:

> "No person shall take any action which circumvents the payment of the prevailing wage rate to workers on public works projects."

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[29] This conclusion is borne out by footnote 4 of the Agency's exceptions which asserts that ORS 279.350(7) was violated by LCCI "when LCCI entered into the contracts in the first place."

OAR 839-016-0330 prohibits "wage averaging" that occurs when an employer "reduce[s] a worker's regular rate of pay for work on projects not subject to the Prevailing Wage Rate Law * * * when the reduction in pay has the effect of the worker not receiving the prevailing rate of wage for work performed on the public works project" and spells out factors the Agency will use to determine if an employer has made such a reduction. This rule provides guidelines for the Agency to use in determining if the employer has violated ORS 279.350(7) by "reducing an employee's regular rate of pay on any project not subject to ORS 279.348 to 279.380 in a manner that has the effect of offsetting the prevailing wage on a public works project."

OAR 839-016-0310, 839-016-0320, and 839-016-0340 describe other actions that the Agency considers circumventions of the payment of the prevailing wage. None of them apply to contractors.

Next, there is the administrative rule cited by the Agency in its Notice -- OAR 839-016-0530(1)(h). This provision appears as a subparagraph to a rule entitled "Violations for which a Civil Penalty May be Assessed." It provides that the commissioner may assess a civil penalty for the following violation:

> "Taking action to circumvent the payment of the prevailing wage, other than subsections (e) and (f) and this section [neither of which are applicable here], in violation of ORS 279.350(7)."

Finally, the forum applied ORS 279.350(7) in the prior case against Respondents when it assessed the $5,000 civil penalty sought by the Agency for Respondents' act of "requiring workers to accept less than the prevailing wage rate as part of [its] bogus apprenticeship program."[30] *Larson*, 17 BOLI at 79. In that case, the forum characterized Respondents' circumvention as "a deliberate effort to avoid complying with the law, and its effect was to cheat the workers out of the minimum wage required by law." *Id*. at 80.

Applying the law to the facts, the forum finds that LCCI's status as a private corporation makes it a "person." OAR 839-016-0004(14). Second, the forum has already determined that the FSR and FSD contracts were public works contracts. Third, LCCI's act of entering into the FSR and FSD contracts constitutes taking an "action" that had the potential to circumvent the payment of the prevailing wage rate. That leaves two key words, the phrase "that circumvents," still open to interpretation.[31]

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[30] Based on the same facts, the forum also assessed a civil penalty of $45,993.72 based on LCCI's failure to pay the prevailing wage rate.

[31] The forum relies on the language of ORS 279.350(7) and OAR 839-016-0300, the Agency's substantive rule that restates the basics prohibition on circumvention contained ORS

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

In its statutory context, "circumvent" means "to overcome or avoid the intent, effect, or force of **:** anticipate and escape, check, or defeat by ingenuity or strategem **:** make inoperative or nullify the purpose or power of esp. by craft or scheme * * *." *Webster's Third New International Dictionary*, 410 (unabridged ed 1985). In other words, "circumvent" refers to a deliberate action, followed by the effect of avoiding an otherwise expected outcome. The phrase in ORS 279.350(7) containing the legislature's only specific description of an "action that circumvents" supports this interpretation in its qualifying language "in a manner that ***has the effect*** of offsetting * * *." (emphasis supplied)

In this case, it is undisputed that LCCI entered into the FSR and FSD contracts while on the List of Ineligibles and paid its workers the prevailing wage rate. The language of the statute and the Agency's administrative rules, as well as the previous *Larson* case, do not support a conclusion that LCCI violated ORS 279.350(7) by these acts.

PLACEMENT ON THE LIST OF INELIGIBLES

In its amended Notice, the Agency seeks to have Respondents LCCI, Larson, and HJSCCI placed on the List of Ineligibles for three years. This debarment, with respect to LCCI and Larson, is sought solely on the basis of their failure to post the applicable prevailing wage rates during the performance of the FSD contract. As for HJSCCI, its debarment is sought on the basis that LCCI allegedly has a financial interest in it.

ORS 279.361 provides that when a contractor intentionally fails or refuses to post the applicable prevailing wage rates, the contractor and any firm in which the contractor has a financial in-

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279.350(7) in determining whether a violation occurred. OAR 839-016-0530(3)(h), upon which the Agency relies, merely states that a civil penalty may be assessed for a violation of ORS 279.350(7). Because it does not establish a substantive violation and its language ("Taking action to circumvent") is inconsistent with the relevant statutory language ("takes any action that circumvents"), as well as the language of OAR 839-016-0300 ("take action which circumvents"), the forum does not rely on OAR 839-016-0530(3)(h) to determine if LCCI violated ORS 279.350(7).

terest shall be placed on the List of Ineligibles for up to three years. It further provides that the president of a corporate contractor who is responsible for the failure or refusal to post the applicable prevailing wage rates shall be placed on the List of Ineligibles for up to three years. That individual is "responsible" if he or she "knew or should have known * * * that such wages must be posted." OAR 839-016-0085(3).

A. Liability of LCCI and Larson.

The forum has already concluded that LCCI failed to post applicable prevailing wage rates during the performance of the FSD and FSR contracts.

1. LCCI's failure to post the prevailing wage rates was "intentional."

The preponderance of the evidence must establish that LCCI's failure to post was "intentional" and that Larson was responsible for the failure to post and "knew or should have known * * * that such wages must be posted" for both LCCI and Larson to be placed on the List. ORS 279.361(1) and (2), OAR 839-016-0085(2) and (3).

In the context of a prevailing wage rate debarment, this forum has previously defined "intentional" as being synonymous with "willful." The forum has also adopted the Oregon Supreme Court's interpretation of "willful" set out in *Sabin v. Willamette Western Corporation*, 276 Or 1083 (1976). "Willful," the court said, "amounts to nothing more than this: That the person knows what he is doing, intends to do what he is doing, and is a free agent." *In the Matter of Southern Oregon Flagging, Inc.,* 18 BOLI 138, 160 (1999) (quoting *Sabin* at 1093). Here, LCCI and its agents knew they had not posted the applicable prevailing wage rates on the FSD and FSR contracts, intended not to post them, and were under no restrictions that would have prevented them from posting the rates. Consequently, the forum must place LCCI on the List of Ineligibles for a period of time not to exceed three years.

2. Larson was "responsible" for LCCI's failure to post the prevailing wage rates because, as corporate president, he "knew or should have known" that the prevailing wage rates must be posted on the FSD and FSR contracts.

Whether or Larson was "responsible" for LCCI's failure to post the applicable prevailing wage rates on the FSD and FSR contracts is the next question. Pursuant to OAR 839-016-0085(3)(a), Larson, as LCCI's corporate president, was "responsible" if he "knew or should have known * * * that such wages must be posted." Whether Larson "knew" is dependent on whether he had actual knowledge that the FSD and FSR contracts were subject to the prevailing wage rate. If Larson had this knowledge, the forum would automatically conclude that he was aware that of the legal requirement to post the applicable prevailing wage rates on the job

site based on his prior experience as a contractor on public works. Since there is no evidence that Larson had this actual knowledge prior to the work on both contracts being completed, the forum cannot conclude that he "knew" that the prevailing wage rates must be posted on either contract. Whether Larson "should have known" is a different story. The phrase "should have known" is synonymous with constructive knowledge or notice. In the case of *In the Matter of Jet Insulation, Inc*., 7 BOLI 133, 140 (1988), the forum relied on an Oregon Supreme Court decision, *American Surety Co. of New York v. Multnomah County*, 171 Or 287 (1943), for a definition of "constructive notice." The forum stated "The general rule that pervades the whole doctrine of notice is that, whenever sufficient facts exist to put a person of common prudence upon inquiry, he is charged with constructive notice of everything to which that inquiry, if prosecuted with proper diligence, would have led." *Jet* at 140.

In this case, there are several facts that lead the forum to conclude that Larson "should have known" that the applicable prevailing wage rates must be posted on the FSD and FSR contracts. First, Larson was an experienced contractor who had to know that any contract involving the City was a public works subject to the prevailing wage rate unless it was for less than $25,000 or was regulated by the Davis-Bacon Act.[32] Second, Larson visited the actual job site before the contracts were awarded to LCCI and observed that the WMC project was taking place in the same immediate area. Third, Larson was well aware of BOLI's interpretation of the scope of debarment stating that contracts for less than $25,000 were not exempt if they were part of a larger project and had relied on it for the prior 16 months in determining LCCI's eligibility to bid on projects. He directed Ewing to send a copy this very interpretation to the City with LCCI's bid. These facts should have put Larson on notice, irregardless of Johansson's representations, of the likelihood that the FSD and FSR contracts were prevailing wage rate jobs. At that point, a person of common prudence would have inquired further into the circumstances of the prospective contracts. However, Larson neither asked nor directed any LCCI employee to ask Johansson the obvious question - whether the FSD and FSR contracts were part of the larger WMC project. This inquiry alone should have made it clear to Larson that the FSD and FSR contracts were part of the larger WMC project and, as such, subject to the prevailing wage rate

[32] There was no evidence that Larson believed the FSD and FSR contracts were regulated by the Davis-Bacon Act or that he believed demolition was an exempt activity.

under BOLI's guidelines.[33] If Larson was still uncertain if the circumstances of the project came within the scope of debarment, there was sufficient time so that he could have called BOLI to obtain an opinion. Instead, he opted to rely solely on the City's determination, which turned out to be both misleading and erroneous. Under the *Jet* standard of constructive notice, Larson's "ostrich" defense has no merit, and the forum concludes that Larson "should have known" that the FSD and FSR contracts were subject to the prevailing wage rate. Based on his prior experience, the forum concludes that Larson also should have known that the prevailing wage rates must then be posted on the job site. As a consequence, Larson is subject to debarment for up to three years.

B. Length of Debarment

As stated earlier in this Opinion, debarment in this case is predicated on the determination that LCCI and Larson failed to post the applicable prevailing wage rates, in violation of ORS 279.350(4), during the performance of the FSD contract. Based on this determination and the mandatory language in the statute, the Commissioner has no choice but to debar LCCI and Larson. The Commissioner's only discretion in this matter is the length of the debarment.

ORS 279.361 provides that debarment "shall" be for "a period not to exceed three years." Although that statute and the Agency's administrative rules interpreting it do not explicitly authorize the forum to consider mitigating factors in determining the length of a debarment, the commissioner has held that mitigating factors may be considered in determining whether the debarment of a contractor or subcontractor should last less than the entire three-year period allowed by law. *See In the Matter of Keith Testerman*, 20 BOLI 112, 129 (2000); *In the Matter of Southern Oregon Flagging, Inc*., 18 BOLI 138, 169 (1999); *In the Matter of Intermountain Plastics*, 7 BOLI 161 (1988).[34] Aggravating factors may also be considered. *See, e.g., Testerman* at 129.

In this case, specific aggravating circumstances with regard to LCCI consist of its violations between 1995 and 1997, for which LCCI was placed on the List of Ineligibles, LCCI's subsequent violation of ORS 279.359, and LCCI's current violations of failure to post, which it should have been aware of, and knowing failure to file a timely certified payroll report. With regard to Larson, specific aggravating circumstances consist of the 1995 and 1997 violations

[33] This assumes, of course, that Johannson would have provided accurate information.

[34] *Compare In the Matter of Larson Construction Co., Inc.,* 17 BOLI 54, 76 (1998), where the commissioner held that mitigating factors may not be considered in the "initial determination of whether to debar a subcontractor."

for which he was found jointly responsible with LCCI, and LCCI's current violation of failure to post, which he should have been aware of. The seriousness of LCCI's and Larson's failure to post and the ease with which it could have been accomplished are further aggravating circumstances, as is LCCI and Larson's tepid response to its prior violations. In short, there are a number of aggravating circumstances, the majority of which are related to prior violations.

Actions taken by the City related to the FSD and FSR contracts offset these aggravating circumstances to a considerable degree. While it is true that, based on the circumstances of the project, Larson and LCCI should not have relied completely on the City's determination that LCCI was eligible to perform the contracts, it is equally true that the City misled LCCI. The City's own documents show that the city engineer made an initial determination that LCCI wasn't eligible based on BOLI's guidelines and passed this information on to the City's manager. Neither informed LCCI of this conclusion and the city engineer told LCCI it was alright to proceed, knowing of LCCI's and Larson's concern that LCCI not perform work within the scope of its debarment. The City also knowingly failed to disclose that the contract was subject to the prevailing wage rate to other FSD contract bidders. Although the forum has concluded that Larson and LCCI should have taken the initiative and inquired further about the circumstances of the job, the aforementioned facts lead to the conclusion that LCCI and Larson's violations were not deliberate, even though they may have been "intentional."

In prior cases where a contractor or subcontractor was debarred, the period of debarment has ranged from one month[35] to three years.[36] This case, like *Southern Oregon*, presents unique mitigating circumstances that make one month a more appropriate period of debarment than the three years sought by the Agency or the one-

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[35] *In the Matter of Southern Oregon Flagging, Inc.,* 18 BOLI 138 (1999) (the forum found that respondents intentionally failed to pay the applicable prevailing wage rates over a four month period because the fringe benefits it paid to workers were placed in a plan that did not meet the requirements of a bona fide plan, but concluded that respondents' violation was mitigated by immediate actions taken to correct the plan, payment of the underpaid fringe benefits as back wages, and the prior approval by USDOL and ODOT of the plan.)

[36] *See, e.g.*, *Larson at* 81 (the forum found that respondents intentionally failed to pay 29 workers the prevailing wage rate, in violation of ORS 279.350(1), intentionally failed to post the prevailing wage rates at the project, in violation of ORS 279.350(4), filed inaccurate and incomplete certified statements, in violation of ORS 279.354, and took action to circumvent payment of the prevailing wage rate by requiring workers to accept less than the prevailing wage rate as part of a bogus apprenticeship program.)

year recommended by the ALJ in the proposed order.

C. Liability of HJSCCI.

HJSCCI's fate in this matter is tied to that of Respondent Larson. ORS 279.361(2) and OAR 839-016-0085(4) provide that any "firms, corporations, partnerships or associations" in which a debarred contractor, subcontractor, or other person has a financial interest shall also be placed on the list of ineligibles. Therefore, if either LCCI or Larson have a financial interest in HJSCCI, HJSCCI must be placed on the List of Ineligibles. Although no evidence was presented showing that LCCI has a financial interest in HJSCCI, HJSCCI admitted in its answer to the Agency's amended notice that that Respondent Larson has a financial interest in HJSCCI. Based on this admission, the forum concludes that HJSCCI should also be placed on the List of Ineligibles for one month, the same period of debarment imposed on LCCI and Larson.

RESPONDENT'S EXCEPTIONS

A. Status of Municipal Building at Time of Ewing's Initial Inspection.

Respondent excepts to Proposed Finding of Fact – The Merits 25 regarding its reference to the completed state of the new municipal building at the time of Ewing's initial inspection. The forum has modified Findings of Fact – The Merits 25 and 75 in response to Respondent's exception.

B. Omission of Mitigating Circumstances Regarding Respondent LCCI's 1999 Wage Survey Violation.

Respondent argues that the forum should temper its consideration of Respondent LCCI's 1999 wage survey violation as an aggravating circumstance by also considering potential mitigating circumstances surrounding that violation. The forum has considered neither aggravating nor mitigating circumstances surrounding that violation and rejects Respondent's argument.

C. Mitigating Circumstances Make One Year on the List of Ineligibles too Harsh.

Respondent argues that four factors – lack of actual notice that the FSR and FSD contracts were subject to prevailing wage rates, Respondent's reasonably diligent inquiries regarding prevailing wage, all employees were paid the prevailing wage when due, and the severe financial impact on Respondents and their community – constitute mitigating factors that require placement on the List of Ineligibles for a period of less than one year. The forum has already considered the first three factors. The fourth does not constitute a mitigating factor and the forum rejects it. *Larson*, 17 BOLI at 76. The forum has reevaluated the mitigating circumstances in this case and places Respondents on the List of Ineligibles for one month instead of one year.

THE AGENCY'S EXCEPTIONS.

A. Julie Stanley's Credibility.

The Agency contends that the forum did not list all the factors relevant to determining Stanley's credibility, and overvalued her testimony as a result. The forum has relied on Stanley's testimony in determining facts that were undisputed, making reassessment of her credibility meaningless to the outcome of this case.

B. Application of ORS 279.357 Exception.

The Agency excepts to the ALJ's conclusion that ORS 279.357(2)(a) expresses the applicable exception from PWR coverage, and argues that the correct exception is stated in ORS 279.357(1)(a). The Agency is correct. The forum has modified the language in the section of the Opinion entitled "The FSD And FSR Contracts Did Not Fall Within The Exemptions In ORS 279.357" in response.

C. LCCI Violated ORS 279.350(7).

The Agency contends that a contractor who is on the List of Ineligibles and intentionally receives a covered project violates ORS 279.350(7) at the time the contractor enters into the contract for the project *and* at any time when it pays its employees less than the prevailing wage rate. The section of the Opinion entitled "LCCI Did Not Take Action That Circumvented The Payment Of The Prevailing Wage To Workers" has been modified in response to the Agency's exception. The Agency's exception is overruled for reasons stated in the Opinion.

D. The Sanctions Imposed Were Insufficient.

1. Mitigating Factors.

The Agency excepts to the ALJ's use of the fact that no employees were underpaid on the FSR and FSD contracts as a mitigating factor in assessing civil penalties. After consideration, the forum agrees that, under these circumstances, Respondent's full payment of its employees is not a mitigating factor. The section in the Opinion discussing mitigating factors relative to Respondent's posting violation has been modified to reflect this.

The Agency also excepts to the forum's use of the City's "deliberateness" in not telling LCCI that the FSD and FSR contracts were covered by PWR as a mitigating factor. In response to this exception, the forum has modified the section in the Opinion discussing mitigating factors relative to Respondent's posting violation. Finally, the Agency's contention that "the evidence established that even after LCCI knew the FSR contract was covered by the PWR laws, it continued to perform work on that contract" is not supported by substantial evidence in the record.

2. Aggravating Factors.

The Agency excepts that the forum failed to give several aggravating factors their due weight in imposing sanctions, arguing that

Respondent's past violations, Respondent's lack of contrition, and the lack of testimonial candor by Respondents' witnesses require stiffer civil penalties and longer placement on the List of Ineligibles. These factors were given due consideration and evaluated appropriately in the Proposed Order. The Agency's exception is overruled. The forum also notes that the Agency's argument that the Proposed Order "imposes only $1,500 in civil penalties for each failure to post the prevailing wage rates" on the FSR and FSD contracts is misplaced, inasmuch as the Notice of Intent did not seek a civil penalty for LCCI's failure to post on the FSR contract.[37]

E. Ineligibility Periods Should Run Consecutively.

The Agency seeks a ruling by the forum as to whether Respondent's placement on the List of Ineligibles should run concurrently with the current period of ineligibility, which expires July 21, 2001, or should begin running after the expiration of the current period of ineligibility. Because this Order is being issued after July 21, 2001, this issue is moot and the forum declines to rule on it.

F. "Responsible" and "Knew or Should Have Known" in OAR 839-016-0085(3).

The Agency excepts to the forum's analysis of OAR 839-016-0085(3) in its determination of Larson's placement on the List of Ineligibles and asks that the forum modify its analysis to reflect that the terms "'responsible for' and 'knew or should have known' are different sides of the same coin, not separate tests which both must be met, for an individual to be on the list of ineligibles based on a corporation's violation." The forum agrees that the analysis contained in the Proposed Order is confusing and has modified the section in the Opinion discussing Larson's placement on the List of Ineligibles to clarify this issue.

ORDER

NOW, THEREFORE, as authorized by ORS 279.370, and as payment of the penalty assessed as a result of Respondent Larson Construction Co., Inc.'s violations of ORS 279.354, ORS 279.350, OAR 839-016-0010, and OAR 839-016-0033, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **Larson Construction Co., Inc.**, to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, the following:

> A certified check payable to the Bureau of Labor and Industries in the amount of FOUR THOUSAND DOLLARS ($4,000.00), plus any interest

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[37] *See* Finding of Fact – The Merits 1, *supra*.

at the legal rate on that amount from a date ten days after issuance of the Final Order in this case and the date Respondent Larson Construction Co., Inc., complies with the Final Order.

FURTHERMORE, as authorized by ORS 279.361, the Commissioner of the Bureau of Labor and Industries hereby orders that Respondents **Larson Construction Co., Inc.**, and **David M. Larson** and any firm, corporation, partnership or association in which they have an interest shall be ineligible to receive any contract or subcontract for public work for a period of one month from the date of publication of their name on the list of those ineligible to receive such contracts maintained and published by the Commissioner of the Bureau of Labor and Industries.

FURTHERMORE, as authorized by ORS 279.361, the Commissioner of the Bureau of Labor and Industries hereby orders that Respondent **Howard E. Johnson & Sons Construction Co., Inc.** and any firm, corporation, partnership or association in which it has an interest shall be ineligible to receive any contract or subcontract for public work for a period of one month from the date of publication of its name on the list of those ineligible to receive such contracts maintained and published by the Commissioner of the Bureau of Labor and Industries.

In the Matter of

SPOT SECURITY, INC.

Case No. 112-01
Final Order of the Commissioner Jack Roberts
Issued September 21, 2001

SYNOPSIS

Respondent failed to complete and return BOLI's 2000 prevailing wage rate survey by the date BOLI had specified. The Commissioner imposed a $350 civil penalty for Respondent's violation of ORS 279.359(2). ORS 279.359, ORS 279.370; OAR 839-016-0520; OAR 839-016-0530; OAR 839-016-0540.

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on August 7, 2001, in Room 1004 of the Portland State Office Building, 800 NE Oregon Street, Portland, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter Peter McSwain, an employee of the Agency. No one

appeared on behalf of Respondent, and Respondent was held in default.

The Agency called Susan Wooley, Wage & Hour Division compliance specialist, as a witness.

The forum received into evidence:

a) Administrative exhibits X-1 through X-4 (submitted or generated prior to hearing);

b) Agency exhibit A-1 (submitted prior to hearing).

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

FINDINGS OF FACT – PROCEDURAL

1) On February 15, 2001, the Agency issued a Notice of Intent to Assess Civil Penalties in which it alleged that Respondent unlawfully failed to complete and return the 2000 Construction Industry Occupational Wage Survey ("wage survey") by September 15, 2000, in violation of ORS 279.359(2). The Agency alleged the violation was aggravated in that Respondent knew, or should have known of the violation and had more than ample opportunity to comply with the law, but failed to do so. The Agency alleged the violation was further aggravated by its seriousness and magnitude and the effect Respondent's failure to complete the survey had on the Commissioner's ability to accurately determine the prevailing wage rates, including potential skewing of the established rates. The Agency sought a civil penalty of $500 for the single alleged violation.

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

3) On March 12, 2001, Respondent sent an answer and request for hearing on Respondent's letterhead that was signed by Don St. Mary and included the following statements:

> "* * * We did return this [the 2000 Construction Industry Occupational Wage] survey and respectfully request you waive the $500.00 fine setforth. Our company forwarded this survey only a few days after receiving it with all answers being no, and it was not necessary for us to provide any further information. I am our company's authorized representative for this hearing, as I am the individual who signed and returned it. * * *"

The following address was printed on Respondent's letterhead: "Spot Security, 3323 SW Harbor Drive, Portland, OR 97201."

4) There is no evidence in the record to establish how the

Agency served the Notice on Respondent, or the address at which Respondent was served. However, the Notice bears the following name and address immediately under its caption: "SPOT SECURITY, INC., 3323 SW NAITO PARKWAY, PORTLAND, OR 97201."

5) The Agency filed a request for hearing with the Hearings Unit on April 26, 2001.

6) On May 16, 2001, the Hearings Unit served Respondent with: a) a Notice of Hearing that set the hearing for August 7, 2001; b) a Summary of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case hearing process; and d) a copy of the Notice of Intent. These documents were mailed to Respondent at 3323 SW Naito Parkway, Portland, OR 97201.

7) On July 6, 2001, the forum ordered the Agency and Respondent each to submit a case summary including: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; and any civil penalty calculations (for the Agency only). The forum ordered the participants to submit their case summaries by July 30, 2001, and notified them of the possible sanctions for failure to comply with the case summary order. The forum sent to Respondent a form designed to assist non-attorneys in filing a case summary.

8) The Agency filed a case summary on July 18, 2001. Respondent did not file a case summary.

9) Respondent did not appear at the time set for hearing and nobody appeared on Respondent's behalf. No one had notified the forum that Respondent would not be appearing at the hearing. Pursuant to OAR 839-050-0330(2), the ALJ waited thirty minutes past the time set for hearing. When no one had appeared on Respondent's behalf, the ALJ declared Respondent to be in default and commenced the hearing.

10) The Agency waived the ALJ's recitation of the Agency of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

11) On August 23, 2001, the ALJ issued a proposed order that notified the participants that they were entitled to file exceptions to the proposed order. No exceptions were filed.

FINDINGS OF FACT – THE MERITS

1) Respondent was an employer in the year 2000.

2) The Research and Analysis section of the Employment Department contracted with BOLI in 1998, 1999, and 2000 to conduct wage surveys. The BOLI Commissioner planned to, and did use the survey to aid in the determination of the prevailing wage rates in Oregon.

3) As part of its contract with BOLI, the Employment Department maintained electronic files showing the name of each business contractor to whom wage survey packets were sent, the address where the packets were sent, whether it was returned, the date the packet was sent for the respective year in which it was sent, whether or not it was timely returned, and when the survey was returned if it was.

4) On August 28, 2000, the Employment Department sent Respondent a 2000 wage survey packet addressed to "Spot Security" at "3323 SW Naito Pkwy, Portland, OR 97201" that included a postage paid envelope for return of the survey. The packet clearly gave notice that its completion and return was required by law and violation could result in the assessment of civil penalties. The packet instructed Respondent to complete and return the survey by September 15, 2000. Reminder cards were sent to Respondent on September 26 and October 16, 2000, at that same address, indicating that the wage survey had not been received, that Respondent was required to complete and return it by law, and that penalties could be imposed. The second reminder card was also stamped "Final Notice."

5) The Employment Department received a completed 2000 wage survey packet from Respondent on February 22, 2001. By this time, data received from 2000 wage survey packets had already been processed and Respondent's data could not be used in the commissioner's determination of prevailing wage rates.

6) Respondent knew or should have known of its failure to timely complete and return the 2000 wage survey.

ULTIMATE FINDINGS OF FACT

1) Respondent was an Oregon employer in the year 2000.

2) The Commissioner conducted a wage survey in 2000 that required persons receiving the surveys to make reports or returns to the Agency for the purpose of determining the prevailing rates of wage.

3) Respondent received the 2000 wage survey packet.

4) Respondent failed to return the completed survey by September 15, 2000, the date specified by the Commissioner. Respondent did not return the completed survey until February 22, 2001, by which time the Commissioner's prevailing wage rate determination based on the 2000 wage survey was already completed.

CONCLUSIONS OF LAW

1) ORS 279.359 provides, in pertinent part:

> "(2) A person shall make such reports and returns to the Bureau of Labor and Industries as the commissioner may require to determine the prevailing rates of wage. The reports and returns shall be made upon forms furnished by the bureau and within the time

prescribed therefor by the commissioner. The person or an authorized representative of the person shall certify to the accuracy of the reports and returns.

"* * * * *

"(5) As used in this section, 'person' includes any employer, labor organization or any official representative of an employee or employer association."

Respondent was a person required to make reports and returns under ORS 279.359(2). Respondent's failure to return a completed 2000 wage survey by September 15, 2000, violated ORS 279.359(2).

2) ORS 279.370 provides, in pertinent part:

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

OAR 839-016-0520 provides:

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

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

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

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

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

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

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

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

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

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

"(1) The commissioner may assess a civil penalty for each

violation of any provision of the Prevailing Wage Rate Law (ORS 279.348 to 279.380) and for each violation of any provision of the administrative rules adopted under the Prevailing Wage Rate Law.

"* * * * *

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

"* * * * *

"(i) Failure to submit reports and returns in violation of ORS 279.359(2)[.]"

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

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

"* * * * *

"(5) The civil penalty for all * * * violations [other than violations of ORS 279.350 regarding payment of the prevailing wage] shall be set in accordance with the determinations and considerations referred to in OAR 839-016-0530."

The imposition of a $350.00 civil penalty for Respondent's violation of ORS 279.359(2) is an appropriate exercise of the Commissioner's discretion.

OPINION

DEFAULT

Respondent failed to appear at hearing and was held in default pursuant to OAR 839-050-0330. When a respondent defaults, the Agency must establish a prima facie case to support the allegations of the charging document. *In the Matter of Vision Graphics and Publishing, Inc.,* 16 BOLI 124, 136 (1997). The Agency met that burden in this case, as discussed *infra*.

THE AGENCY'S PRIMA FACIE CASE

To prove a violation of ORS 279.359(2), the Agency must show that:

(1) Respondent is a "person;"

(2) The commissioner conducted a survey in 2000 that required persons receiving the surveys to make reports or returns to the Agency for the purpose of determining the prevailing rates of wage;

(3) Respondent received the commissioner's 2000 survey; and

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

In the Matter of F.R. Custom Builders, 20 BOLI 102, 109-10 (2000). The Agency's Notice alleged that Respondent was an "employer" who "received the 2000 Survey." Respondent did not deny either allegation. OAR 839-050-0130(2) provides that "factual matters alleged in the charging document and not de-

nied in the answer, shall be deemed admitted by the party." Based on Respondent's failure to deny the allegation that it was an "employer," the forum concludes that Respondent was a "person." for purposes of ORS 279.359. The Agency's uncontested evidence establishes that the Commissioner conducted a wage survey in 2000 requiring people to return completed survey forms by September 15, 2000. Respondent's failure to deny that it received the forms constitutes an admission that Respondent received the forms. Respondent's belated submission of the forms on February 22, 2001, months past the time prescribed by the Commissioner, bolsters this conclusion.

CIVIL PENALTY

The Agency seeks a $500 civil penalty for the single violation of ORS 279.359(2). In determining an appropriate penalty, the forum must consider Respondent's history, including prior violations and Respondent's actions in responding to the prior violations, the magnitude and seriousness of the current violation, and whether Respondent knew it was violating the law. The forum must also consider any mitigating circumstances offered by Respondent. OAR 839-016-0520.

In this case, the Agency has not alleged any prior violations. However, it would have been relatively easy for Respondent to comply with the law by simply returning the wage survey, and Respondent was given several opportunities to do so. Moreover, because it received at least two reminders, Respondent knew of the violation before the Agency issued its Notice of Intent. The violation is serious, in that the Commissioner would be unable to complete his statutorily mandated duty of determining Oregon's prevailing wage rates if all survey recipients failed to return the wage survey until it was too late to be considered. However, the magnitude is less severe, as there is no evidence from which the forum is able to conclude that the data Respondent finally provided would have been included in the data used to set prevailing wage rates, and consequently, could have skewed those rates. There are no mitigating circumstances.

Under the circumstances of this case, and considering other cases in which this forum has imposed penalties for violation of ORS 279.359(2), the forum finds $350 to be an appropriate civil penalty.

ORDER

NOW, THEREFORE, as authorized by ORS 279.370 and as payment of the penalty assessed as a result of Respondent's violation of ORS 279.359(2), the Commissioner of the Bureau of Labor and Industries hereby orders **Spot Security, Inc.** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232, a certified check

payable to the Bureau of Labor and Industries in the amount of THREE HUNDRED FIFTY DOLLARS ($350.00), plus any interest that accrues at the legal rate on that amount from a date ten days after issuance of the Final Order and the date Respondent complies with the Final Order.

In the Matter of

HARNEY ROCK & PAVING CO.

Case No. 92-01

Final Order of the Commissioner Jack Roberts

Issued September 21, 2001

SYNOPSIS

Respondent failed to complete and return BOLI's 2000 prevailing wage rate survey by the date BOLI had specified. The Commissioner imposed a $750 civil penalty for Respondent's violation of ORS 279.359(2). ORS 279.359, ORS 279.370; OAR 839-016-0520; OAR 839-016-0530; OAR 839-016-0540.

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on August 7, 2001, in Room 1004 of the Portland State Office Building, 800 NE Oregon Street, Portland, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter Peter McSwain, an employee of the Agency. Respondent was represented by Troy Hooker, Respondent's designated authorized representative, who participated in the hearing via speakerphone.

The Agency called as witnesses: Susan Wooley, BOLI Wage & Hour Division compliance specialist.

Respondent called as witnesses: Troy Hooker, Respondent's vice president; Deborah Smith, Respondent's payroll clerk; and James Lee, a research analyst employed at the Oregon Employment Department.

The forum received into evidence:

a) Administrative exhibits X-1 through X-8 (submitted or generated prior to hearing);

b) Agency exhibits A-1 (submitted prior to hearing); A-2 and A-3 (submitted at hearing);

c) Respondent exhibits R-1 and R-2 (submitted prior to hearing).

Having fully considered the entire record in this matter, I, Jack Roberts, Commissioner of the Bureau of Labor and Industries,

hereby make the following Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) On January 9, 2001, the Agency issued a Notice of Intent to Assess Civil Penalties ("Notice") in which it alleged that Respondent unlawfully failed to complete and return the 2000 Construction Industry Occupational Wage Survey ("wage survey") by September 15, 2000, in violation of ORS 279.359(2). The Agency alleged the violation was aggravated by Respondent's failure to complete the 1998 wage survey as required by law, by its seriousness and magnitude, and by the effect Respondent's failure to complete the survey had on the commissioner's ability to accurately determine the prevailing wage rates, including potential skewing of the established rates. The Agency sought a civil penalty of $1,000 for the single alleged violation.

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

3) On February 8, 2001, Respondent filed an answer and request for hearing, alleging that it did not receive a copy of the 2000 wage survey until January 2001. Respondent's answer was filed on company letterhead that listed Respondent's address as "P.O. Box 800, Hines, Oregon 97738." Respondent's answer was filed by Troy Hooker, Respondent's vice president, who stated that he would represent Respondent as its authorized representative unless the case went to hearing, in which case Mark Kemp, attorney at law, would represent Respondent.

4) The Agency mailed its Notice to Respondent at "PO Box 1300, Hines, OR 97738."

5) The Agency filed a request for hearing with the Hearings Unit on May 1, 2001.

6) On June 1, 2001, the Hearings Unit served Respondent with: a) a Notice of Hearing that set the hearing for August 7, 2001; b) a Summary of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case hearing process; and d) a copy of the Notice of Intent. These documents were mailed to Respondent at "PO Box 1300, Hines, OR 97738" and "PO Box 800, Hines, OR 97738."

7) On July 6, 2001, the forum ordered the Agency and Respondent each to submit a case summary including: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; and any civil penalty calculations (for the Agency only). The forum ordered the partici-

pants to submit their case summaries by July 30, 2001, and notified them of the possible sanctions for failure to comply with the case summary order. The forum mailed the order to Peter McSwain and Mark Kemp, attorney at law.

8) The Agency filed its case summary on July 17, 2001.

9) On July 28, 2001, Troy Hooker, Respondent's authorized representative, filed a motion for a hearing by telephone.

10) On August 1, 2001, the ALJ conducted a pre-hearing conference with Mr. McSwain and Mr. Hooker. The Agency did not object to Respondent's motion for a telephone hearing and the ALJ granted it.

11) During the pre-hearing conference, Mr. Hooker stated that Mr. Kemp had not forwarded the case summary order to him and he had not seen it. On August 1, the ALJ faxed a copy of the case summary order to Mr. Hooker, along with a form designed to assist non-attorneys in filing a case summary, and confirmed that Mr. Hooker had received it.

12) On August 2, 2001, the ALJ issued an interim order confirming: (a) the previous day's ruling on Respondent's motion for a telephone hearing; (b) that Mr. Hooker, not Mr. Kemp, would be representing Respondent at the hearing; and (c) the ALJ's requirement that Respondent's case summary be faxed directly to the ALJ and Mr. McSwain, no later than August 6, 2001. The ALJ faxed the order to Respondent and Mr. McSwain. On August 3, 2001, the ALJ telephoned Respondent's office and confirmed that the interim order had been received.

13) On August 3, 2001, Respondent filed its case summary by fax.

14) At the start of the hearing, the ALJ verbally advised the Agency and Respondent of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

15) On August 23, 2001, the ALJ issued a proposed order that notified the participants that they were entitled to file exceptions to the proposed order. No exceptions were filed.

FINDINGS OF FACT – THE MERITS

1) At all material times, Respondent was an Oregon corporation and construction contractor based in Hines, Oregon and employed workers on construction projects involving crushed rock, road construction, and asphalt paving. Respondent engaged in non-residential construction during 2000.

2) The Research and Analysis section of the Employment Department contracted with BOLI in 1998, 1999, and 2000 to conduct wage surveys. The BOLI Commissioner planned to, and did use the survey to aid in the determina-

tion of the prevailing wage rates in Oregon.

3) As part of its contract with BOLI, the Employment Department maintained electronic files showing the name of each business contractor to whom wage survey packets were sent, the address where the packets were sent, whether it was returned, the date the packet was sent for the respective year in which it was sent, whether or not it was timely returned, and when the survey was returned if it was.

4) On September 8, 1998, the Employment Department sent Respondent a wage survey packet addressed to "Harney Rock and Paving" at "PO Box 800, Hines, OR 97738" that included a postage paid envelope for return of the survey. The packet clearly gave notice that its completion and return was required by law and violation could result in the assessment of civil penalties. The packet instructed Respondent to complete and return the survey within two weeks of receiving it.

5) Respondent's mailing address from 1998 to the time of the hearing was "P.O. Box 800, Hines, OR 97738."

6) Respondent failed to complete and return the 1998 wage survey packet.

7) The Employment Department sent a 1999 wage survey packet to Respondent at "P.O. Box 800, Hines, OR 977338" on August 13, 1999. Respondent completed and returned it on September 2, 1999.

8) On August 28, 2000, the Employment Department sent Respondent a 2000 wage survey packet addressed to "Harney Rock and Paving" at "PO Box 800, Hines, OR 97738" that included a postage paid envelope for return of the survey. The packet clearly gave notice that its completion and return was required by law and violation could result in the assessment of civil penalties. The packet instructed Respondent to complete and return the survey by September 15, 2000. Reminder cards were sent to Respondent at the same address on September 26 and October 16, 2000, indicating that the wage survey had not been received, that Respondent was required to complete and return it by law, and that penalties could be imposed. The second reminder card was also stamped "Final Notice."

8) The Employment Department received a completed 2000 wage survey packet from Respondent on January 18, 2001.

9) The Employment Department sent all the above-mentioned documents to Respondent by first-class mail.

10) The Agency enclosed a copy of a 2000 wage survey form with the Notice it sent Respondent. Respondent completed and returned it to the Employment Department, which received Respondent's 2000 wage survey form on January 18, 2001.

11) Wage surveys received after November 21, 2000, were not included in the results of the

survey as published by the Employment Department in January 2001 and not considered when the Commissioner reviewed the survey data for the setting of prevailing wage rates.

12) "PO Box 1300, Hines, OR 97338" is the mailing address of Dan Hooker, Respondent's president and registered agent.

13) Respondent employs up to 75 persons, including 6-7 persons who work in its office, during its busy season.

14) Respondent knew or should have known of its failure to timely complete and return the 2000 wage survey.

ULTIMATE FINDINGS OF FACT

1) Respondent is an Oregon employer.

2) The commissioner conducted a wage survey in 2000 that required persons receiving the surveys to make reports or returns to the Agency for the purpose of determining the prevailing rates of wage.

3) Respondent received the 2000 wage survey packet.

4) Respondent failed to return the completed survey by September 15, 2000, the date specified by the Commissioner. Respondent did not return the completed survey until January 18, 2001, by which time the Commissioner's prevailing wage rate determination based on the 2000 wage survey was already completed.

CONCLUSIONS OF LAW

1) ORS 279.359 provides, in pertinent part:

> "(2) A person shall make such reports and returns to the Bureau of Labor and Industries as the commissioner may require to determine the prevailing rates of wage. The reports and returns shall be made upon forms furnished by the bureau and within the time prescribed therefor by the commissioner. The person or an authorized representative of the person shall certify to the accuracy of the reports and returns.
>
> "* * * * *
>
> "(5) As used in this section, 'person' includes any employer, labor organization or any official representative of an employee or employer association."

Respondent was a person required to make reports and returns under ORS 279.359(2). Respondent's failure to return a completed 2000 wage survey by September 15, 2000, violated ORS 279.359(2).

2) ORS 279.370 provides, in pertinent part:

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

of the commissioner adopted pursuant thereto."

OAR 839-016-0520 provides:

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

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

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

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

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

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

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

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

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

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

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

"* * * * *

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

"* * * * *

"(i) Failure to submit reports and returns in violation of ORS 279.359(2)[.]"

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

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

"* * * * *

"(5) The civil penalty for all * * * violations [other than viola-

> tions of ORS 279.350 regarding payment of the prevailing wage] shall be set in accordance with the determinations and considerations referred to in OAR 839-016-0530."

The imposition of a $750.00 civil penalty for Respondent's violation of ORS 279.359(2) is an appropriate exercise of the Commissioner's discretion.

OPINION

THE AGENCY'S PRIMA FACIE CASE

To prove a violation of ORS 279.359(2), the Agency must show that:

(1) Respondent is a "person;"

(2) The Commissioner conducted a survey in 2000 that required persons receiving the surveys to make reports or returns to the Agency for the purpose of determining the prevailing rates of wage;

(3) Respondent received the Commissioner's 2000 survey; and

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

In the Matter of F.R. Custom Builders, 20 BOLI 102, 109-10 (2000).

A <u>Respondent was a "person" in the year 2000.</u>

The testimony of Hooker and Smith established that Respondent was an employer in 2000, and therefore a "person" under the provisions of ORS 279.359.

B <u>The Commissioner conducted a wage survey in 2000.</u>

The Agency's uncontested evidence establishes that the Commissioner conducted a wage survey in 2000 requiring people to return completed survey forms by September 15, 2000.

C <u>Respondent received the Commissioner's 2000 survey.</u>

The third element of the Agency's prima facie case – whether Respondent received the 2000 survey – is contested by Respondent. Respondent contends that it first received the 2000 survey when it received the Agency's Notice on January 11, 2001. In support of this contention, Respondent offered testimony by Troy Hooker that he had "no recollection" or "record" of receiving the 2000 survey before January 2001, Dan Hooker's affidavit that he had "no recollection" or "record" of receiving the 2000 survey before January 2001, and Deborah Smith's testimony that she could find no "record" of receiving the 2000 survey before January 2001. The Hookers testified that they are the individuals who receive and open Respondent's mail and that Smith is the person to whom the wage survey would have been given for completion.

On the other side, the Agency offered evidence consisting of a printout from the Employment Department's computer files and a supporting affidavit showing that wage surveys were sent by first

class mail to Respondent in 1998, 1999, and 2000 at "P.O. Box 800, Hines, OR 97738," that this was Respondent's correct mailing address, and that Respondent received and timely returned the survey in 1999.

To resolve this issue, the forum takes guidance from the Oregon Rules of Evidence,[1] specifically ORE 311(1)(q). This rule creates the following presumption:

> "A letter duly directed and mailed was received in the regular course of the mail."

A presumption is a rule of law requiring that once a basic fact is established the forum must find a certain presumed fact, in the absence of evidence rebutting that presumed act.[2] In this case, credible evidence establishes that the 1998, 1999, and 2000 wage surveys were sent by first class mail to Respondent's correct mailing address. Pursuant to ORE 311(1)(q), this creates a rebuttable presumption that Respondent received the wage surveys and reminder notices sent by the Employment Department to that address. Respondent attempted to rebut this evidence through testimony as to the lack of "recollection" by Respondent's corporate officers who received Respondent's mail and the lack of a "record." If Respondent had not returned the 1999 wage survey and provided credible evidence that their mail service was somehow disrupted in 1998 and 2000, or if Respondent had successfully attacked the credibility of James Lee and the Employment Department's records, the result might be different. As it stands, the forum concludes that the testimony offered by Respondent is legally insufficient to overcome the presumption that Respondent received the wage surveys and reminder notices.

D <u>Respondent failed to return the 2000 wage survey within the time prescribed by the Commissioner.</u>

Undisputed evidence establishes that the Employment Department did not receive Respondent's completed 2000 wage survey until January 18, 2001, well after it could be of any use in determining the relevant appropriate prevailing wage rates. This evidence satisfies the fourth element of the Agency's prima facie case.

CIVIL PENALTY

In this case, the Agency seeks a $1,000 civil penalty. In determining the appropriate size of the penalty, the forum must consider the aggravating and mitigating factors set out in OAR 839-016-0520.

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[1] *See, e.g., In the Matter of Dan Cyr Enterprises*, 11 BOLI 172, 177 (1993) (the forum took judicial notice of ORE 609, which permits the receipt of evidence of conviction of certain crimes for the purpose of attacking the credibility of a witness.)

[2] LAIRD C. KIRKPATRICK, OREGON EVIDENCE 88 (3d ed. 1996).

A Aggravating circumstances.

The Agency alleged and proved several aggravating circumstances. First, the forum infers from the evidence in the record that Respondent received and failed to return the 1998 wage survey. Although the Agency alleged that Respondent's failure to return the 1998 wage survey should be given additional weight as an aggravation because it was a prior violation, the forum declines to give it this weight because there is no evidence that the Agency ever investigated or cited Respondent for its failure to return the 1998 wage survey and the facts giving rise to that violation are outside the substantive allegation in the Notice. *See In the Matter of M. Carmona Painting, Inc.*, 22 BOLI __ (2001), n. 3. However, because it shows Respondent knew or should have known of the violation, Respondent's failure to return the 1998 wage survey constitutes an aggravating circumstance that may be weighed in determining an appropriate penalty. *Id*. at ___. Second, it would have been relatively easy for Respondent to comply with the law by returning the wage survey, and the Agency gave Respondent several opportunities to comply, in the form of reminder notices sent by the Employment Department, before issuing its Notice. Third, because it received those reminder notices from the Agency, Respondent knew or should have known of the violation. Finally, the violation is serious, in that the Commissioner would be unable to complete his statutorily mandated duty of determining Oregon's prevailing wage rates if all survey recipients failed to return the wage survey until it was too late to be considered. Respondent's data, if timely submitted, would have been included in the data used to set prevailing wage rates. However, the forum can only speculate as to the magnitude of Respondent's violation, inasmuch as the Agency offered no evidence from which the forum could gauge the extent to which Respondent's failure to return the 2000 wage survey skewed the Commissioner's determination of the prevailing wage rates.[3]

B Mitigating circumstances.

There are no mitigating circumstances. The forum does not consider Respondent's eventual submission of the 2000 wage survey forms as a mitigating factor for the reason that the submission came too late to be included in the data used in the Commissioner's prevailing wage rate determinations. *See In the Matter of WB Painting & Decorating, Inc*., 22 BOLI __ (2001).

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[3] The Agency elicited testimony from Troy Hooker that Respondent's absence from the survey would be a "small" and an "appreciable" factor." However, because there was no evidence that Hooker had any awareness of the statistical significance of Respondent's absence from the survey, the forum declines to rely on this testimony to determine the magnitude of the violation vis-à-vis "skewing" the Commissioner's determination of the prevailing wage rates.

C Amount of civil penalty.

In *WB Painting & Decorating,* the respondent performed non-residential construction work in the period of time covered by the relevant wage survey and untimely submitted the Commissioner's wage survey form, failed to complete and return the Commissioner's 1998 wage survey, and presented no credible evidence of mitigating factors. The Commissioner assessed a civil penalty of $750. Based on the similarity of the *WB Painting* to this case, the forum finds that $750 is an appropriate civil penalty.

ORDER

NOW, THEREFORE, as authorized by ORS 279.370 and as payment of the penalty assessed as a result of its violation of ORS 279.359(2), the Commissioner of the Bureau of Labor and Industries hereby orders **Harney Rock & Paving Co**. to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232, a certified check payable to the Bureau of Labor and Industries in the amount of SEVEN HUNDRED AND FIFTY DOLLARS ($750.00), plus any interest that accrues at the legal rate on that amount from a date ten days after issuance of the Final Order and the date Respondent complies with the Final Order.

In the Matter of

ILYA SIMCHUK, dba West Coast Motor Company

Case No. 60-01

Final Order of the Commissioner Jack Roberts

Issued September 21, 2001

SYNOPSIS

Respondent employed Claimant as a car painter at the rate of $10.00 per hour. Claimant was not an independent contractor as claimed by Respondent, but an employee who was entitled to the agreed upon rate for all hours worked. Respondent kept no record of the hours Claimant worked and the Commissioner awarded Claimant $4,237.50 in unpaid wages based on Claimant's credible testimony concerning his rate of pay and the amount and extent of work he performed. Respondent's failure to pay was willful and the Commissioner ordered Respondent to pay $2,400 in civil penalty wages in addition to the unpaid wages. ORS 652.140; ORS 652.150; ORS 653.010; ORS 652.610.

The above-entitled case came on regularly for hearing before Linda A. Lohr, designated as Ad-

ministrative Law Judge ("ALJ") by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on May 15, 2001, in the Bureau of Labor and Industries hearing room located at 800 NE Oregon Street, Portland, Oregon.

Peter McSwain, an employee of the Agency, represented the Bureau of Labor and Industries ("BOLI" or "the Agency"). Sergey Karman ("Claimant") was present throughout the hearing and was not represented by counsel. Ilya Simchuk ("Respondent") was present throughout the hearing and was not represented by counsel.

In addition to Claimant, the Agency called Claimant's father, Vasily Karman, and Pavel Malik as witnesses.

Respondent called as witnesses: Sergey Bazlov, Artistic Auto Body employee; Vitaly Zagaryuk, Respondent employee and Respondent's brother-in-law; Vyacheslav Zagaryuk, Respondent employee and Vitaly Zagaryuk's cousin; Nick Vedernikov, Nick's Auto Body owner; and Vitaly Malik.

The forum received as evidence:

Administrative exhibits X-1 through X-10;

Agency exhibits A-1 through A-5 (filed with the Agency's case summary);

Respondent exhibits R-2, R-3 (filed with Respondent's case summary).

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

FINDINGS OF FACT – PROCEDURAL

1) On June 21, 2000, Claimant filed a wage claim form in which he stated Respondent had employed him from November 29, 1999, through January 31, 2000, and failed to pay him the agreed upon rate of $10.00 per hour for all hours worked.

2) At the time he filed his wage claim, Claimant assigned to the Commissioner of the Bureau of Labor and Industries, in trust for Claimant, all wages due from Respondent.

3) On December 3, 2000, the Agency served Respondent with an Order of Determination, numbered 00-4860. The Agency alleged Respondent had employed Claimant during the period November 29, 1999, through January 31, 2000, at the rate of $10.00 per hour and that Claimant had worked a total of 505.5 hours, 116.5 of which were hours worked in excess of 40 in a given work week. The Agency concluded Respondent owed Claimant $4,137.50 in wages, plus interest. The Agency also alleged Respondent's failure to pay was willful and Respondent, therefore, was liable to Claimant for $2,400.00 as

penalty wages, plus interest. The Order of Determination gave Respondent 20 days to pay the sums, request an administrative hearing and submit an answer to the charges, or demand a trial in a court of law.

4) Respondent filed a timely answer and request for hearing. Respondent's answer stated, in pertinent part:

> "In answer to the letter 'Order of Determination No. 00-4860,' Sergey Karman did not work at West Coast Motor Company therefore I do not owe him $4,137.50. I pay my employees only by payroll checks. I did not do that for Sergey Karman. I did not hire him and I could not because I did not have his social security number. Therefore, I should not pay the penalty wage written about in paragraph III also. Sergey Karman did not sign any legal papers that state he was to work for me."

5) On February 14, 2001, the Agency requested a hearing. On March 14, 2001, the Hearings Unit issued a Notice of Hearing stating the hearing would commence at 9:00 a.m. on May 15, 2001. With the Notice of Hearing, the forum included a copy of the Order of Determination, a "SUMMARY OF CONTESTED CASE RIGHTS AND PROCEDURES," and a copy of the forum's contested case hearings rules, OAR 839-050-0000 to 839-050-0440. Also included was a notice in eight different languages, including Russian, that stated:

> "Warning! Enclosed are important documents concerning your legal rights and responsibilities. You may need to respond to these documents within a limited time. If you do not read English, you should have a qualified person interpret them for you as soon as possible."

6) On April 4, 2001, the forum issued a case summary order requiring the Agency and Respondent to submit case summaries that included: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a brief statement of the elements of the claim (for the Agency only); a brief statement of any defenses to the claim (for Respondent only); a statement of any agreed or stipulated facts; and any wage and penalty calculations (for the Agency only). The forum ordered the participants to submit their case summaries by May 4, 2001, and advised them of the possible sanctions for failure to comply with the case summary order.

7) On April 12, 2001, the Agency filed its case summary.

8) On May 3, 2001, the forum received a letter from Respondent stating, in pertinent part:

> "I am writing you this letter regarding of Carman Sergey. Since Mr. Sergey no respond to the item yet that I request from him I'm not able to show you all elements of this claim for that due date of this case

> summary. If I'm able to show you my defenses to this claim by May 4 pleas [*sic*] let me know. If I will need to show you more then [*sic*] only defenses please move this hearing to another date. Please consider this letter to help me show you better elements of this case."

The forum interpreted Respondent's letter as a request for an extension of time to submit his case summary or, in the alternative, a postponement of the hearing.

9) On May 4, 2001, the forum issued an order extending the deadline for case summaries, and any supplemental case summary submitted by the Agency, to May 11, 2001.

10) On May 9, 2001, Respondent filed a case summary. On the same date, Respondent made a separate request that his friend Kerry Lehne act as his "case presenter" at the hearing and that a Russian or Ukrainian interpreter be provided for his benefit during the proceeding.

11) On May 14, 2001, Respondent copied the Hearings Unit with his informal request for discovery, pursuant to OAR 839-050-0200, directed to "Sergey Karman" with copies to the Agency case presenter and order processor. The Agency's response to his request was included. On the same date, Respondent filed a supplemental case summary.

12) At the start of hearing, after a brief conversation with Respondent, the ALJ determined that Respondent would be able to participate effectively in the hearing, which involved subtle legal and factual issues, only with the services of an interpreter. Accordingly, the ALJ appointed a qualified Ukrainian interpreter, Galina Kogan, to translate the proceeding for Respondent. The interpreter advised the forum that she had another commitment during the afternoon proceeding and the ALJ appointed a qualified Russian interpreter, Victor Nikitin, to translate the remainder of the proceeding. Prior to interpreting the proceedings, both interpreters stated their credentials on the record and took an oath or affirmation to translate the proceedings truthfully and accurately to the best of their ability.

13) At the start of hearing, Respondent renewed his request that Kerry Lehne act as his "case presenter" or authorized representative during the hearing. The ALJ denied Respondent's request based on the rules governing the representation of a party in a contested case hearing - OAR 839-050-0110.

14) At the start of hearing, Respondent stated that he had no questions about the Notice of Contested Case Rights and Procedures.

15) At the start of hearing, the ALJ verbally advised the Agency and Respondent of the issues to be addressed, the matters to be proved, and the procedures

governing the conduct of the hearing.

16) The ALJ issued a proposed order on August 28, 2001, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. Neither the Agency nor Respondent filed exceptions.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent Ilya Simchuk operated an auto body shop under the assumed business name, West Coast Motor Company, and employed one or more individuals in Oregon.

2) At all times material herein, Respondent's auto body shop was located at SE 82nd and Harney in Portland, Oregon. During part of 1999, Artistic Auto, operated by Yuri Lupeha (phonetic), was located nearby in a different building.

3) In 1999, Claimant worked briefly for Artistic Auto to learn the business of buying wrecked cars and fixing them up for resale. He had never bought and sold used cars before and wanted to learn the business firsthand. He did not work for wages but Lupeha gave him money whenever he needed extra cash. On occasion, he would paint cars for Respondent but was paid by Lupeha, who usually paid him $50 per car. Claimant had experience painting cars and had previously worked for Sam's Auto Body as a car painter, where he earned $14.50 per hour.

4) Sometime in August 1999, Artistic Auto moved to a new location. When the business began having problems in late November, Claimant approached Respondent about possible employment. One of Respondent's car painters, his nephew, had recently left and Respondent agreed to pay Claimant at the same rate he paid his nephew - $10.00 per hour - to sand, paint, and buff cars. Respondent told Claimant to report to work the next day at 8:00 a.m.

5) November 29, 1999, was Claimant's first day of work. Claimant understood that his workday was from 8 or 9:00 a.m. until 5 or 6:00 p.m.

6) While in Respondent's employ, Claimant worked primarily in the "painting booth," an enclosed structure used to paint cars. The painting booth was shared with other auto body shops located near Respondent's business. Claimant used his own paint gun and buffer. When the painting booth was in use by others, he prepared cars for painting, buffed cars that had been painted, and cleaned up the shop area. Frequently, when the painting booth was unavailable and there was a particular car that needed painting, Respondent instructed Claimant to work after hours when the booth was available and the paint job could be completed.

7) Respondent inspected every car Claimant painted.

Claimant sometimes made mistakes and Respondent told him when and how to correct them.

8) On several occasions, Claimant's father visited Respondent's shop and observed his son working. His visits were intentional and at random because Claimant was only 17 years old and his father wanted to make sure of his son's whereabouts.

9) Respondent kept no record of the hours Claimant worked.

10) During his employment, Claimant maintained a hand made calendar on which he noted the hours he worked and the amounts Respondent paid to him from November 29, 1999, through January 31, 2000.

11) Although Respondent initially told Claimant he would be paid once a month at the end of each month, he paid Claimant sporadically with cash in varying amounts.

12) Between November 29, 1999, through January 31, 2000, Claimant worked 505.5 hours, 136.5 of which were hours exceeding 40 per week. For those hours, Claimant earned $5,737.50. Respondent paid Claimant only $1,500.

13) Claimant quit his employment without notice to Respondent because Respondent refused to pay his full wages. Claimant's last day of work for Respondent was January 31, 2000.

14) Claimant's wages remain unpaid.

15) The forum observed Claimant's demeanor carefully throughout the hearing and found his testimony believable. He gave straightforward, nonevasive answers to all questions asked and made no attempt to portray Respondent in a bad light. The hand made calendar he maintained during his employment further bolstered his credibility. Claimant not only noted on the calendar the hours and days he worked, he also noted the amounts, totaling $1,500, Respondent paid him on eight separate occasions, a fact he could have easily left out had the calendar been created after the fact for litigation purposes. In addition, Respondent corroborated much of Claimant's testimony, such as the fact that Claimant performed work for Respondent and was offered $10.00 per hour to perform that work.

16) Despite Vasily Karman's bias as Claimant's father, his testimony regarding his observations of his son working at Respondent's auto body shop was credible and corroborated by some of Respondent's witnesses, each of whom had observed Vasily Karman on different occasions visiting Claimant.

17) Respondent's testimony was limited in scope and substance. What little he said contradicted his statement in his answer that Claimant never worked at West Coast Motor Company. Respondent testified that Claimant "worked in the shop" and that he assigned the work Claimant was expected to per-

form. Moreover, although he disputes the timing of the offer to pay Claimant $10.00 per hour, Respondent agrees he made an offer to employ Claimant at that rate. Although his intent was to establish Claimant as an independent contractor, Respondent's testimony, as a whole, only lends additional credence to Claimant's testimony and the forum has considered it only as corroboration of Claimant's version of what transpired and when.

ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent conducted a business in the state of Oregon and engaged the personal services of one or more employees in the operation of that business.

2) Respondent employed Claimant between November 29, 1999, and January 31, 2000.

3) Respondent and Claimant agreed Claimant would be paid $10.00 per hour.

4) Claimant quit his employment on January 31, 2000, without notice to Respondent.

5) Claimant worked 505.5 hours between November 29, 1999, and January 31, 2000, 136.5 of which were in excess of 40 hours per week. For all of these hours, Claimant earned a total of $5,737.50. Respondent paid Claimant $1,500 and therefore owed Claimant $4,237.50 in earned and unpaid compensation on the day Claimant's employment terminated.

6) Respondent owes Claimant $4,237.50 for wages earned.

7) Respondent willfully failed to pay Claimant the $4,237.50 in earned, due and payable wages no later than February 7, 2000, the fifth business day after Claimant quit his employment without notice to Respondent. Respondent has not paid the wages owed and more than 30 days have elapsed from the date the wages were due.

8) Civil penalty wages, computed pursuant to ORS 652.150, equal $2,400.

CONCLUSIONS OF LAW

1) ORS 653.010 provides, in pertinent part:

> "(3) 'Employ' includes to suffer or permit to work; * * *.
>
> "(4) 'Employer' means any person who employs another person * * *."

ORS 652.310 provides, in pertinent part:

> "(1) 'Employer' means any person who in this state, directly or through an agent, engages personal services of one or more employees * * *.
>
> "(2) 'Employee' means any individual who otherwise than as a copartner of the employer or as an independent contractor renders personal services wholly or partly in this state to an employer who pays or agrees to pay such individual at a fixed rate, based on the time spent in the performance of such services or on the

number of operations accomplished, or quantity produced or handled."

During all times material herein, Respondent was an employer and Claimant was Respondent's employee subject to the provisions of ORS 652.110 to 652.200, 652.310 to 652.414, and 653.010 to 653.261.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and the Respondent herein.

3) ORS 653.261(1) provides:

"The Commissioner of the Bureau of Labor and Industries may issue rules prescribing such minimum conditions of employment, excluding minimum wages, in any occupation as may be necessary for the preservation of the health of employees. Such rules may include, but are not limited to, minimum meal periods and rest periods, and maximum hours of work, but not less than eight hours per day or 40 hours per week; however, after 40 hours of work in one week overtime may be paid, but in no case at a rate higher than one and one-half times the regular rate of pay of such employees when computed without benefit of commissions, overrides, spiffs, and similar benefits."

OAR 839-020-0030(1) provides that except in circumstances not relevant here:

" * * * all work performed in excess of forty (40) hours per week must be paid for at the rate of not less than one and one-half times the regular rate of pay when computed without benefits of commissions, overrides, spiffs, bonuses, tips or similar benefits pursuant to ORS 653.281(1)."

Oregon law required Respondent to pay Claimant one and one-half times his regular hourly rate, in this case $10.00 per hour, for all hours worked in excess of 40 per week. Respondent failed to pay Claimant at the overtime rate, in violation of OAR 839-020-0030(1).

4) ORS 652.140(2) provides:

"When an employee who does not have a contract for a definite period quits employment, all wages earned and unpaid at the time of quitting become due and payable immediately if the employee has given to the employer not less than 48 hours' notice, excluding Saturdays, Sundays and holidays, of intention to quit employment. If notice is not given to the employer, the wages shall be due and payable within five days, excluding Saturdays, Sundays and holidays, after the employee has quit, or at the next regularly scheduled payday after the employee has quit, whichever event first occurs."

Respondent violated ORS 652.140(2) by failing to pay Claimant all wages earned and unpaid within five days, excluding Saturdays, Sundays and holidays,

after Claimant quit his employment without at least 48 hours' notice to Respondent on January 31, 2000.

5) ORS 652.150 provides:

> "If an employer willfully fails to pay any wages or compensation of any employee whose employment ceases, as provided in ORS 652.140 and 652.145, then, as a penalty for such nonpayment, the wages or compensation of such employee shall continue from the due date thereof at the same hourly rate for eight hours per day until paid or until action therefor is commenced; provided, that in no case shall such wages or compensation continue for more than 30 days from the due date, and provided further, the employer may avoid liability for the penalty by showing financial inability to pay the wages or compensation at the time they accrued."

Respondent is liable for $2,400 in civil penalties under ORS 652.150 for willfully failing to pay all wages or compensation to Claimant when due as provided in ORS 652.140(2).

6) Under the facts and circumstances of this record, and according to the applicable law, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondent to pay Claimant his earned, unpaid, due and payable wages and the civil penalty wages, plus interest on both sums until paid. ORS 652.332.

OPINION

In order to prevail in this matter, the Agency was required to prove: 1) that Respondent employed Claimant; 2) Respondent agreed to pay Claimant $10.00 per hour; 3) that Claimant performed work for which he was not properly compensated; and 4) the amount and extent of work Claimant performed for Respondent. *In the Matter of Barbara Coleman*, 19 BOLI 230, 263, 264 (2000). At hearing, Respondent denied employing Claimant and characterized him as an independent contractor who "performed a very limited amount of work for [Respondent], used his own hand tools, worked for other shops at the same time he worked for [Respondent], and [who] was compensated for the work that he did perform." The Agency established, however, by a preponderance of the evidence, that Respondent not only employed Claimant, he willfully failed to pay him all wages earned when due.

RESPONDENT EMPLOYED CLAIMANT

This forum has adopted and consistently applied an "economic reality" test to determine whether a claimant is an employee or independent contractor under Oregon's minimum wage and wage collection laws. *See In the Matter of Ann L. Swanger*, 19 BOLI 42, 53 (1999); *In the Matter of Frances Bristow*, 16 BOLI 28,

37 (1997). The test, derived from one used by the federal courts when applying the Fair Labor Standards Act, helps to determine "whether the alleged employee, as a matter of economic reality, is economically dependent upon the business to which [he or she] renders [his or her] services." *In the Matter of Geoffrey Enterprises, Inc.*, 15 BOLI 148, 164 (1996) (relying on *Circle C Investments, Inc.*, 998 F2d 324 (5th Cir 1993)). Having considered the following test criteria, the forum finds that credible evidence on the whole record establishes Claimant was economically dependent upon Respondent's business.

A. The degree of control the alleged employer has over a worker

Claimant credibly testified that Respondent controlled the hours he worked and the manner in which he performed his work. Respondent told Claimant when to start and stop his workday and determined when and if he needed to work later than usual in the evening. Respondent also told Claimant which cars to paint and inspected every car Claimant worked on. When Claimant made mistakes, Respondent instructed Claimant on when and how to redo his work. Although he did not follow it, Respondent established the compensation method, including how much and when Claimant was to be paid. The forum finds Claimant was subject to Respondent's control with regard to the time and manner of performing his work.

B. The extent of the relative investments of the worker and alleged employer

Claimant's investment in Respondent's business was his time and little else. Although Claimant brought with him his own paint gun and buffer, Respondent supplied everything else - the cars to be painted, the paint, the materials used to sand and mask the cars, the booth to paint in, and the site for the work to be performed. The forum finds Claimant could not have performed the work he did for Respondent without Respondent's vastly greater investment in the business.

C. The degree to which the worker's opportunity for profit and loss is determined by the alleged employer

Since Claimant had no investment in Respondent's business, he could earn no profit and suffer no loss. Respondent determined and exclusively controlled the amount of Claimant's hourly rate and the forum can conclude from that fact that Claimant was a "wage earner[] toiling for a living, [rather] than [an] independent entrepreneur[] seeking a return on [his] risky capital investments." *See Reich v. Circle C. Investments, Inc.*, 998 F2d 324, at 328 (5th Cir 1993), *citing Brock v. Mr. W. Fireworks, Inc.*, 814 F2d 1042 at 1051 (5th Cir), *cert. denied*, 484 US 924 (1987).

D. The skill and initiative required in performing the job

Evidence shows Claimant had the skills necessary to wield a paint gun and buffer and he had previous experience as a car painter working in a different auto body shop. The forum infers from the facts in the record that car painting is essential to auto bodywork. Since independent contractors generally do not perform services that are an integral part of the business, the forum concludes that Claimant possessed no special skills or talents that would have made him likely to be an independent contractor while working as a car painter for Respondent.

E. The permanency of the relationship

Independent contractors are generally engaged to perform a specific project for a limited period. Respondent's reliance on the fact that Claimant was assigned specific jobs, i.e., particular cars to paint, to demonstrate Claimant was an independent contractor is misguided. That Respondent directed Claimant's work by determining which cars he painted only reinforces Claimant's status as an employee. Moreover, evidence in the record shows Respondent clearly intended Claimant's employment to be of indefinite duration as long as Claimant continued to perform his work satisfactorily. There is no evidence in the record that Claimant painted cars for other businesses while employed by Respondent or that he was economically independent of Respondent's business.

AGREED UPON RATE

Claimant credibly testified, and Respondent confirmed, that Respondent offered Claimant $10.00 per hour to work for Respondent as a car painter. Respondent's testimony that he made the offer only after Claimant announced he was quitting his job defies logic. Claimant's credible testimony establishes and the forum concludes that when Claimant approached Respondent about employment as a car painter, Respondent offered to pay Claimant at the same rate he paid his previous car painter, which was $10.00 per hour.

HOURS WORKED

ORS 653.045 requires Respondent to keep and maintain proper records of wages, hours and other conditions and practices of employment. Where the forum concludes an employee performed work for which he or she was not properly compensated, it becomes the employer's burden to produce all appropriate records to prove the precise hours and wages involved. Where the employer produces no records, the forum may rely on evidence produced by the Agency "to show the amount and extent of the employee's work as a matter of just and reasonable inference and then may award damages to the employee, even though the result be only approximate." *In the Matter of Diran Barber*, 16 BOLI 190 (1997), *quoting Anderson v. Mt.*

Clemens Pottery Co., 328 US 680 (1946).

Here, Respondent kept no record of the days or hours Claimant worked. This forum has previously accepted, and will accept, the credible testimony of a claimant as sufficient evidence to prove work was performed and from which to draw an inference of the extent of that work. *In the Matter of Graciela Vargas*, 16 BOLI 246 (1998). Claimant's testimony was credible as to the amount and extent of the work he performed. In addition, he kept a contemporaneous record of the hours he worked. Respondent, on the other hand, produced no persuasive evidence to "negative the reasonableness of the inference to be drawn from the [Claimant's] evidence." *Id*. at 255, *quoting Mt. Clemens Pottery Co.*, 328 US at 687-88. The forum concludes, therefore, that Claimant performed work for which he was improperly compensated and the forum may rely on the evidence Claimant produced showing the hours he worked as a matter of just and reasonable inference. Claimant's credible testimony establishes that he worked a total of 505.5 hours for Respondent, 136.5[1] of which were hours worked in excess of 40 per week. For all these hours, Claimant earned a total of $5,737.50, based on the agreed upon rate of $10.00 per hour. Respondent testified he gave Claimant $1,292. Claimant's calendar, that the forum found credible, shows he received $1,500 from Respondent. Respondent owes Claimant $4,237.50 in unpaid wages.

[1] In its charging document, the Agency asserted that Claimant had worked 116.5 hours in excess of 40 per week. The ALJ's calculations, based on Claimant's credible record maintained during his employment, reveal Claimant's actual overtime hours to be 136.5.

CIVIL PENALTIES

An award of penalty wages turns on the issue of willfulness. Willfulness does not imply or require blame, malice, wrong, perversion, or moral delinquency, but only requires that that which is done or omitted is intentionally done with knowledge of what is being done and that the actor or omittor be a free agent. *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976). Respondent, as an employer, had a duty to know the amount of wages due to his employee. *McGinnis v. Keen*, 189 Or 445, 221 P2d 907 (1950); *In the Matter of Jack Coke*, 3 BOLI 238 (1983).

Respondent did not dispute at hearing that Claimant performed work for him. Respondent denied, however, that he "employed" Claimant. The facts and law prove otherwise. Respondent's failure to apprehend the correct application of the law and Respondent's actions based on this incorrect application do not exempt Respondent from a determination that he willfully failed to pay wages earned and due. *In the Matter of Locating, Inc.*, 14 BOLI 97 (1994), *aff'd without opinion*, *Locating, Inc. v.*

Deforest, 139 Or App 600, 911 P2d 1289 (1996); *In the Matter of Mario Pedroza*, 13 BOLI 220 (1994). Respondent admits he did not pay Claimant $10.00 per hour and the evidence shows his failure to pay the agreed upon rate was intentional. From these facts, the forum infers Respondent voluntarily and as a free agent failed to pay Claimant all of the wages he earned between November 29, 1999 through January 31, 2000. Respondent acted willfully and is liable for penalty wages under ORS 652.150.

Penalty wages, therefore, are assessed and calculated in accordance with ORS 652.150 in the amount of $2,400. This figure is computed by multiplying $10.00 per hour by 8 hours per day multiplied by 30 days. *See* ORS 652.150 and OAR 839-001-0470.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, and as payment of the unpaid wages, Respondent **Ilya Simchuk** is hereby ordered to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, the following:

A certified check payable to the Bureau of Labor and Industries, in trust for Claimant Sergey Karman, in the amount of SIX THOUSAND SIX HUNDRED THIRTY SEVEN DOLLARS AND FIFTY CENTS ($6,637.50), less appropriate lawful deductions, representing $4,237.50 in gross earned, unpaid, due and payable wages and $2,400 in penalty wages, plus interest at the legal rate on the sum of $4,237.50 from February 7, 2000, until paid and interest at the legal rate on the sum of $2,400 from March 7, 2000, until paid.

In the Matter of

H. R. SATTERFIELD and Stella Satterfield, dba The Tool Box

Case No. 19-01

Final Order of the Commissioner Jack Roberts

Issued September 21, 2001

SYNOPSIS

Where Complainant opposed what she perceived to be an unlawful practice and Respondents subsequently refused to hire her for a training position even though Complainant was the most qualified applicant, the Commissioner found that Respondents refused to hire Complainant based on her opposition to unlawful employment practices. The Commissioner awarded Complainant $2,340 in lost wages but found no basis for awarding mental suffering damages. ORS 659.030(1)(f).

The above-entitled case came on regularly for hearing before Linda A. Lohr, designated as Administrative Law Judge ("ALJ") by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on March 13, 2001, at the Medford office of the Bureau of Labor and Industries, located at 700 East Main, Suite 105, Medford, Oregon. The hearing reconvened for additional testimony on July 17, 2001, after the record was reopened pursuant to OAR 839-050-0410.

Cynthia Domas, an employee of the Agency, represented the Bureau of Labor and Industries ("BOLI" or "the Agency"). Kateena Forster ("Complainant") was present throughout the hearing and was not represented by counsel. Terrance L. McCauley, Attorney at Law, represented H. R. Satterfield and Stella Satterfield ("Respondents"), who were present throughout the hearing.

In addition to Complainant, the Agency called as witnesses: Cheri Ann Forster, Complainant's sister-in-law; Respondent H. R. Satterfield; Betty Moore, Oregon Employment Department supervisor; Janet Chatham, former Jobs Plus Specialist, Oregon Employment Department; Barbara Turner, a BOLI senior civil rights investigator; and David Forster, Complainant's husband.

Respondents called themselves and Dana Zozaya, Respondents' current bookkeeper, as witnesses.

The forum received as evidence:

a) Administrative exhibits X-1 through X-28;

b) Agency exhibits A-1 through A-6 (submitted prior to hearing); A-7 (submitted at hearing); A-8, A-9 (submitted after hearing)

c) Respondents exhibit R-1 (submitted at hearing).

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

FINDINGS OF FACT – PROCEDURAL

1) On February 14, 2000, Complainant filed a verified complaint with the Agency's Civil Rights Division ("CRD") alleging she was the victim of the unlawful employment practices of Respondents based on Respondents' failure to hire Complainant on August 3, 1997. On September 5, 2000, the complaint was amended to properly identify the Respondents. After investigation and review, the CRD issued a Notice of Substantial Evidence Determination finding substantial evidence supporting the allegations regarding Respondents' failure to hire Complainant.

2) On November 7, 2000, the Agency submitted to the forum Specific Charges alleging Re-

spondents discriminated against Complainant by failing to hire her because she complained to a state agency about discriminatory comments made by Respondent H. R. Satterfield, in violation of ORS 659.030(1)(f). The Agency also requested a hearing.

3) On November 14, 2000, the forum served on Respondents the Specific Charges, accompanied by the following: a) a Notice of Hearing setting forth March 13, 2001, in Medford, Oregon, as the time and place of the hearing in this matter; b) a notice of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case process; and d) a separate copy of the specific administrative rule regarding responsive pleadings.

4) On December 5, 2000, Respondents, through counsel, filed a timely answer to the Specific Charges.

5) On January 12, 2001, the forum ordered the Agency and Respondent each to submit a case summary including: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a brief statement of the elements of the claim (for the Agency only); a brief statement of any defenses to the claim (for Respondent only); a statement of any agreed or stipulated facts; and any damages calculations (for the Agency only). The ALJ ordered the participants to submit case summaries by March 2, 2001, and notified them of the possible sanctions for failure to comply with the case summary order.

6) By letter dated January 31, 2001, the Agency requested the caption in this matter be corrected to reflect the correct initials of Respondent H. R. Satterfield. On February 20, 2001, the ALJ issued an interim order amending the caption.

7) The Agency and Respondents filed timely case summaries.

8) On March 6, 2001, the Agency moved for summary judgment based on Respondent H. R. Satterfield's purported admissions to the unlawful employment practices alleged in the Specific Charges. On March 9, 2001, the ALJ issued an interim order denying the Agency's motion because it was untimely.

9) On March 13, 2001, Respondents filed a supplemental case summary.

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

11) During the hearing, the Agency moved to amend the amount of back pay sought downward to seek back pay calculated at the rate of $6.50 per hour, 40 hours per week, from August 3, 1999, to June 8, 2000, less $1,813.50 in interim earnings.

The Agency's motion was granted.

12) On June 7, 2001, the ALJ, on her own motion, issued an order reopening the contested case record pursuant to OAR 839-050-0410, that stated, in pertinent part:

> "At hearing, Agency witness, Barbara Turner, testified she refreshed her memory the day of hearing, prior to her testimony, with notes documenting her contacts with Respondent H. R. Satterfield during her investigation. Respondents' counsel was denied, erroneously, the opportunity to review the notes Ms. Turner used to refresh her memory. Because she relied on the notes the day of hearing for the purpose of testifying and her testimony relates to important issues in this case, I am reversing the ruling. The Agency is hereby ordered to provide to Respondents' counsel all notes and writings Ms. Turner used to refresh her memory for the purpose of testifying in this matter by 5:00 p.m., Thursday, June 14, 2001. After inspecting the documents, counsel may cross-examine Ms. Turner upon them, but must direct the request for cross-examination, in writing, to the Hearings Unit no later than 5:00 p.m., Wednesday, June 20, 2001. If Respondents request cross-examination, I will initiate a telephone conference with the participants to schedule Ms. Turner's testimony for the sole purpose of cross-examination upon the documents provided by the Agency pursuant to this Order.
>
> " * * * * *
>
> "After reviewing the entire record, I find there is insufficient evidence to compute any back pay damages that may be awarded in this matter. Evidence in the record shows Complainant found replacement employment at Bear Creek ("Harry and David's") for a similar duration and with similar hours and hourly wages as the employment she applied for in July 1999 through the Jobs Plus training program. In fairness to both participants, the Agency is hereby ordered to submit to the Hearings Unit, with copies to Respondents' counsel, documentation, preferably from Bear Creek or its payroll agent, establishing the date Complainant began working for Bear Creek by 5:00 p.m., Wednesday, June 20, 2001."

13) On June 11, 2001, the Hearings Unit received a letter from the Agency providing dates the Agency's witness and case presenter were unavailable for cross-examination purposes.

14) On June 19, 2001, the Hearings Unit received documentation from the Agency that included a letter from Bear Creek Corporation with an attached "Employee Data Summary," that the ALJ marked as exhibit A-8 and received in the record, establish-

ing the date Complainant began working for Bear Creek.

15) On June 20, 2001, the Hearings Unit received Respondents' request for cross-examination.

16) On June 27, 2001, the forum issued an order scheduling a hearing for the purpose of Barbara Turner's cross-examination based on the documents provided to Respondents by the Agency.

17) On July 9, 2001, the Agency requested that the hearing time be changed from 10:00 to 11:00 a.m. to accommodate those who were driving long distances to Eugene, Oregon. The forum granted the Agency's request on the same date.

18) On July 11, 2001, the Agency submitted documentation "for clarification purposes" that included a letter from Bear Creek Corporation and an illegible attachment. The letter reads, in pertinent part:

> "This letter is to certify that Kateena Forster was hired by Bear Creek Corporation as a seasonal employee on October 11, 1999. She was placed on layoff status effective December 16, 1999. As of December 16, 2000, she was administratively terminated. This occurs when an employee has not worked for our company for 12 consecutive months.
>
> " * * * * *
>
> "Sincerely, Kristi Dye, Supervisor, Employee Services"

To the extent the letter clarified Complainant's employment period at Bear Creek, the ALJ marked it as exhibit A-9 and received it as evidence in the record.

19) On July 17, 2001, hearing was held in the BOLI conference room located in Eugene, Oregon, to allow Respondents' counsel the opportunity to cross-examine agency witness Barbara Turner on the notes she used to refresh her memory at the previous hearing. Neither the Agency nor Respondent offered any documents for the record.

20) On July 17, 2001, the Hearings Unit received from the Agency copies of two "Job Summary" documents as replacements for the illegible attachment submitted on July 11. Because the documents were cumulative, they were not marked as exhibits and received in the record.[1]

21) The ALJ issued a proposed order on August 2, 2001, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. Neither the Agency nor Respondents filed exceptions.

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[1] Exhibit A-8 included an attachment that provided all of the information the ALJ originally requested. *See* Findings of Fact - Procedural 13 & 14.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, H. R. and Stella Satterfield ("Respondents"), who are husband and wife, were partners and co-owners of an automotive service business known as The Tool Box and were Oregon employers utilizing the personal services of one or more persons.

2) Complainant is a female who submitted an application for employment to Respondents on July 27, 1999, as a referral from the Jobs Plus program administered through the Oregon Employment Department ("Department").

3) The Jobs Plus program is an on-the-job training program that provides a subsidy for employers who are interested in training eligible candidates for a six month period. Those who receive unemployment benefits, food stamps, or welfare benefits (or all three) are eligible to participate in the program. Employers who request a Jobs Plus candidate to train in their business are required to pay the trainee at least minimum wage for the work performed during the course of the training. The Department reimburses the participating employer at the rate of $6.50 per hour for the first month and $5.50 per hour for the remaining five months. After four months, the employer may elect to hire the trainee. If the employer decides not to hire the trainee, the trainee may continue working for the remaining two months with a day off to look for other employment.

4) Respondents placed a job order with the Jobs Plus program on July 20, 1999. The job summary was approved by Respondents and was entered into the Department's computer database as follows:

> "THIS IS A JOBS PLUS ON THE JOB TRAINING POSITION
>
> "REQ:18 YRS OR OLDER, VALID DRIVERS LICENSE (TO DRIVER [*sic*] CUSTOMERS HOME)
>
> "DUTIES: WRITE REPAIR ORDERS, GIVE ESTIMATES, ORDER PARTS, ANSWER PHONES, CLEAN UP & OTHER DUTIES AS ASSIGNED.
>
> "HRS: TO BE ARRANGED W/EMPLOYER
>
> "PAY: $6.50 HR
>
> "@ @ APPLY DIRECT WRITE ON APPLICATION * * JOBS PLUS * *"

The job order denotes a 40-hour workweek, day shift.

5) On July 27, 1999, Complainant filled out and left her application for Respondents at their place of business. At the time, Complainant was receiving unemployment benefits and was eligible for the Jobs Plus training program and so indicated on her application. On the application, in the section listing "FORMER EMPLOYERS," Complainant indicated she was still employed

as a secretary earning $7.00 per hour with "Superior Roofing" located in "Goldhill, Oregon." She indicated the period of her employment was from "3/99 to current." Under "Reason for Leaving" she wrote, "Still there, just not needed." In the section inquiring about "Job Related Skills" she wrote: "Currently own a roofing company. I answer phones, give bids, check customers [*sic*] preferences. Order material." As references, Complainant listed her "business partners" Gene Meyer and James Ebbs.

6) On July 26 and August 3, 1999, the Department also referred two male applicants through the Jobs Plus training program to Respondents.

7) Complainant telephoned Respondents' business several times to inquire about the status of her application. On or about August 3, 1999, she finally spoke with Respondent H. R. Satterfield who told her he was going over the applications and hers was the best one of the three he had received. Complainant told him she would "do anything" for the job. He responded that he was a married man and was in business with his wife, who would have to approve his hiring a woman.

8) Complainant told her husband that she was "shocked" by Respondent H. R. Satterfied's comment and, as a result, was "embarrassed that [she] was a woman looking for a job."

9) On August 3, 1999, Complainant reported to Betty Moore, an employment supervisor with the Department, that Respondent H. R. Satterfield had told her he was a married man and could not hire a woman until he checked with his wife.

10) On the same day she heard from Complainant, Moore contacted Respondent H. R. Satterfield and told him about Complainant's complaint. He told Moore that he had told Complainant her application was the best of the three and that he was a married man and would have to go over the applications that evening with his wife. He also told Moore he had an all-male shop. Moore advised him that in order for his job order to be legal he could not make a hiring decision based on gender. He assured Moore he was considering Complainant for the job because she appeared to be the best qualified, had the nicest handwriting, and she appeared to definitely want the job because she kept calling to let him know that he needed to "make a decision" because she "really wants this job."

11) Moore called Complainant and told her Respondents were considering her for the job and all Complainant could do was wait and see what happened.

12) On August 3, 1999, Respondent H. R. Satterfield called Janet Chatham, the Jobs Plus coordinator with whom he initially placed his job order. He told Chatham that a woman applicant had complained about him and he was very upset about it. He also told Chatham the applicant had

called him repeatedly about the job and during the last telephone call he had told her he was a married man and had to check with his wife before he could "make that kind of decision." He expressed to Chatham his displeasure with the Jobs Plus program and told her he "did not need this kind of problem." She referred him to the Bureau of Labor and Industries to get a better understanding of the "do's and don'ts" of hiring.

13) On August 9, 1999, Moore memorialized a telephone contact with Complainant that reads: "Tina called & said she had not heard from the employer and was going to file a complaint. BRM."

14) Respondents did not hire anyone for the position and it has remained unfilled since August 1999.

15) On August 16, 1999, the Department referred Complainant to two different employers through the Jobs Plus training program. Complainant was not hired for either training position.

16) On October 11, 1999, Complainant began working for Bear Creek, a local business, as a laborer. She worked five days per week, averaging approximately eight hours per day. She was placed on layoff status effective December 16, 1999.

17) Complainant's husband, David Forster, owns and operates a roofing company under the assumed business name, Superior Roofing. During times material, he had one partner, James Ebbs, who was married to Gene Meyer. Meyer was never a partner in the business and was never on the payroll. Although technically not a partner, Complainant shares in the profits of the business as Forster's wife. She continues to run errands for the business and has worked informally for her husband since the business started in March 1999. Although she receives some money from the business, she has never been on the payroll as a secretary and has never earned $7.00 per hour from the business. Forster keeps no records of the hours Complainant works for the business.

18) Agency investigator Barbara Turner was assigned to investigate Complainant's complaint. During the investigation, she spoke with Respondent H. R. Satterfield several times and memorialized the conversations. Satterfield told Turner he had never hired a woman before and had to check with his wife before doing so. He also told Turner that he did not want Complainant working for him because she had complained about him. At no time during his conversations with Turner did Satterfield mention Complainant's remark that she would do anything for the job. Turner testified in an objective, straightforward manner and her testimony has been credited in its entirety.

19) Complainant's testimony about Respondent H. R. Satterfied's comments to her in August 1999 was not consistent with her

previous statements to Moore and does not comport with either the complaint she originally filed with the Agency or with the charges issued by the Agency as a result of her complaint. Contrary to her previous statements that Respondent H. R. Satterfield told her he was a married man and would have to check with his wife before hiring a woman, she testified he told her: "I'm a married man and I'm in this business with my wife and I think it could cause problems to have a female in the front – it could cause problems in the back, so me and my wife have decided not to hire a female." She further embellished her testimony by stating she assumed he meant it would cause trouble with the all-male mechanics she had observed in "the back" working on the cars when she submitted her application. The forum finds that the version Complainant reported to the Department and to BOLI at the time the conversation with Respondent happened is the more likely scenario and comports with Respondent's account. Additionally, the statements she made in her application for employment with Respondent further undermine Complainant's credibility. She claimed to be a business owner and that although she was still employed by the business she was just not needed at the time of her application. All of her claims pertaining to her ownership of and employment with Superior Roofing, including the status of her listed references, were contradicted by her husband's testimony. Accordingly, Complainant's testimony was not believed unless it was corroborated by other credible testimony or was inherently credible.

20) David Forster readily acknowledged having a "selective memory" and he was biased toward his wife, but he appeared to honestly convey what he perceived at the time relevant events occurred. Although he testified that Respondent H. R. Satterfield's comment to his wife upset her, caused her to "doubt herself," affected her enthusiasm about looking for a job, and lowered her housecleaning standards, he acknowledged that those effects were short lived. He credibly testified that despite Complainant's lack of enthusiasm for looking for work, she readily found employment at Bear Creek and thereafter went to work every day and met her household responsibilities without difficulty.

21) Cheri Forster's bias toward Complainant, her sister-in-law, was demonstrated during her exaggerated testimony pertaining to Complainant's damages. She claimed that after Complainant told her about Satterfield's comment, she observed Complainant crying a lot, laying in bed all day, not bathing for as many as three days at a time, and that she did Complainant's housework for six months following the comment because Complainant was "bedbound." However, she also testified that she and Complainant did not speak to each other for six months after the Satterfield comment because Complainant was

difficult to get along with and was treating the comment as "this crushed event thing." Both statements cannot be true and the forum believes neither. Her only credible testimony – that she and Complainant started working together at Bear Creek in September or October 1999, working the same shift six to ten hours per day, averaging eight hours per day with overtime – contradicted all of her previous statements. That testimony was believed only because Complainant's husband corroborated it. Accordingly, Cheri Forster's testimony was believed only when it was corroborated by other credible evidence in the record or was inherently credible.

22) Respondent H. R. Satterfield did not deny that he told Complainant he would have to check with his wife before hiring a woman. His purported reasons for making the statement to Complainant, however, are not consistent. He testified that his statement followed what he construed as a sexual overture by Complainant when she said to him she would do anything for the job. When defending his comment to the Department and BOLI, however, he stated he meant only to emphasize to Complainant his business relationship with his wife and the necessity of checking with her first before hiring someone. The forum finds neither reason particularly believable and relies solely on Respondent H. R. Satterfield's actual words, which are not in dispute, to conclude that Complainant's perception that his comment was discriminatory was not unreasonable.

23) Stella Satterfield's testimony was internally inconsistent and reflected her bias toward her husband and business partner. She stated they ultimately did not hire Complainant because they were "scared" of Complainant's comment that she would do "anything" for the job. Yet, in her earlier testimony she stated that she and her husband had decided to hire Complainant - despite the comment - because Complainant had good handwriting. Overall, her testimony was not reliable and the forum gave it little weight whenever it conflicted with other credible evidence in the record.

24) Betty Moore's testimony was credible. Although her contemporaneous notes consisted solely of cryptic entries in her computer, she demonstrated a clear recollection of her conversations with Respondent H. R. Satterfield and Complainant. The forum has credited her testimony in its entirety.

25) Janet Chatham testified in a straightforward, objective manner. She readily recalled her conversation with Respondent H. R. Satterfield and her memory was consistent with her contemporaneous notes. The forum credits her testimony in its entirety.

ULTIMATE FINDINGS OF FACT

1) At all times material, Respondents H. R. Satterfield and Stella Satterfield co-owned and operated as partners an automo-

tive repair shop under the assumed business name, The Tool Box, and engaged the personal services of one or more persons in the state of Oregon.

2) On July 20, 1999, Respondents, through the Jobs Plus program sponsored by the Oregon Employment Department, advertised an on the job training position at the rate of $6.50 per hour, 40 hours per week.

3) On July 27, 1999, Complainant was a female who applied for a training position with Respondents through the Jobs Plus program.

4) Respondent H. R. Satterfield told Complainant when she applied that he would have to check with his wife before hiring a woman.

5) Complainant reasonably perceived the comment to be discrimination based on her gender.

6) Complainant called the Oregon Employment Department and complained about Respondent H. R. Satterfield's comment.

7) Complainant was the most qualified of the applicants for the training position.

8) Respondents did not hire Complainant because she complained to the Oregon Employment Department about Respondent H. R. Satterfield's comment.

CONCLUSIONS OF LAW

1) At all material times, Respondents H. R. Satterfield and Stella Satterfield were employers subject to the provisions of ORS 659.010 to ORS 659.110.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter herein and the authority to eliminate the effects of any unlawful employment practices found. ORS 659.022; ORS 659.040; ORS 659.050.

3) The actions, inaction, and knowledge of Respondent H. R. Satterfield, a co-owner, operator, and agent of The Tool Box along with Stella Satterfield, are properly imputed to Respondent Stella Satterfield.

4) ORS 659.030(1) states, in pertinent part:

> "For the purposes of ORS 659.010 to 659.110 * * * it is an unlawful employment practice:
>
> " * * * * *
>
> "(f) For any employer to * * * discharge, expel or otherwise discriminate against any person because the person has opposed any practices forbidden by this section * * *."

Respondents discriminated against Complainant by refusing to hire her because she opposed Respondents' unlawful employment practice and, by doing so, violated ORS 659.030(1)(f).

OPINION

The Agency alleges Complainant was denied employment with Respondents because she opposed an unlawful employment practice. ORS 659.030(1)(f) makes it an unlawful employment practice:

> "For any employer to * * * discharge, expel or otherwise discriminate against any person because the person has opposed any practices forbidden by this section * * *." (Emphasis added)

Any person who asserts his or her rights under the statute is protected even if it is found that no discrimination occurred, as long as that person's belief that it occurred is reasonable. *In the Matter of Pzazz Hair Designs*, 9 BOLI 240, 254, 255 (1991).

In this case, Respondent H. R. Satterfield admits he told Complainant he was a married man and would have to check with his wife before hiring a woman for the Jobs Plus training position. He argues, however, that his response was precipitated by his belief that Complainant's statement "I will do anything for this job" was sexually motivated and, therefore, Complainant could not have reasonably inferred a discriminatory animus from his response. Evidence in the record does not support that contention. Respondent H. R. Satterfield never mentioned his purported belief that Complainant made sexual overtures to him when inquiring about her application for the training position to those who investigated the complaint. In fact, when questioned by Moore and Turner about his comment to Complainant, he emphasized to both that Complainant was his first choice for the position. He told both that his intent was to convey to Complainant his need to include his wife in the final decision making process because she was his business partner. At no time did he raise concerns about Complainant's demeanor toward him. Based on those facts, the forum infers Respondent H. R. Satterfield did not perceive Complainant's statement as sexually motivated at the time it was made. The forum concludes, therefore, Respondent H. R. Satterfield's statement to Complainant was enough to raise a question about Respondents' hiring practices and Complainant had the right under the statute to oppose what she reasonably perceived to be an unlawful employment practice.

RETALIATION

A preponderance of the credible evidence shows a causal connection between Respondents' decision not to hire Complainant and her complaint to the Department about Respondent H. R. Satterfield's statement. Respondent H. R. Satterfield readily acknowledged that Complainant was the best candidate of the three applicants for the job. He specifically asked Moore to let Complainant know she was being considered for the job and indicated to Moore she was the best

qualified. His anger about the complaint was made evident, however, when he called Janet Chatham, the Jobs Plus program representative, to complain about the complaint Complainant filed and the "type of people" the program was sending him. Chatham testified he repeatedly stated he "didn't need this kind of problem" and, by his attitude, conveyed to her that he was no longer interested in using the program. The forum infers from these facts that but for Complainant's complaint to the Department, Respondents would have hired her for the training position.

Because Respondent Stella Satterfield was a partner in the business and actively participated in making the decision not to hire Complainant, the forum finds she is jointly and severally liable for any damages Complainant suffered as a result of the unlawful retaliation. *See In the Matter of Lee's Café*, 8 BOLI 1, 16, 17 (1989).

COMPLAINANT'S DAMAGES

A. Back Wages

Back pay awards are intended to compensate a complainant for the loss of wages and benefits the complainant would have received but for the respondent's unlawful discrimination. The awards are calculated to make a complainant whole for injuries suffered as a result of the discrimination. *In the Matter of RJ's All-American Restaurant*, 12 BOLI 24 (1993). In hiring cases, back pay awards are determined by the pay received by the hired comparator during the relevant time period, less mitigation. *In the Matter of Alpine Meadows Landscape*, 19 BOLI 191 (2000). Here, as in the *Alpine Meadows* case, there is no comparator. No one was ever hired for the training position and there is no testimony indicating a date certain that Complainant would have started working in the position. Respondents testified and the job order submitted to the Department stated that the position paid $6.50 per hour for a 40-hour workweek. Evidence shows Respondents were still considering applicants on Tuesday, August 3, 1999, and that Complainant was the best candidate at that point. There is no evidence Respondents considered any other candidates after August 3. On the following Monday, August 9, Complainant notified the Department that she had heard nothing from Respondents and was going to file a formal complaint. Absent evidence to the contrary, the forum finds Complainant would have started her first day of work no later than Monday, August 9, 1999. The forum further finds she would have worked a 40-hour workweek at the rate of $6.50 per hour, as a trainee, until at least December 9, 1999, at which time Respondents, in accordance with the Jobs Plus training program, could have decided not to hire Complainant. Complainant mitigated her damages when she found replacement employment at Bear Creek for a similar duration and with similar hours and hourly wages. Complainant's right to

back wages ceased when she began employment with Bear Creek on October 11, 1999.[2] Accordingly, the forum calculates Complainant's damages for lost wages as follows: $6.50 per hour for 40 hours per week for nine weeks, which equals $2,340.

B. Mental Suffering

Awards for mental suffering are fact driven and limited to those damages that are a direct result of a respondent's unlawful practice. *In the Matter of Courtesy Express, Inc.*, 8 BOLI 139 (1989); *In the Matter of Baker Truck Corral, Inc.*, 8 BOLI 118 (1989). Here, Complainant gave no testimony regarding the effects of Respondents' retaliatory conduct. Instead, she testified only that she was "shocked" by Respondent H. R. Satterfied's comment which she perceived as discriminatory and that, as a result, she was "embarrassed that [she] was a woman looking for a job." There is no credible evidence to support Complainant's allegation in the Specific Charges that she suffered from "humiliation, embarrassment, distress, and impairment of personal dignity" due to the retaliation that was based on her opposition to an unlawful practice. In fact, evidence shows she found employment shortly after she determined she was not going to be hired by Respondents and while so employed was able to perform her job duties and meet her responsibilities at home without manifesting any mental anguish related to Respondents' failure to hire her. Any embarrassment she may have suffered prior to becoming employed at Bear Creek was mild, short term, and specifically related to Respondent H. R. Satterfield's comment, not his subsequent retaliatory action.

ORDER

NOW, THEREFORE, as authorized by ORS 659.010(2) and ORS 659.060(3), and to eliminate the effects of Respondents' violation of ORS 659.030(1)(f), and in payment of the damages awarded, the Commissioner of the Bureau of Labor and Industries hereby orders **H. R. Satterfield and Stella Satterfield** to:

1) Deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, a certified check payable to the Bureau of Labor and Industries in trust for Complainant Kateena Forster in the amount of TWO THOUSAND THREE HUNDRED AND FORTY DOLLARS ($2,340.00), less lawful deductions, representing wages lost by Kateena Forster between August 9 and October 11, 1999, as a result of Respon

[2] *See In the Matter of James Breslin*, 16 BOLI 200, 218 (1997), *affirmed without opinion, Breslin v. Bureau of Labor and Industries*, 158 Or App 247 (1999); *In the Matter of the City of Umatilla*, 9 BOLI 91 (1990), *affirmed without opinion, City of Umatilla v. Bureau of Labor and Industries*, 110 Or App 151 (1991).

dents' unlawful practices found herein.

2) Cease and desist from discriminating against any applicant for employment based upon the applicant's opposition to unlawful employment practices.

In the Matter of

USRA A. VARGAS

dba Leon's Complete Asphalt Maintenance

Case No. 67-01

Final Order of the Commissioner Jack Roberts

Issued October 24, 2001

SYNOPSIS

Respondent Usra A. Vargas employed Claimants as asphalt spreaders and failed to pay them all wages due upon their leaving employment, in violation of ORS 652.140. Respondent's failure to pay the wages was willful, and Respondent was ordered to pay civil penalty wages, pursuant to ORS 652.150. ORS 652.140; ORS 652.150.

The above-entitled case came on regularly for hearing before Linda A. Lohr, designated as Administrative Law Judge ("ALJ") by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on June 26, 2001, in the Bureau of Labor and Industries conference room located at 700 East Main, Suite 105, Medford, Oregon.

Cynthia L. Domas, an employee of the Agency, represented the Bureau of Labor and Industries ("BOLI" or "the Agency"). James John Chisem ("Claimant Chisem") was present throughout the hearing and was not represented by counsel. Martin Dean Cline ("Claimant Cline") was not present at the hearing. Usra Vargas ("Respondent") after being duly notified of the time and place of the hearing failed to appear in person and no one appeared on her behalf.

In addition to Claimant Chisem, the Agency called Deborah Garner, Claimant Chisem's friend, and BOLI Wage and Hour Division compliance specialist Margaret Pargeter as witnesses.

The forum received as evidence:

a) Administrative exhibits X-1 through X-18 (submitted or generated prior to hearing);

b) Agency exhibits A-1 through A-13 (filed with the Agency's case summary).

Having fully considered the entire record in this matter, I, Jack Roberts, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact (Procedural and on

the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) On or about August 31, 2000, Claimant Chisem filed a wage claim form stating Respondent had employed him from August 23 to August 27, 2000, and failed to pay him the agreed rate of $10.00 per hour for all hours worked.

2) At the time he filed his wage claim, Claimant Chisem assigned to the Commissioner of the Bureau of Labor and Industries, in trust for Claimant, all wages due from Respondent.

3) On or about September 1, 2000, Claimant Cline filed a wage claim form stating Respondent had employed him from August 18 to August 27, 2000, and failed to pay him the agreed rate of $15.00 per hour for all hours worked.

4) At the time he filed his wage claim, Claimant Cline assigned to the Commissioner of the Bureau of Labor and Industries, in trust for Claimant, all wages due from Respondent.

5) On November 2, 2000, the Agency served Respondent with an Order of Determination, numbered 00-3744. The Agency alleged Respondent had employed Claimant Chisem during the period August 23 to August 27, 2000, at the rate of $10.00 per hour and that Claimant Chisem had been paid all sums due and owing except for $375. The Agency further alleged Respondent had employed Claimant Cline during the period August 18 to August 27, 2000, at the rate of $15.00 per hour and that Claimant Cline had been paid all sums due and owing except for $945. The Agency alleged Respondent's failure to pay Claimants was willful and Respondent, therefore, was liable to Claimant Chisem for $2,400 as penalty wages, plus interest and to Claimant Cline for $3,600 as penalty wages, plus interest. The Order of Determination gave Respondent 20 days to pay the sums, request an administrative hearing and submit an answer to the charges, or demand a trial in a court of law.

6) Respondent filed a timely answer and request for hearing. In her answer, Respondent stated the following:

> "Both Mr. Chisem and Mr. Dean [*sic*] accepted as a condition of employment that they would be paid at the completion of the contract (see enclosed copy of contract.). Their demand for payment and walking off the job, when it was not forthcoming, delayed the work and gave the customer an excuse to withold [*sic*] payment.
>
> "When Robin McElroy refused to honor the contract I notified both workers that I was going to have to take legal action to get our pay and that when I succeeded I would pay them. (see copies of letter of demand and suit filed in small claims court)

"Mr. Chisem and Mr. Cline have failed to report their rate of pay correctly. Mr. Chisem was hired at $8.00 for the first two hours and then advanced to $10.00 both because he had a legal ODL and was able to move equipment, use my car to bring his co-workers to work and was a good worker. Mr. Cline was hired at $8.00 for the first two hours which I waived and started him at $10.00 when I saw his level of experience. The only promise of more pay was to be in the form of a bonus if we finished in a timely manner and would probably have brought his pay to $12.00 an hour. However, that did not happen.

"Mr. Cline did not have an ODL and his agreement was that he would not drive my car even though it was parked at his house during mid-day breaks and at night. On Saturday August 26th Mr. Chisem went to pick up Mr. Cline and another worker at Mr. Cline's house. Not only were they not there but my car was gone. Mr. Chisem got a ride to the job site and waited awhile and when no one showed up he went home.

"Mr. Cline was not seen again until 8:00 AM the next morning when he arrived at the job site an hour later driving my car. When I confronted him about the potential liability of driving my car illegally and pointed out he was breaking his word to me, he made excuses for his behavior and became sullen when I said I would no longer make my car available.

"On Sunday August 27th during mid-day break Mr. Chisem took the large tank truck off the job site without my permission and against Mr. Cline's instructions. He went to his brother's house to borrow money to buy cigarettes and a cold drink. He ran out of gas, parked the truck illegally and came back to the job site on foot. I took him to buy gas and we were unable to get the truck started. His actions resulted in a parking ticket being issued which cost the company $30.00 and a loss of work time having to haul the sealcoat to the job site in buckets until we could get the tank truck moved. Mr. Chisem walked off the job when the truck did not start and did not return to help after that.

"Mr. Cline and another worker failed to follow my suggestion that they mask a cement drain, curbing and the edge of the building and made a mess with sealcoat that took 6 man hours to clean up. They agreed to clean up their mess at their own expense but walked off the job before doing so. Mr. Cline failed to deduct 3 hours.

"My records show that James Chisem worked:

"Week ended 8-16/00

"Sun	Mon	Tue	Wed	Thur	Fri	Sat
"		5	9	5	8.5	

"Week ended 09/02/00

"Sun Mon Tue Wed Thur Fri Sat

" 4

"My records show that Martin Cline worked:

"Week ended 8-19/00

"Sun Mon Tue Wed Thur Fri Sat

" 10 6

"Week ended 8/26/00

"Sun Mon Tue Wed Thur Fri Sat

" 10 6 8 8 4

"Week ended 8/26/00

"Sun Mon Tue Wed Thur Fri Sat

" 10

"I also gave a $10.00 draw in the form of cigarettes and beer to Mr. Chisem and $15.00 of the same to Mr. Cline. If you need more information please feel free to call me at (541) 770-7002. U. Abra Vargas."

7) On February 2, 2001, the Agency requested a hearing. On February 16, 2001, the Hearings Unit issued a Notice of Hearing stating the hearing would commence at 9:00 a.m. on June 26, 2001. With the Notice of Hearing, the forum included a copy of the Order of Determination, a "SUMMARY OF CONTESTED CASE RIGHTS AND PROCEDURES" and a copy of the forum's contested case hearings rules, OAR 839-050-0000 to 839-050-0440.

8) On April 30, 2001, the forum issued a case summary order requiring the Agency and Respondent to submit case summaries that included: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a brief statement of the elements of the claim (for the Agency only); a brief statement of any defenses to the claim (for Respondent only); a statement of any agreed or stipulated facts; and any wage and penalty calculations (for the Agency only). The forum ordered the participants to submit their case summaries by June 15, 2001, and advised them of the possible sanctions for failure to comply with the case summary order.

9) On May 30, 2001, the Agency filed a motion for partial summary judgment with supporting documentation, alleging there was no dispute as to a number of material facts and the Agency was entitled to prevail on its claims for a minimum amount of wages due and owing and civil penalty wages as a matter of law.

10) On June 5, 2001, the forum issued an order requiring Respondent to respond to the Agency's motion for partial summary judgment, in writing, no later than June 11, 2001. Respondent did not file any opposition to the Agency's motion.

11) On June 14, 2001, the Agency filed its case summary. Respondent did not file a case summary.

12) On June 21, 2001, the ALJ denied the Agency's motion for partial summary judgment, finding there were genuine issues of material fact regarding the amounts paid to each Claimant by Respondent.

13) Respondent did not appear at the time and place set for hearing and no one appeared on her behalf. Respondent had not notified the forum she would not be appearing at the hearing. Pursuant to OAR 839-050-0330(2), the ALJ waited 30 minutes past the time set for hearing. When Respondent failed to appear, the ALJ found her to be in default and began the hearing.

14) The Agency waived the ALJ's recitation of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

15) At hearing, the Agency stipulated that Respondent had paid Claimant Cline wages totaling $320.00.

16) After the hearing, the ALJ, on her own motion, amended the caption in this matter to correct a spelling error and conform the caption to the Agency's Order of Determination, numbered 00-3744.

17) The ALJ issued a proposed order on September 25, 2001, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. Neither the Agency nor Respondent filed exceptions.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent Usra A. Vargas, an individual, owned and operated an asphalt maintenance company under the assumed business name, Leon's Complete Asphalt Maintenance, and engaged or used the personal services of one or more employees in Oregon.

2) Claimant Chisem worked for Respondent as an asphalt spreader from August 23 through August 27, 2000. Claimant Cline, who was Claimant Chisem's brother-in-law, offered Chisem the job at a site formerly known as the Kopper Kitchen in Medford, Oregon. Claimant Cline worked for Respondent from August 18 through August 27, 2000. Cline, who also supervised the job, told Claimant Chisem when and where to show up for work and what his hours would be each day.

3) Respondent agreed to pay Claimant Chisem at least $8.00 per hour for the first two hours of his employment and $10.00 per hour thereafter.

4) Respondent agreed to pay Claimant Cline $15.00 per hour for the work Cline performed for Respondent.

5) When Claimant Cline filed his wage claim, he provided the Wage and Hour Division compliance specialist a weekly calendar that shows the days worked and handwritten start and stop times for himself ("Marty"), Claimant Chisem ("Jim"), and another worker ("Leo") between August 18 and August 27, 2000. The calendar denotes the following as the days and number of hours Cline and Chisem worked:

Claimant Cline

August 18, 2000 (12 hours)

August 19, 2000 (6 hours)

August 20, 2000 (10 hours)

August 24, 2000 (5 hours)

August 25, 2000 (8 hours)

August 26, 2000 (5 hours)

August 27, 2000 (4 hours)

Claimant Chisem

August 24, 2000 (5 hours)

August 25, 2000 (8 hours)

August 26, 2000 (9 hours)

August 27, 2000 (4 hours)

6) At the time they filed their wage claims, Claimants wrote down the hours they worked on blank calendars provided by the Agency. Claimant Chisem stated he worked 37.5 hours and Claimant Cline stated he worked 65 hours during the wage claim period.

7) Respondent admits, and the forum accepts as fact, that from August 23 through August 27, 2000, Claimant Chisem worked at least 31.5 hours. For two of those hours, Chisem earned $16.00, calculated at the rate of $8.00 per hour. For the remaining 29.5 hours, Chisem earned $295.00, calculated at the rate of $10.00 per hour, totaling $311.00 in wages earned. Respondent did not pay Chisem for any of the hours he worked.

8) Respondent admits, and the forum accepts as fact, that from August 18 through August 27, 2000, Claimant Cline worked at least 62 hours. For those hours, Cline earned $930.00, calculated at the rate of $15.00 per hour. Respondent paid Cline wages totaling $320.00, leaving $610.00 in wages due and owing.

9) Claimants' last day of work for Respondent was August 27, 2000.

10) On October 6, 2000, Respondent returned to the Agency a "Wage Claim Investigation/Employer Response" form on which she stated that Claimant Cline's "agreed upon rate at hire" and "agreed upon rate at termination" was "$15.00 hourly." Respondent also stated the following: "I have not paid these people because my contract has not been paid by the business owner [and] I am being forced to take her to small claims court for $2,850 [and] costs. I will settle up with Jim and Marty when I collect." Respondent certified that the document was a "complete, true and accurate statement of the facts relating to the claim to the best of my knowledge and belief."

11) At the time of hearing, Respondent had not paid Claimants all of their wages due and owing.

12) The forum computed civil penalty wages as follows for Claimant Chisem, in accordance with ORS 652.150: $10.00 per hour multiplied by 8 hours per day equals $80.00; $80 per day multiplied by 30 days equals $2,400.

` 13) The forum computed civil penalty wages as follows for Claimant Cline, in accordance with ORS 652.150: $15.00 per day multiplied by 8 hours per day

equals $120.00 per day; $120.00 per day multiplied by 30 days equals $3,600.

ULTIMATE FINDINGS OF FACT

1) Respondent at all times material herein was a person doing business in the state of Oregon and engaged the personal services of one or more employees in the operation of that business.

2) Respondent employed Claimants Cline and Chisem between August 18 and August 27, 2000.

3) Respondent agreed to pay Claimant Chisem $8.00 per hour for the first two hours he worked and $10.00 for each hour thereafter.

4) Respondent agreed to pay Claimant Cline $15.00 per hour.

5) Claimant Chisem worked 31.5 hours between August 23 and August 27, 2000. At the agreed upon rate of $8.00 per hour, Claimant Chisem earned $16.00 and at the agreed upon rate of $10.00 per hour, Claimant Chisem earned $295.00 in wages, totaling $311.00 in wages earned.

6) Claimant Cline worked 62 hours between August 18 and August 27, 2000. At the agreed upon rate of $15.00 per hour, Claimant Cline earned $930.00 in wages.

7) Respondent owes Claimant Chisem $311.00.

8) Respondent owes Claimant Cline $610.00, which represents $930.00 wages earned, minus $320.00 in wages paid to Claimant Cline by Respondent.

9) Respondent willfully failed to pay Claimant Chisem the $311.00 in earned, due and payable wages. Respondent has not paid the wages owed and more than 30 days have elapsed from the date the wages were due.

10) Respondent willfully failed to pay Claimant Cline the $610.00 in earned, due and payable wages. Respondent has not paid the wages owed and more than 30 days have elapsed from the date the wages were due.

11) Civil penalty wages computed for Claimant Chisem, pursuant to ORS 652.150, equal $2,400.

12) Civil penalty wages computed for Claimant Cline, pursuant to ORS 652.150, equal $3,600.

CONCLUSIONS OF LAW

1) During all times material herein, Respondent was an employer and Claimants were employees subject to the provisions of ORS 652.110 to 652.200 and 652.310 to 652.405. During all times material herein, Respondent employed Claimants.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and the Respondent herein. ORS 652.310 to 652.414.

3) ORS 652.140 provides in pertinent part:

> "(1) Whenever an employer discharges an employee or

where such employment is terminated by mutual agreement, all wages earned and unpaid at the time of such discharge or termination shall become due and payable not later than the end of the first business day after the discharge or termination.

"(2) When an employee who does not have a contract for a definite period quits employment, all wages earned and unpaid at the time of quitting become due and payable immediately if the employee has given to the employer not less than 48 hours' notice, excluding Saturdays, Sundays and holidays, of intention to quit employment. If notice is not given to the employer, the wages shall be due and payable within five days, excluding Saturdays, Sundays and holidays, after the employee has quit, whichever event first occurs."

Claimants' last day of work was August 27, 2000, but the record does not establish whether they quit or were fired. Even assuming Claimants quit without notice, their wages would have been due no later than September 1, 2000. Respondent violated ORS 652.140(2) by failing to pay Claimants all wages earned and unpaid by that date. For Claimant Chisem, those wages amount to $311.00. For Claimant Cline, those wages amount to $610.00.

4) ORS 652.150 provides:

"If an employer willfully fails to pay any wages or compensation of any employee whose employment ceases, as provided in ORS 652.140 and 652.145, then, as a penalty for such nonpayment, the wages or compensation of such employee shall continue from the due date thereof at the same rate until paid or until action therefor is commenced; provided, that in no case shall such wages or compensation continue for more than 30 days from the due date; and provided further, the employer may avoid liability for the penalty by showing a financial inability to pay the wages or compensation at the time they accrued."

Respondent is liable for $2,400 in civil penalties under ORS 652.150 for willfully failing to pay all wages or compensation to Claimant Chisem when due and $3,600 in civil penalties under ORS 652.150 for willfully failing to pay all wages or compensation to Claimant Cline when due as provided in ORS 652.140(2).

5) Under the facts and circumstances of this record, and according to the applicable law, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondent to pay Claimants their earned, unpaid, due and payable wages and the civil penalty wages, plus interest on both sums until paid. ORS 652.332.

OPINION

DEFAULT

When Respondent failed to appear at hearing and no one appeared on her behalf, the forum found Respondent in default pursuant to OAR 839-050-0330. The Agency, therefore, needed only to establish a prima facie case on the record to support the allegations in its charging document. *In the Matter of Sealing Technology*, Inc., 11 BOLI 241 (1993). Respondent's only contribution to the record was her answer filed with her request for hearing. Where default occurs, the forum may give some weight to unsworn assertions contained in an answer unless other credible evidence controverts them. If a respondent is found not to be credible the forum need not give any weight to the assertions, even if they are uncontroverted. *In the Matter of Keith Testerman*, 20 BOLI 112, 127 (2000). In this case, the forum credited Respondent's answer only to the extent that it contains admissions of a party opponent.

AGENCY'S PRIMA FACIE CASE

The Agency was required to prove: 1) that Respondent employed Claimants; 2) Respondent agreed to pay Claimant Chisem $10.00 per hour and Claimant Cline $15.00 per hour for the work each performed; 3) that 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 Barbara Coleman*, 19 BOLI 230 (2000). Based on Respondent's answer, the forum finds there is no dispute that Respondent employed Claimants during the relevant period, that she agreed to pay them at a fixed rate higher than the minimum wage, and that she did not pay them for the work they performed. The remaining issues are the specific amount of the agreed upon rate and the amount and extent of the work Claimants performed for Respondent.

AGREED UPON RATE

A. Claimant Chisem

Claimant Chisem testified his starting pay was $9.00 per hour and that on his second workday Respondent increased his pay to $10.00 per hour. Claimant Chisem acknowledged, however, that it was Claimant Cline, and not Respondent, who told him what his wage rate would be before he started work for Respondent. Neither Respondent nor Claimant Cline testified and the evidence in the record is insufficient to determine whether Cline had the authority to offer Chisem a specific amount of compensation on behalf of Respondent. Respondent admits, however, and the forum concludes, that she agreed to pay Claimant Chisem $8.00 per hour for the first two hours he worked and $10.00 per hour thereafter.

B. Claimant Cline

Claimant Cline did not testify, but on his wage claim form he claimed his pay rate was $15.00

per hour. Respondent's contention in her answer that she agreed to pay Cline only $10.00 per hour is contradicted by her initial response to the Agency in which she certified that the "agreed upon rate of pay at hire" and the "agreed upon rate at termination" was $15.00 per hour. The forum finds the latter more reliable because it was a contemporaneous certified statement, made to the Agency before a charging document in this matter was issued, and concludes Respondent agreed to pay Claimant Cline $15.00 per hour for the work he performed.

HOURS WORKED

ORS 653.045 requires Respondent to keep and maintain proper records of wages, hours and other conditions and practices of employment. Where the forum concludes an employee performed work for which he or she was not properly compensated, it becomes the employer's burden to produce all appropriate records to prove the precise hours and wages involved. *In the Matter of Diran Barber*, 16 BOLI 190 (1997), *quoting Anderson v. Mt. Clemens Pottery Co.*, 328 US 680 (1946).

Here, Respondent does not deny Claimants performed work for which they were not properly compensated. Moreover, in her answer, Respondent acknowledged that, according to her records, Claimant Chisem worked 31.5 hours and Claimant Cline worked 62 hours. Evidence shows Respondent's "records" were never turned over to the Agency and she did not appear at hearing with evidence to support her statement of the hours Claimants worked.

Where the employer produces no records, the Commissioner may rely on evidence produced by the Agency "to show the amount and extent of the employee's work as a matter of just and reasonable inference and then may award damages to the employee, even though the result be only approximate." *Id.* at 196-97, *quoting Anderson v. Mt. Clemens Pottery Co.*, 328 at 687-88. This forum will accept 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 - where that testimony is credible. *In the Matter of Graciela Vargas*, 16 BOLI 246 (1998). In this case, there is a discrepancy between the hours each Claimant reported they worked on the Agency form calendars and the hours recorded for both on the calendar Claimant Cline provided to the Agency when he filed his wage claim.[1] Claimant Cline did not testify, and Claimant Chisem did not explain the discrepancy during his testimony. Moreover, Chisem testified that he filled out the form calendar using a personal time record he maintained during his employment, but that he could not produce it at hearing because he had turned his records over to the Agency during the wage claim in-

[1] *See* Findings of Fact – The Merits 5 & 6

vestigation. Since the only evidence of what can be construed as a contemporaneous record is Cline's calendar, which conflicts with the form calendars Claimants filled out for the Agency, the forum finds Chisem's testimony and the documentary evidence of hours worked unreliable and insufficient to determine the amount and extent of the work Claimants performed. The forum will not speculate or draw inferences about wages owed based on insufficient, unreliable evidence. *In the Matter of Ann L. Swanger*, 19 BOLI 42, 57 (1999), *citing In the Matter of Burrito Boy, Inc.*, 16 BOLI 1, 12 (1997).

On the other hand, despite Respondent's failure to provide the Agency with any time records, she admits Claimants performed a specific number of hours that is not radically different than the number reported by Claimants. The forum, therefore, finds Claimant Chisem performed 31.5 hours of work for Respondent. He was entitled to receive $8.00 per hour for the first two hours he worked and $10.00 per hour thereafter, for a total of $311.00. Contrary to Respondent's unsworn assertion in her answer, there is no evidence that Respondent advanced or otherwise paid Claimant Chisem any wages. Respondent therefore owes Claimant Chisem $311.00 in unpaid wages.

The forum further finds Claimant Cline performed 62 hours of work for Respondent. He was entitled to receive $15.00 per hour for the hours he worked, for a total of $930.00. Respondent paid Claimant Cline $320 in wages and therefore owes him $610.00 in unpaid wages.

PENALTY WAGES

An award of penalty wages turns on the issue of willfulness. Willfulness does not imply or require blame, malice, wrong, perversion, or moral delinquency, but only requires that that which is done or omitted is intentionally done with knowledge of what is being done and that the actor or omittor be a free agent. *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976).

Respondent, as an employer, had a duty to know the amount of wages due to her employees. *McGinnis v. Keen*, 189 Or 445, 221 P2d 907 (1950); *In the Matter of Jack Coke*, 3 BOLI 238 (1983). In her answer, Respondent argues that she intended to pay Claimants when her "customer" against whom she had legal action pending paid her. That circumstance does not pose a defense. Indeed, it only serves to show she voluntarily and as a free agent failed to pay Claimants all of the wages they earned from August 18 through August 27, 2000. The forum finds Respondent acted willfully and is liable for penalty wages under ORS 652.150.

Claimants' last day of work was August 27, 2000. Their wages were due and payable on September 1, 2000. *See* ORS 652.140. Penalty wages, therefore, are assessed and calculated

in accordance with ORS 652.150 in the amount of $2,400 and $3,600 for Claimants Chisem and Cline, respectively. These figures are computed by multiplying, in Claimant Chisem's case, $10.00 per hour, and, in Claimant Cline's case, $15.00 per hour by 8 hours per day multiplied by 30 days. *See* ORS 652.150 and OAR 839-001-0470.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, and as payment of the unpaid wages, **Usra A. Vargas**, is hereby ordered to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, the following:

A certified check payable to the Bureau of Labor and Industries, in trust for Claimant James John Chisem, in the amount of TWO THOUSAND SEVEN HUNDRED AND ELEVEN DOLLARS ($2,711), less appropriate lawful deductions, representing $311.00 in gross earned, unpaid, due and payable wages and $2,400 in penalty wages, plus interest at the legal rate on the sum of $311.00 from September 1, 2000, until paid and interest at the legal rate on the sum of $2,400 from October 1, 2000, until paid; and

A certified check payable to the Bureau of Labor and Industries, in trust for Claimant Martin Dean Cline, in the amount of FOUR THOUSAND TWO HUNDRED AND TEN DOLLARS ($4,210), less appropriate lawful deductions, representing $610.00 in gross earned, unpaid, due and payable wages and $3,600 in penalty wages, plus interest at the legal rate on the sum of $610.00 from September 1, 2000, until paid and interest at the legal rate on the sum of $3,600 from October 1, 2000, until paid.

In the Matter of

SQDL CO. fka: Square Deal Lumber Yard of Silverton,

Case Nos. 117-00 and 11-01

Final Order of the Commissioner Jack Roberts

Issued November 13, 2001

SYNOPSIS

The Agency's Orders of Determination alleged that Design-Build Construction, Inc. failed to pay 34 wage claimants a total of $70,759.63 in wages due upon termination, in violation of ORS 652.140; that $47,046.31 of that sum was paid to the claimants out of the Wage Security Fund; that SQDL Co. was a "successor" employer to Design-Build Construction, Inc. under ORS 652.310; and that SQDL Co. was liable to repay $47,046.31, plus a

twenty-five percent penalty of $11,761.58, to the Wage Security Fund, as well as the remaining $23,713.32 in unpaid wages. The Commissioner found that SQDL Co. was not a "successor" employer under ORS 652.310 and dismissed the Orders of Determination. ORS 652.140, ORS 652.310, ORS 414.

———————

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Jack Roberts, Commissioner of the Bureau of Labor and Industries ("BOLI") for the State of Oregon. The hearing was held on April 18, 19, and 20,[1] 2001, at BOLI's office located at 3865 Wolverine St. NE, E-1, Salem, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter Cynthia L. Domas, an employee of the Agency. Respondent was represented by Carl H. Brumund, attorney at law. Eugene ("Gene") Pfeifer, president of Design-Build Construction, Inc. and SQDL Co., was present throughout the hearing to assist in the presentation of Respondent's case.

The Agency called as witnesses: Lynn Lebold, Respondent's former office manager; Newell Enos, BOLI Wage and Hour Division compliance specialist; Marie Ginder, [2] former office manager and controller for Design-Build Construction, Inc.; Faith Akin, former assistant to Gene Pfeifer; and Roger Stuckart, former senior project manager for Design-Build Construction, Inc.

Respondent called as witnesses: Gene Pfeifer; Ronald Pfeifer, Gene Pfeifer's brother and part owner of SQDL Co.; and Enos.

The forum received into evidence:

a) Administrative exhibits X-1 through X-33 (submitted or generated prior to hearing);

b) Agency exhibits A-1 through A-41 (submitted prior to hearing);

c) Respondent exhibits R-1 (pp.1-25, 35-54, and 63-148), R-2, R-5, R-6, R-8 through R-11, R-14 and R-15 (submitted prior to hearing), and R-16 through R-19 (submitted at hearing).

Having fully considered the entire record in this matter, I, Jack Roberts, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact (Procedural and on the Merits), Ultimate Findings of

[1] On April 20, 2001, the Agency case presenter and Respondent's counsel made their closing arguments from BOLI's Salem office via speakerphone to the ALJ, who was located in his Eugene office.

[2] Ginder's last name was Mashburn during her employment with Design Build Construction.

Fact, Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) On March 10, 2000, the Agency issued Order of Determination No. 00-0958 in which it alleged the following:

(a) Thirty (30) separate wage claimants filed wage claims with the Agency[3] and assigned those claims to the Agency, alleging that they were all employed in Oregon by "SQDL Company fka: Square Deal Lumber Yard of Silverton as a successor to Design/Build Construction, Inc., d.b.a. Pfeifer Construction and d.b.a. Pfeifer Homes," and that they performed work, labor and services for the employer and were paid all sums due and owing except the sum of $66,868.46 in unpaid wages, which is due and owing along with interest at the legal rate per annum from November 1, 1999, until paid.

(b) Pursuant to ORS 652.414, the Agency determined that the wage claimants were entitled to receive payment from the Wage Security Fund ("WSF") in the sum of $47,046.31.

(c) The wage claimants received payment in the amount of $47,046.31 from the WSF.

(d) The Commissioner of the Bureau of Labor and Industries is entitled by ORS 652.414(2) to recover from the employer the amount paid from the WSF, together with a penalty of 25 percent of the sum paid from the WSF, which amount is $11,761.58, along with interest at the legal rate per annum from March 1, 2000, until paid.

2) On March 20, 2000, Respondent, through counsel William D. Brandt, filed an answer and request for hearing. Respondent denied all the substantive allegations in the Order of Determination and requested a hearing. Respondent affirmatively alleged that "Square Deal Company is not a successor employer and has never been an employer" of the thirty wage claimants.

3) On August 3, 2000, the Agency filed a "BOLI Request for Hearing" with the forum.

4) On November 14, 2000, the Hearings Unit issued a Notice of Hearing in case 11-01 to Respondent and the Agency stating the time and place of the hearing as January 30, 2001, at 9:00 a.m., at BOLI's Salem office located at 3865 Wolverine St. NE, E-1, Salem. Together with the Notice of Hearing, the forum sent a copy of the Order of Determination, a

[3] The wage claimants, total unpaid wages, amount paid by the WSF, and remaining unpaid wages are listed in Appendix A to this Final Order. Appendix A also incorporates wage claims made in the Agency's subsequent Amended Order of Determination that do not involve payouts by the WSF. See Finding of Fact – Procedural 5 and footnote 2, *infra*.

document entitled "Summary of Contested Case Rights and Procedures" containing the information required by ORS 183.413, and a copy of the forum's contested case hearings rules, OAR 839-050-000 to 839-050-0440.

5) On September 8, 2000, the Agency issued an Amended Order of Determination No. 00-3641 in which it alleged the following:

(a) Twenty-five (25) separate wage claimants filed wage claims with the Agency[4] and assigned those claims to the Agency, alleging that they were all employed in Oregon by "SQDL Company fka: Square Deal Lumber Yard of Silverton as a successor to Design/Build Construction, Inc., d.b.a. Pfeifer Construction and d.b.a. Pfeifer Homes," and that they performed work, labor and services for the employer and were paid all sums due and owing except the sum of $23,713.32 in unpaid wages, which is due and owing along with interest at the legal rate per annum from November 1, 1999, until paid.

6) On October 9, 2000, the Agency issued a Notice of Intent to Issue Final Order by Default stating that the Agency had not yet received an answer or request for hearing and that if no answer or request for hearing or court trial was received by October 19, 2000, the Agency would issue a Final Order by Default.

7) On October 19, 2000, Respondent, through counsel William D. Brandt, filed an answer and request for hearing. Respondent denied all the substantive allegations of the Amended Order of Determination.

8) On November 9, 2000, the Agency filed a second "BOLI Request for Hearing" with the forum.

9) On November 14, 2000, the Hearings Unit issued a Notice of Hearing in case 11-01 to Respondent and the Agency stating the time and place of the hearing as January 30, 2001, at 9:00 a.m., at BOLI's Salem office located at 3865 Wolverine St. NE, E-1, Salem. Together with the Notice of Hearing, the forum sent a copy of the Order of Determination, a document entitled "Summary of Contested Case Rights and Procedures" containing the information required by ORS 183.413, and a copy of the forum's contested case hearings rules, OAR 839-050-000 to 839-050-0440.

10) On November 16, 2000, the Agency filed a motion to consolidate hearings in cases 11-01 and 117-00.

11) On November 17, 2000, the ALJ issued an interim order stating that Respondent had seven days to file a response to the Agency's motion to consolidate.

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[4] The wage claimants, total unpaid wages, amount paid by the WSF, and remaining unpaid wages have been incorporated into Appendix A to this Final Order.

12) Respondent did not file a response to the Agency's motion to consolidate. On November 29, 2000, the ALJ granted the Agency's motion based on the Agency's representation that the cases involved the same Respondent and had a number of common issues and witnesses.

13) On November 30, 2000, the forum ordered the Agency and Respondent each to submit a case summary including: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a brief statement of the elements of the claim (for the Agency only); a brief statement of any defenses to the claim (for Respondent only); a statement of any agreed or stipulated facts; and any wage and penalty calculations (for the Agency only.) The forum ordered the participants to submit case summaries no later than October 27, 2000, and notified them of the possible sanctions for failure to comply with the case summary order.

14) On January 8, 2001, the Agency filed a letter it had received from Carla French of the law firm of Feder Casebeer & French LLP stating that William Brandt, who had been representing Respondent, had been suspended from the practice of law for 13 months, that Brandt was therefore no longer representing SQDL, and that no other attorney in the firm would be representing Respondent. French's letter advised the agency case presenter that Gene Pfeifer had not obtained new counsel and that the case presenter could contact Pfeifer directly regarding the case.

15) On January 8, 2001, the ALJ issued an interim order notifying Respondent that all corporations or unincorporated associations must be represented by an attorney or an authorized representative at all stages of the hearing.

16) On January 8, 2001, the ALJ issued an amended case summary order, along with a form designed to assist unrepresented respondents in complying with the case summary order and mailed it to Carla French and Gene Pfeifer.

17) On January 19, 2001, the Agency filed its case summary, along with attached exhibits A-1 through A-41.

18) On January 20, 2001, the Agency filed Exhibits "A" and "B" of the Agency's case summary, stating they had been inadvertently omitted when the Agency filed its case summary.

19) On January 22, 2001, the Agency filed a letter advising that Debra Kay Maloney-Bolsinger would be testifying by telephone.

20) On January 24, 2001, Carl H. Brumund, attorney at law, filed a motion for a postponement "on behalf of Gene Pfeifer, not in his individual capacity but only as Trustee of the John A. Pfeifer Trust."

21) On January 25, 2001, the Agency filed objections to the motion for postponement on the bases that: (a) the John A. Pfeifer

Trust was not a party and therefore lacked standing to request a continuance; and (b) the motion was untimely.

22) On January 25, 2001, the ALJ conducted a prehearing conference with Ms. Domas and Mr. Brumund regarding the motion for postponement. That same day, the ALJ issued an interim order granting the motion for postponement based on the recent suspension of Mr. Brandt, Mr. Brumund's representation that he would be representing Respondent at the hearing and the recent assignment of the case to Mr. Brumund, and the complexity of the case and Mr. Brumund's corresponding need to prepare for hearing. The ALJ concluded that Respondent had shown good cause and there was no reasonable alternative to postponement. In the interim order, the ALJ also required the participants to indicate available dates for hearing in March, April, May, and June by February 6, 2001.

23) On January 25 and 26, 2001, the Agency and Respondent's counsel provided dates of availability for hearing.

24) On February 1, 2001, the ALJ issued an interim order resetting the hearing date for April 18, 2001. The ALJ also ordered that persons already served with subpoenas were required to honor those subpoenas at the new time and date set for hearing.

25) On February 23, 2001, the ALJ issued a second amended case summary order to Ms. Domas and Mr. Brumund. In the order, the forum acknowledged that the Agency had already submitted its case summary and served a copy on Gene Pfeifer and that the Agency was not required to serve a copy on Mr. Brumund unless he requested service.

26) On April 6, 2001, Respondent filed its case summary, along with attached exhibits R-1 through R-15.

27) At the outset of the hearing, the ALJ explained the issues involved in the hearing, the matters to be proved, and the procedures governing the conduct of the hearing.

28) Prior to opening statements, Respondent and the Agency stipulated to the admissibility of exhibits A-1 through A-41, R-14, and R-15.

29) Prior to opening statements, Respondent stipulated to the validity of the $47,046.31 in wage claims made by the wage claimants listed in the appendix to the Order of Determination that was paid out by the WSF and $23,713.32 in wage claims made by the wage claimants listed in the appendix to the Amended Order of Determination.

30) Prior to opening statements, Respondent stipulated that the Commissioner had made a determination that the wage claimants referred to in the appendix to the Order of Determination were entitled to and had received payment from the WSF in the amount of $47,046.31.

31) Prior to opening statements, the Agency moved to amend its Order of Determination and Amended Order of Determination to reflect that the Agency was seeking a total of $47,046.31 for reimbursement to the WSF, with a 25% penalty, and $23,713.32 in additional unpaid wages. Respondent did not object and the amendment was granted.

32) At the conclusion of the Agency's case, Respondent moved to dismiss the case on the grounds that the Agency had not presented enough evidence to establish a prima facie case. The ALJ denied Respondent's motion on the grounds that the Agency had arguably presented sufficient evidence to make out its prima facie case.

33) On September 5, 2001, the ALJ issued a proposed order that included a notification to the participants that they were entitled to file exceptions to the proposed order within ten days of its issuance. On September 7, 2001, the Agency requested an extension of time to file exceptions until October 19, 2001. Respondent did not object and the ALJ granted the motion. On September 28, 2001, Respondent filed an exception pointing out an omission that has been corrected in this Final Order. On the same date, Respondent's attorney Brumund notified the forum he was withdrawing as Respondent's counsel. The Agency did not file exceptions.

FINDINGS OF FACT – THE MERITS

1945-1995

1) In 1945, John A. Pfeifer ("J. Pfeifer") started a construction business called John A. Pfeifer Construction Co. ("JAPCC") in Silverton, Oregon. In 1953, he opened a retail lumber and hardware store called Square Deal Lumber Yard of Silverton ("Square Deal"), which did business out of a building and yard located at 600 North Water Street, Silverton, Oregon.

2) In 1968, Gene Pfeifer ("G. Pfeifer"), one of J. Pfeifer's sons, went to work for JAPCC. In 1974, G. Pfeifer became an equal partner with J. Pfeifer in the company. In 1987, G. Pfeifer bought out J. Pfeifer's interest, and J. Pfeifer became an employee of JAPCC.

3) From its inception until sometime in the 1970s, JAPCC operated out of the same building as Square Deal. In the 1970s, JAPCC needed more space and built a 500 square foot addition onto Square Deal's 30,000 square foot building. The addition contained three new offices, used only by JAPCC's employees.

4) In the 1980s, JAPCC built another building on the same city block on which Square Deal was located. This building, located at the address of 622 N. Water St., became JAPCC's principal office.

5) In 1989, G. Pfeifer incorporated Design-Build Construction, Inc. ("DBCI"), an Oregon corporation with its primary place of

business stated as "622 North Water Street, Silverton, Oregon" in the corporate bylaws. Four other existing companies – JAPCC, Pfeifer Homes, Pfeifer Companies, and Pfeifer Construction -- continued to operate as assumed business names of DBCI G. Pfeifer became DBCI's president.

6) In 1993, J. Pfeifer incorporated Square Deal Lumber Yard as SQDL Co. ("SQDL"), an Oregon corporation with its primary place of business stated as "600 North Water Street, Silverton, Oregon" in the corporate bylaws. Pfeifer also made provision to give about seven percent of the stock in SQDL Co. to each of seven persons, including G. Pfeifer. From that time on, SQDL has operated under the assumed business name of Square Deal Lumber Yard of Silverton.

7) At all times between 1989 and 1995, DBCI was engaged in the business of designing and constructing buildings. In contrast, SQDL operated a retail hardware and lumber store and did not design or construct buildings.

1996-SEPTEMBER 30, 1999

8) At all times between 1996 and September 30, 1999, DBCI was engaged in the business of designing and constructing buildings. SQDL, in contrast, operated a retail hardware and lumber store and did not design or construct buildings.

9) Between 1996 and September 30, 1999, SQDL conducted its business from a 30,000 square foot building owned by SQDL located at 600 North Water Street, Silverton, Oregon. DBCI's design department was located in three offices that utilized 500 square feet of SQDL's retail building. DBCI's main office was located in another building owned by DBCI on the same city block, with the address of 622 North Water Street. Also located on the same city block were a small storage building used for storage, three buildings with common bearing walls that occupied 25,000 square feet, and a lumber yard. The small storage building was used by DBCI. SQDL owned the three buildings with common bearing walls and used two of those three buildings ("turkey shed" and "storage" building), occupying 21,300 square feet in all, for storing lumber. DBCI used the remaining 3,700 square feet ("tile shed") for storing displays for home shows. The lumberyard was used by SQDL. The property the lumber yard was located on was owned by an adjacent railroad, which leased the property to SQDL. DBCI also used a lot, called the "boneyard," on an adjacent block to store its job trailers and unused lumber brought back from jobs.

10) From 1996 to September 30, 1999, DBCI employed between 50-100 persons. DBCI employed about 20 persons in its office, including persons employed in the design department. The office had a general manager, a controller, marketing personnel, estimators, administrative assis-

tants, assistants to project managers, a shop mechanic, and a shop manager. Persons employed in the construction department included project managers, superintendents, carpenters, painters, an excavation crew, and laborers.

11) From 1996 to September 30, 1999, SQDL employed 7-9 persons. Among these persons were a general manager and an office manager/bookkeeper.

12) From 1996 to September 30, 1999, SQDL and DBCI did not employ any of the same persons and employed separate management teams. However, G. Pfeifer, who owned DBCI, signed checks for both companies.

13) In 1996, DBCI's gross receipts totaled $8,954,128; SQDL's gross receipts totaled $2,336,560. In 1997, DBCI's gross receipts totaled $6,178,797; SQDL's gross receipts totaled $1,911,611. In 1998, DBCI's gross receipts totaled approximately $10-12,000,000; SQDL's gross receipts totaled $1,796,992. In 1999, DBCI's gross receipts totaled approximately $6,000,000; SQDL's gross receipts totaled approximately $1,600,000.

14) From 1996 to September 30, 1999, DBCI and SQDL each utilized various services offered and equipment owned by the other company as "in-kind" exchanges. DBCI's shop mechanic maintained SQDL's equipment. SQDL used DBCI's forklifts when SQDL's forklifts needed repair. SQDL put its debris into DBCI's dump box, and DBCI hauled the debris to the dump. SQDL would use one of DBCI's pickups or vans when it had a small load to deliver. On one occasion, DBCI brought some unused inventory back from a construction job, and SQDL sold the inventory and kept the proceeds. SQDL consistently used DBCI's copy machine. DBCI used 500 square feet owned by SQDL for office space and another 3700 square feet for storage. The two companies did not compensate one another for this borrowed use of equipment and services and G. Pfeifer believed this was a "fair exchange."

15) From 1996 to September 30, 1999, DBCI and SQDL purchased inventory from different vendors and sold their goods and services to a different clientele.

16) From 1996 to September 30, 1999, DBCI and SQDL filed separate quarterly reports with the Oregon Employment Department, separate tax returns, and generated separate financial statements.

17) From 1996 to September 30, 1999, DBCI purchased a large amount of the lumber it used for construction from SQDL. However, in early 1999, DBCI purchased approximately $400,000 worth of lumber from Parr Lumber instead of SQDL because its management team was dissatisfied with the service and product offered by SQDL. On a number of other occasions, the two companies' management teams disagreed over price and

the quality of materials, and there was often tension between the two teams.

18) Between 1997 and 1999, DBCI borrowed money from SQDL approximately eight times to help meet its payroll. Each time, it borrowed about $5,000. This money was paid back to SQDL.

19) DBCI borrowed $120,000 from SQDL in December 1997 and $50,000 in December 1998. G. Pfeifer, acting on behalf of DBCI, signed promissory notes for each loan. These loans were never repaid.

20) J. Pfeifer died in September 1998. Under the terms of his will, G. Pfeifer, his brother Ronald Pfeifer, and five other family members each inherited a seven percent ownership interest in SQDL. The remainder of the trust was owned by the John A. Pfeifer Trust, and G. Pfeifer was appointed as its new trustee and also became SQDL's president as a result of being trustee of the John A. Pfeifer Trust, the majority shareholder of SQDL's stock. Prior to J. Pfeifer's death, G. Pfeifer had participated in SQDL's meetings, but had not been active in the management of SQDL. After J. Pfeifer's death, G. Pfeifer assumed a more active role in the management of SQDL. However, he still spent approximately 99 percent of his time managing DBCI.

21) Beginning in July 1999, DBCI began having troubles meeting its payroll. Because of this, Marie Ginder, DBCI's controller, and G. Pfeifer discussed whether SQDL could be used as a payroll service.

22) After July 1999, DBCI began paying employees draws as needed to survive. DBCI continued to make out regular payroll checks to its employees, but never issued them.

23) DBCI's employees began quitting when they were not paid. By the end of September 1999, only three employees remained. These employees were Will Vinson, a draftsmen who worked in one of DBCI's offices in the SQDL's retail building, G. Pfeifer's secretary Faith Akin, who worked in DBCI's primary office building, and Ginder.

24) At the end of September 1999, G. Pfeifer received a notice from the State of Oregon stating that DBCI needed to stop conducting business.

25) At the end of September 1999, DBCI stopped doing any business except for tasks involved in wrapping up the business. By this time, DBCI had finished all but a few of the construction jobs on which it was working. Of the unfinished jobs, the owners of a boat house that DBCI was working on completed the job themselves by hiring some of DBCI's ex-employees, and the bank that financed the remaining unfinished houses took them over and finished them.

26) When DBCI stopped conducting business on September 30, 1999, approximately

$2,000,000 in judgments had been entered against it, including $450,000 owed to the IRS and $165,000 owed to the Oregon Department of Revenue.

27) The 34 wage claimants listed in Appendix A to this Final Order were all employed by DBCI and earned wages in the amount of $70,759.63 that are still due and owing.

28) The Commissioner made a determination that $47,046.31 of the wage claims filed by the wage claimants listed in Appendix A to this Final Order were valid and caused $47,046.31 to be paid out from the WSF to 29 of those claimants.

OCTOBER 1, 1999 – MAY 2000

29) When DBCI stopped doing business, SQDL had 7-9 employees. On or about November 1, 1999, G. Pfeifer instructed Lynn Lebold, SQDL's bookkeeper/office manager, to put Faith Akin and Will Vinson on SQDL's payroll. From that date until their termination in April 2000, Akin and Vinson continued to perform the same work they had performed for DBCI, working in the same locations, and were paid by SQDL and reported as employees by SQDL on its quarterly reports. Prior to beginning work on SQDL's payroll, Akin and Vinson completed applications for employment with SQDL, as well as W-4 and I-9 forms.

30) G. Pfeifer's intent, which he had cleared with his CPA, was that Akin and Vinson would continue performing the work required so that DBCI could wind up its business, while using SQDL as a "payroll service." This became necessary because DBCI could no longer issue a payroll, there was still work that needed completion, and Vinson and Akin needed to be covered by workers' compensation insurance and have appropriate deductions taken from their pay. G. Pfeifer decided to use SQDL as a "payroll service" instead of an independent company like Barrett Business Services because the cost was less. G. Pfeifer instructed Lebold to submit bills to DBCI for the amount of wages paid to Akin and Vinson. Subsequently, DBCI paid about $4,000 to SQDL to reimburse SQDL for wages paid to Akin and Vinson. On November 1, 1999, Faith Akin and Will Vinson went on SQDL's payroll, continuing to perform the same duties they had performed for DBCI.

31) When DBCI stopped doing business, it did not transfer any assets to SQDL, and SQDL purchased no assets of DBCI.

32) SQDL's business did not change after November 1, 1999.

33) At the end of 1999, Akin issued W-2 slips for 94 DBCI employees. Akin and Vinson were the only persons from the 94 who went on SQDL's payroll.

34) Carl Hashenburger was SQDL's manager from sometime in 1998 to October 1999. G. Pfeifer hired Roger Baca to replace Hashenburger in December 1999, then fired Baca five weeks later. G. Pfeifer then hired Matt

Miles to replace Baca. Miles managed SQDL until he was murdered on SQDL's premises in March 2000.

35) Ronald Pfeifer ("R. Pfeifer") became temporary manager of SQDL out of necessity after Miles was murdered. R. Pfeifer, like G. Pfeifer, had a seven-percent ownership interest in SQDL. Unlike G. Pfeifer, R. Pfeifer had no ownership interest in DBCI and was never an employee of DBCI.

36) After Miles' murder, G. Pfeifer became more involved in the management of SQDL out of necessity because of the reluctance of SQDL's employees to return to work.

37) On April 30, 2000, Lynn Lebold laid off Akin and Vinson due to SQDL's cash flow problems. At that time, SQDL still had 7-9 employees. Lebold's action was contrary to G. Pfeifer's instructions. Neither Akin nor Vinson ever returned to work for DBCI or SQDL.

CREDIBILITY FINDINGS

38) Marie Ginder, DBCI's office manager and controller between May and October 1999, was a credible witness who answered questions directly and candidly, without hesitation, and had no apparent bias. The forum has credited her testimony in its entirety.

39) Faith Akin, G. Pfeifer's personal assistant between May 11, 1998, and April 30, 1999, was a credible witness who had no apparent bias. Like Ginder, she answered questions directly and candidly, without hesitation, and the forum has credited her testimony in its entirety.

40) Roger Stuckart, DBCI's senior project manager, was a credible witness and the forum has credited his testimony in its entirety.

41) Newell Enos was a credible witness. However, the forum has not relied on his testimony or interview notes with G. Pfeifer in determining whether or not SQDL is a successor employer to DBCI because of his lack of personal knowledge or facts relevant to a successor employer determination and because his interview notes contain little or no evidence relevant to that determination.

42) Lynn Lebold, SQDL's bookkeeper and office manager from May 1996 until August 14, 2000, was biased against Respondent. Her demeanor and the substance of her testimony revealed a strong dislike of G. Pfeifer, and she shaded her testimony to have the most negative impact on Respondent. For example, she strongly implied that G. Pfeifer had unlawfully caused DBCI and SQDL to improperly commingle funds by virtue of SQDL's write-off of DBCI's $500,000 debt to SQDL. When asked by the Agency case presenter how many times DBCI had borrowed money from SQDL, her reply was "countless" times. On cross-examination, she modified her answer to "dozens" of times.

This contrasted sharply with G. Pfeifer's more credible estimate of around one dozen times in all. In addition, she was reluctant to provide answers to questions that she perceived might help Respondent's case. Finally, for some inexplicable reason, she refused to acknowledge that Baca and Miles, SQDL's two successive general managers after Harshenburger, had any direct supervisory authority over her. This lessened her credibility, and the forum has only credited her testimony where it was corroborated by other credible evidence or unchallenged.

44) Ronald Pfeifer has a seven percent ownership interest in SQDL and is the brother of G. Pfeifer. Despite this built-in financial and familial bias, the forum found his testimony to be objective and straightforward. In addition, his memory was unimpaired regarding historical events in the evolution of DBCI and SQDL. The forum has credited his testimony in its entirety.

45) Gene Pfeifer, as trustee of the John A. Pfeifer Trust and as a seven percent owner of SQDL, has a large financial and familial stake in the outcome of this proceeding. Despite this inherent bias, the forum found his testimony to be credible. He was not a reluctant witness and voluntarily provided explanations for his answers on cross-examination. He answered questions directly, without hesitation, in a forthcoming manner unless he did not understand the question. The credibility of his testimony was further bolstered by the internal consistency of his answers to the same or similar questions in direct and cross-examination.

ULTIMATE FINDINGS OF FACT

1) At all times material herein, DBCI was an Oregon corporation engaged in the business of designing and constructing buildings and engaged the personal services of one or more employees in the state of Oregon.

2) At all times material herein, SQDL was an Oregon corporation engaged in the business of operating a retail lumber and hardware store in Silverton, Oregon.

3) DBCI and SQDL were companies that were started in the mid-20th century by J. Pfeifer.

4) From the time of its incorporation in 1989 until the time of hearing, DBCI's president and majority shareholder was G. Pfeifer, one of J. Pfeifer's sons.

5) From 1996 to September 30, 1999, DBCI and SQDL had an entirely separate workforce and management team. DBCI employed 50-100 persons, and SQDL employed 7-9 persons.

6) From 1996 to September 30, 1999, DBCI and SQDL utilized various services offered and equipment and space owned by each other as "in-kind" exchanges.

7) J. Pfeifer died in 1998. Upon his death, seven different Pfeifer family members, including G. Pfeifer, inherited a seven per-

cent interest in SQDL. The remaining 51 percent ownership interest remained in the hands of the John A. Pfeifer Trust, of which G. Pfeifer became trustee and president of SQDL. Subsequently, G. Pfeifer participated to a limited extent in the management of SQDL. DBCI and SQDL continued to file separate quarterly reports with the Oregon Employment Department, separate tax returns, and to generate separate financial statements.

8) From 1997-99, DBCI borrowed money from SQDL on at least a dozen occasions to meet payroll expenses and other needs. At least $170,000 was never repaid.

9) Beginning in July 1999, DBCI began having troubles meeting its payroll, and its employees began quitting when they were not paid. By the end of September 1999, only three employees remained – Will Vinson, a draftsman; Faith Akin, Gene Pfeifer's personal secretary; and Marie Ginder, DBCI's controller. At the end of September 1999, DBCI received a notice from the State of Oregon that it needed to stop conducting business, at which time it shut down the business except for wrap-up operations.

10) DBCI ceased business operations on or about September 30, 1999. At that time, DBCI owed $70,759.63 in earned and unpaid wages to the 34 employees listed in Appendix A to this Final Order.

11) After DBCI ceased business operations, those 34 employees filed wage claims. The Commissioner determined that the wage claims were valid. Subsequently, the wages listed in the column entitled "WSF Payment" in Appendix A, totaling $47,046.31, were paid out to the persons listed out of the WSF pursuant to ORS 652.414(1) and the administrative rules adopted thereunder.

12) On November 1, 1999, two of DBCI's employees – Faith Akin and Will Vinson – were put on the payroll of SQDL Between November 1, 1999, and April 30, 2000, at which time they were laid off, Akin and Vinson continued to perform the same duties they had performed for DBCI During this time period, SQDL operated as a "payroll service" for DBCI with regard to Akin and Vinson.

13) When DBCI stopped doing business, it did not transfer any assets to SQDL, and SQDL purchased no assets of DBCI. SQDL did not complete any of DBCI's unfinished construction or design jobs.

14) SQDL's business did not change after November 1, 1999.

15) At all times material, SQDL never did any design or construction work and DBCI never did any retail hardware or lumber sales.

CONCLUSIONS OF LAW

1) During all times material herein, DBCI was an employer and the 34 wage claimants listed in Appendix A to this Order were

employees subject to the provisions of ORS 652.110 to 652.200 and 652.310 to 652.414. At all times material herein, DBCI employed all 34 claimants.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and Respondent herein. ORS 652.310 to 652.414.

3) ORS 652.310(1) provides:

> "As used in ORS 652.310 to 652.414, unless the context requires otherwise:
>
> "(1) 'Employer' means any person who in this state, directly or through an agent, engages personal services of one or more employees and includes any producer-promoter, and any successor to the business of any employer, or any lessee or purchaser of any employer's business property for the continuance of the same business, so far as such employer has not paid employees in full. 'Employer' includes the State of Oregon or any political subdivision thereof or any county, city, district, authority, public corporation or entity and any of their instrumentalities organized and existing under law or charter but does not include:
>
> "(a) The United States.
>
> "(b) Trustees and assignees in bankruptcy or insolvency, and receivers, whether appointed by federal or state courts, and persons otherwise falling under the definition of employers so far as the times or amounts of their payments to employees are regulated by laws of the United States, or regulations or orders made in pursuance thereof."

Respondent SQDL is an employer subject to the provisions of ORS 652.110 to 652.200 and 652.310 to 652.414 but is not a "successor to the business" of DBCI within the meaning of ORS 652.310(1) and is not liable for the $23,713.32 in unpaid wages owed by DBCI to the wage claimants listed in Appendix A to this Final Order that were not paid out to the claimants from the WSF or the $47,046.31 in wages that were paid out by the WSF.

4) ORS 652.140(2) provides:

> "When an employee who does not have a contract for a definite period quits employment, all wages earned and unpaid at the time of quitting become due and payable immediately if the employee has given to the employer not less than 48 hours' notice, excluding Saturdays, Sundays and holidays, of intention to quit employment. If notice is not given to the employer, the wages shall be due and payable within five days, excluding Saturdays, Sundays and holidays, after the employee has quit, or at the next regularly scheduled payday after the employee has quit, whichever event first occurs."

DBCI violated ORS 652.140 by failing to pay the 34 wage claimants listed in Appendix A all

wages earned and unpaid not later than five days, excluding Saturdays, Sundays and holidays, or the next regularly scheduled payday, after the claimants quit.

5) ORS 652.414 provides, in pertinent part:

> "Notwithstanding any other provision of law:
>
> "(1) When an employee files a wage claim under this chapter for wages earned and unpaid, and the Commissioner of the Bureau of Labor and Industries determines that the employer against whom the claim was filed has ceased doing business and is without sufficient assets to pay the wage claim and the wage claim cannot otherwise be fully and promptly paid, the commissioner, after determining that the claim is valid, shall pay the claimant, to the extent provided in subsection (2) of this section:
>
> "(a) The unpaid amount of wages earned within 60 days before the date of the cessation of business; or
>
> "(b) If the claimant filed a wage claim before the cessation of business, the unpaid amount of wages earned within 60 days before the last day the claimant was employed.
>
> "(2) The commissioner shall pay the unpaid amount of wages earned as provided in subsection (1) of this section only to the extent of $4,000 from such funds as may be available pursuant to ORS 652.409 (2).
>
> "(3) The commissioner may commence an appropriate action, suit or proceeding to recover from the employer, or other persons or property liable for the unpaid wages, amounts paid from the Wage Security Fund under subsection (1) of this section. In addition to costs and disbursements, the commissioner is entitled to recover reasonable attorney fees at trial and on appeal, together with a penalty of 25 percent of the amount of wages paid from the Wage Security Fund or $200, whichever amount is the greater. All amounts recovered by the commissioner under this subsection and subsection (4) of this section are appropriated continuously to the commissioner to carry out the provisions of this section."

Under the facts and circumstances of this record, SQDL is not an "employer" or "person" liable for the unpaid wages paid from the Wage Security Fund.

6) Under the facts and circumstances of this record, and according to the law applicable to this matter, the Agency's Order of Determination and Amended Order of Determination filed against Respondent are hereby dismissed.

OPINION

INTRODUCTION

The validity of the underlying wage claims in this matter totaling

$70,759.63 are undisputed, as are the facts that the WSF paid out $47,046.31 of this sum to reimburse the wage claimants and that DBCI was the wage claimants' employer. The only remaining issue is Respondent SQDL's potential liability in this matter to repay the WSF and to pay the remainder $23,713.32 due to the wage claimants. This question of liability rests on the issue of whether SQDL is a "successor to the business" of DBCI.

The test for determining whether a person is a "successor" employer is the same for wage claim and WSF recovery cases. *In the Matter of Fjord, Inc.*, 21 BOLI 260, 286 (2001). That test is whether SQDL conducts essentially the same business that DBCI did. The elements to look for include: the name or identity of the business; its location; the lapse of time between the previous operation and the new operation; the same or substantially the same work force employed; the same product is manufactured or the same service is offered; and, the same machinery, equipment, or methods of production are used. Not every element needs to be present for an employer to be a successor; the facts must be considered together. *In the Matter of Fjord, Inc.,* 21 BOLI 260, 286 (2001*).* A discussion of the relevant facts follows.

THE NAME OR IDENTITY OF THE BUSINESS CHANGED

Retention of the same or a similar name is indicative of successorship, as is similarity of identity. The alleged successor, SQDL, has an entirely different name than DBCI, indicating a lack of successorship.

The name of a business, although entitled to substantial weight, is only one factor in determining if the identity of an alleged successor business is the same as its defunct predecessor. Other factors[5] include, but are not limited to, an historical common identity, common ownership, common management, and common vendors and clients. Except for the fact that DBCI and SQDL were both businesses owned by the same family, they have no common historical identity. SQDL sold hardware and lumber; DBCI used hardware and lumber in construction. They purchased their inventory from different vendors and sold their goods and services to different clients. With the exception of G. Pfeifer's ownership of DBCI and seven percent interest in SQDL, SQDL and DBCI were separate corporations with different ownership interests. They had separate management teams that often had serious disagreements; at one point DBCI opted to purchase $400,000 worth of lumber from another supplier instead of SQDL. SQDL did not acquire any of DBCI's assets and its business did not change after September 30, 1999. In fact,

[5] These are factors in addition to the other five elements of the successor test, all of which also relate in some way to identity.

DBCI and its business simply came to a halt.

On the other hand, DBCI and SQDL did share some equipment, services, and space on the basis of an "in-kind" exchange, and DBCI frequently borrowed money from SQDL, a large sum of which was never repaid. [6] G. Pfeifer was president of DBCI and also became president of SQDL after his father's death, by virtue of his status as trustee of the John A. Pfeifer trust.

Taken as a whole, the commonalties described above are but a minor part of an evidentiary portrait showing that SQDL and DBCI were businesses with distinct and separate identities, before and after DBCI went out of business. This indicates a lack of successorship.

THE LOCATION OF THE BUSINESS DID NOT CHANGE – IT CEASED TO EXIST.

After September 30, 1999, DBCI did not engage in any more construction, the guts of its business, and SQDL has never engaged in construction. The only part of DBCI's business that remained was the wind-up operation conducted by G. Pfeifer, Faith Akin, and Will Vinson. All three continued working in the same offices they had previously occupied, including Vinson's office in SQDL's retail store that had historically been used by DBCI's design department, and G. Pfeifer's office, which was shared by Akin, in the DBCI building located at 622 North Water Street. Although Akin and Vinson did no work for SQDL, they became joint employees of SQDL and DBCI by virtue of their placement on SQDL's payroll. SQDL continued to conduct its business in the same location and did not occupy any or use any of the space formerly occupied or used by DBCI.

In a sense, this evidence shows that the location of DBCI's business did not change. However, the business itself – construction – ceased to exist, and SQDL did not continue any part of DBCI's business, other than serving as a convenient payroll service for Akin and Vinson. Because SQDL did not conduct any of DBCI's business, the fact that G. Pfeifer, Akin and Vinson continued to work in the same location does not indicate successorship.

WHAT WAS THE LAPSE IN TIME, IF ANY, BETWEEN THE PREVIOUS AND NEW OPERATION?

This test is inapplicable because DBCI's business stopped and SQDL did not continue any aspect of it.

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[6] The forum notes that this sum amounts to only ten percent of the total unsatisfied judgments against Design-Build Construction, Inc., which total approximately two million dollars. *See* Finding of Fact – The Merits 26, *supra*.

DOES SQDL EMPLOY THE SAME OR SUBSTANTIALLY THE SAME WORK FORCE AS DBCI?

Faith Akin and Will Vinson, two employees of DBCI, went on SQDL's payroll on November 1, 1999. The evidence showed that this was a procedure whereby DBCI used SQDL as a payroll service while Akin and Vinson continued to do work for DBCI. Vinson was a draftsperson, and Akin was G. Pfeifer's personal secretary. Neither were managerial employees nor performed any construction work. Ninety-two other persons who were employed by DBCI in 1999, including all of DBCI's managerial employees and construction crew, did not go to work for SQDL. These facts indicate a lack of successorship.

DOES SQDL MANUFACTURE THE SAME PRODUCT OR OFFER THE SAME SERVICE AS DBCI?

DBCI performed design and construction; SQDL continues to be a retail hardware and lumber store and has never engaged in design and construction. This indicates a lack of successorship.

DOES SQDL USE THE SAME MACHINERY, EQUIPMENT, OR METHODS OF PRODUCTION AS DBCI?

Prior to September 30, 1999, SQDL used DBCI's copy machine, the services of its equipment mechanic, and some of its equipment. The record does not reveal whether SQDL continued to use DBCI's copy machine and any of its equipment after September 30, 1999. Assuming, *arguendo*, that it did, SQDL used a small percentage of DBCI's equipment and none of its method of production. Again, this indicates a lack of successorship.

CONCLUSION

The test for determining whether SQDL is a "successor" employer to DBCI in this WSF recovery case is whether SQDL conducts essentially the same business as DBCI. There are six elements that must be evaluated in making this determination. Although all six elements do not have to be present for an employer to be a successor, in this case none of the elements are present.[7] The Agency's case is supported by evidence related to historical commonalty of identity, described in detail in this opinion under the heading of "The Name Or Identity Of The Business Changed," the fact that Will Vinson and Faith Akin, two out of DBCI's 92 employees in 1999, became SQDL's employees while

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[7] *Compare In the Matter of Gerald Brown*, 14 BOLI 154 (1995) and *In the Matter of Susan Palmer*, 15 BOLI 226 (1997) (all six elements indicated successorship in both cases); *In the Matter of Anita's Flowers & Boutique*, 6 BOLI 258 (1987), *In the Matter of Tire Liquidators*, 10 BOLI 84 (1991), and *In the Matter of Catalogfinder, Inc*., 18 BOLI 242 (1999) (five out of six elements indicated successorship all three cases); *In the Matter of Fjord, Inc*., 21 BOLI 260 (2001), *appeal pending* (five out of six elements indicated successorship, with the sixth being neutral).

continuing to perform the same work, in the same location, for DBCI, ownership by the same family – although different members -- and the geographical proximity of their principal places of business of SQDL and DBCI. This evidence pales in comparison to undisputed evidence that SQDL acquired none of DBCI's assets, engages in an entirely different line of business, and has employed only of DBCI's former employees, both non-managerial. Considering all of the facts together, the forum concludes that SQDL is not a "successor" employer under ORS 652.310 and is not liable to repay either the wages paid out by the WSF or the wages still unpaid by DBCI or the WSF to the wage claimants listed in Appendix A to this Final Order.

ORDER

NOW, THEREFORE, as Respondent has been found not to be a successor employer to Design-Build Construction, Inc. pursuant to ORS 652.310, the Commissioner of the Bureau of Labor and Industries hereby orders that Order of Determination 00-0958 and Amended Order of Determination 00-3641against SQDL Co. are hereby dismissed.

APPENDIX A

NAME	UNPAID WAGES	WSF PAYMENT	BALANCE DUE
Akin, Faith	$2,028.25	$2,028.25	0
Alayon, Shantelle	$1,607.97	$1,118.17	$489.80
Bauer, Ervin	$773.69	$376.88	$396.81
Beyea, Robert J.	$210.74	0	$210.74
Bigelow, Brian	$802.37	$11.00	$802.37
Braff, Harold	$868.00	0	$868.00
Cathay, Nava	$1,112.05	$1,112.05	0
Currie, Leslie	$1,091.13	$1,091.13	$511.88
Dalisky, Eric	$802.15	$802.15	0
East, Eric	$448.03	$144.00	$304.03
Fonseca, Ronda	$178.39	$178.39	0
Gilpatrick, Wayne	$3,019.99	$3,019.00	$.99
Hannan, Timothy	$4,048.02	$4,000.00	$48.02
Harris, Gary	$2,036.18	$1,046.18	$990.00
Jones, Goode	$2,793.02	$2,224.00	$569.02
Kelley, Kerry	$1,857.05	$763.30	$763.30
Lenhart, Joseph	$303.60	0	$303.60
Lenhart, Rick	$272.83	0	$272.83
Loukojarvi, Larry	$2,381.01	$2,381.01	0
Maloney-Bolsinger,D.	$3,007.48	$2,488.18	$519.30
Mashburn, Marie	$2,002.38	$680/wk.	$2,002.38
McDowell, Dannie	$861.60	$560.25	$301.35
McKinney, Elden	$729.64	$726.55	$43.09
Nguyen, Chien	$861.44	0	$861.44
Olsen, Sverre	$6,880.00	$2,890.00	$3,990.00
Pennington, Steven	$285.95	$285.95	0

Pfeifer, Bryan	**$3,750.00**	**$300.00**	**$3,450.00**
Pfeifer, Kevan	**$1,832.83**	**$461.54**	**$1,371.29**
Roldan, Antonio	**$3,244.43**	**$3,244.43**	**0**
Spencer, Michael	**$4,914.09**	**$2,144.15**	**$2,769.94**
Stuckart, Roger	**$5,709.23**	**$4,000.00**	**$1,709.23**
Szymanski, Gary	**$850.24**	**$850.24**	**0**
Vinson, William	**$1,208.54**	**$1,050.00**	**$158.54**
Weiser, Steven	**$5,105.11**	**$4,000.00**	**$1,105.11**

In the Matter of

LABOR READY NORTHWEST, INC.,

Case No. 31-01

Final Order of the Commissioner Jack Roberts

Issued December 13, 2001

SYNOPSIS

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

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

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter David K. Gerstenfeld, an employee of the Agency. Respondent was represented by David J. Sweeney, attorney at law. Timothy Adams, Respondent's general counsel and executive vice

president, was present on June 19 as the individual designated to assist in the presentation of Respondent's case.

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

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

The forum received into evidence:

a) Administrative exhibits X-1 through X-28 (submitted or generated prior to hearing);

b) Agency exhibits A-1 through A-20 and A-22 through A-24 (submitted prior to hearing), and A-25 through A-30 (submitted at hearing). Agency exhibits A-21, A-31 and A-32 were offered but not received.

c) Respondent exhibits R-1 through R-17 (submitted prior to hearing).

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

FINDINGS OF FACT – PROCEDURAL

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

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

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

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

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

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

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

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

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

6) On January 9, 2001, the Hearings Unit served Respondent with: a) a Notice of Hearing in Case Number 31-01 that set the hearing for June 19, 2001; b) a Summary of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case hearing process; and d) a copy of the Notice of Intent.

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

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

9) On February 28, 2001, the Agency filed a motion for a discovery order requesting the production of documents relevant to the allegations contained in its Notice and requiring Respondent to respond to two interrogatories. The

Agency described the relevancy of the documents and information sought and represented that the Agency had unsuccessfully attempted to obtain the documents and information through an informal exchange of information.

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

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

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

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

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

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

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

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

18) On March 28, 2001, the ALJ issued an interim order granting the Agency's motion for partial summary judgment. That order is affirmed, except

as modified in the section of the Opinion discussing Respondent's exceptions with regard to the following discussion on waiver. The interim order stated:

"Introduction

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

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

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

"Summary Judgment Standard

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

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

"Waiver

"On July 28, 2000, BOLI issued a 'Notice of Claim'

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

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

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

"In order for Respondent to avoid summary judgment on this issue, the evidence, when viewed in the light most favorable to Respon-

dent, must show that Johnson misled Mott, to Respondent's prejudice, into an 'honest and reasonable belief' that BOLI intended to waive all sanctions available to BOLI arising out of Respondent's actions on the Project. Accordingly, the forum assumes that all facts stated in Mott's affidavit are true and that the letters reflect the understanding between Respondent and the Agency regarding the resolution of the Notice of Claim.

"Respondent's argument objecting to the Agency's motion contends that Respondent 'honestly and reasonably believed that the payment of $3,442.91 was a settlement of any and all problems associated with the prevailing wages of the [Project].' However, Mott's affidavit does not bear this out. In his affidavit, Mott refers specifically to the back wages and liquidated damages[1] sought in the Notice of Claim, states that 'Kathleen Johnson agreed to drop the penalties in exchange for the payment of the primary wages totaling $3,442.91,' and concludes that 'Upon payment of the $3,442.91, I believed the issue was completely settled with BOLI.' Mott conspicuously fails to mention any discussion whatsoever of any other sanctions available to BOLI regarding Respondent's work on the Project, and Johnson's letter to Mott confirming resolution of the Notice of Claim refers only to 'owed wages' and 'liquidated damages.' Viewed in this context, it is apparent that that the only 'issue' settled was the payment of back wages and liquidated damages sought in the Notice of Claim. Respondent also does not dispute Johnson's lack of authority, stated in her affidavit, to negotiate away potential civil penalties or placement on the list of ineligibles based on Respondent's violation of Oregon's prevailing wage rate statutes. Finally, there is no explicit or implicit reference to BOLI's waiver of the sanctions sought in this proceeding in the correspondence between Johnson and Mott.

"Viewing the evidence in the light most favorable to Respondent, the forum is unable to conclude that Johnson misled Mott into an honest and reasonable belief that BOLI intended to waive its right to pursue the sanctions sought in this proceeding in exchange for the $3,442.91 received by BOLI to settle the July 28, 2000, Notice of Claim. Consequently, Respondent's waiver by estoppel defense

[1] Mott erroneously refers to them as "penalties."

fails as a matter of law. The Agency's motion for partial summary judgment with regard to Respondent's affirmative defense of waiver by estoppel is **GRANTED**.

"Estoppel

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

"In two prior cases in which violations of Oregon's prevailing wage rate laws were alleged, this forum held that the doctrine of equitable estoppel does not apply to the agency where it is enforcing a mandatory requirement of the law. *In the Matter of Southern Oregon Flagging*, 18 BOLI 138, 162 (1999); *In the Matter of Larson Construction Co., Inc*., 17 BOLI 54, 74 (1998). In this case, the agency is seeking to enforce mandatory requirements of the law[2] and equitable estoppel is not available to Respondent as a defense as a matter of law.[3] The Agency's motion for partial summary judgment with regard to Respondent's affirmative defense of equitable estoppel is **GRANTED**.

"Claim Preclusion

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

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

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

"Respondent contends that the resolution of the Agency's July 28, 2000, Notice of Claim is the functional equivalent of a final judgment, that the allegations raised in the Notice in this case could have been raised in the Notice of Claim, and that the doctrine of claim preclusion prevents the Agency from seeking any other sanctions against Respondent based on Respondent's work on the Project. Respondent is incorrect. First, the Notice of Claim and its resolution do not constitute a judgment, much less a final judgment. Second, the sanctions sought in this proceeding are only available through a contested case proceeding in this forum and could not have been sought in an action against the bond. The Agency's motion for partial summary judgment with regard to Respondent's affirmative defense of claim preclusion is **GRANTED**."

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

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

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

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

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

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

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

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

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

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

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

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

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

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

FINDINGS OF FACT – THE MERITS

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

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

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

4) On July 22, 1999, the Agency issued a Notice of Intent to Assess Civil Penalties against LRI and LRNWI alleging that Respondents had violated Oregon's prevailing wage rate laws in October and November 1998 and in February 1999 and proposed to assess $20,000 in civil penal-

ties. On June 1, 2000, after hearing, the Commissioner issued a final order concluding that LRI had: (a) violated ORS 279.355 and OAR 839-016-0025 by failing to make and maintain records of the daily hours worked by its employees on a public works project; (b) violated ORS 279.355 and OAR 839-016-0025 by failing to make and maintain records of the daily compensation paid to each of its employees on the project; and (c) violated ORS 279.354 by filing certified payroll reports that stated inaccurately the projects on which two employees had worked. The commissioner imposed civil penalties totaling $13,000.00 for these violations.

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

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

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

8) On April 3, 2000, a Pro-Tec representative telephoned Respondent's Bend office and placed a job order with Mandalyll, Respondent's employee in that office. When Mandalyll took the job order, she recorded information about Pro-Tec's job order on Respondent's job order form.

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

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

Number of Workers Needed: **2**

Customer Name: **Protect Fire Proofing**

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

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

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

Safety Equipment: Hard Hat, Boots, Gloves"

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

11) At the time Pro-Tec placed the job order, Respondent's employees made notations in the "Prevailing

Wage" section only if there was a question as to whether or not the job was subject to the prevailing wage.

12) Between April 4 and June 2, 2000, Respondent supplied eight workers to Pro-Tec in response to its April 3 job order, including David Shielar, Santiago Venegas, Michael Gallano, Richard Hadley, Timothy Fallin, Steven Donoghue, Paul Cooper, and Joe Herberhole. These workers performed manual labor on the Project, assisting Pro-Tec employees who were applying sprayed on fireproofing material at the Project. These workers performed two primary duties. First, carrying bags of dry insulating material to a hopper, then cutting open the bag and dumping the material into the hopper, where it was mixed with water and sprayed by a Pro-Tec employee through a nozzle onto the Project's walls. Second, cleaning up any resultant overspray.[4]

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

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

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

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

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

18) On April 13, 2000, David Shielar and Santiago Venegas both worked 10 hours.

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[4] Rowand testified that there is a fairly extensive mess left after fireproofing is sprayed on, and referred to the excess that must be removed as "overspray."

Respondent issued written itemized statements of earnings to both stating that they had worked 13.5 hours on April 13 and paid them for 13.5 hours worked at the rate of $21.59 per hour.

19) On May 3, 2000, Shielar and Venegas both worked 10 hours. Respondent issued written itemized statements of earnings to both stating that they had worked 11 hours on May 3 and paid them for 11 hours at the rate of $21.59 per hour. 20) Respondent billed Pro-Tec for 8 hours straight time and 2 hours overtime worked by both Shielar and Venegas on April 13 and May 3, 2000.

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

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

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

a) All nine statements classify all workers as "Laborers."

b) The 4/7/00 statement states that Shielar and Venegas each worked 10.0 hours of straight time on April 5-7.[5]

c) The 4/14/00 statement states that Shielar and Venegas each worked 9.0 hours of straight time on 4/11, 10.0 hours of straight time on 4/11 and 4/12, and 13.5 hours straight time[6] on 4/13.

d) The 4/21/00 statement states that Shielar and Venegas each worked 16.0

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

[6] *See* Finding of Fact – The Merits 18, *supra*.

hours straight time and 3.0 hours of overtime on 4/18.

e) The 5/5/00 statement states that Shielar and Venegas each worked 11.0 hours straight time on 5/3.[7]

24) Each payroll statement was accompanied by a "Statement of Compliance" that was signed by one of Respondent's administrative assistants and contained the following language:[8]

"1. Payroll Number

"2. Payroll Statement Date

"3. Contract Number

"4. Date

"I, (*name of signatory party*), (*title of signatory party)*[9] do hereby state (1) That I pay or supervise the payment of the persons employed by (*Contractor or subcontractor)*[10] on the (*Building or work)*[11]: that during the payroll period commencing on the ___ day of _____, _____, and ending the day of _____, _____, on said project have been paid the full weekly wages earned, that no rebates have been or will be made either directly or indirectly to or on behalf of said (*Contractor or subcontractor*)[12] from the full weekly wages earned by any person and that no deductions have been made either directly or indirectly from the full wages earned by any person, other than permissible deductions as defined in Regulations, Part 3 (29 CFR Subtitle A), issued by the Secretary of Labor under the Copeland Act, as amended * * * and described below:

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

"(3) That any apprentices employed in the above period are duly registered in a bona fide apprenticeship program registered with a State apprenticeship agency recognized by the Bureau of Apprenticeship and Training,

[7] *Id*.

[8] The cited text reproduces the language, but not the specific format of the Statement of Compliance.

[9] Each was filled in with the words "Administrative Assistant."

[10] Each was filled in with the words "Labor Ready, Inc."

[11] Each was filled in with the words "Cooly Rd."

[12] Each was filled in with the words "Labor Ready, Inc."

United States Department of Labor, or if no such recognized agency exists in a State, are registered with the Bureau of Apprenticeship and Training, United States Department of Labor.

"(4) That:

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

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

"(c) Exceptions

"Exception (*Craft*) Explanation

"5. Remarks

"6. Name Title Signature

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

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

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

week, hourly fringe benefit paid to party, plan, fund or program, and name of benefit party, plan, fund, or program.

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

"CERTIFIED STATEMENT

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

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

_____.

"(2) That any payrolls otherwise under this contract required to be submitted for the above period are correct and complete; that the wage rates for workers contained therein are not less than the applicable wage rates contained in any wage determination incorporated in the contract; that the classification set forth therein for each worker conforms with work performed.

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

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

"(*name and title*)
(*signature*)"

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

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

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

> "I am sending you the pages from the Jan 15, 1999 BOLI prevailing wage rate book that show the correct wage rate for fireproofing. The individual that sprays the fireproofing should be classified as a Plasterer, Nozzleman; the individual that operates the mixer, moves the scaffolding and cleans up is classified as a Tender to Plasterer. Because the application of sprayed fireproofing is not clearly defined, I have also included a copy of the appropriate page from the BOLI index of job classifications showing the correct classification as Plasterer."

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

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

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

> "Since you have asked for written clarification regarding classification of the application of fireproofing, I would like to provide that to you. The application of intumescent fireproofing which was done on this project (I understand it is either brushed on or rolled on) is properly classified as 'Painters.' The application of Cafco brand sprayed-on fireproofing is properly classified as 'Plasterers.' Sprayed on

> fireproofing is either painters or plasterers, depending on the equipment and method of application: while you have mentioned a difference between cementitious fireproofing and others, this is not the distinction that is important for classification of the work for prevailing wage rate purposes. Instead, you look at the application methods and equipment. The feeding of the 'hopper,' clean up, moving materials on the job site and protection from overspray for the sprayed on fireproofing is classified as laborer, group one. I hope that this clarifies the classification of these various duties."

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

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

34) On June 28, 2000, Mott visited BOLI's Bend office and met for several hours with Rhoda Briggs, a WHD compliance specialist stationed in that office. Mott and Briggs discussed the situation and the documentation provided by Pro-Tec. Briggs faxed the Pro-Tec documentation to Lois Banahene, lead compliance specialist in the WHD's prevailing wage unit. The next day, Mott met again with Briggs, accompanied by Charles Stanley, Respondent's Bend office manager.

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

> "Violations of the prevailing wage regulations are a serious matter and may result in a requirement not only to pay workers unpaid prevailing wages, but an additional amount equal to the unpaid prevailing wages as liquidated damages to the workers. In addition to liquidated damages for unpaid workers, the law also provides that the Commissioner may assess civil penalty (sic) for violations of the prevailing wage regulations. Each violation of any provision of the prevailing wage laws is separate and distinct and in the case of continuing

violations, each day's continuance is a separate and distinct violation. The law also allows the Commissioner to take enforcement actions against a contractor that prohibit the contractor from receiving any public works contracts for a period of three years. Payment of prevailing wages to workers does not relieve the contractor from any other enforcement action that the Bureau may determine is appropriate."

Johnson and Mott subsequently communicated in early August 2000. Mott explained his understanding that Respondent's employees on the Project should have been paid as laborers based on BOLI's 1997 letter to Pro-Tec. Johnson told Mott that BOLI had changed the job classification and that Respondent's employees on the Project should have been paid as tenders to plasterers at the higher rate of $20.59 per hour and $6.00 per hour in fringe benefits. Mott provided Johnson with copies of Respondent's nine payroll statements submitted for work done on the Project. Based on those statements, Johnson calculated that Respondent had underpaid its eight workers on the Project by a total of $3,442.91. On August 14, 2000, Johnson and Mott agreed that Respondent would pay $3,442.91 in back wages to Respondent's employees on the Project and that the Agency would not seek liquidated damages.

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

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

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

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

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

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

"Thank you for meeting with me last week. As when we met, I want you to know that at any time you or any of the other compliance specialist have a concern of question, just get in touch with me and

we will get it taken care of. As you said, it is much easier and less time consuming to get a concern taken care of before it is a complaint. As a company, Labor Ready, and as the district manager, we will always try to help get concerns taken care of on a timely basis.

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

38) Prior to 1997, BOLI adopted current Davis-Bacon prevailing wage rates as the applicable prevailing wage rates in Oregon. Since then, BOLI has conducted annual wage surveys in Oregon and has used the data collected from them to determine prevailing wage rates in Oregon. On February 15, 1998, BOLI published its first rate book using rates determined by BOLI instead of Davis-Bacon. That book included some changes in classification and additions. Since that time, BOLI has published rate books in January and July of each year containing Oregon prevailing wage rates. There are usually wage rate changes in each book. However, job classifications stay the same from book to book, although some new classifications may be added. Prevailing wage rates are published for 14 geographical regions, and the rate for a specific classification can vary from region to region.

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

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

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

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

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

"**21. Plasterers and Stucco Masons**[13]

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

Nozzleman

Swinging Scaffold

All Other Work

"* * * * *

"31. Tenders to Plasterers: Assistants, Painters, Paperhangers, Plasterers, and Stucco Masons[14]

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

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

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

"**TRADE**	**BASIC HOURLY RATE**	**FRINGE BENEFITS**
PLASTERERS[15]		
Nozzleman	25.16	5.86
Swinging scaffold	24.16	5.86
all other work	23.16	5.86

"* * * * *

"**TENDERS TO PLASTERERS**[16] 20.59 6.00"

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

[13] This definition is printed on page 9 of the booklet.

[14] This definition is printed on page 13 of the booklet.

[15] The information regarding plasterers is contained on page 64.

[16] The information regarding tenders to plasterers is contained on page 72.

(Sprayed)" as a type of work and indicates persons performing that type of work would be classified as "Plasterers."

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

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

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

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

MITIGATION AND AGGRAVATION

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

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

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

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

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

55) Timothy Adams is LRI's general counsel and executive vice-president, as well as chief legal officer who oversees legal operations for Labor Ready, Inc. throughout the United States. Since the final order was issued in case number 70-99, Adams has taken steps to insure compliance with Oregon's prevailing wage rate laws. To begin with, Adams reviewed all of Labor Ready, Inc.'s prevailing wage rate policies to see if there were any systemic issues that would continue to cause problems. He sent a memo to LRI's prevailing wage rate department and corporate controller to whom that department reported that directed them to assume that Oregon has a "zero tolerance" policy regarding its prevailing wage rate laws. This memo still hangs in the cubicles of all employees in the prevailing wage rate department and is referred to as the "fear of God" memo. He terminated Frankie Sanders, director of the prevailing wage rate department, because of her relative lack of competence. He contacted Oregon's two district managers, Raymond Mott and John Horsigger (phonetic) by phone and suggested they avail themselves of training opportunities offered by BOLI and that they develop relationships with BOLI to open lines of communication so issues could be addressed before they became problems. He reviewed LRI's branch operations manual and tried to address each issue that the final order suggested was deficient. He added language to the manual stating "[f]or prevailing wage rate jobs, we must maintain accurate records of daily hours worked by each employee on each project. Therefore, weekly work tickets are unacceptable on a prevailing wage job." He has instructed LRI's employees that if a job is mistakenly not identified as a prevailing wage rate job and a worker is underpaid, the worker should be correctly paid, "no questions asked."

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

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

58) LRI brings in groups of 20 managers from around the United States for weekly training sessions. One of these

sessions is taught by LRI's legal department and is two hours long. 30 minutes of that time is devoted to prevailing wage rate law. During the weeklong training, LRI's prevailing wage rate department director also meets with the managers to discuss details about prevailing wage rate laws and procedures. The training on prevailing wage rate is based on an outline developed by LRI. Summarized, that outline: (a) provides examples of prevailing wage rate projects; (b) states that prevailing wages must be paid on prevailing wage rate jobs; (c) requires each branch office to maintain accurate records of daily hours worked by each employee and that employee's pay rate; (d) states that certified payrolls are prepared and submitted by LRI's corporate office, but branch offices are responsible for designating the job as prevailing wage on work tickets and on LRI's computer job record screen; and (e) stresses the critical importance of identifying a job as prevailing wage and advises branch offices to do a site visit and look for postings on the job site of the prevailing wage rate, if necessary. LRI's legal department conducts regular telephone conference calls with area directors and district managers and uses the same outline for training. In December 2000, LRI brought all 110 of its district managers to corporate headquarters in Tacoma and Adams "preached" to them for 30 minutes on the subject of prevailing wage rates, using the same outline.

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

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

bility of human error in transposition.

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

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

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

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

CREDIBILITY

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

66) Kathleen Johnson was a credible witness. She answered questions deliberately and thoughtfully on direct and cross-examination except where she did not know the answer. Where she did not know the answer, she readily admitted her lack of knowledge. The forum has credited her testimony in its entirety.

67) Timothy Adams, LRI's general counsel and executive vice president, clearly believed that BOLI is overzealous in enforcing Oregon's prevailing wage rate laws. He testified that Oregon is a "zero tolerance" state with regard to BOLI's enforcement of Oregon's prevailing wage rate laws and described his internal staff memo to that effect as the "fear of God" memo. His testimony was internally consistent and he did not try to embellish his testimony concerning Respondent's mitigation efforts

with evidence of which he had no direct knowledge. Despite his bias, the forum found him to be a credible witness and has credited his testimony in its entirety.

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

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

ULTIMATE FINDINGS OF FACT

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

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

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

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

5) While working on the Project, all eight workers performed work that was properly classified as tender to plasterer. The correct prevailing wage

rate for that classification of work was $20.59 per hour for straight time work and $6.00 per hour in fringe benefits.

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

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

8) Between April 12 and July 3, 2000, Respondent filed nine certified payroll statements showing work performed by its employees on the Project. All nine statements classified the listed employees as "Laborers." All nine statements lack the statement of certification required by ORS 279.354 and OAR 839-016-0010. Four of the statements incorrectly state or mislabel hours worked by two of Respondent's employees on eight separate days when both employees worked.

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

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

CONCLUSIONS OF LAW

1) ORS 279.348(3) provides:

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

OAR 839-016-0004(17) provides:

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

> renovation of privately owned property which is leased by a public agency."

ORS 279.348(5) provides:

> "'Public agency' means the State of Oregon or any political subdivision thereof or any county, city, district, authority, public corporation or entity and any of their instrumentalities organized and existing under law or charter."

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

2) ORS 279.354 provides, in pertinent part:

> "(1) The contractor or the contractor's surety and every subcontractor or the subcontractor's surety shall file certified statements with the public contracting agency in writing in form prescribed by the Commissioner of the Bureau of Labor and Industries, certifying the hourly rate of wage paid each worker which the contractor or the subcontractor has employed upon such public work, and further certifying that no worker employed upon such public work has been paid less than the prevailing rate of wage or less than the minimum hourly rate of wage specified in the contract, which certificate and statement shall be verified by the oath of the contractor or the contractor's surety or subcontractor or the subcontractor's surety that the contractor or subcontractor has read such statement and certificate and knows the contents thereof and that the same is true to the contractor or subcontractor's knowledge. The certified statements shall set out accurately and completely the payroll records for the prior week including the name and address of each worker, the worker's correct classification, rate of pay, daily and weekly number of hours worked, deductions made and actual wages paid.
>
> "(2) Each certified statement required by subsection (1) of this section shall be delivered or mailed by the contractor or subcontractor to the public contracting agency. * * *"

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

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

agency by the contractor or subcontractor.

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

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

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

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

3) ORS 279.350(4) provides:

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

OAR 839-016-0033(1) provides:

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

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

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

"The hourly rate of wage to be paid by any contractor or subcontractor to workers upon all public works shall be not less than the prevailing rate of wage for an hour's work in the same trade or occupation in the locality where such labor is

> performed. The obligation of a contractor or subcontractor to pay the prevailing rate of wage may be discharged by making the payments in cash * * *."

OAR 839-016-0035(1) provides:

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

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

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

> "(1) Except for employees who are otherwise specifically exempt under ORS 653.020, employers shall furnish each employee, each time the employee receives a compensation payment from the employer, a written itemized statement of earnings. The written itemized statement shall include:
>
> "(a) The total gross payment being made;
>
> "(b) The amount and a brief description of each and every deduction from the gross payment;
>
> "(c) The total number of hours worked during the time covered by the gross payment;
>
> "(d) The rate of pay;
>
> "(e) If the worker is paid on a piece rate, the number of pieces done and the rate of pay per piece done;
>
> "(f) The net amount paid after any deductions;
>
> "(g) The employer's name, address and telephone number;
>
> "(h) The pay period for which the payment is made."

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

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

> "(1) In addition to any other penalty provided by law, the Commissioner of the Bureau of Labor and Industries may assess a civil penalty not to exceed

> $1,000 against any person who willfully violates ORS 653.030, 653.045, 653.050, 653.060 or 653.261 or any rule adopted pursuant thereto. However, no civil penalty may be assessed for violations of rules pertaining to the payment of overtime wages.
>
> "(2) Civil penalties authorized by this section shall be imposed in the manner provided in ORS 183.090."

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

> "The commissioner may assess a civil penalty for any of the following willful violations:
>
> "* * * * *
>
> "(5) Failure to supply each of the employer's employees with itemized statements of amounts and purposes of deductions in the manner provided in ORS 652.610 in violation of ORS 653.045, OAR 839-020-0012 and 839-020-0080."

OAR 839-020-1020 provides:

> "(1) The commissioner may consider the following mitigating and aggravating circumstances when determining the amount of any civil penalty to be assessed and cite those the commissioner finds to be appropriate:
>
> "(a) The history of the employer in taking all necessary measures to prevent or correct violations of statutes or rules;
>
> "(b) Prior violations, if any, of statutes or rules;
>
> "(c) The magnitude and seriousness of the violation;
>
> "(d) Whether the employer knew or should have known of the violation;
>
> "(e) The opportunity and degree of difficulty to comply;
>
> "(f) Whether the employers' action or inaction has resulted in the loss of a substantive right of an employee.
>
> "(2) It shall be the responsibility of the employer to provide the commissioner any mitigating evidence concerning the amount of the civil penalty to be assessed.
>
> "(3) Notwithstanding any other section of this rule, the commissioner shall consider all mitigating circumstances presented by the employer for the purpose of reducing the amount of the civil penalty to be assessed."

OAR 839-020-1030 provides:

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

referred to in OAR 839-020-1020.

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

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

7) ORS 279.370 provides, in pertinent part:

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

OAR 839-016-0500 provides:

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

OAR 839-016-0520 provides:

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

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

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

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

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

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

"(2) It shall be the responsibility of the contractor, subcontractor or contracting agency to provide the com-

missioner with evidence of any mitigating circumstances set out in subsection (1) of this rule.

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

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

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

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

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

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

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

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

"* * * * *

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

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

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

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

"(3) Notwithstanding any other section of this rule, when the commissioner determines to assess a civil penalty for a violation of ORS 279.350 regarding the payment of the prevailing rate of wage, the minimum

civil penalty shall be calculated as follows:

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

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

"* * * * *

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

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

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

7) ORS 279.361(1) provides:

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

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

"(1) Under the following circumstances, the commissioner, in accordance with the Administrative Procedures Act, may determine that for a period not to exceed three years, a contractor, subcontractor or any firm, limited liability

company, corporation, partnership or association in which the contractor or subcontractor has a financial interest is ineligible to receive any contract or subcontract for a public work:

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

"* * * * *

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

"* * * * *

"(4) The Wage and Hour Division shall maintain a written list of the names of those contractors, subcontractors and other persons who are ineligible to receive public works contracts and subcontracts. The list shall contain the name of contractors, subcontractors and other persons, and the name of any firms, corporations, partnerships or associations in which the contractor, subcontractor or other persons have a financial interest. Except as provided in OAR 839-016-0095, such names will remain on the list for a period of three (3) years from the date such names were first published on the list."

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

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

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

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

OPINION

INTRODUCTION

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

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

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

Respondent acknowledges that it did not post the applicable prevailing wage rates while its workers performed work on the project. However, Respondent contends that the posting requirement contained in ORS 279.350(4) was satisfied because someone else posted prevailing wage rates for the project in the general contractor's job shack. In its exceptions, Respondent again asserts "that so long as the job site is posted with the appropriate prevailing wage rates, a subcontractor may rely upon a posting undertaken by the general contractor." Respondent misinterprets the statute. .

ORS 279.350(4) reads as follows:

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

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

The text of ORS 279.350(4) mandates that "[e]very contractor or subcontractor * * * shall keep the prevailing wage rates * * * posted * * *." There is only one way this mandate can be accomplished – someone must actually post the rates. The statute provides that the "someone" is "every contractor or subcontractor." There is

nothing in the other provisions of ORS 279.350 that creates an ambiguity in this language, and nothing in its related statutes in ORS chapter 279 leads to a conclusion that those words are susceptible to more than one interpretation. Additionally, ORS 174.010 limits the forum's role in construing ORS 279.350(4) "simply to ascertain[ing] and declar[ing] what is, in terms or in substance, contained therein, *not to insert what has been omitted, or to omit what has been inserted*[.]" (emphasis added) In this case, that means the forum is not free to omit subcontractors from the statute's posting mandate or to insert terms to the effect that subcontractors are not required to post or keep posted the prevailing wage rates, so long as the general contractor posts and keeps them posted.

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

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

B. Civil penalty.

1. Aggravating circumstances.

There are several aggravating factors in this case. First, it would have been simple for Respondent to comply with the statute; all it would have taken was a visit by Respondent's local branch manager to the job site to post a copy of the prevailing wage rate for Respondent's workers in a place conspicuous and accessible to them. Second, the violation is a serious one that

requires debarment[17] if the Commissioner finds that the violation was intentional. The magnitude is high because Respondent itself did not provide its workers with any way of finding out that they were being underpaid and because Respondent did not post prevailing wage rates at any of the 134 prevailing wage rate jobs on which it employed workers in the year 2000.[18] Third, Respondent certainly knew of its violation, and in fact at the time of hearing still did not post prevailing wage rates on public works projects subject to Oregon's prevailing wage rate laws where Respondent employs workers. In its exceptions, Respondent argues that, "[g]iven Labor Ready's policy of looking for postings during site visits, the ALJ's conclusion that Respondent 'certainly knew of its violation' must fail." Respondent misses the point that its violation was its own failure to post, of which it was certainly aware.

2. Mitigating circumstances.

The only mitigating factor is that LRI, Respondent's parent company, advises branch managers to do a site visit and look for postings on the job site. However, there is no evidence that this advice was followed on the Project. LRI has also adopted a contract addenda that requires clients on prevailing wage rate jobs to provide Respondent with "a copy of the proper wage classification schedule," warrant that it has been posted appropriately at the jobsite, and to "reimburse [LRI] for underpayment of wages, penalties, and other losses due to [the client's] failure to do so." While this may encourage Respondent's clients to post, this requirement does nothing to insure that Respondent will post the rates and the forum does not consider it to be a mitigating factor. In its exceptions, Respondent argues that the fact that prevailing wage rates were posted at the job should be added as a mitigating factor. The forum rejects this argument for the reason that Respondent itself did not post the rates and there is no evidence that Respondent took any action on the Project to ensure that the rates were posted. The forum also rejects Respondent's invitation, in its exception, to add as a mitigating circumstance "the fact that there is no evidence that any employee received an improper wage due to the circumstances of the prevailing wage rate posting."

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[17] The forum uses the term "debarment" as a shorthand means of referring to placement of a contractor or subcontractor on the Commissioner's List of Ineligibles.

[18] The forum draws this conclusion from Adams' testimony that the posting of prevailing wage rates on job sites by Respondent where Respondent has workers "is not a part of our compliance process."

3. Amount of civil penalty.

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

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

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

Respondent classified its workers as laborers and paid them $21.59 per hour, including fringe benefits, the correct rate for laborers on the Project. The Agency's position is that Respondent's workers were properly classified as tender to plasterers, a classification with a wage rate of $20.59 per hour and $6.00 per hour in fringe benefits, and that Respondent paid its workers less than the prevailing wage rate as a result. Respondent contends its workers were correctly classified and paid. To support this contention, Respondent points to Gerstenfeld's August 27, 1997, letter to Pro-Tec as proof that laborer was the correct classification for Respondent's workers on the Project and argues it was entitled to rely on the opinion expressed in that letter. Respondent further argues that, even if the classification was incorrect, this could not have been determined from BOLI's January 15, 1999, rate book. Again, Respondent misses the mark.

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

Respondent's argument that it could not have determined from the February 15, 1999, rate book that its workers should have been classified and paid as tender to plasterers fails for three reasons. First, Respondent presented no credible evidence that its branch manager who made the classification determination ever consulted that rate book. In fact, there was no credible evidence presented as to the means by which that determina-

tion was made. Second, other than the cryptic entry "Scissor Lift – 60 lb bags" recorded on Respondent's job order form, there was no evidence presented that Respondent ever determined, while its workers worked on the Project, what specific job duties its workers were performing. Third, there was no evidence presented that Respondent could have determined that its workers should have been classified as laborers from the January 15, 1999, rate book. On the other hand, Johnson and Rowand's credible testimony established that, had Respondent's employees called the Agency's prevailing wage rate unit with an accurate description of the work its workers were performing on the Project, the caller would have been told that the workers should be classified and paid as tender to plasterers. This conclusion is supported by the August 27, 1997, letter stating the workers spraying on fireproofing were properly classified as plasterers and the definition of "Tenders to Plasterers" in the January 15, 1999, rate book which defines their duties as "[a]ssist[ing] * * * plasterers * * * by performing duties of lesser skill. Duties include supplying or holding materials or tools, and cleaning work area and equipment. * * *" It is further supported by the Agency's internal document, which existed at the time of the Project, indicating that persons who spray on fireproofing are properly classed as plasterers.

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

B. Civil penalties.

1. Aggravating circumstances.

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

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

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

2. Mitigating circumstances.

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

3. Amount of civil penalty.

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

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

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

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

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

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

B. Civil penalty.

1. Aggravating circumstances.

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

volving eight workers and over $3,000 in unpaid wages. Third, Respondent knew or should have known of the violations based on the Agency's letter of January 26, 2000.

2. Mitigating circumstances.

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

3. Amount of civil penalty.

In its Notice of Intent, the Agency sought a $2,000 civil penalty for each violation, for a total of $18,000. Considering all the aggravating factors and assessments for similar violations in prior final orders, the forum concludes that a $2,000 civil penalty for each violation, for a total of $18,000, is an appropriate civil penalty.[19]

[19] *See In the Matter of Larson Construction Co., Inc.*, 22 BOLI 118, 158-59 (2001), for a discussion of civil penalties assessed in recent final orders involving for violations of ORS 279.354.

RESPONDENT PROVIDED FOUR ITEMIZED STATEMENTS OF EARNINGS THAT CONTAINED INACCURATE INFORMATION

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

OAR 839-020-0012(1) requires employers to furnish employees with a written itemized statement of earnings that contains specific elements, including the total number of hours worked during the time covered by the gross payment and the pay period for which the payment is made. Respondent issues daily paychecks to its employees, with an itemized statement of earnings accompanying each paycheck. To comply with the rule, each itemized statement issued by Respondent must state the exact number of hours the worker actually worked on the date for which the paycheck is issued. A comparison of Respondent's daily work tickets and invoices sent to Pro-Tec with the itemized statements provided to Respondent's workers Shielar and Venegas on April 13 and May 3, 2000, shows that Respondent incorrectly stated the number of hours actually worked by Shielar and Venegas on both dates, for both workers. All four itemized statements showed that Shielar and Venegas worked more hours on those dates than are reflected on Respondent's daily work

tickets and invoices to Pro-Tec.[20] Respondent's inflation of the actual number of hours worked by Shielar and Venegas on April 13 and May 3, 2000, violated OAR 839-020-0012(1)(c) and (h). The itemized statements did not violate paragraph (1)(d) for the reason that the wage rate of $21.59 per hour that appears on the itemized statement is the rate of pay that the workers actually received.

B. Civil penalty.

1. Aggravating circumstances.

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

2. Mitigating circumstances.

There are no mitigating circumstances.

3. Amount of civil penalty.

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

PLACEMENT ON THE LIST OF INELIGIBLES

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

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

A. Liability of Respondent.

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

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

In this case, Respondent knew it had not posted the applicable prevailing wage rates on the Project, intended not to post them, and was under no restrictions that would have prevented it from posting the rates. Respondent also failed to exercise reasonable diligence in determining the proper classification and pay rate for its workers and thereby acted knowingly in classifying and paying its workers on the Project as laborers instead of tenders to plasterers, a classification that paid $5.00 per hour, including fringe benefits, more than the laborer classification. OAR 839-016-0500. Consequently, the forum must debar Respondent for a period of time not to exceed three years.

B. Length of debarment.

ORS 279.361 provides that debarment shall be for "a period not to exceed three years." Although that statute and the Agency's administrative rules

interpreting it do not explicitly authorize the forum to consider mitigating factors in determining the length of a debarment, the commissioner has held that mitigating factors may be considered in determining whether the debarment of a contractor or subcontractor should last less than the entire three-year period allowed by law. *See In the Matter of Larson Construction Co., Inc.*, 22 BOLI 118, 165 (2001); *In the Matter of Keith Testerman*, 20 BOLI 112, 129 (2000); *In the Matter of Southern Oregon Flagging, Inc*., 18 BOLI 138, 169 (1999); *In the Matter of Intermountain Plastics*, 7 BOLI 161 (1988).[21] Aggravating factors may also be considered. *See, e.g., Testerman* at 129.

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

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

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

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

A. Official Notice

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

[21] *Compare In the Matter of Larson Construction Co., Inc.,* 17 BOLI 54, 76 (1998), where the commissioner held that mitigating factors may not be considered in the "initial determination of whether to debar a subcontractor."

the Prevailing Wage Rate unit.[22]

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

In its closing argument, the Agency argued that Respondent's violation of ORS 279.350(1) was predicated on Respondent's failure to pay the prevailing wage rate, based on its misclassification of workers, and Respondent's failure to pay overtime, as shown by Respondent's work tickets and itemized payroll summaries for Shielar and Venegas. Respondent objected to the Agency's overtime theory on the basis that it was not set out specifically in paragraph 3 of the Agency's Notice of Intent and that Respondent would be prejudiced by the forum's consideration of overtime as sought by the Agency. A review of that Notice and of the record shows that the Agency's case was predicated on the failure of Respondent "to pay $3,442.91 in prevailing wages to 8 employees." Consequently, the forum finds that the Agency's theory is within the scope of its allegations contained in the Notice and overrules Respondent's objection. However, there is insufficient evidence in the record for the forum to make an accurate determination of whether or not Shielar and Venegas, the only two workers who worked overtime, were paid the correct overtime rate for the classification of laborers.

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

In its closing argument, the Agency urged the forum to consider evidence that Respondent might not pay its employees for travel time as an aggravating circumstance, and Respondent objected. Respondent's objection is sustained. No evidence was received that Respondent had committed prior violations of OAR 839-020-0045(3) and no such evidence has been considered in formulating this Final Order.[23]

RESPONDENT'S EXCEPTIONS

Respondent filed 32 detailed exceptions to the proposed order. The forum has changed portions of proposed order in

[22] *See* Finding of Fact – The Merits 48, *supra*.

[23] *See, e.g., In the Matter of M. Carmona Painting, Inc.*, 22 BOLI 52, 60, n. 3 (2001) (Where facts giving rise to alleged prior violations were outside the substantive allegations in the Agency's Notice, the forum refused to consider respondent's failure to return 1998 and 1999 wage surveys as "prior violations.")

response to Respondent's exceptions and overruled the remainder of the exceptions, as discussed below.

A. Exception 1.

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

"Waiver is 'the intentional relinquishment of a known right.'" *Wright Schuchart Harbor v. Johnson*, 133 Or App 680, 685 (1995). "Waiver must be plainly and unequivocally manifested, either 'in terms or by such conduct as clearly indicates an intention to renounce a known privilege or power.'" *Id.* at 685-86. In general, the question of whether a waiver has occurred is resolved by examining the particular circumstances of each case. *Id.* at 686. Waiver may be either explicit or implicit, that is, implied from a party's conduct. *Id.* Respondent argues a theory of "waiver by estoppel," relying on *Mitchell v. Pacific First Bank*, 130 Or App 65 (1994), in an attempt to extend the application of the doctrine of waiver to situations where "a party is misled to the party's prejudice into an honest and reasonable belief that waiver is intended." *Id.*, at 71, n.3. The forum declines to adopt Respondent's theory. As the Oregon Supreme Court has explained, the term "waiver by estoppel * * * should be understood to refer to estoppel and not waiver." *Reed v. Commercial Insurance Company*, 248 Or 152, 155 (1967).

Respondent alleges that waiver occurred as a result of the Agency's settlement of the July 28, 2000, Notice of Claim. Kathleen Johnson, an Agency compliance specialist, issued that Notice of Claim and negotiated a settlement of the claim with Mott, Respondent's district manager. Based on the forum's restatement of the law of waiver, the forum relies on Johnson's statements and actions, not Mott's alleged "honest and reasonable belief that waiver [was] intended," to determine if the Agency waived its power to bring the present action.[24] The forum reexamines the exhibits submitted in support of, and opposing, the Agency's motion for partial summary judgment. These include affidavits of Kathleen Johnson and Raymond Mott, the Notice of Claim, two letters from Johnson to Mott, dated

[24] Of course, Mott's perception of what Johnson said and did may be considered if a dispute exists as to the actual content of Johnson's statements and actions.

August 14 and 18, 2000, and an August 25, 2000, letter from Mott to Johnson.

The Notice of Claim sought unpaid wages in the amount of $3,442.91, and an equal amount as liquidated damages, for a total claim of $6,885.82 on behalf of eight employees. The Notice contains no reference to civil penalties or placement on the List of Ineligibles.

Johnson makes the following pertinent statements in her affidavit:

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

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

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

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

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

> "9. [A] representative named Kathleen Johnson from the BOLI Portland office then filed a Notice of Claim on July 28, 2000 * * *.
>
> "* * * * *
>
> "11. I attempted to speak with Kathleen Johnson regarding the Notice but I was unsuccessful in reaching her. I went to the BOLI Portland office and explained to her what had happened at the BOLI Bend office.

> "12. I reviewed with her the case that had resolved the issue in Bend, but Kathleen Johnson stated that the position had been reclassified since that BOLI ruling.
>
> "13. Although unaware of this information, I agreed that Labor Ready would pay the back wages to the employees. However, I told her that Labor Ready would not agree to pay the penalties BOLI had assessed.
>
> "14. Kathleen Johnson agreed to drop the penalties in exchange for the payment of the primary wages totaling $3,442.91. In a letter dated August 14, 2000, I received confirmation of this settlement."

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

B. Exception 2.

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

C. Exception 3.

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

D. Exception 4.

Respondent excepts to the ALJ's findings that: (1) Respondent did not post prevailing wage rates on the Project, and (2) that the applicable prevailing wage rate for "tender to plasterer" was not posted on the Project by Respondent or anyone else. The forum denies (1) and has modified Finding of Fact 16 – The Merits in response to (2).

E. Exception 5.

This exception argues that Proposed Finding of Fact 41 – The Merits is not supported by the evidence. The testimony of Rowand, and Exhibits A-3 and

R-9, viewed together, constitute substantial evidence supporting this finding. Respondent's exception is overruled.

F. Exceptions 6-8.

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

G. Exception 9.

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

H. Exceptions 10-15.

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

I. Exceptions 16-17.

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

J. Exception 18.

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

K. Exception 19

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

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

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

L. Exceptions 20-21

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

M. Exception 22.

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

N. Exception 23.

Respondent excepts to the ALJ's analyses and conclusions in the proposed opinion that: (1) applicable prevailing wage rates must be posted by all contractors and subcontractors on a prevailing wage rate job, and (2) that the "tender to plasterer" wage rate was not posted on the Project. Respondent's exception (1) is denied and exception (2) is granted. The forum has modified paragraph A in the section of the Opinion entitled "Respondent Failed to Post the Applicable Prevailing Wage Rates While it Employed Workers on the Project" in response to this exception.

O. Exceptions 24-25.

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

P. Exception 26.

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

Q. Exception 27.

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

R. Exception 28.

This exception contends that the ALJ should have listed four additional mitigating circumstances in the "Civil Penalty" section in the proposed opinion related to Respondent's violation of ORS 279.350(1). Those include: (1) "Demonstrated BOLI confusion on the issue of the wage classification"; (2) "Labor Ready's corrective action in responding to previous violations of different statutes and roles (sic)"; (3) "No Labor Ready prior violations of failure to pay prevailing wages"; and (4) "Labor Ready's prompt action in attempting to determine what the wage rate classification was after being notified of the issue by the Fair Contracting Foundation." The forum rejects (1) based on a lack of substantial evidence. (2) is overruled because there is no evidence that Labor Ready Northwest, Inc., the Respondent in this case, had ever

committed any prior violations,[25] therefore, it cannot be said to have engaged in actions designed to correct prior violations. For the same reason, the forum has not cited prior violations by Respondent Labor Ready Northwest, Inc. as an aggravating circumstance. (3) is granted for the reason that the forum has previously recognized the absence of prior violations of Oregon's prevailing wage rate laws as a mitigating factor. *In the Matter of William George Allmendinger*, 21 BOLI 151, 172 (2000). Finally, (4) was considered under the rubric of "Respondent's subsequent cooperation."

S. Exception 29.

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

T. Exception 30.

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

U. Exception 31.

Respondent's exception argues that the ALJ used an inappropriate standard in determining that Respondent's violations were "intentional" in the context of Respondent's placement on the List of Ineligibles. This issue was raised in Respondent's closing argument and appropriately resolved in the proposed order. Respondent's exception is overruled.

V. Exception 32.

Respondent's final exception contends that the three-year period of debarment proposed by the ALJ is "grossly excessive." After review, the forum is in partial agreement and has lessened the period of debarment to one year. This exception also points out that Pro-Tec had prior prevailing wage rate violations but was not subject to BOLI sanctions. The Pro-Tec issue is properly an affirmative defense of selective enforcement,[26] which was

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

[26] *See In the Matter of Albertson's, Inc*., 10 BOLI 199, 318 (1992), *rev'd and remanded, Albertson's v.*

not raised by Respondent through its answer or by a motion to amend at the hearing. Consequently, the forum need not consider it. OAR 839-050-0130(2).

ORDER

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

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

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

Bureau of Labor and Ind., 128 Or App 97 (1994).