Table of Contents

35 BOLI Orders

In the Matter of

ERICK ESPINOZA FARM LABOR CONTRACTOR, LLC, and ERICK ESPINOZA-JUAREZ, INDIVIDUALLY,

Case No. 22-16
Final Order of Commissioner Brad Avakian
Issued May 5, 2016

SYNOPSIS

Respondents, an individual and a limited liability company, while acting jointly as farm labor contractors, failed to promptly satisfy a judgment levied against them. The forum found that Respondents were unfit to act as farm labor contractors and revoked their license pursuant to ORS 658.445(3); OAR 839-015-0520 (3)(o); OAR 839-015-0135(1)(c).

The above-entitled case was assigned to Kari Furnanz, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Administrative Prosecutor Cristin Casey, an employee of the Agency. Respondents were represented by their attorney, Matthew F. Denley.

After the Agency issued a Notice of Intent ("NOI") and an Amended NOI, the Agency moved for and was granted summary judgment.

Having fully considered the entire record in this matter, I, Brad Avakian, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact (Procedural and on the Merits[1]), Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) On November 23, 2015, the Agency issued a Notice of Intent to Revoke Farm Labor Contract License (NOI) against Respondents Erick Espinoza Farm Labor Contractor, LLC, and Erick Espinoza-Juarez, individually. The NOI asserted that Respondents' licenses as farm labor contractors should be revoked because their

[1] The Ultimate Findings of Fact required by OAR 839-050-0370(1)(b)(B) are subsumed within the Findings of Fact – The Merits.

character, reliability and/or competence makes them unfit to lack as labor contractors. ORS 658.445(3); OAR 839-015-0520. The NOI also asserted that Respondents are jointly liable for all alleged violations under OAR 839-015-0135(1)(c). (Ex. X2h)

2) Respondents timely filed an answer and request for hearing on December 14, 2015. In their answer, Respondents asserted that their character, reliability and competence made them fit to act as farm labor contractors. Respondents also asserted in their answer that the alleged violations are not of such magnitude and seriousness that revocation of a license is appropriate. (Exs. X2f, X2g)

3) On January 29, 2016, the forum issued a Notice of Hearing to Respondents and the Agency setting the time and place of hearing for 9:30 a.m. on March 15, 2016, at BOLI's Salem office. Together with the Notice of Hearing, the forum sent a copy of the Notice of Intent, a multi-language warning notice, a document entitled "Summary of Contested Case Rights and Procedures" containing the information required by ORS 183.413, a document entitled "Servicemembers Civil Relief Act (SCRA) Notification, and a copy of the forum's contested case hearings rules, OAR 839-050-000 to 839-050-0445. (Exs. X2, X2a–X2e)

4) The NOI was amended on January 28, 2016, because the original NOI contained a typographical error in the case number. No other changes were made to the NOI. (Ex. X5a)

5) On February 10, 2016, the ALJ issued an interim order which stated, in part:

"HOW TO FILE A DOCUMENT

> "You may file a motion or other document by mailing it or hand delivering it to BOLI's Contested Case Coordinator at the following address:
>
> **"Oregon Bureau of Labor and Industries**
> **ATTN: Contested Case Coordinator**
> **1045 State Office Building**
> **800 NE Oregon Street**
> **Portland, Oregon 97232-2180**
>
> "Motions or other documents are considered "filed" on the date they are postmarked with a date on a correctly addressed envelope or on the date of their receipt by BOLI's Contested Case Coordinator, whichever occurs first. OAR 839-050-0040."

(Ex. X2)

6) The ALJ issued an interim order on February 19, 2016, which noted that some case documents had been mistakenly labeled as Case No. 12-16, and stated that any document previously labeled as "In the Matter of: Erick Espinoza Farm Labor

Contractor, LLC, and Erick Espinoza-Juarez, Individually, Respondents, Case No. 12-16" would be included in the contested case filed for Case No. 22-16. (Ex. X6)

7) Respondents filed a motion for postponement on February 29, 2016, requesting that the hearing be rescheduled because Respondents' counsel had a scheduling conflict. The Agency filed a response objecting to a postponement on March 1, 2016. The ALJ granted the postponement motion in an interim order dated March 2, 2016. A new hearing date was set for Thursday, April 14, 2016, a date which all the parties had indicated they were available. (Ex. X8, X9, X10)

8) On March 4, 2016, the Agency filed a motion for summary judgment, contending it was entitled to judgment as a matter of law. On March 9, 2016, the ALJ issued an interim order setting a response deadline of March 11, 2016, and notifying the parties that, "If Respondents fail to file a written response, the forum will grant the Agency's motion if the pleadings and all documents filed in support of the motion show that there is no genuine issue as to any material fact and that the Agency is entitled to judgment as a matter of law." Respondents' unopposed motion for an extension of time until March 16, 2016, to file their response was granted in an interim order dated March 10, 2016. Respondents were also instructed to email a copy of the response to the Administrative Prosecutor, BOLI's Contested Case Coordinator and the ALJ by 5:00 p.m. on March 16, 2016. Respondents emailed a copy of the response to the ALJ, the Contested Case Coordinator and the Administrative Prosecutor on March 16, 2016, but did not file the original response with BOLI's Contested Case Coordinator. (Exs. X7, X8, X12, X13, X17)

9) On March 18, 2016, the ALJ issued an interim order granting the Agency's motion for summary judgment. The ALJ's interim order is reprinted below, with minor editorial changes noted in bracketed language:

> **"<u>Introduction</u>**
>
> "On November 23, 2015, the Agency issued a Notice of Intent to Revoke Farm Labor Contract License (NOI) against Respondents Erick Espinoza Farm Labor Contractor, LLC, and Erick Espinoza-[Juarez], individually. Respondents timely filed an answer and request for hearing on December 14, 2015. The NOI was amended on January 28, 2016, for the sole purpose of correcting a typographical error in the case number. The Amended NOI asserts that Respondents' licenses as farm labor contractors should be revoked because their character, reliability and/or competence makes them unfit to lack as labor contractors. ORS 658.445(3); OAR 839-015-0520. The Amended NOI also asserts that Respondents are jointly liable for all alleged violations under OAR 839-015-0135(1)(c).
>
> "The Agency filed a motion for summary judgment on March 4, 2016, asserting that there is no genuine issue as to any material fact and the Agency is entitled to judgment in its favor as a matter of law. The forum's interim order

dated March 10, 2016, provided Respondents with an extension of time until March 16, 2016, to file a response to the Agency's motion. Respondents submitted a response[2] to the motion on March 16, 2016.

"**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 and the evidentiary burden on the participants is as 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.

"The record considered by the forum in deciding this motion consists of: (1) the Agency's Amended NOI, the Agency's argument made in support of its motion, and the exhibits submitted with the Agency's motion; and (2) Respondents' Answer, Respondents' argument opposing the Agency's motion, and the exhibits submitted in Respondents' response to the Agency's motion.

"**Summary of Facts**

"In its motion, the Agency asserted that the following facts are not in dispute:

- Respondents were licensed labor contractors and their most current farm labor contractor license (#26707) was issued on March 18, 2015 and will expire on March 31, [2016]. Respondent Erick Espinoza Farm Labor Contractor, LLC is an active domestic limited liability company that filed its Articles of [Organization] with the Oregon Corporations Division on May 25, 2012. Respondent Erick Espinoza is the owner and majority member of Erick Espinoza Farm Labor Contractor, LLC. (Agency Ex. 1; Amended

[2] As of this date [March 18, 2016], the forum has only received a courtesy email copy of the response and not the original document for filing in the contested case file. This interim order assumes that Respondents also mailed the original document to the Contested Case Coordinator on the same day that the courtesy copy was emailed.

NOI; Respondent's Answer)

- On July 15, 2015, the Agency issued a Notice of Intent to Assess Civil Penalties in Case No. 78-15 against Respondents, alleging violations of ORS 658.410, ORS 440(1)(f), OAR 839-015-0125, and OAR 839-015-0360. The Agency recommended the assessment of $1000 in civil penalties for these alleged violations. (Agency Ex. 2)

- The Agency and Respondents entered into an Agreed Settlement, which was incorporated into a Final Order Incorporating Informal Disposition ("FOID") against Respondents in Case No. 78-15 on August 25, 2015. The FOID required Respondents to pay civil penalties of $750 to the Agency no later than September 30, 2015. The Agreed Settlement signed by the parties stated that "[t]ime is of the essence" and that, if payment was not make within 10 days of the due date, the Agency would immediately file the FOID as a judgment against Respondents for $1000 in civil penalties. (Agency Ex. 3)

- Respondents submitted two checks to the Agency ($750 on August 25, 2015, and $1,000 on October 25, 2015). Both checks were returned due to insufficient funds. (Agency's Ex. 4; Respondents' Answer)

- The FOID for Case No. 78-15 was recorded as a judgment in Yamhill County on October 23, 2015. (Agency Ex. 5)

- As of March 3, 2016, Respondents had not complied with the terms of the FOID issued on August 28, 2015, or satisfied the judgment resulting from Case No. 78-15. (Lunsten Aff., p. 2)

"In their response to the summary judgment motion, Respondents did not dispute the facts presented by the Agency, but argued the following:

- After the Notice of Intent to Revoke Farm Labor Contractor License was issued in Case No. 22-16, Respondents retained an attorney and intended to pay the assessed civil penalty of $1000 after it produced payroll records that the Agency requested.

- Respondents believed that they could pay the outstanding judgment at the same time that the payroll information was provided to the Agency.

- Respondents were working with a bookkeeper to obtain the requested payroll information, but experienced complications due to the transfer of accounting duties from their former accountant to a new accounting service.

- After Respondents received the Agency's motion on March 7, 2016, Respondents contacted BOLI's judgment unit to obtain a final judgment amount.

- On March 9, 2016, Respondents contacted the Oregon Department of Revenue by telephone and paid the outstanding judgment in full, leaving a zero balance.

"**Analysis and Ruling**

"`The Commissioner of the Bureau of Labor and Industries may revoke, suspend or refuse to renew a license to act as a labor contractor upon the commissioner's own motion or upon complaint by any individual, if * * * [t]he licensee's character, reliability or competence makes the licensee unfit to act as a farm labor contractor.' ORS 658.445(3). OAR 839-015-0520(3) states:

> `The following actions of a construction, farm or forest labor contractor license applicant or licensee or an agent of the license applicant or licensee demonstrate that the applicant's or the licensee's character, reliability or competence make the applicant or licensee unfit to act as a construction, farm or forest labor contractor:
>
> `* * *
>
> `(o) Failure to promptly satisfy any or all judgments levied against the applicant/licensee . . . .'

"The forum has previously revoked a farm labor contractor license when a contractor agreed to pay a civil penalty, but submitted a check that was dishonored by the bank due to insufficient funds. *See In the Matter of Jesus Guzman*, 14 BOLI 1, 5 (1995).

"In this case, it is undisputed that, as of March 3, 2016, Respondents had not paid the judgment against them which was entered on October 23, 2015, resulting from the FOID issued on August 25, 2015. Furthermore, prior to the issuance of the FOID, Respondents signed an Agreed Settlement recognizing that payment of civil penalties was due September 30, 2015, and that `[t]ime is of the essence.' Therefore, even if the judgment was paid on March 9, 2016,[3] Respondents' late payment did not `promptly satisfy' the judgment [levied] against them. Therefore, pursuant to ORS 658.445(3) and OAR 839-015-0520(3)(o), Respondents are unfit to act as farm labor contractors and their

[3] In making this ruling, the forum does not address whether evidence of a payment on March 9, 2016, is admissible, but assumes, for the sake of argument, that it is admissible.

license to do so should be revoked. Pursuant to OAR 839-015-0135(1)(c),[4] Respondents are jointly and severally liable for these violations. The Agency's motion is GRANTED.

"**Further Proceedings**

"Because this ruling resolves all of the issues in the Amended NOI, the hearing scheduled for April 14, 2016, and all associated deadlines are CANCELED. A Proposed Order incorporating this ruling will be issued as soon as possible, and the parties will have the opportunity to file exceptions to the Proposed Order pursuant to ORS chapter 183 and OAR 839-050-0380.

IT IS SO ORDERED."

(Ex. X16) The ALJ's ruling is CONFIRMED, with the addition noted in the Opinion below to reflect that Respondents did not file a response to the motion for summary judgment with the Contested Case Coordinator.

10) The ALJ issued a proposed order on March 31, 2016, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. On April 11, 2016, Respondents timely filed exceptions.[5] Those exceptions are discussed at the end of the Opinion section of this Final Order.

FINDINGS OF FACT – THE MERITS

1) Respondents were licensed labor contractors. Their most current farm labor contractor license (#26707) was issued on March 18, 2015, with an expiration date of March 31, 2016. Respondent Erick Espinoza Farm Labor Contractor, LLC is an active domestic limited liability company that filed its Articles of Organization with the Oregon Corporations Division on May 25, 2012. Respondent Erick Espinoza is the owner and majority member of Erick Espinoza Farm Labor Contractor, LLC. (Exs. X1, X2e, X2g, X2h, X16)

2) The Agency and Respondents entered into an Agreed Settlement, which was incorporated into a Final Order Incorporating Informal Disposition ("FOID") against Respondents in BOLI Case No. 78-15 on August 25, 2015. The FOID required Respondents to pay civil penalties of $750 to the Agency no later than September 30, 2015. The Agreed Settlement signed by the parties stated that "[t]ime is of the essence" and that, if payment was not make within 10 days of the due date, the Agency would

[4] "[T]he licensed majority shareholder or majority shareholders and the licensed corporation or the majority member(s) of a limited liability company and the licensed limited liability company are jointly and severally liable for all violations of the corporation or limited liability company and its agents when acting as a labor contractor." OAR 839-015-0135(1)(c).

[5] The tenth day after the issuance of the Proposed Order was April 10, 2016, a Sunday. Therefore, the due date for filing exceptions was Monday, April 11, 2016, pursuant to OAR 839-050-0040(3).

immediately file the FOID as a judgment against Respondents for $1000 in civil penalties. (Exs. X12, X16)

3) Respondents submitted two checks to the Agency ($750 on August 25, 2015, and $1,000 on October 25, 2015). Both checks were returned due to insufficient funds. (Exs. X2g, X12, X16)

4) The FOID for Case No. 78-15 was recorded as a judgment in Yamhill County on October 23, 2015. (Exs. X12, X16)

5) As of March 3, 2016, Respondents had not complied with the terms of the FOID issued on August 28, 2015, or satisfied the judgment resulting from Case No. 78-15. (Exs. X12, X16)

CONCLUSIONS OF LAW

1) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and Respondents Erick Espinoza Farm Labor Contractor, LLC, and Erick Espinoza-Juarez herein. ORS 658.405 to 658.503.

2) Respondents' failure to promptly satisfy a judgment levied against them demonstrates that their character, competence and reliability make them unfit to act as farm labor contractors. ORS 658.445(3) and OAR 839-015-0520(3)(o).

3) Respondents are jointly and severally liable for these violations. OAR 839-015-0135(1)(c).

OPINION

All allegations in the Agency's Amended NOI were resolved in the ALJ's interim order granting the Agency's motion for summary judgment, which has been confirmed in this Final Order. In addition, the arguments made in the emailed copy of Respondents' response to the motion for summary judgment were not entitled to consideration because Respondents never filed the response with BOLI's Contested Case Coordinator.[6] No further discussion is required as to the merits.

RESPONDENTS' EXCEPTIONS

In the exceptions, Respondents assert that they "timely and properly filed its [sic] Response [to the Agency's Motion for Summary Judgment] and the ALJ's failure to consider the arguments contained therein was in error." (Ex. X19, p. 1) Respondents argue that the response was timely filed because they followed the ALJ's instruction to email a copy of the response to the Administrative Prosecutor, BOLI's Contested Case

[6] Motions or other documents are considered "filed" on the date they are postmarked with a date on a correctly addressed envelope or on the date of their receipt by BOLI's Contested Case Coordinator, whichever occurs first. OAR 839-050-0040. The forum may disregard a document that is not filed by the established deadline. OAR 839-050-0050(1).

Coordinator and the ALJ. The exceptions are denied for the reasons summarized below.

First, Respondents were notified on several occasions of BOLI's rule regarding how to timely file documents, including at the time the Notice of Hearing was issued. (Ex. X2b) After the case was assigned to the ALJ, the ALJ issued an interim order informing Respondents that "[m]otions or other documents are considered 'filed' on the date they are postmarked with a date on a correctly addressed envelope or on the date of their receipt by BOLI's Contested Case Coordinator, whichever occurs first. OAR 839-050-0040." (Ex. X2) After the Agency filed its motion for summary judgment, the ALJ issued an interim order stating: "If Respondents fail to file a written response, the forum will grant the Agency's motion if the pleadings and all documents filed in support of the motion show that there is no genuine issue as to any material fact and that the Agency is entitled to judgment as a matter of law." (Ex. X13)

Second, there is nothing in the ALJ's interim order of March 10, 2016, which excuses Respondents from filing a written response with the Contested Case Coordinator as required by BOLI's rules. In particular the interim order of March 10, 2016, states as follows:

> "Respondents' unopposed Request for Extension of Time is GRANTED. Respondents *must file* their response to the Agency's motion for summary judgment on or before **March 16, 2016**. Respondents *are also instructed* to email a copy of the response to the Administrative Prosecutor, BOLI's Contested Case Coordinator and the ALJ **by 5:00 p.m on March 16, 2016.**"

(Ex. X14) (Emphasis added in italics; bold and underlining in original). The italicized language above clearly states that Respondents were required to *both* "file" their response and "also" send an email with courtesy copies. Respondents' argument that the ALJ was not "following her own instructions" is contrary to the language in the interim order and is without merit.

Finally, Respondents argue that the ALJ disregarded and failed to consider their arguments. Contrary to Respondents' argument on this point, the ALJ's interim order contains a summary of Respondents' arguments and addresses them in the "Analysis and Ruling" portion of the interim order. (Ex. X16) Accordingly, this argument is also without merit.

For all of the above reasons, the exceptions filed by Respondents are rejected.

ORDER

NOW, THEREFORE, the Commissioner of the Bureau of Labor and Industries hereby revokes the farm labor contractor license of Respondents Erick Espinoza Farm Labor Contractor, LLC, and Erick Espinoza-Juarez, Individually, (No. 26707), which was issued on March 18, 2015, in accordance with ORS 658.445, OAR 839-015-0520(3) and OAR 839-015-0135(1)(c).

In the Matter of

PORTLAND FLAGGING, LLC; A D TRAFFIC CONTROL SERVICES, LLC; TRI-STAR FLAGGING, LLC; PORTLAND SAFETY EQUIPMENT, LLC; PHOENIX CONSTRUCTION GROUP, INC.; SBG CONSTRUCTION SERVICES LLC; GNC CONSTRUCTION SERVICES LLC; EVAN WILLIAMS AND KENYA SMITH AKA KENYA SMITH-WILLIAMS,

Case No. 14-14
Final Order of Deputy Commissioner Christine Hammond
Issued May 20, 2016

SYNOPSIS

Respondents Portland Flagging, LLC ("Portland Flagging"), A D Traffic Control Services, LLC ("A D Traffic") and Tri-Star Flagging, LLC ("Tri-Star") failed to pay the prevailing wage rate to 36 workers who performed flagging work during the construction of the Sellwood Bridge, a public works project, when timely deposits were not paid to the workers' fringe benefit accounts. Civil penalties of $27,046.60 are imposed on Portland Flagging, A D Traffic and Tri-Star for failing to pay the prevailing wage rate. Additionally, civil penalties of $51,000 are assessed against Portland Flagging, A D Traffic and Tri-Star for filing 51 inaccurate certified payroll reports, and an additional civil penalty of $1,000 is imposed for failing to submit a certified payroll statement for the week ending December 8, 2012. Civil penalties will not be assessed against Portland Flagging, A D Traffic and Tri-Star for making unlawful payroll deductions because the statute and administrative rule cited in the Agency's charging document do not provide for an assessment of civil penalties for those violations. Portland Flagging, A D Traffic and Tri-Star are placed on the list of ineligibles to receive public contracts for a period of three years because they failed to pay the appropriate prevailing wage and the prime contractor paid those amounts. As the corporate officer responsible for the intentional falsification of certified payroll statements, Respondent Evan Williams is placed on the list of ineligibles to receive public contracts for a three year period.

The above-entitled case came on regularly for hearing before Kari Furnanz, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held in the W. W. Gregg Hearing Room of the Oregon Bureau of Labor and Industries, located at 800 NE Oregon Street, Suite 1045, Portland, Oregon on May 5, 2015.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Administrative Prosecutor Adriana Ortega, an employee of the Agency. Evan Williams was the authorized representative for Portland Flagging, A D Traffic, Tri-Star, LLC,

Portland Safety Equipment, LLC, Phoenix Construction Group, Inc., SBG Construction Services LLC, and GNC Construction Services LLC, and presented the case on behalf of those Respondents and himself.

The Agency called Prevailing Wage Rate Compliance Specialist Monique Soria-Pons as a witness. Respondents called Evan Williams and Jennifer Erickson as witnesses.

The forum received into evidence:

a) Administrative exhibits X1 through X29;
b) Agency exhibits A3, A6 (pages 2, 3, 5, 40 only), A7, A8 (pages 1 and 2 only), A9, A12, and A14 through A17.
c) No exhibits were offered or received on behalf of Respondents.

Having fully considered the entire record in this matter, I Christine N. Hammond, Deputy 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.[1]

FINDINGS OF FACT – PROCEDURAL

1) On November 5, 2014, the Agency issued a Notice of Intent (NOI) to Portland Flagging, LLC, A D Traffic, and Tri-Star Flagging. The NOI alleged that Respondents failed to timely pay all prevailing wage rate wages owed to its employees on various public works projects, and requested a total of $50,000 in civil penalties for those alleged violations. The NOI also alleged that Respondents submitted inaccurate certified payroll statements, and sought civil penalties in the amount of $49,000 for those violations. Additionally, the NOI stated that Respondents failed to timely file certified payroll statements on three occasions, and requested $3,000 in civil penalties for those violations. The NOI also alleged that Respondents made unlawful deductions from the paychecks of five employees and requested civil penalties of $5,000 for those violations. Finally, the NOI asserted that Respondents should be placed on the list of those ineligible to receive public works contracts because Respondents failed to pay the prevailing wage rate to workers and the prime contractor paid those amounts, and also for intentionally falsifying information on certified payroll statements. (Ex. X1a)

2) An answer and request for hearing from the attorney representing Portland Flagging, LLC, A D Traffic, Tri-Star Flagging, LLC and Portland Safety Equipment, LLC was received by BOLI's Wage and Hour Division on November 25, 2014. In the answer, the Agency's allegations were denied. (Ex. X1b)

[1] The Ultimate Findings of Fact required by OAR 839-050-0370(1)(b)(B) are subsumed within the Findings of Fact – The Merits.

3) On November 26, 2014, the forum issued a Notice of Hearing to Respondents A D Traffic, Tri-Star and Portland Flagging, and the Agency setting the time and place of hearing for 9:00 a.m. on February 10, 2015, at BOLI's Portland office. Together with the Notice of Hearing, the forum sent a copy of the NOI, a multi-language warning notice, a document entitled "Summary of Contested Case Rights and Procedures" containing the information required by ORS 183.413, a document entitled "Servicemembers Civil Relief Act (SCRA) Notification," and a copy of the forum's contested case hearings rules, OAR 839-050-000 to 839-050-0445. (Exs. X2, X2a–X2e)

4) On December 23, 2014, the ALJ issued an Interim Order seeking clarification as to whether Respondents were represented by the attorney who filed its answer and instructed the attorney to file a notice of withdrawal, if he intended to resign, so that the record was clear on this matter. The Interim Order further stated:

> "Furthermore, assuming [Respondents' attorney] does withdraw as counsel, other counsel or an authorized representative must appear on behalf of each Respondent as they are all limited liability companies. Limited liability companies are unincorporated associations. ORS 63.001(17). OAR 839-050-0110(1) requires that unincorporated associations must be represented at all stages of the proceeding either by counsel or by an authorized representative. An authorized representative includes an "authorized officer or regular employee" of the limited liability company. OAR 839-050-0110(2). **Before a person may appear as an authorized representative, the limited liability corporation that is a party to the contested case proceeding must file a letter specifically authorizing the person to appear on behalf of the party.** OAR 839-050-0110(3)."

(Ex. X3)

5) On December 24, 2014, Respondents' attorney filed a motion to withdraw as counsel. The motion was granted in an Interim Order issued by the ALJ on January 9, 2015. (Exs. X4, X5)

6) On January 7, 2015, a letter was submitted to the ALJ from Evan Williams, stating that he was the authorized representative and "acting as President" for A D Traffic, Tri-Star, Portland Flagging and Portland Safety Equipment. (*In the Matter of Portland Flagging, LLC, #28-15*, 34 BOLI 244, 246 (2016))[2]

7) On January 12, 2015, the ALJ issued an Interim Order explaining the requirements for filing motions and other documents, which notified the parties that all documents needed to be submitted in writing to BOLI's Contested Case Coordinator.

[2] Three Final Orders involving Portland Flagging were issued in 2015 and 2016. With the exception of the first Final Order, citations to the Final Orders involving Portland Flagging contain a reference to the case number to assist in differentiating between the cases.

The ALJ also issued an Interim Order requiring the parties to file case summaries which identified witnesses and exhibits two weeks in advance of the date set for hearing. (Exs. X6, X7)

8) A prehearing conference was held on January 16, 2015, to discuss this case and two other cases involving Respondents which were set for hearing February 10, 2015. The primary topic of discussion concerned whether the three cases should be consolidated for hearing. Neither the Agency nor Respondents had submitted a motion to consolidate the cases. The ALJ issued an Interim Order stating that there was insufficient information to conclude that the cases involve common questions of law or fact pursuant to OAR 839-050-0190 and determined that there would be a separate hearing for each of the three cases. The ALJ further ruled that, at the conclusion of the hearing in Case No. 28-15, a prehearing conference would be held in Case Nos. 37-13 and 14-14 to discuss the timeline for ruling on the motions for summary judgment and hearing dates. The deadline for filing case summaries and exhibits was postponed and was to be rescheduled at a later date. (Ex. X9)

9) The Agency filed a motion for partial summary judgment on January 20, 2015, asserting that there is no genuine issue of material fact regarding the claims alleged in the NOI. On January 21, 2015, the ALJ issued an Interim Order requiring Respondents to file a written response to the motion. Respondents' authorized representative Evan Williams filed a response to the motion on January 27, 2015. (Exs. X8, X10, X12)

10) Respondents submitted a case summary on January 27, 2015. (Ex. X11)

11) On February 2, 2015, the ALJ issued an Interim Order granting the Agency's unopposed motion to postpone the hearing so that the Agency could have additional time to review documents recently produced by Respondents. The ALJ set a new hearing date of April 7, 2015. (Ex. X31[3])

12) The Agency filed a second motion for summary judgment on February 19, 2015, asserting that there is no genuine issue of material fact regarding Respondents' intentional filing of falsified certified statements. On February 23, 2015, the ALJ issued an Interim Order requiring Respondents to file a written response to the motion. Respondents' authorized representative Evan Williams filed a response to the motion on February 27, 2015. (Exs. X14, X15, X17)

13) On February 25, 2015, the ALJ issued an interim order reminding the Agency that during the Prehearing Conference held on January 16, 2015, the Agency stated that it intended to amend the Notice of Intent in this matter to include the missing "Exhibit A" and that the potential amendment was also referenced in the ALJ's interim order of January 21, 2015. As of February 25, 2015, an "Exhibit A" was not attached to

[3] This exhibit is a copy of Ex. X15 in Case No. 28-15 and Ex. X34 in Case No. 37-13.

the NOI and the NOI did not include the names of the employees whom Respondents allegedly failed to pay the prevailing wage rate.

The interim order of February 25, 2015, also stated that if the Agency did not file an amended NOI which included the missing information by February 27, 2015, the ALJ would rule on the pending summary judgment motions based on the allegations in the NOI dated November 5, 2014. The Agency did not file an amended NOI by February 27, 2015. On March 2, 2015, the Agency filed a motion for extension of time to amend the NOI, asserting that the Agency just noticed the deadline that day and was unable to amend the document by February 27, 2015. The Agency further stated that "several amendments will need to be made to the" NOI. (Ex. X13, X16)

14) On March 2, 2015, the ALJ issued an interim order denying the Agency's motions for summary judgment. The pertinent portion of the ALJ's interim order is reprinted below:

> **"**In its motion, the Agency argues that Respondents violated ORS 279C.800, 279C.840(1), OAR 839-025-0043(1) and OAR 839-025-0040 by withholding fringe benefit amounts from the paychecks of 36 workers and then failing to deposit the withdrawn amounts into a fringe benefit plan. The Agency also asserts that Respondents violated ORS 279C.845(3) and OAR 839-025-0010(1) by inaccurately certifying that the all workers were paid full wages and benefits. It is the Agency's burden to prove that an employer did not pay all deducted fringe benefits into the employer's fringe benefit plan. *In the Matter of Green Thumb Landscape and Maintenance*, Inc., 32 BOLI 185, 198 (2013).
>
> "All of the arguments in the Agency's motions are based on the argument that Respondents withdrew fringe benefit amounts from the paychecks of 36 workers, but failed to deposit those amounts into a fringe benefit plan. However, the NOI does not identify the names of the 36 workers or the amounts that were allegedly withheld and not deposited into a fringe benefit plan. The forum has previously dismissed allegations when the Agency failed to correctly identify the issues in its NOI. *See Green Thumb*, 32 BOLI at 197 (dismissing allegations of unpaid overtime when the Agency failed to identify the violations correctly or move to amend the NOI at hearing to conform to the evidence). Similarly in this matter, even if some violations could be inferred from the Agency's evidence submitted in support of its motions for summary judgment, the Agency cannot prevail at this time because the violations are not identified in the NOI. *Id.* Accordingly, the Agency has failed to sustain its burden in proving a violation and the motion for summary judgment is DENIED.
>
> "The Agency has indicated that 'several amendments will need to be made to the' NOI. In light of that fact, the requirements set forth in my Interim Order of February 25, 2015, are rescinded and the Agency's Motion for Extension filed today is, therefore, moot. This case remains set for hearing on **April 21, 2015**."

(Ex. X15) The ALJ's ruling on the Agency's motion is hereby CONFIRMED.

15) On March 11, 2015, the Agency filed an Amended NOI which added Portland Safety Equipment, LLC, Phoenix Construction Group, Inc., SBG Construction Services, LLC, GNC Construction Services LLC, Evan Williams and Kenya Smith aka Kenya Smith-Williams as Respondents. The Amended NOI also asserted joint and several liability allegations against all Respondents and contended that Williams was directly liable because the corporate veil was pierced. Additionally, the allegations the Amended NOI were revised to include the names of the workers and removed some of the violations contained in the original NOI. In summary, the Amended NOI asserted:

Allegation	**Action Requested**
Failure to pay prevailing wage rate wages, including fringe benefits	Civil penalties of $36,000 for 36 violations
Filing inaccurate and incomplete certified statements	Civil penalties of $52,000 for 52 violations
Failure to file certified statements	Civil penalties of $1,000 for 1 violation
Unlawful deductions from paychecks	Civil penalties of $5,000 for 5 violations
Failure to pay the prevailing rate of wage to their workers and the prime contractor paid those amounts	Placement on the list of ineligibles for a period of three years
Intentional falsification of information on certified payroll statements	Placement on the list of ineligibles for a period of three years

(Ex. X17)

16) The Agency filed a second motion for summary judgment on March 31, 2015, asserting that there is no genuine issue of material fact regarding Respondents' liability for the allegations in this matter. On April 1, 2015, the ALJ issued an Interim Order requiring Respondents to file a written response to the motion by April 6, 2015. Respondents' response deadline was later extended until April 14, 2015. Respondents' authorized representative Evan Williams filed a response to the motion on April 14, 2015. (Exs. X18 - X21)

17) The Agency filed a case summary on April 14, 2015. (Exs. X23, X29)

18) On April 6, 2015, the Agency filed a letter with notice that it was arranging for security to be present at the hearing due to safety concerns in Case No. 28-15. An Oregon State Police Trooper was present during the hearing for this case (No. 14-14) because it involved the same Respondents as in Case No. 28-15. (*In the Matter of Portland Flagging, LLC, #28-15*, 34 BOLI 244, 258 (2016); Hearing Record)

19) On April 10, 2015, the issue of the liability of the remainder of the Respondents was bifurcated from the claims against Portland Flagging, and then

consolidated with Case Nos. 28-15, 37-13 and 55-15. The hearing for those consolidated matters was postponed until pending default issues were fully resolved in related cases involving all Respondents, and those will be addressed in a separate Final Order. (*In the Matter of Portland Flagging, LLC*, 34 BOLI 208, 213 (2015))

20) After a discussion on the record following the hearing in a companion case, the ALJ issued an interim order on April 10, 2015, setting a new hearing date of April 28, 2015, and extending the case summary deadline until April 14, 2015. The interim order of April 10, 2015, also noted that Respondents filed a document titled Motion to Remove Entities on April 7, 2015 and that the ALJ was considering Respondents' motion as a motion for summary judgment pursuant to OAR 839-050-0150(4) and the Agency's deadline for responding was April 14, 2015. (Ex. X20; *In the Matter of Portland Flagging, LLC, #37-13*, 34 BOLI 270, 275 (2016)[4])

21) On April 20, 2015, the Agency filed a motion for postponement. The Agency notified the Agency by email on April 20, 2015, that it was requesting to postpone the hearing by one day. On April 21, 2015, the ALJ issued an order postponing the hearing by one day and setting a new hearing date of April 22, 2015. (Exs. X24, X25)

22) On April 24, 2015, the ALJ issued an interim order ruling on the Agency's motion for summary judgment that was filed on March 31, 2015. The ALJ's interim order is reprinted[5] below:

> "On November 5, 2014, the Agency issued a Notice of Intent ("NOI") in this matter against the above- referenced Respondents. An Amended Notice of Intent ('ANOI') was filed on March 11, 2015. All of the allegations at issue in the motion for summary judgment are based upon Respondents' alleged failure to pay prevailing wage, including fringe benefits. as set forth in Paragraph 4 of the ANOI.[6]
>
> "The Agency filed a motion for summary judgment on March 31, 2015, asserting that there is no genuine issue of material fact regarding Respondents' failure to pay unpaid wages. Respondents' authorized representative Evan Williams timely filed a response to the motion on April 14, 2015.

[4] The Motion to Remove Entities is in the contested case file for Case No. 37-13.

[5] Minor editorial changes for clarification were made in some places, as reflected by brackets. Otherwise, the interim order is reprinted in its entirety.

[6] It does not appear that the Agency has moved for summary judgment with respect to the allegations in Paragraph 7 of the ANOI alleging unlawful deductions from paychecks for work equipment.

"**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 and the evidentiary burden on the participants is as 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.

"The record considered by the forum in deciding this motion consists of: (1) the Agency's ANOI, the Agency's argument made in support of its motion, and the exhibits submitted with the Agency's motion; and (2) Respondents' Answer, Respondents' argument opposing the Agency's motion, and the exhibits submitted in Respondents' response to the Agency's motion."

"**ANALYSIS**

"In its motion, the Agency argues that Respondents violated ORS 279C.800, 279C.840(1), OAR 839-025-0043(1) and OAR 839-025-0040 by withholding fringe benefit amounts from the paychecks of 36 workers and then failing to deposit the withdrawn amounts into a fringe benefit plan. The Agency further asserts that Respondents violated ORS 279C.845(3) and OAR 839-025-0010(1) by inaccurately certifying that the all workers were paid full wages and benefits. It is the Agency's burden to prove that an employer did not pay all deducted fringe benefits into the employer's fringe benefit plan. *In the Matter of Green Thumb Landscape and Maintenance, Inc.,* 32 BOLI 185, 198 (2013)."

1. Liability of Respondent A D Traffic Control Services LLC for Unpaid Wages

"The Agency asserts that Respondents withdrew fringe benefit funds from the wage claimants' paychecks without depositing those amounts into a fringe benefit plan in the time required by law. In support of its motion, the Agency submitted multiple payroll documents for employees from AD Traffic Control Services, LLC ('AD'), showing the deductions. Agency's Ex. 6. I am unable to

find anything in Respondents' responsive documents which contradicts the Agency's evidence that deposits[7] into the fringe benefit accounts of 36 workers listed in Exhibit A to the ANOI from work weeks ending April 14, 2012 to May 25, 2013, were not made until September 13, 2013. (Agency's Ex. 16)

"Moreover, the Agency sent an email to AD with its calculations of the wages due to workers, which are summarized as follows:

Employee	Amount of Unpaid wages
Alexander	$4,720.44
Bradford	$4,860.46
Brown	$9,032.77
Crampton	$393.74
Davis	$739.49
Dishman	$20,404.39
M. Ford II	$365.40
R. Ford	$92.80
Givens	$3,273.54
Harris	$13,270.16
D. Harrison	$4,118.94
M. Harrison	$2,998.08
Hilp	$1,496.23
Hodge	$2,084.00
Holquin	$679.86
I. Johnson	$1,797.59
M. Johnson	$1,027.94
Kelley	$510.40
King	$28.50
Lewis	$150.80
Lockett	$1,137.54
Lockhart	$213.30
C. Moultrie	$295.82
D. Moultrie	$2,741.73
Newton	$980.53
Ontiveros	$1,667.36
Paterson	$92.80
Peek[8]	$17.99

[7] Respondents disagree with the Agency's contention that the deposit was made by the primary contractor, rather than Respondents. However, the origin of the deposit is not a material issue of fact, and need not be addressed.

[8] This employee is not listed in Exhibit A to the ANOI, but is included in this chart because this number was part of the calculations made in the Agency's Ex. 11 which were sent to AD.

Rasheed	$9,057.72
Ricks	$1,822.70
Rotramel	$2,594.99
Schulenberg	$521.35
Trent	$3,801.77
Vance	$4,524.10
Wakefield	$1,353.31
Weiss	$241.32
Willis	$740.49
Total	**$103,850.35**[9]

"(Agency's Exhibit 11). Kenya Smith sent an email stating that she 'agree[d] with the totals.' (*Id.* at p. 1.) Ms. Smith was the Payroll Supervisor for AD. (Agency's Ex. 5)

"Prevailing wage payments must be made to employees 'in cash [or] by the making of contributions of a type referred to in ORS 279C.800(1)(a).' ORS 279C.840(1). ORS 279C.800(1)(a) defines prevailing wage fringe benefit payments as the 'rate of contribution a contractor or subcontractor makes irrevocably to a trustee or to a third person under a plan, fund or program.' It is clear that any timely (i.e. 'not less often than quarterly') contributions made to The Contractors' Plan would be valid. OAR 839-025-0043(1).

"However, to make late contributions, employers must follow a specific set of steps, which includes notice and potential repayment of investment losses, in order to validly contribute to a retirement plan. *See, e.g.,* 29 CFR § 2510.3-102(d); 67 Fed. Reg. 15,051, 15,062 (March 28, 2002). There is no evidence in this case that the late contributions made to the accounts of the 36 workers listed in Exhibit A for the pa[y] periods ending April 14, 2012 – May 25, 2013, followed an appropriate delinquent contribution payback method. Rather, it appears that only the amounts deducted from the wage claimants' paychecks during those time periods were deposited into The Contractor's Plan several months later on September 13, 2013. Accordingly, I find that the contributions made to the retirement accounts of the wage claimants on that date do not satisfy the requirements of ORS 279C.840(1) and ORS 279C.800(1)(a), and the Agency's motion on this issue is **GRANTED**.

[9] This total is slightly different than the amount sought in the ANOI because it includes $487.05 in unpaid wages that were not fringe benefit amounts, and also due to minor mathematical errors that were later corrected. (Agency Exs. 11, p. 1; 12)

2. Inaccurate Certified Payroll Statements Were Filed by AD

"Because the fringe benefit contributions made on September 13, 2013, were not in compliance with the law, it follows that the certified payroll statements associated with the workers listed in Ex. A to the ANOI for the pay periods ending April 14, 2012 to May 25, 2013, were inaccurate and in violation of ORS 279C.845 and OAR 839-025-0010.

3. Amount of Civil Penalties

"Civil penalties may be imposed against employers who do not comply with Oregon's prevailing wage statutes. ORS 279C.865; OAR 839-025-0530(3)(a). The Agency may assess a civil penalty in the amount of the unpaid wages or $1000, whichever is lesser. OAR 839-025-0540. In this case, the Agency seeks civil penalties of $1000 for each late contribution on behalf of a wage claimant. Respondents argue 'that since all wages were paid and that no monies are owed to employees,' the amount requested is 'excessive.' (Response, p. 10) Viewing the evidence in the light most favorable to Respondents, it appears that Respondents have addressed at least some of the mitigating circumstances set forth in OAR 839-025-0520 which may warrant a reduction of the amount of civil penalty. Accordingly, the Agency's motion on this issue is **DENIED.**

4. Placement on the List of Ineligibles

"The Agency argues, pursuant to ORS 279C.860 and OAR 839-025-0010, that Respondents should be placed on the list of ineligibles because Evan Williams directed his staff to sign false statements certifying that employees' full wages were paid. Respondents argue that it was Mr. Williams's intent to make the quarterly fringe benefit deposits when the weekly certified statements were completed. Therefore, Respondents contend that the Agency did not establish the element of 'intent' which is necessary to place Respondents on the list of ineligibles. Although the evidence submitted by Respondents as to a 'good faith' intention to submit fringe benefit contributions is weak, when viewing it in the light most favorable to Respondents, I am unable to grant the Agency's motion on this issue and thus the motion is **DENIED**.

"**Summary of Rulings**

"I have granted the Agency's motion for summary judgment on the following issues and, therefore, facts regarding these matters do not need to be presented at the upcoming hearing:

- The wage claimants listed in Exhibit A to the ANOI were employed by Respondent AD.

- The fringe benefit contributions Respondents made on September 13, 2013, on behalf of the wage claimants list in Exhibit A to the ANOI were not timely made, and do not satisfy the requirements of ORS 279C.840(1) and ORS 279C.800(1)(a).

- AD filed inaccurate certified payroll statements for the pay periods ending April 14, 2012 to May 25, 2013, in violation in violation of ORS 279C.845 and OAR 839-025-0010.

"I have denied the Agency's motion for summary judgment on the following issues and, therefore, facts regarding these matters are at issue at the upcoming hearing:

- The amount of civil penalties that should be awarded based on the mitigating factors outlined in OAR 839-025-0520(1).

- Whether Respondents should be placed on the list of ineligibles.

IT IS SO ORDERED"

(Ex. X27) The ALJ's ruling on the Agency's motion for summary judgment is hereby CONFIRMED.

23) The ALJ issued an interim order on April 27, 2015, postponing the hearing until May 5, 2015, after Respondent Williams provided a note from a doctor confirming that he had been admitted to the hospital. Respondents also filed a motion to extend the case summary deadline, which was denied because Respondents had previously filed a case summary and were permitted to file an addendum to the case summary pursuant to OAR 839-050-0210(3). (Ex. X26, X29).

24) The hearing convened on May 5, 2015, and went into recess that afternoon. At the commencement of the hearing, the Agency made an oral motion to include testimony of Soria-Pons in Case Nos. 28-15 regarding her qualifications in the record for this case to avoid duplication. The oral motion was GRANTED. (Hearing Record)

25) On July 24, 2015, the ALJ issued an interim order denying Respondents' Motion to Remove Entities. The pertinent portion of the ALJ's interim order is reprinted below:

"On April 7, 2015, Respondents filed a document titled Motion to Remove Entities in the above-referenced consolidated cases. The parties were informed that the motion would be treated as a motion for summary judgment. The Agency submitted a timely response on April 14, 2015.

"In their motion, Respondents argue that SBG Construction Services, LLC ('SBG'), Phoenix Construction Group, Inc. ('Phoenix') and GNC Construction Services, LLC ('GNC') should be 'removed as respondents.'

"**Summary Judgment Standard**

"Respondents did not specifically identify this motion as a motion for summary judgment. However, Respondents have argued that there is 'no just cause for [SBG, Phoenix and GNC] to be listed in this action.' That statement essentially argues that there are no facts to support the inclusion of SBG, Phoenix and GNC. Accordingly, I informed the parties that I would analyze the motion as a motion for summary judgment, and I will review the arguments in accordance with the standard set forth in OAR 839-050-0150(4)(B).

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 and the evidentiary burden on the participants is as 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.

"The record considered by the forum in deciding this motion consists of: (1) the charging documents in the above-referenced cases, the Agency's argument made in response to Respondents' motion, and the exhibits submitted with the Agency's response; and (2) Respondents' Answers and Respondents' argument in support of their motion. Respondents did not submit any exhibits in support of their motion.

"**Summary of Each Party's Arguments and Factual Support**

"Respondents argue that SBG, Phoenix and GNC should not be part of these actions. Respondents make factual arguments in support of their motion, but include no documents to support their arguments.

"The Agency argues that the three companies share the same business address, and that spouses[10] Evan Williams and/or Kenya Smith have an ownership interest in SBG, Phoenix and GNC. The Agency attached copies of documents from the Oregon Secretary of State's website regarding all of the corporations named as Respondents, which can be summarized as follows:

Corporate Respondent	**Associated Names**	**Corporate History**	**Address**	**Agency Ex. No.**[11]
Portland Flagging, LLC	Kenya Smith-Williams (Registered Agent) Evan Williams (Member)	Registered 3/16/2009 Dissolved 10/24/2012	309 S. McLoughlin Blvd, Oregon City, OR 97045 (principal) PO Box 28157, Portland, OR 97228 (mailing)	1
A D Traffic Control Services (assumed business name)	Portland Flagging, LLC (Authorized Representative)	Registered 2/12/2010 Registration cancelled 3/16/2011	4134 N Vancouver Ave., Portland, OR 97217	2
A D Traffic Control Services, LLC	Evan Williams (Registered Agent) Evan Williams (Member)	Registered 3/16/2011 Dissolved 5/16/2014	309 S. McLoughlin Blvd, Oregon City, OR 97045 (principal) PO Box 28157, Portland, OR 97228 (mailing)	3
Portland Safety Equipment, LLC	Kenya Smith-Williams (Registered Agent) Evan Williams (Member)	Registered 9/6/2011 Dissolved 11/2/2012	4134 N Vancouver Ave., Portland, OR 97217 (principal and mailing) 309 S. McLoughlin Blvd, Oregon City, OR 97045 (Evan Williams)	4
Phoenix Construction Group, Inc	Kenya Smith (Registered Agent & Secretary) Evan Williams (President)	Registered 8/26/2013 Active as of 3/24/15	309 S. McLoughlin Blvd, Oregon City, OR 97045 (principal and mailing)	5
SBG Construction Services, LLC	Evan Williams (Registered Agent) Phoenix Construction Group (Member)	Registered 6/21/2012 Active as of 3/24/2015	309 S. McLoughlin Blvd, Oregon City, OR 97045 (principal) PO Box 28157, Portland, OR 97228 (mailing)	6

[10] Although the Agency's summary judgment filings did not include evidence of the spousal relationship between Evan Williams and Kenya Smith, this fact was admitted on the record during the hearings for these matters.

[11] The Agency also attached a print-out that appears to be from the Google Plus website which indicates under a heading called "Story" that GNC is involved with "Traffic Control Services Plans, Rental Equipment and Sign Installations." (Agency Ex. 8) However, because there is no information to authenticate this exhibit and it is not self-authenticating, [the ALJ was] unable to consider it for purposes of [the summary judgment] motion. * * * *

GNC Construction Services, LLC	Kenya Smith (Registered Agent) Kenya Smith (Member)	Registered 2/29/2012 Active status as of 2/4/2015	309 S. McLoughlin Blvd, Oregon City, OR 97045 (principal) PO Box 28157, Portland, OR 97228 (mailing)	7

"* * *

"Case Nos. 37-13 and 14-14 seek to place Respondents on the list of ineligibles or debarred pursuant to ORS 279C.845. If there is a finding that one of the Respondents is a subcontractor that should be debarred, then businesses with a financial interest in the debarred Respondent may also be placed on the list of ineligibles. More specifically, ORS 279C.860(1)(a) provides that '[a] contractor, subcontractor or any firm, corporation, partnership or association *in which the contractor or subcontractor has a financial interest* is ineligible to receive a contractor or subcontract for public works' if the contractor intentionally failed or refused to pay the prevailing rate of wage to workers. (Emphasis added).

"As indicated in the chart above, the Agency has submitted documents from Oregon's Secretary of State which show that spouses Evan Williams and Kenya Smith have or had ownership interests in each of the named corporations. Moreover, the corporate entities shared physical and mailing addresses with the other named Respondents. I am unable to draw any conclusions of the *exact* relationship between Williams, Smith and the various corporate entities. However, at a minimum, Exhibits 1-7 suggest that there was a complex and intertwined relationship among them during the time period of the events in the consolidated cases.

"In reviewing a motion for summary judgment, this forum draws all inferences of fact from the record against the party filing the motion for summary judgment and in favor of the participant opposing the motion. *In the Matter of Farwest Hatchery LLC*, 33 BOLI 176, 179 (2014). Given the related ownership interests and addresses of the companies and when drawing all inferences of fact in favor of the non-moving party (the Agency), I find that there is a question of fact as to whether GNC, Phoenix and SBG have a 'financial interest' in a subcontractor. Accordingly, Respondents are not entitled to summary judgment in Case Nos. 37-14 and 14-14 against SBG, Phoenix and GNC, and their motion on this issue is **DENIED**.[12]

[12] Because I have already determined that there is a question of fact as to the liability of SBG, Phoenix and GNC for debarment in Case Nos. 37-13 and 14-14, these parties will remain in those cases. Since Respondents argued only that these Respondents should be "removed" from the case and made no

"* * * *

"**IT IS SO ORDERED.**"

(Ex. X32) The ALJ's ruling on Respondents' motion is hereby CONFIRMED.

26) On February 10, 2016, a document signed by Commissioner Brad Avakian titled Notice to the Forum was filed. The Notice stated that the Commissioner designated and authorized Deputy Commissioner Christine N. Hammond to issue any and all Final Orders in this case. The Contested Case Coordinator served all of the parties with a copy of the Notice. (Ex. X30)

27) The ALJ issued a proposed order on May 2, 2016, 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 any exceptions.

FINDINGS OF FACT – THE MERITS

1) Slayden/Sundt Joint Ventures was the prime contractor for the Sellwood Bridge project. Slayden/Sundt entered into a subcontract with A D Traffic to perform flagging work on the project. (Testimony of Erickson)

2) Portland Flagging operated under the assumed business name of "A D Traffic." Time sheets, payroll records and retirement plan contribution statements for workers employed by both Portland Flagging and A D Traffic all used some form of the name "A D Traffic." Portland Flagging, A D Traffic and Tri-Star shared the same business address. (*In the Matter of Portland Flagging, LLC, #28-15*, 34 BOLI 244, 258 (2016)).

3) Portland Flagging and A D Traffic operated as joint employers during 2011 and 2012. (*In the Matter of Portland Flagging, LLC, #28-15*, 34 BOLI 244, 263-65 (2016)).

4) Payroll records for A D Traffic for the workers on the Sellwood Bridge project ceased at the end of April, 2013. Beginning in May of 2013, Tri-Star employed workers as flaggers on the Sellwood Bridge project. (Ex. A12; Testimony of Williams; Testimony of Erickson)

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reference to the merits of each individual claim, there is no need for me to examine liability under other legal theories in those cases.

5) Approximately 61% of the workers identified in Ex. A to the Amended NOI performed work on the Sellwood Bridge project for both A D Traffic and Tri-Star. (Amended NOI; Ex. A12)

6) Williams was the "manager and president" of both A D Traffic and Tri-Star. (Testimony of Williams)

7) Funds withheld from the paychecks of 36 workers from April 14, 2012 – May 25, 2013, for fringe benefits were not deposited into the workers' fringe benefit accounts until after a check was issued by Slayden/Sundt on September 13, 2013, to a fringe benefit management company, The Contractors' Plan. The names of the workers and the amounts of the fringe benefit deductions were as follows:

Employee	Unpaid Wages
Alexander	$4,720.44
Bradford	$4,860.46
Brown	$9,032.77
Crampton	$393.74
Davis	$739.49
Dishman	$20,404.39
M. Ford II	$365.40
R. Ford	$92.80
Givens	$3,273.54
Harris	$13,270.16
D. Harrison	$4,118.94
M. Harrison	$2,998.08
Hilp	$1,496.23
Hodge	$2,084.00
Holquin	$679.86
I. Johnson	$1,797.59
M. Johnson	$1,027.94
Kelley	$510.40
King	$28.50
Lewis	$150.80
Lockett	$1,137.54
Lockhart	$213.30
C. Moultrie	$295.82
D. Moultrie	$2,741.73
Newton	$980.53
Ontiveros	$1,667.36
Paterson	$92.80
Rasheed	$9,057.72
Ricks	$1,822.70
Rotramel	$2,594.99

Schulenberg	$521.35
Trent	$3,801.77
Vance	$4,524.10
Wakefield	$1,353.31
Weiss	$241.32
Willis	$740.49
Total	**$103,832.36**

(Exs. A14, A15, A17; Testimony of Soria-Pons; Testimony of Erickson)

8) Williams made a business decision to use the funds deducted from workers' paychecks for fringe benefits to "make payroll," which resulted in getting "behind" in making deposits into the workers' fringe benefit accounts. (Testimony of Williams)

9) The certified payroll statements for 51 pay periods for weeks ending April 14, 2012 to May 25, 2013, inaccurately stated that all prevailing wage rate wages had been paid. (Exs. X18,[13] X27)

10) Workers performed flagging work on the Sellwood Bridge project during the week of December 8, 2012, but a certified payroll statement was not submitted for that week. (Ex. A3, Testimony of Soria-Pons)

11) The following payroll deductions were made from workers' paychecks for work equipment purchased from the "company store" as follows:

Worker	Week Ending Date	Deduction
Peek	4/14/2012	$18.00
Weiss	4/14/2012	$38.95
Brown	4/14/2012	$36.00
Crampton	4/14/2012	$50.95
Willis	4/21/2012	$81.00

(Ex. A6, A8, p. 2; Testimony of Soria-Pons; Testimony of Williams)

12) Witnesses Soria-Pons and Erickson were credible. The testimony of Williams revealed that he was disorganized and was not familiar with the details of his business records. Accordingly, his testimony appeared to be disingenuous and self-serving when he lacked documentation to support his statements, yet was insistent that particular actions were done. Therefore, he was not a credible witness and his testimony is credited only when consistent with other admissible evidence on the

[13] The certified payroll statements at issue are part of Ex. X18 (the Agency's motion for summary judgment) and are marked as Ex. A-5 to the Agency's motion.

record. In particular, Williams' testimony that there was a certified payroll statement for December 2012 and that employees gave permission in writing to make payroll deductions for non-required equipment is not credited because there were no exhibits or credible testimony in the record to reflect that. (Hearing Record)

CONCLUSIONS OF LAW

1) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and Respondents herein. ORS 279C.860; ORS 279C.865.

2) Portland Flagging, A D Traffic and Tri-Star are joint employers who employed workers as flaggers on the Sellwood Bridge public works project.

3) Portland Flagging, A D Traffic and Tri-Star violated Oregon's prevailing wage rate law when they withheld fringe benefit wages from the paychecks of 36 workers for 51 weekly pay periods, but did not deposit those funds into their fringe benefit accounts.

4) Certified payroll reports for work performed on the Sellwood Bridge public works projects inaccurately stated that all prevailing wage payments had been made, resulting in 51 violations of ORS 279C.845 and OAR 839-025-0010.

5) The Commissioner has the authority to assess civil penalties for violations of ORS 279C.845, OAR 839-025-0010, ORS 279C.840(1), OAR 839-025-0035(1), and ORS 279C.540. The imposition of $27,046.60 in civil penalties for failing to pay the prevailing wage rate and $51,000 in civil penalties for submitting inaccurate certified payroll statements is an appropriate exercise of the Commissioner's authority. ORS 279C.865, OAR 839-025-0530, and OAR 839-025-0540.

6) Because ORS 279C.845(4) was violated when a certified payroll statement was not submitted for the pay period ending December 8, 2012, civil penalties in the amount of $1,000 ($1,000 per violation) are assessed. ORS 279C.865; OAR 839-025-0530(3)(k), 839-025-0540(1), (5).

7) Because the prime contractor made deposits to the fringe benefit accounts when the subcontractor failed to do so, Portland Flagging, A D Traffic and Tri-Star should be placed on the list of those ineligible to receive any contract or subcontract for public works for a period of three years from the date on which their names are published on the list. ORS 279C.860(1)(b)

8) The filing of 51 inaccurate certified payroll statements was intentional. Therefore, Portland Flagging, A D Traffic and Tri-Star are placed on the list of those contractors and subcontractors ineligible to receive any contract or subcontract for public works for a period of three years from the date on which their names are published on the list. ORS 279C.860, OAR 839-025-0085.

9) Williams was the corporate officer responsible for the intentional failure to pay the prevailing wage rate and, thus, is placed on the list of those contractors and subcontractors ineligible to receive any contract or subcontract for public works for a period of three years from the date on which their names are published on the list.

10) Portland Flagging, A D Traffic and Tri-Star made unlawful deductions from the paychecks of five workers. However, civil penalties are not assessed for those violations because the statute and rule cited in the Amended NOI do not provide for an assessment of civil penalties for this violation. ORS 652.610(3); OAR 839-020-1020.

OPINION

This is a proceeding brought under Oregon's prevailing wage rate laws in which the Agency seeks civil penalties against Respondents and also seeks to place Respondents on the List of Ineligibles[14] to receive any contract for public works projects for a period of three years after first publication on that list. ORS 279C.860.

A. Portland Flagging, A D Traffic and Tri-Start were Joint Employers

In general, a joint employment relationship exists when two associated employers share control of an employee. *In the Matter of Portland Flagging, LLC* (#28-15), 34 BOLI 244, 264 (2016). Joint or co-employers are responsible, both individually and jointly, for compliance with all applicable provisions of Oregon's wage and hour laws. *Id.* A joint employment relationship is established when employers have an agreement to share the services of an employee that is mutually beneficial to the employer(s), where one employer acts directly or indirectly in the interest of the other employer with respect to the employee, where the employers share direct or indirect control of the employee, or where one employer controls the other employer. *Id.*

The forum takes official notice of the fact that the Commissioner previously held that Portland Flagging and A D Traffic operated as joint employers during 2011 and 2012 when (1) Portland Flagging operated under the assumed business name of "A D Traffic;" (2) time sheets, payroll records and retirement plan contribution statements for Martell and Penn during 2011 and 2013 all use some form of the name "A D Traffic;" (3) the statement for a workers' account with The Contractors Plan is addressed to "A D Traffic Control Services, LLC;" and (4) Portland Flagging and A D Traffic shared the same business address. *Id.* at 263-65. In the case at hand, the evidence also shows that both Portland Flagging and A D Traffic shared the same business address. As well, time labor reports in this case initially use the name "A D Traffic Control" and then in 2013 refer to the employer was "A D Traffic Control Services, LLC." Therefore, the evidence demonstrates that Portland Flagging and A D Traffic were joint employers of the workers on the Sellwood Bridge project. *Id.*

[14] In this Final Order, the term "debar" may alternatively be used in place of the phrase "placement on the List of Ineligibles."

Tri-Star also operated at the same business address as Portland Flagging and A D Traffic. Williams was the "manager and President" of both A D Traffic and Tri-Star. Approximately, 61% of the workers listed in the Amended NOI performed work as flaggers on the Sellwood Bridge project for both A D Traffic and Tri-Star. These facts demonstrate that Tri-Star also operated as a joint employer with Portland Flagging and A D Traffic. Thus, all three companies jointly employed workers as flaggers on the Sellwood Bridge project, and are all individually and jointly responsible for complying with Oregon's prevailing wage rate law.

B. <u>Failure to Pay the Prevailing Wage Rate</u>

1. Violation

It is the Agency's burden to prove that an employer did not pay all deducted fringe benefits into the employer's fringe benefit plan. *In the Matter of Green Thumb Landscape and Maintenance, Inc.,* 32 BOLI 185, 198 (2013). Contributions to fringe benefit plans must be made on a regular basis and not less often than quarterly. OAR 839-025-0043(1). Prevailing wage payments must be made to employees "in cash [or] by the making of contributions of a type referred to in ORS 279C.800(1)(a)." ORS 279C.840(1). ORS 279C.800(1)(a) defines prevailing wage fringe benefit payments as the "rate of contribution a contractor or subcontractor makes irrevocably to a trustee or to a third person under a plan, fund or program." Payments must be made on the 15th day following the end of a calendar quarter. (*In the Matter of Portland Flagging, LLC, #28-15*, 34 BOLI 244, 260 (2016)).

The ALJ issued the following ruling on the Agency's motion for summary judgment: "The fringe benefit contributions Respondents made on September 13, 2013, on behalf of the wage claimants list[ed] in Exhibit A to the ANOI were not timely made, and do not satisfy the requirements of ORS 279C.840(1) and ORS 279C.800(1)(a)." As previously stated, that ruling has been confirmed.

Thus, the Agency sustained its burden of proof in demonstrating that the untimely deposit of funds into the fringe benefit accounts of 36 workers violated the requirement to pay the prevailing wage rate.

2. Civil Penalties

The Agency seeks civil penalties of $36,000 for the late fringe benefit contributions made on behalf of the 36 workers. Civil penalties may be imposed against employers who do not comply with Oregon's prevailing wage statutes. ORS 279C.865; OAR 839-025-0530(3)(a). The Agency may assess a civil penalty in the amount of the unpaid wages or $1,000, whichever is lesser. OAR 839-025-0540. The criteria used to determine the amount of penalties are "the actions of the employer in responding to previous violations, prior violations, opportunity and degree of difficulty to comply, magnitude and seriousness of the violation, and whether the employer knew or should have known of the violation." *In the Matter of Hard Rock Concrete, Inc. and Rocky*

Evans, 33 BOLI 77, 103 (2014), *appeal pending;* OAR 839-025-0520. When determining the appropriate amount of civil penalties, the existence of intent is irrelevant. *In the Matter of Diamond Concrete, Inc. and Eric James O'Malley and Marnie Leanne O'Malley*, 33 BOLI 68, 73 (2014).

The forum takes official notice of Respondents' previous violations of the prevailing wage statutes, Respondents' knowledge of the violations, and that, at times, Respondents did not respond to the Agency's requests in 2011 or early 2012. (*In the Matter of Portland Flagging, LLC, #37-13*, 34 BOLI 270, 281 (2016)).

These factors weigh in favor of assessing a civil penalty up to the full amount of each underpayment or $1,000, whichever is lesser. OAR 839-025-0540; OAR 839-025-0520. Thus, the forum imposes penalties for underpayment, as follows:

Worker[15]	Underpayment Violation	Amount of Civil Penalty
Alexander	$4,720.44	$1,000.00
Bradford	$4,860.46	$1,000.00
Brown	$9,032.77	$1,000.00
Crampton	$393.74	$393.74
Davis	$739.49	$739.49
Dishman	$20,404.39	$1,000.00
M. Ford II	$365.40	$365.40
R. Ford	$92.80	$92.80
Givens	$3,273.54	$1,000.00
Harris	$13,270.16	$1,000.00
D. Harrison	$4,118.94	$1,000.00
M. Harrison	$2,998.08	$1,000.00
Hilp	$1,496.23	$1,000.00
Hodge	$2,084.00	$1,000.00
Holquin	$679.86	$679.86
I. Johnson	$1,797.59	$1,000.00
M. Johnson	$1,027.94	$1,000.00
Kelley	$510.40	$510.40
King	$28.50	$28.50
Lewis	$150.80	$150.80
Lockett	$1,137.54	$1,000.00
Lockhart	$213.30	$213.30
C. Moultrie	$295.82	$295.82
D. Moultrie	$2,741.73	$1,000.00
Newton	$980.53	$980.53

[15] An additional worker who received an underpayment (Peek) is not listed because he was not identified in the Amended NOI.

Ontiveros	$1,667.36	$1,000.00
Paterson	$92.80	$92.80
Rasheed	$9,057.72	$1,000.00
Ricks	$1,822.70	$1,000.00
Rotramel	$2,594.99	$1,000.00
Schulenberg	$521.35	$521.35
Trent	$3,801.77	$1,000.00
Vance	$4,524.10	$1,000.00
Wakefield	$1,353.31	$1,000.00
Weiss	$241.32	$241.32
Willis	$740.49	$740.49
Total		**$27,046.60**

3. Placement on the List of Ineligibles

The Agency contends that Respondents should be placed on the list of ineligibles because they failed to pay the prevailing wage rate and the prime contractor paid those amounts. The Commissioner of the Bureau of labor and Industries "shall add a . . . subcontractor's name" to the list of subcontractors ineligible to receive contracts for public works projects after determining that:

> "The subcontractor has failed to pay to the subcontractors employees amounts required under ORS 279C.840 (Payment of prevailing rate of wage) and the contractor has paid the amounts on the subcontractor's behalf * * *"

ORS 279C.860(1)(b). *See also* OAR 839-025-0085(1)(b).

As previously established in Section B.1., *supra*, A D Traffic failed to pay their employees the amounts required under ORS 279C.840. At hearing, the Agency sustained their burden of proof in demonstrating that the prime contractor, Slayden/Sundt paid the amounts due on behalf of A D Traffic. (Finding of Fact – The Merits, No. 7) Therefore, A D Traffic shall be placed on the list of those ineligible to receive public works contracts for a period of three years.

C. Inaccurate or Falsified Certified Payroll Statements

1. Violation

The Agency alleges that Respondents committed 52 violations of ORS 279C.845 and OAR 839-025-0010(1) by filing "inaccurate and/or incomplete" certified payroll reports for 52 weekly pay periods. ORS 279C.845 provides, in pertinent part:

> "(1) * * * every subcontractor * * * shall file certified statements with the public agency in writing, on a form prescribed by the Commissioner of the Bureau of Labor and Industries, certifying:

"* * * * *

"(3) The certified statements shall set out accurately and completely the * * * subcontractor's payroll records, including the name and address of each worker, the worker's correct classification, rate of pay, daily and weekly number of hours worked and the gross wages the worker earned upon the public works during each week identified in the certified statement."

OAR 839-025-0010(1) also imposes these requirements.

With respect to all workers, this matter was resolved in the summary judgment ruling which stated: "AD filed inaccurate certified payroll statements for the pay periods ending April 14, 2012 to May 25, 2013, in violation of ORS 279C.845 and OAR 839-025-0010." There were 51 inaccurate certified payroll statements during this pay period. Thus, civil penalties of $51,000 ($1,000 per violation) are assessed.

2. Civil Penalties

The Agency asks for the imposition of 52 penalties in the amount of $1,000 for each violation. ORS 279C.865 also allows imposition of a penalty for each filing of an inaccurate or incomplete payroll record, which are required to be filed by ORS 279C.845 and OAR 839-025-0010. The same factors discussed in Section B.2. are also used to determine the penalties for violations based on the filing of inaccurate certified payroll statements.

The Agency seeks a $1,000 penalty for each for each separate violation. The criteria for determining the amount of civil penalties is governed by OAR 839-025-0520. Given the nature of the violations and the criteria of OAR 839-025-0520 discussed in Section B.2., a penalty of $1,000 for each inaccurate certified payroll statement is appropriate, resulting in a total penalty of $51,000 for these violations.

3. Placement on the List of Ineligibles

The Amended NOI asserts that Respondents should be placed on the list of ineligibles because Williams directed his staff to sign false statements certifying that employees' full wages were paid. OAR 839-025-0085(1)(d) provides that the commissioner may place a subcontractor on the list of those ineligible to receive public contracts when "[t]he contractor or subcontractor has intentionally falsified information in the certified statements the contractor or subcontractor submitted under ORS 279C.845." Williams testified at the hearing that he made a "business decision" to use the funds deducted for fringe benefits to "make payroll" and that he "got behind" in making the fringe benefit deposits. The Commissioner has previously found that, at the direction of Williams, Portland Flagging and A D Traffic were responsible for intentionally falsifying certified payroll statements. (*In the Matter of Portland Flagging, LLC, #37-13*, 34 BOLI 270, 288 (2016)). Similarly, in this case, Williams made a conscious choice to fail to make fringe benefit deposits, yet he did not correct certified

payroll statements that inaccurately stated that deposits were made, nor did he instruct his staff to do so. Therefore, based on those intentional decisions, Portland Flagging and A D Traffic should be placed on BOLI's list of ineligibles to receive contracts or subcontracts for public works for a period of three years.

Additionally, Williams has identified himself as the authorized representative and "President" of all the companies who are Respondents in this matter and, thus, is the corporate officer or manager responsible for intentionally falsifying information in the certified statements. Additionally, he testified that he was the one who made the decision to use the fringe benefit withholdings to "make payroll" and was aware that fringe benefit deposits were owed at the time he received BOLI's letter of July 17, 2013. Despite this awareness, he did not have the inaccurate certified payroll statements amended to reflect this. Therefore, Williams should also be placed on the list of ineligibles for a period of three years. ORS 279C.860(3).

D. Failure to File Certified Statement

1. Violation

The Agency asserts that Respondents failed to file a certified payroll statement on the fifth business day of the following month for the pay period ending December 8, 2012. When a certified statement is not timely filed, a violation of ORS 279C.845(4) and OAR 839-025-0010(3) exists. Although Williams testified that a certified payroll statement was prepared for this week, no such statement was submitted as an exhibit or provided to the investigator upon request. Therefore, the Agency has sustained its burden in proving that this violation occurred.

2. Civil Penalties

Because ORS 279C.845(4) was violated, civil penalties in the amount of $1,000 ($1,000 per violation) are assessed. ORS 279C.865; OAR 839-025-0530(3)(k), 839-025-0540(1), (5).

E. Unlawful Deduction from Paychecks

1. Compliance with ORS 652.610(3) and OAR 839-020-0020

The Agency asserts that Respondents unlawfully deducted amounts for work equipment from the paychecks of five workers in violation of "ORS 652.610(3) and OAR 839-020-0020."

The Agency sustained its burden of proof in establishing that the deductions occurred, and there was no admissible evidence to establish that the deductions met one of the exceptions of ORS 652.610(3)(a) or ORS 652.610(3)(b). Accordingly, ORS 652.610(3) was violated on five occasions.

With respect to OAR 839-020-0020, that regulation applies to payroll deductions for equipment from the "minimum wage." There was no evidence presented to show that the deductions caused the workers' pay to fall below the minimum wage. Accordingly, this regulation was not violated.

2. Civil Penalties

The Amended NOI requests civil penalties in the amount of $5,000 ($1,000) per violation, citing to "ORS 652.900, OAR 839-020-1010 and OAR 839-020-1020" to support the request. However, none of the cited authorities provide for an assessment of civil penalties for violations of ORS 652.610(3). ORS 652.900(1) references assessing civil penalties for violations of ORS 652.610(4), but does not reference violations of ORS 652.610(3), which is the statute cited in the Amended NOI. OAR 839-020-1010[16] provides a detailed enumerated list of a number of violations which support an assessment of civil penalties, but it does not refer to violations of ORS 652.610(3). OAR 839-020-1020 lists the criteria for determining the appropriate civil penalty, but does not identify the violations for which civil penalties may be assessed. Because none of the cited authorities provides the basis for an assessment of civil penalties for violations of ORS 652.610(3), no civil penalties will be assessed for those violations.

F. Additional Named Respondents

The issue of the liability of the remaining Respondents has been bifurcated and that portion of the case was consolidated with Case Nos. 55-15, 28-15 and 37-13 into a separate proceeding. *In the Matter of Portland Flagging, LLC*, 34 BOLI 208, 213 (2015). No further discussion is required as to the merits.

ORDER

A. NOW, THEREFORE, as authorized by ORS 279C.865, and as payment of the penalties assessed as a result of its violations of ORS 279C.540, ORS 279C.840(1), ORS 279C.845, OAR 839-025-0010(1), OAR 839-025-0035, and OAR 839-025-0050, the Commissioner of the Bureau of Labor and Industries hereby orders **Respondents Portland Flagging, LLC, A D Traffic Control Services, LLC, and Tri-Star Flagging, LLC,** to deliver to the Administrative Prosecution Unit of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, the following:

> A certified check payable to the Bureau of Labor and Industries in the amount of **SEVENTY NINE THOUSAND, FORTY SIX DOLLARS AND SIXTY CENTS ($79,046.60)**, plus interest at the legal rate on that sum between a date ten days after the issuance of the final order and the date

[16] This rule was amended after the events at issue, but the changes to the rule did not impact this case. The Amended NOI contains footnotes with information describing when other applicable administrative rules were amended, but this information was not included with respect to OAR 839-020-1010.

Respondents Portland Flagging, LLC, A D Traffic Control Services, LLC, and Tri-Star Flagging, LLC, comply with the Final Order.

B. As authorized by ORS 279C.860(1)(a) and OAR 839-025-0085(1)(a), as a result of intentional violations of ORS 279C.840 and OAR 839-025-0035, the Commissioner of the Bureau of Labor and Industries further orders—

Respondents Portland Flagging, LLC, A D Traffic Control Services, LLC, and Tri-Star Flagging, LLC, shall be placed on the List of Ineligibles, as defined in OAR 839-025-0090, and shall thereafter be ineligible to receive any contract or subcontract for a public works for a period of three years from the date first published there; and

Respondent Evan Williams shall be placed on the List of Ineligibles, as defined in OAR 839-025-0090, and shall thereafter be ineligible to receive any contract or subcontract for a public works for a period of three years from the date first published there.

In the Matter of

ABDUL RAHIM GHAFFARI and UNITED GEM & CARPETS, INC.,

Case Nos. 18-16 & 29-16
Final Order of Commissioner Brad Avakian
Issued June 27, 2016

SYNOPSIS

Claimant, a minor, was employed by Respondent Ghaffari, who failed to pay him all wages due and owing, including overtime wages. The forum awarded Claimant $1,627 in unpaid wages. Ghaffari's failure to pay the wages was willful and the forum awarded Claimant $2,880 in ORS 652.150 penalty wages. The forum awarded Claimant $2,880 as an ORS 653.055 civil penalty because Claimant was not paid all his overtime wages. The forum also found that Ghaffari violated ORS 653.045(2), OAR 839-020-0083, ORS 653.307(2), OAR 839-021-0220(2), OAR 839-021-0104, 839-021-0170, and 839-020-0185 and assessed $5,600 in civil penalties.

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on April 27, 2016, in the W. W. Gregg Hearing Room of the Oregon 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 Administrative Prosecutor Cristin Casey, an employee of the Agency. Jacob Backus ("Claimant") was present throughout the hearing and was not represented by counsel. Respondent Abdul Rahim Ghaffari ("Ghaffari") represented himself and was present throughout the hearing. Ghaffari also acted as the authorized representative for Respondent United Gem and Carpets, Inc. ("United").

The Agency called the following witnesses: Claimant; Maria Perez, BOLI Compliance Specialist; Nate Platz, Claimant's father; and Stephanie Platz, Claimant's stepmother. Respondent Ghaffari called himself as a witness.

The forum received into evidence:

a) Administrative exhibits X-1 through X-21;
b) Agency exhibits A1 through A12; and
c) Respondent exhibits R1 through R5.

Having fully considered the entire record in this matter, I, Brad Avakian, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact (Procedural, On the Merits, and Ultimate[1]), Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) On Sept 5, 2014, Claimant filed a wage claim with the Agency's Wage and Hour Division alleging that Respondents owed him unpaid wages and assigned his claim to the Agency. (Ex. A1)

2) On May 22, 2015, the Agency issued Order of Determination #14-2359 ("OOD") in which it alleged that Claimant was employed by Respondents from July 27 through August 16, 2014, at the pay rate of $12 per hour and worked a total of 154.5 hours, 34.5 of which were overtime hours, earning a total of $2,061 in straight time and overtime wages. The OOD alleged that Claimant was only paid $434 for his work and is owed $1,627 in unpaid wages, $2,880 in ORS 652.150 penalty wages, and $2,880 in ORS 653.055(1)(b) civil penalties, plus applicable interest. (Ex. X9)

3) On June 25, 2015, Respondents filed an answer and request for hearing. The case was assigned no. 18-16. (Ex. X6)

4) On January 28, 2016, the Agency issued a Notice of Intent ("NOI") in case #29-16 which it announced its intent to assess $6,100 in civil penalties based on Respondents' alleged violations of Oregon's record keeping and child labor laws and regulations. (Ex. X2)

5) On February 12, 2016, Respondents filed an answer and request for hearing. (Ex. X3)

6) On March 7, 2016, the Agency filed a motion to consolidate cases #18-16 and 29-16 on the grounds that both cases involve the same Respondents and presented common questions of law and fact. (Ex. X5)

7) On March 8, 2016, the forum issued a Notice of Hearing to Respondents, the Agency, and Claimant setting the time and place of hearing for 9 a.m. on April 19, 2016, at BOLI's Portland office. On March 10, 2016, the forum issued an Amended Notice of Hearing to Respondents, the Agency, and Claimant setting the time and place of hearing for 9 a.m. on April 19, 2016, at BOLI's Portland office. Together with the Amended Notice of Hearing, the forum sent a copy of the Order of Determination, a document entitled "Summary of Contested Case Rights and Procedures" containing the information required by ORS 183.413, a document entitled "Servicemembers Civil Relief

[1] The Ultimate Findings of Fact required by OAR 839-050-0370(1)(b)(B) are subsumed within the Findings of Fact – The Merits.

Act (SCRA) Notification, and a copy of the forum's contested case hearings rules, OAR 839-050-000 to 839-050-0445. (Ex. X6)

8) On March 9, 2016, the ALJ issued a case summary order requiring case summaries to be filed no later than April 13, 2016. (Ex. X7)

9) On March 15, 2016, the Agency issued an amended NOI that corrected statutory citations in sections 1 and 5. (Ex. X9)

10) On March 17, 2016, the Agency filed a motion for partial summary judgment. On March 18,[2] 2016, the ALJ issued an order entitled "Interim Order – Requiring Respondents' Written Response to Motion for Summary Judgment" that explained the significance of summary judgment in the proceeding and set a deadline for Respondents' response. Respondents timely requested a one week extension of time to respond. The Agency did not object and the ALJ granted Respondents' request. On March 31, 2016, Respondents timely filed a response. (Ex. X13)

11) On March 18, 2016, the ALJ granted the Agency's unopposed motion to consolidate cases #18-16 and 29-16. (Ex. X12)

12) On April 8, 2016, the ALJ issued an interim order ruling on the Agency's motion for partial summary judgment, reprinted below:

"INTRODUCTION

"On May 22, 2015, the Agency issued an Order of Determination ('OOD') in which it alleged that Respondents employed Jacob T. Backus ('Claimant') from July 27, 2014, through August 16, 2014, and owe Claimant $1,627 in unpaid wages, $2,880 in ORS 652.150 penalty wages, and $2,880 in ORS 653.055 (1)(b) civil penalties, plus interest on all three sums. (Case No. 18-16)

"On March 15, 2016, the Agency issued an Amended Notice of Intent ('NOI') in which it alleged that Respondents failed to keep, maintain, and make required records available and also violated numerous child labor laws and administrative rules with respect to Claimant's employment with Respondents. In its NOI, the Agency proposed to assess $6,100 in civil penalties. (Case No. 29-16)

"Respondents filed an answer and request for hearing in response to both charging documents. On March 18, 2016, in response to the Agency's motion and Respondents' failure to object, I issued an interim order consolidating case nos. 18-16 and 29-16 for hearing.

[2] The order was mistakenly dated March 28, 2016.

"On March 17, 2016, the Agency filed a motion for partial summary judgment ('MSJ') with respect to its charging documents. In its motion, the Agency contends that there are no material issues of fact related to a number of the Agency's allegations and, based on the undisputed facts, the Agency should prevail as a matter of law on all those allegations. Respondents filed a timely response and objections to the Agency's 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 and the evidentiary burden on the participants is as 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.'

The 'record' considered by the forum consists of: (1) The Agency's NOI, Amended NOI, OOD, and Respondents' answers; (2) The Agency's motion, with attached exhibits; and (3) Respondents' response to the Agency's motion, with attached exhibits.

"**DISCUSSION**

"THE AGENCY'S OOD

"The Agency seeks summary judgment with respect to two allegations in its OOD. First, that Respondents United Gem and Carpets, Inc. ('United') and Abdul Rahim Ghaffari ('Ghaffari') were joint employers of Claimant. Second, that Claimant was employed at the agreed wage rate of $12 per hour. Both allegations are contained in Paragraph II, entitled 'Employer Liability for Unpaid Wages,' which reads as follows:

> 'This Order is based upon the assigned wage claim filed by [Claimant], claiming unpaid wages from Abdul Rahim Ghaffari, individually, and United Gem and Carpets, Inc., an Oregon corporation ("employers"). During the period July 27, 2014 through August 16, 2014 the wage claimant performed work, labor and services for the employer at the regular rate of $12.00 per hour for each hour worked. The employer was required * * * to compensate the wage claimant * * *. The Wage and Hour Division of the Bureau ('Agency') has determined that the employer owes the wage claimant $1,627.00, together with interest thereon at the legal rate per annum from September 1, 2014, until paid.'

"*Joint Employment Relationship*

"The Agency contends that it is entitled to summary judgment on the issue of 'the joint employment relationship' because 'Respondents did not deny that they were both employers of the wage claimant, nor did either Respondent independently deny that they employed the wage claimant in their separate answers and request for hearing[.]' The Agency's latter assertion is correct but the forum declines to grant summary judgment on this issue because of the ambiguity of the Agency's pleading. The first sentence in Paragraph II referencing Claimant's wage claim identifies Respondents as the 'employers.' However, the Agency's subsequent allegations of employment relationship and liability for unpaid wages all use the singular term 'employer' without specifically identifying either United or Ghaffari as the 'employer.' Respondents are not required to jointly or separately deny a joint employment relationship to avoid summary judgment on that issue when the Agency has only alleged the liability of a single employer and not specified which employer.

"*Agreed Wage Rate*

"The Agency's OOD specifically alleges that Claimant was hired at the agreed wage rate of $12.00 per hour, an amount that neither Respondent denied in their answer and request for hearing.

"*Conclusion*

"The Agency's motion for summary judgment as to its allegation of employment relationship is **DENIED**. Agency's motion for summary judgment as to Claimant's agreed wage rate of $12.00 per hour is **GRANTED**.

"**THE AGENCY'S NOI**

"The Agency seeks summary judgment with respect to all the allegations in its NOI, including the assessment of civil penalties in the amounts proposed in its NOI. The forum addresses the Agency's allegations in the order in which they appear in the NOI.

"As with the OOD, both United and Ghaffari are named as Respondents in the NOI, with one important difference. In Paragraph 1 of the NOI ('Jurisdiction'), the Agency alleges that '[a]t all times material, Respondents were employers pursuant to ORS 653.010(3) within the state of Oregon with respect to any and all employees mentioned herein[.]' Claimant is the only employee mentioned in the NOI. In their answer, Respondents did not deny this allegation. Under the forum's rules, 'factual matters alleged in the charging document and not denied in the answer will be deemed admitted by the party.' OAR 839-050-0130(3). Accordingly, Respondents' failure to deny the NOI's allegation that Respondents both employed Claimant constitutes an

admission of that fact, making Respondents jointly and severally liable for all violations alleged in the NOI and proven by the Agency.

"**A. Willful failure to keep, maintain and make required records available.**

"1. Failure to keep and maintain records

"In Paragraph 3 of its NOI, the Agency alleges that Respondents willfully failed to keep and maintain time and payroll records for Claimant as required by ORS 653.045(1) and OAR 839-050-0080. ORS 653.045(1) provides:

> '(1) Every employer required by ORS 653.025 or by any rule, order or permit issued under ORS 653.030 to pay a minimum wage to any of the employer's employees shall make and keep available to the Commissioner of the Bureau of Labor and Industries for not less than two years, a record or records containing:
>
> > '(a) The name, address and occupation of each of the employer's employees.
> >
> > '(b) The actual hours worked each week and each pay period by each employee.
> >
> > '(c) Such other information as the commissioner prescribes by the commissioner's rules if necessary or appropriate for the enforcement of ORS 653.010 to 653.261 or of the rules and orders issued thereunder.'

"OAR 839-020-0080 provides, in pertinent part:

> "(1) Every employer regulated under ORS 653.010 to 653.261 must maintain and preserve payroll or other records containing the following information and data with respect to each employee to whom the law applies:
>
> > '(a) Name in full, as used for Social Security recordkeeping purposes, and on the same record, the employee's identifying symbol or number if such is used in place of name on any time, work, or payroll records;
> >
> > '(b) Home address, including zip code;
> >
> > '(c) Date of birth, if under 19;
> >
> > '(d) Occupation in which employed;
> >
> > '(e) Time of day and day of week on which the employee's workweek begins. If the employee is part of a work force or employed in or by an establishment all of whose workers have a workweek beginning at the same time on the same day, a single notation of the time of the day and

beginning day of the workweek for the whole work force or establishment will suffice;

'(f) Regular hourly rate of pay for any workweek in which overtime compensation is due, and an explanation of the basis of pay by indicating the monetary amount paid on a per hour, per day, per week, per piece, commission on sales, or other basis, and the amount and nature of each payment which, pursuant to ORS 653.261(1) is excluded from the "regular rate of pay". (These records may be in the form of vouchers or other payment data.);

'(g) Hours worked each workday and total hours worked each workweek (for purposes of this section, a "workday" is any fixed period of 24 consecutive hours and a "workweek" is any fixed and regularly recurring period of seven consecutive workdays);

'(h) Total daily or weekly straight-time earnings or wages due for hours worked during the workday or workweek, exclusive of premium overtime compensation;

'(i) Total premium pay for overtime hours. This amount excludes the straight-time earnings for overtime hours recorded under subsection (h) of this section;

'(j) Total additions to or deductions from wages paid each pay period including employee purchase orders or wage assignments. Also, in individual employee records, the dates, amounts, and nature of the items which make up the total additions and deductions;

'(k) Total wages paid each pay period;

'(l) Date of payment and the pay period covered by payment.'

With their answer, Respondents attached three hand written pages that they identified as a 'copy of [Claimant's] time and payroll records.' 'Name Jack' is written at the top of the first page. The remaining entries identify each date worked, type of work performed, number of hours worked, and gross wages earned each day worked. (Agency MSJ, Ex. 5). Viewed in the manner most favorable to Respondents, the forum concludes that this record meets the requirements of OAR 839-050-0080(1)(g) & (h), but does not meet the requirements of OAR 839-020-0080(1)(a-f) & (i-l)[3] or the overall requirements of ORS 653.045. Accordingly, the forum concludes that Respondents violated ORS 653.045(1) and OAR 839-020-0080.[4]

[3] The ALJ's original ruling on the Agency's motion for summary judgment mistakenly cited this rule as OAR 839-050-0080, whereas the correct citation is 839-020-0080, the rule actually cited by the Agency in NOI.

[4] *Id.*

"2. Failure to make records available to the Commissioner

"Paragraph 3 of the NOI also alleges that Respondents violated ORS 653.045(2) and OAR 839-020-0083 by failing to respond to requests for records made by Maria Perez, the Agency's compliance specialist, during her investigation. ORS 653.045(2) provides: 'Each employer shall keep the records required by subsection (1) of this section open for inspection or transcription by the commissioner or the commissioner's designee at any reasonable time.' OAR 839-020-0083 provides:

> '(1) All records required to be preserved and maintained by these rules shall be preserved and maintained for a period of at least two years.
>
> '(2) All employers shall keep such records in a safe and accessible place.
>
> '(3) All records required to be preserved and maintained by these rules shall be made available for inspections and transcription by the Commissioner or duly authorized representative of the Commissioner.'

In its motion for summary judgment, the Agency provided documentation of the following requests for records that form the basis of its charge:

> '1. An Agency "Notice of Wage Claim" letter dated October 27, 2014, that notified Ghaffari of Claimant's wage claim for "unpaid wages and statutory overtime wages of $1,777.00 at the rate(s) of $12 per hour from July 27, 2014 to 16, 2014." The letter included the language: "IF YOU DISPUTE THE CLAIM, complete the enclosed 'Employer Response' form and return it together with the documentation which supports your position, as well as payment of any amount which you concede is owed the claimant to [BOLI] by [November 10, 2014]." The "Employer Response" form asked number of questions, with blank spaces provided for Ghaffari to write an answer. Question 13 stated: "If the claim is for hourly wages or salary, and you dispute the amount claimed, explain the discrepancy and attach copies of timecards and other records to substantiate[.]'
>
> '2. A letter dated February 6, 2015, to Ghaffari that asked Ghaffari to complete and return an enclosed "Child Labor Employer Questionnaire" no later than February 17, 2015. The Questionnaire asked a number of questions, with a blank space provided for Ghaffari to write in an answer. The information requested included "a list of names, addresses, phone numbers, social security numbers, birthdates, hire and termination dates, job duties, and rate of pay for all employees who are under the age of 18 and any time during the review period **September 1, 2006, to present**."'
>
> '3. A letter dated February 25, 2015, to Ghaffari that requested payment of Claimant's unpaid wages and informed Ghaffari of BOLI's intent to pursue

penalties for child labor violations, and included the following language relevant to the Agency's motion:

> "[I]t is critical that you respond by sending me the completed Child Labor/Employer Questionnaire that I previously sent to you, as well as any records regarding employment and payment of the minor. Your response will give us the opportunity to consider your position regarding the child labor violations when determining the amount of penalties that should be assessed. For that reason, I am enclosing a second copy of the Child Labor/Employer questionnaire as well as the Employer Response Form for you to complete and return.
>
> "We would prefer to resolve this matter prior to litigation. However, without your cooperation, this is not possible. You may stop this action by responding no later than **March 4, 2015** with payment or, if you dispute the claim, with the appropriate records and/or information pertinent to this matter."'

(Agency MSJ, Ex. 6)

"Ghaffari sent two responses. The first was a letter dated October 30, 2014, in which he stated:

> 'In response to your letter dated October 27, 2014, I don't know how to answer it.
>
> 'Who is Jacob T. Backus? Has Mr. Backus provided any verifiable documentation?
>
> 'Furthermore, claimant Backus' claim of accumulating back pay totaling $1,777.00 doesn't make sense. Nobody we've ever hired would work for that long a stretch without getting paid.' (Agency MSJ, Ex. 7)

The second was a three-page typed document Ghaffari sent to Perez entitled 'WORK LOG RECONSTRUCTION: RAHIM GHAFFARI AND EMPLOYEE JACOB BACKUS.'[5] (Agency MSJ, Ex. 6) The document included an account of work performed by Claimant from July 20 through August 16, 2014, broken down by day. Each day contained a description of work performed, if any, by Claimant; the amount paid to Claimant each day that he worked; and on some days the number of hours and specific hours of the day that Claimant worked.

"As seen earlier, ORS 653.045(1) describes specific records that employers must keep and maintain. ORS 653.045(2), in turn, requires employers to make those records

[5] The affidavit of Maria Perez that the Agency submitted in support of its MSJ did not state the date that the "WORK LOG" was received and the "WORK LOG" itself is not dated.

available for inspection, with the phrase 'available for inspection' containing the implicit requirement that an employer provide records in a timely manner after a BOLI request for those records. However, it does not require employers to create any additional records. Therefore, to the extent BOLI's requests asked Respondents to provide a 'list' instead of providing the actual records containing the information sought, Respondents' failure to comply is not a violation of ORS 653.045(2) or OAR 839-020-0083. In contrast, BOLI's October 27, 2014, request for 'copies of timecards and other records' supporting Respondents' reason for disputing Claimant's wage claim unequivocally requests documents that Respondents were required to keep under the provisions of ORS 653.045(1) and OAR 839-050-0080. Respondents provided the 'WORK LOG' in response to one of BOLI's requests and attached the three previously undisclosed hand written pages that they identified as a 'copy of [Claimant's] time and payroll records' with their answer and request for hearing. Respondents' 16-month delay in providing these records constitutes a violation of ORS 653.045(2) and OAR 839-020-0083. *See In the Matter of MAM Properties, LLC,* 28 BOLI 172, 194 (2007)(Respondent violated ORS 653.045(2) by failing to make claimant's weekly time sheets available to the commissioner for inspection in response to a written request).

"3. Civil penalties

"ORS 653.256 provides that the Commissioner may assess a civil penalty 'not to exceed $1,000 against any person who willfully violates * * * ORS 653.045 * * * or any rule adopted thereunder.' The Agency proposes to assess the maximum $1,000 civil penalty for each of Respondents' two violations.

"The forum's first task is to determine whether Respondents' violations were 'willful.' In the context of the alleged violations, 'willfully' is defined in OAR 839-020-0004(32) as follows:

> '"Willfully" means knowingly. An action is done knowingly when it is undertaken with actual knowledge of a thing to be done or omitted or action undertaken by a person who should have known the thing to be done or omitted. A person "should have known the thing to be done or omitted" if the person has knowledge of facts or circumstances which, with reasonably diligent inquiry, would place the person on notice of the thing to be done or omitted to be done. A person acts willfully if the person has the means to inform himself or herself but elects not to do so. For purposes of these rules, the employer is presumed to know the requirements of ORS 653.010 to 653.261 and these rules.'

Employers have a duty to know the laws that regulate employment in this state. *See, e.g., In the Matter of Okechi Village & Health Center,* 27 BOLI 156, 169 (2006). ORS 653.045 is one of those laws and Respondents, as employers, had a duty to know and abide by its provisions. Under OAR 839-020-0004(32), Respondents' failure to make and keep the records required by ORS 653.045 and to provide the records it made and kept in response to BOLI's request constitutes a willful violation. *See, e.g., In the Matter of MAM Properties, LLC,* 28 BOLI 172, 194 (2007)(when there was undisputed

evidence that respondent received the agency's request for claimant's weekly time sheets, the forum found that respondent's violation of ORS 653.045(2) was willful).

"The criteria for determining the amount of civil penalty are set out in OAR 839-020-1020, which 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.'

The Agency alleges aggravating circumstances related to OAR 839-020-1020(1)(c-f) in support of both the $1,000 civil penalties it proposes to assess. Included in the alleged aggravating circumstances are claims that (a) Claimant was underpaid by $1,627 (b) as a result of Respondents' failure to accurately record Claimant's hours worked. Because the Agency has not sought summary judgment on those allegations, the issues of whether or not Claimant was underpaid and whether Respondents failed to accurately record Claimant's hours will not be resolved until those issues have been litigated at hearing. With those allegations still in dispute, the forum cannot award summary judgment to the Agency as to the Agency's proposed assessment of civil penalties in the amount of $2,000 because there is still a genuine issue of fact remaining.

"4. Conclusion

"The Agency's MSJ with regard to its allegations that Respondents committed separate violations of ORS 653.045(1), OAR 839-050-0080, ORS 653.045(2), and OAR

839-020-0083 are **GRANTED**. The Agency's MSJ with regard to its proposed assessment of $1,000 for each violation is **DENIED**.

"**B. Failure to obtain employment certificate before employing a minor.**

"In Paragraph 4 of the NOI, the Agency alleges that Claimant was 17 years old at the time of his employment with Respondent and that Respondents failed to obtain an employment certificate before employing Claimant, as required by ORS 653.307(2) and OAR 839-021-0220(2). ORS 653.307(2) provides:

> '(1) In accordance with the applicable provisions of ORS chapter 183, the Bureau of Labor and Industries shall adopt rules governing annual employment certificates required under this section. After September 9, 1995, the rules governing the total hours a minor can work shall not be more restrictive than the requirements of the federal Fair Labor Standards Act (29 U.S.C. 202, et seq.), unless otherwise provided by Oregon law.
>
> '(2) An employer who hires minors shall apply to the bureau for an annual employment certificate to employ minors. The application shall be on a form provided by the bureau and shall include, but need not be limited to:
>
> "a) The estimated or average number of minors to be employed during the year.
>
> "b) A description of the activities to be performed.
>
> "c) A description of the machinery or other equipment to be used by the minors."

OAR 839-021-0220(2) provides:

> '(2) An employer may not employ a minor without having first obtained a validated employment certificate from the Bureau. Application forms for an employment certificate may be obtained from any office of the Bureau or by contacting the Child Labor Unit, Wage and Hour Division, Bureau of Labor and Industries, 800 NE Oregon Street Suite 1045, Portland OR 97232, 971-673-0836, www.oregon.gov/BOLI.'

'Minor' is defined in OAR **839-021-0006(8) as '**any person under 18 years of age.'

"In their answer, Respondents do not dispute the fact that Claimant was 17 years of age when Respondents employed him. Rather, Respondents state that both Claimant and Claimant's father told Ghaffari that Claimant was 17½ years old when Respondents hired him. Respondents admit not obtaining an employment certificate prior to employing Claimant but assert ignorance of the law requiring employers to obtain employment certificate before employing minors as their reason for not obtaining

a certificate. Ignorance of the law is no defense[6] and the forum **GRANTS** the Agency's MSJ with respect to its allegation that Respondents violated ORS 653.307(2) and OAR 839-021-0220(2).

"The Agency proposes to assess a $100 civil penalty for Respondents' violation of ORS 653.307(2) and OAR 839-021-0220(2). ORS 653.370(1) provides:

> '(1) In addition to any other penalty provided by law, the Commissioner of the Bureau of Labor and Industries may impose upon any person who violates ORS 653.305 to 653.370, or any rule adopted by the Bureau of Labor and Industries under ORS 653.305 to 653.370 or 653.525, a civil penalty not to exceed $1,000 for each violation.'

BOLI has promulgated administrative rules setting out the criteria for assessing civil penalties for child labor violations. Those rules, all of which are cited in NOI, are set out in pertinent part below.

> "OAR 839-019-0010 provides:
>
> 'The Commissioner may impose a civil penalty for violations of any of the following statutes, administrative rules and orders:
>
> "(1) Violation of any provision of ORS 653.305 to 653.370.
>
> "(2) Violation of any provision of OAR 839-021-0001 to 839-021-0500."

OAR 839-019-0025 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 any mitigating and aggravating circumstances..
>
> '(2) When the Commissioner determines to impose a civil penalty for the employment of a minor without a valid employment certificate, the minimum civil penalty shall be as follows:
>
> > "(a) $100 for the first offense[.]"'

The Agency does not assert that Respondents have failed to obtain the required employment certificate on any previous occasions. Accordingly, the forum concludes that this was Respondents' first offense. Pursuant to OAR 839-01-0025(2)(a), the minimum civil penalty for a first offense of employing a minor without a valid

[6] *See, e.g., In the Matter of Panda Pizza,* 10 BOLI 132, 144 (1992)(ignorance of the law is not a mitigating circumstance. Employers have a legal duty to know and comply with the law.) *See also In the Matter of Spud Cellar Deli, Inc.,* 30 BOLI 185, 194 (2009)(fact that minors were hired as temporary help for a short period did not negate respondent's duty to comply with child labor laws).

employment certificate is $100. Accordingly, the forum **GRANTS** the Agency's MSJ and assesses a $100 civil penalty for Respondents' violation of ORS 653.307(2) and OAR 839-021-0220(2).

"**C. Failure to maintain and preserve required records on minor employees.**

"In Paragraph 5 of the NOI, the Agency alleges that Respondents violated OAR 839-021-0170 by failing to maintain and preserve records on Claimant, a minor employee. OAR 839-021-0170 provides, in pertinent part:

> '(1) Every employer employing minors must maintain and preserve records containing the following information and data with respect to each minor employed:
>
> > "(a) Name in full, as used for social security recordkeeping purposes and on the same record, the minor's identifying symbol or number if such is used in place of name on any time, work or payroll records;
> >
> > "(b) Home address, including zip code;
> >
> > "(c) Date of birth;
> >
> > "(d) Sex and occupation in which the minor is employed (sex may be indicated by use of the prefixes Mr., Mrs., Miss or Ms.);
> >
> > "(e) Time of day and day of week on which the minor's workweek begins;
> >
> > "(f) Hours worked each workday and total hours worked each workweek;
> >
> > "(g) Date the minor became employed by the employer and date employment was terminated.'"

The only evidence of any records that Respondents maintained and preserved with respect to Claimant and his employment with Respondents are those records described in the section of this order entitled 'A. Willful failure to keep, maintain and make required records available.' These records contain no mention of Claimant's full name, his street address, or his date of birth, and Respondents have provided no evidence that they made any attempt to ascertain these facts. Respondents' initial response to the Agency's October 27, 2014, 'Notice of Wage Claim' demand letter included the question: 'Who is Jacob T. Backus? Has Mr. Backus provided any verifiable documentation?' As noted by the Agency, Respondents would have been able to identify Claimant as a former employee had Respondents maintained and preserved the records required by OAR 839-021-0170. In conclusion, the above undisputed evidence, viewed in a manner most favorable to Respondents, establishes that Respondents violated the provisions of OAR 839-021-0170. There being no genuine issue as to any

material fact, the Agency's MSJ regarding its allegation that Respondents violated OAR 839-021-0170 is **GRANTED**.

"The Agency proposes to assess a $1,000 civil penalty for Respondents' violation of OAR 839-021-0170. As noted earlier, ORS 653.370(1), OAR 839-019-0010, and OAR 839-019-0025 authorize the Commissioner to impose a civil penalty of up to $1,000 for violations of Oregon's child labor laws or the corresponding administrative rules promulgated by BOLI. OAR 839-019-0020 sets out the criteria to be used by Commissioner in determining the amount of civil penalty. It provides:

> '(1) Except as provided in section (4) of this rule, when determining the amount of civil penalty to be imposed, the Commissioner shall consider the following circumstances and shall cite those the Commissioner finds applicable:
>
> > "(a) The history of the employer in taking all necessary measures to prevent or correct violations of statutes and rules;
> >
> > "(b) Prior violations, if any, of statutes and rules;
> >
> > "(c) The magnitude and seriousness of the violation;
> >
> > "(d) The opportunity and degree of difficulty to comply;
> >
> > "(e) Any other mitigating circumstances."
>
> '(2) It shall be the responsibility of the employer to provide the Commissioner with evidence of the mitigating circumstances set out in section (1) of this rule.
>
> '(3) In arriving at the actual amount of the civil penalty, the Commissioner shall consider whether the minor was injured while employed in violation of the statute and rules.
>
> '(4) Notwithstanding section (1) of this rule, in the case of a serious injury to or the death of a minor while employed in violation of the statutes or rules, the Commissioner may impose the maximum penalty allowed by ORS 653.370.
>
> '(5) Notwithstanding any other section of this rule, the Commissioner shall consider all mitigating and aggravating circumstances presented by the employer for the purpose of reducing the amount of the civil penalty to be imposed.'

In its NOI, the Agency alleged the following aggravating factors to support a proposed civil penalty of $1,000:

> '(1) The violation is serious because maintaining records on the employment of minors helps ensure that employment protections for minors are being enforced; and magnitude of the violation is such that Respondents kept no records

> regarding the employment of minors and took no steps to obtain information from Mr. Backus before hiring him; (2) Respondents knew or should have known that they were required to comply with child labor laws; and (3) It would not have been difficult or unduly burdensome for Respondents to have maintained required employment records on Mr. Backus.'

Mitigation refers to actions taken by the employer regarding the alleged violation, or to circumstances that might affect an employer's ability to comply with the law. *In the Matter of Albertson's, Inc.,* 10 BOLI 199, 314 (1992), *reversed and remanded on other grounds*, *Albertson's, Inc. v. Bureau of Labor and Industries,* 128 Or App 97, 874 P2d 1352 (1994). Respondents' only potentially mitigating evidence is Ghaffari's following statement:

> 'Jake and his father stated that Jake Backus, the minor, was 17½ years of age. Jake that he did not have a driver's license, which I usually use for our records, and that all his records were with his mother in Washington. He said he would have her send them to him and would provide those records to us. He never brought them.'

This statement does not mitigate Respondents' failure to obtain, record, and keep Claimant's full name, his street address, and date of birth, as all of these facts could have been easily obtained merely by asking Claimant or Claimant's father at the time Claimant was hired.

"In a previous case when a respondent failed to maintain and preserve records regarding the employment of a minor and there was no evidence of any mitigation, the commissioner assessed a civil penalty of $250, the amount sought by the Agency. *In the Matter of Randall Stuart Bates,* 23 BOLI 1, 18 (2002). In this case, all the aggravating factors cited by the Agency, viewed in a manner most favorable to the Respondents, are amply supported by evidence in the record and the forum finds there is no genuine material issue of fact. Absent any mitigating factors, this evidence supports the assessment of the $1,000 civil penalty sought by the Agency. The Agency's MSJ regarding the assessment of a $1,000 civil penalty for Respondents' violation of OAR 839-021-0170 is **GRANTED**.

"**D. Failure to verify the age of a minor.**

The Agency alleges that Respondents violated OAR 839-021-0185 by failing to verify Claimant's age before employing him. OAR 839-021-0185 provides:

> '(1) The employer must verify the age of all minors by requiring the minor to produce an acceptable proof of age document.
>
> '(2) As used in these rules, an acceptable proof of age document includes, but is not limited to:
>
> "(a) A birth certificate issued by any state, county, or municipal authority;

"(b) A hospital record of birth;

"(c) A state-issued driver's license or a state-issued I.D. card with a photograph, or information, including date of birth;

"(d) A U.S. Military Card;

"(e) A U.S. Passport;

"(f) A Certificate of U.S. Citizenship;

"(g) A Certificate of Naturalization;

"(h) An unexpired foreign passport with attached Employment Authorization;

"(i) An Alien Registration Card with photograph;

"(j) A Social Security Administration record indicating date of birth;

"(k) A Certificate of Age issued by the U.S. Department of Labor;

"(l) A baptismal record;

"(m) Other acceptable proof approved by the bureau."

'(3) The employer must retain a record of the document used to verify the minor's age pursuant to the provisions of OAR 839-021-0170 and 839-021-0175. A notation in the minor's personnel file of which document was used to verify the minor's age or retaining a copy of the document will satisfy this requirement.'

'Requiring' a minor employee to produce 'an acceptable proof of age document' under OAR 839-021-0185 means that a respondent employer must require the production of that document *before* employing the minor employee. Viewed in a manner most favorable to Respondents, the forum concludes that (1) Claimant told Respondent Ghaffari that he was 17 years old; (2) Respondent Ghaffari asked Claimant if he had a driver's license; (3) Claimant said he did not, that all his records were with his mother in Washington and that he would ask her to send them to Claimant; (4) Claimant never provided Respondents with any proof of age document; and (5) Respondents did not require Claimant to produce any proof of age document before Claimant started work or at any time during his employment. Based on this evidence, the forum concludes that Respondents violated OAR 839-021-0185. The Agency's MSJ regarding its allegation that Respondents violated OAR 839-021-0185 is **GRANTED**.

"The Agency proposes to assess a $1,000 civil penalty for Respondents' violation of OAR 839-021-0185, citing the following aggravating circumstances in its NOI:

> '(1) The violation is serious because age verification of minors is necessary in order to comply with child labor laws; the magnitude of the violation is such that Respondents took no steps to ascertain Mr. Backus' age before offering them employment; (2) Respondents knew or should have known that they were required to comply with child labor laws; and (3) It would not have been difficult or unduly burdensome for Respondents to have verified Mr. Backus' age before employing him.'

The forum considers employment of a minor without first verifying the minor's age as a serious violation because the purpose of verifying a minor's age before hire is to ensure that the minor is employed under proper working conditions and with proper hours for that specific age. *In the Matter of Spud Cellar Deli, Inc*., 30 BOLI 185, 193 (2009). When an employer knows a prospective employee is a minor, employment of that minor without first verifying the minor's age is an aggravating factor. *Id.,* at 193-94. Ghaffari's excuse that he asked Claimant to provide documentation and Claimant failed to provide any is not a mitigating factor because he employed Claimant without first obtaining any proof of age documentation. Based on the aggravating circumstances and lack of any mitigating circumstances, the forum concludes that $1,000 is an appropriate civil penalty for Respondents' violation of OAR 839-021-0185. The forum **GRANTS** the Agency's MSJ regarding the assessment of a $1,000 civil penalty for Respondents' violation of OAR 839-021-0185.

> "**E. Employing a minor under 18 in hazardous and prohibited occupations.**
>
> "This allegation is contained in Paragraph 6 of the NOI and reads as follows:
>
> 'Respondents employed a minor, Jacob Thomas Backus, to operate a chain saw and to work on or about a roof. At times material to his employment, Mr. Backus was 17 years old. A civil penalty may be assessed for the above violation not to exceed $1,000. CIVIL PENALTY of $2,000. Two (2) violations at $1,000 per violation. ORS 653.370, OAR 839-019-0010(1), (2), OAR 839-019-0015, OAR 839-019-0020, OAR 839-019-0025.'

The statutes and rules cited by the Agency in Paragraph 6 relate only to assessment of and calculation of civil penalties. BOLI's administrative rules that make the employment of minors under 18 in hazardous and prohibited occupations unlawful are contained in OAR 839-021-0097(1)(a) and OAR 839-021-0104, rules not cited in Paragraph 6. ORS 183.415(3)(c) and OAR 839-050-0060(1)(a) both require the Agency to include 'a reference to the particular statutes and rules involved in the violation,' and the Oregon Court of Appeals has held that the failure to do so is grounds for reversal. *Drayton v. Department of Transportation,* 186 Or App 1 (2003). The Agency's motion for summary judgment as to Paragraph 6 of its NOI is **DENIED** because of the Agency's failure to meet the procedural requirements of ORS 183.415(3)(c) and OAR 839-050-0060(1)(a).

This ruling is **AFFIRMED**. (Ex. X17)

13) On April 12, 2016, the Agency issued an amended OOD in case no. 18-16 and a second amended NOI in case no. 29-16. Neither amendment made a substantive change that affected the forum's summary judgment determination. Respondents did not file an answer to these amended charging documents. (Ex. X19)

14) At the outset of the hearing, pursuant to ORS 183.415(7), the ALJ verbally advised the Agency and Respondents of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing. (Statement of ALJ)

15) Prior to opening statements, Ghaffari and the Agency stipulated that Ghaffari was Claimant's sole employer. The Agency moved to dismiss all charges against Respondent United Gem and Carpets, Inc., including the charges resolved in the ALJ's interim order ruling on the Agency's motion for partial summary judgment. The ALJ **GRANTED** the Agency's motion. (Statements of Ghaffari, Casey, ALJ)

16) The ALJ issued a proposed order on June 6, 2016, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. Respondent Ghaffari filed exceptions on June 16, 2016.

FINDINGS OF FACT – THE MERITS

1) Claimant was born on April 24, 1997. (Testimony of Claimant)

2) Respondent Ghaffari (hereafter "Ghaffari") hired Claimant on July 27, 2014, and employed Claimant through August 16, 2014. At the time Ghaffari hired Claimant, Claimant told Ghaffari that he was 17 years old. Ghaffari asked to see Claimant's driver's license and Complainant said he did not have one and that all his papers were with his mother, who lived in Washington. Claimant said he would have his records sent to him. Claimant never provided Ghaffari with any identification records and Ghaffari did not ask Claimant again about his records. (Testimony of Claimant, Ghaffari)

3) Ghaffari hired Claimant to perform miscellaneous tasks related to the Ghaffari's property management business and agreed to pay Claimant $12 per hour, with Claimant's wages to be paid at the end of each day. (Testimony of Ghaffari, Claimant)

4) Claimant worked unsupervised and alone most of the time, with Ghaffari occasionally checking in on him. Claimant took no lunch breaks. (Testimony of Claimant, Ghaffari)

5) One of the duties Claimant performed for Ghaffari was using an electric chain saw with a 14 inch blade to trim tree branches. He was given no protective gear

and stood on top of a fence part of the time he operated the saw. Claimant worked alone for several days while using the chain saw. (Testimony of Claimant, S. Platz)

6) Another duty Claimant performed for Ghaffari was scraping moss off the roofs of two different buildings with a metal putty knife while standing on the roofs. The roofs were 15 to 20 feet above the ground. While standing on a ladder, Claimant also cleaned and painted a gutter that was at least nine feet off the ground. (Testimony of Claimant, S. Platz, Ghaffari)

7) Claimant worked the following hours for Ghaffari:

Dates	**Straight Time Hours**	**Overtime Hours**
7/27/14 - 8/2/14	40	31
8/3 – 8/9/14	40	3
8/10 – 8/16/14	40	.5
Totals:	**120**	**34.5**

(Testimony of Claimant, Perez; Exs. A1, A10)

8) At the end of Claimant's employment, Claimant's father telephoned Ghaffari to find out when Claimant would be paid for all his work and Ghaffari told him he would not pay Claimant any more money. Claimant then quit Ghaffari's employment because Ghaffari refused to pay him for all the hours he had worked. (Testimony of Claimant)

9) In total, Claimant earned $2,061 (120 hours x $12 = $1,440 + 34.5 hours x $18 = $621). Up to the time of hearing, Claimant had only been paid $434 in cash, leaving $1,627 in earned, due, and owing wages. (Testimony of Claimant, Perez; Exhibits A1, A10)

10) Penalty wages amount to $2,880 ($12 x 8 hours x 30 days). (Testimony of Perez)

11) ORS 653.055 civil penalties based on Ghaffari's failure to pay overtime wages are $2,880. (Testimony of Perez)

12) Neither Ghaffari nor Claimant created, kept, or maintained a contemporaneous record of the dates and hours that Claimant worked. With his wage claim, Claimant attached a completed BOLI WH-127 calendar on which he wrote, to the best of his recollection, the dates and hours he worked for Ghaffari. (Testimony of Ghaffari, Claimant; Ex. A1)

13) On October 27, 2014, BOLI compliance specialist Perez mailed a "Notice of Wage Claim" letter (WH-3) to Ghaffari in which she notified Ghaffari of Claimant's wage claim in the amount of $1,777. Among other things, the letter stated "IF THE

CLAIM IS CORRECT, you are required to IMMEDIATELY make a negotiable check or money order payable to the claimant for the amount of wages claimed, less deductions required by law, and send it to the Bureau of Labor and Industries * * *." On February 6, 2015, Perez mailed a second demand letter to Ghaffari requiring "immediate payment of the wages due." At the time of hearing, Ghaffari still had not paid any additional wages. (Testimony of Perez; Exs. A3, A5)

14) Perez's October 27, 2014, letter included the following instruction:

> "IF YOU DISPUTE THE CLAIM, complete the enclosed 'Employer Response' form and return it together with the documentation which supports your position, as well as payment of any amount which you concede is owed the claimant to [BOLI] by [November 10, 2014]."

The "Employer Response" form asked a number of questions, with blank spaces provided for Ghaffari to write an answer. Question 13 stated: "If the claim is for hourly wages or salary, and you dispute the amount claimed, explain the discrepancy and attach copies of timecards and other records to substantiate[.]" (Exs. A3, A6)

15) On October 30, 2014, Ghaffari initially responded by sending a letter to BOLI that included the following statement: "Who is Jacob T. Backus? Has Mr. Backus provided any verifiable documentation?" Ghaffari's letter included no records that Perez requested. (Testimony of Perez, Ghaffari; Ex. A4)

16) In March 2015, Ghaffari sent Perez a typed document entitled "WORK LOG RECONSTRUCTION: RAHIM GHAFFARI AND EMPLOYEE JACOB BACKUS" that purported to show the dates and hours worked by Claimant, type of work he performed, and amounts he was paid. On February 24, 2016, Ghaffari attached three previously undisclosed hand written pages that he identified as a "copy of [Claimant's] time and payroll records" to his answer and request for hearing. (Testimony of Perez, Ghaffari; Exs. X3, A7)

17) Claimant, Perez, S. Platz, and N. Platz were credible witnesses. (Testimony of Claimant, Perez, S. Platz, N. Platz)

18) Ghaffari's testimony regarding the hours worked by Claimant and hazardous work performed was self-serving and not supported by any contemporary records that Ghaffari, as an employer, was required by law to maintain. The forum has only credited Ghaffari's testimony when it was undisputed or corroborated by other credible evidence and has credited Claimant's testimony whenever it conflicted with Ghaffari's. (Testimony of Ghaffari)

CONCLUSIONS OF LAW

1) At all times material herein, Respondent Ghaffari employed Claimant. ORS 652.310.

2) BOLI's Commissioner has jurisdiction over the subject matter and Respondent Ghaffari herein. ORS 652.330, 652.332, 653.040.

3) Respondent Ghaffari owes Claimant $1,627 in unpaid, due and owing wages and more than five days have elapsed since Claimant left Respondent Ghaffari's employment. ORS 652.140.

4) Respondent Ghaffari's failure to pay Claimant all unpaid, due and owing wages after Claimant left his employment was willful and Claimant is entitled to $2,880 in penalty wages. ORS 652.150.

5) Respondent Ghaffari failed to pay Claimant all earned overtime wages and Claimant is entitled to $2,880 in penalty wages. ORS 653.055.

6) Respondent Ghaffari violated ORS 653.045(1) and OAR 839-050-0080 by willfully failing to keep and maintain time and payroll records for Claimant.

7) Respondent Ghaffari violated ORS 653.045(2) and OAR 839-020-0083 by failing to provide records requested by the Agency that he was required by law to maintain.

8) Respondent Ghaffari violated ORS 653.307(2) and OAR 839-021-0220(2) by failing to obtain an employment certificate before employing Claimant.

9) Respondent Ghaffari violated OAR 839-021-0185 by failing to verify Claimant's age before employing him.

10) Respondent Ghaffari violated OAR 839-021-0170 by failing to maintain and preserve required records on Claimant, a minor employee.

11) Respondent Ghaffari committed two violations of OAR 839-021-0104 by allowing Claimant to perform the hazardous operations of using a chain saw and working on or about a roof.

12) Under the facts and circumstances of this record, and according to the applicable law, BOLI's Commissioner has the authority to order Respondent Ghaffari to pay Claimant his earned, unpaid, due and payable wages and penalty wages, plus interest on all sums until paid. ORS 652.332.

13) The Commissioner has the authority to assess civil penalties for violations of ORS 653.045(1), OAR 839-050-0080, ORS 653.045(2), OAR 839-020-0083, ORS 653.307(2), OAR 839-021-0220(2), OAR 839-021-0185, and OAR 839-021-0104. The imposition of $5,600 in civil penalties on Respondent Ghaffari for his violations of these statutes and rules is an appropriate exercise of the Commissioner's authority. ORS 653.256, ORS 653.370.

OPINION

A number of the allegations in the Agency's NOI were resolved in the forum's ruling on the Agency's motion for summary judgment and require no further discussion. At hearing, the Agency and Respondents stipulated that Respondent Ghaffari was Claimant's sole employer and the forum granted the Agency's motion to dismiss all charges in the OOD and NOI against Respondent United. The remaining unresolved allegations include:

1. Whether Ghaffari owes Claimant $1,627 in unpaid wages.
2. Whether Ghaffari owes Claimant $2,880 in ORS 652.150 penalty wages.
3. Whether Ghaffari owes Claimant $2,880 in ORS 653.055 civil penalties.
4. The amount of civil penalty, if any, Ghaffari should be assessed for his violations of ORS 653.045(1) & (2).
5. Whether Ghaffari employed a minor under the age of 18 in hazardous and prohibited occupations and, if so, the amount of civil penalty, if any, that should be assessed.

Unpaid Wages

To show that Claimant is entitled to the alleged unpaid wages, the Agency must prove the following elements by a preponderance of the evidence: 1) Ghaffari employed Claimant; 2) The pay rate upon which Ghaffari and Claimant agreed; 3) The amount and extent of work Claimant performed for Ghaffari; and 4) Claimant performed work for which he was not properly compensated. *See, e.g., In the Matter of Christopher Lee Ruston and Christine M. Stahler,* 34 BOLI 56, 61 (2015).

Elements (1) and (2) are undisputed, in that Ghaffari admitted that that he was Claimant's employer and Ghaffari and Claimant agreed that Ghaffari agreed to pay Claimant $12 per hour.

Amount and Extent of Work Performed by Claimant for Ghaffari

Ghaffari and Claimant paint conflicting pictures regarding the amount and extent of work performed by Claimant. Neither maintained a contemporaneous record of the actual hours worked by Claimant, and both created an after-the-fact written record. Claimant's record, created two weeks after he left Ghaffari's employment, was made on a "fill in the blanks" calendar submitted with his wage claim and shows that he worked 170.5 hours, including 27.5 hours of overtime. Claimant testified that this record was accurate, to the best of his recollection, at the time he created it. The forum has found Claimant to be a credible witness, and his testimony as to the amount and extent of his work was bolstered by the credible testimony of his father and stepmother. In contrast, Ghaffari disclaimed any knowledge of Claimant in his initial response to the Agency's

Notice of Wage Claim.[7] Five months later, Ghaffari submitted a typed document entitled "WORK LOG RECONSTRUCTION: RAHIM GHAFFARI AND EMPLOYEE JACOB BACKUS" that purported to show that Claimant worked 57.5 hours, with no overtime. Perez discussed Ghaffari's "RECONSTRUCTION" with Claimant and concluded that Claimant had actually worked 154.5 hours, including 34.5 overtime hours. At hearing, Ghaffari testified that much of the work claimed by Claimant was either not authorized by him or could have been done in significantly less time by a more experienced person.

In a wage claim case, it is primarily the employer's responsibility to keep records of the actual hours worked each pay period by each employee. At hearing, it is the employee's responsibility merely to show the amount and extent of work done as a matter of just and reasonable inference; once that is done, the burden shifts to the employer to show the precise amount of work or to negate the showing of the employee. If the employer fails to produce such evidence, wages may be awarded to the employee, even though the award is approximate. *See, e.g., In the Matter of Bruce Crisman, dba Nu West Painting Contractors*, 32 BOLI 209, 215 (2013). A claimant's credible testimony may be sufficient evidence to show the amount of hours worked by the claimant. *See, e.g., In the Matter of E. H. Glaab, General Contractor, Inc.,* 32 BOLI 57, 61 (2012). Here, Ghaffari kept no records and his testimony as to Claimant's work hours was not credible. Claimant met his responsibility of showing the amount and extent of work he performed as a matter of just and reasonable inference by credibly testifying as to the approximate hours that he worked. Claimant's approximation was subsequently adjusted downward by Perez and the forum relies on Perez's calculations in awarding unpaid wages to Claimant.

Regarding Ghaffari's argument that Claimant should not be compensated for unauthorized work, the forum has long held that employees are entitled to be paid for all work an employer suffers or permits an employee to perform on their behalf. Ghaffari's failure to exercise adequate supervision over Claimant to prevent him from doing that work is not a defense. *See, e.g., In the Matter of Christopher Lee Ruston and Christine M. Stahler,* 34 BOLI 56, 63 (2015). Ghaffari's argument that a more experienced worker could have performed the work in less time likewise fails. *Cf. In the Matter of Forestry Action Committee,* 30 BOLI 63, 77 (2008)(respondent's assertion that claimant was not owed any wages because she did not perform well and left before completing the work she was hired to perform was disingenuous and not a defense; if respondent believed claimant was not performing as expected, its recourse was to take disciplinary action or terminate her for poor work performance, if appropriate).

Based on Perez's calculations and Claimant's credible testimony, the forum concludes that Claimant worked 154.5 hours, including 34.5 overtime hours.

Claimant Performed Work for Which He was Not Properly Compensated

[7] *See* Finding of Fact 15 -- The Merits.

Claimant earned $2,061, based on the following calculation: 120 straight time hours x $12 = $1,440 + 34.5 overtime hours x $18 = $621; $1,440 + $621 = $2,061. According to Ghaffari's "RECONSTRUCTION," he paid Claimant $608. Ghaffari and Claimant agreed that all payments were in cash, and Ghaffari provided no receipts or contemporaneous record to document his payments. Claimant was a more credible witness than Ghaffari and provided a more contemporaneous estimate of the amount paid to him by Ghaffari, that estimate being $434. Based on Claimant's estimate, the forum concludes that Ghaffari only paid Claimant $434 and owes Claimant $1,627 ($2,061 *minus* $434 = $1,627) in unpaid, due, and owing wages.

Penalty Wages

An employer is liable for penalty wages when it willfully fails to pay any wages or compensation of any employee whose employment ceases. Willfulness does not imply or require blame, malice, 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. *See, e.g., In the Matter of Giants, Inc., George T. Comalli, Hollywood Fitness, LLC, and Hollywood Fitness Center, LLC,* 33 BOLI 53, 56 (2014). Penalty wages can accrue for up to 30 days after wages are due if notice is given and the wages are not paid for that full 30 days. *In the Matter of Charlene Marie Anderson dba Domestic Rescue,* 33 BOLI 253, 261 (2014).

Ghaffari's arguments that he should not have to pay Claimant for all hours worked because some of it was not authorized and because a more experienced worker could have performed the work in less time are no defense to a claim for penalty wages. Further, it is an employer's duty to keep an accurate record of the hours worked by its employees,[8] and there is no evidence to suggest that Ghaffari's omission of this required act, which potentially contributed to Claimant's underpayment, was an unintentional act.

The Agency provided documentary and testimonial evidence that its investigative staff made the written demand contemplated by ORS 652.150(2) for claimant's wages and the Agency's OOD repeated this demand. Because Ghaffari failed to pay Claimant his unpaid wages after receiving the notices, the forum computes penalty wages at the maximum rate set out in ORS 652.150(1): $12 per hour x 8 hours = $96 x 30 = $2,880.

ORS 653.055 Civil Penalty

ORS 653.055 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:

[8] *In the Matter of Computer Products Unlimited, Inc.,* 31 BOLI 209, 225 (2011).

"(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 652.150."

Summarized, an employer who does not pay an employee the minimum wage or overtime wages is liable to a civil penalty computed in the same manner as ORS 652.150 penalty wages. In this case, the Agency contends that Claimant is entitled to a civil penalty based on Ghaffari's failure to pay him overtime wages. Claimant earned $621 in overtime wages and was only paid $434 in total for all hours worked. The forum need not attempt to calculate how the $434 paid to Claimant should be apportioned between straight time and overtime wages because the simple fact that Claimant was paid less than the overtime wages he earned proves that Claimant was not paid for all the overtime he worked. Since Claimant was not paid all his overtime wages, he is entitled to an ORS 653.055 civil penalty in the amount of $2,880.

Civil Penalty for Ghaffari's violations of ORS 653.045(1) & (2).

The forum's ruling on the Agency's motion for summary judgment concluded that Ghaffari violated ORS 653.045(1) & (2) but denied the Agency's proposed civil penalties, reserving that determination for the proposed order. ORS 653.256 provides that the Commissioner may assess a civil penalty of not more than $1,000 against any person who "willfully violates * * * ORS 653.045 * * * or any rule adopted thereunder." The commissioner must consider aggravating and mitigating circumstances set out in OAR 839-020-1020[9] when determining the amount of civil penalties. *See In the Matter of MAM Properties, LLC,* 28 BOLI 172, 192 (2007). It is the employer's responsibility to provide the commissioner with any mitigating evidence concerning the amount of civil penalties to be assessed. *Id.* In its Second Amended NOI, the Agency alleged the following aggravating factors:

"(1) The violations are serious because the requirement to keep, maintain and make available accurate time and payroll records is vital to the Agency's mission in investigating wage claims; the magnitude of the violation is such that Respondents failed to accurately record hours worked by Mr. Backus; and therefore, underpaid Mr. Backus by $1,627 in wages; (2) Respondents knew or should have known of the record keeping requirements and that they apply even to employees hired in a 'temporary' capacity; and (3) Complying with the record keeping requirements would not have been burdensome on Respondents as Respondents had other employees."

Perez testified to her difficulty in determining the wages due to Claimant because of Ghaffari's failure to make and keep records and his lengthy delay in providing records that minimally assisted her in making a determination. As an employer, Ghaffari is held

[9] The text of this lengthy rule is set out in its entirety on page 16 of this Final Order.

to have known or that he should have known of an employer's record keeping requirements. Ghaffari could have easily created and maintained the required records by (1) simply asking Claimant for the identification information required by the statute and rule and writing it down; (2) asking Claimant, at the end of each day, about the hours he worked and writing them down; and (3) making a written record of all payments to Claimant. Had he done this, it would have been easy for him to provide that information to Perez when she first requested it. There is no proof that Ghaffari had other employees, as he testified that he generally used licensed independent contractors and would have had no record keeping requirements with respect to them under ORS 653.045(1) & (2). Ghaffari presented no mitigating circumstances.

In the past, the commissioner has assessed a $1,000 civil penalty for ORS 653.045 violations when there were aggravating circumstances and no mitigating circumstances. *See In the Matter of MAM Properties, LLC,* 28 BOLI 172, 194-95 (2007); *In the Matter of Bukovina Express, Inc*., 27 BOLI 184, 208 (2006); *In the Matter of Okechi Village & Health Center,* 27 BOLI 156, 169 (2006). Following these precedents, the forum assesses a $1,000 civil penalty for Ghaffari's violation of ORS 653.045(2) and OAR 839-020-0083. Though equally serious, the forum views Ghaffari's violation of ORS 653.045(1) and OAR 839-020-0080 differently.

OAR 839-020-0080 requires 12 distinct types of records to be maintained. Six of those types are also required by OAR 839-021-0170. Although the forum has found that both rules were violated, their six identical requirements merge for the purpose of assessing an appropriate civil penalty. In its summary judgment ruling, the forum already assessed a $1,000 civil penalty against Ghaffari for his violation of OAR 839-021-0170. Because of the duplicative language in the rules, Ghaffari has already been penalized in part for his violation of the provisions of OAR 839-020-0080. As a result the forum only assesses a $500 civil penalty against Ghaffari for his violation of ORS 653.045(1) and OAR 839-020-0080.

Claimant, a Minor, Worked in Two Hazardous and Prohibited Occupations

The Agency was denied summary judgment on this allegation because it failed to cite OAR 839-021-0104 in its amended NOI. The Agency cured this problem by amending its NOI a second time to cite OAR 839-021-0104 in paragraph 6.a.

OAR 839-021-0104 provides:

> "(1) Except as provided in OAR 839-021-0285, an employer may not employ a minor under 18 years of age in any occupation declared particularly hazardous or detrimental to their health or well-being, except under terms and conditions specifically set forth by rules of the Bureau.
>
> "(2) Those occupations set out in Title 29 CFR, Part 570.51 to and including Part 570.68 as amended July 19, 2010 are hereby adopted as occupations particularly hazardous or detrimental to the health and well-being of minors 16 and 17 years of age and the regulations pertaining to these occupations set out

> in Title 29 CFR, Part 570.51 to and including Part 570.68 as amended July 19, 2010 are hereby adopted and incorporated by reference herein and are attached as **Appendix 1**."

Operation of a chain saw by a minor under the age of 18 years is an occupation listed as hazardous under Title 29 CFR §570.65. Work on or about a roof, including gutter work, by a minor under the age of 18 years is an occupation listed a hazardous under Title 29 CFR §570.67. OAR 839-021-0285 regulates the employment of minors in agriculture and is inapplicable here.

Claimant credibly testified that he spent several days operating a 14" chain saw, on a roof scraping off moss, and on a ladder cleaning and painting a gutter. Ghaffari claimed that Claimant never used Ghaffari's chain saw or worked on a roof and testified that an OSHA complaint alleging safety violations regarding Claimant's alleged use of a chain saw had been dismissed. Ghaffari provided documentation to show that the Workers' Compensation Board had withdrawn and dismissed Citation and Order No. R3320-062-14, issued against Ghaffari, on June 11, 2015. However, Ghaffari provided no documentary evidence to show the basis for the citation or why the citation was withdrawn. While not acknowledging that Claimant worked on a roof, Ghaffari acknowledged that Claimant, while standing on a ladder, painted a gutter that was nine feet off the ground. Relying on Claimant's credible testimony, the forum finds that Ghaffari committed two violations of OAR 839-021-0104 by allowing Claimant to use a chain saw and perform work on or about a roof.

Civil Penalties for Violations of OAR 839-021-0104

Agency's second Amended NOI seeks two separate civil penalties of $1,000, the first based on Claimant's use of a chain saw and the second for his roof work. The Agency alleges the following aggravating factors:

> "(1) The violations are serious because Respondents took no steps to verify Mr. Backus' age before employing him in hazardous and prohibited occupations; and such employment could have been detrimental to Mr. Backus' health; (2) Respondents knew or should have known that they were required to comply with child labor laws; and (3) It would not have been difficult or unduly burdensome for Respondents to check Mr. Backus' age before employing him to work in hazardous and prohibited occupations."

Operating a chain saw and working on a roof are two inherently hazardous occupations, and Claimant could have been seriously hurt doing either activity. Fortunately he was not hurt. Claimant was given no protective gear to use while he operated Ghaffari's chain saw and he worked alone while performing both jobs. It was Ghaffari's responsibility to be aware of the work Claimant was performing and make sure Claimant was not performing hazardous work. Consequently, Ghaffari's claimed lack of awareness of Claimant's use of the chain saw and work on a roof is not a mitigating factor. Furthermore, had Ghaffari verified Claimant's age and applied for an

employment certificate, he would have been made aware that 17-year-olds are prohibited from using a chain saw or working on or about a roof.

After considering the aggravating and mitigating circumstances, the forum concludes that the maximum civil penalty of $1,000 should be assessed for each of Ghaffari's violations of OAR 839-021-0104, for a total of $2,000.

Respondents' Exceptions

Respondent Ghaffari raised no issues in his exceptions that he did not argue at hearing and were not already considered by the ALJ in the Proposed Order. His primary argument is that Claimant and his parents were not credible witnesses. The ALJ concluded differently, and there is no evidence in the record that causes the forum to alter that conclusion.

ORDER

1. All charges in case nos. 18-16 and 29-16 against Respondent United Gem and Carpets, Inc., are hereby DISMISSED.

2. NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **Abdul Rahim Ghaffari** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, the following:

> A certified check payable to the Bureau of Labor and Industries in trust for Claimant Jacob Backus in the amount of SEVEN THOUSAND THREE HUNDRED and EIGHTY SEVEN DOLLARS ($7,387.00), less appropriate lawful deductions, representing $1,627.00 in gross earned, unpaid, due and payable wages, $2,880.00 in ORS 652.150 penalty wages, and $2,880.00 in ORS 653.055(1)(b) civil penalties, plus interest at the legal rate on the sum of $1,627.00 from September 1, 2014, until paid, and interest at the legal rate on the sum of $5,760.00 from October 1, 2014, until paid.

3. NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **Abdul Rahim Ghaffari** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, the following:

> A certified check payable to the Bureau of Labor and Industries in the amount of FIVE THOUSAND SIX HUNDRED DOLLARS ($5,600.00), less appropriate lawful deductions, representing the civil penalties listed below, plus interest at the legal rate on that sum beginning ten days after the issuance of the Final Order and the date Ghaffari complies with the Final Order.

a) $500 for Ghaffari's violations of ORS 653.045(1) and OAR 839-020-0080;
b) $1,000 for Ghaffari's violations of ORS 653.045(2) and OAR 839-020-0083;
c) $100 for Ghaffari's violations of ORS 653.307(2) and OAR 839-021-0220(2);
d) $2,000 for Ghaffari's violations of OAR 839-021-0104;
e) $1,000 for Ghaffari's violation of 839-021-0170;
f) $1,000 for Ghaffari's violation of OAR 839-020-0185.

_____

In the Matter of

BROWN'S ARCHITECTURAL SHEETMETAL, INC. and BRUN METALS COMPANY, LLC,

Case No. 80-15
Final Order of Commissioner Brad Avakian
Issued August 29, 2016

SYNOPSIS

The Agency's Order of Determination ("OOD") alleged that four wage claimants worked on two public works projects ("ACMA" and "EG"), that Claimants were entitled to be paid the prevailing wage rate for their work on both projects, that they were paid a lesser agreed rate, and that Respondents were Claimants' joint employers. The OOD sought unpaid wages consisting of the difference between Claimants' agreed rates and the appropriate prevailing wage rate, liquidated damages, and penalty wages. The forum held: (1) Respondents were not joint employers of Claimants, who were only employed by Brun Metals; (2) Claimants were entitled to be paid the prevailing wage rate for all their work that was physical or manual labor within a trade classification at both projects; (3) Respondent Brun is liable to pay $18,139.81 in unpaid wages and $18,139.81 in liquidated damages for Claimants' work on the ACMA project; (4) Respondent Brun is liable to pay one Claimant $1,104.96 in unpaid wages and $1,104.96 in liquidated damages for work on the EG project but is not liable to pay unpaid wages on the EG project to the other three Claimants because the Agency did not meet its burden of proof to show the amount and extent of their work subject to the prevailing wage rate; and (5) Respondent Brun's failure to pay the unpaid wages was willful and Claimants are entitled to $27,480.00 in penalty wages. The Charges against Brown's Architectural Sheetmetal were dismissed.

NOTE: The procedural history of this case is extensive. For ease of reading, all procedural facts and rulings on numerous motions are included as an Appendix to this Final Order. The Appendix immediately follows the "Order" section of this Final Order that bears the Commissioner's signature. The Judicial Review Notice appears on the last page of this Final Order.

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries ("BOLI") for the State of Oregon. The hearing was held on March 22-25, March 30-31, May 3-6, and May 17-18, 2016, in BOLI's W. W. Gregg Hearing Room, located in the Portland State Office Building at 800 NE Oregon Street, 10th floor, Portland, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by administrative prosecutor Adriana Ortega, an employee of the Agency. Respondents Brown's Architectural Sheetmetal, Inc. and Brun Metals Company, LLC were represented at the hearing by Richard Hunt, attorney at law. Marc Brown was present throughout the hearing as the person designated by Respondents to assist Mr. Hunt in the presentation of Respondents' case.

The Agency called the following witnesses: Christopher Leis, wage claimant; Robert Sinner, wage claimant; Brady Steinmetz, wage claimant (by phone); Don Gross, wage claimant (by phone on March 22 and in person on March 23-25); Michael Fevurly, BOLI Prevailing Wage compliance specialist; Susan Wooley, BOLI's Technical Assistance coordinator and lead worker for prevailing wages; and Marc Brown. Respondents called the following witnesses: Randall Robinson, owner of Robinson Construction (by phone); and Marc Brown. The forum received into evidence:

a) Administrative exhibits X1 through X59.

b) Agency exhibits A1 through A47.[1] A10 and A48-A54 were offered by the Agency but not received and the Agency made an offer of proof as to those exhibits.

c) Respondents' exhibits R3, R15 through R17, R20 and R20A, R25 through R29, R36 through R42, R45, R48, R49, R51 through R53, R55, R56, R101, R102, and R104 through R110.[2] R47 was offered by Respondents but not received and Respondents made an offer of proof as to that exhibit.

Having fully considered the entire record in this matter, I, Brad Avakian, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact,[3] Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – THE MERITS

1) Brown's Architectural Sheetmetal, Inc. ("BAS") is an Oregon domestic business corporation that was incorporated on June 4, 1990, with Marc Brown as its corporate president and registered agent and Kathy Brown, Marc Brown's wife, as its corporate secretary. BAS's primary business is the custom design, fabrication, and installation of custom-designed sheet metal, with the fabrication done in BAS's shop in North Plains, Oregon. BAS was administratively dissolved on August 4, 2006, and

[1] Exhibits A5, A7, A8, A12-A16, A21, A24, A27-A30, A35, and A43-45 were received over Respondents' objections. Exhibit A8 was received solely for the purpose of showing that Fevurly received it during his investigation.

[2] Exhibits R36, R39, R41, R53, R55, R56, R101, and R102 were received over the Agency's objections.

[3] The Ultimate Findings of Fact required by ORS 183.470 are subsumed within the Findings of Fact – The Merits.

reinstated on May 15, 2008. Between 2004 and 2010, Brown was BAS's only employee. (Testimony of Brown; Ex. A39)

2) Brun Metals Company LLC ("BMC") is a domestic limited liability company that was organized and registered with the Oregon secretary of state on April 6, 2004, and was administratively dissolved on June 7, 2013, because the economy "was horrible" and BMC's "insurance rates doubled." Listed on BMC's business registry were Kathy Brown, member, and Marc Brown, manager. (Testimony of Brown; Ex. A40)

3) During their joint existence, BAS and BMC had shops located in the same building in North Plains and shared the same mailing address. (Testimony of Brown)

4) Marc Brown started BMC to handle the majority of the work that BAS had been doing, namely custom fabrication and installation of architectural sheet metal. From 2004 until BMC's dissolution in 2013, BAS's only function was to act as a consultant to projects undertaken by other entities and Brown was its sole employee. (Testimony of Brown)

Elton Gregory Project (EG)

5) On July 9, 2004, Redmond School District 2J ("Redmond") advertised a public works project for bid named the "New Elementary and Middle School" ("NEMS")[4] project. On March 11, 2005, the contract was awarded to Robinson Construction Co. ("RCC") in the amount of $20,000,000, with a warranty that expired in 2006. The project, which was designed by Dull Olsen Weeks Architects, Inc. ("DOWA"), called for a metal roof. (Testimony of R. Robinson; Ex. A5)

6) The prevailing wage rates published by BOLI "effective" January 1, 2005, were in effect on the NEMS project. The applicable rate for sheet metal workers and sheet metal duct installers was $22.91 per hour, with a fringe rate of $8.27 per hour, totaling $31.18 per hour. (Testimony of Fevurly; Exs. A43-44)

7) The definition of "sheet metal workers and sheet metal duct installers" in BOLI's January 1, 2005, publication defining "covered occupations" was:

> "On a construction site, fabricate, assemble, install and replace sheet metal products and equipment, such as control boxes, drainpipes and furnace casings. Work may involve any of the following: set up and operate fabricating machines to cut, bend and straighten sheet metal; sheet metal over anvils, blocks or forms using hammer; operate soldering and welding equipment to join sheet metal parts; inspect; assemble and smooth seams and joints of burred surfaces. Install prefabricated sheet metal ducts used for heating, air conditioning or other

[4] Ultimately, the school constructed through the NEMS project was named "Elton Gregory Middle School," the name by which it was referred to throughout the hearing.

purposes and commercial buildings and similar structures. **(Includes metal roofs)**"

(Testimony of Fevurly; Ex. A43)

8) In 2005, BOLI had no category for "testing and balancing" work. Instead, BOLI's policy was that any "testing and balancing" work performed on a public works that involved manual labor was to be paid at the classification most directly related to the trade with which it was associated. For example, when the work involved checking for leaks in a metal roof by inspecting buckets placed to catch leaks and emptying the buckets into which water had leaked, BOLI's policy was that workers performing that task should be paid as sheet metal workers for their entire day, even if they spent their entire day checking for leaks and only emptied one bucket. Likewise, set-up and clean-up duties directly related to a trade were subject to being paid at the prevailing wage rate assigned to the trade classification. (Testimony of Fevurly)

9) RCC subcontracted with Cascade Heating & Specialty for installation of the metal roof on the NEMS project. (Testimony of R. Robinson)

10) A draft[5] of a "Standard Form of Agreement Between Owner and Construction Manager" dated January 26, 2005, between Redmond and RCC contains the following warranty provision:

> "§3.5.1 The Contractor warrants to the Owner and Architect that the Work including but not limited to any and all materials and equipment furnished under the Contract will be of good quality and new unless otherwise required or permitted by the Contract Documents, that the Work will be free from defects not inherent in the quality required or permitted, and that the Work will conform to the requirements of the Contract Documents. Work not conforming to these requirements, including substitutes not properly approved and authorized, may be considered defective. The Contractor's warranty excludes remedy for damage or defect caused by abuse, modifications not executed by the Contractor, improper or insufficient maintenance, improper operation, or normal wear and tear in normal usage. If required by the Architect, the Contractor shall furnish satisfactory evidence as to the kind and quality of materials and equipment. In addition, the Contractor assigns to the Owner any and all warranties and further agrees to perform the Work so as to preserve all such warranties. To the extent that any warranty is non-assignable Contractor agrees to pursue such warranty

[5] The draft agreement admitted as Exhibit A8 contains numerous strikethroughs and underscores and there was no evidence offered to show their significance. A copy of the final agreement was never obtained by the Agency. Furthermore, Exhibit A8 was not authenticated and was received only for the purpose of establishing that Fevurly received the document in the course of his investigation. The Agency listed "Brett Hudson, Redmond School District" as a witness in its case summary, but did not call Hudson or any other witness from the Redmond to testify as to the warranty terms in the final agreement between Redmond and RCC for the subject project.

for the use and benefit of the Owner without cost or expense to the Owner. The Contractor shall require this provision to be included in all subcontracts at any tier." (Underscores in original)

(Testimony of Fevurly; Ex. A8)

11) RCC completed work on the NEMS project in 2005. When completed, the school was named the "Elton Gregory Middle School."[6] (Testimony of R. Robinson; Entire Record)

12) Within a few months after the EG project was complete, roof leaks were reported to RCC. Cascade Heating & Specialty thereafter made unsuccessful attempts to fix the leaks.[7] Between 2006 and 2008, RCC paid Stryker, another company, to fix the leaks. Stryker was likewise unsuccessful.[8] (Testimony of Robinson)

13) In July 2009, Redmond, DOWA, and RCC entered into a "Settlement Agreement and Release" regarding the leaky roof. Neither BAS nor BMC was a party to the agreement. The purpose of the agreement was to split the repair costs incurred to date. In the agreement, the costs were split three ways, with the split accomplished by Redmond reimbursing DOWA and RCC in part for the costs they had already incurred.[9] In pertinent part, the agreement included the following terms:

"**I. PURPOSE OF AGREEMENT**

"THIS AGREEMENT among the Parties is a complete and final settlement of the dispute described here.

"**II. RECITALS**

"A. DOWA designed and Robinson constructed Elton Gregory Middle School * * * for Redmond. The roof has leaked and the Parties have agreed upon a solution to repair the leaking problem. The scope of the "Repairs" is attached at **Exhibit 1**.[10]

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[6] The NEMS project is hereafter referred to as EG, short for "Elton Gregory."

[7] The Agency did not investigate whether or not Cascade paid its employees the prevailing wage rate for the work it performed after the original project was completed and there was no evidence presented as to whether Cascade paid its employees the prevailing wage rate.

[8] The Agency did not investigate whether or not Stryker paid its employees the prevailing wage rate for the work it performed after the original project was completed and there was no evidence presented as to whether Stryker paid its employees the prevailing wage rate.

[9] As referenced in the Agreement, total costs were approximately $114,000. Redmond, DOWA, and RCC each accepted responsibility for $38,000 of the total costs.

[10] Exhibit 1 was not offered in evidence and R. Robinson, who signed the agreement on behalf of RCC, testified that Exhibit 1 was never prepared.

"B. There is a dispute regarding the responsibility for the cost of the Repairs.

"C. To date, the Parties have paid the following amounts for the cost of Repairs:

DOWA: $43,339.37
Robinson: $71,175.00

"C.[11] The Parties wish to resolve all differences regarding the Repairs and avoid litigation.

"**III. <u>TERMS OF SETTLEMENT</u>**

"A. Payment.

"1. Redmond shall pay Dowa the sum of Five Thousand One Hundred Sixty Seven Dollars and Ninety Two Cents ($5,167.92) and shall pay Robinson Thirty Three Thousand Three Dollars and Fifty Five Cents ($33,003.55).

"2. Upon approval of the Bonding Company,[12] Redmond agrees to make progress payments from the remaining Retainage to Robinson to pay for the Repairs. If the cost of the Repairs exceeds the Retainage, Robinson will be responsible for that cost.

"B. Repairs and Warranty.

"Robinson will complete the Repairs and will warrant the work pursuant to the existing Contract as of the Completion Date of the Repairs.

"C. Release.

"Except with regard to Robinson's Warranty under the Contract described above, the Parties mutually release each other individually, the Corporation and their affiliates, officers, directors, employees and agents from all claims and causes of action, known or unknown, whether based in tort, contract, or any federal, state or local law, arising from or in any way connected with Repairs.

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[11] This paragraph is lettered as "C" in the original.

[12] There is no evidence in the record that the Bonding Company approved this Settlement Agreement and Release, that "progress payments from the remaining Retainage" was actually paid to RCC by Redmond, or to the amount of money that was paid to BMC and BAS by RCC for its work on EG.

"D. Compromise.

"The Parties agree that this settlement is the compromise of a disputed claim and that payment and Repair work is not an admission of liability."

(Testimony of Robinson; Exhibit R17)

14) Prior to 2009, BAS had performed 30-40 jobs for RCC. In 2009, Randall Robinson ("Robinson"), RCC's owner, called Marc Brown and asked him to identify and fix the leaks at EG on a "time and materials" basis. Brown agreed to do this. Robinson did not ask Brown to bid on the EG project and Brown did not make a bid. (Testimony of Robinson, Brown)

15) Prior to starting work at EG, Brown asked Robinson if EG was a public works project subject to the prevailing wage rate. Robinson told him "no, I'm paying for it." Brown was never given a copy of the contract between RCC and Redmond. (Testimony of Brown)

16) Brown was never told by any Redmond representative that BAS and BMC had to pay workers the prevailing wage rate for their work at EG. (Testimony of Brown)

17) Prior to starting work at EG, Brown was not given a copy of the original plans for EG and he never received a copy during BAS's and BMC's work at EG. (Testimony of Brown)

18) Brown has never seen any document that shows the warranty in the original contract between RCC and Redmond School District for the EG project. (Testimony of Brown)

19) Before the Claimants began work at EG, Brown visited EG and discovered that the primary cause of the leaks was the roof's faulty design and the improper application of the materials used on the roof, exacerbated by extreme weather conditions in the city of Redmond. In all, he discovered 19 separate leaks. To fix the leaks, Brown concluded he would have to create entirely new designs for sheet metal and waterproofing systems that fit within the overall roof design and could withstand Redmond's weather. Brown created those designs and BMC workers, including Claimants, fabricated them. (Testimony of Brown; Ex. R20)

20) BMC employed workers to fix the leaks at EG, including wage claimants Christopher Leis, Robert Sinner, Don Gross, and Brady Steinmetz. While Claimants worked at EG, Brown occasionally visited EG and Claimants reported to him. (Testimony of Brown, Leis, Sinner, Steinmetz)

21) Among other things, the job duties performed at EG by Leis, Sinner, Gross, and Steinmetz included tearing off existing cricket panels, installing new

waterproofing and new sheet metal cricket panels that had been designed by Brown and fabricated at Respondents' North Plains shop, clean up, and checking for leaks. (Testimony of Leis, Sinner, Gross, Steinmetz)

22) BMC paid Leis, Sinner, Gross, and Steinmetz at the following agreed wage rates for all their work at EG, including their travel time to and from the job: Leis -- $12.00/hr.; Sinner -- $10.50/hr.; Gross -- $20.00/hr.; and Steinmetz -- $25.00/hr. (Testimony of Leis, Sinner, Gross, Steinmetz; Stipulation of Agency and Respondents)

23) Leis performed work at EG between June 15 and December 31, 2009. Leis filled out a Daily Report each day that he worked in which he described the work he performed that day.[13] When he filed his wage claim for EG, Leis included a calendar on which he noted the hours he worked each day on the EG project. In his wage claim, he claimed he should have been paid the prevailing wage rate for sheet metal workers for the following hours:

Week[14]	**Hours**
6/13- 6/19	45.25
6/20- 6/26	50
6/27-7/3	52.75
7/4-7/10	50
7/11-7/17	57
7/18-7/24	57
7/25-7/31	57
8/1-8/7	57
8/8-8/14	55
8/15-8/21	55
8/22-8/28	55
8/29-9/4	57
12/19-12/24	25.5
12/26-12/31	31.25

Besides work properly classified as sheet metal work, his claimed work hours included: travel time from North Plains to Redmond on Monday mornings and travel time from Redmond to North Plains on Saturday, a drive of three to four hours each way; time talking to Marc Brown; at least one day fabricating sheet metal in BMC's shop in North Plains; attendance at safety meetings; and an average of one hour a week taking photos. (Testimony of Leis; Ex. A2)

[13] None of these reports were produced or offered at hearing.

[14] The week dates chosen for all four Claimants' work at EG correspond to BMC's payroll period, which was Saturday through Friday. (Ex. A11)

24) Leis received a W-2 from Brun Metals Company LLC in 2009. (Testimony of Leis; Ex. A22)

25) Sinner performed work at EG between June 15 and December 31, 2009. Sinner filled out a Daily Report each day that he worked in which he described the work he performed that day.[15] When he filed his wage claim for EG, Sinner included a calendar on which he noted the hours he worked each day on the EG project. In his wage claim, Sinner claimed he should have been paid the prevailing wage rate for sheet metal workers for the following hours:

Week	**Hours**
6/13- 6/19	45.25
6/20- 6/26	50
6/27-7/3	52.75
7/4-7/10	50
7/11-7/17	57
7/18-7/24	57
7/25-7/31	57
8/1-8/7	57
8/8-8/14	55
8/15-8/21	55
8/22-8/28	55
8/29-9/4	57
9/5-9/11	40
12/19-12/24	25.25
12/26-12/31	31.25

Besides work properly classified as sheet metal work, his claimed work hours included: 30 minutes to one hour in BMC's shop in North Plains each Monday before leaving for Redmond; travel time from North Plains to Redmond on Monday mornings and travel time from Redmond to North Plains on Saturday, a drive of three to four hours each way; around one hour per week observing the work of others; an unknown amount of time fabricating components for EG at BMC's shop in North Plains; an average of five hours a week talking to someone; attendance at safety meetings; and time spent walking around EG inspecting for leaks with one of the other claimants. (Testimony of Sinner, Leis; Ex. A3)

26) Steinmetz performed work at EG between June 15 and December 31, 2009. Steinmetz filled out a Daily Report each day that he worked in which he described the work he performed that day.[16] When he filed his wage claim for EG, Steinmetz included a calendar on which he noted the hours he worked each day on the

[15] *See* fn. 13.

[16] *Id.*

EG project. In his wage claim, Steinmetz claimed he should have been paid the prevailing wage rate for sheet metal workers for the following hours:

Week	**Hours**
6/13- 6/19	45.25
6/20- 6/26	50
6/27-7/3	57.75
7/4-7/10	50
7/11-7/17	57
7/18-7/24	57
7/25-7/31	57
8/1-8/7	57
8/8-8/14	55
8/15-8/21	55
8/22-8/28	55
8/29-9/4	25
12/19-12/24	31.25
12/26-12/31	31.25

Besides work properly classified as sheet metal work, Steinmetz's claimed work hours included: travel time from North Plains to Redmond on Monday mornings and travel time from Redmond to North Plains on Saturday, a drive of three to four hours each way; a couple hours a week talking with Marc Brown; two to four hours a week checking for leaks; ten hours spent fabricating components for EG at BMC's shop in North Plains; attendance at safety meetings; and 30 minutes a week "at most" taking photos. (Testimony of Steinmetz, Leis; Ex. A4)

27) Gross performed work at EG between August 24, 2009, and March 2, 2010. Gross filled out a Daily Report each day that he worked in which he described the work he performed that day. Some of the reports had "BRUN METALS Co., LLC" printed at the top of the page; some had "BROWNS ARCHITECTURAL SHEETMETAL, INC." printed at the top of the page; and others had both names printed at the top of the page.

On his wage claim form for EG, Gross claimed he was owed $15,294.11 in unpaid wages, based on the difference between the $20/hr. wage rate he was paid and the prevailing wage rate for sheet metal workers of "$38.46 per hour."[17] He did not complete and submit a calendar of hours worked like the other Claimants. Instead, he included pay stubs from BMC for continuous weeks beginning on 8/23/09 and ending on 2/20/10, and the week beginning 2/28/10 that showed the number of hours he worked and was paid for each week. He also submitted two Daily Reports showing that he worked at EG on December 31, 2009, and March 2, 2010. At hearing, he produced: (1)

[17] This rate is incorrect. *See* Finding of Fact 6 – The Merits.

additional Daily Reports showing that he worked at EG on the following dates -- 12/9-11/09, 12/15-22/09, 12/26-27/09, 1/9/10, 1/29-30/10, and 2/1/10; and (2) copies of timecards showing that he worked at EG the following dates -- 11/30-12/4/09, 12/9-11/09, 12/14-19/09, 12/21-22/09, 12/26-27/09, 1/29-30/10.

Based on the documents Gross produced before hearing, Fevurly calculated that Gross had worked a total of 781 hours at EG for which Gross was entitled to be paid the prevailing wage rate for sheet metal workers and was owed $7,702.30 in unpaid wages.[18] After Gross produced Ex. A47 at hearing and testified about his work duties at EG, Fevurly revised his calculations and concluded that Gross had worked 803.5 hours and was owed $6,900.93 in unpaid wages based on his determination that Gross had worked 87.43% of his time as a sheet metal worker, 2.73% of his time as a laborer, and that 9.84% of his work was not subject to the prevailing wage rate because it did not involve manual labor.

No Daily Reports or testimony were offered to show the specific job duties that Gross performed at EG on any specific day between 8/24 and 12/8/09, on 1/1-2/10, or on 1/5/10.

Based on Gross's Daily Reports, Gross worked 98.75 hours, detailed below, in the "sheet metal workers and sheet metal duct installers" classification that was subject to the prevailing wage rate of $22.91 per hour base rate, with a fringe rate of $8.27 per hour:[19]

Date	**Hours**
12/9/09	9
12/10/09	6.75
12/11/09	9.5
12/15/09	8
12/16/09	8.5
12/17/09	4.5
12/18/09[20]	4

[18] Fevurly described his "Methodology" for calculating Gross's wages in Exs. A12 and A17 as follows – "For weeks for which Mr. Gross provided daily written calendars, I relied on those to determine Mr. Gross' hours worked on the project. For weeks for which neither Mr. Gross nor Brown's provided written calendars or timecards and during which Mr. Gross reported working on the project, I assessed all hours on that week's paystub as having been worked on the project."

[19] Gross's Daily Reports for 12/26/09, 12/27/09, 12/31/09, and 2/1/10 do not demonstrate that Gross performed work subject to the prevailing wage rate because they all involved checking for leaks and there was no reference in those Reports to Gross's use of a "tool" such as a baby food jar and no testimony that he did any manual labor on those days.

[20] Gross's Daily Report says he was checking leaks and he testified that the "13 baby food jars" and "shotglass" written on the Report were a means of measuring the amount of the leak. The forum infers that Gross must have manually used the baby food jars and shotglass to determine the quantity of the leak. Based on Fevurly's testimony that this constituted "testing and balancing" that was subject to be paid at the sheet metal worker prevailing wage rate, referenced in Findings of Fact 6, 8 – The Merits, the forum concludes that this work was subject to the prevailing wage rate.

12/19/09[21]	2
12/20/09[22]	2
12/21/09	3.5
12/22/09[23]	1
1/9/10[24]	1
1/29/10	8
1/30/10	5.5
3/2/10	5.5

In total, Gross earned $3,079.96 for this work (98.75 hours x $31.18/hr). He was paid $1,975.00 for this work (98.75 hours x $20.00/hr., leaving $1,104.96 in unpaid, due, and owing wages. He earned $2,262.36 base rate wages (98.75 hours x $22.91/hr.).

Besides work properly classified as sheet metal work, Gross's claimed work hours included: walking around EG to check for water leaks, talking to other persons; talking to Marc Brown on the phone; going home to get supplies; faxing Daily Reports; taking photographs; and attendance at safety meetings. (Testimony of Gross; Exs. A1, A17, A47, R106)

28) On the EG project, the following duties performed by Claimants were not subject to the prevailing wage rate: walking, general observation, consulting with other workers, talking with Marc Brown, taking photos, attendance at safety meetings, submitting reports of observations, giving advice to co-workers, working at BMC's shop in North Plains, driving, and observing water from a leak in a pre-placed cup or bucket when no cups or bucket were emptied or replaced that day. (Testimony of Fevurly)

29) On the EG project, a Claimant's observation of water from a leak in a pre-placed cup or bucket when a Claimant emptied or replaced the cup or bucket was "testing and balancing" incidental to sheet metal work that was subject to the prevailing wage rate for sheet metal workers. (Testimony of Fevurly)

30) When BMC dissolved in 2013, Marc Brown threw away the "project paperwork" for all projects BMC worked on, including the EG and ACMA projects. (Testimony of Brown; Ex. A11)

31) All paychecks given to Claimants on EG project were issued by Prime Pay, a payroll service, and drawn on BMC's account. (Testimony of Gross, Leis, Sinner, Steinmetz, Brown)

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[21] This Daily Report makes references to shotglasses used as a unit of measuring. *See* fn.15.

[22] *Id.*

[23] *Id.*

[24] *Id.*

32) Brown billed RCC on a "time and materials" basis for the work BAS and BMC performed on the EG project. RCC paid Brown directly for all the work done on the EG project. Brown, BAS, and BMC received no money from Redmond or any other public entity for their work on the EG project. RCC did not use any money received from Redmond or any other public entity to pay Respondents for their work at EG. BMC and BAS did not enter into any contract with Redmond for their EG work. (Testimony of Robinson, Brown, Fevurly; Ex. R45)

33) While working at EG, BMC also performed work on other public works in Hood River and Hillsboro, Oregon. On both projects, BMC made bids and paid its workers the prevailing wage rate. (Testimony of Brown)

Beaverton Performing Arts Project (ACMA)

34) In November 2008, Beaverton School District #48 ("Beaverton") advertised a public works project for bid named the "ACMA Performing Arts and Educational Building" ("ACMA") project. On March 9, 2009, the contract was awarded to RCC in the amount of $7,790,000. The Notice of Award of Public Works Contract submitted by Beaverton stated that work was expected to begin on March 25, 2009. The contract between Beaverton and RCC specified that work on the ACMA project would be completed within 296 calendar days from the date RCC started work on the project. (Testimony of Fevurly, Hartsock; Exs. A25, A26)

35) The applicable prevailing wage rates for the ACMA project were those effective July 1, 2008. The rates relevant to this case were:

Classification	Base Rate	Fringe Rate
Carpenter, Group 1	$30.30	$13.32
Laborer, Group 1	$24.66	$11.15
Sheet Metal Worker	$33.27	$16.05
Bricklayer/Stonemason	$31.12	$13.80

(Testimony of Fevurly; Ex. A46)

36) After RCC began work on the ACMA project, Robinson called Brown. Robinson and Brown made an oral agreement for Brown to do "quality assurance" on the ACMA project regarding "anything [Brown thought] might be a problem," with Brown to be compensated for "time and materials" for work performed by Brown and employees that Brown dispatched to work on the ACMA project. Robinson and Brown did not enter into a written subcontract. Brown asked Robinson if Brown's work would be subject to the prevailing wage rate and Robinson told him it would not. (Testimony of Robinson, Brown)

37) The quality assurance performed by Brown and the Claimants included "applications, forensic, and discovery." They began performing this work when

construction of the concrete slab at the ACMA project was complete and the walls framed with steel studs. Brown, on behalf of BAS, conducted quality assurance at the ACMA project first, then brought Claimants in as employees of BMC when RCC's subcontractors commenced other "exterior skin applications." Brown regularly visited the ACMA project while Claimants worked there. There were other subcontractors working at the ACMA project while Claimants worked there. (Testimony of Brown, Leis, Sinner)

38) The work that Brown and the Claimants performed on the ACMA project was unsupervised by RCC or any of RCC's subcontractors. (Testimony of Brown)

39) Claimants used various tools on the ACMA project, including paper towels, windex, brooms, utility knives, hammers, rakes, hoses, crowbars, and shovels. (Testimony of Brown)

40) Gross performed work on the ACMA project between January 4 and February 19, 2010. He handwrote the specific jobs he performed each day on a "Daily Labor and Material Report." Some of those reports had "BROWNS Architectural Sheetmetal, Inc." printed on top; others had "BRUN METALS Co., LLC" printed on top. He was paid $20.00 per hour for all his work. (Testimony of Gross; Stipulation of Agency and Respondents; Ex. R109)

41) Based on Gross's Daily Reports, Fevurly calculated the total hours worked by Gross, by job classification, on the ACMA project. (Testimony of Fevurly; Ex. R109)

42) In total, Gross worked 156.25 hours[25] on the ACMA project that were classified as belonging to the following trades:[26]

Carpenter Group 1: 69.5
Laborer Group 1: 56
Sheet Metal Worker: 16.25
Bricklayer/Stonemason: 14.5

(Testimony of Gross, Fevurly; Ex. R109; Calculation of ALJ)

[25] Ex. R109 contains Fevurly's calculations of Gross's earnings. In Ex. R109, Fevurly calculated that Gross had worked 12 additional hours as a carpenter and 6 additional hours as a laborer. In concluding that Gross worked 156.25 hours that were subject to the prevailing wage rate, the forum (a) has subtracted 6.75 carpenter hours and 1.25 laborer hours on both February 3 and 5, 2010, from Ex. R109 because there is no evidence showing the appropriate job classification for the work that Gross performed, making it impossible to calculate the correct prevailing wage rate; and (b) based on Fevurly's testimony on cross examination as to Ex. A42, has added 1.5 carpenter hours and subtracted 3.5 laborer hours from Ex. R109 related to work performed on February 9 and February 17, 2010.

[26] Gross reported that he worked more than 156.25 hours, but Fevurly determined that some of the hours were not subject to the prevailing wage rate because they did not involve manual labor.

43) Based on the applicable prevailing wage rates, Gross earned gross wages calculated as follows for his work on the ACMA project in the above trade classifications:

Carpenter Group 1:	(69.5 hrs. x $30.30 (*base*) =	$2,105.85)
	(69.5 hrs. x $13.32 (*fringe*) =	$ 925.74)
	TOTAL:	**$3,031.59**
Laborer Group 1:	(56 hrs. x $24.66 (*base*) =	$1,380.96)
	(56 hrs. x $11.15 (*fringe*) =	$ 624.40)
	TOTAL:	**$2,005.36**
Sheet Metal Worker:	(16.25 hrs. x $33.27 (*base*) =	$ 540.64)
	(16.25 hrs. x $16.05 (*fringe*) =	$ 260.81)
	TOTAL:	**$ 801.45**
Bricklayer/Stonemason:	(14.5 hrs. x $31.12 (*base*) =	$ 451.24)
	(14.5 hrs. x $13.80 (*fringe*) =	$ 200.10)
	TOTAL:	**$ 651.34**

TOTAL EARNINGS (*base*): $2,105.85 + $1,380.96 + $540.64 + $451.24= **$4,478.69**.

TOTAL EARNINGS (*fringe*): $925.74 + $624.40+ $260.81+ $200.10 = **$2,011.05**.

TOTAL EARNINGS (*base* + *fringe*): $4,478.69 + $2,011.05 = **$6,489.74**.

TOTAL AMOUNT PAID FOR 156.25 hours: 156.25 hours x $20.00 = **$3,125.00.**[27]

TOTAL UNPAID, DUE AND OWING WAGES: $6,489.74 - $3,125.00 = **$3,364.74.**

(Testimony of Fevurly, Gross; Ex. R109; Calculation of ALJ)

44) Gross's average hourly base wage rate at ACMA while he worked in trade classifications subject to the prevailing wage rate was $28.66 per hour ($4,478.69 ÷ 156.25 hours = $28.66). His average hourly base wage at EG was $22.91 per hour.[28] His average combined hourly base rate for EG and ACMA was $26.43 per hour, calculated as follows:

[27] The forum notes that payroll records provided by Gross in Ex. A21, pp.10-11, show that Gross was paid overtime wages of $30.00 per hour for some of the time he worked on the ACMA project. The forum does not factor in Gross's overtime pay because there is no evidence in the record to show the specific work that the overtime pay is tied to or whether it is even associated with work that was subject to the prevailing wage rate.

[28] *See* Finding of Fact 27 – The Merits.

(a) $4,478.69 (ACMA base rate wages) + $2,262.36 (EG base rate wages) = $6,741.05
(b) 156.25 hours (ACMA pwr hours) + 98.75 (EG pwr hours) = 255 hours
(c) $6,741.05 ÷ 255 hours = $26.43 per hour

(Calculation of ALJ)

45) Penalty wages for Gross are computed as follows: $26.43/hr. x 8 hrs. = $211.44 x 30 days = $6,343.20. (Calculation of ALJ)

46) Sinner performed work on the ACMA project between January 15 and March 3, 2010. He handwrote the specific jobs he performed each day on a "Daily Labor and Material Report" that had "BROWNS Architectural Sheetmetal, Inc." printed on top of each report. He spent approximately six hours of his recorded work time taking photographs of the work Claimants had completed. He was paid $10.50 per hour for all his work. (Testimony of Sinner; Stipulation of Agency and Respondents; Ex. R108)

47) Based on Sinner's Daily Reports, Fevurly calculated the total hours worked by Sinner, by job classification, on the ACMA project. (Testimony of Fevurly; Ex. R108)

48) In total, Sinner reported that he worked 277.65 hours that Fevurly determined should be classified as belonging to the following trades:[29]

Carpenter Group 1: 173.15
Laborer Group 1: 57.25
Sheet Metal Worker: 23.25
Bricklayer/Stonemason: 24

(Testimony of Sinner; Ex. R108)

49) Based on the applicable prevailing wage rates, Sinner earned gross wages, calculated as follows, for his work on the ACMA project in the above trade classifications, less six hours for the time he spent taking photographs:

Carpenter Group 1:	(173.15 hrs. x $30.30 (*base*) = $5,246.45)	
	(173.15 hrs. x $13.32 (*fringe*) = $2,306.36)	
	TOTAL:	**$7,552.81**
Laborer Group 1:	(57.25 hrs. x $24.66 (*base*) = $1,411.79)	
	(57.25 hrs. x $11.15 (*fringe*) = $ 638.38)	
	TOTAL:	**$2,050.17**

[29] Sinner reported that he worked more than 277.65 hours, but Fevurly determined that some of the hours were not subject to the prevailing wage rate because they did not involve manual labor.

Sheet Metal Worker:	(23.25 hrs. x $33.27 (*base*) =	$ 773.53)
	(23.25 hrs. x $16.05 (*fringe*) =	$ 373.16)
	TOTAL:	**$1,146.69**
Bricklayer/Stonemason:	(24 hrs. x $31.12 (*base*) =	$ 746.88)
	(24 hrs. x $13.80 (*fringe*) =	$ 331.20)
	TOTAL:	**$1,078.08**

TOTAL EARNINGS (*base*): $5,246.45 + $1,411.79 + $773.53 + $746.88 = **$8,178.65**.

TOTAL EARNINGS (*fringe*): $2,306.36 + $638.38 + $373.16 + $331.20 = **$3,649.10**.

TOTAL EARNINGS (*base* + *fringe***) before adjustment:** $8,178.65 + $3,649.10 = **$11,827.75**.

AVERAGE HOURLY WAGE (*base* + *fringe*): $11,827.75 ÷ 277.65 hours = **$42.60.**

ADJUSTMENT FOR TIME SPENT TAKING PHOTOS: $42.60 x 6 hours = **$255.60.**

TOTAL EARNINGS AFTER ADJUSTMENT: $11,827.75 - $255.60 = **$11,572.15.**

TOTAL AMOUNT PAID FOR 271.65 hours: 271.65 hours x $10.50 = **$2,852.33.**

TOTAL UNPAID, DUE AND OWING WAGES: $11,572.15 - $2,852.33 = **$8,719.82**

(Testimony of Fevurly, Sinner; Ex. R108; Calculation of ALJ)

50) Sinner's average hourly base wage rate at ACMA while he worked in trade classifications subject to the prevailing wage rate was $29.46 per hour ($8,178.65 ÷ 277.65 hours = $29.46). (Calculation of ALJ)

51) Penalty wages for Sinner are computed as follows: $29.46/hr. x 8 hrs. = $235.68 x 30 days = $7,070.40. (Calculation of ALJ)

52) Steinmetz performed work on the ACMA project on December 28, 2009, and on January 15 and 16, 2010. He handwrote the specific jobs he performed each day on a "Daily Labor and Material Report" that had "BRUN METALS Co., LLC" printed on top of each report. He was paid $25.00 per hour for all his work. (Testimony of Steinmetz; Exs. A24, A42, pp. 92-95)

53) Based on Steinmetz's Daily Reports, Fevurly calculated the total hours worked by Steinmetz, by job classification, on the ACMA project. (Testimony of Fevurly; Ex. R110)

54) In total, Steinmetz worked 14.5 hours that Fevurly determined should be classified as belonging to the following trades:

Carpenter Group 1: 12.5
Laborer Group 1: 2

(Testimony of Fevurly; Ex. R110)

55) Based on the applicable prevailing wage rates, Steinmetz earned gross wages calculated as follows for his work on the ACMA project in the above trade classifications:

Carpenter Group 1:	(12.5 hrs. x $30.30 (*base*) =	$378.75)
	(12.5 hrs. x $13.32 (*fringe*) =	$166.50)
	TOTAL:	**$545.25**
Laborer Group 1:	(2 hrs. x $24.66 (*base*) =	$ 49.32)
	(2 hrs. x $11.15 (*fringe*) =	$ 22.30)
	TOTAL:	**$ 71.62**

TOTAL EARNINGS (*base*): $378.75+ $49.32 = **$428.07**.

TOTAL EARNINGS (*fringe*): $166.50 + $22.30 = **$188.80**.

TOTAL EARNINGS (*base* + *fringe*): $428.07 + $188.80 = **$616.87**.

(Testimony of Fevurly, Steinmetz; Ex. R110; Calculation of ALJ)

56) In all, Steinmetz was paid $362.50 for the 14.5 hours he worked in the trade classifications listed in Finding of Fact 53 – The Merits, leaving unpaid wages due and owing in the amount of $254.37 for Steinmetz's work on the ACMA project. (Testimony of Steinmetz; Stipulation of Agency and Respondents; Calculation of ALJ; Ex. R110)

57) Steinmetz's average hourly base wage rate at ACMA while he worked in trade classifications subject to the prevailing wage rate was $29.52 per hour ($428.07 ÷ 14.5 hours = $29.52). (Calculation of ALJ)

58) Penalty wages for Steinmetz are computed as follows: $29.52/hr. x 8 hrs. = $236.16 x 30 days = $7,084.80. (Calculation of ALJ)

59) Leis performed work on the ACMA project from January 6 through February 24, 2010. He was paid $12.00 per hour for all his work. He spent approximately 10 percent of his recorded work time taking photographs of the work Claimants had completed. He handwrote the specific jobs he performed each day on a "Daily Labor and Material Report" that had "BROWNS Architectural Sheetmetal, Inc." printed on top of each report. With his wage claim form, Leis included pay stubs from BMC for continuous weeks beginning on 12/21/09 and ending on 3/20/10 that showed

the number of hours he worked and was paid for each week. (Testimony of Leis; Exs. A23, A42, pp. 59-88)

60) Based on Leis's Daily Reports, Fevurly calculated the total hours worked by Leis, by job classification, on the ACMA project. His calculations did not include an adjustment for Leis's photo taking activity. (Testimony of Fevurly; Ex. A32)

61) In total, Leis reported that he worked 214.75 hours that Fevurly determined should be classified as belonging to the following trades:[30]

Carpenter Group 1: 149[31]
Laborer Group 1: 51
Sheet Metal Worker: 7.75
Bricklayer/Stonemason: 7

62) Based on the applicable prevailing wage rates, Leis earned gross wages calculated as follows for his work on the ACMA project in the above trade classifications:

Carpenter Group 1:	(149 hrs. x $30.30 (*base*) =	$4,514.70)
	(149 hrs. x $13.32 (*fringe*) =	$1,984.68)
	TOTAL:	**$6,499.38**
Laborer Group 1:	(51 hrs. x $24.66 (*base*) =	$1,257.66)
	(51 hrs. x $11.15 (*fringe*) =	$ 568.65)
	TOTAL:	**$1,826.31**
Sheet Metal Worker:	(7.75 hrs. x $33.27 (*base*) =	$ 257.84)
	(7.75 hrs. x $16.05 (*fringe*) =	$ 124.39)
	TOTAL:	**$ 382.23**
Bricklayer/Stonemason:	(7 hrs. x $31.12 (*base*) =	$ 217.84)
	(7 hrs. x $13.80 (*fringe*) =	$ 96.60)
	TOTAL:	**$ 314.44**

TOTAL EARNINGS (*base*): $4,514.70 + $1,257.66 + $257.84 + $217.84 = **$6,248.04**.

TOTAL EARNINGS (*fringe*): $1,984.68 + $568.65 + $124.39 + $96.60 = **$2,774.32**.

[30] Leis reported that he worked more than 214.75 hours, but Fevurly determined that some of the hours were not subject to the prevailing wage rate because they did not involve manual labor.

[31] This excludes 6.75 hours that Leis recorded on his timecard for 1/19/10 and Fevurly counted as Carpenter work because there is no Daily Report and was no testimony as to the specific work that Leis performed that day.

TOTAL EARNINGS (*base* + *fringe*): $6,248.04 + $2,774.32 = **$9,022.36**.

TOTAL EARNINGS (*with adjustment for 10 percent of time taking photographs*): $9,022.36 - $902.24 = **$8,120.12**.

TOTAL PWR HOURS WORKED: 214.75 hours x .10 = 21.48 hours;
214.75 hours – 21.48 hours = **193.27 hours**.

TOTAL WAGES PAID FOR PWR HOURS WORKED: 193.27 hours x $12.00 per hour = $2,319.24.

TOTAL UNPAID, DUE AND OWING WAGES: $8,120.12 - $2,319.24 = **$5,800.88**.

(Testimony of Fevurly, Leis; Ex. A32; Stipulation of Agency and Respondents; Calculation of ALJ)

63) Leis's average hourly base wage rate at ACMA while he worked in trade classifications subject to the prevailing wage rate was $29.09 per hour ($6,248.04 ÷ 214.75 hours = $29.09). (Calculation of ALJ)

64) Penalty wages for Leis are computed as follows: $29.09/hr. x 8 hrs. = $232.72 x 30 days = $6,981.60. (Calculation of ALJ)

65) RCC paid Brown directly for the work that Gross, Leis, Sinner, and Steinmetz performed at ACMA. (Testimony of Robinson, Brown)

66) At some time in late 2012,[32] BMC and BAS were parties to a "Mutual Settlement Agreement and Release of All Claims" in which BAS, BMC, RCC, Cascade Heating, Cascade Mechanical, Stryker, ASC, and Schaber agreed to pay Redmond various amounts based on "construction defects and resulting property damage." BAS and BMC agreed to pay $50,000. The Agreement made no reference to any warranty and stated there was no admission of liability. (Testimony of Brown; Ex. A10)

BOLI's Wage Claim Demands

67) On April 24, 2014, BOLI compliance specialist Michael Fevurly sent letters to Marc Brown requesting information related to the wage claims of Gross, Sinner, Leis, and Steinmetz for their work on EG and ACMA projects. On April 30, 2014, Brown called Fevurly and told him, among other things, that the work on the EG project "was warranty work." On June 2, 2014, Brown sent Fevurly a letter in which he responded to Fevurly's request for information and attached a printout of "Employee Pay History" for all four wage claimants for the periods of time that they worked on EG and ACMA projects. Brown's letter included the following statements:

[32] Ex. A10 is the version of the Agreement that was received in evidence. Although it is unsigned, there was no dispute as to its authenticity and a term of the Agreement calls for payments to be made by "November 9, 2012."

"6. Request Item #6: Detail Description of work performed.

a. Worked (sic) performed on Elton Gregory were repairs made to an existing metal roof assembly completed by others years previous. The metal roof repair plan included emergency waterproofing, demolition of existing roofing assembly materials, cleaning, moisture barrier waterproofing, and caulking.

b. Worked (sic) performed on Beaverton Performing Arts consisted of repairs to protection mat materials at concrete foundation, clean up of debris, material cleaning, repairs to weather resistant barriers, and caulking.

"* * * * *

"11. Request Item #12: Additional Documentation of Resolve.

a. Both projects were repair projects as requested by Randy Robinson, and in both cases were treated as a time and material type of repair job."

Brown also enclosed printouts showing the "Employee Pay History" for all four Claimants for the time period encompassed by the EG and ACMA projects. (Testimony of Fevurly; Ex. A11)

68) On October 29, 2014, Fevurly sent letters to Marc Brown regarding the wage claims of Gross, Sinner, Leis, and Steinmetz based on their work on the EG project. In the letters, Fevurly informed Brown that he had concluded his investigation of Claimants' wage claims stemming from their work on the EG project. With each letter, Fevurly enclosed a wage calculation spreadsheet that showed how he computed the unpaid wages that he demanded on behalf of each Claimant. Fevurly's letter demanded the following amounts: **Gross**: $15,404.60 in unpaid wages, including $7,702.30 in liquidated damages; **Sinner**: $27,582.14 in unpaid wages, including $13,791.07 in liquidated damages; **Leis**: $19,534.72 in unpaid wages, including $9,767.36 in liquidated damages; **Steinmetz**: $4,738.00 in unpaid wages, including $2,369.00 in liquidated damages. Fevurly's letters also stated that BOLI would not pursue liquidated damages if the unpaid wages were paid in full by November 20, 2014. On February 26, 2015, Fevurly sent a second set of letters to Brown in which he repeated the same wage demands and indicated that BOLI would not pursue liquidated damages if the unpaid wages were paid in full by March 12, 2015. (Testimony of Fevurly; Exs. A12 through A15, A17 through A20)

69) On October 29, 2014, Fevurly sent letters to Marc Brown regarding the wage claims of Gross, Sinner, Leis, and Steinmetz based on their work on ACMA project. In the letters, Fevurly informed Brown that he had concluded his investigation of Claimants' wage claims stemming from their work on the ACMA project. With each letter, Fevurly enclosed a wage calculation spreadsheet that showed how he computed the unpaid wages that he demanded on behalf of each Claimant. Fevurly's letter demanded the following amounts: **Gross**: $14,501.60 in unpaid wages, including

$7,250.80 in liquidated damages; **Sinner**: $29,397.10 in unpaid wages, including $14,698.55 in liquidated damages; **Leis**: $24,793.68 in unpaid wages, including $12,396.84 in liquidated damages; **Steinmetz**: $3,587.22 in unpaid wages, including $1,793.61 in liquidated damages. Fevurly's letters also stated that BOLI would not pursue liquidated damages if the unpaid wages were paid in full by November 20, 2014. On February 26, 2015, Fevurly sent a second set of letters to Brown in which he modified his October 29, 2014, wage claim demand as follows: **Gross**: $6,915.12 in unpaid wages, including $3,457.56 in liquidated damages; **Sinner**: $15,025.70 in unpaid wages, including $7,512.85 in liquidated damages; **Leis**: $11,928.64 in unpaid wages, including $5,964.32 in liquidated damages; **Steinmetz**: $541.20 in unpaid wages, including $270.60 in liquidated damages. He also stated that BOLI would not pursue liquidated damages if the unpaid wages were paid in full by March 12, 2015. (Testimony of Fevurly; Exs. A27 through A34)

70) BAS and BMC have paid no additional wages to Gross, Sinner, Leis, and Steinmetz since Fevurly's letters demanding payment. (Entire Record)

71) BOLI's practice and policy regarding the payment of prevailing wage rate for "warranty work" on public works projects is that "warranty work" is work that falls within the scope of a warranty or guarantee in the original contract for a public works project or a separate warranty or guarantee in force related to the work performed on the original public works project when that work is performed prior to the expiration date of those applicable warranties. (Testimony of Wooley)

72) At the time of the hearing, BOLI's investigator Fevurly had no knowledge that any public funds were used, either directly or indirectly, to pay Respondents for the EG or ACMA projects. (Testimony of Fevurly)

Credibility Findings

73) Christopher Leis, Don Gross, Robert Sinner, Brady Steinmetz were credible witnesses regarding: (a) their testimony about the type of work they performed on the EG and ACMA projects; (b) the total hours they worked for BMC on the EG and ACMA projects; and (c) the Daily Reports on which they contemporaneously notated their specific job duties and amount of time they performed those job duties during the time period they worked on the EG and ACMA projects. (Testimony of Leis, Gross, Sinner, Steinmetz)

74) Mike Fevurly, BOLI's compliance specialist who investigated Claimants' wage claims, was a credible witness. To the extent that his testimony about BOLI's warranty policy conflicted with Wooley's, the forum has credited Wooley's testimony because she is BOLI's undisputed expert in the matter. In particular, the forum has relied on his testimony as to the appropriate trade classifications of the work performed by Claimants on the EG and ACMA projects. (Testimony of Fevurly)

75) Susan Wooley, BOLI's prevailing wage rate Technical Assistance Coordinator and lead worker in BOLI's Prevailing Wage Rate Unit, was a credible witness and the forum has credited her testimony in its entirety. (Testimony of Wooley)

76) John Hartsock was a credible witness and the forum has credited his testimony in its entirety. (Testimony of Hartsock)

77) Randall Robinson was a rude and argumentative telephone witness. Because of his attitude, the forum has credited his testimony only when it was undisputed or not contradicted by more credible evidence. The forum has credited his testimony (a) that the original contract for the EG project had a one year warranty; (b) as to settlements regarding the EG project in which RCC was a party; and (c) that no public funds received by RCC were used to pay BAS or BMC simply because there is no evidence to the contrary. (Testimony of Robinson)

78) Marc Brown had selective memory issues. He could not remember how much Robinson paid BAS or BMC for their work at EG, the number of hours he billed Robinson for BAS's and BMC's work at EG or ACMA, or how many employees BMC had at EG, except for Claimants. In contrast, he described the 10 separate projects at EG that BAS and BMC worked on in great detail. He testified credibly about the nature of the work he and Claimants performed at the EG and ACMA projects, the relationship between BAS and BMC and their respective functions and employees, and his agreements with Robinson. (Testimony of Brown)

CONCLUSIONS OF LAW

1) BMC was Claimants' sole employer at the EG and ACMA projects. BMC and BAS were not joint employers of Claimants on those projects.

2) At the time Claimants performed work on the EG project, that project was a public works project on which BMC was required to pay employees the prevailing wage rate. BMC violated ORS 279C.840 and OAR 839-025-0035 by failing to pay Claimants the prevailing wage rate for all hours worked in a trade classification for which they were entitled to be paid the prevailing wage rate. BMC owes no unpaid wages, liquidated damages, or penalty wages to Claimants Sinner, Leis, and Steinmetz for their work on the EG project. BMC owes $1,104.96 in unpaid wages and $1,104.96 in liquidated damages to Gross for his work on the EG project. ORS 279C.840, ORS 279C.855, OAR 839-025-0035.

3) At the time Claimants performed work on the ACMA project, that project was a public works project on which BMC was required to pay employees the prevailing wage rate. BMC violated ORS 279C.840 and OAR 839-025-0035 by failing to pay Claimants the prevailing wage rate for all hours worked in a trade classification for which they were entitled to be paid the prevailing wage rate.

4) BMC owes unpaid wages in the following amounts to Claimants for their work at the ACMA project: Gross -- $3,364.74; Leis -- $5,800.88; Sinner -- $8,719.82; and Steinmetz -- $254.37. ORS 279C.840 and OAR 839-025-0035.

5) BMC owes liquidated damages in the following amounts to Claimants for their work at the ACMA project: Gross -- $3,364.74; Leis -- $5,800.88; Sinner -- $8,719.82; and Steinmetz -- $254.37. ORS 279C.855.

6) BMC owes penalty wages in the following amounts to Claimants Leis, Sinner, and Steinmetz for their work at the ACMA project: Leis -- $6,981.60; Sinner -- $7,070.40; and Steinmetz -- $7,084.80. ORS 652.150.

7) BMC owes $6,343.20 in penalty wages to Claimant Gross for his work on the EG and ACMA projects. ORS 652.150.

8) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the persons and of the subject matter herein. ORS 652.332.

9) The Commissioner has the authority to award unpaid wages, penalty wages, and liquidated damages under ORS 279C.840, ORS 279C.855, OAR 839-025-0035, ORS 652.140, and ORS 652.150.

OPINION

This case involves wage claims by four Claimants for work they performed on the EG and ACMA projects in 2009 and 2010. In a typical wage claim case, the elements of the Agency's prima facie case are as follows: 1) Respondent employed Claimant; 2) The pay rate upon which Respondent and Claimant agreed, if other than the minimum wage; 3) The amount and extent of work Claimant performed for Respondent; and 4) Claimant performed work for which Claimant was not properly compensated. *See, e.g., In the Matter of Christopher Lee Ruston and Christine M. Stahler,* 34 BOLI 56, 61 (2015). This case presents two additional issues. First, the Agency alleges that BAS and BMC jointly employed Claimants on both projects. Second, Claimants' claim for unpaid wages, penalty wages, and liquidated damages, as plead in the Agency's OOD, is solely predicated on the allegation that they were entitled to be paid the prevailing wage rate for all their work because the EG and ACMA projects were "public works."

Did BMC and BAS jointly employ Claimants?

The Agency alleges that BMC and BAS were joint employers of Claimants and are jointly and severally liable for any due and owing unpaid wages, penalty wages, and liquidated damages. In general, a joint employment relationship exists when two associated employers share control of an employee. Joint or co-employers are responsible, both individually and jointly, for compliance with all applicable provisions of Oregon's wage and hour laws. *In the Matter of Portland Flagging, LLC (#28-15),* 34 BOLI 244, 264 (2016); *In the Matter of Kurt E. Freitag,* 29 BOLI 164, 197-98 (2007), *affirmed without opinion*, *Freitag v. Bureau of Labor and Industries,* 243 Or App 389,

256 P3d 1099 (2011). A joint employment relationship cannot exist unless each alleged "joint" employer is also an individual employer. *In the Matter of Laura M. Jaap, 30 BOLI 110, 126 (2009).*

In the past, the forum has relied on the federal Fair Labor Standards Act ("FLSA"), specifically 29 CFR § 791.2, to determine whether respondents were joint employers.[33] *Id. See also In the Matter of Staff, Inc.*, 16 BOLI 97, 114-16 (1997). A joint employment relationship is established under the FLSA when employers have an agreement to share the services of an employee that is mutually beneficial to the employer(s), where one employer acts directly or indirectly in the interest of the other employer with respect to the employee, where the employers share direct or indirect control of the employee, or where one employer controls the other employer. *Portland*

[33] 29 CFR § 791.2 of the FLSA (footnotes omitted) provides:

> "(a) A single individual may stand in the relation of an employee to two or more employers at the same time under the Fair Labor Standards Act of 1938, since there is nothing in the act which prevents an individual employed by one employer from also entering into an employment relationship with a different employer. A determination of whether the employment by the employers is to be considered joint employment or separate and distinct employment for purposes of the act depends upon all the facts in the particular case. If all the relevant facts establish that two or more employers are acting entirely independently of each other and are completely disassociated with respect to the employment of a particular employee, who during the same workweek performs work for more than one employer, each employer may disregard all work performed by the employee for the other employer (or employers) in determining his own responsibilities under the Act. On the other hand, if the facts establish that the employee is employed jointly by two or more employers, i.e., that employment by one employer is not completely disassociated from employment by the other employer(s), all of the employee's work for all of the joint employers during the workweek is considered as one employment for purposes of the Act. In this event, all joint employers are responsible, both individually and jointly, for compliance with all of the applicable provisions of the act, including the overtime provisions, with respect to the entire employment for the particular workweek. In discharging the joint obligation each employer may, of course, take credit toward minimum wage and overtime requirements for all payments made to the employee by the other joint employer or employers.
>
> "(b) Where the employee performs work which simultaneously benefits two or more employers, or works for two or more employers at different times during the workweek, a joint employment relationship generally will be considered to exist in situations such as:
>
> "(1) Where there is an arrangement between the employers to share the employee's services, as, for example, to interchange employees; or
>
> "(2) Where one employer is acting directly or indirectly in the interest of the other employer (or employers) in relation to the employee; or
>
> "(3) Where the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer."

Flagging, LLC (#28-15) at 264. Under the FLSA, the forum's inquiry necessarily "depends upon all the facts" in the particular case.[34]

The record reveals the following relevant evidence:

1. At all times material herein, Marc Brown was the corporate president of BAS and the managing member of BMC, an LLC.

2. BAS is an Oregon domestic business corporation that was incorporated in June 1990 with Marc Brown as its corporate president and registered agent and Kathy Brown, Brown's wife, as its corporate secretary. BAS's primary business is the design, fabrication and installation of custom-designed sheet metal, with the fabrication done in BAS's shop in North Plains, Oregon. BAS temporarily went out of business between 2004 and 2006.

3. BMC was a domestic limited liability company started up in April 2004 and was administratively dissolved in June 2013. Listed on BMC's business registry with the secretary of state were Kathy Brown, member, and Marc Brown, manager.

4. Marc Brown started BMC to handle the majority of the work that BAS had been doing, namely custom fabrication and installation of architectural sheet metal. From 2004 until BMC's dissolution in 2013, BAS's only function was to act as a consultant and do design work for other entities' projects.

5. While BMC was in business, BAS and BMC had shops located in the same building in North Plains and shared the same mailing address.

6. Steinmetz testified that he was employed by BMC. Gross testified that he was hired by BMC. Leis testified he was told, before he went to a job site: "We're working for Brown's Architectural today, so hide all your Brun Metals gear." Leis was not asked and did not testify who told him this. Leis also testified, on direct examination, that Marc Brown hired him to work for BMC. Sinner did not testify who his employer was.

7. All Claimants' wages on the EG and ACMA projects were paid by BMC.

8. Leis and Gross's 2009 W-2 forms were issued by BMC.[35]

9. Claimants' paystubs all came from BMC.

10. Some of the Daily Reports completed by Claimants on the EG and ACMA projects had "BROWNS Architectural Sheetmetal, Inc." printed on them; some

[34] 29 CFR § 791.2(a).

[35] Sinner's and Steinmetz's W-2 forms were not offered in evidence.

had “Brun Metals Co. LLC” printed on top; and some had both names printed on top.

Summarized, the Agency’s claim of joint employment is supported by the following:

- Marc Brown’s undisputed interest in BAS and BMC;
- BAS and BMC were both involved in the sheet metal business;
- BAS, through its employee Brown, and BMC, through Claimants, both performed work at EG and ACMA;
- BAS and BMC had shops located in the same building while BMC was in business and the same P.O. address;
- Some of the Daily Reports have either “BROWNS Architectural Sheetmetal, Inc.” or “BROWNS Architectural Sheetmetal, Inc.” and “Brun Metals Co. LLC” printed on top.

Respondents’ defense that BMC was Claimants’ sole employer is supported by the following:

- Claimants understood they were hired to work for BMC;
- Claimants were paid by BMC and BMC issued 2009 W-2 forms to them;
- Claimants’ paystubs all came from BMC;
- BAS and BMC performed different functions – BAS performed consulting and design through Brown, its employee, and BMC did fabrication and installation.

The forum has found the existence of a joint employment relationship in four previous cases.

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

In *Freitag*, the forum found that an individual respondent and a corporate respondent jointly employed a claimant when they: (1) shared an interest in the property being developed on a construction site; (2) the individual respondent controlled and directed the work performed by claimant and other laborers on the construction site and signed their paychecks, which he paid to them as a sole proprietor using an assumed business name; (3) the corporate respondent maintained an office where claimant and

other laborers submitted their timesheets and controlled, to some extent, how, when, and whether claimant would be paid; and (4) the facts supported an inference that the claimant was under the simultaneous control of Respondents and simultaneously performed services for both. *Freitag* at 299-301.

In *Staff, Inc.*, an employer leased the wage claimant from Barrett Business Services, an employee leasing company. Respondent Barrett retained hiring and firing rights, had the authority to administer discipline to the employees, handled payroll matters (including the payment of state and federal taxes), provided workers' compensation insurance, and made various fringe benefits available to its employees. Respondent Staff maintained day-to-day supervision of the employees and retained the right to hire, fire, and discipline them. Staff's president set the pay rates, obtained the contracts the employees worked on, such work schedule, arranged for the employees' lodging, and gave them advances on wages. The forum concluded that each respondent retained sufficient control of the terms or conditions of employment to be considered a joint employer and held both respondents jointly and individually liable for the claimant's unpaid wages. *Id.,* at 114-16.

Finally, in *Jack Crum Ranches, Inc.*, 14 BOLI 258 (1995), the forum found three respondents – an individual and two corporate respondents – liable as joint employers when they shared work crews and equipment, the claimant performed work that benefited all three respondents, and the claimant was issued separate paychecks drawn on the accounts of each respondent. *Id.* at 271.

In three prior cases, the forum has also found that no joint employment relationship existed.

In *The Alphabet House,* 24 BOLI 262 (2003), the forum found no joint employment relationship existed when credible evidence established that claimant's work site was in respondent Alphabet House's office; the paychecks she wrote to herself were drawn on Alphabet House's account; her immediate supervisor was an employee of Alphabet House and testified that she was always an employee of Alphabet House; and claimant never completed any paperwork for respondent Children's Center that a new employee would be asked to complete and she tracked her work time on Alphabet House "Time Billing" sheets and signed a letter as the "Director of Administrative Services, The Alphabet House." *Id.* at 279.

In another case, the Agency named an individual and an LLC as joint employers in its order of determination. The Agency established that the LLC was active during the entire period of claimant's employment, but did not allege or present any evidence to support a conclusion that the individual was a successor to the business of the LLC or a lessee or purchaser of the LLC's business for the continuance of the LLC's business, such that the individual would meet the definition of an "employer" under ORS 652.310. The forum held that the individual was not claimant's "employer" and had no personal liability. *In the Matter of Orion Driftboat and Watercraft Company,* 26 BOLI 137, 147-48 (2005).

In the third case, the Agency alleged that respondents Jaap and her daughter, Honn, were joint employers when claimants repaired and remodeled Honn's house. The forum found that Jaap was claimants' sole employer based on the following facts: Jaap and Honn were not partners; Honn gave Jaap complete authority over the repair and remodel work on her house; Jaap hired all three claimants to perform repair and remodel work on Honn's house; Jaap agreed to pay Claimants at a fixed hourly rate for their work; Jaap paid $2,268 in wages to the Claimants that corresponded to their agreed hourly rate; Jaap paid for all the building materials and supplies; Jaap or Jaap's agent directed Claimants' work; Honn's only connection with the work was that she owned the house that Claimants worked on and she met Claimants at a building supply store to pay for materials when Jaap was gone and Jaap reimbursed her for the materials; and Jaap had no ownership interest in Honn's house. *Laura M. Jaap* at 126.

Based on these precedents and the facts of this case, the forum finds that the Agency has not met its burden of proof of showing that Claimants were jointly employed by BAS and BMC. Instead, the forum concludes that Brown was employed by BAS and Claimants were employed by BMC, not BAS, on both the EG and ACMA projects.

ACMA PROJECT

A. ACMA was a "public works."

"Public works," as defined in ORS 279C.800(6)(a), "includes, but is not limited to:

"(A) 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;

"(B) A project that uses $750,000 or more of funds of a public agency for constructing, reconstructing, painting or performing a major renovation on a road, highway, building, structure or improvement of any type[.]"

It is undisputed that the ACMA project involved the new construction of a building that was contracted for by Beaverton School District #48, a public agency,[36] and that the contract award was in the amount of $7,790,000. These facts establish that the ACMA project was a public works.

ORS 279C.840(1) requires all contractors and subcontractors "upon all public works" to pay "not less than the prevailing rate of wage for an hour's work in the same trade or occupation in the locality where the labor is performed." "Prevailing rate of wage" means "the rate of hourly wage, including all fringe benefits, that the

[36] "Public agency" means "the State of Oregon or a political subdivision of the State of Oregon, or a county, city, district, authority, public corporation or public entity organized and existing under law or charter or an instrumentality of the county, city, district, authority, public corporation or public entity." ORS 279C.800(5).

Commissioner of the Bureau of Labor and Industries determines is paid in the locality to the majority of workers employed on projects of a similar character in the same trade or occupation." When the public agency is not a party to a CM/GC[37] contract, the rates in effect on a public works are "those in effect at the time the initial specifications were first advertised for bid solicitations." OAR 839-025-0020(4)(b). The ACMA project was first advertised for bid in November 2008, and the prevailing wage rates in effect at that time were published in BOLI's July 1, 2008, publication entitled "Prevailing Wage Rates for Public Works Contracts in Oregon." Accordingly, any contractor or subcontractor whose worker performed manual or physical labor[38] on the ACMA project was required to pay that worker the prevailing wage rate.

Respondents argue four primary defenses. First, they were not required to pay prevailing wage rate because they were not "subcontractors." Second, Respondents were paid with private funds. Third, RCC employed Respondents as "consultants" to perform types of work not subject to the prevailing wage rate. Fourth, Claimants performed no "sheet metal" activities.

B. BAS and BMC were subcontractors on the ACMA Project.

Respondents argue that BAS and BMC were not subcontractors because Respondents did not bid on the work and there was no written contract between RCC and Respondents, only an oral agreement between Randall Robinson and Marc Brown. Respondents' argument presupposes that an agreement to perform work in exchange for payment must be in writing before it can be considered a contract. Contrary to Respondents' argument, an oral agreement does not need to be in writing to be an enforceable contract, so long as it satisfies the other elements of a contract and its subject matter does not fall within the statute of frauds, which it does not in this case. Whether or not Respondents bid on the work is irrelevant. In this case, Randall Robinson made an oral agreement with Marc Brown for Respondents to perform "quality assurance" work at the ACMA project on RCC's behalf, in exchange for which Robinson agreed to reimburse Respondents for their "time and materials." Respondents performed that work and received reimbursement. This constitutes a valid contract, making Respondents a subcontractor on the ACMA project.[39]

C. Payment of Respondents with private funds.

Randall Robinson and Marc Brown testified that Robinson paid Respondents directly from RCC's "private funds." This argument is a red herring. RCC was the prime

[37] CM/GC stands for "Construction Manager/General Contractor contract." OAR 839-025-0020(1)(a).

[38] OAR 839-025-0004(31) defines "worker" as "a person employed on a public works project and whose duties are manual or physical in nature (including those workers who use tools or who are performing the work of a trade), as distinguished from mental, professional or managerial. The term 'worker' includes apprentices, trainees and any person employed or working on a public works project in a trade or occupation for which the commissioner has determined a prevailing rate of wage."

[39] The same analysis applies to the EG project.

contractor on the ACMA project and Respondents were subcontractors. Allowing Respondents to avoid paying its workers the prevailing wage rate because RCC paid Respondents directly would mean that no subcontractor on a public works project would have to pay its workers the prevailing wage rate if it was paid directly by the prime contractor instead of the contracting public agency. This is not the law.

D. "Consulting," "Remedial and Repair Activities," "Diagnostic Activities," "Educational Activities," "Safety Compliance Activities."

As affirmative defenses, Respondents argue that their activities on the EG and ACMA projects were "consulting," "remedial and repair," "diagnostic," and "safety compliance." This is another red herring. These four activities may not be listed trade classifications, but Claimants credibly testified that they performed manual and physical labor on BMC's behalf on the ACMA project. Based on their Daily Reports, the veracity of which was not questioned by Respondents, Fevurly testified that most of the actual work Claimants performed was appropriately classified as one of four trades – Sheet Metal Worker, Laborer Group 1, Carpenter Group 1, or Bricklayer/Stonemason. The forum has relied on Fevurly's testimony regarding the appropriate trade classification for Claimants' work in making its Findings of Fact.

E. Claimants performed sheet metal activities.

Claimants' credible testimony, as corroborated by their contemporaneous Daily Reports and categorized by Fevurly, establish that Claimants not only performed activities properly classified as sheet metal related,[40] but also performed activities properly classified as Laborer Group 1, Carpenter Group 1, and Bricklayer/Stonemason.

F. The amount and extent of work Claimants performed for Respondent.

The Agency and Respondents agree that Claimants were paid agreed rates of pay that were all lower than the prevailing wage rate for all work performed at the ACMA project.[41] Consequently, the forum only need determine the amount and extent of work Claimants performed that was subject to the prevailing wage rate. That determination is set out in Findings of Fact 42, 48, 54, 61 – The Merits.

G. Claimants performed work for which Claimants were not properly compensated.

Since Claimants were paid their agreed rate of wage for all work performed and the agreed rate for all four Claimants was lower than the prevailing wage rate, they were not properly compensated for any of the work they did that was subject to the prevailing

[40] Steinmetz only performed work as a carpenter and laborer, but the other three Claimants performed work in all four trade classifications.

[41] The Agency and Respondents stipulated that if Respondents were not required to pay the prevailing wage rate on the EG and ACMA projects, then Claimants were not entitled to any additional wages.

wage rate. BMC is liable for unpaid wages consisting of the difference between Claimants' agreed rate of pay and the prevailing wage rate for every hour that Claimants performed work in a trade classification on the ACMA project. The forum's calculation of those unpaid wages is set out in Findings of Fact 43, 49, 55, 62 – The Merits. Claimants are owed the following unpaid wages based on their work on the ACMA project: Gross -- $3,364.74; Leis -- $5,800.88; Sinner -- $8,719.82; and Steinmetz -- $254.37.

Liquidated damages

ORS 279C.855 provides: "(1) A * * * subcontractor * * * that violates the provisions of ORS 279C.840 is liable to the workers affected in the amount of the workers' unpaid minimum wages, including all fringe benefits, and in an additional amount equal to the unpaid wages as liquidated damages." BMC violated ORS 279.840(1) on the ACMA project by not paying Claimants the prevailing wage rate for every hour that Claimants performed work in a trade classification. Accordingly, BMC is liable to Claimants for liquidated damages in the following amounts: Gross -- $3,364.74; Leis -- $5,800.88; Sinner -- $8,719.82; and Steinmetz -- $254.37.

Penalty Wages

An employer is liable for penalty wages when it willfully fails to pay any wages or compensation of any employee whose employment ceases. Willfulness does not imply or require blame, malice, 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. *See, e.g., In the Matter of Giants, Inc., George T. Comalli, Hollywood Fitness, LLC, and Hollywood Fitness Center, LLC,* 33 BOLI 53, 56 (2014).

In this case, Marc Brown, the principal in BAS and BMC, testified that he had worked on public works projects in the past in which he had paid the prevailing wage rate to his employees. Despite this past experience and the fact that the ACMA project was obviously a public building being newly constructed, Brown's only inquiry as to Respondents' responsibility to pay the prevailing wage rate was to ask Robinson, who told him he did not have to pay the prevailing wage rate because he would be working as a "consultant." BMC's workers credibly testified that they performed physical and manual labor on the ACMA project, testimony reflected in the unchallenged Daily Reports they submitted to Respondents' office. Brown himself was at the ACMA project on a regular basis to observe the activities. Based on his prior experience on public works projects, he could not have avoided seeing that the project was a new public works under construction. His reliance on Robinson's assurance that Respondents did not have to pay the prevailing wage rate was ill-founded and establishes Respondents' willful failure to pay the prevailing wage rate on the ACMA project.

ORS 652.150 provides, in pertinent part:

"(1) Except as provided in subsections (2) and (3) of this section, 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 the nonpayment, the wages or compensation of the 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.

"(a) In no case shall the penalty wages or compensation continue for more than 30 days from the due date; and

"(b) A penalty may not be assessed under this section when an employer pays an employee the wages the employer estimates are due and payable under ORS 652.140 (2)(c) and the estimated amount of wages paid is less than the actual amount of earned and unpaid wages, as long as the employer pays the employee all wages earned and unpaid within five days after the employee submits the time records.

"(2)(a) If the employee or a person on behalf of the employee submits a written notice of nonpayment, the penalty may not exceed 100 percent of the employee's unpaid wages or compensation unless the employer fails to pay the full amount of the employee's unpaid wages or compensation within 12 days after receiving the notice.

"(b) If the employee or a person on behalf of the employee fails to submit a written notice of nonpayment, the penalty may not exceed 100 percent of the employee's unpaid wages or compensation.

"(c) A written notice of nonpayment must include the estimated amount of wages or compensation alleged to be owed or an allegation of facts sufficient to estimate the amount owed. Submission of a written notice of nonpayment that fails to include the estimated amount of wages or compensation alleged to be owed or an allegation of facts sufficient to estimate the amount owed does not satisfy the requirement for written notice under this subsection unless the employer has violated ORS 652.610, 652.640 or 653.045."

The record does not clearly establish the specific dates that Claimants' employment ceased, a prerequisite for an award of penalty wages. However, as Claimants were employees of BMC, it could have been no later than June 7, 2013, the date BMC was administratively dissolved.

BOLI's October 29, 2014, and February 26, 2015 "demand" letters[42] satisfy the "written notice of nonpayment" provision of ORS 652.150(2), and Respondents have not paid any of the unpaid wages in response to those letters. Accordingly, Claimants are entitled to penalty wages computed under ORS 652.150(1)(a). The calculation of those

[42] *See* Findings of Fact 68, 69 – The Merits.

wages presents a question that the forum has not addressed before, namely, what does the phrase "at the same hourly rate for eight hours" mean when Claimants were entitled to be paid the prevailing wage rate for some of their hours worked and their agreed rate for other hours in the time period encompassed by the wage claim? The OOD is of no assistance, as it merely shows that the penalty wages sought by the Agency were calculated by means of a "weighted average." At hearing, the Agency's administrative prosecutor elicited no testimony from Fevurly, the Agency's compliance specialist who calculated the penalty wages alleged in the OOD, as to how he performed his calculations.

The forum adopts a "weighted average" approach based on the prevailing wage base rate for each trade classification Claimants worked for which they were entitled to be paid the prevailing wage rate. Claimants received their full pay for all the hours they worked for which they were not entitled to be paid the prevailing wage rate, leaving only the hours for which they were entitled to be paid the prevailing wage rate as the basis for their wage claim. As set out in Findings of Fact 44, 50, 57, 63 – The Merits, the forum has computed Claimants' hourly base wage rates by dividing each Claimant's total earned base rate prevailing wages by the number of hours each Claimant worked for which they were entitled to be paid the prevailing wage rate. Based on those hourly base rates, multiplied by eight hours and again multiplied by 30 days, Claimants are entitled to the following penalty wages: Gross -- $6,343.20[43]; Leis -- $6,981.60; Sinner -- $7,070.40; Steinmetz -- $7,084.80.

Elton Gregory Project

The forum has determined that (1) the EG project, involving the construction of a public middle school in Redmond, Oregon, was originally a public works that required payment of the prevailing wage rate; (2) RCC was the prime contractor and completed work on the EG project so that it could be occupied in 2006; (3) EG's roof leaked and two other subcontractors tried unsuccessfully to fix the leaks before Respondents were hired to fix the leaks; (4) Respondents performed work at EG in 2009 and 2010 that included the design, fabrication, and installation of new components as part of the repairs; and (5) BMC employed the four Claimants to perform work that fell within the trade classification of sheet metal work at EG.

This is the first case to come before the forum in which prevailing wages are claimed for workers who performed work on a public works project *after* the original project was completed and occupied for its intended use. Despite the lapse of time and fact that Respondents were not subcontractors on the original project, the Agency contends that Respondents[44] were required to pay Claimants the prevailing wage rate for all their work at EG because it was "warranty" work related to the original public works project.

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[43] This computation includes Gross's wages at EG. *See* Finding of Fact 44 – The Merits.

[44] For reasons stated earlier, the forum has already determined that BMC was Claimants' sole employer.

Wooley, the Agency's prevailing wage rate expert, testified that the Agency's practice and policy is that the requirement for the payment of the prevailing wage rate on a public works ceases when the original warranty or any separate warranty in force related to the work performed on a project expires. This is a common sense interpretation recognizing that "warranty work," by definition, means work performed within the scope of a warranty. Without such a warranty, work cannot be said to be "warranty" work.

Respondents raise two primary defenses. First, Respondents were not subcontractors because they did not enter into a contract with RCC. The forum has already resolved that argument in favor of the Agency in its discussion of the ACMA project and the same logic applies to the EG project. Second, the work was not "warranty" work because it was not performed pursuant to a warranty and if there was a warranty, Marc Brown was not aware of it and BAS and BMC were not parties to it.

At hearing, the only evidence presented of the warranty in the original contract was Randall Robinson's testimony that it was "one year." The original contract is not in evidence,[45] and the Agency called no witnesses to testify as to the warranty in the original contract. Lacking any other evidence, the forum has adopted Robinson's testimony about the length of the warranty in the original contract. In the absence of a separate warranty in force related to the original work performed on the EG project, this fact would be dispositive.

Here, a separate warranty existed that brought Respondents' work at EG within the scope of Oregon's prevailing wage rate laws. In July 2009, RCC and DOWA entered into a settlement with Redmond in which RCC agreed to repair the roof originally designed by DOWA and constructed pursuant to the original contract. In that settlement, RCC agreed to "warrant the work pursuant to the existing Contract as of the Completion Date of the Repairs."[46] That work was performed by BAS and BMC, beginning in June 2009. Because the work was done on behalf of RCC, the warranty also bound Respondents and the repair work they performed was "warranty" work subject to the prevailing wage rate. As such, BMC was required to pay Claimants the prevailing wage rate for all the work they performed that fell within the scope of a trade classification in BOLI's publication defining "covered occupations."

Although ORS 279C.840 entitled Claimants to be paid the prevailing wage rate for any manual labor they performed within a trade classification, the Agency's case for unpaid wages fails for Sinner, Leis, and Steinmetz because the Agency failed to meet its burden of proof as to the amount and extent of work they performed that was subject to the prevailing wage rate. At the ACMA project, this burden was satisfied by all four Claimants' unchallenged Daily Reports that listed the specific job duties performed each day and amount of time spent performing them, combined with Claimants' credible

[45] *See* fn. 5.

[46] *See* Finding of Fact #13 – The Merits.

testimony about those Reports. In contrast, Claimants' testimony established that a significant portion of their work related to EG was not subject to the prevailing wage rate. This included work such as time at Respondents' shop in North Plains each Monday before leaving for Redmond; travel time of three to four hours to and from North Plains to Redmond each week; observing the work of others; fabricating components for EG at BMC's shop in North Plains; talking to someone; attending safety meetings; and time spent walking around EG inspecting for leaks with another Claimant. There were no Daily Reports offered into evidence that might have allowed the forum to approximate the time Sinner, Leis, and Steinmetz spent on these non-prevailing wage rate activities. There was also no testimony sufficiently specific regarding dates and times that would have allowed the forum to make reasonably accurate calculations.[47]

Gross, on the other hand, produced a limited number of Daily Reports for his work at EG, as described in Finding of Fact 27 – The Merits, and testified as to the activities noted on those Reports. Fevurly also credibly testified as the specific work hours on those Reports that fell within the sheet metal worker classification. In total, the forum has found that Gross worked 98.75 hours as a sheet metal worker at EG for which he was entitled to be paid a $22.91 base rate and an $8.27 per hour fringe rate. Instead, he was only paid $20.00 per hour, leaving $1,104.96 in unpaid, due, and owing wages. He is also entitled to $1,104.96 in liquidated damages. As with the ACMA project, the forum finds that BMC's failure to pay the wages to Gross was willful, making BMC liable to penalty wages. As shown in Finding of Fact #44 -- The Merits, Gross's base rate has been included in the computation of his penalty wages.

Other Defenses

1. Statute of Limitations: Respondents assert that "some or all of the Agency's and claimants' claims are barred by the applicable statute of limitations." The statute of limitations for wage claims for regular wages is six years. ORS 12.080(1). The OOD in this case was issued on March 27, 2015, which falls within the six year period for all four Claimants.

2. Laches: Respondents assert that "some or all of the Agency's and claimants' claims are barred by the doctrine of laches." Respondents have not satisfied their burden of proof.

3. "Good Faith/Legitimate Business Motives": This is not a defense to Claimants' wage claims.

4. "Rationale that Agency Following (sic) in Not Requiring Other Contractors to Pay Prevailing Wage Should Apply": Respondents assert that "[o]ther contractors worked on the subject properties prior to and following Respondents but were not

[47] ORS 653.045 requires employers to keep records of the "actual hours worked each week and each pay period by each employee," but only for a period of two years. There is no law or administrative rule that requires employers to keep a record of the specific job duties performed by employees.

required by the Agency to pay prevailing wages for similar activities. As a consequence, the rationale governing those of the contractor should apply to Respondents." There is no evidence in the record as to whether the "other contractors" referred to by Respondents paid the prevailing wage rate to their employees. Consequently, Respondents' defense fails.

5. "Agency Condoned, Approved, and Acquiesced in Actions of Other Contractors": Respondents assert that "[t]he Agency has failed to apply its policies even-handedly and fairly by subjecting Respondents to an OOD while acquiescing, approving, or condoning similar actions of other contractors at the same project locations without requiring those other contractors to pay prevailing wages." This defense fails for the same reason as the prior defense.

6. "Invoicing Directed to Law Firm Representing General Contractor": This defense is directed only at the EG project and is not a valid defense to the OOD.

7. "Failure to Join Indispensable Parties": Respondents assert "[t]o the extent that any activities were undertaken at the direction of third parties or third parties knowingly participated in said activities or indemnified those activities, those third parties, including [RCC], are indispensable parties." Respondents' defense fails because the Agency has no obligation to join any other parties to this action.

8. "Lack of Knowledge": Respondents assert "[t]he basis of the Agency's action is without merit because Respondents had no knowledge of the underlying agreement between [RCC] and the Redmond School District nor of the underlying agreement between [RCC] and the Beaverton School District." Respondents' knowledge of the underlying agreement between RCC and the public contracting agencies at the EG and ACMA projects is irrelevant to the issue of whether Respondents were required to pay the prevailing wage rate.

9. "Attorney's Fees": Respondents assert they are entitled to reasonable attorneys' fees incurred in defending this matter because the charges in the OOD are "frivolous and unreasonable and without foundation." Even if Respondents' request had merit, it would be denied because the legislature has only granted authority to the commissioner to award attorney fees and costs in contested case proceedings to interveners in a real property case brought under ORS 659A.145 or ORS 659A.421. *In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa,* 34 BOLI 102, 170 (2015), *appeal pending*.

Remaining Issues Discussed in Respondents' and Agency's Briefs

After the evidentiary portion of the hearing concluded, the ALJ issued an interim order requesting briefs on the three arguments raised by Respondents in their May 17, 2016, motion to dismiss that the ALJ orally denied at hearing, specifically: (1) lack of jurisdiction; (2) insufficiency of process; and (3) failure to state a claim upon which relief may be granted. The following discussion addresses those issues in detail.

1. Lack of Jurisdiction:

Respondents argue that the ALJ lacks jurisdiction over the EG prevailing wage law issues "because there is no statute or regulation defining warranty work and the Agency is asking the forum to engage in rulemaking process without following established rulemaking procedures." Respondents contend that, in the absence of an existing administrative rule defining "warranty work," the ALJ must necessarily engage in rulemaking to determine whether or not Claimants' work on the EG project was "warranty work" subject to the prevailing wage rate.

Respondents are correct that neither Oregon's prevailing wage laws nor BOLI's administrative rules define "warranty work" in the prevailing wage context. Furthermore, there is no Oregon case law defining "warranty work" in this context. However, Respondents incorrectly assert that the forum lacks jurisdiction to adjudicate whether or not Claimants' work on the EG project was "warranty work" for which they were entitled to be paid the prevailing wage rate.

The Oregon Supreme Court has held that "[a]gencies generally may express their interpretation of the laws they are charged with administering either by adjudication or by rulemaking, or both." *Trebesch v. Employment Division,* 300 Or 264, 273 (1985). In *Trebesch*, the Court stated:

> "We are called upon to consider whether the responsible officials in the Employment Division are required to promulgate rules in advance of adjudication. The answer is not found in the constitution * * * or in a common law, that is, a judge-made law of administrative agencies; nor may it be divined from the state administrative procedures act, ORS 183.310 to 183.725, which does no more than set uniform procedures for state agencies. Rather, the answer is a matter of statutory interpretation, the relevant statutes being those regulating the particular agency whose action is challenged. We seek to derive the legislature's intent from an analysis of the statutes by which a particular agency operates. The authorizing statutes will specify whether rulemaking or adjudication authority, or both, are delegated to the agency and will indicate the agency's tasks, the breadth of the agency's discretion to carry out these tasks, and the process by which they are to be accomplished. Judicial decisions may present the methodology by which we examine the question of required or permissive agency rulemaking. Nonetheless, only the statutes regulating a particular agency will provide the answer."[48] *Trebesch* at 267.

In 1988, the Oregon Supreme Court held that whether an agency is required to adopt a policy that qualifies as a "rule" *solely* by means of rulemaking procedures depends on whether the legislature has declared that rulemaking is the sole acceptable means of adopting the particular policy at issue. *Forelaws on Board v. Energy Fac. Siting Council,*

[48] Internal citations and footnotes omitted.

306 Or 205, 214, 760 P2d 212 (1988). In *Hale v. Water Res. Dep't of State*, 184 Or App 36, 44-45, 55 P3d 497, 502 (2002), the Court of Appeals, citing *Trebesch* as authority, held "[i]f there is statutory text that, reasonably construed, may be taken expressly or by implication to require rulemaking, then rulemaking is required. Otherwise, it is not required[.]" In *McCline v. Bd. of Parole & Post-Prison Supervision*, 205 Or App 144, 150, 133 P3d 349, 352 (2006), the Court of Appeals held "[i]n some situations, an agency can be precluded from deciding contested cases without prior rulemaking. Whether a particular agency is or is not subject to that constraint depends on the intention of the legislature." In *Himes v. Bd. of Parole & Post-Prison Supervision*, 221 Or App 386, 392, 190 P3d 466, 469 (2008), the Court of Appeals noted "[i]t is well settled, however, that an agency need not adopt rules establishing the agency's policy in regard to every possible factual circumstance that may arise in the course of the agency's exercise of its enforcement functions." Most recently, in *Homestyle Direct, LLC v. Dep't of Human Servs.*, 354 Or 253, 265-66, 311 P3d 487, 494-95 (2013), the Oregon Supreme Court stated:

> "Merely because a given administrative standard or policy satisfies the statutory definition of a 'rule' under the Administrative Procures Act (APA) does not necessarily mean that it is invalid unless preceded by notice and comment rulemaking proceedings. Most public contracts, for example, are exempt from rulemaking procedures, even if they contain terms that otherwise qualify as 'rules.' *See ORS* 183.335(10). In addition, the APA provides that agencies are authorized to adopt general policies that otherwise would qualify as 'rules' during contested case proceedings, without going through notice-and-comment rulemaking. *See* ORS 183.355(5) ('[I]f an agency, in disposing of a contested case, announces in its decision the adoption of a general policy applicable to such case and subsequent cases of like nature, the agency may rely upon such decision in disposition of later cases.'). Whether an agency is required to adopt a policy that qualifies as a 'rule' *solely* by means of rulemaking procedures depends on whether the legislature has declared that rulemaking is the sole acceptable means of adopting the particular policy at issue."

In this case, the Agency has an unwritten[49] practice and policy that it follows regarding "warranty work" and its application in the prevailing wage rate context. Although BOLI has written a rule defining "public works,"[50] ORS chapter 279C contains no provision that specifically requires the Commissioner to engage in rulemaking to further define "public works" and there is no other statutory provision requiring BOLI to engage in rulemaking procedures to define every possible activity that could be construed as work subject to the prevailing wage rate. In fact, the tasks that the legislature has assigned to BOLI's commissioner with respect to prevailing wage rate laws require numerous fact-based determinations without rulemaking as to the

[49] Wooley was not asked and did not testify if BOLI's practice and policy regarding "warranty work," as described in Finding of Fact 71 – The Merits, existed in written form.

[50] OAR 839-025-0004(20).

prevailing wage rate for each trade or occupation and application of the prevailing wage rate laws to projects with various components and multiple contracts. ORS 279C.815(2), ORS 279C.817, ORS 279C.827. In conclusion, the forum has jurisdiction to adjudicate the application of the term "public works" to various types of construction work, including "warranty" work. In this case, the forum has properly applied the Agency's stated practice and policy to the EG project and determined that Respondents' work was "warranty" work.

2. Insufficiency of Process:

In their motion to dismiss, Respondents argued that this case should be dismissed because "[t]he Agency has engaged in numerous procedural and discovery abuses which have resulted in an unfair hearing and a lack of due process." Summarized, Respondents contend that this case should be dismissed[51] because:

a) Respondents were denied due process by the Agency's "numerous procedural and discovery abuses," addition of new exhibits during the hearing, and claim of what classification of prevailing wage should be assigned to the work involved in the wage claims.

b) The Agency's compliance specialist and his supervisors and the Agency prosecutor had "improper ex parte contacts" prior to the hearing and during the course of the hearing.

c) Respondents were not given an adequate opportunity to respond to the Agency's demands, which were "inflated and in part based on erroneous facts," prior to the issuance of the OOD.

d) The Agency "failed to consider all relevant factors and assumed facts that have proven to be erroneous."

The forum responds to these arguments below.

a. After the Agency's failure to adequately respond to Respondents' informal discovery requests, Respondents sought and were granted a discovery order, which the Agency responded to in a timely manner. At hearing, Respondents made much of the administrative prosecutor not having provided a copy of their informal discovery request for documents to Fevurly, the Agency investigator who gathered the information on which the OOD was based and drafted the OOD. Neither the APA nor contested case rules govern an agency's internal processes in this regard. The Agency did produce

[51] Respondents' post-hearing brief also argues (1) that "the Agency's OOD did not constitute sufficient process" because it failed to cite ORS 279C.810(2); (2) "the Agency's position regarding the significance of its 'warranty' work argument remains a mystery and has resulted in insufficient process"; and (3) "the Agency's process was insufficient because it imposed economic duress upon Respondents." The forum does not consider these arguments because they were not raised in Respondents' motion to dismiss.

new exhibits during the hearing to which Respondents objected, but then ultimately offered as their own exhibits after being given an opportunity to review them. The Agency also revised its estimate of the wages due to Claimants based on Claimants' testimony at hearing that some of their work involved travel or work that did not involve manual or physical labor. None of these actions constitute a violation of Respondents' due process rights under the Oregon APA.

b. OAR 839-050-0310(1) defines an "ex parte communication" as "an oral or written communication to an agency decision maker or the presiding officer not made in the presence of all parties to the hearing, concerning a fact in issue in the proceeding, but does not include communication from agency staff or counsel about facts in the record." When an ex parte communication occurs, the ALJ is required to "place on the record a statement of the substance of any ex parte communication on a fact in issue made to the administrative law judge while the proceeding is pending." OAR 839-050-0310(2). Respondents do not allege the existence of any communications between the Agency and the ALJ or Commissioner, the ultimate Agency decision maker. Accordingly, the communications that Respondents challenge cannot be considered improper ex parte contacts.

c. As the Agency points out in its post-hearing brief, the only deadline applicable to this hearing regarding Respondents' time to respond is the 20-day deadline for a response to an OOD under ORS 652.332(1)(d). The APA does not apply until such time as a charging document, the OOD in this case, is issued.

d. Due process does not require that an Agency's investigation be perfect in the eyes of a respondent. The APA provides for contested case hearings so that respondents who are served with a charging document and believe that the allegations in that document are untrue can challenge the Agency's proposed action before it takes effect. Respondents have done so in this case and have not been deprived of due process based on the Agency's investigation.

3. Failure to state a claim upon which relief may be granted:

Respondents argue that "[t]he Agency cannot prove any violation by Respondents at [ACMA] because they cannot prove that any of the work performed by Respondents consisting of quality assurance and consulting was paid by direct funds or indirect funds of the Beaverton School District or any other public agency." The forum has already concluded that the ACMA project was a public works, that Respondents were subcontractors on the ACMA project prior to its completion, and that, contrary to Respondents' assertion, Claimants performed work in a trade classification on the ACMA project while employed by BMC that required payment of the prevailing wage rate. Under these circumstances, RCC's use of its own funds to pay BMC for Claimants' work, as noted earlier, is not a defense.

The Agency's Exceptions

The Agency excepted to the ALJ's conclusions that: (1) BMC and BAS were not joint employers; (2) that the work performed by Gross, Sinner, Leis, and Steinmetz on the EG project was not work subject to the prevailing wage rate; (3) to the statement that Susan Wooley was Michael Fevurly's supervisor; and (4) to the ALJ's credibility findings.

(1) The Agency's exception to the ALJ's conclusion that BMC and BAS were not joint employers lacks merit and is OVERRULED.

(2) In the Proposed Order, the ALJ concluded that BMC was not required to pay the prevailing wage rate to Claimants work for their work on the EG project because the work they performed was not subject to the "warranty" in the original contract or a subsequent, separate warranty in force related to the work performed on the EG project. The Agency's exception related to this conclusion is GRANTED for reasons stated earlier in the Opinion.

(3) The Agency's exception to the statement concerning Wooley's supervisory status over Fevurly is GRANTED and the forum has deleted the language stating that Wooley was Fevurly's supervisor.

(4) The exceptions concerning the ALJ's credibility findings lack merit and are OVERRULED.

ORDER

A. NOW, THEREFORE, the charges against Brown's Architectural Sheetmetal, Inc. are **DISMISSED**.

B. NOW, THEREFORE, as authorized by ORS 279C.840, OAR 839-025-0035, ORS 279C.855, ORS 652.140, ORS 652.150, and ORS 652.332, and as payment of the unpaid wages, liquidated damages, and penalty wages, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **Brun Metals Company, LLC**, to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, the following:

(1) A certified check payable to the Bureau of Labor and Industries in trust for Claimant Don F. Gross in the amount of **FIFTEEN THOUSAND TWO HUNDRED EIGHTY TWO DOLLARS AND SIXTY CENTS ($15,282.60**), less appropriate lawful deductions, representing $4,469.70 in gross earned, unpaid, due and payable wages and $4,469.70 in liquidated damages, plus interest at the legal rate on that sum from April 1, 2010, until paid; and ORS 652.150 penalty wages of $6,343.20, plus interest at the legal rate on that sum from May 1, 2010, until paid.

(2) A certified check payable to the Bureau of Labor and Industries in trust for Claimant Robert G. Sinner in the amount of **TWENTY FOUR THOUSAND FIVE HUNDRED TEN DOLLARS AND FOUR CENTS** (**$24,510.40**), less appropriate lawful deductions, representing $8,719.82 in gross earned, unpaid, due and payable wages and $8,719.82 in liquidated damages, plus interest at the legal rate on that sum from April 1, 2010, until paid; and ORS 652.150 penalty wages of $7,070.40, plus interest at the legal rate on that sum from May 1, 2010, until paid.

(3) A certified check payable to the Bureau of Labor and Industries in trust for Claimant Christopher L. Leis in the amount of **EIGHTEEN THOUSAND FIVE HUNDRED EIGHTY THREE DOLLARS AND THIRTY SIX CENTS** (**$18,583.36**), less appropriate lawful deductions, representing $5,800.88 in gross earned, unpaid, due and payable wages and $5,800.88 in liquidated damages, plus interest at the legal rate on that sum from March 1, 2010, until paid; and ORS 652.150 penalty wages of $6,981.60, plus interest at the legal rate on that sum from April 1, 2010, until paid.

(4) A certified check payable to the Bureau of Labor and Industries in trust for Claimant Brady D. Steinmetz in the amount of **SEVEN THOUSAND FIVE HUNDRED NINETY THREE DOLLARS AND FIFTY FOUR CENTS** (**$7,593.54**), less appropriate lawful deductions, representing $254.37 in gross earned, unpaid, due and payable wages and $254.37 in liquidated damages, plus interest at the legal rate on that sum from February 1, 2010, until paid; and ORS 652.150 penalty wages of $7,084.80, plus interest at the legal rate on that sum from March 1, 2010, until paid.

APPENDIX

FINDINGS OF FACT – PROCEDURAL

1) On March 25, 2014, Don F. Gross filed a wage claim with the Agency alleging that Respondent "Brunn's Metal" had employed him and failed to pay $15,294.11 in wages earned on the EG project and due to him. At the same time, Gross assigned to the Commissioner of the Bureau of Labor and Industries, in trust for himself, all wages due from Respondent. (Testimony of Fevurly, Gross; Ex. A1)

2) On March 27, 2014, Christopher L. Leis filed a wage claim with the Agency alleging that Respondents "Browns Artchit" and "Brunn Metals" had employed him and failed to pay $20,960.89 in wages earned on the EG project and due to him. At the same time, Leis assigned to the Commissioner of the Bureau of Labor and Industries, in trust for himself, all wages due from Respondent. (Testimony of Fevurly, Leis; Ex. A2)

3) On March 27, 2014, Robert G. Sinner filed a wage claim with the Agency alleging that Respondent "Brown's Metal" had employed him and failed to pay $22,287.90 in wages earned on the EG project and due to him. At the same time, Sinner assigned to the Commissioner of the Bureau of Labor and Industries, in trust for himself, all wages due from Respondent. (Testimony of Fevurly, Sinner; Ex. A3)

4) On March 27, 2014, Brady D. Steinmetz filed a wage claim with the Agency alleging that Respondent "Brun Metals LLC." had employed him and failed to pay $8,670.79 in wages earned on the EG project and due to him. At the same time, Steinmetz assigned to the Commissioner of the Bureau of Labor and Industries, in trust for himself, all wages due from Respondent. (Testimony of Fevurly, Steinmetz; Ex. A4)

5) On March 25, 2014, Don F. Gross filed a wage claim with the Agency alleging that Respondent "Brun Metals" had employed him and failed to pay $12,428.72 in wages earned on the ACMA project and due to him. At the same time, Gross assigned to the Commissioner of the Bureau of Labor and Industries, in trust for himself, all wages due from Respondent. (Testimony of Fevurly, Gross; Ex. A21)

6) On March 27, 2014, Christopher L. Leis filed a wage claim with the Agency alleging that Respondents "Browns Architectural" had employed him and failed to pay $14,813 in wages earned on the ACMA project and due to him. At the same time, Leis assigned to the Commissioner of the Bureau of Labor and Industries, in trust for himself, all wages due from Respondent. (Testimony of Fevurly, Leis; Ex. A22)

7) On March 27, 2014, Robert G. Sinner filed a wage claim with the Agency alleging that Respondent "Brown's Architectural" had employed him and failed to pay $15,615.14 in wages earned on the ACMA project and due to him. At the same time, Sinner assigned to the Commissioner of the Bureau of Labor and Industries, in trust for himself, all wages due from Respondent. (Testimony of Fevurly, Sinner; Ex. A23)

8) On March 27, 2014, Brady D. Steinmetz filed a wage claim with the Agency alleging that Respondent "Browns Architectural" had employed him and failed to pay $1,997.82 in wages earned on the ACMA project and due to him. At the same time, Steinmetz assigned to the Commissioner of the Bureau of Labor and Industries, in trust for himself, all wages due from Respondent. (Testimony of Fevurly, Steinmetz; Ex. A24)

9) On March 27, 2015, the Agency issued an Order of Determination ("OOD") in case no. 80-15 in which the Agency alleged that BASI and BMC owed unpaid wages in the amount of $50,835.06, penalty wages in the amount of $30,088.80, and liquidated damages in the amount of $50,835.06 to wage claimants Don Gross, Robert Sinner, Christopher Leis, and Brady Steinmetz, based on work performed for BASI and BMC between June 15, 2009 and March 3, 2010. Broken down by Claimant, the specific amounts alleged to be due were:

Claimant	Wages Due	Liquidated Damages	Penalty Wages
D. Gross	$11,159.86	$11,159.86	$7,564.80
Sinner	$21,303.92	$21,303.92	$7,737.60
Leis	$15,731.68	$15,731.68	$7,766.40
Steinmetz	$2,639.60	$2,639.60	$7,020.00

Respondents, through attorneys Larry Brisbee and Christopher Allnatt, timely filed an answer and request for hearing. On October 16, 2015, BOLI issued a Notice of Hearing setting a hearing date of December 1, 2015. (Ex. X1)

10) On August 17, 2015, the Agency issued a Notice of Intent ("NOI") in Case No. 81-15 to place Respondents BASI, BMC, and Marc Brown on the List of Ineligibles and Assess Civil Penalties in the amount of $13,000 against BASI and BMC. In part, the NOI was based on the Agency's allegation that BASI and BMC failed to pay the prevailing wage rate to their employees on two public works. Respondents, through attorneys Larry Brisbee and Christopher Allnatt, timely filed an answer and request for hearing. On September 11, 2015, BOLI issued a Notice of Hearing setting a hearing date of December 1, 2015. (Ex. X5)

11) On October 1, 2015, the ALJ issued a case summary order that required submission of case summaries by November 17, 2015, and included a statement of the possible sanctions for failure to comply with the case summary order. Among other things, the order required Respondents and the Agency to submit:

> "A list of all persons to be called as witnesses, along with a statement identifying any person who will be called as a telephone witness, *except* those who will give testimony solely for the purpose of impeachment or Agency rebuttal.
>
> "* * * * *
>
> "Identification and description of any document or other physical evidence to be offered into evidence at the hearing, together with a copy of any such document or evidence, *except* for exhibits offered solely for the purpose of impeachment or Agency rebuttal." (Ex. X3)

12) On October 20, 2015, attorneys Brisbee and Allnatt filed a motion to postpone the hearing and a letter withdrawing as Respondents' counsel. (Ex. X6)

13) On October 21, 2015, the Agency filed a motion to consolidate case nos. 80-15 and 81-15. (Ex. X5)

14) On October 22, 2015, Richard Hunt, attorney at law, filed a notice of appearance stating that Barran Liebman had been retained on October 21, 2015, to represent Respondents and that he would be the principal counsel. (Ex. X7)

15) On October 26, 2015, Respondents filed a supplemental motion to postpone the hearing based on Hunt's pre-existing conflicts and need for time to review the file and pleadings and prepare for hearing. On October 29, 2015, the Agency filed a response opposing Respondents' motion. On October 30, 2015, the ALJ issued an interim order granting Respondents' motion, reprinted below in pertinent part:

"***Procedural History***

"On March 27, 2015, the Agency issued an Order of Determination (OOD) in case number 80-15. The OOD alleged that Respondents * * *Brown's Architectural Sheetmetal, Inc. (BASI) and Brun Metals Company, LLC (BMC) owed four wage claimants $50,835.06 in unpaid wages, $30,088.80 in penalty wages, and $50,835.06 and liquidated damages, plus interest, based on work performed in 2009 and 2010. On April 15, 2015, Respondents filed an answer and request for hearing through attorneys Larry Brisbee and Christopher Allnatt of Brisbee and Stockton, LLC. On October 16, 2015, the Agency issued a Notice of Hearing in which a hearing was scheduled for December 1, 2015.

"On August 17, 2015, the Agency issued a Notice of Intent (NOI) in case number 81-15. The NOI alleged that BASI and BMC had employed four workers on two public works projects and failed to pay those workers the prevailing rate of wage, that Marc Brown (Brown) was responsible for the underpayments, and that BASI, BMC, and Brown should all be placed on the Commissioner's list of contractors ineligible to receive any contract or subcontract for public works for three years. On September 8, 2015, Respondents filed an answer and request for hearing through attorneys Larry Brisbee and Christopher Allnatt of Brisbee and Stockton, LLC. Also enclosed with the answer and request for hearing was a statement by Brown, dated September 4, 2015, in [which] Brown authorized himself 'to appear on behalf of [BASI] and [BMC] at all stages of the hearing pursuant to OAR 839-050-0110.'

"On September 11, 2015, Adriana Ortega, the Agency's administrative prosecutor, sent an e-mail to Brisbee and Allnatt in which she asked them to clarify if they would be representing Respondents in case 81-15. On September 14, 2015, Allnatt sent an e-mail to Ortega and Brisbee in which he stated 'I will not be representing Mr. Brown at the contested case hearing.'

"On September 11, 2015, the Agency also issued a Notice of Hearing in which case number 81-15 was scheduled for hearing beginning December 1, 2015.

"On October 20, 2015, Brisbee filed a letter withdrawing as counsel for Respondents in case 81-15. In the letter, Brisbee stated that attorney Allnatt is 'currently serving with the Oregon National Guard, and is thus not actively practicing law and will not be returning until March 1 of next year.' Brisbee also stated that he was withdrawing his firm as attorney of record 'due to irreconcilable differences between the firm and the Respondents.' Brisbee accompanied his withdrawal letter with a motion to postpone case number 81-15 'to give Respondents an appropriate opportunity to retain legal counsel and proceed with their defense.'

"On October 21, 2015, the Agency filed a motion to consolidate cases 80-15 and 81-15 for hearing on the grounds based on Agency's representation that the 'two cases arise out of the same facts and involve common questions of law.'

"On October 21, 2015, the Agency filed objections to Respondents' motion to postpone in case number 81-15, arguing that Allnatt's September 14, 2015, e-mail to Ortega and Brown's September 4, 2015, designation of himself as the authorized representative for BASI and BMC showed that Respondents were 'ready to proceed.'

"On October 22, 2015, attorney Richard Hunt of Barran Liebman LLP filed a Notice of Appearance on behalf of Respondents in case nos. 80-15 and 81-15, stating that Barran Liebman had been retained as counsel for Respondents on October 21, 2015, and that he will be their principal attorney. Hunt also stated his intent to file a motion to reset the hearing date.

"On October 26, 2015, Hunt filed a supplemental motion to postpone the hearing in case nos. 80-15 and 81-15, supported by his Declaration. As grounds for a postponement, Hunt stated:

- Respondents did not have advance notice of the October 20, 2015, withdrawal of their former counsel;
- As of October 26, Hunt had requested but not yet received the client file from the Brisbee firm;
- Hunt had not yet had time to review the files or pleadings;
- The supplemental motion for postponement was filed at the earliest possible date;
- Hunt has 'various matters scheduled throughout the month of November 2015, * * * matters scheduled in early December of 2015, * * * and will be away from the continental United States from December 5 through December 14, 2015. Arrangements for this trip were made months ago and cannot be altered.'

"Hunt requested that the hearings be rest for a date and time between February 15 and March 30, 2016 'at a date and time convenient to all parties and the Administrative Law Judge.'

"On October 29, 2015, Ortega filed objections to Respondents' supplemental motion to postpone on behalf of the Agency, arguing as follows:

> 'Respondents' designation of Marc Brown as authorized representative to participate at hearing * * * and Mr. Allnatt's unequivocal statement that he would not be representing Respondents at hearing * * * indicate that Respondents have been aware of their need to represent themselves at hearing or retain new counsel as early as September 4, 2015. Respondents' delay in obtaining new counsel should not be

rewarded, particularly where the Agency has relied on their representations that they were ready to proceed with the hearing. Respondents have failed to show good that good cause exists for postponement[.]'

"***Analysis***

"A participant requesting a postponement in this forum must demonstrate that 'good cause' exists for granting the postponement. 'Good cause' means, unless otherwise specifically stated, that a participant failed to perform a required act due to an excusable mistake or a circumstance over which the participant had no control. 'Good cause' does not include a lack of knowledge of the law, including these rules. OAR 839-050-0020(16).

"Respondents argue that 'good cause' exists because they did not have advance notice of the withdrawal of their counsel, their need to obtain new counsel, their new counsel's need for time to prepare for the hearing, and their new counsel's pre-existing scheduling conflict. The Agency argues that Brown's September 4, 2015, letter authorizing him to appear at hearing in case no. 81-15 on behalf of BASI and BMC, together with Allnatt's September 14, 2015, statement that 'I will not be representing Mr. Brown at the contested case hearing' clearly shows that Respondent Brown intended to represent Respondents at hearing, knew as early as September 14, 2015, that the Brisbee firm would not be representing Respondents at hearing, and that Brown should have sought new counsel earlier.

"The Agency's arguments ignore the important fact that Brown never authorized himself to appear as authorized representative for Respondents in case no. 80-15 and there is no evidence to show that Brown, prior to Brisbee's notice of withdrawal, intended to represent Respondents at the hearing in case no. 80-15. Notwithstanding the existence of Brown's September 4, 2015, authorized representative letter, the Brisbee firm was still actively representing Respondents in case no. 81-15 until October 20, 2015, and in fact has never filed a letter formally withdrawing as Respondents' counsel in case no. 80-15. This active representation, coupled with (1) Allnatt's September 14, 2015, email to Ortega written in the first person, coupled with his subsequent National Guard service; (2) Brisbee's statement that his firm was withdrawing their representation in case no. 81-15 due to 'irreconcilable differences'; and (3) Hunt's statement that Respondents had no advance notice of the withdrawal indicate to the forum that that Allnatt's email was intended to show that Allnatt would not be personally representing Respondents at hearing, not that Brisbee's firm would not be representing Respondents.

"The Agency's pending motion to consolidate case nos. 80-15 and 81-15 demonstrate that the Agency itself believes these cases should be heard together because of their common questions of fact and law. At the time the

Agency requested that hearings be scheduled, the Agency estimated that each case would take '3-4 days.'[52] Hunt, Respondents' new counsel, has pre-existing plans to leave the country for 10 days on December 5, the Saturday on the week the hearings are scheduled to begin. Based on the Agency's estimate of time, this would require the hearings, if consolidated, to be recessed and finished at some later date.

"Here, when (1) Respondents had no prior notice of their original counsel's withdrawal; (2) Respondents immediately obtained new counsel following the withdrawal of their original counsel and that counsel immediately filed a motion for a postponement; [and] (3) Respondents' new counsel has a pre-existing schedule conflict, the forum finds that Respondents have shown good cause for a postponement.

"Respondents' motion for postponement is **GRANTED**. * * *" (Exs. X8, X11, X13)

16) On November 11, 2015, Respondents filed a response to the Agency's motion to consolidate in which Respondents opposed the motion on the grounds that: (1) consolidation of the cases would prejudice Respondents because of the dissimilarities as to evidence, witnesses, and issues; (2) the evidence for the two cases is not the same; (3) many witnesses have only evidence regarding one of the cases; and (4) the defenses and issues raised by Respondents are significantly different. (Ex. X14)

17) On November 18, 2015, Respondents moved to amend their answer in case no. 80-15, supported by Hunt's Declaration as to the reasons for the amendment. The proposed amendments in case no. 80-15 included 23 defenses that Respondents characterized as "affirmative." The same day, Respondents moved to amend their answer in case number 81-15, also supported by Hunt's Declaration as to the reasons for the amendment. The proposed amendments in case no. 80-15 included 13 defenses that Respondents characterized as "affirmative." (Ex. X15)

18) On November 25, 2015, the Agency responded to Respondents' motions to amend, stating that that Agency had no objection. On November 30, 2015, the ALJ issued separate interim orders granting Respondents' motions and stating that "any new facts or defenses alleged in Respondents' amended answer[s] will be deemed denied by the Agency." (Ex. X17)

19) On December 2, 2015, the ALJ held a prehearing conference with Adriana Ortega, the Agency's administrative prosecutor handling the case, Richard Hunt and

[52] In BOLI's contested case hearing process, the Agency's Administrative Prosecutions Unit submits a "BOLI Request for Hearing" when a respondent has filed an answer to a charging document and requested a hearing. That document becomes an administrative exhibit in the contested case hearing file.

Josephine Ko, Respondents' attorneys. The purpose of the conference was to resolve the consolidation issue and determine the most efficient way of moving both cases forward. After the conference, the ALJ issued an interim order that summarized ALJ's rulings and the agreements reached during the conference. In pertinent part, it stated:

> "1. Case no. 80-15 will be heard first, with the wage claims related to the Redmond Elton Gregory projects to be heard first, followed by the wage claims related to the Beaverton ACMA project.
>
> "2. When the record has closed related to case no. 80-15, the ALJ will issue a proposed order and BOLI's Commissioner will issue a final order.
>
> "3. If the final order in case no. 80-15 concludes that the work alleged to have been performed by Respondents' employees on the Elton Gregory and ACMA project was not subject to the prevailing wage rate, this will also resolve case no. 81-15 and there would be no need for hearing in case no. 81-15.
>
> "4. If the final order in case no. 80-15 concludes that any part of the work performed by Respondents' employees on the Elton Gregory and ACMA projects that is encompassed by the wage claims in case no. 80-15 was subject to the prevailing wage rate, the forum will schedule a hearing in case no. 81-15 and set a case summary due date.
>
> "5. The hearing in case no. 80-15 will begin at 9 a.m. on **Tuesday, March 22, 2016** * * * [and] **continue on successive days until completed**.
>
> "6. Case summaries in case no. 80-15 must be filed by **Tuesday, March 8, 2016**. The requirements for case summaries are set out in my interim order dated October 1, 2015, that is entitled 'INTERIM ORDER REQUIRING CASE SUMMARIES TO BE FILED."

(Ex. X18)

20) On February 23, 2016, the ALJ issued an interim order reminding the Agency and Respondents that case summaries for case no. 80-15 must be filed by Tuesday, March 8, 2016, and that the requirements for case summaries were set out in the October 1, 2015, interim order entitled "INTERIM ORDER REQUIRING CASE SUMMARIES TO BE FILED." (Ex. X21)

21) Respondents and the Agency timely filed case summaries on March 8, 2016. (Exs. X22, X23)

22) On March 10, 2016, Respondents filed a motion to dismiss or, in the alternative, for an order that Respondents' requests for admissions are deemed to be admitted. Respondents' motion was based on the Agency's alleged continuing failure to respond to Respondents' requests for admissions that were served on the Agency on November 17, 2015, and the Agency's failure to respond to an interrogatory. On March

11, 2016, the ALJ issued an interim order denying Respondents' motion on the grounds that it was premature because Respondents had not yet filed a motion for a discovery order. In the same order, the ALJ included the following requirement:

> "The hearing in this case is scheduled to begin on March 22, 2016. Any participant intending to file a motion is encouraged to do so as soon as possible. In addition to the forum's standard filing requirements of mailing or hand delivery, I am also requiring that any motions or responsive pleadings filed between now and the time of hearing be emailed in their entirety to the other participants and me on the same day that they are officially filed." (Exs. X24, X28, X28a)

23) On March 11, 2016, Respondents filed a motion for a Discovery Order, a motion In Limine to Exclude Evidence, and a motion for Expenses. The Agency filed a timely response on March 15, 2016, but did not email the attachments to its response to Respondents' counsel or the ALJ. On March 16, 2016, Respondents filed a motion to strike the Agency's response because the Agency did not email the attachments to its response to Respondents' counsel or the ALJ as instructed in the ALJ's March 22, 2016, interim order. On March 16, 2016, the ALJ issued an interim order ruling on Respondents' motions, set out below in pertinent part:

> "***Motion for Discovery Order***
>
> "Respondents' motion for a discovery order seeks answers and clarification related to Respondents' Requests for Admission and Interrogatories. Specifically, Respondents seek a discovery order 'compelling the Agency to make a full, complete, and truthful response to Respondents' First Request for Admissions and an order compelling the Agency to answer Respondents' Interrogatory Nos. 1, 2, 3, and 5[.]'
>
> "* * * * *
>
> "Respondents' motion includes supporting documents that establish Respondents' attempts to obtain the sought after discovery on an informal basis and the Agency's responses as of the date of Respondents' motion.
>
> "Before beginning my analysis, I note that this is not an ordinary wage claim case in which the primary questions presented are how many hours the claimant worked, the claimant's rate of pay, and the amount of due and owing wages, if any. In this case, the forum cannot determine the answer to any of those questions until it first determines whether or not the claimants performed work on a public works, thereby entitling them to be paid the prevailing wage rate. Based on the pleadings, this case appears to present the novel question of whether a subcontractor who performs warranty or repair work on an undisputed public works <u>after</u> the original contract has been completed must pay the prevailing wage rate to its workers. The forum's rulings are tailored accordingly.

"Request for Admissions

The forum first addresses Respondents' Requests for Admissions, almost all of which[53] are directed at both the Elton Gregory ('Elton') and Beaverton School District projects ('subject projects').

*"**A. Request No. 1*** seeks an admission 'that none of Respondents received any payment from any public agency' on the subject projects. The Agency objected on the basis of relevancy, stating '[w]hether Respondents received direct payment from a public Agency is irrelevant to the issue of whether the work performed is subject to the prevailing wage rate.' ORS 279C.810(2)(b) provides that 'ORS 279C.800 to 279C.870 do not apply to [p]rojects for which no funds of a public agency are directly or indirectly used. In accordance with ORS chapter 183, the Commissioner of the Bureau of Labor and Industries shall adopt rules to carry out the provisions of this paragraph.' OAR 839-025-0100(1)(c) states the same exemption.[54] In addition, Respondents plead this exemption as their third affirmative defense in their amended answer. The essence of this case is whether or not Respondents' alleged underpayment of its workers was due to Respondents' failure to pay the prevailing wage rate. Accordingly, I find that the question of whether or not funds of a public agency were used to pay Respondents is reasonably likely to produce information that is generally relevant to the case. In addition, I find that Respondents' receipt of public funds, if any, is reasonably likely to produce information that is generally relevant to show whether Respondents' failure to pay wages was willful.

"The Agency is required to admit or deny Respondents' request. If good faith requires that the Agency qualify its answer or deny only a part of the question, the Agency shall specify the part that is true and qualify or deny the remainder.

*"**B. Request No. 2*** seeks an admission 'that the Elton * * * project * * * was completed years before any activities were requested or engaged in by any of the Respondents.' The Agency responded, stating 'Deny. Respondents performed warranty work on the Elton * * * project.' I find that the Agency's answer is adequate.

*"**C. Request No. 3*** seeks an admission 'that none of the Respondents were party to any agreement for work on [the subject projects].' The Agency objected on the basis of relevancy. This request relates to Respondents' fourth

[53] Request No. 2 is the exception.

[54] OAR 839-025-0100(1)(c) provides: "(1) All public works are regulated under ORS 279C.800 to 279C.870 except as follows: * * * (c) Projects for which no funds of a public agency are directly or indirectly used."

affirmative defense in their amended answer, in which Respondents contend that they were not parties to the agreement in the Elton project, 'which was completed years in advance of Respondents undertaking any activities on that project,' and that Respondents' activities cannot be in 'in the nature of a public works project subject to prevailing wage rate law' because they performed no work 'pursuant to that agreement.' I find that Respondents' request is reasonably likely to produce information that is generally relevant to the case.

"The Agency is required to admit or deny Respondents' request. If good faith requires that the Agency qualify its answer or deny only a part of the question, the Agency shall specify the part that is true and qualify or deny the remainder.

"***D. Request No. 4*** seeks an admission 'that the Agency has no information in (sic) Respondents were informed by any source * * * that the activities to be undertaken by the Respondents on the [subject projects] were in the nature of a public works project that required prevailing wages be paid.' The Agency objected on the basis of relevancy. I find that the answer to this question is reasonably likely to produce information that is generally relevant to show whether Respondents' failure to pay wages was willful.

"The Agency is required to admit or deny Respondents' request. If good faith requires that the Agency qualify its answer or deny only a part of the question, the Agency shall specify the part that is true and qualify or deny the remainder.

"***E. Request No. 5*** seeks an admission 'that none of the activities performed by Respondents on [the subject projects] were: a. Sheet metal work; b. Work of any skilled craft or trade.' The Agency responded, stating 'Deny. Work performed on the [subject projects] included sheet metal work.' I find that the Agency's answer is adequate.

"***F. Request No. 6*** seeks an admission 'that the activities of Respondents on the [subject projects] were remedial and repair activities.' The Agency responded, stating 'Deny.' I find that the Agency's answer is adequate.

"***G. Request No. 7*** seeks an admission 'that the activities of Respondents on the [subject projects] consulting activities.' The Agency responded, stating 'Deny.' I find that the Agency's answer is adequate.

"***H. Request No. 8*** seeks an admission 'that the activities of Respondents on the [subject projects] were educational activities.' The Agency responded, stating 'Deny.' I find that the Agency's answer is adequate.

"***I. Request No. 9*** seeks an admission 'that any monies paid to any of the Respondents were paid by Robinson Construction Co. through its private

funds and were not paid by any public entity.' The Agency responded, stating 'Deny.' I find that the Agency's answer is adequate.

"***J. Request No. 10*** seeks an admission 'that the Agency has no evidence of any public monies were paid to Respondents with regard to [the subject projects].' The Agency objected on the basis of relevancy. For the same reasons set forth in the forum's resolution of Request No. 1, I find that the answer to this question is reasonably likely to produce information that is generally relevant to this case.

"The Agency is required to admit or deny Respondents' request. If good faith requires that the Agency qualify its answer or deny only a part of the question, the Agency shall specify the part that is true and qualify or deny the remainder.

"***K. Request No. 11*** seeks an admission 'that the Agency has not undertaken any activities to hold the following entities accountable for failure to pay prevailing wages, including but not limited to issuing an Order of Determination and/or issuing a Notice of Intent to Place on List of Ineligibles and Notice of Intent to Assess Civil Penalties: [followed by nine named entities].' The Agency objected on the basis of relevancy. The forum agrees, as Respondents have not explained how this request is reasonably likely to produce information that is generally relevant to this case. Accordingly, the Agency is not required to answer this request.

"***Conclusion***

"With regard to Requests Nos. 1, 3, 4, and 10, the Agency is required to admit or deny Respondents' request. If good faith requires that the Agency qualify its answer or deny only a part of the question, the Agency shall specify the part that is true and qualify or deny the remainder. The Agency's responses must be filed no later than **noon, March 18, 2016**, and a courtesy copy of the Agency's responses must be emailed to Respondents' counsel and the forum by that time. If the Agency does not respond as ordered, Respondents' Requests Nos. 1, 3, 4, and 10 will be deemed admitted.

"*Interrogatories*

"Respondents ask that the Agency be required to provide an adequate response to Respondents' Interrogatories nos. 1, 2, 3, and 5. Those interrogatories are set out in full below, together with the Agency's responses.

"***Interrogatory No. 1*** states: 'Please state all facts that establish the Agency's basis for claiming that the Respondents are liable for unpaid wages." The Agency responded: 'Respondents failed to pay the prevailing rate of wage for work performed on the [subject projects] as set out in the Order of

Determination and Notice of Intent resulting in unpaid wages.' Although the Agency's response only addresses one element of the Agency's prima facie case, Respondents' request is extremely broad in scope, relating to every element of the Agency's case. Ordinarily, the forum would require Respondents to make its interrogatory more specific. Given the short time before hearing, the forum does not require Respondents to issue a new set of more specific interrogatories or the Agency to provide a narrative response to Respondents' broadly-phrased question. ***Instead, the forum requires the Agency supplement its answer by identifying the exhibits submitted with its case summary containing facts that establish the Agency's basis for its determination that Respondents are liable for unpaid wages.***

*"**Interrogatory No. 2*** states: 'Please state all facts that establish the Agency's position that the Respondents have willfully failed to pay prevailing wages.' The Agency responded: 'The Agency made demand for payment upon Respondents by letter on October 29, 2014 and February 26, 2015 and by an Order of Determination on March 30, 2015; Respondents have willfully refused to [sic] the prevailing wages.' From the Agency's response, the forum concludes that the Agency's allegation that Respondents willfully failed to wages is based solely on Respondents' failure to pay those wages after the Agency made its demands and issued its Order of Determination ('OOD'). ***If the Agency is basing its allegation of willfulness on any other facts, it must state those facts in a supplemental answer.***

*"**Interrogatory No. 3*** states: 'State the basis for determining that Brown's Architectural Sheetmetal, Inc. was the employer of the wage claimants.' The Agency responded: 'The evidence in the record indicates that Brown's Architectural Sheetmetal, Inc. employed the wage claimants.' This response provides no information whatsoever and is purely conclusory in nature. The Agency has named Brown's as a co-Respondent and Respondent Brown's is entitled to know the Agency's basis for its determination that Brown's was the claimants' employer. ***The Agency is ordered to supplement their answer by stating the specific basis for its determination that Brown's Architectural Sheetmetal, Inc. was the employer of the wage claimants.***

*"**Interrogatory No. 5*** states: 'With respect to any matter on which admission has been requested of the Agency in this contested case for which the Agency's answer is anything but an unqualified admission, set forth all facts that support or otherwise relate to the denial or qualifications, including the true facts of the matter, to the best of the Agency's knowledge, information, and belief.' The Agency responded: 'The Agency has not received any requests for admission.' Like Interrogatory No. 1, Respondents' query is overly broad. Unlike Interrogatory No. 1, the forum does not require an additional response from the Agency.

"***Conclusion***

"With regard to Interrogatories Nos. 1, 2, and 3, the Agency must file its supplemental responses no later than **noon, March 18, 2016**, and a courtesy copy of the Agency's responses must be emailed to Respondents' counsel and the forum by that time.

"***Motion In Limine To Exclude Evidence***

"In the alternative, Respondents' motion in limine requests that the forum issue an order 'precluding the Agency from offering any evidence regarding matters about which it declined to respond to discovery on the basis of relevancy.' Respondents' motion will be **GRANTED** with respect to Requests for Admission Nos. 1, 3, 4, and 10 if the Agency fails to timely file the responses that the forum has ordered.

"***Motion for Expenses***

"Respondents seek an order 'granting Respondents their expenses, including attorneys' fees, incurred in connection with bringing their discovery motions of March 10, 2016 and March 11, 2016.' The forum has no authority to make the award sought by Respondents and Respondents' motion is **DENIED**.[55]"

On March 21, 2016, the ALJ issued an interim order granting Respondents' motion to strike the Agency's response because the Agency failed to meet the forum's filing requirements in not emailing the attachments to its response as required by the ALJ's March 11, 2016, interim order. (Exs. X35, X38, X48)

24) On March 16, 2016, the Agency filed objections to "Respondents' Newly Raised Defenses Submitted in Respondents' Case Summary" and a motion to strike those defenses. On March 18, 2016, Respondents filed a response to the Agency's motion. On March 18, 2016, the ALJ issued an interim order ruling on the Agency's motion, set out below in pertinent part:

"On March 16, 2016, the Agency filed a document entitled 'Objection to Respondents' Newly Raised Defenses Submitted in Respondents' Case Summary; Motion to Strike Respondent's Newly Raised Defenses Submitted in Respondents' Case Summary.' Respondents timely filed a response on March

[55] *See In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa*, 34 BOLI 102, 170 (2015), *appeal pending* (the legislature has only granted authority to BOLI's Commissioner to award attorney fees and costs in contested case proceedings to interveners in a real property case brought under ORS 659A.145 or ORS 659A.421). *See also In the Matter of West Coast Grocery Company,* 4 BOLI 47, 62 (1983)(forum denied respondent's counterclaim for attorney fees, stating that the forum is not empowered to make attorney fee awards to prevailing parties)*; In the Matter of Pioneer Building Specialties Co*., 3 BOLI 123, 124 (1982), *affirmed without opinion*, *Pioneer Building Specialties v. Bureau of Labor and Industries,* 63 Or App 871, 667 P2d 583 (1983)(agency's motion to strike respondent's request for attorney's fees was granted because no provision in Oregon law allows an award of attorney fees to respondent when a complainant of the Bureau of Labor and Industries has filed specific charges against a respondent).

18, 2016, that responded to the Agency's objections to each 'newly raised' defense. This interim order rules on the Agency's objections and motion.

"Respondents filed their case summary on March 8, 2016. Among other things, the forum's case summary order required Respondents to include 'a brief statement of any defenses to the claim.' In the case summary, Respondents listed 40 separate defenses, including a request for attorney fees. Including the request for attorney fees, 21 of the listed defenses were identical to or similar to defenses pled in Respondent's amended answer and characterized as 'Affirmative Defenses.'[56] The other 19 defenses ('19 defenses'), numbered 21 through 39 in Respondents' case summary, are not specifically set out in Respondents' amended answer.

"The Agency categorized those 19 defenses as 'newly raised defenses' and moved that they be stricken because 'those defenses were not properly raised pursuant to OAR 839-050- [sic][57] state each relevant defense to the allegations in their answer.' In addition, the Agency argues that, pursuant to OAR 839-050-050-0130(3), 'Respondents[']' newly raised defenses constitute affirmative defenses or legal issues and should be stricken from the record because they were not properly raised' in Respondents' original or amended answer.

*"**Newly Raised Defenses***

"The Agency relies on ORS 839-050-0130(2) to support its first argument that Respondents' 19 defenses should be stricken. That rule provides, in pertinent part: 'The answer must include an admission or denial of each factual matter alleged in the charging document and a statement of each relevant defense to the allegations.' The forum has compared Respondents' 19 defenses with the defenses raised in Respondents' amended answer and concludes that they are all integrally related to and constitute elements of defenses previously raised in Respondents' amended answer. Accordingly, the forum finds that these 19 defenses are subsets of defenses[58] already plead in Respondents' amended answer, not 'newly-raised' defenses. Summarized:

"* * * * *

[56] Before setting out those defenses in the amended answer, Respondents stated the caveat "[w]ithout assuming the burden of proof, Respondents set forth the following affirmative defenses."

[57] It appears that part or all of a sentence is missing from the Agency's document.

[58] In their objections to the Agency's motion, Respondents listed other "corresponding" defenses in their amended answer that the 19 defenses in the case summary are related to. The forum finds it unnecessary to address the merits of all the "corresponding" defenses listed by Respondents.

"In conclusion, the Agency's OAR 839-050-0130(2) objections to these 19 defenses are **OVERRULED** and the Agency's motion to have them stricken based on the provisions of OAR 839-050-0130(2) is **DENIED**.

"***Affirmative Defenses***

"As an alternative ground for striking the 19 defenses, the Agency contends that those defenses are affirmative defenses that should be stricken 'because they were not properly raised' in Respondents' original or amended answer. OAR 839-050-050-0130(3) provides, in pertinent part: 'The failure of the party to raise an affirmative defense in the answer is a waiver of such defense, except as provided in OAR 839-050-0140(3).' Accordingly, the forum must determine if Respondents' defenses ##21-39 in Respondents' case summary are in fact affirmative defenses that fall within the scope of OAR 839-050-050-0130(3).

"In general, an affirmative defense is a defense setting up new matter that provides a defense against the Agency's case, assuming all the facts in the complaint to be true. *See In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa,* 34 BOLI 102, 161, fn. 33 (2015), *appeal pending, citing Pacificorp v. Union Pacific Railroad,* 118 Or App 712, 717, 848 P2d 1249 (1993). A few examples of defenses previously recognized as affirmative defenses by this forum include equitable estoppel,[59] lack of jurisdiction,[60] waiver,[61] statute of limitations,[62] claim and issue preclusion,[63] bona fide occupational requirement,[64] undue hardship,[65] laches,[66] unclean hands,[67] and unconstitutionality.[68] Some other affirmative defenses recognized by Oregon courts include discharge in bankruptcy, duress, fraud, payment, release, statute of frauds. *ORCP 19B.* In contrast, a defense that admits or denies facts constituting elements of the Agency's prima facie case that are alleged in the Agency's charging document is not an affirmative defense.

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[59] *See, e.g., In the Matter of Larson Construction Co.*, 17 BOLI 54, 74 (1998).

[60] *See, e.g., In the Matter of Pzazz Hair Designs,* 9 BOLI 240, 249-50 (1991).

[61] *See, e.g., In the Matter of Rodrigo Ayala Ochoa*, 25 BOLI 12, 36 (2003), *affirmed without opinion, Ochoa v. Bureau of Labor and Industries,* 196 Or App 639, 103 P3d 1212 (2004).

[62] *See, e.g., In the Matter of Stimson Lumber Company,* 26 BOLI 158, 168 (2005).

[63] *See, e.g., In the Matter of Staff, Inc.,* 16 BOLI 97, 122 (1997).

[64] *See, e.g., In the Matter of Lane County Youth Care Center, Inc.,* 2 BOLI 246, 254 (1982).

[65] *See ORS 659A.112(2)(e).*

[66] *See, e.g., In the Matter of Pzazz Hair Designs,* 9 BOLI 240, 249 (1991).

[67] *See, e.g., In the Matter of Alpine Meadows Landscape,* 19 BOLI 191, 217-18 (2000).

[68] *See, e.g., In the Matter of Melissa and Aaron Klein dba Sweetcakes by Melissa,* 34 BOLI 102, 132-33 (2015), *appeal pending.*

"In this case, the Agency alleges that Respondents failed to pay claimants all the earned wages they earned and that Respondents' failure was willful, entitling claimants to their unpaid wages, penalty wages, and liquidated damages. The Agency's case is based on the allegation that claimants were entitled to be paid the prevailing wage rate for their work, a wage rate considerably higher than the wage rate they were actually paid. The elements of the Agency's prima facie case are: 1) Respondents employed claimants; 2) The pay rate(s) that claimants were entitled to be paid; 3) The amount and extent of work claimants performed for respondent; 4) Claimants performed work for which they were not properly compensated; (5) Respondents' failure to pay the wages was willful;[69] and (6) Claimants performed work on a public works project for which they were not fully paid.[70] *See, e.g., In the Matter of Christopher Lee Ruston and Christine M. Stahler,* 34 BOLI 56, 61 (2015).

"After review, the forum concludes that Respondents' defenses ##21-39 are all defenses that deny facts constituting elements of the Agency's prima facie case alleged in the Agency's charging document. More specifically, defenses ##21-27, 32-33, and 35-39 deny facts constituting elements of the second element of the Agency's prima facie case and defenses ##28-29 deny facts constituting elements of the fifth element of the Agency's prima facie case. Accordingly, they cannot be categorized as affirmative defenses that, under OAR 839-050-050-0130(3), were waived if not plead in Respondents' answer. As stated earlier, defenses ##30, 31, and 34 all are integrally related to and subsets of affirmative defenses previously plead in Respondents' amended answer. Therefore, they are not subject to being stricken under OAR 839-050-050-0130(3) because they were not plead in Respondents' amended answer.

"The Agency's motion to strike Respondents' defenses ##21-39 on grounds that they are affirmative defenses that were waived by Respondents' failure to not plead them in Respondents' amended answer is **DENIED**." (Exs. X34, X38, X40)

25) On March 18, 2016, Respondents filed a motion entitled "Respondents Renewed Motion to Dismiss or in the Alternative Respondents' Motion for Summary Judgment or for a Decision by the ALJ for Accelerated Decision in Favor of Respondents on Agency Claims." At the outset of the hearing, the ALJ denied Respondents' motion in its entirety after allowing brief oral argument by Mr. Hunt and Ms. Ortega. (Ex. X41; Statement of ALJ)

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[69] Although the forum has not previously included this element as an element in the Agency's prima facie case, it directly relates to the Agency's claim for penalty wages.

[70] This element relates to the Agency's claim for liquidated damages that are only available under ORS 279C.855(1).

26) At the outset of the hearing, pursuant to ORS 183.415(7), the ALJ verbally advised the Agency and Respondents of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing. (Statement of ALJ)

27) At the conclusion of Respondents' cross examination of Christopher Leis, Respondents moved to amend their case summary to list all four wage claimants as witnesses.[71] The Agency objected and the ALJ denied Respondents' motion. (Statements of Hunt, Ortega, ALJ)

28) After redirect by the Agency, the ALJ asked Leis follow-up questions. Respondents' counsel asked permission to ask Leis additional questions that the ALJ determined were beyond the scope of his questions. The Agency objected and the ALJ sustained the Agency's objection. The ALJ subsequently allowed Respondents' counsel to ask Leis questions as an offer of proof. (Statements of Hunt, Ortega, ALJ)

29) When the hearing reconvened at 9 a.m. on March 23, 2016, Don Gross, who had testified by phone on March 22, appeared in person to resume his direct examination by the Agency. Ms. Ortega stated that Gross had just given her 48 pages of documents that his wife found the previous evening that Gross thought were lost and the Agency wanted to offer them as Ex. A47. The documents included daily reports completed by Gross detailing his work for Respondents that formed part of the basis of his wage claim. Respondents objected, then offered to drop their objection in exchange for the hearing being adjourned until March 24 to give Respondents an opportunity to review Ex. A47 and being able to call Claimants as Respondents' exhibits. The Agency objected to this proposal. After a brief examination of Ex. A47, Respondents' counsel determined that some of the pages in Ex. A47 might help Respondents' case. The ALJ granted Respondents' request for an adjournment to review Ex. A47 but denied Respondents' request to call Claimants as Respondents' witnesses. (Statements of Hunt, Ortega, ALJ)

30) Ex. A35 is a five-page document containing chronologically organized interviews conducted by Mike Fevurly, the Agency's compliance specialist who investigated wage claims being litigated at the hearing. It contains interviews with all four Claimants, as well as interviews with Marc Brown and Respondents' counsel, each contained within a separate text box. The Agency offered portions of Ex. A35 on a piecemeal basis during its direct examination of all four wage claimants. Respondents objected to its admission on a piecemeal basis because it was hearsay and based on Rule 106 of the Oregon Evidence Code. The ALJ overruled Respondents' objections on the grounds that OEC 106, while allowing admission into evidence of the part of a writing not offered "which is necessary [to make the part offered] understood," did not apply to Ex. A35 because (a) the interview notes in Ex. A35, although all part of one exhibit, reflected separate, individual interviews that took place on different days, and

[71] Marc Brown, Michael Fevurly, and Randall Robinson were the only witnesses Respondents listed on their case summary and supplements to their case summary.

(b) since each interview was a separate event, admitting each separate interview was unnecessary to make the other interviews understood. The Agency subsequently moved to admit the Ex. A35 in its entirety and it was received in its entirety without objection. (Statements of Hunt, Ortega, ALJ)

31) On redirect examination of Don Gross, Ms. Ortega began asking questions about whether certain specific jobs that Gross had testified he performed were "related to the job duties he was assigned to perform." Mr. Hunt objected on the grounds that the questions called for a legal conclusion. Ms. Ortega responded that she asked the question because work related to job duties subject to prevailing wage must also be paid the prevailing wage. ALJ sustained the objection and allowed the Agency to ask questions as an offer of proof. Respondents' objection is sustained. (Statements of Hunt, Ortega, ALJ)

32) When the hearing reconvened on March 30, 2016, Ms. Ortega stated that, based on Ex. A47, the Agency had asked Fevurly to recalculate the wages due to the four wage claimants, that Fevurly had done so, and that the Agency had seven new exhibits, A48 through A54, that reflected those recalculations. Ms. Ortega gave copies of those exhibits to the ALJ and Mr. Hunt. When Ms. Ortega began to ask Fevurly questions about A48, Mr. Hunt filed a written motion entitled "Objection to Agency Use of Annotated Exhibit to Coach Witness." In the motion, Mr. Hunt stated that (1) Ms. Ortega had emailed him copies of Exhibits A42 and A47 the previous afternoon and evening that, unlike the original A42 and A47 that had already been received, contained Fevurly's handwritten annotations to show how he made his calculations of the wages due to the claimants; and (2) Ms. Ortega made the following statement in her seven emails that accompanied the exhibits: "Attached please find documents provided to me by the investigator today. I don't anticipate submitting these documents as exhibits, however given the complexity and detail of the calculations made, the investigator will be referring to these documents during his testimony." Mr. Hunt's motion specifically objected to Fevurly's use of these annotated documents because they were "coaching documents" and because the Agency failed to provide them earlier in response to the forum's March 16, 2016, discovery order requiring the Agency to "supplement its answer [to Respondents' interrogatory] by identifying the exhibits submitted with its case summary containing facts that establish the Agency's basis for its determination that Respondents are liable for unpaid wages." Ms. Ortega confirmed that Fevurly had not provided her with his annotated Exhibits A42 and A47 until March 29, 2016, and Fevurly testified that most of his annotations had been made in January or February 2015 and some in the "last week or so." Respondents' motion further asked that the case be dismissed based on "prosecutorial misconduct." The ALJ denied Respondents' motion to dismiss. Mr. Hunt requested that the annotated copies be included in the record and marked as Exhibit R103. Color copies were provided to the forum and were marked as Exhibits R103A (corresponding to Exhibit A42) and R103B (corresponding to Exhibit A47). (Exs. X51, R103A, R103B; Statements of Hunt, Ortega, ALJ)

33) Respondents objected to Exhibits A48-A54 because they were not provided with the Agency's case summary and because Respondents did not have an

adequate opportunity to prepare for cross examination due to the Agency's failure to provide Exhibits A48-54 prior to the morning of March 30, 2016. The ALJ sustained Respondents' objection on the grounds that: (1) it was unfair to Respondents to continue the hearing and allow testimony about those documents when Respondents' counsel had no prior opportunity to examine them; and (2) it was inefficient for the forum to adjourn the hearing to give Respondents' counsel that opportunity when the Agency could have given Respondents and the forum notice the previous week that it intended to create these documents and the hearing could have been continued on a later date. (Statements of Hunt, ALJ)

34) After the ALJ sustained Respondents' objections to Exhibits A48 through A54, Respondents renewed their motion to dismiss based on the Agency's failure to produce Fevurly's handwritten notes before the afternoon and evening of March 29, 2016. The ALJ denied Respondents' motion. (Statements of Hunt, ALJ)

35) When the hearing commenced on March 31, 2016, Respondents asked that Exhibits A48-A54 be marked as Exhibits R104-R110 for possible use as impeachment exhibits by Respondents. The ALJ reiterated his ruling that the Agency could not use Exhibits A48-A54 as part of the Agency's case-in-chief. Against the Agency's objection that Respondents could use Exhibits A48-A54 as impeachment exhibits, the ALJ clarified that they would only be admissible as impeachment exhibits if used for that specific purpose. (Statements of Hunt, Ortega, ALJ)

36) Shortly after the hearing commenced on March 31, Marc Brown received news of a medical emergency to a member of his family. Respondents moved to adjourn the hearing so that Brown could attend to the emergency and Respondents' counsel would not be deprived of Brown's assistance. The Agency did not object and the ALJ granted the motion. (Statements of Hunt, Ortega, ALJ)

37) On April 14, 2016, the ALJ issued an interim order scheduling the hearing to be continued at 9 a.m. on May 3, 2016, pursuant to the mutual agreement of the ALJ, Mr. Hunt, and Ms. Ortega. In the interim order, the ALJ included language requiring persons already served with subpoenas requiring their appearance to honor that subpoena when the hearing reconvened. The ALJ additionally ordered that "notice of the duty of each witness to comply with the modified time of reporting on the previously served subpoena shall be given to each witness by means of Respondents and the Agency sending a copy of this ruling by regular mail to the witness's mailing address." (Ex. X52)

38) Michael Fevurly is BOLI's compliance specialist who investigated this case. When Fevurly was cross examined by Respondents on May 3, he said that he had sent emails to his supervisors regarding the investigation and written a "Legal 60" at the conclusion of his investigation that summarized his factual findings and made recommendations as to the disposition of the case. Mr. Hunt requested that the emails and Legal 60 be provided to Respondents. After an *in camera* review, the ALJ released the entire Legal 60 and some of the emails to Respondents. The ALJ also issued an

oral protective order over the Legal 60 and followed it up with a written Protective Order that was issued on May 11, 2016. The Agency asked to file a brief addressing both rulings. (Exs. X54, Statements of Hunt, Ortega, ALJ)

39) On May 5, 2016, the Agency called Susan Wooley, BOLI Technical Assistance Prevailing Wage Rate Coordinator, as a witness. Respondents objected to Wooley's testimony concerning "warranty" work on public works subject to the prevailing wage rate on the grounds that it constituted legal argument. The ALJ sustained Respondents' objection, but allowed the Agency to make an offer of proof through Wooley's testimony. As part of the offer of proof, Respondents were allowed to cross examine Wooley and the ALJ also asked Wooley some questions related to BOLI's position on warranty work. (Statements of ALJ, Ortega, Hunt)

40) On May 11, 2016, the ALJ issued an interim order in which he reversed his ruling on Wooley's testimony, stating as follows:

> "I have reviewed my ruling and conclude that it was in error for two reasons. First, OAR 839-050-0210(1)(f), OAR 839-050-0360(3), and OAR 839-050-0400 give the ALJ the authority to request a statement indicating the 'Agency's policy with regard to any statute or administrative rule at issue in the case.' That rule presupposes that the Agency is entitled to state its policy when the ALJ believes it may be helpful to the forum's understanding of the law. The purpose of Ms. Wooley's testimony, as stated by Ms. Ortega, was to state 'the Agency's policies and practices as to warranty work.' Ms. Wooley, as the Agency expert with regard to Oregon's prevailing wage rate laws and lead worker to the Agency's prevailing wage rate compliance specialists, is eminently qualified to state the Agency's policies and practices. Second, Wooley's testimony was not legal argument and is highly relevant to the Agency's allegations concerning Claimants' work on the 'Elton Gregory' project. Wooley specifically testified that there is no statute or administrative rule in Oregon that defines 'warranty work' in the context of Oregon's prevailing wage rate laws and limited her testimony to the Agency's current practice and policies.
>
> "I hereby reverse my ruling that allowed Wooley to testify about the Agency's practice and policy on 'warranty' work only as an offer of proof and overrule Respondents' objection. Wooley's testimony will be considered in the proposed and final orders."

In the same interim order, the ALJ denied the Agency's request to file briefs related to discovery and Fevurly's emails and Legal 60. (Ex. X53)

41) During Marc Brown's testimony while on direct examination by Respondents' attorney, Respondents moved to amend its answer:

> "to conform to the evidence that came in through Mr. Fevurly that Mr. Fevurly did not do a complete and thorough investigation and, as a consequence, wrote

> demands to the Respondents that were higher than they should have been and so we have a small business being faced with these inflated demands that are based upon factual inaccuracies and omissions."

The Agency objected on the grounds that the forum's administrative rules contain no provision for a Respondent to amend its answer after the hearing has begun except in response to an Agency motion to amend. The ALJ reserved ruling for the Proposed Order. OAR 839-050-0140 provides, in pertinent part:

> "(4) Once the hearing commences, issues not raised in the charging document or answer may be raised and evidence presented on such issues, provided there is express or implied consent of the participants, except that affirmative defenses not raised in the answer may only be raised in response to an agency motion to amend that is made and allowed under this section or section (5) of this rule. Consent will be implied when there is no objection to the introduction of such issues and evidence or when the participants address the issues. Any participant raising new issues must move the administrative law judge, before the close of the evidentiary portion of the hearing, to amend its charging document or answer to conform to the evidence and to reflect issues presented. The administrative law judge may address and rule upon such issues in the Proposed Order.
>
> "(5) If evidence offered at hearing is objected to on the grounds that it is not within the issues raised by the charging document or answer, the administrative law judge may allow the pleadings to be amended to conform to the evidence presented. The administrative law judge will allow the amendment when the participant seeking the amendment shows good cause for not having included the new matter in its charging document or answer prior to hearing and the objecting participant fails to satisfy the administrative law judge that it would be substantially prejudiced by the admission of such evidence. The administrative law judge may grant a continuance to enable the objecting participant to meet such evidence. A party may amend its answer to raise an affirmative defense and introduce evidence in support of that defense only when the amendment responds to new matter raised in a charging document amended under this section or section (4) of this rule."

Fevurly testified at length on direct examination and cross examination, without objection, as to the methodology in his investigation, including the persons he chose to interview, the questions he asked during his interviews, the requests for information he sent to Respondents, the documentary evidence he gathered, how he computed the wages allegedly due and owing to the Claimants, and adjustments he made to his computations during the hearing based on the testimony of Claimants and Exhibit A47 that included relevant information he did not obtain during his investigation. Based on the provision in OAR 839-050-01409(4) that provides "[c]onsent will be implied when there is no objection to the introduction of such issues and evidence," the ALJ **GRANTED** Respondents' motion. This ruling is **AFFIRMED**. (Statements of Hunt, Ortega, ALJ)

42) On May 17, 2016, when the Agency concluded the presentation of its case-in-chief, Respondents filed a motion to dismiss the OOD for lack of jurisdiction, insufficiency of process, and failure to state a claim. The ALJ orally denied Respondents' motion. (Ex. X55; Statement of ALJ)

43) On May 20, 2016, the ALJ issued an interim order requesting the submission of briefs that stated, in pertinent part:

> "Pursuant to OAR 839-050-0360, Respondents and the Agency are requested to brief the specific issues set out below.
>
> 1. In the context of Oregon's prevailing wage rate laws, (a) What constitutes 'warranty' work on a public works project; and (b) How should the concept of 'warranty' work be applied to the Elton Gregory project?
>
> 2. The three arguments raised by Respondents in their May 17, 2016, motion to dismiss, specifically: (1) lack of jurisdiction; (2) insufficiency of process; and (3) failure to state a claim upon which relief may be granted.
>
> Mr. Hunt also asked that Respondents be allowed to brief the topic of 'consulting' work as it applied to the Beaverton Performing Arts Project ('BPAP'). I am denying that request. Respondents' defense that the work it performed on the BPAP was 'consulting' and not subject to Oregon's prevailing wage rate laws will necessarily be addressed in my proposed order. Assuming Respondents dispute the conclusions in my proposed order regarding their 'consulting' defense, Respondents are free to address this issue by filing Exceptions as provided in OAR 839-050-0380."

Respondents and the Agency timely filed briefs on June 8, 2016. (Exs. X56, X58, X59)

44) On July 5, 2016, 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. The Agency filed exceptions on July 15, 2016. On July 22, 2016, Respondents filed a motion for leave to file a response to the Agency's exceptions. On July 27, 2016, the Agency filed objections to Respondents' motion. That same day, Respondents filed a response to the Agency's exceptions. On July 29, 2016, the ALJ denied Respondents' motion, stating that Respondents' response to the Agency's exceptions would not be considered. (Exs. X60 to X65)

In the Matter of

X WALL INCORPORATED

Case No. 42-16
Final Order of Commissioner Brad Avakian
Issued September 21, 2016

SYNOPSIS

Respondent violated ORS 653.045(2) and OAR 839-020-0083 by failing to provide records requested by the Agency that were related to the employment of two workers. No civil penalties were assessed because the Agency did not allege that the violation was "willful."

The above-entitled case was assigned for hearing to Alan McCullough, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. Prior to the scheduled date for hearing, the case was resolved by the ALJ's ruling on the Agency's motion for summary judgment. The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Administrative Prosecutor Cristin Casey, an employee of the Agency. Respondent was represented by Douglas Johnsen, its authorized representative.

Having fully considered the entire record in this matter, I, Brad Avakian, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact,[1] Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) On May 6, 2016, the Agency issued a Notice of Intent to Assess Civil Penalties ("NOI") in which it proposed to assess $3,000 in civil penalties against Respondent based on Respondent's failure to make required records available in violation of ORS 653.045(2) and OAR 839-020-0083.

2) On May 25, 2016, Respondent, through its authorized representative Douglas Johnsen, filed an answer and request for hearing.

[1] The Ultimate Findings of Fact required by ORS 183.470 are subsumed within the Findings of Fact – The Merits.

3) On June 17, 2016, the forum issued a Notice of Hearing to Respondent and the Agency setting the time and place of hearing for 9:30 a.m. on August 30, 2016, at BOLI's Eugene office. Together with the Notice of Hearing, the forum sent a copy of the NOI, a document entitled "Summary of Contested Case Rights and Procedures" containing the information required by ORS 183.413, a document entitled "Servicemembers Civil Relief Act (SCRA) Notification, and a copy of the forum's contested case hearings rules, OAR 839-050-000 to 839-050-0445.

4) On August 1, 2016, the Agency filed a motion for summary judgment. On August 2, 2016, the ALJ issued an order entitled "Interim Order – Requiring Respondents' Written Response to Motion for Summary Judgment" that explained the significance of summary judgment in the proceeding and set a deadline for Respondent's response. Respondent did not file a response.

5) On August 12, 2016, the ALJ issued an interim order in which the ALJ **GRANTED** the Agency's motion in part and **DENIED** it in part. That interim order is reprinted in its entirety below.

> "On August 1, 2016, the Agency filed a motion for summary judgment as to all the allegations in its Notice of Intent ('NOI') pursuant to OAR 839-050-0150(4). On August 2, 2016, the forum issued an interim order to Respondent that described the significance of a motion for summary judgment and set August 9, 2016, as Respondent's deadline for responding. As of today, the forum has received no response from Respondent. Accordingly, the forum rules on the Agency's motion based on the existing record and documents provided by the Agency in support of its 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].' ORCP 47C.
>
> "**The Agency's NOI**
>
> "The Agency issued its NOI on May 5, 2016, and alleged the following:

> ‘Respondent failed to make records required to be kept and maintained under ORS 653.045(1) and OAR 839-020-0080 available for inspection as required by ORS 653.045(2) and OAR 839-020-0083. On November 17, 2015, that Wage and Hour Division requested from Respondent, through its attorney, the following records: (1) Pertaining to employee “Oscar” – Oscar’s full name, job title/functions, first day of work and, if no longer employed, last date of work; (2) Pertaining to employee Ulysses Diaz -- Ulysses Diaz’s full name, job title/functions, first day of work and, if no longer employed, last date of work; (3) Pertaining to employee Daniel Diaz -- Daniel Diaz’s full name, job title/functions, first day of work and, if no longer employed, last date of work.’

The Agency seeks a $3,000 civil penalty for three violations, calculated at $1,000 per violation. The Agency further alleges that the violations were aggravated by the following circumstances:

> ‘(1) These violations are serious because the requirement to produce records upon request frustrates the Agency's mission and makes investigating potential violations of wage and hour laws difficult; the magnitude of the violation is that Respondent failed to produce any the records requested by the division; (2) Respondent knew or should have known that it was required to produce certain records upon request; and (3) Complying with the record request should not have been difficult for Respondent. Respondent's counsel confirmed having received the request, Respondent was given several opportunities to comply with the specific records request, and during the course of the investigation, Respondent provided its own “random sampling” of other payroll records that were not responsive to this request.’

Respondent, through its authorized representative Douglas Johnsen, filed an answer and request for hearing on May 25, 2016, in which it denied all the alleged violations.

“**Discussion**

> “ORS 653.045(1) and (2) provide:
>
> ‘(1) Every employer required by ORS 653.025 or by any rule, order or permit issued under ORS 653.030 to pay a minimum wage to any of the employer’s employees shall make and keep available to the Commissioner of the Bureau of Labor and Industries for not less than two years, a record or records containing:
>
> > “(a) The name, address and occupation of each of the employer’s employees.

"(b) The actual hours worked each week and each pay period by each employee.
"(c) Such other information as the commissioner prescribes by the commissioner's rules if necessary or appropriate for the enforcement of ORS 653.010 to 653.261 or of the rules and orders issued thereunder.

'(2) Each employer shall keep the records required by subsection (1) of this section open for inspection or transcription by the commissioner or the commissioner's designee at any reasonable time."

OAR 839-020-0083, which interprets ORS 653.045(1) and (2), provides:

'(1) All records required to be preserved and maintained by these rules shall be preserved and maintained for a period of at least two years.

'(2) All employers shall keep such records in a safe and accessible place.

'(3) All records required to be preserved and maintained by these rules shall be made available for inspections and transcription by the Commissioner or duly authorized representative of the Commissioner.'

"In support of its motion, the Agency provided the following:

- A Consent Order signed by Respondent on 5/21/15 relating to an Order of Determination ('OOD') and NOI issued against Respondent in 2014 and 2015 based on two wage claims, recordkeeping violations, and employment of minors;
- A series of November and December 2015 emails from Bernadette Yap-Sam, BOLI Compliance Specialist, to Respondent's attorney requesting that Respondent provide the full name, job title/functions, first day of work and, if no longer employed, last date of work for 'Oscar,' a statement as to whether Respondent had ever employed Ulysses and Daniel Diaz, and if so, the same information as requested for 'Oscar.'
- An affidavit from Yap-Sam stating that Respondent's attorney had not responded to her record request or followed up with a statement that Respondent had or had not employed Ulysses and Daniel Diaz.
- An investigative contact report by BOLI Compliance Specialist Stan Wojtyla regarding his interviews of Daniel Diaz in which Diaz confirms that he and his brother Ulysses were both working for Respondent in Eugene in August 2015, that his supervisor 'is Saul who works for X Wall Inc.' and that 'He rarely sees Saul [and] more often he deals with Oscar.'

"The records requested by Yap-Sam are records that fall squarely within the provisions of ORS 653.045(1). Yap-Sam's request that Respondent provide those records was a request that those records 'be made available for inspections and transcription by [a] duly authorized representative of the Commissioner.' Wojtyla's interview of Daniel Diaz constitutes credible, unrebutted evidence that Daniel and Ulysses Diaz were employed by Respondent in Oregon in 2015. Under ORS 653.045(2), the Agency was authorized to request that records of their employment be made available. Respondent's failure to provide those records violated ORS 653.045(2) and OAR 839-020-0083(3). However, the cryptic note related to 'Oscar' is insufficient evidence to establish that Respondent actually employed an 'Oscar' in Oregon. Respondent cannot be held accountable for failing to provide records associated with 'Oscar' when the Agency has not met its burden of proof of showing that Respondent actually employed such an individual. In conclusion, the forum finds that Respondent violated ORS 653.045(2) and OAR 839-020-0083(3) by failing to provide the records requested by the Agency related to Respondent's employment of the Diaz brothers.

"ORS 653.256 provides that '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 653.045 * * * or any rule adopted thereunder' (*emphasis added*). In this case, the Agency did not allege that Respondent's violation was 'willful.' Without that allegation, the forum has no grounds on which to assess a civil penalty.[2]

"Conclusion

"The Agency's motion for summary judgment is GRANTED with respect to its allegation that Respondent violated ORS 653.045(2) and OAR 839-020-0083(3) by failure to provide the records requested by the Agency related to Respondent's employment of Daniel and Ulysses Diaz brothers**.**

"The Agency's motion for summary judgment for $3,000 in civil penalties based on Respondent's violation of ORS 653.045(2) and OAR 839-020-0083(3) is DENIED because of the Agency's failure to allege that Respondent's violation was 'willful.'

"**Case Status**

"Should the Agency choose to amend its NOI to allege that Respondent's violation of ORS 653.045(2) and OAR 839-020-0083(3) was 'willful,' the hearing will commence as scheduled at 9:30 a.m. on August 30, 2016. If the Agency

[2] *Compare In the Matter of Abdul Rahim Ghaffari,* 35 BOLI 37 (2016), in which the forum assessed a recordkeeping civil penalty based on Respondent's alleged "willful" failure to keep and maintain records required by ORS 653.045.

chooses not to amend its NOI, it is instructed to inform the forum of this decision as soon as possible. If there is no amendment, the forum will cancel the hearing and issue a proposed order that incorporates this ruling. Case summaries remain due on August 16, 2016**.**

"**IT IS SO ORDERED**"

6) On August 18, 2016, the Agency notified the forum that it would not be amending its NOI. That same day, the forum issued an interim order cancelling the hearing.

7) On August 29, 2016, 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 times material herein, Respondent was an active foreign business corporation doing business in the State of Oregon.

2) In 2015, Ulysses and Daniel Diaz were employed by Respondent in Oregon.

3) Bernadette Yap-Sam, BOLI Compliance Specialist, was assigned to investigate work performed by Respondent in Oregon.

4) On November 17, 2015, Yap-Sam sent an email to Don Johnsen, Respondent's attorney, in which she requested that Respondent provide the full name, job title/functions, first day of work and, if no longer employed, last date of work for "Oscar," a statement as to whether Respondent had ever employed either a Ulysses Diaz or a Daniel Diaz in Oregon, and if so, the same information as requested for "Oscar."

5) Respondent provided no information to Yap-Sam in response to her records request regarding "Oscar," Ulysses Diaz, and Daniel Diaz.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent employed Ulysses and Daniel Diaz in the State of Oregon. ORS 652.310.

2) BOLI's Commissioner has jurisdiction over the subject matter and Respondent herein. ORS 653.040.

3) Respondent violated ORS 653.045(2) and OAR 839-020-0083 by failing to provide records requested by the Agency that Respondent was required to maintain pursuant to ORS 653.045(1) and OAR 839-020-0080.

OPINION

The forum's ruling on the Agency's motion for summary judgment resolved the Agency's allegations that Respondent had violated ORS 653.045(2) and OAR 839-020-0083 and that issue requires no further discussion. The same ruling denied the Agency's summary judgment motion for civil penalties because of a defect in the Agency's pleading and gave the Agency the option to amend its NOI if it chose to pursue civil penalties. The Agency declined to amend its NOI, electing to accept the summary judgment ruling rather than pursue the civil penalties issue further. Accordingly, no civil penalties are assessed.

ORDER

1. NOW, THEREFORE, as authorized by ORS 651.060 and ORS 653.045, the Commissioner of the Bureau of Labor and Industries hereby finds that Respondent X Wall Incorporated violated ORS 653.045(2) and OAR 839-020-0083 as set out in the forum's ruling on the Agency's motion for summary judgment.

2. All charges in case no. 42-16 related to the assessment of civil penalties against Respondent are hereby DISMISSED.

In the Matter of

PDX GLASS, LLC

Case No. 56-16
Final Order of Commissioner Brad Avakian
Issued November 22, 2016

SYNOPSIS

Respondent PDX Glass, LLC employed three wage claimants at the agreed rate of $12.00 per hour and failed to pay them all wages due and owing. Respondent was ordered to pay Claimants a total of $2,196.00 in unpaid, due and owing wages. Respondent willfully failed to pay these wages and was ordered to pay Claimants $2,880 each in ORS 652.150 penalty wages.

The above-entitled case was assigned to Kari Furnanz, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Administrative Prosecutor Adriana Ortega, an employee of the Agency. Respondent was represented by its authorized representative, Theodore Johnson.

After the Agency issued an Order of Determination ("OOD"), the Agency moved for and was granted summary judgment.

Having fully considered the entire record in this matter, I, Brad Avakian, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact (Procedural and on the Merits[1]), Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) On or before November 25, 2015, Gregory Alan Fischer and Christopher Dean Reynolds filed wage claims and assignments of wages with the Agency. (Ex. X8)

2) On or before December 2, 2015, David Eric Kendrick filed a wage claim and assignment of wages with the Agency. (Ex. X8)

3) On March 2, 2016, the Agency issued an Order of Determination ("OOD") which alleged that Respondent failed to pay Claimants a total of $2,196.00 in unpaid

wages. The OOD also stated that the Agency determined that more than 30 days elapsed since the wages became due and owing and since a written notice was sent to Respondent pursuant to ORS 652.140 and ORS 652.150. The Agency asserted that Respondent willfully failed to pay wages to its employees, entitling Claimants to a total of $8,640.00 in penalty wages under ORS 652.150, with interest at the legal rate until paid, pursuant to OAR 839-001-0470. (Ex. X4a)

4) On March 3, 2016, the OOD was personally served upon Theodore Johnson, Director of Operations for Respondent. (Ex. X8)

5) Respondent filed an answer and request for hearing on April 18, 2016. Respondent also stated that Theodore Johnson was its Authorized Representative. (Exs. X2, X3)

6) On June 23, 2016, the forum issued a Notice of Hearing to Respondent, the Agency, and Claimants setting the time and place of hearing for October 18, 2016, at 9:30 a.m. at BOLI's Portland office. Together with the Notice of Hearing, the forum sent a copy of the Order of Determination, a multi-language warning notice, a document entitled "Summary of Contested Case Rights and Procedures" containing the information required by ORS 183.413, a document entitled "Servicemembers Civil Relief Act (SCRA) Notification, and a copy of the forum's contested case hearings rules, OAR 839-050-000 to 839-050-0445. (Exs. X4, X2a–X2e)

7) On August 16, 2016, the ALJ issued an interim order which stated, in part:

"HOW TO FILE A DOCUMENT

"You may file a motion or other document by mailing it or hand delivering it to BOLI's Contested Case Coordinator at the following address:

"Oregon Bureau of Labor and Industries
ATTN: Contested Case Coordinator
1045 State Office Building
800 NE Oregon Street
Portland, Oregon 97232-2180

"Motions or other documents are considered "filed" on the date they are postmarked with a date on a correctly addressed envelope or on the date of their receipt by BOLI's Contested Case Coordinator, whichever occurs first. OAR 839-050-0040." (Ex. X5)

8) On September 21, 2016, the Agency filed a motion for summary judgment, contending it was entitled to judgment as a matter of law. On September 21 2016, the ALJ issued an interim order notifying Respondent of the response deadline of September 28 2016, and stating, "If Respondent fails to file a written response, the

forum will grant the Agency's motion if the pleadings and all documents filed in support of the motion show that there is no genuine issue as to any material fact and that the Agency is entitled to judgment as a matter of law." (Exs. X8, X9)

9) The ALJ issued an interim order on September 28, 2016 which stated as follows:

"A telephone prehearing conference was held on September 28, 2016 at 2:30 p.m. Administrative Prosecutor Adriana Ortega was present by telephone on behalf of the Agency. Respondents' authorized representative, Theodore Johnson, was also present by telephone. The conference was digitally recorded.

"The ALJ arranged the telephone conference to address concerns raised by Mr. Johnson in an email dated September 28, 2016, which stated as follows:

'Dear Judge Furnanz:

'We currently have not been able to afford an attorney. Though I have googled "how to respond to a motion" I do not yet understand what I am supposed to do. I understand our company must respond by today but I still don't know how.

'I had intended to represent our company in the proceedings on October 18 2016 and wished to pay our previous employees there back wages. I had also hopped to explain to the court the circumstances of our lack of payment to our old employees and thus a request to the court to wave the penalties imposed on our company if the court sees that our lack of payment was not our fault.

'Thank you[.]'

"The following information was provided to Mr. Johnson during the telephone conference:

- "A response to the Agency's summary judgment motion needed to be submitted in writing. Either a typewritten response or handwritten response would be acceptable.

- "The response also needed to include evidence in the form of documentation or statements to support the information in the written response.

- "The response needed to be filed by 5:00 p.m. on September 28, 2016, unless (1) a written motion for an extension of time was filed which contained good cause for granting an extension of time to respond to the motion and (2) a motion for extension of time was granted by the ALJ.

"• To file a document, it must be delivered to BOLI's Contested Case Coordinator at the following address:

CONTESTED CASE COORDINATOR
Bureau of Labor and Industries
1045 State Office Building
800 NE Oregon Street
Portland, OR 97232-2180

"• The requirement to file a response to the agency's motion for summary judgment is not excused due to the fact that the parties may be discussing a potential settlement. Unless the parties actually agree to a settlement and submit the terms of the agreement to the ALJ in writing, the hearing in this matter will proceed and will not be canceled (unless the agency's motion for summary judgment is granted in its entirety).

"Mr. Johnson indicated that he understood all of the information above and that he had no more questions." (Ex. X10)

10) Respondent filed a motion for an extension of time, which was granted in an interim order dated September 29, 2016. The deadline for Respondent's summary judgment response was extended until September 30, 2016. Respondent filed its response to the motion for summary judgment on September 30, 2016. (Exs. X11-X13)

11) On October 5, 2016, the ALJ issued an interim order granting the Agency's motion for summary judgment. The pertinent portion of the ALJ's interim order is reprinted below:

"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 and the evidentiary burden on the participants is as 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.

"The record considered by the forum in deciding this motion consists of: (1) the Agency's OOD, the Agency's argument made in support of its motion, and the exhibits submitted with the Agency's motion; and (2) Respondent's Answer and Respondent's argument opposing the Agency's motion. No exhibits were submitted in support of Respondent's opposition to the Agency's motion.

"**Summary of Facts**

"In its motion, the Agency asserted that the following facts are not in dispute:

"• Employees of Respondent were owed unpaid wages along with interest as follows:

Employee Name	Wages	Last Day of Work
Gregory Alan Fischer	$978	November 19, 2015
David Eric Kendrick	$840	November 18, 2015
Christopher Dean Reynolds	$378	November 19, 2015

"• On December 7, 2015, the Agency sent a Notice of Claim regarding Claimants Fischer and Reynolds to Respondent with notification that wages were due.

"• On December 16, 2015, the Agency sent a Notice of Claim regarding Claimant Kendrick to Respondent with notification that wages were due.

"• More than 30 days elapsed since the wages became due and owing and since a written notice was sent to Respondent.

"In their response to the summary judgment motion, Respondent did not dispute the facts presented by the Agency, but argued the following:[1]

'PDX GLAS LLC requests a settlement. We can not yet afford an attorney and thus do not have one to represent us in these proceedings.

'PDX GLASS LLC can now pay our old employees in full and can have a check to BOLI for the full amount within two business days.

'PDX GLASS is and was at the time of our failure to pay our employees a MBE, DBE, & ESB. We were cash poor and trying to stay in business by

[1] The following is a direct quote from the response filed by Respondent without changes to spelling, grammar or punctuation.

taking small jobs that paid weekly or sooner. At the recommendation of a business friend we started working with an agency named the Community Energy Project (CEP) with contracted jobs that stated we were to be paid 20% in advance arid the balance throughout the project as needed.

'Once we started working on the project we brought on our employees and paid them out of our small cash reserve. However that reserve quickly ran out during the job and I explained this to our employees. They told me they were instructed to file a case with BOLI and I agreed saying; I hope our company receive the funds owed to us before the BOLI case comes to fruition if so we will pay you, but if not I will take a privet job and do my best to pay you guys out of my pay.

'Needless to say we were never paid by the CEP and though I took them to small calms court I was not eloquent enough to prevail getting a ruling of 50/50 from the judge but needing 51% to win, so I was told by the judge. Please see PDX GLASS LLC v.s. Community Energy Project (CEP).

'I closed the company and looked for work in the privet sector but to no avail, then out of desperation bit some small work without a CCB license and won and slowly reopened the doors and reacquired a CCB license again.

'PDX GLASS LLC would like to settle this case with BOLI by paying our old employees and request the court wave the penalty's due to the circumstances of the case. Buy imposing the fines and penalties on PDX GLASS LLC, a cash poor DBE, MBE & ESB, this will effectively bankrupt the company and force us to close our doors for good.'

"**Analysis and Ruling**

"The Agency requests summary judgment on the issue of unpaid wages and penalty wages.

"**UNPAID WAGES**

"In a wage claim case, the Agency must first establish a prima facie case supporting the allegations of its OOD in order to prevail. *In the Matter of Letty Lee Sesher,* 31 BOLI 255, 261 (2011). In this case, the elements of the Agency's prima facie case are: 1) Respondent employed the wage claimants; 2) the pay rate upon which Respondent and the wage claimants agreed, if other than the minimum wage; 3) the amount and extent of work the wage claimants performed for Respondent; and 4) the wage claimant performed work for which they were not properly compensated. *See, e.g., In the Matter of Dan Thomas Construction, Inc.,* 32 BOLI 174, 180 (2013).

"In the Answer to the OOD, Respondent agreed that the following allegations were correct:

Employee	Hourly Rate	Amount Due[2]
Fischer	$12/hour	$978
Kendrick	$12/hour	$840
Reynolds	$12/hour	$378

(Agency Exs. K, M, O). Therefore, the Agency has established that the wage claimants are owed unpaid wages [in] the amounts described in the above chart. Accordingly, the Agency's motion for summary judgment on the issue of unpaid wages is GRANTED.

"PENALTY WAGES

"*Liability for Penalty Wages*

"An employer is liable for penalty wages when it willfully fails to pay any wages or compensation of any employee whose employment ceases as required by ORS 652.140. ORS 652.150(1). In this case, Respondent was required to pay all wages due to the wage claimants no later than 'five days, excluding Saturdays, Sundays and holidays' after November 18 or 19, 2015, their last days of employment. ORS 652.140(2)(b).

"Willfulness does not imply or require blame, malice, 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. *See, e.g., In the Matter of Stahler*, 34 BOLI 56, 64 (2015).

"When the employee or a person on behalf of the employee submits a written notice of nonpayment and payment is not made, penalty wages continue for 30 days. ORS 652.150(1)(a).

"As stated above, Respondent admitted in its Answer that it owes the three wage claimants the wages alleged in the OOD. Additionally, Respondent stated:

> '[Cash] reserve quickly ran out during the job and I explained this to our employees. They told me they were instructed to file a case with BOLI and I agreed saying[,] ["]I hope our company receive[s] the funds owed to us

[2] Although the Agency did not specifically state the hours worked, the amount of hours can be inferred by calculating the amount due to each wage claimant divided by the hourly rate of $12 per hour. The exact amount of hours worked is not listed because the total amount due was agreed upon by Respondent.

before the BOLI case comes to fruition[.] [I]f so we will pay you, but if not I will take a privet [*sic*] job and do my best to pay you guys out of my pay.["]'

From these admissions, the forum infers that Respondent was aware that these wages were owed prior to the issuance of the OOD and finds that Respondent's failure to pay the wage claimants all wages owed at the time of their termination corresponded to Respondent's awareness that those wages were in fact owed. There is no evidence in the record that Respondent was not a free agent in its decision not to pay the wage claimants those wages. *See In the Matter of Giants, Inc.,* 33 BOLI 53, 57 (2014).

"The forum therefore concludes that Respondent's failure to pay the wage claimants all wages due to them at the time of their termination was willful.

"When a written notice of nonpayment submitted on behalf of a wage claimant and the proposed civil penalty does not exceed 100 percent of a claimant's unpaid wages, penalty wages are computed by multiplying a claimant's hourly wage x eight hours per day x 30 days. ORS 652.150(1) & (2); OAR 839-001-0470. Each of the three Claimants' penalty wages equal $2,880 ($9 x 8 hours x 30 days).

"*Affirmative Defense of Inability to Pay*

"In its Answer and in the response to the Agency's motion for summary judgment, Respondent asserts that it did not have the funds to pay the wages to its employees at the time the wages were due. The '[i]nability to pay wages at the time the wages accrued is an affirmative defense under ORS 652.150(5) that, if proven, relieves an employer of all liability for ORS 652.150 penalty wages.' *In the Matter of Farwest Hatchery LLC*, 33 BOLI 176, 187-88 (2014). Respondent has the burden of proving this affirmative defense. *See, e.g., In the Matter of Tailor Made Fencing & Decking, Inc.*, 30 BOLI 151, 157 (2009). 'To meet its burden of proof, an employer must provide specific information as to the financial resources and expenses of both the business and the employer personally during the wage claim period, including submission of records from which that information came.' *In the Matter of Captain Hooks*, *LLP*, 27 BOLI 211, 230 (2006). In this case, although Respondent argued that it had the inability to pay wages, it did not submit any records that contain the detailed information required to support this affirmative defense. Accordingly, the affirmative defense fails and Respondent is not relieved from its obligation to pay penalty wages.

"Therefore, the Agency's motion for summary judgment on the issue of penalty wages is GRANTED.

"**Further Proceedings**

"Because this ruling resolves all of the issues in the OOD, the hearing scheduled for October 18, 2016, and all associated deadlines are CANCELED. A Proposed Order incorporating this ruling will be issued as soon as possible, and the parties will have the opportunity to file exceptions to the Proposed Order pursuant to ORS chapter 183 and OAR 839-050-0380." (Ex. X14).

The ALJ's ruling on the Agency's motion for summary judgment is hereby CONFIRMED.

12) The ALJ issued a proposed order on October 11, 2016, 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 any exceptions.

FINDINGS OF FACT – THE MERITS

1) Claimant Fischer performed work, labor and services for Respondent November 5-19, 2015, at the rate of $12.00 per hour worked. Claimant Fischer earned $978.00, and was paid nothing for his work. (Ex. X4a, X3)

2) Claimant Kendrick performed work, labor and services for Respondent November 6-18, 2015, at the rate of $12.00 per hour worked. Claimant Kendrick earned $840.00, and was paid nothing for his work. (Ex. X4a, X3)

3) Claimant Reynolds performed work, labor and services for Respondent November 12-19, 2015, at the rate of $12.00 per hour worked. Claimant Reynolds earned $378.00, and was paid nothing for his work. (Ex. X4a, X3)

4) The Agency sent a written notice of the wage claims of Fischer and Reynolds to Respondent on or before December 6, 2015. The Agency sent a written notice of the wage claim of Kendrick to Respondent on or before December 16, 2015. (Ex. X8)

5) Respondent has not paid any wages to Claimants since receiving the Agency's written notices. (Ex. X8, X13)

6) ORS 652.150 penalty wages for each of the three claimants are computed as follows: $9 x 8 hours x 30 days = $2,880.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent was an Oregon employer who employed Claimants and was subject to the provisions of ORS 652.110 to 652.332.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and Respondent herein. ORS 652.310 to 652.405.

3) Respondent violated ORS 652.140(2) by failing to pay all wages earned and unpaid to the Claimants not later than five days, excluding Saturdays, Sundays and holidays, after Claimants left Respondent's employment.

4) Respondent owes the following in unpaid, due, and owing wages to Claimants in the following amounts:

Fischer	$978.00
Kendrick	$840.00
Reynolds	$378.00

ORS 652.140(2).

5) Respondent willfully failed to pay Claimants all wages due and owing and owes $2,880 in penalty wages to each Claimant. ORS 652.150.

6) Under the facts and circumstances of this record, and according to the applicable law, BOLI's Commissioner has the authority to order Respondent to pay Claimants their earned, unpaid, due and owing wages and penalty wages. ORS 652.332.

OPINION

All allegations in the Agency's Amended OOD were resolved in the ALJ's interim order granting the Agency's motion for summary judgment. No further discussion is required as to the merits.

ORDER

NOW, THEREFORE as authorized by ORS 652.140(2), ORS 652.150, and ORS 652.332, and as payment of the unpaid wages and penalty wages, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **PDX Glass, LLC,** to deliver to the Administrative Prosecution Unit of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, the following:

(1) A certified check payable to the Bureau of Labor and Industries in trust for Gregory Alan Fischer in the amount of **THREE THOUSAND EIGHT HUNDRED AND EIGHTY DOLLARS ($3,858.00)**, less appropriate lawful deductions, representing $978.00 in gross earned, unpaid, due and payable wages, plus interest at the legal rate on that sum from December 1, 2015, until paid; and $2,880.00 in ORS 652.150 penalty wages, plus interest at the legal rate on that sum from January 1, 2016, until paid.

(2) A certified check payable to the Bureau of Labor and Industries in trust for David Eric Kendrick in the amount of **THREE THOUSAND SEVEN HUNDRED AND TWENTY DOLLARS ($3,720.00),** less appropriate lawful deductions,

representing $840.00 in gross earned, unpaid, due and payable wages, plus interest at the legal rate on that sum from December 1, 2015, until paid; and $2,880.00 in ORS 652.150 penalty wages, plus interest at the legal rate on that sum from January 1, 2016, until paid.

(3) A certified check payable to the Bureau of Labor and Industries in trust for Christopher Dean Reynolds in the amount of **THREE THOUSAND TWO HUNDRED AND FIFTY-EIGHT DOLLARS ($3,258.00)**, less appropriate lawful deductions, representing $378.00 in gross earned, unpaid, due and payable wages, plus interest at the legal rate on that sum from December 1, 2015, until paid; and $2,880.00 in ORS 652.150 penalty wages, plus interest at the legal rate on that sum from January 1, 2016, until paid.

In the Matter of

COAST 2 COAST CONSTRUCTION, LLC

Case No. 59-16
Final Order of Commissioner Brad Avakian
Issued January 26, 2017

SYNOPSIS

Four claimants filed wage claims with the Agency in which they alleged that Respondent had employed them and not paid them all the wages they had earned. When Respondent produced no records to show the hours worked and amounts paid to the claimants, the forum relied on the credible testimony of three claimants to determine that they were owed $133.00, $437.25, and $4,531.50, respectively, in unpaid, due, and owing wages in the amounts. The three claimants were awarded $3,360.00, $3,960.00, and $4,320.00 in ORS 652.150 penalty wages. One of those claimants was also awarded $4,320.00 as an ORS 653.055 civil penalty because some of his unpaid wages were overtime wages. The forum awarded no unpaid wages to the fourth claimant because his testimony as to his hours worked and the amount of wages he was paid was not credible and there were no credible records on which to base an award of unpaid wages. ORS 652.140, 652.140, 653.055, 653.261, OAR 839-020-0030.

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on December 6-7, 2016, in the W. W. Gregg Hearing Room of the Oregon 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 Administrative Prosecutor Rafael Colin, an employee of the Agency. Brian Hanners, Respondent's authorized representative, represented Respondent throughout the hearing. Hanners was physically present at the hearing on December 6 and participated by telephone on December 7.

The Agency called the following witnesses: Wage Claimants Kevin Abraham, Evelyn Clark, Jason Taylor, and John Westwood; and Virginia Grosso, BOLI Compliance Specialist. Brian Hanners testified on behalf of Respondent.

The forum received into evidence: a) Administrative exhibits X-1 through X-21; b) Agency exhibits A1 through A22; and c) Respondent exhibits R1 through R3.[1]

Having fully considered the entire record in this matter, I, Brad Avakian, Commissioner of the Bureau of Labor and Industries, hereby make the following Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact,[2] Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) On December 18, 2015, Claimant Jason Taylor filed a wage claim with the Agency's Wage and Hour Division ("WHD") alleging that Respondent owed him $470.25 in unpaid wages and assigned his claim to the Agency. (Ex. A2)

2) On January 6, 2016, Claimant Kevin Abraham filed a wage claim with the Agency's WHD alleging that Respondent owed him $9,749.50 in unpaid wages and assigned his claim to the Agency. (Ex. A11)

3) On January 15, 2016, Claimant Evelyn Carter filed a wage claim with the Agency's WHD alleging that Respondent owed her $253.00 in unpaid wages and assigned her claim to the Agency. (Ex. A14)

4) On January 27, 2016, Claimant John Westwood filed a wage claim with the Agency's WHD alleging that Respondent owed him $4,660.00 in unpaid wages and assigned his claim to the Agency. (Ex. A9)

5) On March 17, 2016, the Agency issued Order of Determination #15-3422 ("OOD") in which it alleged that Claimants were owed the following unpaid wages, ORS 652.150 penalty wages, and ORS 653.055 civil penalties:

Claimant	Unpaid Wages	Penalty Wages	Civil Penalty
Taylor	$437.25	$3, 960.00	
Abraham	$7,255.60	$4,320.00	$4,320.00
Carter	$133.00	$3,360.00	
Westwood	$4,583.50	$4,320.00	$4,320.00

(Exs. X2, A17)

[1] *See* Finding of Fact #17 – Procedural. At hearing, R4 was received in its entirety. After the hearing, and before the Proposed Order was issued, the ALJ altered his ruling and received only one sentence in that document and placed a protective order on the entire exhibit. In response to the Agency's exception, the forum has determined that no part of Exhibit R4 should have been received. The ALJ's protective order remains in force.

[2] The Ultimate Findings of Fact required by ORS 183.470 are subsumed within the Findings of Fact – The Merits.

6) On April 28, 2016, Brian Hanners filed an answer and request for hearing on behalf of Respondent, in which he authorized himself, as "the owner of Coast 2 Coast Construction LLC," to appear as Respondent's authorized representative. The case was assigned no. 59-16. (Exs. X4, A18)

7) On July 15, 2016, the Agency issued an amended OOD in which it alleged that Claimant Abraham was owed $8,309.50 in unpaid wages. (Ex. X8)

8) On August 8, 2016, the forum issued a Notice of Hearing to Respondent, the Agency, and Claimants setting the time and place of hearing as 9 a.m. on October 18, 2016, at BOLI's Portland office. Together with the Notice of Hearing, the forum sent a copy of the OOD, a document entitled "Summary of Contested Case Rights and Procedures" containing the information required by ORS 183.413, a document entitled "Servicemembers Civil Relief Act (SCRA) Notification, and a copy of the forum's contested case hearings rules, OAR 839-050-000 to 839-050-0445. (Ex. X6)

9) On August 18, 2016, the forum issued a case summary order requiring case summaries to be filed no later than October 4, 2016. The Agency filed its case summary on October 4, 2016. Respondent did not file a case summary. (Ex. X6)

10) On October 18, 2016, at the time set for hearing, Brian Hanners appeared on behalf of Respondent and requested a postponement. Before commencing the hearing, the ALJ held a conference with Mr. Hanners and Mr. Colin, the Agency's administrative prosecutor. As a result of the conference, the ALJ postponed the hearing and set a new hearing date and due date for case summaries. (Statement of ALJ)

11) On October 20, 2016, the ALJ issued four interim orders related to the postponement, reprinted in part or in whole below:

1. <u>Order Granting Respondent's Motion for Postponement; New Hearing Date</u>

"On October 18, 2016, this hearing was set to commence at 9 a.m. Brian Hanners, the authorized representative for Respondent, appeared and requested a postponement on two grounds. First, that he had just learned of the hearing date because BOLI mailed the mailing of the Notice of Hearing to his former address. Second, because of death threats he alleged had been made to him by Jason Taylor, one of the wage claimants who was present when Mr. Hanners arrived at the hearing.

"Before commencing the hearing, I held a 90-minute conference with Mr. Colin and Mr. Hanners to discuss Mr. Hanners's requests. This conference was recorded in its entirety. Mr. Hanners's pre-school aged son * * * was also present, as Mr. Hanners brought him to the hearing.

"At the conclusion of the conference, I **GRANTED** Mr. Hanners's request for a postponement based on his security concerns and reset the hearing to begin at 9 a.m. on December 6, 2016, in the WW Gregg Hearing Room, 1045 State Office Building, 800 N.E. Oregon, Portland, Oregon. This ruling is **CONFIRMED**. I told Mr. Hanners and Mr. Colin that they should plan for a two-day hearing and instructed Mr. Hanners not to bring his son to the hearing.

"Mr. Hanners stated that he needed an attorney and a seven-week postponement would not give him time to get an attorney and obtain all the documents he needed to prepare for hearing. I told him that he needed to begin his search for an attorney immediately. I also gave him instructions regarding the discovery process. Finally, I indicated that the forum will contact the Oregon State Police and arrange to have an officer present when the hearing reconvenes."

(Ex. X10)

2. <u>Documents Provided to Respondent by the Forum</u>

"Before the evidentiary part of the hearing in this case began on October 18, 2016, I held a conference with Mr. Colin and Mr. Hanners to discuss Mr. Hanners's oral motion for postponement, which I granted at the conclusion of the conference.

"During the conference, Mr. Hanners stated that he had never received the Order of Determination mailed to him by the Agency, and only filed an answer and request for hearing because he learned of it from an employee of the Construction Contractors Board. He also stated that he had only received a copy of the Notice of Hearing the night before the hearing, while acknowledging that Mr. Colin emailed a copy of Notice of Hearing to him on October 4 that he was unable to print out as a clean copy because of issues with his printer. Mr. Hanners acknowledged that he did receive a copy of the Agency's case summary and showed me the copy that he brought to the hearing. Mr. Hanners also stated that he was not the person served with the Order of Determination, as reflected in the process server's affidavit, because he was in Spokane for medical treatment at the time of the service and, unlike the individual identified in the affidavit, does not have black hair and weighs 220 pounds.

"The forum wants to be certain that Mr. Hanners has hard copies of all the documents issued by the forum that are pertinent to this hearing, as well as the Agency's original Order of Determination and the answer and request for hearing filed by Mr. Hanners on behalf of Coast 2 Coast. Since Mr. Hanners's printer is not currently working, the forum is enclosing hard copies of the following documents as an attachment to this interim order and not attaching them to the forum's courtesy email.

"1. Original Order of Determination (6 pages long).

"2. Coast 2 Coast's answer and request for hearing (4 pages), dated 4/21/16, along with a copy of the envelope it was mailed in showing Mr. Hanners's address on 4/26/16 as being '20270 S. Danny Ct., Oregon City, OR 97045.'

"3. Notice of Hearing (4 pages), dated August 8, 2016, with the following attachments:

"a) Amended Order of Determination (8 pages);
"b) Multilingual Notice explaining significance of documents;
"c) Summary of Contested Case Rights and Procedures (2 pages);
"d) Servicemembers Civil Relief Act Notification (1 page);
"e) BOLI Contested Case Hearing Rules with Index (34 pages).

(Ex. X13)

3. <u>Amended Case Summary Order</u>

"IMPORTANT: Your Case Summary must be filed no later than November 22, 2016. Your case summary is filed when it is postmarked or hand-delivered to the Bureau's address printed on the first page of the Notice of Hearing. If you do not file a case summary, you may not be able to call witnesses or present evidence at the contested case hearing.

"CASE SUMMARY ORDER

"Pursuant to OAR 839-050-0200 and OAR 839-050-0210, I hereby order Respondent and the Agency to each prepare and file a case summary that contains:

"1. A list of all persons to be called as witnesses, along with a statement identifying any person who will be called as a telephone witness, *except* those who will give testimony solely for the purpose of impeachment or Agency rebuttal.

"2. The qualifications of any expert witnesses and the substance of the facts and opinions to which the experts are expected to testify.

"3. Identification and description of any document or other physical evidence to be offered into evidence at the hearing, together with a copy of any such document or evidence, *except* for exhibits offered solely for the purpose of impeachment or Agency rebuttal. Agency exhibits shall be marked A-1, A-2, etc., and Respondent's exhibits shall be marked R-1, R-2, etc. All paper exhibits must be no larger than 8 1/2 by 11 inches in size. All social security numbers that appear on exhibits should be deleted unless relevant to the case.

"4. For the Agency only, a statement of any applicable Agency policies together with, in the discretion of the Agency, any supporting documents or information on which such policies are based.

"Send your case summary, with exhibits, to the following address:

Bureau of Labor and Industries
ATTN: Contested Case Coordinator
1045 State Office Building
800 NE Oregon Street
Portland, Oregon 97232-2180

"Case summaries must be filed by **Tuesday, November 22, 2016**. You also must send a copy of your summary, with exhibits, to the other participant. At hearing, you must have two additional copies of any document submitted with your case summary that you intend to offer as an exhibit. You must bring four copies of any rebuttal or impeachment exhibits unless those exhibits were previously submitted with the case summary, in which case only two additional copies are required at the hearing. OAR 839-050-0270(2). You should not expect a copy machine to be available at the hearing location or expect state agency staff at that location to help you with copying.

"**The administrative law judge may refuse to admit evidence that has not been disclosed in response to this order unless (a) the participant that failed to provide the evidence offers a satisfactory reason for having failed to do so, or (b) excluding the evidence would violate the duty to conduct a full and fair inquiry under ORS 183.417(8). If the administrative law judge admits evidence not provided in response to this order, the administrative law judge may grant a continuance to allow an opportunity for the other participants to respond.**

"I have also enclosed a form designed to help respondents who are not represented by an attorney in filing a case summary."

(Ex. X12)

4. Amended Order – Requirements for Filing Motions and Other Documents

"**This interim order does not require the Agency or Respondent to take any specific action. Its purpose is to ensure that the Agency and Respondent understand how documents must be filed and the time in which they must be filed for them to be considered.**

"**HOW TO FILE A DOCUMENT**

"You may file a motion or other document by mailing it or hand delivering it to BOLI's Contested Case Coordinator at the following address:

Oregon Bureau of Labor and Industries
ATTN: Contested Case Coordinator
1045 State Office Building
800 NE Oregon Street
Portland, Oregon 97232-2180

"Motions or other documents are considered 'filed' on the date they are postmarked with a date on a correctly addressed envelope or on the date of their receipt by BOLI's Contested Case Coordinator, whichever occurs first. OAR 839-050-0040.

"**FAX AND E-MAIL FILINGS REQUIRE PRIOR APPROVAL**

"Documents may not be filed by facsimile transmission or e-mail ***except*** with the prior approval of the administrative law judge. To obtain such approval, call BOLI's Contested Case Coordinator at 971-673-0865. Documents sent only by fax or e-mail will not be considered filed without the administrative law judge's prior approval. OAR 839-050-0040(2).

"**TIMELINE FOR RESPONDING TO MOTIONS**

"All participants have seven days to file a written response after 'service' of any motion filed by another participant. OAR 839-050-0150. 'Service' of a motion occurs when a motion is personally served on a participant or mailed to a participant's last known address, whichever occurs first. OAR 839-050-0030."

(Ex. X11)

12) Respondent did not file a case summary. (Entire Record)

13) On November 29, 2016, the ALJ held two telephonic prehearing conferences with Mr. Hanners and Mr. Colin. On November 30, 2016, the ALJ issued an interim order summarizing his rulings on issues raised in the conferences and containing a protective order covering Mr. Hanners's current address and phone number. That order is reprinted below in part:

"On November 29, 2016, I presided over two telephonic prehearing conferences with Mr. Colin and Mr. Hanners. Both conferences were digitally recorded.

"The first conference was conducted beginning in 11:10 a.m. and lasted 25 minutes. Mr. Hanners stated concerns for the safety of himself, his wife, and his child based on a previous death threat made to him by claimant Jason Taylor and claimant Kevin Abraham's recent threat to kill him * * *. Mr. Hanners stated that he learned of Abraham's threat on the afternoon of November 22, 2016, while he was on a hunting trip with his father. * * * Mr. Hanners stated that * * *

claimant Abraham * * * had records that were stolen from Mr. Hanners. Mr. Hanners stated that he did not want to be in the same building with claimants Taylor and Abraham and stated that he anticipated bringing his wife to the hearing as a witness and also bringing his preschool age child because he could not afford childcare. Mr. Hanners reiterated several times that he was very afraid for himself and his family. I told Mr. Hanners that I arranged for an Oregon state police officer to be present during the hearing for his security. Mr. Hanners asked that I issue a protective order that would prevent his home address and his phone number from being disclosed as a public record because of his safety concerns over claimants Taylor and Abraham potentially learning his new address and phone number. I stated that I would grant that motion. I ended the conference by telling both Mr. Hanners and Mr. Colin that I would consider the issues raised and call them back for a second prehearing conference.

"The second conference began at 2:50 p.m. and lasted 27 minutes. Noting that Respondent had not filed the case summary, I asked Mr. Colin if the Agency would be making any objection on that basis and stated that I was prepared to rule on an objection at that time. Mr. Colin stated that the Agency did object to Respondent having any witnesses testify or offering any exhibits based on Respondent's failure to file a case summary. I asked Mr. Hanners, Respondent's authorized representative, if he had received the amended case summary order I issued on October 20, 2016. He acknowledged that he had received it by email and by regular mail and that he had read 'most' of it. He also said that he intended to call himself, his wife, his father, and [another witness]. I asked him why he had not filed a case summary. He gave a number of reasons, summarized below:

- He cannot afford an attorney and needs an attorney to defend Respondent.
- He doesn't know what a case summary is and doesn't understand what is required in the case summary.
- He has had only 4½ weeks to prepare for the hearing and is still gathering evidence to defend Respondent.
- His records are stored in a 5,000 square foot storage facility, along with his family's furniture, and he does not have the time, given his present living situation of being homeless, to access those records.
- Claimant Abraham stole his records.
- He needs to subpoena some records and has not yet been able to do that.

I **GRANTED** the Agency's objection based on the provisions of OAR 839-050-0210(5) that provide:

> '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 183.417(8).'

Based on this ruling, Respondent's participation at hearing is limited to the following: (1) Cross-examination of all Agency witnesses, including Claimants; (2) Offering witness testimony that is presented solely for the purpose of impeachment[3]; and (3) Offering exhibits that are presented solely for the purpose of impeachment. When the Agency has concluded its case-in-chief, I will also allow Mr. Hanners to make a verbal offer of proof at hearing summarizing what his witnesses would have testified to and what his proposed exhibits would have shown, had he been allowed to present them.

"The following subjects were also discussed:

"1. Witness Exclusion.

"I **DENIED** Mr. Hanners's request that the hearing be held so that he and claimants were in separate rooms because that is a logistic impossibility. I stated that witnesses would be excluded so that only one witness would be in the hearing room at a time, and that only one claimant would be in the hearing room at a time. This also means that any witnesses Respondent might consider calling, excluding Mr. Hanners, is also excluded from the hearing room except when testifying.

"2. Security.

"I stated that an Oregon State trooper will be present throughout the hearing for the purpose of providing security at the hearing. I informed Mr. Hanners that the trooper will be available to escort him from his vehicle to the hearing and back and, at his request, to accompany him at all times during the day of the hearing. I informed Mr. Hanners that, if he wants to be accompanied from his vehicle to the hearing room in the morning, he needs to call Diane Anicker, BOLI's contested case coordinator (971-673-0865) and let her know of his decision. Mr. Hanners should make that call the day before the hearing so that Ms. Anicker can make arrangements with the Oregon State Police for Mr. Hanners's escort.

[3] Impeachment by extrinsic evidence, e.g. testimony of a witness or by introduction of an exhibit, can be used to show bias, interest, prejudice, improper motive, a witness's ability to perceive or remember, prior inconsistent conduct, and prior inconsistent statements directly related to a relevant issue and conviction of a crime as set out in the Oregon Evidence Code, Rule 609. [NOTE: The underlined language was added in an amended interim order issued on 12/1/16.]

"3. Mr. Hanners's child.

"Mr. Hanners stated that he had no choice but to bring his pre-school aged son * * * to the hearing because he could not afford childcare. I repeated my instruction included in the interim order I issued on October 20, 2016, that Mr. Hanners was not to bring his child to the hearing. The reason for that instruction is the distraction that his child would cause for the forum and all the participants.

"4. Participating by phone.

"I gave Mr. Hanners the alternative of participating by phone instead of him being present at the hearing and told him he needs to let Ms. Anicker know in advance if he intends to do that, that he would need to use a phone that had good reception,[4] and that the hearing might last two days. If Mr. Hanners decides to participate by phone, he will need to provide three copies of any impeachment exhibits he intends to use in advance to the ALJ. Those exhibits must be delivered to Ms. Anicker before the hearing begins and will not be disclosed to the Agency unless Mr. Hanners offers them at hearing.

"5. Default.

"During the conference, Mr. Hanners initially stated that he would not come, given the restrictions I had placed on Respondent. I then stated the consequences of Mr. Hanners's failure to appear at hearing by summarizing the forum's default rule and advised Mr. Hanners that, even if he did not present any evidence on Respondent's behalf, he would be well advised to appear and cross examine the Agency witnesses. By the end of the conference, Mr. Hanners did not state definitively that he would or would not appear at the hearing. I informed Mr. Hanners and Mr. Colin that I would be in Portland and commence the hearing at 9 a.m. on December 6, the time set in my October 20, 2016, interim order granting Respondent's motion for postponement and setting a new hearing date.

"6. Protective Order.

"The Agency is hereby prohibited from sharing Mr. Hanners's address and phone number with anyone except myself. Any documents issued by the forum, including my interim orders and the proposed and final orders, will have Mr. Hanners's address redacted from the certificate of service. Any documents currently in the Agency's possession or that come into the Agency's possession that have Mr. Hanners's address and phone number of them should be placed in a confidential file, with a redacted copy remaining in the Agency's original file."

[4] This instruction was based on Mr. Hanners's statement that his cell phone reception at his residence was poor.

(Exs. X14, X15)

14) Mr. Hanners appeared in person on the first day of hearing, accompanied by his wife, Lisa Hanners, whom he stated would be a witness. At the time he arrived, Oregon State Police trooper Mike Kendoll was also present, at the forum's request, to provide security. The ALJ informed Mr. Hanners that, pursuant to the ALJ's interim order, Mrs. Hanners was excluded from the hearing. For the remainder of the day, Officer Kendoll was either in the hearing room or providing an escort for Mr. Hanners whenever Mr. Hanners left the room. (Statement of ALJ)

15) At the outset of the hearing, pursuant to ORS 183.415(7), the ALJ verbally advised Mr. Colin and Mr. Hanners of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing. (Statement of ALJ)

16) On December 6, the first day of hearing, WHD Compliance Specialist Grosso testified by phone and Claimant Taylor testified in person. When Claimant Abraham appeared in person and was sworn in to testify, Mr. Hanners became extremely upset, to the extent that, in the opinion of the ALJ, he was unable to continue participating in the hearing. The ALJ went off the record and went with Mr. Hanners and Officer Kendoll into an adjacent room, where they conferred about Mr. Hanners's continued presence at the hearing. The ALJ concluded that Mr. Hanners was too distraught to continue participating that day and adjourned the hearing after giving Mr. Hanners the option of participating by telephone the following day. (Statement of ALJ)

17) On December 7, Mr. Hanners participated by telephone and had the opportunity to cross examine Claimants Abraham, Carter, and Westwood. Security was not present on December 7 based on Mr. Hanners's statement on December 6 that he would participate by telephone on December 7. After the Agency concluded its case-in-chief, Mr. Hanners was given the opportunity to present impeachment evidence. He testified briefly and offered exhibit R-4, consisting of a witness affidavit, which was received in its entirety. However, the ALJ ruled that the affidavit would be given no weight unless Mr. Hanners made the witness available for the Agency's cross examination. Mr. Hanners was given an opportunity to contact the witness and, at the witness's request, the ALJ spoke privately with the witness. The witness refused to testify. On December 9, 2016, the ALJ issued a protective order over exhibit R-4 in which he found that it was a public record that was exempt from disclosure under ORS 192.502(4). The order prohibited Mr. and Mrs. Hanners and Mr. Colin from disclosing the contents of the exhibit. In the order, the ALJ also reversed his ruling that admitted exhibit R-4 in its entirety and only admitted the single sentence in the exhibit that could properly be construed as impeachment evidence. That ruling is **CONFIRMED**. The ALJ's ruling is reprinted in its entirety below in response to the Agency's exception. It sets out in detail the conversation between the witness and the ALJ:

> "At hearing, Respondent's authorized representative Brian Hanners offered exhibit R-4 as an impeachment exhibit. I gave Mr. Colin a copy and kept the other two copies. Mr. Hanners had provided me the original and two copies

of that exhibit the previous evening before leaving the hearing for the day, pursuant to my interim order requiring him to provide the forum with three copies of any impeachment exhibits if he was going to participate by phone.

"Exhibit R-4 is a one page sworn, notarized affidavit from a witness. Included in the statement, in the 13th sentence in the first paragraph of the affidavit, is a description of a Claimant's alleged removal of records from Respondent's office. In addition to describing events, the witness states: 'I'm only agreeing to write this because Mr. Hanners has assured me that this document will be SEALED * * * If this statement is made public, I will withdraw my statement in this case.'

"At the time the exhibit was offered, Mr. Hanners was appearing at the hearing by telephone. When Mr. Hanners offered exhibit R-4, I received it, but stated that I would not give it any weight unless the witness was made available to be cross-examined by Mr. Colin, the Agency's administrative prosecutor. Mr. Hanners stated that the witness was extremely fearful and that he would telephone the witness and see if the witness would agree to testify. Mr. Hanners then called the witness. After five minutes or so had elapsed, I stated that I would talk to the witness and explain the situation if the witness wanted to talk with me. It also became apparent to me during the conversation that Lisa Hanners, Mr. Hanners's wife, had knowledge of the exhibit. Mr. Hanners then said the witness would like to talk with me and provided me with the witness's phone number. I disconnected Mr. Hanners, had Mr. Colin leave the hearing room, and made a private, non-recorded telephone call to the witness.

"During the call, the witness informed me that Mr. Hanners had told the witness that I had told him that the witness's statement would be kept secret, that it would not become a public record, and that none of the claimants would ever learn of its existence. I informed the witness that I had in fact told Mr. Hanners that if he offered the affidavit as evidence it would become a public record and that the witness's name would be included in the proposed order if I relied at all on the witness's statement. The witness stated that the witness would not have given Mr. Hanners the statement except for Hanners's representation of what I supposedly told him. The witness then refused to testify. I told the witness that I would explain the situation to Mr. Hanners and give him the option of withdrawing the exhibit and honoring the witness's request that it not be used if it was made public, since it would not be given any weight due to the witness's refusal to testify. I also told the witness that, regardless of Mr. Hanners's decision, I would place a protective order on the exhibit that prohibited Mr. Hanners, Mr. Hanners's wife, who was also aware of the exhibit, and Mr. Colin, the only persons besides myself who had seen or knew the contents of the exhibit, from disclosing the existence or contents of the exhibit to anyone. I then terminated the phone call with the witness, telephoned Mr. Hanners back, and went back on the record.

"While back on the record, I explained the situation to Mr. Hanners and gave him the option of withdrawing the exhibit, again explaining that I would give it no weight whatsoever due to the witness's refusal to testify. Mr. Hanners declined to withdraw the exhibit, stating that he needed it to be in the record of the case. I then stated that I was placing a protective order on the exhibit, that it was not to be disclosed to anyone by Mr. Hanners, Mr. Colin, or myself, and that it would be placed in the original hearings file in a sealed envelope. I also instructed Mr. Colin to return his copy of exhibit R-4 to me and he immediately complied.

"Upon review, the 13th sentence in the first paragraph of exhibit R-4 is the only statement in exhibit R-4 that can properly be considered impeachment evidence. Accordingly, I am reversing my ruling that admitted exhibit R-4 in its entirety and only admitting the 13th sentence in the first paragraph of exhibit R-4. This ruling will be included in the forthcoming Proposed Order. The remainder of the exhibit is not admitted as evidence.

"I HEREBY FIND AND ORDER THAT:

"a) Exhibit R-4 is a witness statement that was made in the expectation that it would not become a public record, based on the assurance of Respondent's authorized representative, Brian Hanners, that was given to the witness before the witness agreed to write exhibit R-4. The statement will be given no weight by the forum because the witness declined to appear to be cross-examined by the Agency at hearing. The statement is a confidential submission that contains information that may place the witness in serious and imminent danger of bodily harm if its contents became known and, as such, is a public record that is exempt from disclosure under ORS 192.502(4).

"b) Exhibit R-4 will be placed in a sealed envelope in the official record of the case. That envelope shall be labeled to indicate that the enclosed record is a confidential record exempt from disclosure under Oregon's public records law.

"c) To my knowledge, Mr. Brian Hanners, Mrs. Lisa Hanners, Mr. Rafael Colin are the only persons besides me who have seen exhibit R-4, other than the witness who wrote that document. **Mr. Brian Hanners, Mrs. Lisa Hanners, Mr. Rafael Colin are hereby expressly prohibited from disclosing the contents of exhibit R-4.**

"d) Exhibit R-4 shall remain in the possession of the Bureau of Labor and Industries for the duration required by statute."

The ALJ's ruling admitting the 13th sentence in the first paragraph of exhibit R-4 is overruled for reasons set out in the section of the Opinion discussing the Agency's exceptions. (Statement of ALJ; Entire Record; Ex. X16)

18) On December 22, 2016, 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. The Agency and Respondent filed separate motions for an extension of time to file exceptions that were GRANTED. The Agency and Respondent timely filed exceptions on January 19, 2017, that are discussed at the end of the Opinion section of this Final Order.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent was an Oregon domestic limited liability company engaged in the business of construction and remodeling. Respondent's registered agent and organizer was Brian L. Hanners. (Ex. A1)

2) Claimant Taylor was employed by Respondent to do construction labor at the agreed rate of $16.50 per hour. He started work on October 29, 2015. His last day of work was November 19, 2015. While employed by Respondent, he maintained a contemporaneous record of his hours worked on his personal calendar. (Testimony of Taylor; Exs. A2, A2(a))

3) Claimant Taylor was paid in full for all the work he performed from October 29 through November 13. Claimant Taylor worked 28.5 hours from November 16-19, broken down as follows: 6.5 hours on November 16, 7.5 hours on November 17, 7 hours on November 18, and 7.5 hours on November 19, minus two hours for bathroom breaks for which he was not entitled to be paid. In total, he earned $437.25 in gross wages (26.5 hours x $16.50 = $437.25). At the time of hearing, Respondent still had not paid Claimant Taylor anything for the hours he worked between November 16-19. (Testimony of Taylor; Exs. A2, A2(a))

4) ORS 652.150 penalty wages for Claimant Taylor are computed as follows: $16.50/hr. x 8 hours = $132.00 x 30 days = $3,960.00. (Testimony of Grosso; Exs. A5, A8)

5) Claimant Carter was employed by Respondent to do construction labor at the agreed rate of $14.00 per hour and maintained a contemporaneous record of her hours worked on her personal calendar. She started work on October 7, 2015. Her last day of work was October 27, 2015. By week, she worked the following hours: October 7-8: 13.5 hours; October 12-16: 31.75 hours; October 20-23: 30.5 hours; October 26-27: 11.75 hours. In all, she worked 87.5 straight time hours, earning $1,225.00 in gross wages (87.5 hours x $14.00 = $1,225). Respondent only paid Carter $1,092.00 in gross wages, leaving $133.00 in gross, unpaid, due and owing wages ($1,225.00 - $1,092.00 = $133.00) that had not been paid at the time of the hearing. (Testimony of Carter, Grosso; Exs. A14, A16)

6) ORS 652.150 penalty wages for Claimant Carter are computed as follows: $14.00/hr. x 8 hours = $112.00 x 30 days = $3,360.00. (Testimony of Grosso; Exs. A5, A8)

7) Claimant Abraham was employed by Respondent as a construction supervisor from October 12, 2015, through December 11, 2015, at the agreed rate of $18.00 per hour. Sometime in late November or early December, Abraham moved into Hanners's house with Hanners, Hanners's wife, and Hanners's child, where he stayed until he went on vacation on December 12, 2015. Abraham moved out of Hanners's house on December 25, 2015. (Testimony of Abraham; Ex. A11)

8) Respondent provided no record of the days and hours worked by Claimant Abraham. (Entire Record)

9) Claimant Abraham provided the Agency with time sheets showing the dates and hours that he worked, but the forum finds them unreliable based on internal inconsistencies in Abraham's testimony. (Testimony of Abraham; Ex. A11; Statement of ALJ)

10) Respondent provided no record of the wages paid to Abraham. Claimant Abraham provided the Agency with a statement of the amount he was paid but the forum finds that amount unreliable based on internal inconsistences in Abraham's testimony. (Testimony of Abraham; Ex. A11; Statement of ALJ)

11) Claimant Westwood was employed by Respondent as a construction supervisor from late July 2015 through December 29, at the agreed rate of $36,000 per year. While employed by Respondent, he maintained a contemporaneous record of his hours worked. (Testimony of Westwood; Ex. A9)

12) Westwood was paid in full for all his work up to October 26, 2015. His take home pay was approximately $1,100 every two weeks. (Testimony of Westwood)

13) On or around October 26, 2015, Hanners changed Westwood's pay to $720 per week. (Testimony of Westwood)

14) Westwood worked the following hours, per week, beginning Monday, October 26, 2015, until his last day of work on December 29, 2015 (the "wage claim period"):

October 26-30: 42 hours
November 2-6: 39.5 hours
November 9-13: 48 hours
November 16-20: 41 hours
November 23-27: did not work
November 30-December 5: 49 hours
December 7-12: 46.5 hours
December 14-17: 36.5 hours
December 21-25: did not work
December 28-29: 16 hours

In total, he worked 292 straight time hours and 26.5 overtime hours during the wage claim period. (Testimony of Westwood; Exs. A9, A13)

15) Calculated at $18.00/hr. ($720/wk. ÷ 40 hours = $18.00/hr.), Westwood earned $5,256.00 in straight time wages between October 26 and December 29, 2015 (292 hrs. x $18.00 = $5,526.00). Calculated at $27.00/hr. ($18.00 x 1.5 = $27.00), Westwood earned $715.50 in overtime wages between October 26 and December 29, 2015 (26.5 hrs. x $27.00 = $715.50). In total, he earned $5,971.50 between October 26 and December 29, 2015. (Testimony of Westwood; Exs. A9, A13; Calculation of ALJ)

16) The only pay Westwood received for the work he performed during the wage claim period was $1,100 in cash in December 2015 that Hanners gave him after Westwood's bank refused payment on Respondent's paycheck #1513 due to "insufficient funds." The gross amount of Westwood's pay covered by that paycheck would have been approximately $1,440.00. (Testimony of Westwood; Ex. A9, pp. 22, 23)

17) In total, Respondent owes Westwood $4,531.50 in gross earned and unpaid straight time and overtime wages. (Entire Record)

18) ORS 652.150 penalty wages for Claimant Westwood are computed as follows: $18.00/hr. ($720 ÷ 40 hours = $18.00/hr. x 8 hours = $144 x 30 days = $4,320.00. (Testimony of Grosso; Ex. A17)

19) An ORS 653.055 civil penalty for Claimant Westwood is computed as follows: $18.00/hr. ($720 ÷ 40 hours = $18.00/hr. x 8 hours = $144 x 30 days = $4,320.00. (Testimony of Grosso; Ex. A17)

20) On December 30, 2015, BOLI compliance specialist Virginia Grosso mailed BOLI's standard "Notice of Wage Claim" letter (WH-3) to Respondent in which she notified Respondent of Claimant Taylor's wage claim in the amount of $470.25. Among other things, the letter stated "IF THE CLAIM IS CORRECT, you are required to IMMEDIATELY make a negotiable check or money order payable to the claimant for the amount of wages claimed, less deductions required by law, and send it to the Bureau of Labor and Industries * * *." On February 9, 2015, Grosso mailed a second demand letter to Respondent requiring "immediate payment of the wages due." At the time of hearing, Respondent still had not paid any additional wages. (Testimony of Grosso; Exs. A3, A4)

21) On March 2, 2016, Grosso mailed a WH-3 to Respondent in which she notified Respondent of Claimant Carter's wage claim in the amount of $253.00. At the time of hearing, Respondent still had not paid any additional wages. (Testimony of Grosso; Ex. A15)

22) On February 9, 2016, Grosso mailed a WH-3 to Respondent in which she notified Respondent of Claimant Abraham's wage claim in the amount of $9,749.50,

plus $1,440.00 in vacation pay. At the time of hearing, Respondent still had not paid any additional wages. (Testimony of Grosso; Ex. A12)

23) On February 4, 2016, Grosso mailed a WH-3 to Respondent in which she notified Respondent of Claimant Westwood's wage claim in the amount of $4,660.00. At the time of hearing, Respondent still had not paid any additional wages. (Testimony of Grosso; Ex. A10)

24) All of the WH-3 letters sent out by Grosso included the following language:

> "IF THE CLAIM IS CORRECT, you are required to IMMEDIATELY make a negotiable check or money order payable to the claimant for the amount of wages claimed, less deductions required by law, and send it to the Bureau of Labor and Industries * * *."
>
> "IF YOU DISPUTE THE CLAIM, complete the enclosed 'Employer Response' form and return it together with the documentation which supports your position, as well as payment of any amount which you concede is owed the claimant to [BOLI] by [date]."

(Exs. A3, A4, A10, A12, A15)

Credibility Findings

25) WHD Compliance Specialist Grosso was a credible witness and the forum has credited her testimony in its entirety. (Testimony of Grosso)

26) Carter testified she worked 8 hours of overtime in her last week of work for Respondent, which was not borne out by her records. Aside from that, her testimony as to the hours she worked and amount she was paid was credible. (Testimony of Carter)

27) Claimants Taylor and Westwood were credible witnesses and the forum has credited their testimony regarding the hours they worked, their rate of pay and the amounts they were paid in its entirety. (Testimony of Taylor, Westwood)

28) Claimant Abraham was not a credible witness because of significant inconsistencies in his testimony, summarized below, regarding the days and hours he worked and the amount he was paid. He showed disrespect for the forum, as his testimony was liberally sprinkled with editorial comments, even after the ALJ instructed him to stop making such comments. He also persisted on arguing with Hanners during cross examination after the ALJ instructed him to stop.

- On the face of his wage claim, he stated he had not been paid from October 12 to December 25, 2015. In contrast, on a typed letter submitted with his wage claim, he stated he was initiating a wage claim "for unpaid wages from October 26th, 2015 to December 25th 2015."

- He testified that he worked "60+ hours" some weeks, whereas the time sheets he gave the Agency show that the most hours he ever worked in a week was 57.
- On cross examination, he testified that Hanners "didn't give me a single day off. * * * I worked Monday through Sunday." In contrast, the calendar he filled out for BOLI in conjunction with his wage claim shows that he only worked three out of nine Sundays and six out of eight Saturdays between October 11 and December 11. In comparison, Claimant Westwood, Respondent's other supervisor, only worked three Saturdays between October 26 and December 12 and no Sundays.
- He claimed two weeks paid vacation and testified that Hanners authorized his paid vacation, but testified that they never met to discuss his vacation.
- On redirect, he testified that Hanners never gave him cash instead of a paycheck for wages, then testified a minute later that Hanners had given him cash to replace a bounced paycheck.
- On his wage claim form, he stated that the only pay he had received from Hanners during his wage claim period was $1,100 in cash on November 5 to cover a bounced paycheck. When questioned by the ALJ, he testified that, in addition to the cash, he had been paid "3-4 checks at the most," getting "$1,000 something for each paycheck." He also testified, when questioned by the ALJ, that he had received net pay of around $4,000.

Based on Abraham's above-described demeanor and the numerous inconsistencies in Abraham's testimony, the forum gives no credit whatsoever to Abraham's testimony concerning the days and hours he worked and the amount he was paid. (Testimony of Abraham)

29) Brian Hanners's testimony was limited because of his failure to file a case summary on Respondent's behalf.[5] During the hearing, he repeatedly interrupted the proceedings with editorial comments, ignored the ALJ's instructions, argued with the ALJ after being asked to stop, and accused the ALJ and Agency's administrative prosecutor of lying and ganging up on him. Respondent's defense rested primarily on Hanners's unsubstantiated testimony that: (1) Claimants were all lying and acting in collusion against him; (2) three Claimants, particularly Abraham, engaged in unlawful activity during their employment with Respondent that affected their ability to be truthful; (3) Abraham was engaged in criminal activity throughout his employment with Respondent that made him an unreliable witness; and (4) Hanners could not adequately defend Respondent because the forum had refused to appoint an attorney to defend Respondent. Hanners claimed that he had a restraining order against Claimant Taylor, but offered no evidence of it other than his unsubstantiated claim. Considering Hanners's strident accusations related to Claimants' unlawful activity during their employment, particularly concerning Abraham, and the criminal actions Hanners alleged

[5] *See* Finding of Fact #12 – Procedural, for a summary of Hanners's explanations for why he did not provide a case summary and why the ALJ granted the Agency's motion to exclude Respondent's exhibits and testimony, except for evidence offered solely for impeachment purposes.

he has initiated against Claimants,[6] it makes no sense that Hanners (1) let Abraham live in a house with Hanners and his family if Hanners believed that Abraham was engaged in criminal activity, and (2) continued to employ Abraham and Westwood as supervisors. For the reasons stated above, the forum finds that Hanners was not a credible witness and has not relied on his testimony or the unsworn statements made in Respondent's answer and request for hearing. (Testimony of Hanners)

CONCLUSIONS OF LAW

1) At all times material herein, Respondent Coast 2 Coast Construction, LLC was a limited liability company doing business in Oregon that employed Claimants Taylor, Carter, Abraham, and Westwood. ORS 652.310.

2) BOLI's Commissioner has jurisdiction over the subject matter and Respondent herein. ORS 652.330, 652.332.040.

3) Respondent owes Claimant Taylor $437.25 in unpaid, due and owing wages and more than five days have elapsed since Taylor left Respondent's employment. ORS 652.140.

4) Respondent's failure to pay Claimant Taylor all unpaid, due and owing wages after Taylor left Respondent's employment was willful and Taylor is entitled to $3,960.00 in penalty wages. ORS 652.150.

5) Respondent owes Claimant Carter $133.00 in unpaid, due and owing wages and more than five days have elapsed since Carter left Respondent's employment. ORS 652.140.

6) Respondent's failure to pay Claimant Carter all unpaid, due and owing wages after Carter left Respondent's employment was willful and Carter is entitled to $3,360.00 in penalty wages. ORS 652.150.

7) Respondent owes Claimant Westwood $4,531.50 in unpaid, due and owing wages and more than five days have elapsed since Westwood left Respondent's employment. ORS 652.140.

8) Respondent's failure to pay Claimant Westwood all unpaid, due and owing wages after Westwood left Respondent's employment was willful and Westwood is entitled to $4,320.00 in penalty wages. ORS 652.150.

9) Respondent failed to pay Claimant Westwood all earned overtime wages and Westwood is entitled to a $4,320.00 civil penalty. ORS 653.055.

[6] As expressed in an unsworn statement contained in Respondent's answer and request for hearing.

10) Claimant Abraham is not entitled to any unpaid wages, penalty wages, or a civil penalty. ORS 652.140, ORS 652.140, ORS 653.055.

11) Under the facts and circumstances of this record, and according to the applicable law, BOLI's Commissioner has the authority to order Respondent to pay Claimants Carter and Taylor their earned, unpaid, due and payable wages and penalty wages, plus interest on all sums until paid. ORS 652.332.

12) Under the facts and circumstances of this record, and according to the applicable law, BOLI's Commissioner has the authority to order Respondent to pay Claimant Westwood his earned, unpaid, due and payable wages and penalty wages, plus interest on all sums until paid, plus a civil penalty based on Respondent's failure to pay him all earned overtime wages. ORS 652.332, ORS 653.055.

OPINION

This case involves wage claims filed by four claimants, each of whom was employed to perform construction duties for an agreed rate of pay. To show that Claimants are entitled to the alleged unpaid wages, the Agency must prove the following elements by a preponderance of the evidence: 1) Respondent employed Claimants; 2) The pay rate upon which Respondent and Claimants agreed; 3) The amount and extent of work Claimants performed for Respondent; and 4) Claimants performed work for which they were not properly compensated. *See, e.g., In the Matter of Christopher Lee Ruston and Christine M. Stahler,* 34 BOLI 56, 61 (2015).

Because the circumstances of each Claimant's employment and wage claim differ considerably, the forum analyzes each wage claim separately. A discussion of element #1 is unnecessary, as there is no dispute that Respondent employed each of the Claimants.

Claimant Carter

It is undisputed that Claimant Carter was employed at the agreed wage rate of $14.00 per hour. She credibly testified that she maintained a record of her hours worked on a personal calendar that was received into evidence and that the dates and hours she recorded were accurate. In contrast, Respondent offered no records to show the hours worked by Carter, claiming that Abraham had stolen them or, in the alternative, that the records were stored in boxes in a 5,000 square foot warehouse that Hanners did not have the time to access because he was homeless.[7]

In a wage claim case, it is primarily the employer's responsibility to keep records of the actual hours worked each pay period by each employee. At hearing, it is the employee's responsibility merely to show the amount and extent of work done as a matter of just and reasonable inference; once that is done, the burden shifts to the

[7] Respondent also offered the same reason for not offering any records to show the hours worked by Taylor and Westwood.

employer to show the precise amount of work or to negate the showing of the employee. If the employer fails to produce such evidence, wages may be awarded to the employee, even though the award is approximate. *See, e.g., In the Matter of Bruce Crisman, dba Nu West Painting Contractors*, 32 BOLI 209, 215 (2013). A claimant's credible testimony may be sufficient evidence to show the amount of hours worked by the claimant. *See, e.g., In the Matter of E. H. Glaab, General Contractor, Inc.,* 32 BOLI 57, 61 (2012). Here, Respondent produced no records and provided no evidence of Carter's work hours. In contrast, Carter maintained a contemporaneous record of her work hours that the forum found to be credible. The forum relies on that credible record to determine that Carter worked 87.5 straight time hours, earning $1,225.00 in gross wages.

The forum relies on two pay stubs produced by Carter and Carter's credible testimony that those pay stubs accurately reflect the wages she was paid to conclude that Respondent only paid Carter $1,092.00 in gross wages. This leaves $133.00 in gross, unpaid, due and owing wages that had not been paid to Carter at the time of the hearing.

Claimant Taylor

Claimant Taylor credibly testified that he was employed at the agreed wage rate of $16.50 per hour. Like Claimant Carter, Taylor credibly testified that he maintained a record of his hours worked on a personal calendar that was received into evidence and that the dates and hours recorded on his calendar were accurate. In contrast, Respondent offered no records[8] to show the hours worked by Taylor and no credible testimony to rebut Taylor's claim as to the hours Taylor worked, the amount he earned, and the amount he was paid. Based on this evidence, the forum concludes that Taylor worked 26.5 hours from November 16-19, earning $437.25 in gross wages, and has been paid nothing for that work.

Claimant Westwood

Claimant Westwood credibly testified that he was employed at the agreed wage rate of $720.00 per week during his wage claim period. Like Claimants Carter and Taylor, Westwood credibly testified that he maintained a written contemporaneous record of his hours that was received into evidence and that the dates and hours he recorded were accurate. In contrast, Respondent offered no records[9] to show the hours worked by Westwood and no testimony to rebut Westwood's claim as to the hours Westwood worked, the amount he earned, and the amount he was paid.

Westwood credibly testified that he worked 292 straight time hours and 26.5 overtime hours during his wage claim period, earning $5,256.00 in straight time wages

[8] *See* fn. 7.

[9] *Id.*

and $715.50 in overtime wages. He also credibly testified that he was only paid $1,100.00in net wages, which the forum has determined was actually $1,440.00 in gross wages, leaving $4,531.50 in gross earned and unpaid wages.

Claimant Abraham

Respondent failed to provide any records to show the amount and extent of work performed by Abraham. The Agency relied on Abraham's records and testimony to prove its case. Due to Abraham's lack of credibility, the Agency failed to produce any evidence from which "a just and reasonable inference may be drawn." *Crisman,* at 215. Accordingly, despite Respondent's failure to produce any credible evidence, Abraham's claim fails because the forum has no way of determining the exact or approximate number of hours that Abraham worked or amounts he was paid.

Penalty Wages

An employer is liable for penalty wages when it willfully fails to pay any wages or compensation of any employee whose employment ceases. Willfulness does not imply or require blame, malice, 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. *See, e.g., In the Matter of Giants, Inc., George T. Comalli, Hollywood Fitness, LLC, and Hollywood Fitness Center, LLC,* 33 BOLI 53, 56 (2014). Penalty wages can accrue for up to 30 days after wages are due if notice is given and the wages are not paid for that full 30 days. *In the Matter of Charlene Marie Anderson dba Domestic Rescue,* 33 BOLI 253, 261 (2014).

There is no credible evidence in the record to suggest that Hanners, Respondent's agent and the person responsible for paying Claimants, was unaware of the hours they worked[10] or that he was not acting as a free agent in deciding not to pay Claimants Taylor, Carter, and Westwood all their earned wages. The Agency provided documentary and testimonial evidence to prove that its investigative staff made the written demand contemplated by ORS 652.150(2) for Claimants' wages and the Agency's OOD repeated this demand. Because Respondent failed to pay Claimants Taylor, Carter, and Westwood their unpaid wages after receiving the notices, the forum computes penalty wages at the maximum rate set out in ORS 652.150(1), as set out in Findings of Fact ## 4, 6, 18 -- The Merits.

[10] It is an employer's duty to keep an accurate record of the hours worked by its employees. *See, e.g., In the Matter of Computer Products Unlimited, Inc.,* 31 BOLI 209, 225 (2011).

ORS 653.055 Civil Penalty for Westwood

ORS 653.055 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 652.150."

Summarized, an employer who does not pay an employee the minimum wage or overtime wages is liable to a civil penalty computed in the same manner as ORS 652.150 penalty wages. In this case, the Agency contends that Claimant Westwood is entitled to a civil penalty based on Respondent's failure to pay him overtime wages. Westwood earned $715.50 in overtime wages for his work between October 26 and December 12, 2015. The only pay he received for that work was $1,100.00 net wages he received in cash, which was only enough to cover the wages he earned between October 26 and November 6. He worked overtime during four subsequent weeks[11] and was paid nothing at all for that work. Accordingly, the forum concludes that Westwood was not paid for the overtime he worked after November 6. As a result, he is entitled to an ORS 653.055 civil penalty in the amount of $4,320.00.

Exceptions

A. Respondent's exceptions.

Respondent's exceptions include extensive argument by Brian Hanners, Respondent's authorized representative, along with written, signed witness statements by Gene Hanners, Brian Hanners's father, and Lisa Hanners, Brian Hanners's wife.

The forum declines to consider the statements by Gene and Lisa Hanners. Both persons could have been called as witnesses at the hearing by Respondent, had Respondent submitted a case summary that listed them as witnesses. Respondent's failure to do that forecloses Respondent's ability to have their post-hearing statements considered.

Brian Hanners raised the following issues in his statement on Respondent's behalf:

- A mistrial should be granted.

[11] *See* Finding of Fact #14 – The Merits.

- After the hearing, Claimant Abraham "hacked into" Abraham's mother's Facebook account and "put inflammatory and harassing messages on the Coast 2 coat Coast Construction website and Facebook pages" and made threatening phone calls to Hanners.
- The ALJ's denial of Respondent's request for a continuance was prejudicial to Respondent.
- BOLI was required to appoint an attorney for Respondent since Respondent could not afford one and Respondent was prejudiced as a result of BOLI's failure to do so.
- Claimants perjured themselves at hearing.
- The contested case hearing process and procedures used by the ALJ was unfair to Respondent.
- BOLI failed to protect Hanners and his witnesses by holding the hearing in an unsecured building instead of in a court room at the Multnomah County Courthouse.
- BOLI's administrator prosecutor engaged in misbehavior.

Hanners also requested an internal investigation of BOLI's actions regarding its investigation of the Claimants' wage claims and the contested case proceeding, as well as a transcript of the contested case proceeding.

Respondent's exceptions are **OVERRULED**. The forum does not prepare a transcript of the hearing proceedings until such time as an appeal of the Final Order is filed with the Oregon Court of Appeals. However, the forum will provide a digital recording of the proceedings to Respondent if Respondent makes a written request for copy of the recording.

B. The Agency's Exceptions.

1. The Agency excepts to Proposed Finding of Fact #15 -- Procedural that contains a discussion of the circumstances that led the forum to adjourn the hearing on the first day of hearing. In particular, the Agency objects to the characterization of Mr. Hanners as being "unable to continue participating in the hearing" and asks that the forum substitute the word "unwilling" for "unable." The Agency also excepts to having been excluded from the conversation between the ALJ, Officer Kendoll, and Hanners that concluded with the hearing being adjourned and the likelihood "that statements made by Mr. Hanners may have gone to either the facts at issue in the case or the credibility of witnesses, including Mister Hanners himself."

This was not an ordinary hearing. The forum retained the services of the Oregon State Police based on Mr. Hanners's allegations that Claimants Abraham and Taylor had threatened to kill him. Despite the presence of Officer Kendoll, Mr. Hanners was palpably upset at the ALJ and BOLI's administrative prosecutor Colin when Claimant Abraham appeared in person to testify. Mr. Hanners accused both of misconduct in letting Abraham appear in person and stated that he was going to leave the hearing because of Abraham's presence. Under the circumstances, the ALJ concluded, based

on Hanners's emotional demeanor, that it would be virtually impossible to inform Hanners of the consequences of his leaving and to discuss alternatives without taking him aside. It was within the forum's discretion to take that action to maintain order and to conduct a fair hearing. Regrettably, in the heat of the moment, the ALJ did not think to record the conversation. However, no statements made by Hanners in that conversation were considered by the ALJ in writing the proposed order or in this final order. The only statements made by Hanners at hearing that have been considered are those he made while testifying under oath.

In conclusion, the Agency's exception is **OVERRULED**.

2. The Agency objects to the ALJ's characterization of a potential witness in Proposed Finding of Fact #16 – Procedural and to the ALJ's receipt of one sentence of Exhibit R4 into evidence as impeachment evidence, along with the ALJ's statement that no weight would be given to that evidence.[12] The Agency's objection is based on the fact that no foundation was laid and the Agency was not given an opportunity to cross examine the witness. The Agency's exception is **GRANTED** based on the grounds set forth in the Agency's exception and the ALJ's ruling admitting one sentence of Exhibit R4 is rescinded.

3. The Agency excepts to the forum's failure to award amounts reflecting "Respondent's unlawful deductions from wage claimant's paychecks" and asks that the forum award "actual damages or $200, whichever is greater" to Claimants pursuant to ORS 652.615. There are two possible remedies for a violation of ORS 652.610(4) – a civil penalty under ORS 652.900 or "actual damages or $200" pursuant to a private right of action under ORS 652.615. The Agency's amended OOD did not ask for a civil penalty under ORS 652.900 and the remedy available under ORS 652.615 can only be obtained through a private right of action in court. The Agency's exception is **OVERULED**.

4. The Agency excepts to the ALJ's conclusion as to the unpaid wages due to Claimant Carter, asserting that Carter was owed wages for an extra hour for each day that she worked based on her testimony that "she would arrive to her shifts an hour early, every shift, and not get paid for these early hours worked." The ALJ concluded that Claimant Carter was owed the wages sought in the Agency's amended OOD. The hours that those wages are based on are set out in Exhibit A14 on Carter's handwritten calendar of hours worked. Carter specifically testified that page 8 of Exhibit A14, her handwritten calendar of hours worked that submitted with her wage claim,[13] accurately reflects the hours she worked and that Exhibit A16, Grosso's spread sheet showing the hours Carter worked and the wages she was paid and still owed, "seems a fair calculation." Furthermore, the Agency's exception is based on Carter's testimony that

[12] Finding of Fact #17 – Procedural has been amended to include an extended discussion of the circumstances surrounding the witness and the offer and admission of Exhibit R4.

[13] The Agency's WH-127 form.

she started work before 9 a.m. every day, as early as 8 a.m., and Carter's personal calendar included in Exhibit A14, which she used to complete the WH-127, shows that she started work at 8 a.m. or 8:30 a.m. every day. The Agency's exception is **OVERRULED**.

5. The Agency excepts to the ALJ's conclusion that Claimant Abraham was not a credible witness, alleging it was not "fact-specific" and based entirely on demeanor. The Agency's argument stands in marked contrast with Finding of Fact #28 – The Merits, the ALJ's finding discussing Abraham's credibility. That finding recites a number of specific facts, primarily inconsistencies in Abraham's own testimony, that led the ALJ to conclude that Abraham was not credible, as well as noting Abraham's demeanor. The Agency's exception is **OVERRULED**.

6. The Agency also excepts to the charges related to Claimant Abraham being dismissed. The Agency's exception is **OVERRULED** for the reasons set out in the Opinion discussing Abraham's wage claim.

ORDER

1. NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **Coast 2 Coast Construction LLC** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, the following:

A. A certified check payable to the Bureau of Labor and Industries in trust for Claimant Evelyn Carter in the amount of THREE THOUSAND FOUR HUNDRED and NINETY-THREE DOLLARS ($3,493.00), less appropriate lawful deductions, representing $133.00 in gross earned, unpaid, due and payable wages and $3,360.00 in ORS 652.150 penalty wages, plus interest at the legal rate on the sum of $133.00 from December 1, 2015, until paid, and interest at the legal rate on the sum of $3,360.00 from January 1, 2016, until paid.

B. A certified check payable to the Bureau of Labor and Industries in trust for Claimant Jason Taylor in the amount of FOUR THOUSAND THREE HUNDRED and NINETY-SEVEN DOLLARS and TWENTY-FIVE CENTS ($4,397.25), less appropriate lawful deductions, representing $437.25 in gross earned, unpaid, due and payable wages and $3,960.00 in ORS 652.150 penalty wages, plus interest at the legal rate on the sum of $437.25 from December 1, 2015, until paid, and interest at the legal rate on the sum of $3,960.00 from January 1, 2016, until paid.

C. A certified check payable to the Bureau of Labor and Industries in trust for Claimant John Westwood in the amount of THIRTEEN THOUSAND ONE HUNDRED SEVENTY-ONE DOLLARS and FIFTY CENTS ($13,171.50), less appropriate lawful deductions, representing $4,531.50 in gross earned, unpaid, due and payable wages, $4,320.00 in ORS 652.150 penalty wages, and $4,320.00 as an ORS 653.055 civil penalty, plus interest at the legal rate on the

sum of $4,531.50 from January 1, 2016, until paid, and interest at the legal rate on the sum of $8,640.00 from February 1, 2016, until paid.

2. The charges related to Kevin Abraham are hereby DISMISSED.

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In the Matter of

GREEN THUMB LANDSCAPE AND MAINTENANCE, INC. aka GREEN THUMB LANDSCAPING aka GT GENERAL CONTRACTING and GREEN THUMB LLC aka GREEN THUMB CONTRACTING, CJ CONSTRUCTION, INC.,[1] and SCOTT FRIEDMAN, individually, and JENNIFER FRIEDMAN, individually,

Case Nos. 62-15 & 15-16
Amended Final Order of Commissioner Brad Avakian
Issued February 14, 2017

SYNOPSIS

The Agency's two charging documents alleged that Respondents committed numerous violations of Oregon's prevailing wage rates laws on two public works projects and sought to assess $354,514.70 and $15,000, respectively, for Respondents' alleged violations on the two projects and to place all Respondents on the Commissioner's list of contractors ineligible to receive any contract or subcontract for public works for a period of three years from the date of publication of their names on that list ("debarment").

On the first project (case no. 62-15), the forum found that Respondents Green Thumb Landscape and Maintenance, Inc. ("GTM") and Green Thumb LLC ("GTL") were joint employers and violated ORS 279C.840(1), OAR 839-025-0035, OAR 839-025-0040, ORS 279C.845, OAR 839-025-0010, ORS 279C.850, OAR 839-025-0030, ORS 653.045(1)&(2), OAR 839-020-0083, ORS 653.261, and OAR 839-020-0030 and assessed $36,852.03 in civil penalties against GTM and GTL. The forum also found that GTM and GTL intentionally failed to pay three workers the prevailing wage rate and that Scott Friedman and Jennifer Friedman were corporate officers responsible for the nonpayment and imposed debarment on all four Respondents, plus Green Thumb Landscaping and GT General Contracting, businesses in whom GTM and GTL have a financial interest, for three years.

On the second project (case no. 15-16), the forum found that GTM and CJ Construction ("CJ") were joint employers who committed three violations of ORS 279C.845 and OAR 839-025-0010 and assessed $6,500 in civil penalties. The forum found that these three certified payroll violations did not constitute intentional falsification and that GTM and CJ did not fail to pay their workers the prevailing wage

[1] CJ Construction is a Respondent in case no. 15-16 only.

rate and did not impose debarment on Respondents. The charges against GTL and both Friedmans were dismissed.

Although CJ did not intentionally fail to pay its workers the prevailing wage rate or intentionally falsify certified payroll reports, CJ was debarred pursuant to ORS 279C.860 and OAR 839-025-0085 because Jennifer Friedman, a person debarred in case no. 62-15, has a financial interest in CJ.

Case nos. 62-16 and 15-16 came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries ("BOLI") for the State of Oregon. The hearing was held on June 21-24, 2016, at the Workers' Compensation Board offices, located at 2601 25th Street SE, Suite 150, Salem, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by administrative prosecutor Cristin Casey, an employee of the Agency. Respondents were represented by Michael Petersen, attorney at law. Respondent Scott Friedman ("S. Friedman) was present throughout the hearing and Respondent Jennifer Friedman ("J. Friedman") was present through part of the hearing.

The Agency called Michael Fevurly, Monique Soria-Pons, BOLI Prevailing Wage compliance specialists, and Arturo Orozco, former employee of Green Thumb, as witnesses. Respondents called S. Friedman, J. Friedman, Stephanie Wiltsey, and Jared Halter (by phone) as witnesses. The forum received into evidence:

a) Administrative exhibits X1 through X21 and X25-X26, X22-24[2];
b) Agency exhibits A1 through A79;
c) Respondents' exhibits R1 through R47.

Having fully considered the entire record in this matter on reconsideration under OAR 137-003-0080(6), I, Brad Avakian, Commissioner of the Bureau of Labor and Industries, hereby make the following Amended Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact,[3] Amended Conclusions of Law, Amended Opinion, and Amended Order.

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[2] X1-X21 were submitted or generated before the hearing. X25 and X26 are Respondents' answers and requests for hearing that were part of the record, but mistakenly not given a number before the hearing. X22 is the ALJ's email to Respondents' counsel and the Agency administrative prosecutor requesting clarification of the prehearing stipulations. X23 is the draft addendum to Stipulations. X24 is the jointly signed Addendum to Stipulations that the ALJ requested in X22.

[3] The Ultimate Findings of Fact required by OAR 839-050-0370(1)(b)(B) are subsumed within the Findings of Fact – The Merits.

AMENDED FINDINGS OF FACT – PROCEDURAL

1) The NOI sought to assess civil penalties against GTM and GTL in the amount of $354,514.70 and to place GTM, GTL, both Friedmans, and any firm, corporation, partnership, LLC, or association in which Respondents had a financial interest on the Commissioner's list of contractors ineligible to receive any contract or subcontract for public works for a period of three years from the date of publication of their names on that list.[4] (Ex. X2)

2) On July 15, 2015, Respondents, through attorney Michael Petersen, filed an answer and request for hearing to the NOI in case no. 62-15. Respondents denied all the substantive allegations, alleged mitigating factors in the event the Commissioner determined Respondents had committed a violation, and alleged that the Agency had "failed to commence this proceeding within the applicable statute of limitations set forth in ORS 12.110(2). (Ex. X25)

3) On June 13, 2016, the Agency filed an amended NOI. Summarized, the Agency's amended NOI in case no. 62-15 alleged the following:

a. GTM and GTL performed work as subcontractors and joint employers whose workers provided manual labor on The Fields Neighborhood Park ("Fields"), a public works project, in 2012 and 2013.

b. GTM and GTL failed to pay the prevailing wage rate ("PWR") to ten workers on the Fields project, underpaying them by $20,343.70, thereby violating ORS 279C.840(1), OAR 839-025-0035, and OAR 839-025-0040, and are liable for $9,514.70 in civil penalties, calculated at two times the amount of the unpaid wages or $3,000, whichever is less.

c. On eight occasions, GTM and GTL willfully failed to pay overtime ("OT") for hours over 40 in a week on non-PWR projects to four workers, thereby violating ORS 653.261 and OAR 839-020-0030, and are liable for $8,000 in civil penalties, calculated at $1,000 per violation.

d. GTM and GTL failed to pay OT for work performed at the Fields and other PWR projects to nine workers for 25 weeks, thereby violating ORS 279C.540(1)&(2) and OAR 839-025-0050(1)&(2) and are liable for $125,000 in civil penalties, calculated $5,000 per violation.

e. GTM and GTL failed to give written notice to workers at the Fields project of their work schedules and changes to those schedules, thereby violating OAR 839-025-0034, and are liable for a civil penalty of $1,000.

[4] In the rest of this Order, the forum refers to placement on the list of ineligibles as "debarment" or being "debarred."

f. GTM and GTL failed to submit accurate and/or complete certified statements ("CPRs") on the Fields project on nine occasions, thereby violating ORS 279C.845(1)-(3) and OAR 839-025-0010(1)-(3), and are liable for $45,000 in civil penalties, calculated at $5,000 per violation.

g. GTM and GTL failed to timely deliver or mail CPRs to the contracting agency on the Fields project on 30 occasions for the weeks ending 8/4/12, 8/11/12, 8/18/12, 11/10/12, 11/17/12, 11/24/12, 12/1/12, 12/8/12, 12/15/12, 12/22/12, 12/29/12, 1/5/13, 1/12/13, 1/19/13, 1/26/13, 2/2/13, 2/9/13, 2/16/13, 2/23/13, 3/2/13, 3/9/13, 3/16/13, 3/23/13, 3/30/13, 4/6/13, 4/13/13, 4/20/13, 4/27/13, 5/4/13, and 8/3/13, thereby violating ORS 279C.845(4) and OAR 839-025-0010(3), and are liable for $150,000 in civil penalties, calculated at $5,000 per violation.

h. GTM and GTL willfully failed to make records available for inspection to the Commissioner or the Commissioner's designee as required, thereby violating ORS 653.045(1), (2), and OAR 839-020-0083(3), and are liable for a $1,000 civil penalty.

i. GTM and GTL failed to timely make available records to the Agency necessary to the determination of whether the PWR was paid on the Fields project, thereby violating ORS 279C.850(1)&(2) and OAR 839-025-0030(1)-(3), and are liable for a $5,000 civil penalty.

j. GTM and GTL failed to post the applicable PWRs on the Fields project, thereby violating ORS 279C.840(4) and OAR 839-025-0033, and are liable for a $5,000 civil penalty.

k. GTM and GTL should be debarred because they: (1) intentionally failed to pay the PWR to their workers on the Fields project; (2) intentionally failed or refused to post the PWR; and (3) intentionally falsified information contained in CPRs submitted under ORS 279C.845.

l. S. and J. Friedman should be debarred because they are corporate officers of GTM and GTL who were each responsible for GTM's and GTL's intentional failure to pay the PWR to workers on the Fields project, intentional failure or refusal to post the PWR, and intentional falsification of information contained in CPRs under ORS 279C.845.

(Ex. X18)

4) On July 17, 2015, the forum issued a Notice of Hearing setting a hearing date of September 15, 2015, in Salem, Oregon. Together with the Notice of Hearing, the forum sent a copy of the Agency's amended NOI, a document entitled "Summary of Contested Case Rights and Procedures" containing the information required by ORS 183.413, a document entitled "Servicemembers Civil Relief Act (SCRA) Notification, and a copy of the forum's contested case hearings rules, OAR 839-050-000 to 839-050-0445. (Ex. X2)

5) On July 21, 2015, the ALJ granted Respondents' unopposed motion to postpone the hearing based on a pre-existing conflict in Mr. Petersen's schedule. (Ex. X13)

6) On October 26, 2015, the Agency filed an unopposed motion to postpone the hearing based on new charges it expected to file against Respondents. That same day, the ALJ granted the motion and reset the hearing to begin on February 29, 2016. (Exs. X7, X8)

7) On December 8, 2015, the Agency issued a Notice of Intent to Place on List of Ineligibles and Assess Civil Penalties ("NOI") in case no. 15-16 against GTM, GTL, CJ Construction, Inc. ("CJ"), and S. and J. Friedman. The NOI sought to assess civil penalties against GTM, GTL, and CJ in the amount of $15,139.94 and to debar GTM, GTL, CJ, both Friedmans, and any firm, corporation, partnership, LLC, or association in which Respondents had a financial interest for a period of three years from the date of publication of their names on that list. (Ex. X11)

8) Summarized, the Agency's NOI in case no. 15-16 alleged the following:

a) GTM, GTL, and CJ performed work as contractors and joint employers whose workers provided manual labor on Elmonica Rail Facility Metal Storage Building project ("Elmonica"), a public works project, in 2015.

b) GTM, GTL, and CJ failed to pay the prevailing wage rate to three workers on the Elmonica project, underpaying them by $69.92, and are liable for $139.84 in civil penalties.

c) GTM, GTL, and CJ failed to submit accurate and/or complete certified statements on the Elmonica project on three occasions and are liable for $15,000 in civil penalties.

d) GTM, GTL, and CJ should be debarred because they: (1) intentionally failed to pay the prevailing rate of wage to their workers on the Elmonica project; and (2) intentionally falsified information contained in certified statements submitted under ORS 279C.845.

e) S. and J. Friedman should be debarred because they are corporate officers of GTM, GTL, and CJ who were each responsible: (1) for the intentional failures by GTM, GTL, and CJ to pay the prevailing rate of wage to workers on the Elmonica project; and (2) intentional falsification of information contained in certified statements submitted under ORS 279C.845 by GTM, GTL, and CJ.

(Ex. X15)

9) On December 28, 2015, Respondents, through attorney Michael Petersen, filed an answer and request for hearing to the NOI in case no. 15-16. (Ex. X26)

10) On January 5, 2016, the Agency moved to consolidate case nos. 62-15 and 15-16 because they involved the same Respondents and had common questions of fact and law. On January 7, 2016, Respondents filed an unopposed motion to postpone the hearing based on pending discovery issues that involved gathering relevant documents from a third party. The ALJ issued an order resetting the case to begin on June 21, 2016, that also noted that a separate proposed order would be issued for each case to avoid confusion.[5] (Ex. X12)

11) On June 20, 2016, the Agency and Respondents filed written stipulations to a number of facts. After the hearing, at the ALJ's request for additional clarification as to the meaning and intent of the stipulations, the Agency and Respondents filed an addendum to their original stipulations. (Exs. X20, X22-X24)

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

13) Jazmine Rodriguez was subpoenaed as a witness by Respondents but failed to appear at hearing to testify. Respondents did not ask the forum to take any action against Rodriguez based on her failure to honor the subpoena. (Statement of Petersen; Ex. X21; Statement of ALJ)

14) On November 2, 2016, 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. The Agency and Respondents timely filed exceptions. In response to the exceptions, the forum made changes in the Findings of Fact, Conclusions of Law, Opinion, and Order and issued a Final Order on January 26, 2017.

15) On February 8, 2017, the Agency's Administrative Prosecution Unit filed a motion for reconsideration in which it asked that the Commissioner reconsider his Final Order and order that CJ be placed on the list of contractors and subcontractors ineligible to receive public works contracts. On February 14, 2017, Respondents filed an unopposed motion for an extension of time to respond to the Agency's motion. The Commissioner chose not to address the Agency's motion, but elected to reconsider the Final Order in this Amended Final Order. Consequently, Respondents' motion is moot.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, GTM was an active Oregon corporation with a principal place of business at "4400 Dallas Highway, Salem, Oregon 97304," with a mailing address of "P.O. Box 5172, Salem, OR 97304." GTM's corporate officers are Scott Friedman, president, and Jennifer Friedman, secretary. GTM's CCB license number, first issued on October 2, 1998, is 131659. (Exs. A1, A6)

[5] While drafting the Proposed Orders, the forum concluded that one Proposed Order, instead of two, will provide more clarity, and therefore issued only one Proposed Order for both cases.

2) From 2002 to the time of hearing, Green Thumb Landscaping was registered with the Corporation Division as an assumed business name ("abn") of GTM, with a mailing address of "P.O. Box 5172, Salem, OR 97304." Green Thumb Landscaping was registered as an abn for GTM because "it is easier to write" than Green Thumb Landscape and Maintenance, Inc. (Testimony of S. Friedman; Ex. A2)

3) From October 16, 2014, to the time of hearing, GT General Contracting was registered with the Corporation Division as an abn of GTM, with a mailing address of "P.O. Box 5172, Salem, OR 97304." (Ex. A3)

4) GTL was an active Oregon limited liability company from the time it was organized in 2002 until December 13, 2013, when it was administratively dissolved. It had the same principal place of business and mailing address as GTM. J. Friedman was listed as GTL's registered agent and member with the Oregon Secretary of State's Corporation Division. It was created with the idea of "doing employee leasing." GTL processed all the payroll and payment of taxes and withholding for GTM. (Testimony of S. Friedman; Ex. A4)

5) From 2003 until November 22, 2013, Green Thumb Contracting was registered with the Corporation Division as an abn of GTL, with J. Friedman listed as its authorized representative and the same mailing address as GTM. (Ex. A5)

6) In 2012, GTM and GTL[6] were "interchangeable" entities. (Testimony of S. Friedman)

7) Respondent CJ is an Oregon domestic business corporation that filed its articles of incorporation with the Corporation Division on February 26, 2014, with J. Friedman listed as CJ's registered agent, president, and secretary. CJ was incorporated at the request of GTM's bonding company to "uniquely separate the employee groups" so that the bonding company could see distinct profit and loss statements on construction projects that were separate from landscape projects. CJ focuses primarily on public, construction-oriented projects. In S. Friedman's words, CJ handles "our general contracting and construction labor." (Testimony of S. Friedman; Exs. X11, A78; Respondents' Answer)

1. The Fields Project

8) On November 28, 2011, the City of Portland ("Portland") first advertised "The Fields Neighborhood Park" project ("Fields") for bid. On March 2, 2012, a contract was awarded to R&R General Contractors, Inc. ("R&R") in the amount of $3,083,195.00. "Green Thumb Landscape" was named on "First-Tier Subcontractor Disclosure" form

[6] Hereafter, the forum uses the term "Green Thumb" to refer jointly to GTM and GTL except when the forum finds it necessary to identify GTM and GTL separately for clarity's sake.

submitted to BOLI by R&R for the Fields project, with a dollar value of $414,000 assigned to their work. (Ex. A7)

9) R&R asked Green Thumb bid as a subcontractor on the landscape part of the Fields project. S. Friedman reviewed the project specifications and put together a bid on Green Thumb's behalf. While preparing the bid, S. Friedman made an effort to determine the appropriate labor classifications based on the project specifications, his prior experience on PWR jobs, and BOLI's publication containing definitions of covered occupations for public works contracts in Oregon. In making Green Thumb's bid, S. Friedman determined that the work performed by Green Thumb's workers would fit into the "Landscape Laborer/Technician" ("LL/T") classification in BOLI's July 1, 2011, publication and used the PWR rate for the LL/T classification to calculate Green Thumb's labor costs. (Testimony of S. Friedman; Exs. R2, R3)

10) BOLI publishes a booklet containing definitions of covered occupations for public works contracts in Oregon. The booklet is published twice a year when rates change and is available online or in hard copy. BOLI's booklet that was effective July 1, 2011, contained the following relevant definitions:

"**3. Bricklayer/Stonemason**

"**Primary Purpose**: Lays out, lays, cuts, installs, and finishes all brick, * * * precast units, concrete, * * * to construct or repair walls, partitions, stacks, furnaces, or other structures.
"Sets stone to build stone structures such as piers, walls, and abutments, and lays walks, curbstones, * * * for * * * floors. * * *

"* * * * *
"**Typical Duties**:

"* * * * *
"Spreads soft layer of mortar that serves as based in binder for brick or block using trowel.
"Breaks or cut bricks or blocks to size, using power or hand tools.
"Shapes stone preparatory to setting, using a chisel hammer and other shaping tools.
"Applies mortar to end of brick or block and positions same in mortar bed.
"Spreads mortar over stone and foundation with trowel and sets stone placed by hand or with the aid of a crane.
"Removes excess mortar from face using trowel.
"Taps brick or block with trowel to level, align and embed in mortar, allowing for specified thickness of joint.
"Aligns stone with plumb line and finishes joints between stone with a pointing trowel.
"* * * * *
"Finishes mortar between brick and block of pointing tool or trowel.

"* * * * *
"Claims excess mortar or grout from surface of stone using sponge, brush, water, or acid."

"**21. Landscape Laborer/Technician**
"**Primary Purpose**: Beautifies plots of land by changing natural features through the addition or modification of lawns, trees, and bushes.

"**Typical Duties**:

Group 1:

"Performs seeding, planting, mulching, land clearing, and topsoil spreading by the use of hand tools.
"Mixes and spreads groundcovers, soil amendments, decorative bark or decorative rock.
"Using hand tools and power equipment with less than 90 horsepower, clears land of surface vegetation, trenches to a maximum depth of three feet below finished grade, hydroseeds, and applies chemicals and fertilizers.
"Tills, spreads, and grades topsoil.
"Establishes lawns and plants trees, shrubs, and plants.
"Installs, services, or replaces aboveground and underground lawn or landscape irrigation systems.
"Installs French drains or other subsurface water collection systems to a maximum depth of three feet below finished grade.
"Installs, services, or repairs low-voltage outdoor landscape lighting irrigation valves.
"Assembles or places pre-manufactured and custom fabrication trelliswork, play equipment, benches and picnic tables."

The booklet also included a "Cross Reference of Covered Occupations (2011)" that described specific job duties and the trade classification they fall within to help employers determine the appropriate trade classification for specific types of work. The "Cross Reference" further explained the appropriate trade classification for workers setting pavers as follows:

Paver setting – if buttered with mortar first	Bricklayer/Stonemason
Paver setting – if set in sand with no mortar	Laborer -- Group 1

(Testimony of Soria-Pons, S. Friedman; Ex. A7, A77)

11) Prior to work on the Fields project, GTM had installed pavers on residential jobs, setting them in a sand base. (Testimony of S. Friedman)

12) Green Thumb's bid for the Fields project, dated 1/10/12, included the following language:

"**Unit Paver Detail**:

"1) Stepstone Modular Concrete pavers, mortar set with edging
"2) Stone Paving Columbia River special pavers, mortar set, no edging"

(Testimony of Soria-Pons; Ex. A50)

13) On March 23, 2012, R&R and Green Thumb signed a subcontract to perform work on the Fields Project for the amount of $417,347.00. S. Friedman signed the subcontract on behalf of Green Thumb. Attachment "A" to Green Thumb's subcontract with R&R included a detailed description of the work to be performed by Green Thumb and descriptions and line item prices for the work. The line items included the following entries related to "pavers":

Line Item	Contract Amount
Pre-Cast Concrete Paver Labor	$10,492.00
Pre-Cast Concrete Paver Material	$28,730.00
Stone Pavement Labor	$2,511.00
Stone Pavement Material	$5,702.00

Included in the descriptions of the work to be performed was the following:

"**Unit Pavers**:
1) Stepstone Modular Concrete pavers, mortar set with edging
2) Capstone Paving Columbia River Special Pavers, mortar set, no edging"

(Testimony of Soria-Pons, S. Friedman; Exs. A49, R34)

14) The prevailing wage rates in effect as of July 1, 2011, applied to the Fields project. In pertinent part, those rates were:

Trade	**Base Hourly Rate**	**Fringe Rate**
Bricklayer/Stonemason	$32.75	$15.56
Laborer Group 1	$25.25	$11.85
Landscape Laborer/Technician	$16.39	$ 3.42

(Testimony of Soria-Pons; Ex. A7)

15) A preconstruction meeting was held before work on the Fields project commenced that was attended by S. Friedman, representatives of the City of Portland, R&R, and the other subcontractors. In conjunction with discussion about the City's contractual requirement with R&R for apprentices on the job, there was a discussion about the classification of Respondents' workers in which it was determined that the

work to be done with pavers was not "apprenticeable"[7] work. (Testimony of S. Friedman)

16) During the Fields project, Green Thumb had approximately 40 employees who worked on various projects, including the Fields project. During the performance of the Fields project, some of Green Thumb's workers worked at the Fields project and on non-PWR jobs in the same weeks. (Testimony of S. Friedman; Entire Record)

17) During Green Thumb's work on the Fields project, Green Thumb had two payroll systems, one for PWR jobs and one for non-PWR jobs. (Testimony of S. Friedman)

18) During Green Thumb's work on the Fields project, Jared Halter was Green Thumb's onsite foreman during most of the project. Green Thumb had a job trailer onsite. Halter opened the trailer every morning and held meetings inside the trailer with workers to give work instructions for the day. Workers ate lunch in the trailer and also went into the trailer every day to get job supplies. Green Thumb's work schedule was posted on the wall inside the trailer. (Testimony of Halter)

19) Green Thumb did not keep timecards on the Fields project, but employees were given timecards to note their hours for their own private record. Employees were not asked to turn these in and Green Thumb did not use them as a basis for computing their pay. (Testimony of S. Friedman)

20) On the Fields project, Green Thumb's jobsite foreman completed a "Daily Job Site Report" each day that listed the employees who worked on the project that day, the hours they worked, and summarized the work done each day. For each day's work, the hours worked by Green Thumb's employees were recorded in Green Thumb's computer system in one of two ways – (1) Halter, onsite foreman, entered the hours from the Report into a computer from the jobsite at the end of each workday[8]; or (2) Halter's substitute[9] would bring the Daily Job Site Reports to Green Thumb's office and a Green Thumb employee in Green Thumb's office would enter the hours into Green Thumb's computer. J. Friedman, the person in charge of Green Thumb's payroll and CPRs, would then manually enter the hours into a payroll program that generated paychecks and paystubs. To create CPRs, J. Friedman manually entered the information from the paystubs into a writable pdf.

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[7] This was the term used by S. Friedman in describing whether setting pavers in mortar on the Fields project could be done by apprentices.

[8] Halter completed Reports for the dates 7/16/12 through 10/13/12, 11/12/12 through 11/15/12, 12/4/12 through 1/7/13, and 2/25/13 through 4/18/13.

[9] The Reports not completed by Halter were completed (a) by Daniel Stenger from 10/31/12 through 11/9/12; 5/3/13 and 7/30/13; and (b) by Miguel Alejandre from 11/16/12 through 11/30/12 and 1/8/13 through 2/15/13.

Notice of Work Schedule & Work Schedule Changes on Fields project

21) Green Thumb's work schedule on the Fields project from the start of the project in July 2012 until October 15, 2012, was posted in Green Thumb's job trailer at the Fields project and read as follows:

> "JOB NAME: FIELDS NEIGHBORHOOD PARK
> PREVAILING WAGE RATE: $16.89
> FRINGE RATE: $3.78
> WORK WEEK: MON-THU/10"[10]

(Testimony of Halter, S. Friedman; Ex. A18)

22) On October 15, 2012, Green Thumb changed its work schedule on the Fields project because there were fewer daylight hours. Green Thumb posted the new schedule in Green Thumb's job trailer at the Fields project. It read as follows:

> "*FIELDS SCHEDULE REVISION EFFECTIVE 10/15/12*
> JOB NAME: FIELDS NEIGHBORHOOD PARK
> PREVAILING WAGE RATE: $16.89
> FRINGE RATE: $3.78
> WORK WEEK: MON-FRI/8"[11]
> *SCHEDULED IS ADJUSTED DUE TO DARKNESS*

(Testimony of Halter, S. Friedman; Ex. A18)

23) During Green Thumb's work on the Fields project, S. Friedman did not know that BOLI's interpretation of PWR law with respect to work schedule and overtime ("OT") was that if workers are scheduled to work a 4x10 schedule, but then work five days in a given week, their schedule automatically reverts to a 5x8 schedule for purposes of calculating OT. (Testimony of S. Friedman)

Posting the Applicable PWRs

24) Throughout Green Thumb's work on the Fields project, the PWR for the Fields project was posted on the wall in Green Thumb's onsite job trailer at Fields. (Testimony of S. Friedman, Halter)

[10] The forum hereafter refers to this type of schedule as a "4x10" schedule.

[11] The forum hereafter refers to this type of schedule as a "5x8" schedule.

Unpaid PWR on the Fields Project

25) Armando Alamo was a Green Thumb employee who performed work on the Fields Project that was manual or physical in nature and was paid less than the PWR for the weeks ending 9/15/12, 9/29/12, 12/15/12, 1/12/13, 1/19/13, 1/26/13, 2/2/13, 2/9/13, 2/16/13, 3/2/13, 3/9/13, and 3/16/13.

PWR Straight Time ("ST"). Alamo was underpaid PWR ST for all the above weeks except the week ending 9/15/12. Except for the week ending 9/29/12,[12] the reason for the underpayment was that Green Thumb paid him as a LL/T instead of a Bricklayer when Alamo performed work consisting of setting pavers in mortar.

PWR OT. Alamo was underpaid PWR OT for the weeks ending 9/15/12, 9/29/12, 1/12/13, 3/2/13, 3/9/13, and 3/16/13, detailed as follows:

a) Underpayment for the week ending 9/15/12 was because Green Thumb paid him PWR ST for 10 hours of work on the Fields project on Monday, 9/10/12, and Alamo worked five days that week.

b) Underpayment for weeks ending 1/12/13, 3/2/13, 3/9/13, and 3/16/13 was because Green Thumb paid him OT at the LL/T rate instead of the Bricklayer rate.

Total PWR Underpayment. Alamo was underpaid $9,829.17 in PWR straight time wages and $705.81 in PWR OT wages based on work he performed on the Fields project, for a total underpayment of $10,534.98.

(Stipulation of Participants; Testimony of Soria-Pons; Ex. A39)

26) José Alejandre was a Green Thumb employee who performed work on the Fields Project that was manual or physical in nature and was underpaid $41.74 in PWR OT for the weeks ending 9/8/12 and 9/22/12.[13] (Stipulation of Participants; Testimony of Soria-Pons; Exs. A15, A40)

27) Miguel Alejandre ("Miguel A.") was a Green Thumb employee who performed work on the Fields Project that was manual or physical in nature and was paid less than the PWR for the weeks ending 12/15/12, 1/12/13, 1/19/13, 1/26/13, 2/2/13, 2/9/13, 2/16/13, 3/9/13, and 3/16/13.

[12] The forum is unable to determine from the record why Alamo was underpaid PWR ST the week ending 9/29/12.

[13] The forum is unable to determine from the record why Jose Alejandre was underpaid PWR OT for either week.

PWR Straight Time ("ST"). Miguel A. was underpaid PWR ST for all the above weeks because Green Thumb paid him as a LL/T instead of a Bricklayer when he performed work consisting of setting pavers in mortar.

PWR OT. Miguel A. was underpaid PWR OT for the weeks ending 1/12/13 and 3/9/13. He was underpaid for the week ending 1/12/13 because Green Thumb paid him OT at the LL/T rate instead of the Bricklayer rate.[14]

Total PWR Underpayment. Miguel A. was underpaid $7,443.42 in PWR straight time wages and $65.50 in PWR OT wages based on work he performed on the Fields project, for a total underpayment of $7,508.92.

(Stipulation of Participants; Testimony of Soria-Pons; Exs. A15, A16, A41)

28) Moises Alejandre ("Moises A.") was a Green Thumb employee who performed work on the Fields Project that was manual or physical in nature and was paid less than the PWR for the weeks ending 8/25/12, 9/1/12, 9/8/12, 9/22/12, 1/12/13, and 1/19/13.

PWR Straight Time ("ST"). Moises A. was underpaid PWR ST for the week ending 1/19/13 because Green Thumb paid him as a LL/T instead of a Bricklayer when he performed work on 1/15/13 consisting of setting pavers in mortar.[15]

PWR OT. Moises A. was underpaid PWR OT for the weeks ending 8/25/12, 9/1/12, 9/8/12, 9/22/12, and 1/12/13. The forum is unable to determine from the record why Moises A. was underpaid PWR OT for these weeks.

Total PWR Underpayment. Moises A. was underpaid $308.30 in PWR straight time wages and $157.42 in PWR OT wages based on work he performed on the Fields project, for a total underpayment of $465.72.

(Stipulation of Participants; Exs. A15, A42)

29) Rogelio Jimenez was a Green Thumb employee who performed work on the Fields Project that was manual or physical in nature on 3/13/13 and 3/14/13 and was not paid the PWR his work. In total, he was underpaid $241.71 in PWR ST wages. Green Thumb's CPR for the week ending 3/16/13 shows that Jimenez worked 7 hours on 3/13/13, 8 hours on 3/14/13, and 8 hours on 3/15/13 and was paid PWR ST for those hours. Jimenez's paystub for that week shows that he was paid $8.95 for the ST hours

[14] The forum is unable to determine from the record why Miguel Alejandre was underpaid PWR OT for the week ending 3/9/13.

[15] The forum is unable to determine from the record why Moises Alejandre was underpaid PWR ST for the week ending 1/12/13.

and $13.43 for the OT hours he worked that week.[16] (Stipulation of Participants; Testimony of Soria-Pons; Exs. A15, A44)

30) Arturo Orozco was a Green Thumb employee who performed work on the Fields Project on 3/13/15, 3/14/13 and 3/15/13 that was manual or physical in nature and was not paid the PWR his work. In total, he was underpaid $770.51 in PWR ST wages and $6.31 in PWR OT wages for the week ending on 3/16/13, for a total underpayment of $776.82. Orozco was not paid the PWR because Halter did not write Orozco's name on the Daily Job Site Reports for those days. (Stipulation of Participants; Exs. A16, A45)

31) Miguel Arellanes was a Green Thumb employee who performed work on the Fields Project. He worked Tuesday-Friday during the week ending 10/6/12 and Monday-Thursday during the week ending 10/12/13. During the week ending 10/12/13, he worked 10 hours each day. He was not paid PWR OT wages for the week ending 10/12/13 and was underpaid a total of $31.16 in PWR OT wages.[17] (Stipulation of Participants; Ex. A15, A43)

32) Daniel Stenger was a Green Thumb employee who performed work on the Fields Project that was manual or physical in nature during the weeks ending 8/25/12, 9/29/12, and 10/13/12, and was not paid PWR OT wages that he earned each of those three weeks. In total, he was underpaid $65.81 in PWR OT wages. The forum is unable to determine from the record how or why Stenger was underpaid PWR OT for those weeks. (Stipulation of Participants; Ex. A46)

33) Jesus Zacarias was a Green Thumb employee who performed work on the Fields Project that was manual or physical in nature during the week ending 10/13/12. He worked 4x10 hour days on the Fields project on 10/8-11/12, then 8 hours on a non-PWR job on 10/12/12, and was not paid PWR OT for the week. In total, he was underpaid $31.16 in PWR OT wages.[18] (Stipulation of Participants; Ex. A47)

34) Ricardo Zuniga worked OT on the Fields Project doing work that was manual or physical in nature during the week ending 9/8/12 and was not paid PWR OT wages that he earned. In total, he was underpaid $31.16 in PWR OT wages. The forum is unable to determine from the record how or why Zuniga was underpaid PWR OT for the week ending 9/8/12. (Stipulation of Participants; Exs. A15, A48)

[16] The forum is unable to determine from the record why Jimenez was not paid the PWR for his work for the week ending 3/16/13.

[17] Respondents actually overpaid him per hour, paying him $16.89 per hour and $3.78 per hour fringe, but because he was not paid overtime, his weekly pay was short $31.16.

[18] Respondents actually overpaid him per hour, paying him $16.89 per hour and $3.78 per hour fringe, but because he was not paid overtime, his weekly pay was short $31.16.

Calculation of PWR OT Generally

35) Employers can schedule workers to work a 5x8 hour day or 4x10 hour day schedule on PWR projects. The schedule can be employee-specific, in contrast to job-specific. If a worker on a 4x10 schedule works five days in a week during the time that the 4x10 schedule is operative, BOLI investigators make "a judgment call" as to whether there are sufficient irregularities between weeks so that the worker's schedule defaults to a 5x8 schedule for the purpose of calculating PWR OT.[19] (Testimony of Soria-Pons)

36) Failure to use a consistent 4x10 schedule is not an uncommon mistake made by employers on PWR projects. (Testimony of Soria-Pons)

Failure to Pay Overtime for Hours Worked on non-PWR Projects

37) Armando Alamo performed non-PWR work for Green Thumb during the week ending 9/15/12 for which he was not paid appropriate OT for all hours worked. In total, he was underpaid $34.20 in non-PWR OT wages. (Stipulation of Participants)

38) Rogelio Jimenez performed non-PWR work for Green Thumb during the week ending 3/16/13 for which he was not paid appropriate OT for all hours worked. In total, he was underpaid $52.20 in non-PWR OT wages. (Stipulation of Participants)

39) Arturo Orozco performed non-PWR work for Green Thumb during the weeks ending 4/27/13, 6/1/13, 6/15/13, and 6/22/13 for which he was not paid appropriate OT for all hours worked. In total, he was underpaid $119.15 in non-PWR OT wages. (Stipulation of Participants)

40) Jesus Zacarias performed non-PWR work for Green Thumb during the weeks ending 10/6/12 and 10/27/12 for which he was not paid appropriate OT for all hours worked. In total, he was underpaid $55.48 in non-PWR OT wages. (Stipulation of Participants)

Underpayment of Non-PWR Wages During the Fields Project

41) During Green Thumb's performance of the Fields project, Green Thumb also underpaid Armando Alamo, Miguel Arellanes, Arturo Orozco, and Jesus Zacarias straight time non-PWR wages in the following amounts: Alamo -- $118.12, Arellanes -- $73.23, Orozco -- $785.92, and Zacarias -- $1.20. (Stipulation of Agency and Respondents)

[19] Soria-Pons specifically testified that the determination "depends on the consistency of the irregularities for the scheduling."

Failure to Submit Accurate and/or Complete CPRs and Failure to Timely Submit CPRs to Contracting Agency

42) Article 20, paragraph 20.2 of Green Thumb's subcontract with R&R stated: "Subcontractor agrees to furnish certified payrolls promptly and further agrees to cooperate fully in any effort by Contractor to verify compliance with labor laws and regulations, including requirements under the Davis-Bacon Act of any applicable State Labor Code. Such cooperation shall include without limitation, furnishing copies and originals of records and providing access to employees or witnesses for interviews and statements. **Failure to provide such certifications shall result in contractor withholding 25% of all sums due to Subcontractor, without prior notice and without incurring any interest penalties, until all such certifications have been furnished to Contractor.** Contractor shall pay Subcontractor any amounts withheld under this paragraph within 14 days after Subcontractor furnishes the required certifications. Subcontractor shall include a provision identical to this paragraph in [sic] of its subcontracts and purchase orders, and shall undertake to insure that all of its subcontractors provide certified payrolls promptly."

(Testimony of S. Friedman; Ex. R34)

43) The City of Portland's contract with R&R included the following provision:

"109.20 PAYMENTS AND RETAINAGE

"* * * * *

"D. The Contractor shall comply with ORS 279C.845 and submit certified payroll forms as required by the Oregon Bureau of Labor and Industries and shall ensure all Subcontractors do the same.

"1. Pursuant to ORS 279C.845 (7), the Owner shall retain 25 percent of any amount earned by the Contractor on this public works project until the Contractor has filed a certified statements required by law. The Owner shall pay to the Contractor the amount retained under this section within 14 days after the Contractor files the required certified statements, regardless of whether a Subcontractor has failed to file certified statements. The Owner is not required to verify the truth of the contents of certified statements filed by the Contractor under this section.

"2. Pursuant to ORS 279C.845(8), the Contractor shall retain 25 percent of any amount earned by a first-tier Subcontractor on this public works project until the first-tier Subcontractor has filed with the Owner[20] the certified statements required by law. Before paying any amount retained under this subsection, the

[20] In the contract, "owner" was defined as the "City of Portland."

contractor shall verify that the first-tier Subcontractor has filed the certified statement. Within 14 days after the first-tier Subcontractor files required certified statement the Contractor shall pay the first-tier Subcontractor any amount retained under this subsection. Neither the Owner nor the Contractor is required to verify the truth of the contents of certified statements filed by a first-tier Subcontractor under this section."

(Ex. R33)

44) Green Thumb's workers performed work that was manual or physical in nature on the Fields project beginning on July 16, 2012, and ending on July 30, 2013. (Ex. A16)

45) During the performance of the Fields project, Respondents' employee Stephanie Wiltsey emailed payment applications to R&R at least once a month for the purpose of receiving payment for work performed by Green Thumb's workers. Wiltsey attached the CPRs required by ORS 279C.845 and OAR 839-025-0010 covering the time period for which payment was sought, as R&R required Green Thumb to submit CPRs with payment applications before they would pay Green Thumb. In 2012, Green Thumb submitted CPRs to R&R for the Fields project for the weeks ending: July 21, 28; August 4, 11, 18, 25; September 1, 8, 15, 22, 29; October 6, 13, 20, 27; November 3, 10, 17, 24; and December 1, 8, 15, 22, 29. In 2013, Green Thumb submitted CPRs to R&R for the Fields project for the weeks ending: January 5, 12, 19, 26; February 2, 9, 16, 23; March 2, 9, 16, 23, 30; April 6, 13, 20, 27; May 4; and August 3. J. Friedman was responsible for Green Thumb's payroll on the Fields project and completed and certified each statement.[21] (Testimony of S. Friedman, J. Friedman, Wiltsey; Exs. A15, R35, R36)

46) During the performance of the Fields project, Green Thumb did not submit CPRs to the City of Portland based on S. Friedman's understanding that R&R would pass Green Thumb's CPRs on to the City of Portland. (Testimony of S. Friedman; Wiltsey)

47) R&R never withheld any payment applications from Green Thumb based on Green Thumb's failure to provide CPRs. R&R would not have paid Green Thumb without first receiving CPRs covering the period for which payment was sought. (Testimony of S. Friedman)

48) During the Fields project, R&R submitted the CPRs of its subcontractors, including Green Thumb, to the City of Portland. (Ex. R33)

[21] Green Thumb was not required to submit a CPR for the weeks ending 8/11/12, 8/18/12, 2/23/13, 4/6/13, and 4/13/13 because its workers performed no work on the Fields project those weeks.

49) Green Thumb's CPRs for the weeks ending on 10/6/12 and 10/27/12 were inaccurate. Green Thumb's CPRs for the weeks ending on 8/25/12, 9/1/12, 9/8/12, 9/15/12, 9/22/12, 9/29/12, and 10/13/12, were inaccurate and/or incomplete because they failed to list PWR OT worked by Green Thumb's workers. In addition, Ricardo Zuniga worked at the Fields project during the week ending 9/8/12 and his name does not appear on Green Thumb's CPR for that week. (Stipulation of Participants; Testimony of S. Friedman; Ex. A15)

50) Armando Alamo performed Bricklayer work during the weeks ending 12/15/12, 1/12/13, 1/19/13, 1/26/13, 2/2/13, 2/9/13, 2/16/13, 3/2/13, 3/9/13, and 3/16/13. Green Thumb's CPRs for those weeks stated that Alamo worked as a Landscape Laborer during those weeks. (Testimony of Soria-Pons; Exs. A15, A16, A23, A24, A25, A39)

51) Miguel Alejandre performed Bricklayer work at the Fields project during the weeks ending 12/15/12, 1/12/13, 1/19/13, 1/26/13, 2/2/13, 2/9/13, 2/16/13, 3/9/13, and 3/16/13. Green Thumb's CPRs for the weeks ending 1/19/13, 1/26/13, and 2/2/13 stated that he worked as a Landscape Laborer; the remaining six omitted mention of any job classification.[22] Green Thumb's CPR for the week ending 3/9/13 showed that he worked no hours, whereas Green Thumb's Daily Job Site Reports for 3/5/13 and 3/8/13 show that he worked 7 a.m. to 3:30 p.m. both days at the Fields project. (Testimony of Soria-Pons; Exs. A15, A16, A23, A24, A25, A41)

52) Moises Alejandre performed 8 hours of Bricklayer work at the Fields project on 1/15/13. Green Thumb's CPR for the week ending 1/19/13 stated that he worked as a Landscape Laborer on 1/15/13. (Testimony of Soria-Pons; Exs. A15, A16, A24, A41, A42)

53) In a previous job when Green Thumb was a subcontractor on a City of Portland public works project, Portland rejected Green Thumb's CPRs when Green Thumb attempted to submit them and instructed Green Thumb to submit them to the general contractor. (Testimony of S. Friedman)

54) During the performance of PWR projects, it is common for subcontractors to submit CPRs to the general contractor, who then submits them to the contracting agency. (Testimony of Soria-Pons)

Failure to Make Records Available

55) On July 14, 2013, Arturo Orozco filed a wage claim with BOLI in which he alleged he was paid his regular wage when he should have been paid the prevailing wage rate. On August 20, 2013, Orozco submitted a completed prevailing wage rate

[22] A listing of "the worker's correct classification" is one of the requirements for CPRs. OAR 839-025-0010(1).

complaint form to BOLI's Prevailing Wage Rate Unit. Orozco's wage claim was assigned to Monique Soria-Pons, BOLI Wage & Hour Division ("WHD") compliance specialist, for investigation. (Testimony of Soria-Pons; Exs. A8, A9)

56) On August 21, 2013, the Agency asked the City of Portland for copies of Respondents' CPRs for the Fields Project. On August 23, 2013, Susan Watt, Construction Manager, Portland Parks & Recreation, responded to Soria-Pons as follows:

> "[H]ere is the information sheet filled out and also attached is a copy of the performance bond for R & R. I have some CPRs for Green Thumb but not all for the job. I am currently trying to get them from the General Contractor and will send them to you as soon as I have them all together. Let me know if there's anything else you need."

(Testimony of Soria-Pons; Ex. A11)

57) On August 22, 2013, Soria-Pons sent a letter to Green Thumb in which she requested that Green Thumb provide her with information related to the Fields project no later than September 5, 2013. Her letter included a statement that BOLI had received a complaint that Green Thumb "may be in violation of the [PWR] law for work performed [on the Fields project]. In addition, [BOLI] has received a wage claim from Arturo Martinez Orozco regarding wages owed for work he performed from March 03, 2013 to July 03, 2013." Soria-Pons's letter requested the following information:

> "1. A list of names of employees who worked for your company from the beginning of the project through the most current week of work, including their last known addresses and phone numbers.
>
> "2. Complete daily time cards or time sheets for each employee who worked on this project, from the beginning of the project through the most current week of work. (Records must show or be provided for both PWR and non-PWR work performed each day.)
>
> "3. Complete payroll records showing gross wages earned and itemized deductions made from all wages for all employees who worked on this project from the beginning of the project through the most current week of work.
>
> "4. A complete set of certified payrolls filed from the beginning of the project through the most current week of work.
> "5. Copies of your fringe benefit plans that you provide to your employees.
>
> "6. Proof of payments made to the fringe benefit plans which show the total amount paid, as well as statements indicating the specific amounts paid on behalf of individual employees.

"7. A copy of your contract (or subcontract), which includes the scope of work for this project.

"8. Copies of the project manager's or supervisor's daily logs kept for this project.

"9. A detailed description (in your own words) of the actual duties performed by your employees.

"10. A description of where and how you post(ed) the prevailing wage rates, and fringe benefit information if applicable, upon the public works site.

"11. A copy of your written notice to employees who work on a public contract of the days per week and number of hours per day they may be required to work.

"12. Proof of registration and current standing in a bona fide apprenticeship program for any apprentices you currently have.

"13. Any other additional documents you may have which would assist us in the resolution of this matter.

"14. All time and payroll records for Arturo Martinez Orozco, beginning from March 03, 2013 until the end of his employment."

Item 2 is "extremely important" in a BOLI investigation of a wage claim so that overtime can be accurately computed using a weighted average computation method. Item 3 is "vital" because payroll records are necessary for BOLI to verify amounts due to employees and that wages due were actually paid to employees. Item 4 is used in a BOLI investigation to verify that the contracting agency's CPRs and a contractor's CPRs "match" and contain the same information. Item 7 is used in a BOLI investigation to verify that workers are paid according to their trade classification because subcontracts typically set out the type of work to be performed. Item 14 was requested to assess the validity of Orozco's claim for overtime wages. (Testimony of Soria-Pons; Ex. A12)

58) Before receiving Soria-Pons's letter, Green Thumb had no idea that there were any PWR concerns regarding Green Thumb's work at the Fields project. At that time, Green Thumb's office staff consisted of S. Friedman, J. Friedman, S. Wiltsey, and a receptionist. On September 5, 2013, Soria-Pons received a response to her August 22, 2013, letter from S. and J. Friedman that consisted of 453 pages. The response included a statement that referred Soria-Pons to attachments and explanatory statements when documents were not provided, including:[23]

[23] Numbered paragraphs correspond to request numbers in Soria-Pons' August 22, 2013, letter requesting information.

1. Names and addresses of Jered Halter, Miguel Alejandre, Cody Cutz, Armando Alamo, Ricardo Zuniga, Daniel Stenger, Moises Alejandre, Jesus Zacharias, Ryan Greene, Miguel Arellenas, and Leonardo Alejandre.

2. 147 pages of documents entitled "Daily Job Site Report," printed with the logo "Green Thumb Landscape & Maintenance" on top of each document, and completed by Green Thumb's job site manager for each day that Green Thumb performed work at the Fields project. Each document listed the employees who worked that day, the times they started and ended work, and a summary of the work performed that day.

3. 81 pages of paystubs[24] showing gross wages earned and itemized deductions made from all wages for Green Thumb's employees who worked at the Fields project starting with the pay period "07/15/2012 - 07/21/2012" and ending with the pay period "04/28/2013 – 05/04/2013."

- For paystubs reflecting work from 7/15/12 through 12/29/12, "**GREEN THUMB LANDSCAPE & MAINTENANCE INC./PAYROLL** is printed on top of each paystub and "Green Thumb LLC, PO Box 5172, Salem, OR 97304" is printed on the bottom.
- For paystubs reflecting work from 12/30/12 through 1/5/13, 1/6/13 through 1/12/13, and 1/13/13 through 1/19/13, "**GREEN THUMB LANDSCAPE & MAINTENANCE INC./PAYROLL**" is printed on top of each paystub. "Green Thumb LLC, PO Box 5172, Salem, OR 97304" is printed on the bottom of some paystubs and "Green Thumb LLC, PO Box 5172, Salem, OR 97304" is printed on the top and bottom of other paystubs.
- For paystubs for Moises Alejandre, Armando Alamo, and Jesus Zacarias reflecting work from 1/20/13 through 1/26/13 and for Miguel Alejandre reflecting work from 1/20/13 through 2/2/13, "Green Thumb LLC, PO Box 5172, Salem, OR 97304" is printed on the top and bottom.
- For all paystubs after 1/28/13, "**GREEN THUMB LANDSCAPE & MAINTENANCE INC./PAYROLL**" is printed on top of each paystub; "Green Thumb LLC, PO Box 5172, Salem, OR 97304" is printed on the bottom.

4. 43 CPRs that encompassed all work done on by Respondents on the Fields project, totaling 132 pages. None of the CPRs showed that any Bricklayer/Stonemason ("Bricklayer") work had been performed or that any workers had been paid the prevailing wage rate for Bricklayer.

5. A statement that read: "We pay fringe in cash to the employee on each paycheck."

[24] Many of the pages in Exhibit A17 have more than one paystub printed on them.

6. A statement that read: "We pay in cash."

7. A statement that read: "See Attachment D."[25]

8. No specific response.

9. A statement that read: "Irrigate, plant, and beautify paths, walkways, grassy areas in the park area. This includes planting trees, bushes, grass and plants; finishing walkways with stone and crushed rock and granite; irrigating all park areas; dirt, bark and mulch placement."

10. A statement that read: "The wage rates are posted in the office where the employees meet to fill out paperwork and pick up paychecks. It is also posted in the job trailer on the wall that is on site."

11. A statement that read: "See Attachment E."[26]

12. A statement that read: "We are not part of any apprenticeship programs. We have no apprentices."

13. A statement that read: "See Attachment G."[27]

14. A statement that read: "See Attachment F."[28]

(Testimony of Soria-Pons, S. Friedman; Exs. A14, A15, A16, R5, R6)

59) After receiving GTM's response, Soria-Pons concluded that Green Thumb had failed to provide her with the following information that she had requested:

- Phone numbers of workers on the Fields project
- Time records for work performed on non-PWR projects by Green Thumb employees while the Fields project was ongoing
- Payroll records for work performed on non-PWR projects by Green Thumb employees while the Fields project was ongoing

Soria-Pons also concluded that Green Thumb had inadequately responded to her request #9 because Green Thumb's response did not mention "paver" work, a type of

[25] Attachment D is not identified in the record as a separate exhibit. However, the document requested – a copy of Green Thumb's subcontract with R&R – was received as Exhibit A49. Since Soria-Pons did not make a repeat request for this document in her subsequent record requests, the forum infers that Green Thumb provided the requested document with their response.

[26] Attachment E was copies of the posting described in Findings of Fact #21 & 22 – The Merits.

[27] Attachment G is not identified in the record and there was no testimony about its contents.

[28] *Id.*

work referred to in Green Thumb's contract with R&R and in Green Thumb's Daily Job Site Reports. (Testimony of Soria-Pons)

60) On September 25, 2013, Soria-Pons sent a second letter to Green Thumb, addressing it to J. Friedman. In her letter she wrote:

> "Thank you for supplying most of the information requested. However, I need additional information from you at this time.
>
> "1.) Generally speaking, on projects subject to PWR law, overtime is due on a daily basis, after eight hours per day, Monday through Friday. Green Thumb's records indicate workers began working on the project on a based on [sic] a four-ten schedule. In addition, the records reflect that your workers switched to a five-eighths (sic) schedule effective October 15, 2012. How did your company notify employees of the changes that were made to their schedules?
>
> "2.) I am in receipt of your 'Daily Job Site Reports' which list Green Thumb's employees at the Fields Neighborhood Park Project. How did your company keep track of required daily breaks and lunches for its workers on the above-mentioned project?
>
> a. In addition, I have yet to receive individual employee timecards for the project. In order to avoid being subpoenaed, please provide me with all employee timecards for all workers who worked on the project for the entire duration of the project. The timecards should reflect both prevailing wage and non-prevailing wage projects Green Thumb's workers worked on during the same time frame as The Fields Neighborhood Park Project.
>
> "3.) Oregon Revised Statute 279C.840(1) and Oregon Administrative Rule 839-025-0035(1) require that every contractor or subcontractor employing workers on a public works project must pay its workers no less than the prevailing rate of wage for each trade or occupation. According to your subcontract agreement, Green Thumb set steppingstones and other pre-cast concrete. The document shows the contracted labor amount for this work was about $13,000.00. Based on the specified job duties, Oregon's prevailing wage law defines this classification of work to fall under Bricklayers and Stonemasons. The certified payroll records submitted by your company did not disclose workers performed Bricklayer/Stonemason work whatsoever.
>
> a. Review your records and provide me with a list of workers which (sic) performed such work. Supply the dates and hours in which the Bricklayer/Stonemason work was performed. Once the information is provided, I will reclassify their hourly rates from Landscape Laborers to Bricklayer/Stonemason and request additional payments to be made.

"4.) As you know, Arturo Martinez Orozco has filed a wage claim with our office. He is alleging he worked on the above named project from March 13, 2013 to March 15, 2013 on loading equipment and performing general laborer cleanup work. He indicated Rogelio (the other landscape maintenance worker) worked with him during those three days. Neither worker was listed on Green Thumb's certified payrolls for that week.

a. Please provide me with Rogelio's full name, address, and time and payroll records for those 3 days.

b. The other portion of Arturo Orozco's wage claim includes regular overtime (non-prevailing wage) wages due to him which were not paid. Mr. Orozco has indicated that he filled out and signed his own timecards. Please supply me with Mr. Orozco's timecards.

c. In addition, provide me with all Mr. Orozco's timecards and payroll records for beginning from March 03, 2013 to July 03, 2013 (the duration of his employment).

d. Review of Mr. Orozco's pay records indicate he was regularly paid under code called 'Bonus Class 13.5.' What were the payments for or what did the payments represent?

Please keep in mind that ORS 279C.850(2) states that every contractor or subcontractor performing work on public works projects must provide payroll or other records necessary to determine the prevailing rate of wages actually being paid. This letter is meant as your final notice to deliver all of the previously requested documents to this office no later than **October 09, 2013**. Failure to receive all requested information will result in the subpoena enforcement action."

(Testimony of Soria-Pons; Ex. A19)

61) On October 8, 2013, BOLI received a written response from Green Thumb related to Soria-Pons's September 25, 2013, letter. It stated:

"1) The employees were notified because of weather and the time change we would change our schedule for PW workers the week prior to the change in the morning toolbox meeting. We revised and re-posted the job site notification at both Fields job site and at the main corporate office. No one was tardy, absent, or otherwise, indicating that they all received and were aware of the changes. This is not unusual for us to modify hours during this time of year because of daylight, weather and conditions.

"2) Lunches are required on our jobsites. It is the responsibility of the project manager to insure that the mandatory 30 minute lunch is taken. We do not allow for a violation of the lunch policy. They are mandatory per our employee

handbook and orientation process regardless of PWR or not. The job site stops work and all employees take lunch at the same time to ensure everyone receives the proper lunch break time.

a) Green Thumb workers do not use time cards they use a daily sheet and time is recorded into a computer program by the on-site supervisor for the day. Timecards are available for employee personal recordkeeping only. They are not required or turned in.

"3) It was determined at the preconstruction meeting with the City of Portland and its contracting agents, and the General Contractor, that the paper work on site was enhancement work and was not going to be subject to the required apprenticeship program permits for brick mason's. Therefore, it was classified by our firm accordingly as landscape laborer technician wage, not the brick mason wage. When reviewing the bricklayer/stonemason description, the only work that may possibly be eligible for this classification would be change order work which was a revision to the dry streambed. It was accepted by the City of Portland under the landscape laborer tech wage and was still determined to be exempt from the City of Portland required apprenticeship program.

"a) Miguel Alejandre
Armando Alamo
January 29, 30, 31. February 4, 5.

"4) According to payroll records from March Arturo Orozco was missing hours from those days. I asked his supervisor to ask him where he was and that he had timecards for the pay period. He did, and it was provided to me. It indicated he was on a landscape job in Portland. When asked where he was he said he was helping a Portland crew on a landscape. It was close to payday and I paid him the hours he had punched in and out for from the timeclock. The only timeclock is located at the Salem Office and would be a congruent practice if the crew was sent to help on a job in Portland from Salem. We did not have a timeclock at the Fields site.

"a) Rogelio Jimenez, 3887 Etta Dr. NE, Salem, OR 97305
Records attached.

"b) Mr. Orozco (sic) records are attached. I can only provide timecards that he gave to me as they are not required.

"c) Mr. Orozco (sic) time records and payroll records are attached.

"d) Mr. Orozco was put on a draw based bonus program. The class is based on job and tenure at the company. They are provided a draw against an annual bonus long as they meet the minimum criteria for payment. Bonus is

calculated based on class and is reconciled at year end based on the company's performance."

Green Thumb enclosed 106 pages of time and payroll records for Arturo Orozco ("AO") that included the following documents:

- "Payroll Analysis"[29] for 3/4/13 – 3/15/13, showing number of hours worked by AO each day that he worked, accompanied by "Daily Ticket Schedule Report[s]" for 3/4/13 - 3/12/13 showing the time AO and co-workers started work, ended work, and their lunch period, a description of the work performed, and AO's paystub[30] for that payroll period that shows he was paid for 75.46 straight time hours at the rate of $8.95 per hour and 11.23 overtime hours at the rate of $13.43 per hour.
- "Payroll Analysis" for 3/18/13 – 3/29/13, 5/13/13 – 5/25/13, and 6/10/13 – 6/22/13, showing number of hours worked by AO each day that he worked, accompanied by job tickets and "Employee Daily Time Page" showing the time AO and co-workers started work, ended work, specific increments of time worked on different jobs, a description of the work performed, and AO's paystub for that payroll period.
- "Payroll Analysis" for 4/1/13 – 4/12/13, 4/15/13 – 4/26/13, and 4/29/13 – 5/11/13, showing number of hours worked by AO each day that he worked, accompanied by "Daily Ticket Schedule Report[s]" showing the time AO and co-workers started work, ended work, and their lunch period, a description of the work performed, and AO's paystub for that payroll period.

Green Thumb also enclosed 106 pages of time and payroll records for Rogelio Jimenez ("RJ") that included the following documents:

- "Payroll Analysis" for 3/4/13 – 3/15/13 showing number of hours worked by RJ each day that he worked, accompanied by a single "Daily Ticket Schedule Report[s]" for 3/15/13 showing the time RJ and co-workers started work, ended work, specific increments of time worked on different jobs, a description of the work performed, and RJ's paystub for that payroll period that shows he was paid for 80 straight time hours at the rate of $8.95 per hour and 30.48 overtime hours at the rate of $13.43 per hour.

(Testimony of Soria-Pons; Exs. A20, A21, A22)

62) On December 12, 2013, S. Friedman emailed nine pages of Green Thumb's "Payroll Register" to Soria-Pons that Soria-Pons had requested. The Register

[29] "Payroll Analysis" is a one-page computer generated form that lists workers, their work dates, a digital record of the number of hours they worked on each date, e.g. 8.83, and the total of hours worked during each payroll period by employee and branch of Green Thumb's operation.

[30] AO's paystubs all had "**GREEN THUMB LANDSCAPE & MAINTENANCE INC./PAYROLL**" printed on top and "Green Thumb LLC, PO Box 5172, Salem, OR 97304" printed on the bottom.

included partial payroll information for Moises Alejandre, Daniel Stenger, Armando Alamo, Ricardo Zuniga, Jose Alejandre, and Jesus Zacarias. It showed pay period, gross and net wages, hours worked, and deductions, but did not differentiate between PWR and non-PWR hours. (Testimony of S. Friedman; Ex. R15)

63) No one from BOLI ever asked to inspect records at Green Thumb's premises. (Testimony of S. Friedman, Soria-Pons)

64) Green Thumb could not provide employee phone numbers to Soria-Pons because Green Thumb does not maintain a record of employee phone numbers. (Testimony of S. Friedman)

65) On February 13, 2014, S. Friedman emailed 13 pages of Green Thumb's bank records to Soria-Pons that consisted of account summaries and a record of checks paid by Green Thumb for the months of January, February, and March 2013. (Testimony of S. Friedman; Ex. R17)

66) On March 31, 2014, Soria-Pons sent a letter to Green Thumb that stated, in pertinent part:

> "Thank you for supplying most of the information requested. However, after reviewing Green Thumb's records, I found that I am still missing time records for work weeks in which both prevailing wage and non-prevailing wage hours were worked beginning from 11/20/2012 through the end of the project. At this time, I asked that you supply such records. In addition, at this time please completely respond to my attached **Green Thumb Questionnaire Concerning the Fields Neighborhood Project** which is found on pages three and four of this correspondence. Please supply all requested information as soon as possible or no later than April 11, 2014.
>
> "* * * * *
>
> "**Green Thumb Questionnaire Concerning the Fields Neighborhood Project**
> **Please completely answer and/or provide all of the following:**[31]
>
> **Moises Alejandre:**
>
> "1.) Please provide missing check stubs for workweeks 01/06/13-01/12/13, 01/27/13-02/02/13, 04/28/13-05/04/13.
>
> "* * * * *

[31] The only items included are those that specifically asked for records. Omitted are requests for explanations or information that do not include a specific request for records.

"**Daniel Stenger:**

"* * * * *

"5.) Missing check stub 07/28/13-08/03/13, please provide it.

"* * * * *

"**Jesus Zacarias:**

"2.) Provide check stub for week 10/14/12-10/20/12."

Soria-Pons' letter also included a demand that GTM pay $1,681.89, less lawful deductions, to resolve Arturo Orozco's wage claim and $323.33 to pay Rogelio Jimenez for the time he worked on the Fields project on March 13 and 14, 2013, and was not paid the prevailing wage rate. On April 11, 2014, GTM issued checks to Rogelio Jimenez for $323.33 in gross wages and to Arturo Orozco for $1,681.89 in gross wages. "Green Thumb Landscape and Maintenance Inc. PAYROLL ACCOUNT" is printed on the upper left hand corner of both checks. BOLI received those checks on April 17, 2014. (Testimony of Soria-Pons; Exs. A31, A32)

67) On April 16, 2014, Soria-Pons prepared a subpoena that was served on Green Thumb on April 21, 2014, that demanded production of the following documents on May 16, 2014:

"1. Provide any and all forms, W-4's, job applications, insurance coverage applications, emergency contact forms, or any other documents Green Thumb Landscape and Maintenance Inc., et al., collected from its employees who worked on the Fields Neighborhood prevailing wage project, located in Portland, during the period of July 01, 2012 through the completion of the project;

"2. Excluding your 'Daily Jobsite Report,' provide any and all documents recording, memorializing, or indicating the prevailing wage and/or non-prevailing wage hours worked for each day including all hand written time sheets for all employees who worked for Green Thumb Landscape and Maintenance Inc., et al., during the period of July 01, 2012 through the completion of the project. Identify the overlapping workweek records for all employees who worked on both the Fields project and on non-prevailing wage jobs, during the period of July 01, 2012 through the completion of the project.

"3. Excluding the bank statements you have previously supplied, provide any and all receipts, canceled checks, and any other documents, papers, or records of any kind indicating in any manner any sums paid to all employees who worked for Green Thumb Landscape and Maintenance Inc., et al., during the period of July 01, 2012 through the completion of the project. Identify the overlapping workweek records for all employees who worked on the Fields project and on non-prevailing wage jobs, during the period of July 01, 2012 through the completion of the project;

"4. Excluding any records which have already been submitted, provide any and all paycheck itemizations and stubs, statements of deductions, documents, papers, or records of any kind indicating in any manner the amount and purpose of deductions taken from all employees who worked for Green Thumb Landscape and Maintenance Inc., et al., during the period of July 01, 2012 through the completion of the project. Identify the overlapping workweek records for all employees who worked on the Fields project and on non-prevailing wage jobs, during the period of July 01, 2012 through the completion of the project[.]"

Soria-Pons subpoenaed these records so she could get contact information for the purpose of interviewing workers, verifying that PWR was paid correctly and weighted average OT computed correctly, and proof of payment of wages to workers. (Testimony of Soria-Pons; Ex. A33)

68) On April 23, 2014, S. Friedman sent an email to Soria-Pons in which he wrote:

"We have been working on compiling the documentation you have requested. As we are reviewing the original packet we sent you we are finding the paystubs you are requesting. Is it necessary for us to pull them out and re-copy? We are eager to comply, and close this issue, however this is (sic) takes an enormous amount of time to recompile this information. We are a small company and do not have staff to do this. It is a huge burden on our regular work day.

"[explanation of 'double hour issue']

"Each employees(sic) rate of pay is attached.

"We have tendered the checks per your request we have not gotten confirmation you have received them. Please let us know if anything further is needed."

(Ex. A54)

69) In response to the subpoena, Green Thumb provided, among other documents, 41 pages of documents consisting of charts with approximately 30 rows on each page showing hours worked by employees, by day, from July 2, 2012, through May 3, 2013. The names of Green Thumb's employees are printed only on the first two pages. The pages came with no explanation. (Testimony of Soria-Pons; Ex. A53)

70) Including the 41 pages of documents referred to above, Soria-Pons received "two big boxes" of documents that were hand-delivered in response to the subpoena. The documents were responsive to the subpoena, but she never received all the time cards she requested. Some of the records she received did not correspond to previous records received and it was difficult for her to evaluate them in the context of her entire investigation, particularly since Green Thumb had two payroll systems, one for PWR work that paid every week, and one for non-PWR work that paid every other week. (Testimony of Soria-Pons)

71) On July 14, 2014, Soria-Pons sent a letter to S. Friedman in which she stated that she had concluded her investigation and found a number of violations of Oregon's PWR laws. At the time she wrote her letter, she had received enough information from Green Thumb to determine whether any PWR was due to Green Thumb's workers on the Fields project, but not enough to accurately calculate weighted average overtime for weeks in which workers worked both on the Fields project and on non-PWR projects. This was because she had not been given complete time records for workers who worked both on the Fields project and on non-PWR projects in the same week. She concluded that Green Thumb had failed to provide "all time and pay records necessary for the agency to determine if the prevailing rate of wage was paid for all work performed on the [Fields project], despite several requests by the agency. Some of the examples cited by Soria-Pons were:

> "Green Thumb failed to provide payment records, specifically check stubs. Even after the subpoena was issued, I have continued to request check stubs because it was uncertain whether some of the company's workers had been paid all of their prevailing wages due.
>
> "Green Thumb failed to provide me with its workers phone numbers indicating they did not have records of such information.
>
> "Green Thumb failed to provide BOLI with time records pertaining to the J. Herbert project and the 2012 Downtown Resurfacing project, other concurrent ongoing [PWR] projects that were happening throughout the same timeframes as the [Fields project]."

Soria-Pons also stated her conclusion that Green Thumb owed eight workers the wages set out below, adding "[t]o resolve these wage matters, please submit payments in the amount found owed to each affected worker, less lawful deductions to our **Portland** office, by no later than **July 28, 2014.** If Green Thumb failed to supply me proof of payment for any weeks in question, then please supply them immediately so that I can adjust the amounts determined owed." Soria-Pons enclosed 74 pages showing her computation of wages due.

Employee	PWR Wages Due	Liquidated Damages	Overtime Liquidated Damages	All Wages + Liquidated Damages
Daniel Stenger	$ 65.81	$ 65.81	$ 65.81	$ 197.43
Moises Alejandre	$ 488.17	$ 488.17	$148.71	$ 1,125.05
Ricardo Zuniga	$ 37.94	$ 37.94	$ 37.94	$ 113.82
Armando Alamo	$11,060.30	$11,060.30	$ 0.00	$22,120.60
Jose L. Alejandre	$ 84.58	$ 84.58	$ 41.74	$ 210.90
Jesus Zacarias	$ 87.84	$ 87.84	$ 87.84	$ 263.52
Miguel Arellanes	$ 104.39	$ 104.39	$ 56.84	$ 265.62
Miguel Alejandre	$ 8,051.46	$ 8,051.46	$ 0.00	$16,102.92
Total	$19,980.49	$19,980.49	$438.88	$40,399.86

(Testimony of Soria-Pons; Ex. A34)

72) On July 30, 2014, BOLI received checks from Green Thumb written on GTM's payroll account to the eight workers in the chart above for the following amounts of gross wages:

Daniel Stenger	$65.81
Moises Alejandre	$488.17
Ricardo Zuniga	$37.94
Armando Alamo	$11,060.30
Jose L. Alejandre	$84.58
Jesus Zacarias	$87.84
Miguel Arellanes	$104.39
Miguel Alejandre	$8,051.46

(Testimony of Soria-Pons; Ex. A36)

The Elmonica Project

73) On August 19, 2014, TriMet first advertised "The Elmonica Rail Facility -- Metal Storage Building" ("Elmonica") for bid. The project involved the installation of a prefabricated building, including some site concrete work and some site improvements. GTM bid on and was awarded the contract. On October 1, 2014, GTM and TriMet executed a written contract for the Elmonica project in the amount of $172,337.00 and identified the "base term" of the contract as "October 1, 2014 to January 31, 2015." S. Friedman signed the contract on behalf of GTM. The contract included the following provision:

> "This Contract is for a public works subject to State of Oregon Prevailing Wage Rate requirements (ORS 279C.800 to 279C.870) as set forth in the July 1, 2014 "Prevailing Wage Rates for Public Works Contracts in Oregon" publication located at the following web address:
>
> http://www.oregon.gov/boli/WHD/PWR/Pages/July 2014 Index.aspx
>
> Workers must be paid not less than the applicable State prevailing wage rate in the job classification applicable to the work they actually perform."

(Exs. A55, A60)

74) A contract condition required GTM to submit weekly certified payroll report ("CPRs") using TriMet's "Elations" tracking system ("Elations"), described in the contract as an "on-line web based contract and labor compliance system designed to track MWESB participation, workforce utilization prevailing wage and order controlled insurance data collection, as applicable. This system addresses public works project reporting and monitors requirements set forth by state and federal laws." Elations "pre-populates" certain fields that cannot be overridden by the party completing the Elations CPR. In addition, Respondents' workers had to complete TriMet's safety training before Respondents could enter payroll information about them into Elations. (Testimony of J. Friedman, S. Friedman; Ex. A60)

75) J. Friedman processed GTM's payroll on the Elmonica project. After completion of the Fields project in 2013, she revised GTM's payroll processes so that two steps that could have resulted in human error were eliminated. However, she was forced to revert to GTM's former system of manually inputting the hours GTM's Daily Inspection Reports ("DIP") from the DIP into GTM's computer payroll program because the contract required use of the Elations system. This increased the possibility of human error. (Testimony of J. Friedman)

76) The prevailing wage rates in effect as of July 1, 2014, applied to the Elmonica project. In pertinent part, those rates were:

Trade	**Base Hourly Rate**	**Fringe Rate**
Cement Mason Group 1	$29.98	$17.79
Laborer Group 1	$26.43	$13.10
Carpenter Group 1	$33.94	$14.83
Ironworker	$34.12	$21.35

(Testimony of Fevurly; Ex. A55)

77) BOLI publishes a booklet containing definitions of covered occupations for public works contracts in Oregon. The 2014 booklet contains the following relevant definitions:

> "**5. Carpenter Group 1 & 2**
>
> "**Primary Purpose**: Constructs, erects, installs and renovates buildings and structures, structural members, and fixtures made of plywood, wallboard, and materials to take the place of wood such as plastic, light gauge metals, metal studs, fiberglass, transite sheeting, and cemesto board by using carpentry hand tools, power tools, and woodworking machines and by measuring materials and distances, cutting materials to required size, assembling, anchoring, erecting and aligning forms or framework.
>
> "**Typical Duties of Carpenter Group 1**:
>
> - "* * * * *

- "Makes and installs all types of concrete forms, but does not include concrete forms for sidewalks, curbs, gutters, and pavement. * * *"

- "* * * * *
- "Strips reusable forms. (See 'Laborer Group 1' for stripping of non-reusable forms or for cleaning or prepping of reusable forms.)"

"**6. Cement Mason**

"**Primary Purpose**: Smooth and finishes surfaces of poured concrete to specified textures using hand or power tools, including floats, trowels, and screeds.

"**Typical Duties**:
"Group 1:
- "Levels, smooth, edges and finishes surfaces of poured concrete floors, walls, sidewalks, curbs, steps and stairways, or any other concrete surface.
- "Patches, repairs, or removes rough or defective areas on concrete surfaces to impart a finish, including application of any cementitious product to such surfaces.
- "Applies cement, sand, pigment or marble chips to concrete in order to attain durable and/or decorative services.
- "Grouts and plugs holes on concrete surfaces, including dry packing and end pointing.
- "Joints concrete surfaces, including expansion, control, or decorative.
- "Hand chips concrete in preparation of patching or to produce a finished concrete product.
- "Sets all curb, gutter, and sidewalk forms, and planks, lines, stakes, grades, and screeds. (For concrete wall forms see "Carpenter Group 1.")

"**21. Laborer**

"**Primary Purpose**: Performs a variety of tasks involving physical labor including but not limited to digging, lifting, carrying, holding, mixing, spreading, and cleaning, and which may include the operation of equipment by air, electricity, or gas.

"**Typical Duties**:

Group 1:

"* * * * *
- "Concrete Laborer: Mixes concrete, cement and shotcrete, using portable mixer. Pours, places, spreads and cures concrete. Mixes cement products used in patching, granting, or dry packing of concrete. Drives self-propelled

buggy to transport concrete from mixer or source of supply to place of deposit.

"* * * * *

- "Form Stripper and Preparation: Strips forms and form materials used for pouring concrete and forms were for materials are to be discarded. Also cleans, prepares, and oils all reusable forms. * * *"

- "* * * * *

- "Power Tool Worker: Uses power tools to perform such work as breaking old pavement or large rocks or loosens or digs hard earth using jackhammer, chipping gun, and paving breakers."

(Exs. A55, R39)[32]

78) Using Elations, J. Friedman completed the CPRs required by ORS 279C.845 during the Elmonica project ("Respondents' CPRs") and submitted them to TriMet. On the "Certified Statement" page on each CPR, she wrote that she paid or supervised the payment of persons employed by "Green Thumb Landscaping," whom she identified as the "Contractor or Subcontractor." (Testimony of Fevurly; Ex. A58)

79) CJ actually paid the workers listed on Respondents' CPRs. (Testimony of Fevurly; Ex. A65)

80) Daniel Stenger ("Stenger") completed a handwritten "Daily Inspection Report" ("DIP") for each day of work on at Elmonica. On each report, the "general contractor" was identified as "GT General Contracting" and Stenger was identified as the "QC Manger (sic)." Each report lists the employees who worked that day on the Elmonica project, the hours they worked, and their wage classification. Each report also contains a summary of the "construction activity" performed that day by the listed workers. The information on the DIPs was used by J. Friedman to fill out the CPRs. (Testimony of J. Friedman; Ex. A63)

81) The 1/30/15 DIP shows that Stenger and Moises Alejandre ("M. Alejandre") each worked 2 hours as a Laborer and 6 hours as an Ironworker and that Lenny B. worked 2 hours as a Carpenter and 6 hours as an Ironworker. The Report notes the "construction activity" as "Form curbs and tie rebar" and "Reformed per RFI #4 - 3 guys 2 hrs." (Ex. A63, p. 12)

[32] The remainder of the order refers to these trade classifications simply by the trade name, e.g. "Laborer," instead of referencing the trade and group.

82) "RFI #4" referred to corrective work at Elmonica project required by TriMet. Pursuant to RFI #4, D. Stenger, M. Alejandre, and L. Byers spent two hours tearing out and discarding non-reusable existing forms. This work was properly classified as "Form Stripper and Preparation" under the trade classification of Laborer Group 1. (Testimony of S. Friedman; Ex. R40)

83) Forming curbs falls in the trade classification of Carpenter and tying rebar falls in the trade classification of Ironworker. (Testimony of Fevurly; Ex. R40)

84) There was no evidence presented to establish the amount of time D. Stenger, M. Alejandre, and L. Byers spent forming curbs on 1/30/15. (Entire record)

85) Respondents' CPR for the week ending 1/31/15 states: (a) M. Alejandre and Leonard Byers both worked 6 hours as an Ironworker and 2 hours as a Laborer on 1/30/15; and (b) Stenger worked 6 hours as an Ironworker and 2 hours as a Carpenter on 1/30/15. The CPR shows that M. Alejandre and Byers were both paid $26.43 base rate and $13.10 fringe rate for their 2 hours of Laborer work on 1/30/15 and that Stenger was paid $34.12 base rate and $21.35 fringe rate for his Carpenter work on 1/30/15. All three workers were paid the correct rate for Ironworker for 6 hours. (Ex. A58, pp. 8-10)

86) GTM's contract with TriMet called for the work performed pursuant to RFI #4 to be paid on a time and materials basis, regardless of the trade classification of GTM's workers. As a result, GTM had no economic incentive to pay its workers in a lower classification. (Testimony of S. Friedman)

87) S. Friedman determined the classification of Stenger, Byers and M. Alejandre based on the work they actually performed and BOLI's published trade classifications. He did not determine that they were Carpenters, then choose to pay them as Laborers. (Testimony of S. Friedman)

88) Respondents' 2/3/15 DIP shows that Stenger, M. Alejandre, and Lenny B. all worked 8 hours as Ironworkers. Respondents' CPR for the week ending 2/7/15 shows that Stenger, M. Alejandre, and Lenny B. all worked 8 hours as Ironworkers on 2/2/15. (Exs. A58, pp. 12-15, A63, p. 13)

89) Respondents' 2/4/15 DIP shows that: (a) M. Alejandre and Jeff M. both worked 3 hours as Carpenters and 6.5 hours as Cement Masons; and (b) D. Stenger and Lenny B. worked 3 hours as Carpenters and 9 hours as Cement Masons. Respondents' CPR for the week ending 2/7/15 shows that: (a) M. Alejandre and Jeff M. both worked 3 hours as a Carpenter and 6.5 hours as a Cement Mason, including 1.5 overtime hours; (b) D. Stenger and L. Byers worked 3 hours as Carpenters and 9 hours as Cement Masons, including 4 overtime hours on 2/3/15. (Exs. A58, pp. 12-15, A63, p. 13)

90) Respondents' 2/5/15 DIP shows that: (a) Jeff M. worked 1 hour as a Laborer and 4 hours as an OP5; (b) M. Alejandre and Lenny B. worked 5 hours as

Laborers; and (c) Stenger worked 5 hours as an OP5 and spent 3 hours in a meeting. Respondents' CPR for the week ending 2/7/15 shows that: (a) Jeff Mack worked 1 hour as a Laborer and 4 hours as a Power Equipment Operator; (b) M. Alejandre and L. Byers worked 5 hours as Laborers; and (c) D. Stenger worked 5 hours as a Power Equipment Operator on 2/4/15. Respondents' CPR for the week ending 2/7/15 shows that no one worked on 2/5/15. (Exs. A58, pp. 12-15, p. A63, pp. 14, 15)

91) Respondents' CPR for the week ending 2/7/15 states that, for work performed on 2/3/15, M. Alejandre was paid $33.94 per hour base rate for his Carpenter work, $29.98 per hour for his 5 straight time hours of Cement Mason work with a fringe rate of $17.79 per hour, and $46.84 per hour for his 1.5 hours of overtime on 2/3/15, for a total of $321.98. M. Alejandre was actually paid a $19.79 per hour fringe benefit rate for his Cement Mason work. (Exs. A58, p. 15, A62, p. 3, A63, p. 14)

92) When a worker on a public works project performs work in multiple trades in a single day and also works overtime that day, the worker's overtime rate must be calculated by using a weighted average drawn from the different base wage rates for each trade. In the case of M. Alejandre's work on 2/3/15, his correct overtime rate was $15.62, calculated as follows: 6.5 hours x $29.98 = $194.87; 3 hours x $33.94 = $101.82; $194.87 + $101.82 = $296.69; $296.69 ÷ 9.5 hours = $31.23; $31.23 x .5 = $15.62; $15.62 x 1.5 hours = $23.43. In total, M. Alejandre earned $320.12 on 2/3/15 and was overpaid $1.86. This mathematical error was due to Elations' miscalculation of M. Alejandre's weighted average overtime. Respondents' CPR was not falsified for the purpose of overpaying M. Alejandre. (Testimony of Fevurly, S. Friedman; Ex. A79)

93) Respondents' 3/6/15 DIP shows that Allen Fruck worked 5 hours on the Elmonica project performing work in the Laborer classification. He was paid base and fringe rates of $26.43 and $13.10 per hour, respectively, for that work. Respondents' CPR for the week ending 3/7/15 did not list Fruck's name, the hours he worked, or any information about his pay for that week. (Testimony of Fevurly; Exs. A58, pp. 28-29, A62, p. 18, A63, p.22)

94) J. Friedman was unable to enter Fruck's 3/6/15 work hours and earnings into the Elations system on the 3/7/15 CPR because Fruck had not yet completed the safety training required by TriMet and, as a result, had not yet been added to Elations. (Testimony of S. Friedman; Ex. R44)

95) A weekly timesheet for the week of 3/22-28/15 that Respondents[33] gave to Fevurly shows that M. Alejandre worked 8 hours as a Laborer at Elmonica on 3/24/15. The DIP for 3/24/15 also shows that M. Alejandre worked 8 hours as a Laborer at Elmonica that day. M. Alejandre was paid the correct Laborer base and fringe rate on his paycheck for the pay period 3/22-28/15. On 4/9/15, J. Friedman signed a CPR for

[33] Fevurly testified that "Respondents" gave these documents to him without specifying which specific Respondents.

work performed the week ending 3/28/15 that listed Stenger as the only person who worked at Elmonica that week. M. Alejandre's omission from the CPR was an "error." On July 22, 2015, J. Friedman signed an amended CPR for work performed at Elmonica during the week ending 3/28/15 that listed two workers – Stenger and M. Alejandre – as having worked that week, with Alejandre working 8 hours as a Laborer on 3/24/15. Otherwise, the two CPRs were identical. (Testimony of Fevurly; Exs. A59, p.2, A62, p.7 A63, p.23, A68)

96) The DIP for 3/27/15 shows that Stenger worked 4 hours on the Elmonica project performing work as a Laborer. The DIP notes the "construction activity" as "Fix concrete in door way." Respondents' CPR for the week ending 3/28/15 shows that Stenger was paid as a Laborer, at the base rate of $26.43 per hour for the 4 hours he worked on 3/27/15. (Exs. A59, p.2, A63, p. 24)

97) The work performed by Stenger on 3/27/15 consisted of using a power grinder and roto-hammer[34] to grind off a high spot in cured, hardened concrete at the base of a door frame so that the door would swing properly. The concrete had been poured earlier by union employees employed by another contractor. Stenger's work was not done to "impart a finish." (Testimony of S. Friedman; Ex. R44)

98) S. Friedman did not determine that Stenger was doing Cement Mason work on 3/27/15 and then decide to pay him as a laborer. S. Friedman relied on BOLI's description of Power Tool worker (under Laborer group 1) to classify Stenger in that category. (Testimony of S. Friedman)

99) Michael Fevurly, compliance specialist in BOLI's prevailing wage unit, conducted the investigation that resulted in the NOI being issued against Respondents in case no. 15-16. On July 8, 2015, Fevurly sent a demand letter to S. Friedman in which he summarized the violations he found in his investigation of Respondents regarding Elmonica and stated that "Green Thumb" owed $2,124.24 in unpaid wages to its workers, including $1,062.12 in liquidated damages. Fevurly also stated that Green Thumb had submitted inaccurate CPRs for the weeks ending 3/7/15 and 3/28/15. On July 22, 2015, S. Friedman sent a response letter that included amended payroll reports[35] for the weeks ending 3/7/15 and 3/28/15. The amended report for the week ending 3/7/15 showed that Allen Fruck worked 5 hours as a Laborer on 3/5/15 and the amended report for the week ending 3/7/15 listed two workers – Stenger and M. Alejandre – as having worked that week, with Alejandre working 8 hours as a Laborer on 3/24/15. (Testimony of Fevurly, S. Friedman; Exs. A66, A67, R44)

[34] S. Friedman testified that a roto hammer is a hand held jackhammer.

[35] The requirement for CPRs includes two components – payroll information and a separate page on which an employer certifies that the information is accurate. The forum refers to these reports as "payroll reports" instead of "certified payroll report" because no certified statement was attached to them.

100) On July 30, 2015, after reviewing S. Friedman's response, Fevurly sent another letter to S. Friedman revising his investigative conclusions and reducing the amount of prevailing wages due from $1,062.12 to $69.92. This figure included wages of $18.48 each to M. Alejandre and L. Byers and wages of $32.96 to Stenger. Fevurly again stated that Green Thumb had submitted inaccurate CPRs for the weeks ending 3/7/15 and 3/28/15 and acknowledged his receipt of an amended report for the week ending 3/28/15. (Testimony of Fevurly; Exs. A66, A68)

101) On September 4, 2015, CJ Construction dba C-One Site Development issued checks to M. Alejandre and L. Byers in the gross amounts of $18.48 and to D. Stenger in the gross amount of $32.96. (Testimony of Fevurly; Ex. A75)

102) On September 15, 2015, TriMet sent Respondents' CPR for the week ending 3/28/15 that included M. Alejandre's 3/24/15 hours and a certified statement to Fevurly. (Ex. A59)

103) Except for a certified statement attached to the amended CPRs for the weeks ending 3/7/15 and 3/28/15, Respondents timely provided Fevurly with the information and documents he requested during his investigation. (Testimony of Fevurly)

Additional Aggravating & Mitigating Circumstances

104 S. and J. Friedman signed a "Compliance Agreement" on October 17, 2010, on behalf of "Green Thumb LLC, dba: Green Thumb Contracting, Green Thumb Landscape and Maintenance Inc., Green Thumb Landscaping, Green Thumb Yard Maintenance Inc."[36] S. Friedman signed an identical "Compliance Agreement" on May 30, 2011, on behalf of "Green Thumb Landscape and Maintenance Inc." (Testimony of Soria-Pons; Ex. A76)

105) On July 29, 2013, BOLI's Commissioner issued a Final Order in case no. 25-12 in which the respondents were GTM, S. Friedman, and J. Friedman.[37] In case no. 25-12, the Agency alleged that GTM violated Oregon's prevailing wage rate laws during its work on a public works project between August 31, 2010, and February 26,

[36] The "Compliance Agreement" is a standard BOLI form ("WH-60B") that summarizes the requirements of ORS 279C.540(1) and OAR 839-025-0050(2), ORS 279C.836 and OAR 839-025-0015, ORS 279C.840(1) and OAR 839-025-0035(1), ORS 279C.840(4) and OAR 839-025-0033, ORS 279C.845 and OAR 839-025-0010, and ORS 279C.850(2) and OAR 839-025-0030(2). At the bottom of the form is a place for signatures, prefaced by the following statement:

> "I, _____, have read and understand the foregoing prevailing wage rate statutes and Oregon administrative rules, paraphrased above, the exact text of which is attached and incorporated by reference, and agree to future compliance with those statutes and the Oregon administrative rules. I understand that if I violate the prevailing wage rate laws, I may be subject to the imposition of liquidated damages, civil penalties and debarment."

[37] *In the Matter of Green Thumb Landscape and Maintenance, Inc., Scott A. Friedman and Jennifer Friedman,* 32 BOLI 185 (2013).

2011. In the Order, the Commissioner concluded: (1) that GTM underpaid four workers by a total of $261.29 in gross wages, committing four violations of ORS 279C.840(1) and OAR 839-025-0035(1); (2) that GTM submitted one inaccurate CPR, committing one violation of ORS 279C.845 and OAR 839-025-0010; and (3) that GTM's violation of ORS 279C.840(1) and OAR 839-025-0035(1) was unintentional. (Official Notice)

106) Workers who currently work on Green Thumb's PWR jobs are hired specifically for that job and work for CJ, working the majority of their hours exclusively on PWR projects to make it easier for Green Thumb to be in compliance with Oregon's PWR laws. (Testimony of S. Friedman)

107) Since the Fields project and before the Elmonica project began, Green Thumb improved its payroll system to reduce the chance of error. Jobsite reports are still done at the job. Information on that report has been increased to include everything from the weather to job classes so that if multiple classifications are involved, they can be written in. Green Thumb also asks employees to initial hours to verify that they are correct. At the end of week, J. Friedman prints out information from reports and gives them to employees so they know how they are being classified and paid for the week. The reports go directly into a payroll system that generates the paychecks and CPRs from the information J. Friedman has entered. (Testimony of J. Friedman)

108) Green Thumb began doing prevailing wage rate work in 2010. When BOLI has investigated Green Thumb it has paid all demands for wages. S. Friedman has signed several Compliance Agreements at BOLI's request and has attempted to increase his understanding of prevailing wage rate law. Since completing the Fields project in 2013, Green Thumb has changed its payroll/CPR system on public works projects by revising its job ticket to make it "more robust in its information and tracking" and with the exception of Elmonica, has used its computer to generate CPRs. Green Thumb has also eliminated 4x10 hour schedules and now only works 5x8 hour schedules to eliminate overtime computation problems. (Testimony of S. Friedman)

Credibility Findings

109) Soria-Pons and Michael Fevurly were both credible witnesses. The forum credits the entirety of their testimony except for legal conclusions they drew in their investigations that differ from the forum's conclusions. (Testimony of Soria-Pons, Fevurly)

110) Jennifer Friedman, Stephanie Wiltsey, and Jared Halter were credible witnesses and the forum has credited the entirety of their testimony. (Testimony of J. Friedman, Wiltsey, Halter)

111) Scott Friedman's testimony was credible except for his testimony that he did not make a conscious choice not to determine the prevailing wage or know the prevailing wage but consciously choose not to pay it regarding Green Thumb's workers who performed Bricklayer work on the Fields project. (Testimony of S. Friedman)

112) Arturo Orozco testified in Spanish and his testimony was translated by an interpreter. He testified credibly as to the number of hours he worked during three days at the Fields project, a figure that to which the Agency and Green Thumb stipulated. However, the forum did not believe his testimony that Green Thumb did not have a job trailer at the site or the prevailing wage rates posted because of Orozco's limited opportunity to observe and credible testimony by S. Friedman and Halter that Green Thumb did have a job trailer at the site in which the prevailing wage rates were posted. (Testimony of Orozco)

AMENDED CONCLUSIONS OF LAW

The Fields Project

1) The Fields project was a "public works" and Respondents Green Thumb Landscape and Maintenance, Inc. ("GTM") and Green Thumb LLC ("GTL") were contractors who jointly employed workers on that project. ORS 279C.800.

2) GTM and GTL violated ORS 279C.840(1), OAR 839-025-0035, and OAR 839-025-0040 by paying ten workers – Armando Alamo, Jose Alejandre, Miguel Alejandre, Moises Alejandre, Miguel Arellanes, Rogelio Jimenez, Arturo Orozco, Daniel Stenger, Jesus Zacarias, and Ricardo Zuniga -- less than the prevailing wage rate for physical and manual labor they performed in a trade classification on the Fields project. GTM and GTL intentionally failed to pay the prevailing wage rate to Armando Alamo, Miguel Alejandre, and Moises Alejandre for the work they performed as Bricklayers. ORS 279C.860.

3) GTM and GTL committed eight willful violations of ORS 653.261 and OAR 839-020-0030 by failing to pay non-prevailing wage rate overtime wages to four workers – Armando Alamo, Rogelio Jimenez, Arturo Orozco, and Jesus Zacarias – during eight weeks of their employment in 2012 and 2013.

4) GTM and GTL committed 22 violations of ORS 279C.540(1) and OAR 839-025-0050 by not paying overtime for overtime hours worked on the Fields project to nine workers for 22 weeks.

5) GTM and GTL gave written notice to workers on the Fields project of their work schedules and of changes to their work schedules and did not violate OAR 839-025-0034.

6) GTM and GTL committed nine violations of ORS 279C.845 and OAR 839-025-0010 by filing inaccurate certified payroll statements for work performed at the Fields project for the weeks ending 8/25/12, 9/1/12, 9/8/12, 9/15/12, 9/22/12, 9/29/12, 10/6/12, 10/13/12, and 10/27/12. GTM and GTL did not intentionally falsify these certified payroll statements. ORS 279C.860.

7) GTM and GTL, through Jennifer Friedman, falsified certified payroll statements for work performed at the Fields project for the weeks ending 12/15/12, 1/12/13, 1/19/13, 1/26/13, 2/2/13, 2/9/13, 2/16/13, 3/2/13, 3/9/13, and 3/16/13. These falsifications were not intentional. ORS 279C.860.

8) GTM and GTL committed 25 violations of ORS 279C.845(1) and OAR 839-025-0010(3) by failing to timely submit certified payroll statements for work to the contracting agency at the Fields project for the weeks ending 8/4/12, 11/10/12, 11/17/12, 11/24/12, 12/1/12, 12/8/12, 12/15/12, 12/22/12, 12/29/12, 1/5/13, 1/12/13, 1/19/13, 1/26/13, 2/2/13, 2/9/13, 2/16/13, 3/2/13, 3/9/13, 3/16/13, 3/23/13, 3/30/13, 4/20/13, 4/27/13, 5/4/13, and 8/3/13.

9) GTM and GTL posted the applicable prevailing wage rates at the Fields project and did not violate ORS 279C.840(4) and OAR 839-025-0033.

10) GTM and GTL violated ORS 279C.850 and OAR 839-025-0030 by failing to timely make available records necessary to the determination of whether the prevailing wage rate was being paid.

11) GTM and GTL willfully violated ORS 653.045(1)&(2) and OAR 839-020-0083 by failing to make records available to BOLI for inspection within a reasonable time.

12) The Commissioner has the authority to assess civil penalties for violations of ORS 279C.840(1), OAR 839-025-0035, OAR 839-025-0040, ORS 279C.845, OAR 839-025-0010, ORS 279C.845, OAR 839-025-0010, ORS 279C.850, OAR 839-025-0030, ORS 653.045(1)&(2), OAR 839-020-0083, ORS 653.261, and OAR 839-020-0030. The imposition of $36,552.03 in civil penalties on GTM and GTL for their violations of these statutes and rules is an appropriate exercise of the Commissioner's authority. ORS 279C.865, OAR 839-025-0530, OAR 839-025-0540, ORS 653.256, OAR 839-020-1010.

13) GTM's and GTL's intentional failure to pay the prevailing wage rate to Armando Alamo, Miguel Alejandre, and Moises Alejandre requires the forum to debar GTM and GTL for three years. ORS 279C.860, OAR 839-025-0085.

14) S. Friedman and J. Friedman were both responsible for GTM's and GTL's intentional failure to pay the prevailing wage rate to Armando Alamo, Miguel Alejandre, and Moises Alejandre and the forum is required to debar S. Friedman and J. Friedman for three years. ORS 279C.860, OAR 839-025-0085.

The Elmonica Project

15) The Elmonica project was a "public works" and Respondents GTM and CJ Construction, Inc. ("CJ") were contractors who jointly employed workers on that project. ORS 279C.800.

16) GTM and CJ did not violate ORS 279C.840 by paying their workers less than the prevailing wage rate for manual labor they performed in a trade classification on the Elmonica project.

17) GTM and CJ committed three violations of ORS 279C.845 and OAR 839-025-0010 by filing inaccurate certified payroll statements for work performed at the Elmonica project for the weeks ending 2/7/15, 3/7/15, and 3/28/15.

18) GTM, CJ, S. Friedman, and J. Friedman did not intentionally falsify their inaccurate certified payroll statements for work performed at the Elmonica project for the weeks ending 2/7/15, 3/7/15, and 3/28/15 and are not subject to placement on the commissioner's list of ineligibles because of those inaccuracies. ORS 279C.860, OAR 839-025-0085.

19) J. Friedman, a debarred person, has a financial interest in CJ, and the forum is required to debar CJ for three years. ORS 279C.860, OAR 839-025-0085.

20) The Commissioner has the authority to assess civil penalties for violations of ORS 279C.845 and OAR 839-025-0010. The imposition of $6,500 in civil penalties on GTM and CJ and debarment of CJ for their violations of these statutes and rules is an appropriate exercise of the Commissioner's authority. ORS 279C.865, OAR 839-025-0530, and OAR 839-025-0540.

AMENDED OPINION

The Fields Project

It is undisputed that the Fields project was a public works project subject to the requirements of ORS chapter 279C.

1. GTM and GTL were joint employers on the Fields project.

The Agency alleges that GTM and GTL jointly employed Green Thumb's workers on the Fields project. In general, a joint employment relationship exists when two associated employers share control of an employee. Joint or co-employers are responsible, both individually and jointly, for compliance with all applicable provisions of Oregon's wage and hour laws. *In the Matter of Brown's Architectural Sheetmetal, Inc. & Brun Metals Company, LLC* (#80-15), 35 BOLI 68, 91-92 (2016). Here, Green Thumb's president, S. Friedman, testified that GTM and GTL were "interchangeable" entities during the Fields project. Based on that testimony, the forum concludes that GTM and GTL were joint employers on the Fields project and are jointly and severally liable for the civil penalties assessed by the forum for Green Thumb's violations of Oregon's PWR and wage and hour laws.

2. Green Thumb failed to pay appropriate prevailing wages to 10 workers.

In its NOI, the Agency alleged that Green Thumb failed to pay the PWR to ten workers -- Armando Alamo, Jose Alejandre, Miguel Alejandre, Moises Alejandre, Miguel Arellanes, Rogelio Jimenez, Arturo Orozco, Daniel Stenger, Jesus Zacarias, and Ricardo Zuniga. ORS 279C.840(1) provides, in pertinent part:

> "(1) The hourly rate of wage to be paid by any * * * 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 the labor is performed. * * * The contractor or subcontractor shall pay all wages due and owing to the * * * subcontractor's workers upon public works on the regular payday established and maintained under ORS 652.120."

OAR 839-025-0035(1) provides:

> "(1) Every contractor or subcontractor employing workers on a public works project must pay to such workers no less than the applicable prevailing rate of wage for each trade or occupation, as determined by the commissioner, in which the workers are employed. Additionally, all wages due and owing to the workers shall be paid on the regular payday established and maintained under ORS 652.120."

OAR 839-025-0040(1) provides:

> "(1) Each contractor and subcontractor required to pay workers the prevailing rate of wage must pay no less than the hourly rate of pay and fringe benefits as determined by the Commissioner."

Respondents and the Agency stipulated that Green Thumb paid all ten workers less than the PWR they were entitled to be paid on their regular paydays. The stipulated amounts are: Armando Alamo - $10,534.98, Jose Alejandre - $41.74, Miguel Alejandre - $7,508.92, Moises Alejandre - $465.72, Miguel Arellanes - $31.16, Rogelio Jimenez - $241.71, Arturo Orozco - $776.82, Daniel Stenger - $65.81, Jesus Zacarias - $31.16, and Ricardo Zuniga - $31.16. These wages equal all the unpaid prevailing wages alleged by the Agency in paragraph 4 of its NOI for Alamo, Arellanes, Jimenez, Orozco, Stenger, and Zacarias.

In its NOI, the Agency alleged that additional unpaid prevailing wages are due to José Alejandre, Miguel Alejandre, Moises Alejandre and Ricardo Zuniga. For reasons set out below, the forum finds that the Agency did not meet its burden of proof on the allegations to which there is no stipulation.

José Alejandre: The NOI alleges that José Alejandre was also underpaid for the week ending 9/15/12. Soria-Pons's calculation in Exhibit A40, p. 1, shows (a) that he

worked 40 hours that week, including 10 on 9/10, (b) that he earned $808.79 in gross wages; and (c) that he was underpaid $16.39 in PWR OT and $26.45 in PWR ST wages. Alejandre's paystub for that week for check #5178, found at p. 3 of A40, reflects 34 hours of PWR ST and six hours PWR OT at Fields, with total gross wages of $877.50 and net pay of $800.37. Green Thumb's checking statement, at A40, p. 6, shows check #5178 was in the amount of $757.53. Green Thumb's CPR for that week, found at A15, p. 22, shows that Alejandre worked 34 hours of PWR ST, including 10 hours on 9/10, and six hours of PWR OT on 9/14, earning gross wages of $877.50, with a net of $800.37. Based on gross earnings of $808.79 and a net paycheck in the amount of $757.53, corresponding to the net amount Alejandre was paid after deductions, it is impossible for the forum to determine from the record that Alejandre was paid less than the PWR the week ending 9/15/12. Furthermore, the forum is unable to determine how Soria-Pons arrived at the conclusion that Alejandre was only paid $765.95[38] for his work that week.

Miguel Alejandre: The NOI alleges that he was also underpaid for the weeks ending 12/29/12 and 1/5/13. Soria-Pons testified that she concluded Miguel Alejandre was paid nothing for work he performed during those weeks because his paystub for check #5524 that corresponds to those weeks reads "Pay Period: 12/23/2013 – 01/05/2014" and "Pay Date: 01/18/2013." That check was made out for the gross amount of $1,661.17. Green Thumb argued that the pay period dates were a typo and actually reflected pay for the period 12/23/12 – 1/5/13. Based on the fact that paycheck #5551 was issued to Alejandre on 2/1/13, the forum agrees with Green Thumb.

Moises Alejandre: The NOI alleges that he was also underpaid for the week ending 9/15/12. Soria-Pons testified that her calculations showed he earned $808.79 and was paid $769.95, leaving $38.84 in unpaid PWR ST and OT wages. Exhibit A42, p.13, is Alejandre's paystub for this week and shows he earned gross wages of $877.50 and was paid $781.36 by check #5177. Exhibit A42, p.23, is Green Thumb's bank statement that shows check #5177 was paid in the amount of $742.52. Based on gross earnings of $808.79 and a net paycheck in the amount of $742.52, corresponding to the net amount Alejandre was paid after deductions, it is impossible for the forum to determine from the record that Alejandre was paid less than the PWR the week ending 9/15/12. Furthermore, the forum is unable to determine how Soria-Pons arrived at the conclusion that Alejandre was only paid $769.95 for his work that week.

Ricardo Zuniga: The NOI alleges that he was also underpaid PWR OT in the amount of $6.78 for the week ending 1/12/13. Soria-Pons's calculations at Exhibit A48, p.4, show Zuniga working at the Fields project 1/7-11/13. Exhibit A48, p. 12, shows that Zuniga was paid the PWR for four hours of work at the Fields project on 1/7/13. Green Thumb's Daily Job Reports at Exhibit A48, pp. 13-17 show that Zuniga only worked at the Fields project for four hours on 1/7/13 and did not work at the Fields project the rest

[38] The forum cannot determine from the record whether the $765.95 that Soria-Pons testified was "paid" to José Alejandre was gross or net wages.

of the week. Exhibit A15, p. 82, Green Thumb's CPR for that week, also shows that Zuniga worked four hours at the Fields project that week. In conclusion, the Agency has not demonstrated how Zuniga was underpaid for the week ending 1/12/13.

Civil Penalties

OAR 839-025-0540 contains the schedule for assessing civil penalties for violations of ORS 279C.840 regarding the payment of the prevailing rate of wage. In pertinent part, it provides:

> "(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 279C.840 regarding the payment of the prevailing rate of wage, the minimum civil penalty will be calculated as follows:
>
> "(a) An equal amount of the unpaid wages or $1,000, whichever is less, for the first violation;
>
> "(b) Two times the amount of the unpaid wages or $3,000, whichever is less, for the first repeated violation;
>
> "(c) Three times the amount of the unpaid wages or $5,000, whichever is less, for second and subsequent repeated violations."

The Agency's NOI asks the forum to assess civil penalties "at an amount two times the amount of the unpaid wages or $3,000, whichever is less[.]" This assessment corresponds to the provisions of OAR 839-025-0540(3)(b), calculated for first repeated violations.

In *Green Thumb Landscape and Maintenance, Inc., Scott A. Friedman and Jennifer Friedman,* 32 BOLI 185 (2013), the forum concluded that Green Thumb violated ORS 279C.840 by not paying four workers the PWR for work performed between August 31, 2010, to February 26, 2011. Pursuant to OAR 839-025-0540(2), any violations of ORS 279C.840(1)[39] that occurred before February 26, 2013, are first repeated violations for which the forum calculates a civil penalty based on the formula in OAR 839-025-0540(3)(b). This yields the following result:

[39] Although the Agency's NOI alleges failure to pay PWR OT as a separate violation, the forum considers failure to pay PWR OT as a violation of ORS 279C.840(1) and includes the amount of unpaid PWR OT to each worker for purposes of calculating a civil penalty. As noted in the next section of this Opinion, the legislature has not given the commissioner authority to assess separate civil penalties based on a contractor's or subcontractor's failure to pay PWR OT in violation of ORS 279C.540.

Worker	***Earliest week of PWR underpayment***	***Total amount underpaid***	***Civil penalty***
Armando Alamo	9/15/12	$10,534.98	$3,000.00
Jose Alejandre	9/8/12	$41.74	$ 83.48
Miguel Alejandre	12/15/12	$7,508.92	$3,000.00
Moises Alejandre	8/25/12	$465.72	$ 931.44
Miguel Arellanes	10/13/12	$31.16	$ 62.32
Rogelio Jimenez	3/16/13	$241.71	$ 241.71
Arturo Orozco	3/16/13	$776.82	$ 776.82
Daniel Stenger	8/25/12	$65.81	$ 131.62
Jesus Zacarias	10/6/12	$31.16	$ 62.32
Ricardo Zuniga	9/8/12	$31.16	$ 62.32
Total			**$8,352.03**

In conclusion, the forum assesses $8,352.03 in civil penalties based on Green Thumb's failure to pay the appropriate PWR and corresponding violations of ORS 279C.840(1).

3. Green Thumb failed to pay non-PWR OT wages to four workers.

The Agency and Green Thumb stipulated that Green Thumb failed to pay non-PWR OT wages to four workers – Armando Alamo, Rogelio Jimenez, Arturo Orozco, and Jesus Zacarias – on eight occasions in 2012 and 2013, for a total underpayment of $260.98. By failing to pay, Green Thumb violated ORS 653.261(1) and OAR 839-020-0030. The Agency's NOI asks the forum to impose a civil penalty of $8,000, computed at $1,000 per violation, and cites several aggravating factors.

ORS 653.256(1) provides, in pertinent part: "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 that willfully violates ORS 653.261 * * * or any rule adopted thereunder." OAR 839-020-1010(1)(b) provides that "[t]he commissioner may assess a civil penalty for any of the following willful violations: * * * (b) Failure to pay overtime for all hours worked over forty (40) in a week in violation of OAR 839-020-0030." Accordingly, the forum must determine that Green Thumb's violations were "willful" before considering how to compute an appropriate civil penalty.

In the context of Green Thumb's violation of ORS 653.261(1) and OAR 839-020-0030, "willfully" is defined in OAR 839-020-0004(33) as follows:

> "'Willfully' means knowingly. An action is done knowingly when it is undertaken with actual knowledge of a thing to be done or omitted or action undertaken by a person who should have known the thing to be done or omitted. A person 'should have known the thing to be done or omitted' if the person has knowledge of facts or circumstances which, with reasonably diligent inquiry, would place the person on notice of the thing to be done or omitted to be done. A person acts willfully if

the person has the means to inform himself or herself but elects not to do so. For purposes of these rules, the employer is presumed to know the requirements of ORS 653.010 to 653.261 and these rules."

Employers have a duty to know the laws that regulate employment in this state. *See, e.g., In the Matter of Okechi Village & Health Center,* 27 BOLI 156, 169 (2006). ORS 653.261 is one of those laws and Respondents, as employers, had a duty to know and abide by its provisions. Green Thumb should have known the hours worked by Alamo, Jimenez, Orozco, and Zacarias. Under OAR 839-020-0004(33), Green Thumb was presumed to know the requirements of ORS 653.261 and OAR 839-020-0030, the law and rule that require payment of OT on non-PWR jobs and describe the method by which OT is to be calculated. Part or all of Green Thumb's failure to pay non-PWR OT was due to its failure to properly calculate weighted average OT. In Green Thumb's defense, S. Friedman testified that he did not have a proper understanding of how to calculate weighted OT during the Fields project, but "made an effort to pay OT when [he] thought it was due." S. Friedman's lack of understanding of weighted average is not a defense and the forum finds that Green Thumb's eight violations were "willful."

In determining the amount of civil penalties to assess, OAR 839-020-1020 requires the forum to consider aggravating and mitigating circumstances. It 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."

In its NOI, the Agency alleged the following aggravating circumstances:

> "(1) These violations are serious because the failure to pay overtime, as required, contributed to the underpayment of wages to the affected workers;
>
> "(2) Respondents knew or should have known the affected workers were working overtime and Respondents knew or should have known that they were required to pay appropriate overtime for hours worked over forty (40) in a work week;
>
> "(3) Complying with the law would have been simple for Respondents had Respondents not kept separate records for PWR and non-PWR work."

The forum concludes from the record that this was Green Thumb's first violation of ORS 653.261 and OAR 839-020-0030; that Green Thumb knew or should have known the four workers were working OT and likely would have known, had Green Thumb not kept separate records for PWR and non-PWR work; and that four workers were underpaid a total of $260.98 as a result of Green Thumb's failure to pay non-PWR OT. S. Friedman's lack of understanding of how weighted average OT is computed is not a mitigating circumstance. Green Thumb's improvements in its payroll system to avoid this problem in the future is a mitigating circumstance, as is Green Thumb's prompt payment of the unpaid wages upon BOLI's demand for those wages.

Considering the aggravating and mitigating circumstances, the forum concludes that a civil penalty of $500 per violation is an appropriate civil penalty, for a total of $4,000 (eight violations x $500).

4. Green Thumb failed to pay PWR OT wages to nine workers.

The Agency and Respondents stipulated that Green Thumb committed 22 violations of ORS 279C.540(1) and OAR 839-025-0050 by not paying PWR OT for OT hours worked on the Fields project to nine workers for 22 weeks. In its NOI, the Agency asks the forum to impose a civil penalty of $5,000 per violation and alleges several aggravating factors, citing ORS 279C.540, OAR 839-025-0050, OAR 839-025-0520, OAR 839-025-0530(1), and OAR 839-025-0540(1)&(5) as the statute and rules establishing the violation and authorizing the imposition of civil penalties.

ORS 279C.865(1) provides: "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 279C.800 to 279C.870 or any rule of the commissioner adopted thereunder." Under this statute, the Commissioner is only authorized to assess a civil penalty for violations of ORS 279C.800 to 279C.870 or administrative rules corresponding to those statutory provisions. The Commissioner has no authority to assess a civil penalty for violations of ORS 279C.540 because it is

outside the scope of the statutory provisions listed in ORS 279C.865(1).[40] Furthermore, none of the rules cited by the Agency in its NOI authorize the imposition of a civil penalty for violations of ORS 279C.540.

In conclusion, the forum assesses no civil penalties for Green Thumb's violations of ORS 279C.540 because it lacks the statutory authority to do so.

5. Green Thumb gave written notice of its work schedule to its workers.

In its NOI, the Agency alleges that Green Thumb "failed to give written notice to workers * * * of their work schedules and of the changes to their work schedules as required by OAR 839-025-0034." OAR 839-025-0034 provides:

> "(1) Employers must give written notice to employees who work on a public contract of the days per week and number of hours per day they may be required to work.
>
> "(2) The notice required by section (1) of this rule may be given:
>
> "(a) At the time the employee is hired;
>
> "(b) Prior to commencing work on the contract; or
>
> "(c) By posting a notice at a place frequented by and accessible to employees.
>
> "(3) If an employer fails to give the notice required by section (1) of this rule, the work schedule will be presumed to be a five-day work schedule.
>
> "(4) The work schedule may be changed by the employer if the change is intended to be permanent and is not designed to evade the overtime requirements of ORS 279C.540 and OAR 839-025-0050. Notice of any work schedule changes intended to be made by an employer must be provided in writing to affected employees in advance of the change."

S. Friedman credibly testified that Green Thumb gave written notice of its original work schedule and its changed work schedule to its workers and copies of the written notices were received into evidence without objection.[41] No credible testimony to the contrary was offered, and the Agency did not prove by a preponderance of the evidence that Green Thumb's October 15, 2012, schedule change was designed for the purpose of evading the OT requirements of ORS 279C.540 and OAR 839-025-0050. Accordingly, the forum finds no violation of OAR 839-025-0034.

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[40] The forum notes that the unpaid PWR OT for Green Thumb's 22 violations of ORS 279C.540 was added to the unpaid PWR ST in the forum's calculations of the appropriate civil penalty for Green Thumb's violations of ORS 279C.840(1).

[41] *See* Finding of Fact ##21-22 – The Merits.

6. Green Thumb posted the applicable PWR.

In its NOI, the Agency alleges that Green Thumb "failed to post the applicable [PWR] in a conspicuous and accessible location at the public works project work site in violation of ORS 279C.840(4) and OAR 839-025-0033." ORS 279C.840(4) provides, in pertinent part:

> "(4) Every contractor or subcontractor engaged on a project for which there is a contract for a public works shall keep the prevailing rates of wage for that project posted in a conspicuous and accessible place in or about the project."

OAR 839-025-0033 provides, in pertinent part: [42]

> "(1) Every contractor or subcontractor must post the prevailing wage rates applicable to the project in a conspicuous place at the site of work. The posting must be easily accessible to employees working on the project. * * *"

S. Friedman and Jared Halter, Green Thumb's foreman on the Fields project, credibly testified that Green Thumb's work schedule and the PWR for the Fields project were posted on the wall inside Green Thumb's jobsite trailer that Halter opened every morning, that Halter held daily meetings inside the trailer with workers to give work instructions for the day, and that Green Thumb's workers ate lunch in the trailer and also went into trailer every day to get job supplies. The only evidence to the contrary was the testimony of Arturo Orozco that the forum has found to be not credible. Furthermore, Soria-Pons testified that posting in a job trailer is acceptable, so long as workers are allowed to enter the job trailer while they are working on a PWR project. In conclusion, the forum finds that Green Thumb did not violate ORS 279C.840(4) and OAR 839-025-0033.

7. Green Thumb submitted nine inaccurate CPRs for which a civil penalty can be assessed.

In its NOI, the Agency specifically alleges that Green Thumb filed nine inaccurate and/or incomplete certified statements[43] for work performed on the Fields project in that Green Thumb "filed unsigned certified statements and/or certified that the information contained in the certified statement was accurate when was not." ORS 279C.845(1)-(3) provide:

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[42] Green Thumb did not provide for or contribute to a health and welfare plan or pension plan for its workers on the Fields project, so subsections (2) and (3) of -0033 do not apply.

[43] Although the Agency only seeks a civil penalty for nine violations, it also alleges that respondents intentionally falsified other certified statements for which the Agency seeks debarment instead of a civil penalty.

"(1) The contractor or the contractor's surety and every subcontractor or the subcontractor's surety shall file certified statements with the public agency in writing, on a form prescribed by the Commissioner of the Bureau of Labor and Industries, certifying:

(a) The hourly rate of wage paid each worker whom the contractor or the subcontractor has employed upon the public works; and

(b) That no worker employed upon the public works has been paid less than the prevailing rate of wage or less than the minimum hourly rate of wage specified in the contract.

"(2) The certified 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 the certified statement, that the contractor or subcontractor knows the contents of the certified statement and that to the contractor or subcontractor's knowledge the certified statement is true.

"(3) The certified statements shall set out accurately and completely the contractor's or subcontractor's payroll records, including the name and address of each worker, the worker's correct classification, rate of pay, daily and weekly number of hours worked and the gross wages the worker earned upon the public works during each week identified in the certified statement."

OAR 839-025-0010(1)-(3) provides:

"(1) The form required by ORS 279C.845 is the Payroll and Certified Statement form, **WH-38**. This form must accurately and completely set out the contractor's or subcontractor's payroll records, including the name and address of each worker, the worker's correct classification, rate of pay, daily and weekly number of hours worked and the gross wages the worker earned each week during which the contractor or subcontractor employs a worker upon a public works project.

"(2) The contractor or subcontractor may submit the weekly payroll on the **WH-38** form or may use a similar form providing such form contains all the elements of the **WH-38** form. When submitting the weekly payroll on a form other than **WH-38**, the contractor or subcontractor must attach the certified statement contained on the **WH-38** form to the payroll forms submitted.

"(3) Each Payroll and Certified Statement form must be submitted by the contractor or subcontractor to the public agency by the fifth business day of each month following a month in which workers were employed upon a public works project."

The Agency and Respondents stipulated that Green Thumb committed nine violations of ORS 279C.845(1)-(3) and OAR 839-025-0010(1)-(3) by filing inaccurate CPRs for work performed on the Fields project for the weeks ending 8/25/12, 9/1/12,

9/8/12, 9/15/12, 9/22/12, 9/29/12, 10/6/12, 10/13/12, and 10/27/12.[44] S. Friedman testified generally that the inaccuracies were due to classification and weighted average OT mistakes. Although the Agency did not identify the specific problems with the nine CPRs, the forum has drawn the following conclusions after examining the CPRs, then comparing them with the stipulations made by the Agency and Respondents regarding unpaid PWR and the nine CPRs:

1. All nine CPRs are signed and certified by J. Friedman.

2. The CPR for the week ending 8/25/12 is inaccurate and incomplete because Daniel Stenger and Moises Alejandre earned PWR OT that is not shown on the PWR.

3. The CPR for the week ending 9/1/12 is inaccurate and incomplete because Moises Alejandre earned PWR OT that is not shown on the CPR.

4. The CPR for the week ending 9/8/12 is inaccurate and incomplete because Jose Alejandre, Moises Alejandre, and Ricardo Zuniga earned PWR OT that is not shown on the CPR and Zuniga's name does not appear on the CPR.

5. The CPR for the week ending 9/15/12 is inaccurate and incomplete because Armando Alamo earned PWR OT that is not shown on the CPR.

6. The CPR for the week ending 9/22/12 is inaccurate and incomplete because Jose Alejandre and Moises Alejandre earned PWR OT that is not shown on the CPR.

7. The CPR for the week ending 9/29/12 is inaccurate and incomplete because Armando Alamo and Daniel Stenger earned PWR OT that is not shown on the CPR.

8. The CPR for the week ending 10/13/12 is inaccurate and incomplete because Daniel Stenger, Miguel Arellanes, and Jesus Zacarias earned PWR OT that is not shown on the CPR.

9. Aside from the bare stipulation that they were inaccurate, the forum cannot determine why the CPRs for the weeks ending 10/6/12 and 10/17/12 are inaccurate or how they violated ORS 279C.845.

10. None of the inaccuracies were due to Green Thumb's misclassification of workers.

[44] The Agency did not allege that any of the CPRs in which Alamo, Miguel Alejandre, or Moises Alejandre were misclassified as LL/Ts instead of Bricklayers were inaccurate or otherwise in violation of ORS 279C.845(3).

In its NOI, the Agency asks the forum to impose a civil penalty of $5,000 per violation and alleges the following aggravating factors:

> "(1) Respondents knew or should have known that they were required to submit accurate and complete certified payroll reports and knew or should have known that information contained on its certified statements was inaccurate and/or incomplete;
>
> "(2) Respondents had the opportunity to submit complete and accurate certified statements and it would not have been difficult for Respondents to have done so;
>
> "(3) Respondents' violations were serious because the requirement to submit accurate and complete certified statements ensures that workers are receiving the appropriate prevailing wages and the magnitude of Respondents' violations were such that nine (9) certified statements filed with the contracting agency were inaccurate and/or incomplete; and
>
> "(4) Respondent Green Thumb Landscape has previously been found to have violated ORS 279C.845(3)."

Green Thumb's nine violations fall into three different categories: (1) Green Thumb's 10/6/12, and 10/27/12 violations for which the forum cannot determine how the violation occurred except for the stipulation of inaccuracy by the Agency and Respondents; (2) Green Thumb's 8/25/12, 9/1/12, 9/15/12, 9/22/12, 9/29/12, and 10/13/12 CPRs that are inaccurate and incomplete because they failed to show that PWR OT was earned by one or more workers; and (3) Green Thumb's 9/8/12 CPR that is inaccurate and incomplete because it fails to show that PWR OT was earned by three workers and one of those workers – Ricardo Zuniga -- does not even appear on the CPR.

ORS 279C.865 provides: "(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 279C.800 to 279C.870 or any rule of the commissioner adopted thereunder." OAR 839-025-0530(3)(k) specifically provides that BOLI's commissioner may assess a civil penalty "against a contractor or subcontractor for * * * [f]iling inaccurate or incomplete certified statements in violation of ORS 279C.845[.]" OAR 839-025-0540(1) provides that "[t]he actual amount of the civil penalty will depend on all the facts and on any mitigating and aggravating circumstances." When the commissioner elects to assess a civil penalty, OAR 839-025-0520 sets out specific criteria for determining the amount of a civil penalty. It reads as follows:

> "(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 public agency and shall cite those the commissioner finds to be applicable:

"(a) The actions of the contractor, subcontractor or public 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 public agency knew or should have known of the violation.

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

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

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

1. Respondents knew or should have known of the accurate certified payroll requirement.

S. Friedman and J. Friedman both signed BOLI Compliance Agreements on 10/17/10 and S. Friedman signed a second Compliance Agreement on 5/30/11 in which they acknowledged awareness of BOLI's certified payroll report requirements. Furthermore, it is a given that Respondents knew or should have known that they were required to submit accurate and complete certified payroll reports, in that all employers are charged with the knowledge of wage and hour laws governing their activities as employers. *See, e.g., In the Matter of Southern Oregon Flagging, Inc.,* 18 BOLI 138, 166 (1999). This conclusion applies to all nine violations.

2. Opportunity and degree of difficulty to comply.

Green Thumb had the opportunity to initially submit complete and accurate CPRs. Nothing prevented Green Thumb from doing so except for the apparent confusion caused by Green Thumb's two payroll systems and misunderstanding of how to properly calculate weighted average OT.

3. Magnitude and seriousness of the violations.

As the Agency points out, the requirement to submit accurate and complete certified statements helps ensure the worker is receiving the appropriate prevailing wages. In this case, the nine inaccurate and incomplete CPRs resulted in seven workers not being paid the correct PWR until a year after they earned the unpaid wages.

4. Green Thumb's prior violation of ORS 279C.845(3).

GTM committed one prior violation of ORS 279C.845(3) by failing to list a worker employed on a public works on a CPR for the week ending October 9, 2010. *See In the Matter of Green Thumb Landscape and Maintenance, Inc., Scott A. Friedman and Jennifer Friedman,* 32 BOLI 185, 193, 201-02 (2013).

5. Amount of underpayment.

The total amount of underpayment due to the nine inaccurate and incomplete CPRs was $518.24, broken down as follows: Armando Alamo - $223.73, Moises Alejandre - $93.48, Jose Alejandre - $41.74, Daniel Stenger - $65.81, Ricardo Zuniga - $31.16, Jesus Zacarias - $31.16, and Miguel Arellanes - $31.16.

6. Green Thumb's actions in responding to previous violations of statutes and rules.

The record does not reflect any actions that Green Thumb took to revise its business practices to be more compliant with Oregon's PWR laws until the Fields project was completed.[45]

Having determined the aggravating and mitigating factors present in this case, the forum examines past Final Orders in which civil penalties were assessed for CPR violations to determine the appropriate civil penalties in this case.

In past Final Orders, the commissioner has assessed the maximum $5,000 civil penalty for CPR violations in only three cases. *See In the Matter of Larson Construction Co., Inc.,* 17 BOLI 54, 79 (1998)[46]; *In the Matter of Labor Ready, Inc.,* 20 BOLI 73, 100-

[45] The forum notes that the Final Order in *Green Thumb Landscape and Maintenance, Inc., Scott A. Friedman and Jennifer Friedman,* 32 BOLI 185 (2013) was not issued until July 29, 2013, after the Fields project was completed.

[46] In *Larson*, the forum imposed a $5,000 civil penalty for respondents' failure to file multiple accurate and complete certified statements over a four month period of time when aggravating factors included: respondents' inaction in response to their prior violations of the prevailing wage rate laws; the widespread and deliberate nature of their violations; respondents' use of a sham apprenticeship program to circumvent paying prevailing wage rates; respondents' practice of banking hours and recording overtime and weekend hours as though they were worked on weekdays, for the same purpose; the certification of statements that included deliberately falsified hours and rates of pay; and the fact that respondents knew or should have known of the violation.

01 (2000)[47]; *In the Matter of Labor Ready Northwest, Inc.,* 27 BOLI 83, 144 (2005), *affirmed, Labor Ready Northwest, Inc. v. Bureau of Labor and Industries,* 208 Or App 195, 145 P3d 232 (2006), *rev den* 342 Or 473, 155 P3d 51 (2007).[48]

In other cases that have resulted in a civil penalty being assessed for CPR violations related to inaccurate and/or incomplete CPRs, the commissioner has assessed civil penalties of $250,[49] $400,[50] $500,[51] $1,000,[52] $1,250,[53] $2,000,[54] $3,000,[55] and $4,000.[56]

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[47] In *Labor Ready* (2000), the forum imposed a $5,000 civil penalty when respondent's violation consisted of three inaccurate CPRs pled as a single violation; when respondent's violation was aggravated by respondent's "less than impressive" response to the agency's prior investigations of it; respondent's persistent difficulties in ensuring that workers on prevailing wage rate jobs were paid overtime for work they did on weekends; the fact that respondent's failure to record daily hours worked resulted in one worker not receiving all wages due for several months; the ease with which respondent could have complied with the law; the fact that respondent deliberately included possibly inaccurate information on the certified payroll reports. The forum concluded its analysis by stating that "[t]he deliberate nature of Labor Ready's decision to include possibly inaccurate information regarding daily hours worked leads the forum to impose a $5,000 penalty[.]"

[48] *Labor Ready* (2005) involved three public works projects. The Agency alleged that respondent committed CPR violations on all three projects – Cornelius, Central, and Beaver Acres. The forum imposed a $5,000 civil penalty for respondent's three inaccurate CPRs on the Beaver Acres project that were pled as a single violation when respondent had a previous CPR violation; 24 workers were employed on the project; respondent's use of its own CPR form that did not contain the elements required by statute and rule or a certification section; the Agency's prior notification to respondent that its CPR form was inadequate and respondent's failure to modify its form in response.

[49] *In the Matter of Southern Oregon Flagging, Inc.,* 18 BOLI 138, 166-67, 169 (1999)(forum imposed a civil penalty of $250 for each of 24 violations when respondents should have known that their payroll methods, as reflected in their certified statements, were illegal).

[50] *In the Matter of Hard Rock Concrete, Inc. and Rocky Evans,* 33 BOLI 77, 105 (2014), *aff'd without opinion, Hard Rock Concrete, Inc. and Rocky Evans v. Oregon Bureau of Labor and Industries,* 278 Or App 625 (2016)(agency sought $1,000 penalties for each violation and 22 inaccurate CPRs were filed; the forum assessed a penalty of $400 for each violation, "given the nature of the violations and the aggravating and mitigating criteria").

[51] *In the Matter of High Mountain Plumbing and Diane Marie Cina,* 33 BOLI 40, 50 (2014)(agency asked the forum to assess a civil penalty of $1,000 for each of respondent's six CPR violations. Although respondent should have known all the hours the worker was working, the worker's contemporaneous misrepresentation of those hours and respondent's justifiable reliance on those misrepresentations in completing its CPRs led the forum to assess a $500 civil penalty for each of respondent's six violations).

[52] *In the Matter of Northwest Permastore,* 18 BOLI 1, 18 (1999), *reconsidered* 20 BOLI 37 (2000), *affirmed, Northwest Permastore Systems v. Bureau of Labor and Industries*, 172 Or App 427 (2001)(commissioner assessed $1,000 civil penalty for respondent's single CPR violation based on respondent's submission of a CPR that inaccurately stated that five workers on respondent's public works project were laborers when their correct classification was boilermakers); *In the Matter of Keith Testerman,* 20 BOLI 112, 128-29 (2000)(commissioner imposed a $1,000 penalty for each of respondent's three CPR violations when the agency previously had warned respondent about other violations of the prevailing wage rate laws, it would not have been difficult for respondent to complete the certified payroll reports accurately, and the reports falsely certified that three workers had been paid all wages earned); *In the Matter of William George Allmendinger,* 21 BOLI 151, 172 (2000)(commissioner

Based on these precedents and the aggravating circumstances, the forum assesses $8,500 in civil penalties, calculated as follows:

(1) A civil penalty of $250 for each of Green Thumb's 10/6/12 and 10/27/12 violations, totaling $500;
(2) A civil penalty of $1,000 each for Green Thumb's 8/25/12, 9/1/12, 9/15/12, 9/22/12, 9/29/12, and 10/13/12 violations, totaling $6,000; and

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assessed $1,000 civil penalty for each of respondent's two violations when they were similar in magnitude to those committed by the respondent in *Testerman*); *In the Matter of Larson Construction Co., Inc.,* 22 BOLI 118, 158-59 (2001)(commissioner assessed a civil penalty of $1,000 based on all the aggravating and mitigating factors measured against civil penalties assessed for the same violation in prior cases when respondent submitted untimely certified payroll statements); *In the Matter of Harkcom Pacific,* 27 BOLI 62, 79-80 (2005)(based on precedent and the aggravating factors present, the commissioner assessed $1,000 per violation for respondent's 20 CPR violations); *In the Matter of Green Thumb Landscape and Maintenance, Inc., Scott A. Friedman and Jennifer Friedman,* 32 BOLI 185, 193, 201-02 (2013)(commissioner assessed a $1,000 civil penalty when respondent's single violation was aggravated by the fact that respondent knew or should have known of the violation and there were no mitigating circumstances); *In the Matter of Portland Flagging, LLC (#37-13),* 34 BOLI 270, 286 (2016)(commissioner imposed a civil penalty of $1,000 each for 16 inaccurate and intentionally falsified CPRs); *In the Matter of Portland Flagging, LLC, #14-14,* 35 BOLI 11 (2016)(commissioner imposed a civil penalty of $1,000 each for 51 inaccurate and intentionally falsified CPRs, taking official notice of respondents' previous violations of the prevailing wage statutes, respondents' knowledge of the violations, and that, at times, respondents did not respond to agency's requests for records).

[53] *In the Matter of Johnson Builders, Inc.,* 21 BOLI 103, 126-27 (2000)(commissioner assessed civil penalties of $1,250 for each of respondent's 23 CPR violations based on misclassification of workers or submission of certified statements without accompanying payroll, and $2,000 for each of respondent's violations of failing to file any certified payroll report).

[54] *In the Matter of Labor Ready Northwest, Inc.,* 22 BOLI 245, 287 (2001), *reversed in part*, *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 188 Or App 346, 71 P3d 559 (2003), *rev den* 336 Or 534, 88 P3d 280 (2004)(commissioner assessed a civil penalty of $2,000 each for nine CPR violations when all nine CPRs misclassified workers as laborers, four CPRs either misstated the amount of straight time worked by respondent's workers on particular days or the total hours worked by those workers on particular days, and all nine were missing the certified statement contained on the agency's form WH-38); *In the Matter of Design N Mind, Inc.,* 27 BOLI 32, 45 (2005)(commissioner assessed civil penalties of $2,000 each for respondent's six inaccurate certified payroll reports when respondent knew or should have known the correct classification and prevailing wage rate for four workers and, despite its knowledge, misclassified and underpaid each and violations were considered serious).

[55] *In the Matter of Labor Ready Northwest, Inc.,* 27 BOLI 83, 141-42 (2005), *affirmed, Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 208 Or App 195, 145 P3d 232 (2006), *rev den* 342 Or 473, 155 P3d 51 (2007)(commissioner assessed $3,000 each for six CPR violations related to Cornelius project when it should have been easy for respondent to comply, respondent's violation was serious and substantial in magnitude and involved five workers, respondent was on notice and had knowledge that its CPR practices were defective, and respondent violated the same statute and rules on two prior occasions).

[56] *Id. at 142* (commissioner assessed $4,000 for a single CPR violation when it should have been easy for respondent to comply, respondent did not file a CPR at all until prompted by the agency, but only one worker was affected, respondent knowingly failed to file a CPR, and respondent violated the same statute and rules on three prior occasions).

(3) A civil penalty of $2,000 for Green Thumb's 9/8/12 violation.

8. Green Thumb failed to timely submit 25 CPRs to the contracting agency.

In its NOI, the Agency alleges that Green Thumb "failed to timely deliver or mail certificate statements to the contracting agency as required by ORS 279C.845(4) and OAR 839-025-0010(3)" on 30 occasions. ORS 279C.845(4) provides:

> "(4) The contractor or subcontractor shall deliver or mail each certified statement required by subsection (1) of this section to the public agency. Certified statements for each week during which the contractor or subcontractor employs a worker upon the public works shall be submitted once a month, by the fifth business day of the following month. Information submitted on certified statements may be used only to ensure compliance with the provisions of ORS 279C.800 to 279C.870."

OAR 839-025-0010(3) provides "Each Payroll and Certified Statement form must be submitted by the contractor or subcontractor to the public agency by the fifth business day of each month following a month in which workers were employed upon a public works project."

Through the credible testimony of Wiltsey, Green Thumb established that it submitted a payment application and corresponding CPRs once a month to R&R during Green Thumb's work on the Fields project. Wiltsey's testimony was bolstered by (a) uncontradicted testimony by S. Friedman that R&R would not have paid Green Thumb without Green Thumb's CPRs and that R&R never refused payment on Green Thumb's payment application,[57] and (b) copies of the emails documenting those payment applications.[58] The Agency provided no evidence to show that Green Thumb did not submit its CPRs to R&R in a timely manner, i.e. "by the fifth business day of the following month." Furthermore, although there is no evidence as to when R&R sent Green Thumb's CPRs to the City of Portland, it is clear that R&R sent some, if not all, of Green Thumb's CPRs to the City.

Green Thumb argues that it should prevail because its timely submission of all the CPRs listed in the Agency's NOI to R&R meets the requirements of ORS 279C.845(4) and OAR 839-025-0010(3) and because the Agency has not met its

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[57] ORS 279C.845(8) requires, in pertinent part:

> "Notwithstanding ORS 279C.555, the contractor shall retain 25 percent of any amount earned by a first-tier subcontractor on a public works until the subcontractor has filed with the public agency certified statements as required by this section. The contractor shall verify that the first-tier subcontractor has filed the certified statements before the contractor may pay the subcontractor any amount retained under this subsection."

[58] Green Thumb provided some emails, but was not able to provide all of the relevant emails because of a crash in its server prior to the hearing.

burden of proof to show that R&R did not provide all of Green Thumb's CPRs to the City of Portland in a timely manner. Green Thumb's argument fails because it contradicts the clear language of the statute and rule. ORS 279C.845(4) states that the "contractor or subcontractor shall deliver or mail each certified statement required by subsection (1) of this section to the public agency." ORS 279C.845(1) states that the "contractor or the contractor's surety ***and*** every subcontractor or the subcontractor's surety shall file certified statements with the public agency in writing[.]" (emphasis added) Read together, these provisions require each contractor and subcontractor to submit CPRs directly to the contracting agency, regardless of the contracting agency's preference to have subcontractors submit them through the contractor or a contractual provision between the subcontractor and contractor that requires the subcontractor to submit CPRs to the contractor.

The forum's conclusion is supported by the Oregon Court of Appeals' decision in another PWR case involving the interpretation of *former* ORS 279.350(4), Oregon's PWR posting statute mandating that "[e]very 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. * * *."[59] *See Labor Ready Northwest., Inc. v. Bureau of Labor & Industries,* 188 Or App 346, 71 P.3d 559 (2003). In that case, Labor Ready was a subcontractor that did not post the PWR on the jobsite and argued that ORS 279.350(4) did not require every subcontractor and contractor to independently post the prevailing wage rates, so long as someone posted the rates. After a hearing, BOLI's commissioner issued a Final Order concluding that Labor Ready's failure to post violated *former* ORS 279.350(4) and assessed a $2,000 civil penalty.[60] In rejecting Labor Ready's argument, the Court discussed the significance of the statute's inclusion of the words "[e]very contractor or subcontractor." Because ORS 279C.845(1) also requires the "contractor * * * and every subcontractor" to file CPRs, that discussion, reprinted below, is particularly germane to this case.

> "In assessing the parties' arguments, we again employ the *PGE* methodology. The statute's requirements are addressed to '*every* contractor or subcontractor.' (Emphasis added.) The statute does not define 'every,' but, in common usage, 'every' means 'being *each individual or part of a class or group* whether definite or indefinite in number without exception.' *Webster's Third New Int'l Dictionary* 788 (unabridged ed 1993) (emphasis added). Thus, the requirements of ORS 279.350(4) must be fulfilled by each contractor and subcontractor on an individual basis."

Labor Ready at 367-68.

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[59] *Former* ORS 279.350(4) has since been renumbered as ORS 279C.840(4).

[60] *In the Matter of Labor Ready Northwest,* 22 BOLI 245 (2001), *rev'd in part, Labor Ready Northwest., Inc. v. Bureau of Labor & Industries,* 188 Or App 346, 71 P.3d 559 (2003), *rev den* 342 Or 473, 155 P3d 51 (2007).

In its NOI, the Agency alleged 30 violations, but the forum finds only 25,[61] as Green Thumb's CPRs show that no workers were employed on the Fields project during five of the weeks – 8/11/12, 8/18/12, 2/23/13, 4/6/13, and 4/13/13 -- in which the alleged violations occurred and ORS 279C.845(4) does not require contractors and subcontractors to submit CPRs for weeks in which they employed no workers on a public works. In conclusion, the forum finds that Green Thumb violated ORS 279C.845(4) on 25 occasions on the Fields project.

In its NOI, the Agency asks the forum to impose a civil penalty of $5,000 per violation and alleges the following aggravating factors:

> "(1) Respondents have worked on public works projects before and knew or should have known that they were required to timely submit accurate incomplete certified payroll reports to the contracting agency on the public works;
>
> "(2) Respondents had the opportunity to timely submit certified statements and it would not have been difficult for Respondents to have done so;
>
> "(3) Respondents' violations were serious because the requirement to timely submit accurate and complete certified statements to the contracting agency helps ensures that workers are being paid appropriately on the public works; the magnitude was such that Respondents failed to timely submit certified statements to the contracting agency on thirty (30) occasions."

By a preponderance of the evidence, the Agency established the existence of each of these aggravating factors, with the exception that there were only 25 occasions on which Green Thumb failed to timely submit a CPR to the contracting agency.

In determining the amount of civil penalties, the forum also considers the following mitigating factors: (1) Green Thumb timely submitted CPRs to R&R; (2) the City of Portland, on a previous public works, had instructed S. Friedman to submit CPRs directly to the contractor instead of the City; (3) On the Fields project, the City expected subcontractors to submit CPRs directly to R&R; (4) It is a common practice for subcontractors to submit CPRs to the general contractor; (5) R&R submitted some, if not all, of Green Thumb's CPRs to the City; and (6) This was Green Thumb's first violation of the "timely" submission requirement of ORS 279C.854(4).

This is the first time the forum has been asked to assess a civil penalty based on a subcontractor's submission of CPRs to the general contractor instead of the contracting agency. Based on the aggravating and mitigating factors listed above and prior final orders involving CPR violations, the forum concludes that a civil penalty of $500 for each violation is appropriate, totaling $12,500 for 25 violations.

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[61] *See* Conclusion of Law #7.

9. Green Thumb willfully failed to make required records available as required by ORS 653.045(1)-(2) and OAR 839-020-0083.

The Agency's NOI alleges that Green Thumb willfully failed to make available to the Commissioner or Commissioner's designee the records required to be maintained by ORS 653.045(1)-(2) and OAR 839-020-0083(3) as follows:

> "The Wage and Hour Division requested complete time and payroll records from [Green Thumb] on several occasions. [Green Thumb's] violation was willful because [Green Thumb] did not produce the responsive records that [Green Thumb] maintained until after WHD issued a subpoena."

Before evaluating whether Green Thumb's responses violated the law, the forum must first identify the records that Green Thumb was required to maintain. ORS 653.045(1) provides:

> "(1) Every employer required by ORS 653.025 or by any rule, order or permit issued under ORS 653.030 to pay a minimum wage to any of the employer's employees shall make and keep available to the Commissioner of the Bureau of Labor and Industries for not less than two years, a record or records containing:
>
> "(a) The name, address and occupation of each of the employer's employees.
>
> "(b) The actual hours worked each week and each pay period by each employee.
>
> "(c) Such other information as the commissioner prescribes by the commissioner's rules if necessary or appropriate for the enforcement of ORS 653.010 to 653.261 or of the rules and orders issued thereunder.

ORS 653.045(2) provides:

> "Each employer shall keep the records required by subsection (1) of this section open for inspection or transcription by the commissioner or the commissioner's designee at any reasonable time."

OAR 839-020-0083(3) provides:

> "All records required to be preserved and maintained by these rules shall be made available for inspections and transcription by the Commissioner or duly authorized representative of the Commissioner."

OAR 839-020-0080 lists the "records required to be preserved and maintained" in OAR 839-020-0083(3). In pertinent part, it provides:

> "(1) Every employer regulated under ORS 653.010 to 653.261 must maintain and preserve payroll or other records containing the following information and data with respect to each employee to whom the law applies:

"(a) Name in full, as used for Social Security recordkeeping purposes, and on the same record, the employee's identifying symbol or number if such is used in place of name on any time, work, or payroll records;

"(b) Home address, including zip code;

"(c) Date of birth, if under 19;

"(d) Occupation in which employed;

"(e) Time of day and day of week on which the employee's workweek begins. If the employee is part of a work force or employed in or by an establishment all of whose workers have a workweek beginning at the same time on the same day, a single notation of the time of the day and beginning day of the workweek for the whole work force or establishment will suffice;

"(f) Regular hourly rate of pay for any workweek in which overtime compensation is due, and an explanation of the basis of pay by indicating the monetary amount paid on a per hour, per day, per week, per piece, commission on sales, or other basis, and the amount and nature of each payment which, pursuant to ORS 653.261(1) is excluded from the 'regular rate of pay'. (These records may be in the form of vouchers or other payment data.);

"(g) Hours worked each workday and total hours worked each workweek (for purposes of this section, a 'workday' is any fixed period of 24 consecutive hours and a 'workweek' is any fixed and regularly recurring period of seven consecutive workdays);

"(h) Total daily or weekly straight-time earnings or wages due for hours worked during the workday or workweek, exclusive of premium overtime compensation;

"(i) Total premium pay for overtime hours. This amount excludes the straight-time earnings for overtime hours recorded under subsection (h) of this section;

"(j) Total additions to or deductions from wages paid each pay period including employee purchase orders or wage assignments. Also, in individual employee records, the dates, amounts, and nature of the items which make up the total additions and deductions;

"(k) Total wages paid each pay period;

"(l) Date of payment and the pay period covered by payment."

As a starting point in its analysis, the forum notes that the statute and rules related to Green Thumb's alleged violation of ORS 653.045(1)-(2) refer specifically to "ORS 653.010 to 653.261 or of the rules and orders issued thereunder." This distinction is

significant because the Agency also alleges a violation of ORS 279C.850(1)-(2), a parallel statute in Oregon's PWR law that requires contractors and subcontractors to make payroll and other records available that BOLI's commissioner deems necessary to determine if the PWR has been paid as required by ORS 279C.840. The existence of these separate statutes pertaining to the production of PWR and non-PWR records, respectively, indicates that the forum's analysis of the alleged ORS 653.045 violation should focus on Green Thumb's production of records related to non-PWR wages. Consequently, this section only refers to records requested that were related to non-PWR work.

Although it is not necessary for the forum to conclude that Green Thumb's workers were owed unpaid non-PWR wages to find that ORS 653.045 was violated, the forum infers from stipulations made by the Agency and Respondents that four workers who worked on the Fields project – Armando Alamo, Rogelio Jimenez, Arturo Orozco, and Jesus Zacarias – worked non-PWR OT and were owed non-PWR OT wages for work performed during Green Thumb's performance of the Fields project. In addition, the forum infers that Alamo, Orozco, Zacarias, and Miguel Arellanes worked non-PWR ST hours and were owed non-PWR ST wages were owed non-PWR OT wages for work performed during Green Thumb's performance of the Fields project.[62]

Findings of Fact ##53-68 – The Merits detail the voluminous records requests made to Green Thumb by Soria-Pons, the Wage and Hour Division's Compliance Specialist, and Green Thumb's equally voluminous responses. Soria-Pons's first request was made on August 22, 2013, and asked for a response by September 5, 2013. Among other things, it included a request for:

> "1. A list of names of employees who worked for your company from the beginning of the project through the most current week of work, including their last known addresses and phone numbers.
>
> "2. Complete daily time cards or time sheets for each employee who worked on this project, from the beginning of the project through the most current week of work. (Records must show or be provided for both PWR and non-PWR work performed each day.)
> "3. Complete payroll records showing gross wages earned and itemized deductions made from all wages for all employees who worked on this project from the beginning of the project through the most current week of work."

Soria-Pons received Green Thumb's response on September 5, 2013. Soria-Pons read the response and concluded that Green Thumb had failed to provide her with phone numbers of workers on the Fields project, time records for work performed on non-PWR projects by Green Thumb employees while the Fields project was ongoing, and payroll

[62] The forum draws this inference from the stipulations that these five workers were owed non-PWR wages stemming from work performed while the Fields project was in progress.

records for work performed on non-PWR projects by Green Thumb employees while the Fields project was ongoing. OAR 839-020-0083(3) does not require employers to keep a record of employee phone numbers. However, it does require that an employer maintain the time and payroll records requested by Soria-Pons.

On September 25, 2013, Soria-Pons sent a second request to Green Thumb in which she asked for a response no later than October 9, 2013. Among other things, she requested:

> "[P]lease provide me with all employee timecards for all workers who worked on the project for the entire duration of the project. The timecards should reflect both prevailing wage and non-prevailing wage projects Green Thumb's workers worked on during the same time frame as The Fields Neighborhood Park Project.
>
> "The other portion of Arturo Orozco's wage claim includes regular overtime (non-prevailing wage) wages due to him which were not paid. Mr. Orozco has indicated that he filled out and signed his own timecards. Please supply me with Mr. Orozco's timecards. In addition, provide me with all Mr. Orozco's timecards and payroll records for beginning from March 03, 2013 to July 03, 2013 (the duration of his employment)."

On October 9, 2013, Soria-Pons received a response from Green Thumb that included, among other things, 106 pages of time and payroll records for Arturo Orozco covering the period of time from 3/4/13 through 6/22/13. On December 12, 2013, S. Friedman emailed nine pages of Green Thumb's "Payroll Register" to Soria-Pons that Soria-Pons had requested. The Register included partial payroll information for Moises Alejandre, Daniel Stenger, Armando Alamo, Ricardo Zuniga, Jose Alejandre, and Jesus Zacarias. It showed pay period, gross and net wages, hours worked, and deductions, but did not differentiate between PWR and non-PWR hours. On February 13, 2014, S. Friedman emailed another 13 pages of Green Thumb's bank records to Soria-Pons that consisted of account summaries and a record of checks paid by Green Thumb for the months of January, February, and March 2013.

On March 31, 2014, Soria-Pons sent a letter to Green Thumb in which she stated "after reviewing Green Thumb's records, I found that I am still missing time records for work weeks in which both prevailing wage and non-prevailing wage hours were worked beginning from 11/20/2012 through the end of the project." Soria-Pons requested that those records be supplied. When Green Thumb did not respond, Soria-Pons prepared a subpoena, served on Green Thumb on April 21, 2014, that included, among other things, a demand for production of the following documents on May 16, 2014:

> "Excluding your 'Daily Jobsite Report,' provide any and all documents recording, memorializing, or indicating the prevailing wage and/or non-prevailing wage hours worked for each day including all hand written time sheets for all employees who worked for [Green Thumb] during the period of July 01, 2012 through the

completion of the project. Identify the overlapping workweek records for all employees who worked on both the Fields project and on non-prevailing wage jobs, during the period of July 01, 2012 through the completion of the project.

"Excluding the bank statements you have previously supplied, provide any and all receipts, canceled checks, and any other documents, papers, or records of any kind indicating in any manner any sums paid to all employees who worked for [Green Thumb] during the period of July 01, 2012 through the completion of the project. Identify the overlapping workweek records for all employees who worked on the Fields project and on non-prevailing wage jobs, during the period of July 01, 2012 through the completion of the project;

"Excluding any records which have already been submitted, provide any and all paycheck itemizations and stubs, statements of deductions, documents, papers, or records of any kind indicating in any manner the amount and purpose of deductions taken from all employees who worked for [Green Thumb] during the period of July 01, 2012 through the completion of the project. Identify the overlapping workweek records for all employees who worked on the Fields project and on non-prevailing wage jobs, during the period of July 01, 2012 through the completion of the project[.]"

In response to the subpoena, Green Thumb provided "two big boxes" of documents that were responsive to the subpoena.[63] However, Soria-Pons never received all the time cards she requested.

In Green Thumb's defense, S. Friedman testified that it was a huge burden on Green Thumb to provide all the records that Soria-Pons requested because of the magnitude of her request and Green Thumb's level of staffing.

The commissioner has held that the provision in OAR 839-020-0083(3) requiring records to "be made available" includes that requirement that those records be provided to BOLI upon request. *In the Matter of Abdul Rahim Ghaffari,* 35 BOLI 38, 46-47 (2016), *appeal pending* ("ORS 653.045(1) describes specific records that employers must keep and maintain; ORS 653.045(2), in turn, requires employers to make those records available for inspection, with the phrase 'available for inspection' containing the implicit requirement that an employer provide records in a timely manner after a BOLI request for those records.") Soria-Pons made several requests for non-PWR time and payroll records for Green Thumb workers who worked on the Fields project and non-PWR jobs in the same weeks so she could accurately determine the amount of unpaid wages, if any, owed to those workers. Although Green Thumb eventually provided her with most of the records, she never received all the requested time cards, and many of

[63] Soria-Pons was unable to recall the date that Green Thumb complied with the subpoena and there is no other evidence in the record to establish that date.

the records were only provided in response to the subpoena, more than seven months after her initial request.

In its NOI, the Agency asks the forum to assess a $1,000 civil penalty based on the "willful" nature of Green Thumb's violation. As discussed earlier in this Opinion:

> "'Willfully' means knowingly. An action is done knowingly when it is undertaken with actual knowledge of a thing to be done or omitted or action undertaken by a person who should have known the thing to be done or omitted. A person 'should have known the thing to be done or omitted' if the person has knowledge of facts or circumstances which, with reasonably diligent inquiry, would place the person on notice of the thing to be done or omitted to be done." OAR 839-020-0004(33).

Green Thumb, as an employer, had the obligation to maintain its workers' non-PWR time and payroll records and provide them to BOLI upon request. Soria-Pons's requests were clearly written and Green Thumb ultimately responded to most of them. However, it took Green Thumb seven months and Green Thumb provided its last batch of records only after receiving a subpoena. Under these circumstances, the forum finds that Soria-Pons's requests and deadlines were reasonable and that Green Thumb knowingly failed to provide the records in a timely manner, constituting a willful violation of ORS 653.045(2) and OAR 839-020-0083(3).

In its NOI, the Agency alleged the following aggravating circumstances:

> "(1) These violations are serious because the failure to make the records available to the WH frustrated the Agency's mission and hindered WHD's investigation into the underpayment of wages;
>
> "(2) Respondents knew or should have known they were required to keep certain records available for inspection; and
>
> "(3) Complying with the law should not have been unduly burdensome on Respondents."

Green Thumb's failure to provide those records in a timely manner prevented Soria-Pons from accurately calculating the workers' unpaid wages for an extended period of time, which in turn kept them from receiving the non-PWR wages coming to them until more than a year after they were earned. Given the time it took Green Thumb to comply, Green Thumb's understaffing and the magnitude of BOLI's request are not mitigating circumstances. Considering the aggravating and mitigating circumstances, the forum concludes that an appropriate civil penalty is $1,000, the amount requested by the Agency.

10. Green Thumb violated ORS 279C.850 and OAR 839-025-0030 by failing to timely make available records necessary to the determination of whether the PWR was being paid.

The Agency's NOI alleges that Green Thumb failed to timely make available records necessary to the determination of whether the PWR was being paid, thereby violating ORS 279C.850(1)-(2) and OAR 839-025-0030(1)-(3).

ORS 279C.850(1)-(2) provides:

> "(1) At any reasonable time the Commissioner of the Bureau of Labor and Industries may enter the office or business establishment of any contractor or subcontractor performing public works and gather facts and information necessary to determine whether the prevailing rate of wage is actually being paid by such contractor or subcontractor to workers upon public works.
>
> "(2) Upon request by the commissioner, every contractor or subcontractor performing work on public works shall make available to the commissioner for inspection during normal business hours any payroll or other records in the possession or under the control of the contractor or subcontractor that are deemed necessary by the commissioner to determine whether the prevailing rate of wage is actually being paid by such contractor or subcontractor to workers upon public works. The commissioner's request must be made a reasonable time in advance of the inspection."

OAR 839-025-0030(1)-(3) provides:

> "(1) Every contractor and subcontractor performing work on a public works contract shall make available to representatives of the Wage and Hour Division records necessary to determine if the prevailing wage rate has been or is being paid to workers upon such public work. Such records shall be made available to representatives of the Wage and Hour Division for inspection and transcription during normal business hours.
>
> "(2) The contractor or subcontractor shall make the records referred to in section (1) of this rule available within 24 hours of a request from a representative of the Wage and Hour Division or at such later date as may be specified by the division.
>
> "(3) When a prevailing wage rate claim or complaint has been filed with the Wage and Hour Division or when the division has otherwise received evidence indicating that a violation has occurred and upon a written request by a representative of the Division a public works contractor or subcontractor shall send a certified copy of such contractor's or subcontractor's payroll records to the Division within ten days of receiving such request. The Division's written request for such certified copies will indicate that a prevailing wage rate claim has been filed or that the division has received evidence indicating that a violation has occurred."

Historically, the forum has interpreted the "make available" provisions of both ORS 279C.850(1)-(2) and ORS 653.045 as requiring contractors and subcontractors to submit documents to BOLI upon BOLI's written request.[64]

The forum concludes that its precedent, not the interpretation advanced by Respondents' counsel, is the correct interpretation of the statute and rule. Here, Green Thumb did not provide the information and records the Agency needed to determine if Green Thumb had paid its workers the prevailing wage rate until almost eight months after the Agency's initial records request, and then only after subpoenaing those records. Green Thumb's failure to provide those records in a timely manner constitutes a violation of ORS 279C.850 and OAR 839-025-0030.

The commissioner is authorized to assess a civil penalty of up to $5,000 for violations of ORS 279C.850 and OAR 839-025-0030. ORS 279C.865(1); OAR 839-025-0530(1); OAR 839-025-0540(1). In its NOI, the Agency alleged and proved the same aggravating circumstances it alleged with regard to Respondents' violation of ORS 653.045(1)-(2) and OAR 839-020-0083(3). There are no mitigating circumstances. Considering these circumstances and BOLI precedent, the forum concludes that $2,500 is an appropriate civil penalty for Respondents' violations of ORS 279C.850 and OAR 839-025-0030.

11. Debarment

In its NOI, the Agency asked the forum to debar all four Respondents. The Agency sought debarment of Green Thumb on three grounds: (1) Green Thumb's alleged intentional failure to pay the PWR; (2) Green Thumb's alleged intentional failure

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[64] *See In the Matter of Labor Ready Northwest, Inc.,* 27 BOLI 83, 144-46 (2005), *affirmed, Labor Ready Northwest, Inc. v. Bureau of Labor and Industries,* 208 Or App 195, 145 P3d 232 (2006), *rev den* 342 Or 473;, 155 P3d 51 (2007)(when the agency requested records deemed necessary by the commissioner to determine if the prevailing wage rate was actually being paid by respondent on a public works project and respondent did not provide the requested records until five months later, the forum held that respondent had violated *former* ORS 279.355 and *former* OAR 839-016-0030) and assessed a civil penalty of $2,500; *In the Matter of Design N Mind, Inc.,* 27 BOLI 32, 43 (2005)(a respondent violated ORS 279C.355(2) when the agency requested payroll records related to a prevailing wage rate investigation, respondent ultimately failed to provide the records, and the forum assessed a civil penalty of $2,000); *In the Matter of Johnson Builders,* 21 BOLI 103, 128-29 (2000)(when the agency sent a letter requesting records requesting records instead of asking to visit a respondent's premises to inspect the records, and respondent failed to provide any records, the commissioner found that respondent had violated ORS 279.355(2) and assessed a civil penalty of $5,000, reasoning that "[ORS 279.355(2)] gives the commissioner the authority to require a subcontractor to make records available within a reasonable time after the commissioner's request. The critical element is the records be made available. Without the availability of records, the commissioner cannot accomplish the statute's purpose – determining whether the prevailing rate of wage's been paid. * * * the records availability requirement encompasses an on-site inspection, as well as the commissioner's authority to request that copies of the subcontractor's records be delivered to the Agency. If the latter was not the case, the commissioner would have no viable means of inspecting these records of the subcontractor had left the job site, moved out of state, or gone out of business, and consequently, no way of verifying whether or not the prevailing rate of wage and been paid.")

or refusal to post the PWR; and (3) Green Thumb's alleged intentional falsification of information contained in its CPRs. The Agency sought debarment of S. Friedman and J. Friedman on the grounds that they are corporate officers of Green Thumb who were each responsible for Green Thumb's intentional failure to pay the PWR, intentional failure or refusal to post the PWR, and intentional falsification of information contained in Green Thumb's CPRs.

ORS 279C.860 provides:

"(1) A contractor or a subcontractor or a firm, corporation, partnership, limited liability company or association in which the contractor or subcontractor has a financial interest may not receive a contract or subcontract for public works for a period of three years after the date on which the Commissioner of the Bureau of Labor and Industries publishes the contractor's or subcontractor's name on the list described in subsection (2) of this section. The commissioner shall add a contractor's or subcontractor's name to the list after determining, in accordance with ORS chapter 183, that:

"(a) The contractor or subcontractor has intentionally failed or refused to pay the prevailing rate of wage to workers employed upon public works;

"* * * * *

"(c) The contractor or subcontractor has intentionally failed or refused to post the prevailing rates of wage as required under ORS 279C.840(4); or

"d) The contractor or subcontractor has intentionally falsified information in the certified statements the contractor or subcontractor submitted under ORS 279C.845.

"* * * * *

"(3) If a contractor or subcontractor is a corporation or a limited liability company, the provisions of this section apply to any corporate officer or agent of the corporation or any member or manager of the limited liability company who is responsible for failing or refusing to pay or post the prevailing rate of wage * * * or intentionally falsifying information in the certified statements the contractor or subcontractor submits under ORS 279C.845."

OAR 839-025-0085 provides, in pertinent part:

"(1) Under the following circumstances, the commissioner, in accordance with the Administrative Procedures Act, may determine that a contractor or a subcontractor or a firm, limited liability company, corporation, partnership or association in which the contractor or subcontractor has a financial interest may not receive a contract or subcontract for a public works for a period of three years:

"(a) The contractor or subcontractor has intentionally failed or refused to pay the prevailing rate of wage to workers employed on a public works project as required under ORS 279C.840;

"* * * * *

"(c) The contractor or subcontractor has intentionally failed or refused to post the prevailing wage rates as required under ORS 279C.840(4) and these rules; or

"(d) The contractor or subcontractor has intentionally falsified information in the certified statements the contractor or subcontractor submitted under ORS 279C.845.

"(2) If a contractor or subcontractor is a corporation or a limited liability company, the provisions of this rule will apply to any corporate officer or agent of the corporation or any member or manager of the limited liability company who is responsible for failing or refusing to pay or post the prevailing wage rates, * * * or intentionally falsifying information in the certified statements the contractor or subcontractor submits under ORS 279C.845.

"(3) As used in section (2) of this rule, any corporate officer or agent of the corporation or any member or manager of the limited liability company responsible for failing or refusing to pay or post the prevailing wage rates * * * or intentionally falsifying information in the certified statements the contractor or subcontractor submits under ORS 279C.845, 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;

"* * * * *

"(c) The corporate secretary;

"* * * * *

"(e) Any member or manager of the limited liability company[.]"

Failure to Post

The forum has already concluded that Green Thumb did not fail or refuse to post the PWR as required under ORS 279C.840(4). Therefore, Respondents cannot be debarred for this reason.

Intentional Falsification of Information in Green Thumb's CPRs

Before the forum can determine whether the CPRs were "intentionally" falsified, the forum must first determine the meaning of the word "falsified," as the fact that the CPRs were "inaccurate" or "incomplete" under ORS 279C.845(3) does not *ipso facto* mean that they were "falsified" under ORS 279C.860 and OAR 839-025-0085. *Cf. State ex rel. Dep't of Transp. v. Stallcup*, 341 Or 93, 101, 138 P3d 9, 14 (2006)(*citing State v. Keeney,* 323 Or. 309, 316, 918 P2d 419 (1996) for the proposition that the legislature intends different meanings when it uses different terms in a statute).

ORS chapter 279C and OAR 839, Division 25 do not define "falsified." To determine legislative intent, and in the absence of a statutory definition, Oregon courts assume that the legislature intended to give words of common usage their "plain, natural, and ordinary meaning." *Portland General. Elec. Co. v. Bureau of Labor and Industries,* 317 Or 606, 611, 859 P2d 1143 (1993). "Falsified" is a word of common usage. In determining its "plain, natural, and ordinary meaning," the forum turns to *Webster's Third New International Dictionary*.[65]

As pertinent here, *Webster's* defines "falsify" as "to represent falsely**:** MISREPRESENT, DISTORT. * * * **:** to engage in misrepresentation or distortion." *Webster's* at 820. "Misrepresent," in turn, can mean 'to represent incorrectly: to give a false, imperfect, or misleading representation' or it can 'impl[y] intent, suggesting deliberate falsification, injustice, bias, or prejudice.'" *Webster's* at 1445. *See also Pierce v. Dep't of Pub. Safety Standards & Training*, 196 Or App 190, 193-94, 100 P.3d 1125 (2004)(in the context of determining whether petitioner had "falsified" an application for intermediate police certification, the court relied on *Webster's* to determine the meaning of "falsify" when "falsify" was not defined by statute and concluded that "as a matter of plain meaning and common usage, 'to falsify' can refer to the mere act of making a false or erroneous representation or it can refer to doing so with a particular mental state, such as deliberately or intentionally.")

Based on the above, the forum examines the reasons for Green Thumb's inaccuracies and incomplete CPRs to determine if those CPRs contain misrepresentations. The forum first examines the nine CPRs for which the forum has assessed a civil penalty because they were inaccurate or incomplete before moving on to consideration of the 10 CPRs for which no civil penalty was sought.[66]

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[65] Oregon courts have predominantly used *Webster's* (unabridged ed 1961 or later) to discern the plain meaning for statues enacted from around 1961 to the present. *Interpreting Oregon Law*,§2-27 (Hon. Jack Landau, ed., Oregon State Bar Legal Publications 2009 edition).

[66] *See* Findings of Fact ##51-53 – The Merits.

A. The nine CPRs for which a civil penalty was assessed.

First, the forum is unable to pinpoint why the 10/6/12 and 10/27/12 CPRs were inaccurate or incomplete and has only determined they were inaccurate because of the Agency's and Respondents' stipulation. Since the forum cannot determine the stipulated inaccuracy, the forum cannot conclude that those CPRs contain misrepresentations or were falsified. Second, Green Thumb's CPRs for the weeks ending on 8/25/12, 9/1/12, 9/8/12, 9/15/12, 9/22/12, 9/29/12, and 10/13/12 were inaccurate and/or incomplete because of omissions, in that they included all hours worked, but failed to categorize some of the hours worked as PWR OT. These categorical omissions constitute "erroneous representations," which fit under the definition of "falsify." Third, Green Thumb's CPR for the week ending 9/8/12 also completely omitted Ricardo Zuniga, whereas the Agency and Respondents stipulated that Zuniga was due $31.16 in PWR for his work at the Fields project that week, proving conclusively that Zuniga worked at the Fields project that week. This omission fits squarely within *Webster's* definition of "falsify," in that it gave "a false, imperfect, or misleading representation." The forum concludes that Green Thumb falsified its CPRs for the weeks ending on 8/25/12, 9/1/12, 9/8/12, 9/15/12, 9/22/12, 9/29/12, and 10/13/12.

B. The 10 CPRs for which no civil penalty was sought.

These CPRs misrepresent the job classification in which Miguel Alejandre, Armando Alamo, and Moises Alejandre worked by stating they were Landscape Laborers during weeks when they actually performed Bricklayer work. In Miguel Alejandre's case, the CPRs for the weeks ending 12/15/12, 1/12/13, 2/9/13, 2/16/13, 3/913, and 31613 omit stating any job classification whatsoever for him. In addition, the CPR for the week ending 3/9/13 shows that Miguel Alejandre worked no hours that week, whereas Green Thumb's Daily Job Reports for 3/5/13 and 3/8/13 show that Alejandre worked 7 a.m. to 3:30 p.m. both days at the Fields project. In total, the CPRs for the weeks ending 12/15/12, 1/12/13, 1/19/13, 1/26/13, 2/2/13, 2/9/13, 2/16/13, 3/2/13, 3/9/13, and 3/16/13 state that Alamo or one of the Alejandres worked as a Landscape Laborer when they actually worked as a Bricklayer and the 3/9/13 CPR entirely fails to show hours worked by Miguel Alejandre that week. The forum finds that these 10 CPRs were all falsified.

C. The 19 "falsified" CPRs were not "intentionally" falsified.

To "intentionally" falsify information in a CPR, an employer must be aware of the correct information required to be included in the CPR and make a conscious choice to include other, incorrect information. A negligent or otherwise inadvertent failure to include the correct information, while sufficient to invoke civil penalties, is not sufficient to impose debarment. Rather, a culpable mental state must be shown for the forum to conclude that a CPR was "intentionally" falsified. *See, e.g., In the Matter of Portland Flagging, LLC (#37-13),* 34 BOLI 270, 287 (2016); *In the Matter of High Mountain*

Plumbing and Diane Marie Cina, 33 BOLI 40, 51 (2014); *In the Matter of Green Thumb Landscape and Maintenance, Inc.,* 32 BOLI 185, 204 (2013).

This is only the third case to come before the forum in which the Agency has sought to debar a respondent for intentionally falsifying a CPR. *Portland Flagging, LLC*, was the respondent in the first two cases. In both cases, (1) respondent's CPRs stated that fringe benefits due to respondent's workers had been deposited when the deposits had not been made; (2) respondent's president consciously chose not to make the deposits at the time they were due; and (3) respondent's president neither corrected the CPRs nor instructed his staff to do so, testifying at hearing that he made a "business decision" to use the funds deducted for fringe benefits to "make payroll" and that he "got behind" in making the fringe benefit deposits. *In the Matter of Portland Flagging, LLC, #37-13*, 34 BOLI 270, 288 (2015); *In the Matter of Portland Flagging, LLC, #14-14*, 35 BOLI 11, 34 (2016). The commissioner concluded that respondent had intentionally falsified information in its CPRs and placed respondent and respondent's president, the corporate officer or manager responsible for intentionally falsifying information in the CPRs, on the list of ineligibles for a period of three years.

The forum first considers the nine CPRs for which a civil penalty has been assessed. The only way the forum has even been able to conclude that eight of the nine CPRs were inaccurate or incomplete is because the Agency and Respondents stipulated that unpaid PWR OT occurred in those weeks. The only exception is the CPR for the week ending 9/8/12 that omits Zuniga's name. However, there is no evidence that this omission was based on "a conscious choice" by Green Thumb or one of Green Thumb's employees or agents or that J. Friedman or S. Friedman possessed a "culpable mental state" in making the omission. Rather, the omission appears to have been caused a "negligent or otherwise inadvertent failure" by Respondents to include Zuniga's name. Negligence, while sufficient to invoke civil penalties, is not sufficient to impose debarment. Accordingly, the forum does not impose debarment on Green Thumb, S. Friedman, or J. Friedman based on these nine falsified CPRs.

Jennifer Friedman completed all of Green Thumb's CPRs, including the 10 that listed Miguel or Moises Alejandre and Armando Alamo as Landscape Laborers when they performed work as Bricklayers. There is no evidence that Scott Friedman played any role in the completion or submission of Green Thumb's CPRs. There is also no evidence that Jennifer Friedman was actually aware that these three workers had worked as Bricklayers when she wrote their job classification as Landscape Laborer on the 10 inaccurate CPRs or as to her state of mind when she completed those CPRs. Without any evidence that Jennifer Friedman had a culpable state of mind when she misclassified the three workers as Landscape Laborers, omitted writing any job classification for Miguel Alejandre, and omitted listing any hours for Alejandre in the CPR for the week ending 3/19/13, the forum cannot conclude that Green Thumb's 10 faulty CPRs were intentionally falsified. Based on the foregoing, the forum does not impose debarment on Green Thumb, S. Friedman, or J. Friedman based on these 10 falsified CPRs.

Intentional Failure to Pay the PWR

The forum has concluded that Green Thumb failed to pay 10 workers the PWR on the Fields project. Those workers were: Armando Alamo, Jose Alejandre, Miguel Alejandre, Moises Alejandre, Rogelio Jimenez, Arturo Orozco, Miguel Arellanes, Daniel stinger, Jesus Zacarias, and Ricardo Zuniga. To "intentionally" fail to pay the prevailing rate of wage, an "employer must either consciously choose not to determine the prevailing wage or know the prevailing wage but consciously choose not to pay it." *In the Matter of Labor Ready Northwest, Inc.,* 22 BOLI 245, 287 (2001), *rev'd in part, Labor Ready Northwest, Inc. v. Bureau of Labor and Industries,* 188 Or App 346, 364, 71 P3d 559 (2003), *rev den* 336 Or 534, 88 P3d 280 (2004). "[A] negligent or otherwise inadvertent failure to pay the prevailing wage, while sufficient to require the repayment of the back wages and liquidated damages to the employee and to invoke civil penalties, is not sufficient to impose debarment." *Id.*

To determine whether Green Thumb's failure to pay the PWR was intentional, the forum must examine the circumstances involving the underpayment of each worker.

1. *Armando Alamo* was paid less than the PWR for his work on the Fields project for the weeks ending 9/15/12, 9/29/12, 12/15/12, 1/12/13, 1/19/13, 1/26/13, 2/2/13, 2/9/13, 2/16/13, 3/2/13, 3/9/13, and 3/16/13. Except for the weeks ending 9/15/12 and 9/29/12, Alamo was underpaid because Green Thumb paid him as a Landscape Laborer/Technician ("LL/T") instead of the higher Bricklayer rate when he performed Bricklayer work.

2. *José Alejandre* was paid less than the PWR for his work on the Fields project for the weeks ending 9/8/12 and 9/22/12. The forum was unable to determine from the record why he was underpaid.

3. *Miguel Alejandre* was paid less than PWR for his work on the Fields project for the weeks ending 12/15/12, 1/12/13, 1/19/13, 1/26/13, 2/2/13, 2/9/13, 2/16/13, 3/9/13, and 3/16/13. He was underpaid because Green Thumb paid him as an LL/T instead of the higher Bricklayer rate when he performed Bricklayer work.

4. *Moises Alejandre* was paid less than PWR for his work on the Fields project for the weeks ending 8/25/12, 9/1/12, 9/8/12, 9/22/12, 1/12/13, and 1/19/13. He was underpaid for the week ending 1/19/13 because Green Thumb paid him as an LL/T instead of the higher Bricklayer rate when he performed Bricklayer work. The forum was unable to determine why he was underpaid the other weeks.

5. *Rogelio Jimenez* was paid less than the PWR for his work on the Fields project for the week ending 3/16/13. Green Thumb's CPR for the week ending 3/16/13 shows that Jimenez worked 23 hours on the Fields project that week and that he was paid the PWR, but he was only paid $8.95 for the PWR ST hours and $13.43 for the PWR OT hours he worked that week.

6. *Arturo Orozco* was paid less than the PWR for his work on the Fields project for the week ending 3/16/13. He was underpaid because Halter, Green Thumb's job supervisor, did not write Orozco's name on the Daily Job Site Reports for those days.

7. *Miguel Arellanes* was paid less than the PWR for his work on the Fields project for the week ending 3/16/13. He was underpaid because Green Thumb failed to calculate PWR OT on the basis of a 5x8 hour day week instead of a 4x10 hour day week when he worked Tuesday-Friday during the week ending 10/6/12 and Monday-Thursday during the week ending 10/13/12.

8. *Daniel Stenger* was paid less than the PWR for his work on the Fields project for the week ending 8/25/12, 9/29/12, and 10/13/12. The forum was unable to determine why Stenger was underpaid.

9. *Jesus Zacarias* was paid less than the PWR for his work on the Fields project for the week ending 10/13/12. He was underpaid because he worked 4x10 hour days on the Fields project on 10/8-11/12, then 8 hours on a non-PWR job on 10/12/12, and was not paid PWR OT for the week.

10. *Ricardo Zuniga* was paid less than the PWR for his work on the Fields project for the week ending 10/13/12. The forum was unable to determine from the record how or why Zuniga was underpaid.

As a preliminary matter, the forum notes that it regards S. Friedman's and J. Friedman's testimony that they never "intentionally" failed to pay the PWR as asserting a legal conclusion, not a fact.

The Agency's allegations that José Alejandre, Daniel Stenger, and Ricardo Zuniga were intentionally underpaid require no further discussion because the forum was unable to determine the reason for their underpayment. The forum's conclusions with respect to the other workers and the reasons for those conclusions follow.

Green Thumb's underpayment of Arturo Orozco was inadvertent, as it was caused by the failure of Green Thumb's onsite supervisor to write down Orozco's name on the Daily Job Site Reports that J. Friedman used to compute Green Thumb's PWR payroll.

Jesus Zacarias was underpaid because of Green Thumb's negligence, possibly caused by Green Thumb's "two payroll" system,[67] in not considering his 8 hours of non-PWR work on 10/12/12 with the 4x10 hour days he worked on the Fields project on 10/8-11/12 in calculating his PWR wages for that week.

[67] *See* Finding of Fact #17 -- The Merits.

Miguel Arellanes was underpaid because Green Thumb failed to calculate PWR OT on the basis of a 5x8 hour day week instead of a 4x10 hour day week when he worked a 4x10 hour week on Tuesday-Friday and a 4x10 hour week Monday-Thursday during the following week. These are the only two weeks that Arellanes worked on the Fields project before Green Thumb reverted to a 5x8 hour day week schedule. Soria-Pons testified that determining whether there are sufficient irregularities between weeks so that the worker's schedule defaults to a 5x8 hour schedule for the purpose of calculating PWR OT is a "judgment call" for BOLI investigators. Based on these facts, the forum concludes that Green Thumb's failure to pay PWR OT to Arellanes was inadvertent.

The reason for Rogelio Jimenez's underpayment remains a mystery, as there was no evidence presented at hearing to explain why his name appeared on Green Thumb's CPR for the week ending 3/16/13 but he was not paid the PWR for any of his 23 hours of work. Although J. Friedman was responsible for Green Thumb's CPRs and Green Thumb's payroll, the burden is on the Agency to show she made a conscious, intentional choice not to pay Jimenez the prevailing wage rate. The Agency did not meet that burden. Without any evidence as to J. Friedman's reason for underpaying Jimenez, the forum concludes that Green Thumb's underpayment to Jimenez was negligent, as opposed to intentional, because J. Friedman knew the PWR, knew Jimenez had worked on the Fields project, and knew or should have known that Jimenez was being underpaid.

In contrast to the other workers, Armando Alamo and Miguel Alejandre were underpaid because they were misclassified and paid as LL/Ts instead of Bricklayers for a number of weeks when they performed Bricklayer work consisting of setting stone pavers in mortar. Moises Alejandre was also underpaid for one week for the same reason.

The following facts are relevant in determining whether Green Thumb's misclassification and subsequent underpayment of these three workers was intentional:

- Before submitting a bid on the Fields project, S. Friedman reviewed the project specifications. While preparing the bid, S. Friedman made an effort to determine the appropriate labor classifications based on the project specifications, his prior experience on PWR jobs, and references to BOLI's publication containing definitions of covered occupations for public works contracts in Oregon.
- The definitions of covered occupations in BOLI's publication list the primary purpose and typical duties of each occupation. The LL/T definition contains no reference to setting pavers, whereas setting stones or brick in mortar is listed as a typical duty for a Bricklayer.
- BOLI's publication included a cross reference to covered occupations that described specific job duties and the trade classification they fell within to help employers determine the appropriate trade classification for specific types of work. The cross reference stated that the appropriate trade classification for workers setting pavers in mortar was "Bricklayer/Stonemason" and the

appropriate trade classification for workers setting pavers in sand with no mortar was Laborer -- Group 1.

- The bid submitted by S. Friedman on behalf of Green Thumb included a quote for "Stepstone Modular Concrete pavers, mortar set with edging" and "Stone Paving Columbia River special pavers, mortar set, no edging."
- The subcontract between R&R and Green Thumb, signed several months before Green Thumb commenced work on the Fields project, was signed by S. Friedman. Among other things, the line items included labor and material costs of almost $50,000 related to "pavers." Included in the descriptions of the work to be performed was the following: "Stepstone Modular Concrete pavers, mortar set with edging" and "Stone Paving Columbia River special pavers, mortar set, no edging."
- Green Thumb's Daily Job Site Reports show that: (a) "Stone pavers" was the only activity performed by Green Thumb on "1-15-12"[68] and Moises and Miguel Alejandre were the only workers on the Fields project that day; and (b) Armando Alamo and Miguel Alejandre worked at the Fields project during the weeks ending 12/15/12, 1/12/13, 1/19/13, 1/26/13, 2/2/13, 2/9/13, 2/16/13, 3/9/13, and 3/16/13 on days when there was work activity that included "pavers."
- In a preconstruction meeting held before work on the Fields project commenced that was attended by S. Friedman, representatives of the City of Portland, R&R, and the other subcontractors, there was a discussion about the classification of Green Thumb's workers in which it was determined that the work to be done with pavers was not "apprenticeable" work within the contract requirements.

Green Thumb's primary defenses were the "apprenticeable" determination in the preconstruction meeting, S. Friedman's testimony that he did not consciously choose not to determine the prevailing wage or know the prevailing wage but consciously choose not to pay it, and J. Friedman's testimony that she did not intentionally fail to pay the PWR. These defenses fail for two reasons. First, there is no evidence or legal authority to support the proposition that Green Thumb's workers were required to become Bricklayer apprentices in order to be paid as Bricklayers for performing Bricklayer work. Second, S. Friedman had worked on PWR projects before the Fields project and was aware of the procedure for determining the correct classification for workers and that he could call BOLI for advice on this subject. He testified that he consulted BOLI's PWR publication for that very purpose and put Green Thumb's workers in the LL/T classification based on information from that publication. However, the LL/T definition contains no reference whatsoever to pavers, whereas the Bricklayer definition includes pavers as a typical duty and the occupational cross reference specifically states that workers setting pavers with mortar are Bricklayers and workers setting pavers in sand are Laborers – Group 1. This leads the forum to one of two conclusions – (1) S. Friedman made a choice to make no further inquiry after reading the LL/T definition that made no reference to pavers, or (2) S. Friedman was aware that

[68] This was an obvious misdate, as Green Thumb did not even begin work on the Fields project until July 2012.

Green Thumb's workers should have been paid as Bricklayers for their paver work but chose to pay them as LL/Ts. Under (1), S. Friedman consciously chose not to determine the prevailing wage. Under (2), S. Friedman knew the prevailing wage but consciously choose not to pay it. Either way, his behavior was intentional. Since S. Friedman was acting as Green Thumb's agent, Green Thumb's failure to pay the PWR to Alamo and the two Alejandres was also intentional.

Based on the foregoing, the forum is required to debar Green Thumb for a period of three years.

As noted earlier, when a subcontractor is a corporation or a limited liability company, ORS 279C.860(3) requires the commissioner to debar "any corporate officer or agent of the corporation or any member or manager of the limited liability company who is responsible for failing or refusing to pay * * * or post the prevailing rate of wage." OAR 839-025-0085(2)-(3) further provide:

> "(2) If a contractor or subcontractor is a corporation or a limited liability company, the provisions of this rule will apply to any corporate officer or agent of the corporation or any member or manager of the limited liability company who is responsible for failing or refusing to pay * * * the prevailing wage rates[.]
>
> "(3) As used in section (2) of this rule, any corporate officer or agent of the corporation or any member or manager of the limited liability company responsible for failing or refusing to pay * * * the prevailing wage rates * * * includes, but is not limited to, the [corporate president and secretary and member and manager of the limited liability company] when the individuals knew or should have known the amount of the applicable prevailing wages[.]"

Based on the forum's conclusion that S. Friedman, GTM's president, was directly responsible for Green Thumb's intentional failure to pay the PWR, the forum is required to debar him for a period of three years. ORS 279C.860(3), OAR 839-025-0085(3).

The Agency also seeks to debar J. Friedman, GTM's corporate secretary and a GTL member, based on her responsibility in Green Thumb's intentional failure to pay the PWR. There is no evidence that J. Friedman was involved in the bidding process at the Fields project. However, she was the person responsible for Green Thumb's CPRs and payroll and that role made her responsible for Green Thumb's intentional failure to pay the PWR under ORS 279C.860(3) and OAR 839-025-0085(3). Accordingly, the forum must debar J. Friedman for a period of three years.

The Elmonica Project

It is undisputed that the Elmonica project was a "public works" subject to the requirements of ORS chapter 279C.

Joint Employment Relationship

The Agency's NOI alleges that Respondents GTM, GTL, and CJ jointly employed the workers at Elmonica that appear on the CPRs completed by J. Friedman. In general, a joint employment relationship exists when two associated employers share control of an employee. Joint or co-employers are responsible, both individually and jointly, for compliance with all applicable provisions of Oregon's wage and hour laws. *In the Matter of Brown's Architectural Sheetmetal, Inc.,* 35 BOLI 68 (2016); *In the Matter of Portland Flagging, LLC (#28-15),* 34 BOLI 244, 264 (2016); *In the Matter of Kurt E. Freitag,* 29 BOLI 164, 197-98 (2007), *affirmed without opinion*, *Freitag v. Bureau of Labor and Industries,* 243 Or App 389, 256 P3d 1099 (2011). A joint employment relationship cannot exist unless each alleged "joint" employer is also an individual employer. *In the Matter of Laura M. Jaap, 30 BOLI 110, 126 (2009).*

In the past, the forum has relied on the federal Fair Labor Standards Act ("FLSA"), specifically 29 CFR § 791.2, to determine whether respondents were joint employers.[69] *Id. See also In the Matter of Staff, Inc.*, 16 BOLI 97, 114-16 (1997). A

[69] 29 CFR § 791.2 of the FLSA (footnotes omitted) provides:

> "(a) A single individual may stand in the relation of an employee to two or more employers at the same time under the Fair Labor Standards Act of 1938, since there is nothing in the act which prevents an individual employed by one employer from also entering into an employment relationship with a different employer. A determination of whether the employment by the employers is to be considered joint employment or separate and distinct employment for purposes of the act depends upon all the facts in the particular case. If all the relevant facts establish that two or more employers are acting entirely independently of each other and are completely disassociated with respect to the employment of a particular employee, who during the same workweek performs work for more than one employer, each employer may disregard all work performed by the employee for the other employer (or employers) in determining his own responsibilities under the Act. On the other hand, if the facts establish that the employee is employed jointly by two or more employers, i.e., that employment by one employer is not completely disassociated from employment by the other employer(s), all of the employee's work for all of the joint employers during the workweek is considered as one employment for purposes of the Act. In this event, all joint employers are responsible, both individually and jointly, for compliance with all of the applicable provisions of the act, including the overtime provisions, with respect to the entire employment for the particular workweek. In discharging the joint obligation each employer may, of course, take credit toward minimum wage and overtime requirements for all payments made to the employee by the other joint employer or employers.
>
> "(b) Where the employee performs work which simultaneously benefits two or more employers, or works for two or more employers at different times during the workweek, a joint employment relationship generally will be considered to exist in situations such as:
>
> "(1) Where there is an arrangement between the employers to share the employee's services, as, for example, to interchange employees; or
>
> "(2) Where one employer is acting directly or indirectly in the interest of the other employer (or employers) in relation to the employee; or

joint employment relationship is established under the FLSA when employers have an agreement to share the services of an employee that is mutually beneficial to the employer(s), where one employer acts directly or indirectly in the interest of the other employer with respect to the employee, where the employers share direct or indirect control of the employee, or where one employer controls the other employer. *Portland Flagging, LLC (#28-15)* at 264. Under the FLSA, the forum's inquiry necessarily "depends upon all the facts" in the particular case.[70]

The facts here are relatively straightforward. To start, Respondent GTL, having been administratively dissolved on 12/13/13, played no part at Elmonica. Respondent GTM bid on and was awarded the Elmonica contract. During the performance of the contract, the name of the general contractor printed on the DIPs was "GT General Contracting," an assumed business name of GTM. The CPRs were completed by J. Friedman, GTM's secretary and CJ's president and secretary, on behalf of "Green Thumb Landscaping," another assumed business name of GTM. The workers were actually paid by Respondent CJ, a company that was set up – in the words of S. Friedman – to handle "our general contracting and construction labor." There was no evidence that CJ was set up as an independent payroll service. These facts, taken together, indicate that GTM and CJ were joint employers at Elmonica.[71]

Failure to Pay the Prevailing Wage Rate

The Agency's NOI alleges that Respondents intentionally failed to pay $69.92 in prevailing wages to three workers on the Elmonica project. ORS 279C.840(1) requires, in pertinent part:

> "The hourly rate of wage to be paid by any * * * 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 the labor is performed. * * * The * * * subcontractor shall pay all wages due and owing to the * * * subcontractor's workers upon public works on the regular payday established and maintained under ORS 652.120."

The Agency calculated the alleged $69.92 underpayment based on the following: (1) On 1/30/15, Byers and M. Alejandre were paid as Laborers for two hours work instead of the higher-paid Carpenter classification, constituting an underpayment of $18.48 each;

> "(3) Where the employers are not completely disassociated with respect to the employment of a particular employee and may be deemed to share control of the employee, directly or indirectly, by reason of the fact that one employer controls, is controlled by, or is under common control with the other employer."

[70] 29 CFR § 791.2(a).

[71] *See In the Matter of Brown's Architectural Sheetmetal, Inc. and Brun Metals Co. LLC,* 35 BOLI 68 (2016) for a detailed review of prior BOLI Final Orders in which the Commissioner has determined the existence of non-existence of an alleged joint employment relationship.

and (2) On 3/27/15, Stenger was paid as a Laborer for four hours work instead of the higher-paid Cement Mason classification, constituting an underpayment of $32.96. The Agency that these workers should have been paid the higher classification and Respondents contend they were paid correctly.

1. Byers & Alejandre

Neither Byers nor Alejandre testified at hearing or were interviewed to determine what work they performed on 1/30/15 at Elmonica. There are two pieces of documentary evidence that describe the work performed that day. The first is Stenger's handwritten notes on Respondents' 1/30/15 DIP that reads "Form curbs and tie rebar" and "Reformed per RFI #4 – 3 guys 2 hrs."[72] The second is Respondents' CPR for the week ending 1/31/15 that shows that on 1/30/15: (1) Alejandre, Byers, and Stenger worked and were paid 6 hours as Ironworkers; and (2) Alejandre and Byers worked and were paid 2 hours as Laborers and Stenger worked and was paid 2 hours as a Carpenter. S. Friedman credibly testified that the work Byers, Alejandre, and Stenger performed during the two contested hours was tearing out and discarding non-reusable existing forms, work classified as "Form Stripper and Preparation" under the trade classification of Laborer Group 1. In contrast, Fevurly testified that Byers and Alejandre should have been paid as Carpenters because they were "forming curbs," work that falls into the Carpenter classification.[73] The forum finds that the contemporaneous DIP created by Stenger and S. Friedman's testimony, not the CPR, is the most reliable evidence as to the work performed by Stenger, Alejandre, and Byers during the two hours they performed the work identified as "Reformed per RFI #4." That work, consisting of tearing out and discarding non-reusable existing forms, was properly classified as Laborer Group 1. This conclusion is bolstered by the fact that GTM/CJ had no financial incentive to underpay their workers.[74] If there was any misclassification of workers on 1/30/15, it appears to be that Stenger, Alejandre, and Byers may have been working as Carpenters, a classification that paid less than Ironworker, for the portion of the six hours that they were forming curbs in preparation to tying rebar. Finally, there is no evidence that Respondents determined that Alejandre and Byers were working as Carpenters, then paid them as Laborers for the contested two hours.

2. Stenger

The relevant facts are undisputed. Stenger used a power grinder and roto-hammer for four hours on 3/27/15 to grind off a high spot in cured, hardened concrete at the base of a door frame so that the door would swing properly. The concrete had been

[72] The only "3 guys" whom Stenger listed on the 1/30/15 DIP were himself, Alejandre, and Byers.

[73] *See* Finding of Fact #8 – The Merits. In addition, Fevurly testified that he made no attempt to determine if the workers were only stripping forms because he believed that was not relevant, based on the notation of "Form curbs" and that he made an unsuccessful attempt to obtain information from M. Alejandre and Byers as to the specific work they performed on 1/30/15.

[74] *See* Finding of Fact #17 -- The Merits.

poured earlier by union employees employed by another contractor. His work was not done to impart any kind of finish. Stenger was paid as a Laborer for that work.

The agency contends that Stenger should have been paid as a Cement Mason and that he was underpaid by $32.96. The evidence is not sufficient to support that Stenger be paid as a Cement Mason for this work.

Further, there is no evidence that Respondents determined that Stenger was working as a Cement Mason, then paid him as a Laborer for the contested four hours.

In conclusion, Respondents did not intentionally or unintentionally underpay Byers and Alejandre on 1/30/15 or Stenger on 3/27/15 in violation of ORS 279C.840(1) and the forum assesses no civil penalties.

Filing Inaccurate Certified Payroll Reports

The Agency alleges that Respondents committed three violations of ORS 279C.845(1)-(3) and OAR 839-025-0010(1)-(3) by filing "inaccurate and/or incomplete certified statements for work performed [at Elmonica] in that Respondents certified that the information contained in the certified statement was accurate when it was not." The Agency alleges these violations occurred for certified statements submitted for the weeks ending 2/7/15, 3/7/15, and 3/28/15.

ORS 279C.845 provides, in pertinent part:

> "(1) * * * every subcontractor * * * shall file certified statements with the public agency in writing, on a form prescribed by the Commissioner of the Bureau of Labor and Industries, certifying:
>
> "* * * * *
>
> "(3) The certified statements shall set out accurately and completely the * * * subcontractor's payroll records, including the name and address of each worker, the worker's correct classification, rate of pay, daily and weekly number of hours worked and the gross wages the worker earned upon the public works during each week identified in the certified statement."

1. Week ending 2/7/15.

Respondents' CPR for the week ending 2/7/15 contains several inaccuracies. First, the correct hours and work classifications are reported for all workers, but the days and hours actually worked were all erroneously transposed from the DIP to reflect that the work was done one day earlier than it was actually performed.[75] Second, M.

[75] *See* Findings of Fact ##19-22 – The Merits.

Alejandre was reported as having earned $321.98, the amount he was actually paid, whereas he actually earned only $320.12 when his weighted overtime was accurately calculated.[76] This constitutes one violation of ORS 279C.845(1)-(3) and OAR 839-025-0010(1)-(3).

2. Week ending 3/7/15.

Respondents' 3/6/15 DIP shows that Allen Fruck worked 5 hours on the Elmonica project performing work in the Laborer classification. However, Fruck's name does not appear on Respondents' corresponding CPR. On July 22, 2015, S. Friedman sent Fevurly an amended CPR for the week ending 3/7/15 showed that Allen Fruck worked 5 hours as a Laborer on 3/5/15, but did not include a certified statement. This constitutes one violation of ORS 279C.845(1)-(3) and OAR 839-025-0010(1)-(3).

3. *Week ending 3/28/15.*

Respondents' 3/24/15 DIP and a weekly time sheet provided by Respondents shows that M. Alejandre worked eight hours at Elmonica on 3/24/15 as a Laborer. However, Alejandre's name does not appear on Respondents' corresponding CPR, which lists Stenger as the only person who worked at Elmonica that week. On July 22, 2015, S. Friedman sent Fevurly an amended CPR for the week ending 3/28/15 that showed M. Alejandre worked eight hours at Elmonica on 3/24/15 as a Laborer, but did not have an attached certified statement. The same day, Respondents sent an amended CPR for the week ending 3/28/15 to TriMet that included a certified statement. Fevurly received a certified statement from TriMet on September 15, 2015. This constitutes one violation of ORS 279C.845(1)-(3) and OAR 839-025-0010(1)-(3).

Civil Penalties

In its Notice of Intent, the Agency asks the forum to assess the maximum civil penalty of $5,000 for each of GTM's and CJ's three certified payroll report violations. The Agency alleges the following aggravating circumstances in support of its request:

> (1) Respondents knew or should have known that they were required to submit accurate and complete certified payroll reports and knew or should have known that information contained on their certified statements was inaccurate and/or incomplete;
>
> (2) Respondents had the opportunity to submit complete and accurate certified statements and/or submit amended certified statements and would not have been difficult for Respondents to have done so;

[76] *See* Finding of Fact #23 – The Merits.

(3) Respondents' violations were serious because the requirement to submit accurate and complete certified statements helps insure the worker is receiving the appropriate prevailing wages and the magnitude of Respondents' violations were such that three (3) certified statements filed with the contracting agency or inaccurate and/or and complete; and

(4) GTM previously violated ORS 279C.845(3).

ORS 279C.865 provides: "(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 279C.800 to 279C.870 or any rule of the commissioner adopted thereunder." OAR 839-025-0530(3)(k) specifically provides that the Commissioner may assess a civil penalty "against a contractor or subcontractor for * * * [f]iling inaccurate or incomplete certified statements in violation of ORS 279C.845[.]" OAR 839-025-0540(1) provides that "[t]he actual amount of the civil penalty will depend on all the facts and on any mitigating and aggravating circumstances." When the commissioner elects to assess a civil penalty, OAR 839-025-0520, printed out in full in **The Fields** section of this Opinion in section 7 entitled "***Green Thumb submitted nine inaccurate CPRs***," sets out the specific criteria for determining the amount of a civil penalty. The forum compares the facts against those criteria below.

1. *Respondents knew or should have known of accurate certified payroll requirement.*

S. Friedman and J. Friedman both signed BOLI Compliance Agreements on 10/17/10 and S. Friedman signed a second Compliance Agreement on 5/30/11 in which they acknowledged awareness of BOLI's certified payroll report requirements. Furthermore, it is a given that Respondents knew or should have known that they were required to submit accurate and complete certified payroll reports, in that all employers are charged with the knowledge of wage and hour laws governing their activities as employers. *See, e.g., In the Matter of Southern Oregon Flagging, Inc.,* 18 BOLI 138, 166 (1999). This conclusion applies to all three violations.

2. *Opportunity and degree of difficulty to comply.*

Respondents had the opportunity to initially submit complete and accurate certified statements and did so with all of their CPRs at Elmonica except for the weeks ending for the weeks ending 2/7/15, 3/7/15, and 3/28/15. After Fevurly informed S. Friedman that Respondents' CPRs for the weeks ending 3/7/15 and 3/28/15 were inaccurate, Respondents timely submitted amended payroll reports to Fevurly on July 22, 2015, for those two weeks that were accurate but lacked certified statements. That same day, Respondents submitted an amended CPR to TriMet for the week ending 3/28/15 that included a certified statement. Respondents' CPR for the week ending 2/7/15 is inaccurate because of J. Friedman's transposition error that could have been avoided, had she been more careful. Respondents credibly explained that the CPR for

the week ending 3/7/15 lacked Fruck's name because Elations would not allow Fruck's name to be entered because he had not taken TriMet's safety training. Respondents offered no explanation for the absence of M. Alejandre's name from their CPR for the week ending 3/28/15, other than S. Friedman's statement in his July 22, 2015, letter to Fevurly in which he stated that M. Alejandre "was not included on the original submission in error."

3. Magnitude and seriousness of the violations.

As the Agency points out, the requirement to submit accurate and complete certified statements helps insure the worker is receiving the appropriate prevailing wages. In this case, Respondents' inaccurate CPRs notwithstanding, all of Respondents' workers were timely paid the correct prevailing wage rate and one – M. Alejandre – was mistakenly overpaid. Respondents also cooperated with the Agency in sending checks to Byers, Stenger, and Alejandre for the alleged unpaid wages.[77]

4. GTM's previous violations of ORS 279C.845(3).

GTM committed one violation of ORS 279C.845 by failing to list a worker on a CPR for the week ending October 9, 2010, and the commissioner assessed a civil penalty of $1,000, finding that the violation was aggravated by the fact that Respondent knew or should have known of the violation and that there were no mitigating circumstances. *In the Matter of Green Thumb Landscape and Maintenance, Inc., Scott A. Friedman and Jennifer Friedman,* 32 BOLI 185, 201-02 (2013). GTM committed 34 violations of ORS 279C.845 in case no. 62-15.

5. GTM's actions in responding to previous violations of statutes and rules.

GTM began doing prevailing wage rate work in 2010. When BOLI has investigated GTM, GTM has paid all demands for wages. S. Friedman has signed several Compliance Agreements at BOLI's request and has attempted to increase his understanding of prevailing wage rate law. J. Friedman has also signed a Compliance Agreement at BOLI's request. Since completing the Fields project in 2013, GTM has changed its payroll/CPR system on public works projects by revising its job ticket to make it "more robust in its information and tracking" and with the exception of Elmonica, now uses its computer to generate CPRs. GTM has also eliminated 4x10 schedules and now works exclusively 5x8 schedules to eliminate overtime computation problems.

Based on the aggravating and mitigating factors listed above, prior final orders, and the proposed civil penalties for Green Thumb's CPR violations in case no. 62-15, the forum concludes that the following civil penalties are appropriate for Respondents' CRP violations: $500 for the 2/7/15 violation; $3,000 for the 3/6/15 violation; and $3,000 for the 3/28/15 violation, for a total of $6,500.

[77] *See* Finding of Fact #32 – The Merits.

Debarment

In its NOI, the Agency alleges that Respondents GTM and CJ[78] should be debarred because (1) they intentionally failed to pay the prevailing rate of wage to their workers on the Elmonica project, and (2) intentionally falsified information contained in certified statements submitted under ORS 279C.845. The Agency further alleges that S. and J. Friedman should both be debarred because they are corporate officers of GTM and CJ who were both responsible for GTM and CJ's intentional failures to pay the prevailing rate of wage to workers employed at the Elmonica project and intentional falsification of information contained in certified statements submitted under ORS 279C.845 by GTM, GTL, and CJ.

ORS 279C.860 provides:

"(1) A contractor or a subcontractor or a firm, corporation, partnership, limited liability company or association in which the contractor or subcontractor has a financial interest may not receive a contract or subcontract for public works for a period of three years after the date on which the Commissioner of the Bureau of Labor and Industries publishes the contractor's or subcontractor's name on the list described in subsection (2) of this section. The commissioner shall add a contractor's or subcontractor's name to the list after determining, in accordance with ORS chapter 183, that:

"(a) The contractor or subcontractor has intentionally failed or refused to pay the prevailing rate of wage to workers employed upon public works;

"* * * * *

"d) The contractor or subcontractor has intentionally falsified information in the certified statements the contractor or subcontractor submitted under ORS 279C.845.

"* * * * *

"(3) If a contractor or subcontractor is a corporation or a limited liability company, the provisions of this section apply to any corporate officer or agent of the corporation or any member or manager of the limited liability company who is responsible for failing or refusing to pay or post the prevailing rate of wage, failing to pay to a subcontractor's employees amounts required under ORS 279C.840 that the contractor pays on the subcontractor's behalf or intentionally falsifying information in the certified statements the contractor or subcontractor submits under ORS 279C.845."

[78] The forum has found that Respondent GTL has no liability in this matter.

The forum has already concluded that Respondents neither intentionally nor unintentionally failed to pay the prevailing rate of wage to any worker on the Elmonica project. Therefore, Respondents cannot be debarred for this reason.

To "intentionally" falsify information in a CPR, an employer must be aware of the correct information required to be included in the CPR and make a conscious choice to include other, incorrect information. A negligent or otherwise inadvertent failure to include the correct information, while sufficient to invoke civil penalties, is not sufficient to impose debarment. Rather, a culpable mental state must be shown for the forum to conclude that a respondent "intentionally" falsified[79] a CPR. *See, e.g., In the Matter of Portland Flagging, LLC (#37-13),* 34 BOLI 270, 287 (2016); *In the Matter of High Mountain Plumbing and Diane Marie Cina,* 33 BOLI 40, 51 (2014); *In the Matter of Green Thumb Landscape and Maintenance, Inc.,* 32 BOLI 185, 204 (2013).

1. Week ending 2/7/15.

The inaccuracies in Respondents' CPR for the week ending 2/7/15 were due to J. Friedman's negligence in notating Respondents' worker's hours a day earlier than they were actually worked and the Elations system's miscalculation of M. Alejandre's weighted average overtime that Respondents had no control over. There is no evidence that Respondents' CPR was falsified for the purpose of overpaying M. Alejandre. There is also no evidence of "a culpable mental state" on the part of S. or J. Friedman or any other employee of Respondents with respect to the inaccuracies on this CPR.

2. Week ending 3/7/15.

S. Friedman credibly testified that Allen Fruck was not listed on Respondents' CPR for the week ending 3/7/15 due to the Elations system that prevented J. Friedman from entering Fruck's information into the Elations CPR until Fruck completed the safety training required by Trimet and was added to Elations. The Agency presented no evidence to the contrary. Fruck was timely paid his wages and S. Friedman sent Fevurly an amended payroll report for the week ending 3/7/15 showed that Allen Fruck worked 5 hours as a Laborer on 3/5/15. Again, there is also no evidence of "a culpable mental state" on the part of S. or J. Friedman or any other employee of Respondents with respect to the inaccuracies on this CPR.

3. *Week ending 3/28/15.*

Respondents' CPR for the week ending 3/28/15 does not list M. Alejandre, who worked eight hours at Elmonica on 3/24/15 as a Laborer. On July 22, 2015, S. Friedman sent Fevurly an amended CPR for the week ending 3/28/15 that showed M.

[79] *See* the Fields Project portion of the Opinion for a prior discussion of the meaning of "falsify" and "intentionally."

Alejandre worked eight hours at Elmonica on 3/24/15 as a Laborer, but did not include a certified statement. The same day, Respondents sent the same amended CPR for the week ending 3/28/15 to TriMet, along with a certified statement. The only evidence of why Respondents omitted M. Alejandre's name from the original CPR is S. Friedman's statement in his July 22, 2015, letter to Fevurly in which he stated that M. Alejandre's name "was not included on the original submission in error." M. Alejandre was timely paid his wages for his work on 3/24/15. This evidence is insufficient to allow the forum to infer "a culpable mental state" on the part of S. or J. Friedman or any other employee of Respondents with respect to M. Alejandre's omission from Respondent's original CPR. At worst, the forum can only infer that Respondents' omission was "a negligent or otherwise inadvertent failure to include the correct information."

Conclusion

The Agency has not met its burden of proof to show that Respondents intentionally falsified its CPRs for the weeks ending 2/7/15, 3/7/15, and 3/28/15. Consequently, the forum may not debar GTM, CJ, S. Friedman, or J. Friedman based on GTM and CJ's violations of ORS 279C.845 and OAR 839-025-0010.

Debarment of CJ Based on J. Friedman's Financial Interest in CJ

Although CJ may not be debarred for intentional failure to pay the prevailing wage rate or intentional CPR falsification, a separate ground exists for debarring CJ. In its NOIs for case nos. 62-15 and 15-16, the Agency asked that:

> "Respondent Jennifer Friedman and any firm, corporation, partnership or association in which she has a financial interest should be placed on the list of those ineligible to receive contracts or subcontract for public works for a period of three (3) years pursuant to ORS 279C .860(1)(a) and (d) and OAR 839-025-0085(1)(a) and (d)."

J. Friedman has been debarred in this Order because she was a corporate officer of GTM and GTL who was responsible for GTM and GTL's intentional failure to pay the prevailing wage rate to their workers. It is undisputed that J. Friedman is the corporate president and secretary of Respondent CJ. This fact establishes that she has a financial interest in CJ. Based on J. Friedman's financial interest, the forum is also required to debar CJ for three years.

Exceptions to Proposed Order

A. Agency Exceptions

Agency Exception #1.

The Agency excepted to both the amount and method by which civil penalties were assessed in the Proposed Order for Respondents nine certified payroll violations.

The proposed assessment is consistent with recent BOLI precedent and appropriate for the three different sets of circumstances presented by the nine violations. The Agency's exception is **OVERRULED**.

Agency Exception #2.

The Agency excepted to the amount of civil penalties assessed in the Proposed Order for Respondents' 25 violations of ORS 279C.845 and OAR 829-025-0010(3), arguing that they should be increased from $500 to $1,000 for each violation. The Agency's exception is **OVERRULED**.

Agency's Exception #3.

The Agency excepted to the ALJ's conclusion that Respondents did not fail to timely make available records necessary to the determination of whether the prevailing wage rate was being paid in violation of ORS 279C.850 and OAR 839-025-0030. In the Proposed Order, the ALJ concluded that the statute and rule were not violated unless the Agency first made a request to visit a contractor's business premises for the purpose of inspecting records and had that request denied or otherwise impeded. This conclusion implicitly overruled existing BOLI precedent. The ALJ's interpretation unduly restricted the application of the statute and rule in its failure to follow longstanding BOLI precedent. The Agency's exception is **GRANTED** and the Conclusions of Law and discussion in the Opinion have been modified to reflect this.

Agency Exception #4.

The Agency excepts to the ALJ's conclusion that Respondents did not intentionally falsify information contained in CPRs submitted for the Fields project pursuant to ORS 279C.845 and should not be debarred for that reason. The Agency's exception has two components: (1) The ALJ failed to consider any CPRs other than the nine for which the Agency sought civil penalties; and (2) The ALJ used the wrong test to determine that Respondents did not intentionally falsify information contained in the relevant CPRs.

Based on the pleadings, the forum concludes that the ALJ incorrectly limited his analysis to the nine CPRs for which the Agency sought civil penalties and should have considered all the CPRs submitted by Respondents related to the Fields project. The forum has added Findings of Fact that describe 10 additional relevant CPRs. In the Opinion, the forum has amended its analysis to include an evaluation of those additional CPRs. However, the forum rejects the Agency's argument that the ALJ used the wrong test to determine that Respondents did not engage in intentional falsification. Applying the test set out in the Proposed Opinion to the additional CPRs, the forum still reaches the same conclusion as the ALJ. Based on the application of that test, the Agency's exception is **OVERRULED**.

Agency Exception #5.

The Agency excepts to the ALJ's failure to propose debarment of Green Thumb Landscaping and GT General Contracting (both assumed business names of Green Thumb Maintenance & Landscape, Inc. ("GTM")), and CJ Construction, Inc. ("CJ"), a separate corporation set up for the purposes described in Finding of Fact #7 – The Merits. All three business entities are named as respondents. The Agency contends that all three entities should be debarred because Scott and Jennifer Friedman, GTM, and GTL have a financial interest in them. The Agency's exception is **GRANTED** as to Respondents Green Thumb Landscaping and GT General Contracting because of the respective financial interests that GTM and GTL have in GT General Contracting and Green Thumb Contracting.[80] The Agency' exception regarding CJ is also **GRANTED** for the reason stated in the section in this Amended Opinion entitled "Debarment of CJ Based on J. Friedman's Financial Interest in CJ."

Agency Exception #6.

The Agency's excepts to "several footnotes in the PO note the Forum's inability to ascertain the basis for the parties' stipulations. * * * The Agency takes exception to any notations implying that the failure to present [a detailed analysis of the stipulated underpayments] was somehow a deficiency in the Agency's case." The PO contains 76 footnotes and the Agency does not identify the specific footnotes that form the basis of its exception. There are a number of footnotes in the Proposed Order that state "the forum is unable to determine from the record why [worker] was underpaid PWR" or "was not paid the PWR." These footnotes are not intended to imply a deficiency in the Agency's case. Rather, since the Agency's NOI proposed to debar Respondents based on the intentional failure to pay PWR to all the workers referenced in these footnotes, and intent can only be established when there is evidence of the reason for nonpayment, the forum includes these footnotes as a way of showing the factual basis for its finding of Respondents' lack of intent with respect to the workers referenced in the footnotes. The Agency's exception is **OVERRULED**.

B. Respondents' Exceptions

Respondents' Exception #1.

Respondents excepted to the ALJ's credibility finding for Scott Friedman and to Proposed Conclusions of Law ##2, 13, and 14, and the portion of the Proposed Opinion that addresses those Conclusions of Law. Those Proposed Conclusions set out the forum's conclusions that Respondents intentionally failed to pay the prevailing wage rate on the Fields project and that Scott and Jennifer Friedman were responsible for that failure. The ALJ's credibility finding is supported by substantial evidence and the

[80] *See* Findings of Fact ##3, #5 – The Merits.

Proposed Conclusions of Law and Proposed Opinion are supported by substantial evidence and substantial reason. Respondents' exceptions are **OVERRULED**.

Respondents' Exception #2.

Respondents excepted to Proposed Conclusion of Law #7 and the accompanying portion of the Proposed Opinion in which the ALJ found that Respondents committed 25 violations of ORS 279C.845 and OAR 829-025-0010(3) by failing to timely submit 25 CPRs to the City of Portland. Respondents argue that they met the requirements of the law by timely submitting them to R & R, the general contractor, who in turn submitted them to the City of Portland. Respondents are mistaken. The Proposed Order correctly interprets the law as requiring contractors and subcontractors to submit CPRs directly to the contracting agency. It is undisputed that Respondents did not do this. Respondents' exception is **OVERRULED**.

AMENDED ORDER

A. <u>Case No. 62-15</u>

1. NOW, THEREFORE, as authorized by ORS 279C.865, and as payment of the penalties assessed as a result of their violations of ORS 279C.840(1), OAR 839-025-0035, OAR 839-025-0040, ORS 279C.845, OAR 839-025-0010, ORS 279C.845, OAR 839-025-0010, ORS 653.045(1)&(2), OAR 839-020-0083, ORS 653.261, and OAR 839-020-0030, the Commissioner of the Bureau of Labor and Industries hereby orders Respondents **Green Thumb Landscape and Maintenance, Inc.** and **Green Thumb LLC** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, the following:

> A certified check payable to the Bureau of Labor and Industries in the amount of **THIRTY-SIX THOUSAND EIGHT HUNDRED FIFTY-TWO DOLLARS AND THREE CENTS ($36,852.03)**, plus interest at the legal rate on that sum between a date ten days after the issuance of the final order and the date Respondents **Green Thumb Landscape and Maintenance, Inc.** and **Green Thumb LLC** complies with the Final Order.

2. NOW, THEREFORE, as authorized by ORS 279C.860, the Commissioner of the Bureau of Labor and Industries hereby orders that Respondents **Green Thumb Landscape and Maintenance, Inc., Green Thumb LLC, Scott Friedman, Jennifer Friedman**, **Green Thumb Landscaping, GT General Contracting, and CJ Construction, Inc.** shall be ineligible to receive any contract or subcontract for public works for three years from the date of publication of their names on the list of those ineligible to receive such contracts maintained and published by the Commissioner of the Bureau of Labor and Industries.

B. Case No. 15-16

1. NOW, THEREFORE, as authorized by ORS 279C.865, and as payment of the penalties assessed as a result of its violations of ORS 279C.845 and OAR 839-025-0010, the Commissioner of the Bureau of Labor and Industries hereby orders Respondents **Green Thumb Landscape and Maintenance, Inc.** and **CJ Construction, Inc.** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, the following:

> A certified check payable to the Bureau of Labor and Industries in the amount of **SIX THOUSAND FIVE HUNDRED DOLLARS ($6,500.00)**, plus interest at the legal rate on that sum between a date ten days after the issuance of the final order and the date Respondents **Green Thumb Landscape and Maintenance, Inc.** and **CJ Construction, Inc.** comply with the Final Order.

2. The charges in case no. 15-16 against **Green Thumb LLC**, **Scott Friedman** and **Jennifer Friedman** are hereby **DISMISSED**.

3. NOW, THEREFORE, as authorized by ORS 279C.860 and OAR 839-025-0085, the Commissioner of the Bureau of Labor and Industries hereby orders that Respondent **CJ Construction, Inc.** shall be ineligible to receive any contract or subcontract for public works for three years from the date of publication of its names 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

OREGON STATE BUILDING & CONSTRUCTION TRADES COUNCIL,

Case Nos. 28-16 and 51-16
Final Order of Commissioner Brad Avakian
Issued February 9, 2017

SYNOPSIS

Oregon State Building & Construction Trades Council requested a Determination as to whether the proposed project to construct a new hospital in Newport, Oregon would be a public works on which payment of the prevailing rate of wage is or would be required under ORS 279C.840. The Agency correctly determined that the proposed new hospital project is not a public works project under ORS 279C.800(6)(a)(A) (2015). Therefore, payment of the prevailing rate of wage to workers on the project would not be required under ORS 279C.840.

The above-entitled case came on regularly for hearing before Kari Furnanz, designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on August 4 and 5, 2016, in the W. W. Gregg Hearing Room of the Oregon 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 Administrative Prosecutor Adriana Ortega, an employee of the Agency. Requester/Aggrieved Person Oregon State Building & Construction Trades Council ("OSBCTC") was represented throughout the proceeding by Attorney Noah Barish.

The Agency called Susan Wooley, BOLI Technical Assistance Coordinator, as its only witness. OSBCTC called three witnesses: Kate Newhall, Government Affairs Director for Focus Point Communications, John Mohlis, Executive Secretary for the OSBCTC, and Tary Carlson, Senior Construction Manager for Legacy Health.

The forum received into evidence: (a) Administrative exhibits X1 through X30; (b) Agency exhibits A1 through A16; and (c) OSBCTC exhibits AP1 through AP18.

Having fully considered the entire record in this matter, I, Brad Avakian, Commissioner of the Bureau of Labor and Industries, hereby make the following

Findings of Fact (Procedural and on the Merits[1]), Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) On October 21, 2015, Pacific Communities Health District ("District"), through counsel Carolyn H. Connelly, submitted a written request for a determination under ORS 279C.817 ("coverage determination") as to whether the District's proposed project was a "public work, subject to the payment of prevailing wages under ORS 279C.840." The proposed project was the demolition and construction of a new hospital in Newport, Oregon. (Ex. A1[1])

2) Relying on information accompanying the District's request and additional information subsequently provided at BOLI's request, the Agency issued a coverage determination on December 7, 2015, that contained the following "Conclusions of Law" and "Determination:"

> "**Conclusions of Law**
>
> "1. As proposed, the New Hospital project will not be carried on or contracted for by any public agency and is therefore not a 'public works' under ORS 279C.800(6)(a)(A). However, if the project does not proceed as required by the Lease Addendum and the District utilizes one of its allowable remedies, this conclusion could change.
>
> "2. The proposed project is not privately owned construction and therefore, even though the project will use $750,000 or more in funds of a public agency, it is not a 'public works' under ORS 279C.800(6)(a)(B), as that statute is currently written. However, pursuant to 2015 Senate Bill 137, the language in this statute will be amended so that any project for constructing, reconstructing, painting or performing a major renovation of a road, highway, building, structure or improvement of any type that uses $750,000 or more in funds of a public agency will be a 'public works,' regardless of who owns the property. The amendments to this statute apply to public works projects for which a contracting agency advertises or otherwise solicits or, if the contracting agency does not advertise or solicit the public works project, to a contract for a public works project into which a contracting agency enters on or after January 1, 2016. Therefore, if the [District] enters into an agreement to provide $750,000 or more in funds of a public agency for the proposed project on or after January 1, 2016, this project will be a 'public works' under ORS 279C.800(6)(a)(B), as amended by 2015 Senate Bill 137.

[1] Exhibit AP17 is the same document as Exhibit A1. For the sake of efficiency, only Exhibit A1 will be cited.

"3. Because the proposed project is not privately owned construction, the project is not a 'public works' under ORS 279C.800(6)(a)(C).

"4. The proposed project will not include the construction or installation of a device that uses solar radiation and is therefore not a 'public works' under ORS 279C.800(6)(a)(D)."

"**Determination**

"Based on the foregoing, the Prevailing Wage Rate laws, ORS 279C.800 to ORS 279C.870, and OAR Chapter 839, Division 025, will not apply to the New Hospital project, as the project is currently proposed, if the [District] enters into an agreement to provide funds for this project prior to January 1, 2016. However, the Prevailing Wage Rate laws will apply to the New Hospital project if the [District] enters into an agreement to provide $750,000 or more in funds of a public agency on or after January 1, 2016.

"This determination is based on the agency's file as of the date of this determination. The commissioner may make a different determination if any of the project information is incorrect, or if the project or project documents are modified or supplemented after the date of this determination."

(Ex. A8)

3) On December 23, 2015, OSCBTC filed a request for a hearing "to contest the prevailing wage determination made regarding the New Hospital Project issued on December 7, 2015." (Ex. A9)

4) On January 12, 2016, Attorney John Bishop sent a letter indicating that he was representing OSCBTC. (Ex. X5)

5) On January 14, 2016, the forum issued a Notice of Hearing to OSCBTC, the District's counsel Connelly, and the Agency setting the time and place of hearing for 9:30 a.m. on February 23, 2016, at the Portland office of the Bureau of Labor and Industries. The Notice of Hearing also stated that the matter was assigned to ALJ Kari Furnanz. Together with the Notice of Hearing, the forum sent a copy of BOLI's December 7, 2015, coverage determination, a document entitled "Summary of Contested Case Rights and Procedures" containing the information required by ORS 183.413, a document entitled "Servicemembers Civil Relief Act (SCRA) Notification, and a copy of the forum's contested case hearings rules, OAR 839-050-000 to 839-050-0445. (Ex. X2)

6) The ALJ issued an interim order on January 14, 2016, which stated, in pertinent part, as follows:

"**SUBMISSIONS DUE FEBRUARY 3, 2016**

"Pursuant to OAR 839-050-0445(7), Requester and the Agency are hereby ordered to file written statements containing the names of all persons they propose to call as witnesses at the hearing, along with a statement of how each person's testimony will help the administrative law judge understand the materials provided by the Requester under OAR 839-025-0005(1)-(4) or the reasons for the Agency's determination. These statements must be filed **no later than February 3, 2016**.

"**SUBMISSIONS DUE FEBRUARY 9, 2016**

"Pursuant to OAR 839-050-0445, Requester and the Agency are hereby ordered to file the following documents and responses with the forum **no later than February 9, 2016**.

1. For **Requester** only, a written statement identifying all of Requester's reasons for contesting the Agency's determination; and

2. For the **Agency** only, (a) copies of the Agency's determination, (b) all materials provided by Requester under OAR 839-025-0005(1)-(4), and (c) any other materials the Agency relied upon to reach its determination. OAR 839-050-0445(5)(a) & (b).

"The Agency's determination and materials must be marked for identification in the manner set forth in OAR 839-050-0270.

"Pursuant to OAR 839-050-0445(6), the Requester's written statement, the Agency's determination, and the materials filed in accordance with this interim order will be admitted into the record as exhibits.

"**Failure to comply with this order may result in sanctions as described in OAR 839-050-0210(5), including the refusal to admit evidence that was not disclosed in response to this order.**

IT IS SO ORDERED"

(Ex. X3)

7) On January 22, 2016, an interim order was issued which stated:

"A telephone prehearing conference was held on January 20, 2016. Administrative Prosecutor Adriana Ortega appeared on behalf of the Agency. Attorney John Bishop appeared on behalf of the Oregon Building State Building & Trades Council ('OSBTC'). The conference was held at the request of OSBTC

to address questions regarding its status as a party and the case deadlines in the Interim Order of January 14, 2016. The following rulings were made during the conference:

- The caption in this case is hereby amended to reflect that OSBTC is to be referred to as an 'Aggrieved Person' as defined by OAR 839-050-0445(3)(a).
- Any reference to 'Requester' in the Interim Order of January 14, 2016, should be replaced with 'Aggrieved Person.'
- The deadlines in the Interim Order of January 14, 2016, remain unchanged. However, the parties may supplement their submissions within a reasonable time before hearing. If either party objects to any supplemental prehearing submissions, the objections will be addressed at the hearing or by a prehearing conference.

IT IS SO ORDERED"

(Ex. X6A)

8) On February 3, 2016, the Agency filed its submission of documents and names of witnesses and OSCBTC filed a written statement regarding proposed witnesses. (Exs. X6B, X7)

9) On February 9, 2016, OSCBTC filed a written statement for contesting the agency's determination and proposed exhibits. (Ex. X8)

10) On February 12, 2016, an interim order was issued stating that the assigned ALJ was changing to ALJ Alan McCullough. (Ex. X9)

11) OSBCTC filed an amended written statement regarding reasons for contesting the agency's determination and proposed exhibits on February 17, 2016.

12) The start time of the hearing was revised in an interim order dated February 18, 2016. Additionally, the ALJ listed the order of presentation of evidence at the hearing. (Ex. X11)

13) On February 19, 2016, the Agency filed a motion for postponement. The motion indicated that the parties jointly requested the postponement so that the Agency could consider additional evidence relevant to its determination. The ALJ issued an interim order indicating that a prehearing conference was held with Ms. Ortega and Mr. Barish in which the ALJ orally granted the motion. The interim order also stated that the hearing was postponed indefinitely, and that the Agency and OSBCTC were instructed to provide the ALJ with a brief case status report on March 4, then an additional report every 21 days thereafter. (Ex. X12, X13)

14) On March 2, 2016, BOLI received a request from OSBCTC asking whether the proposed project "is or would be a public works on which the payment of the prevailing wage would be required under ORS 279C.840." OSBCTC filed a joint case status report on March 4, 2016. The joint status report stated that on March 1, 2016, at the Agency's prompting, OSBCTC submitted a new request for prevailing wage determination to the Agency. Accordingly, the Agency was going to process that new determination request with OSBCTC as the requester, and continue to hold case number 28-16 in abeyance. The parties would continue to provide periodic case status updates as required. (Exs. X14, A10, A15)

15) On March 25, 2016, the Agency submitted a Joint Case Status Report that stated that on March 2, 2016,[2] the Agency received OSBCTC's request for prevailing wage determination. The parties requested that the contested case hearing continue to be held in abeyance pending the Agency's issuance of its determination and resulting request for hearing. (Ex. X15)

16) On April 6, 2016, BOLI issued a coverage determination in which it concluded that Oregon's prevailing wage rate laws would not apply to the subject project. The determination contained the following "Conclusions of Law" and "Determination:"

"**Conclusions of Law**

"1. To be subject to the Prevailing Wage Rate laws, a project must meet the definition of 'public works' under ORS 279C.800(6)(a). Under ORS 279C.800(6)(a)(A), a public works project is a construction project that is 'carried on' or 'contracted for' by a public agency. The District was not involved in the solicitation process for the New Hospital project, nor did it assist in the selection of the firms who will design and build the New Hospital. The District will review project costs and disbursements, to verify they are reasonable and within the limitations of SPHS's budget, and all changes to the budget must be approved by the District. The oversight responsibilities the District will have regarding the New Hospital project will ensure the facility is properly constructed in a manner that complies with all applicable laws related to hospitals and the provision of health services, in a cost effective manner. The District will not be directing any of the construction work, and will not have substantial control over the project. As such, the project will not be 'carried on' by a public agency. The New Hospital project will not be 'contracted for' by a public agency because the Lease Agreement does not require construction to occur, and as such, the District has not entered into a binding agreement for construction. Therefore, the New Hospital project is not a 'public works' under ORS 279C.800(6)(a)(A). However, if the project does not proceed as stipulated by the Lease Addendum and the District utilizes one of its allowable remedies, this conclusion could change.

[2] The status report used the date March 2, 201**5**, which appears to be a typographical error.

"2. The proposed project is not privately owned construction and therefore, even though the project will use $750,000 or more in funds of a public agency, it is not a 'public works' under ORS 279C.800(6)(a)(B), as that statute was written at the time the District and SPHS entered into the Lease Addendum.

"3. Because the proposed project is not privately owned construction, the project is not a 'public works' under ORS 279C.800(6)(a)(C).

"4. The proposed project will not include the construction or installation of a device that uses solar radiation and is therefore not a 'public works' under ORS 279C.800(6)(a)(D)."

"**Determination**

"Based on the foregoing, the Prevailing Wage Rate laws, ORS 279C.800 to ORS 279C.870, and OAR Chapter 839, Division 025, will not apply to the New Hospital project.

"This determination is based on the agency's file as of the date of this determination. The commissioner may make a different determination if any of the project information is incorrect, or if the project or project documents are modified or supplemented after the date of this determination."

(Exhibit A15)

17) OSBCTC filed a request for hearing on April 7, 2016, based on BOLI's April 6, 2016, coverage determination. The case was docketed as case number 51-16. (Exs. X30, X18)

18) The ALJ issued the following interim order on April 26, 2016:

"On October 21, 2015, Pacific Communities Health District ('District') filed a coverage determination request related to the proposed demolition of its existing hospital and the design and construction of a replacement structure ('subject project'). On December 7, 2015, BOLI issued a coverage determination in which it concluded that prevailing wage rate laws would not apply to the subject project. On December 23, 2015, Oregon State Building & Construction Trades Council ('OSBCTC') filed a request for hearing as an 'aggrieved person' under OAR 839-050-0445. A hearing was scheduled, and then postponed to allow BOLI to review its coverage determination. On March 1, 2016, OSBCTC filed a request for a coverage determination on the subject project. On April 6, 2016, BOLI issued a coverage determination in which it again concluded that prevailing wage rate laws would not apply to the subject project. On April 7, 2016, OSBCTC filed a request for hearing based on BOLI's April 6, 2016, coverage determination.

> "On April 21, 2016, OSBCTC and the Agency requested that a prehearing conference be held to discuss '[W]hether OSBCTC should withdraw their original request for hearing or whether the new request for hearing should be consolidated with the previously scheduled hearing.' On April 25, 2016 of the * * * ALJ conducted a prehearing conference with Ms. Ortega, the Agency's administrative prosecutor, and Mr. Barish, OSBCTC's counsel, to discuss the issue. After considerable discussion the participants agreed that the best interests of OSBCTC, the agency, and the forum would be served by consolidating the cases for hearing. Accordingly, I hereby order that OSBCTC's December 23, 2015 and April 7, 2016, request for hearing are consolidated and will be heard together at the hearing set for August 4, 2016.
>
> "The forum greatly appreciates Ms. Ortega's and Mr. Barish's willingness to work together and with the ALJ to resolve this unusual procedural issue."

(Ex. X16)

19) The ALJ entered an interim order on April 26, 2016, rescheduling the hearing to begin at 8:30 a.m. on August 4, 2016, a date mutually agreed upon by the Agency, OSBCTC and the ALJ. (Ex. X17)

20) On April 29, 2016, the ALJ issued an interim order with requirements pertaining only to case number 51-16. The parties were ordered to file written statements containing the names of all persons they proposed to call as witnesses at the hearing, along with a statement of how each person's testimony would help the ALJ understand the materials provided. The statements were to be filed no later than 20 days before August 4, 2016, the date set for hearing. OSBCTC was required to file a written statement identifying all of OSBCTC's reasons for contesting the Agency's determination. The Agency was required to file a copy of its determination, all materials provided by OSBCTC under OAR 839-025-005(1)-(4), and any other materials the Agency relied upon to reach its determination. (Ex. X19)

21) On June 24, 2016, OSBCTC filed a written statement regarding its proposed witnesses. (Ex. X20)

22) The Agency submitted a filing with documents and names of witnesses on July 15, 2016. (Ex. 21)

23) On July 5, 2016, Carolyn Connelly (counsel for the District) sent a letter to BOLI's Contested Case Coordinator, requesting that she be copied on all documents, updates and mailings regarding the hearing in case nos. 28-16 & 51-16. (Ex. X22)

24) An interim order was issued on July 27, 2016, reassigning the case to BOLI ALJ Kari Furnanz. (Ex. X23)

25) The Agency submitted an Amended Submission of Documents and Names of Witnesses on August 2, 2016. (Ex. X24)

26) At the start of the hearing, the ALJ orally advised the Agency and OSBCTC of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing. (Statement of ALJ)

27) The Agency and OSBCTC agreed to the following stipulations:

- The exhibits submitted by both participants to date are admissible.
- The statutory provision at issue is ORS 279C.800(6)(a)(A).
- Legislation which took effect in 2016 does not apply to this proceeding.[3]

(Stipulation of the Participants)

28) The ALJ denied the Agency's request to have either Carolyn Connelly (counsel for the District) or Tyler Jacobsen (General Counsel for Samaritan) sit with the Administrative Prosecutor at the counsel table during the hearing. (Hearing Record)

29) After the conclusion of the hearing, an interim order was issued on August 5, 2016, which stated:

"The following rulings were made at the conclusion of the hearing in this matter:

- The parties may submit legal briefs to the forum. Those briefs must be filed no later than **Tuesday, September 6, 2016**.

- The parties' request for copies of the audio recording of the hearing was granted. Copies of the recording will be sent out to Ms. Ortega and Mr. Barish within the next week."

30) The Contested Case Coordinator served a copy of the audio recording of the hearing on Ms. Ortega and Mr. Barish on August 8, 2016. (Exs. X26, X27)

31) On September 6, 2016, the Agency and OSBCTC filed post-hearing briefs. (Exs. X28, X29)

32) On December 21, 2016, the ALJ issued a proposed order that notified the participants they were entitled to file exceptions to the proposed order within ten days of

[3] The legislature made amendments to ORS 279C.800(6)(a) that specifically discussed reconstruction or renovations of certain publicly owned property made by private non-profit corporations. Or Laws 2015, ch. 482 (S.B. 137). Those amendments became operative on January 1, 2016. That language was not in the 2015 version of ORS 279C.800(6)(a), which is at issue in this case.

its issuance. OSBCTC timely filed exceptions. The exceptions are addressed in the Opinion section of this Final Order.

FINDINGS OF FACT – THE MERITS

1) The District is a political subdivision and special district of the State of Oregon, organized under ORS 440.305 to 440.410. The District is a public body as defined by ORS 174.109. (Exs. A1, AP 17)

2) The District owns and, for many years past, has operated the hospital facilities known as the Pacific Communities Hospital in Newport, Oregon. The District owns both the ground and the structures on the real property on which the hospital is located. (Ex. A1)

3) On December 13, 2001, the District entered into a "Lease and Operating Agreement" with Samaritan Health Services, Inc. ("Samaritan") and Samaritan Pacific Health Services, Inc. ("SPHS") based on a determination by the District's Board of Directors that it would be more efficient and better serve the public interest to enter into an affiliation with a larger hospital group. (Exs. A1, AP18)

4) Following is a summary of the pertinent portions of the Lease and Operating Agreement:

- The leased premises included the Pacific Communities Hospital and related, adjacent health care facilities. The lease included all buildings and improvements, and all equipment and personal property owned by the District. (Recitals and Definitions, § A; Article 2.1)

- Samaritan created a new public benefit non-profit corporation, SPHS, of which Samaritan is the sole member. SPHS operates the hospital campus and conducts the service area operations. Samaritan has assured and guaranteed the performance of SPHS' duties under the agreement. (Article 1.2)

- Samaritan and/or SPHS are responsible for operating the Pacific Communities Hospital, its outpatient medical clinics, medical office space, and its home health, hospice, and home medical services, for a period of 30 years. (Articles 5.1, 7, 10)

- The District warranted that SPHS was to "hold and enjoy" the leased property "free from disturbance by [the] District." (Article 2.3)

- The District provided SPHS initial working capital. In exchange, SPHS paid no rent for use of the hospital and property, but instead agreed to operate the hospital and other facilities in the service area. The rent SPHS was to pay in exchange for the lease was to be "the performance by Samaritan and SPHS of all their obligations under this Agreement * * *" (Article 2.1)

- "The parties acknowledge that under the existing portions of ORS Chapter 279, any alterations, additions, improvements or renovations to any of the Leased Property owned by the District will constitute 'public improvements' subject, in the absence of an available exemption, to the public competitive bid requirements of ORS Chapter 279. The parties agree to cooperate with one another for the purpose of fully complying with the requirements of ORS Chapter 279 (or any successor thereto) in connection with any such any [*sic*] alterations, additions, improvements or renovations to the Leased Property." (Article 2.9.1)

- The District was required to use its best efforts to maintain its operating tax levy on all taxable property within the jurisdictional boundaries of the District in order to provide the funds needed by the District to support the District's operations and fund the provision of indigent care and other services by SPHS. In the event that the District does not maintain its operating tax levy, Samaritan may terminate the agreement. (Article 8.2)

- The District maintains primary responsibility for financing all master site development and capital construction and improvements, subject to the availability of District funds. (Article 9)

- The name of the hospital was changed to "Samaritan Pacific Communities Hospital." (Article 1.1)

(Ex. AP18)

5) In 2008, SPHS and the District began to consider the resources necessary for future health care in the area. A facility assessment identified a number of needs which could not be met with the current buildings. A plan was created and recently revised to address the needs and accommodate projected growth over the next 30 years. (Ex. A10, p. 58)

6) On January 20, 2014, David Bigelow, the CEO for SPHS, "proposed a yearlong campaign to the Board [of Directors of the District] in order to begin the process of a bond measure with the intent to build a new replacement hospital." (Ex. A11, p. 10.

7) During 2014, Bigelow reconvened a strategic planning committee to explore the potential to replace the hospital bond in 2015, and reported to the Board at its meetings regarding the progress. (Ex. A11, pp. 9-24).

8) On September 12, 2014, SPHS contracted with The Neenan Company LLP ("Neenan"). The agreement with Neenan stated that SPHS was "requesting updated information for the existing [hospital] facility as well as a master plan solution for the health care campus as supporting documents in order to secure bond finding from the community for a proposed upgrade of the facilities." Neenan was to "perform

design and pre-construction work to update" the facilities plan of SPHS and to perform a collaborative delivery process for SPHS's existing facility. (Ex. A14, pp. 3-7)

9) SPHS entered a second contract with Neenan on February 11, 2015, to "create a validation study, inclusive of a space program, visual layouts, and budgets for a replacement/remodel of the existing hospital." On June 15, 2015, the Board approved a motion to reimburse SPHS in the amount of $240,000 for "charges incurred to Neenan Company for hospital plans and designs." (Ex. A14, pp. 8-13; A10, pp. 199, 202)

10) In May of 2015, the following bond measure was voted on and approved by the residents of the District:

> "**21-163**
>
> "**Pacific Communities Health District General Obligation Bond Authorization for Hospital**
>
> "**QUESTION**: Shall Pacific Communities Health District issue general obligation bonds not exceeding $57 million for new and updated hospital facilities?
>
> "If the bonds are approved, they will be payable from taxes on property or property ownership that are not subject to the limits of sections 11 and 11b, Article XI of the Oregon Constitution."

(Ex. A10, p. 58)

11) On August 10, 2015, SPHS issued a Request for Design and Construction Proposals ("RFP") to build a new hospital and renovate a 1988 building. The RFP said that proposals should be submitted to SPHS, and questions should be directed to SPHS. Specifically, the RFP stated that SPHS "is ready to build new and updated hospital facilities in Newport, Oregon. SPHS intends to deliver the project utilizing, in part, the services of either a single entity design-build firm, or an Architect/Engineer and a Construction Manager/General Contractor team." (Ex. A11, pp. 70-78)

12) A summary of the RFP was published on August 10 and 12, 2015, in the Daily Journal of Commerce, and on August 14, 2015, in the Newport News Times. The published notices stated that the "District" was accepting proposals. The District asserts that the RFP's were published without approval of the District. (Ex. A11, pp. 4-5, 80-82)

13) On August 17, 2015, the Board unanimously approved motions that allowed "reimbursement of expenditures" and provided for SPHS to "carry out the hospital project on behalf of the [District] and * * * allow [the District's] legal counsel to work directly with [SPHS] to prepare an agreement for presentation to the Board." (Ex. A10, p. 204)

14) The group selected to review hospital construction proposals was comprised of SPHS staff and community members. (Ex. A11, pp. 4-5)

15) The minutes for the board meeting held on September 21, 2015, state:

> "The hospital selection committee and Board District teams met a week ago and selected six submittals for the new hospital. One is only an architect and not a build, all others are build design, out of the five others, three have been scheduled for interview with the same question and answer format and are scheduled for Sept. 30th, Oct. 7th and Oct. 8th."

(Ex. A10, p. 207)

16) After a telephone conference with the District's legal counsel on September 28, 2015, SPHS postponed interviews it had scheduled companies who had submitted proposals until after BOLI issued a prevailing wage rate coverage determination. "On that date, in response to [Wooley's] advice rendered on behalf of the District, [SPHS] placed the solicitation on hold until a draft Addendum could be agreed upon by both parties and submitted to BOLI for a coverage determination." (Ex. A11, pp. 4-5)

17) On December 17, 2015, SPHS notified Neenan that it had been identified as the highest ranked finalist to provide design build services to SPHS in support of the design and construction of the hospital. The notification to Neenan further stated:

> "It is SPHS's intent to begin negotiations with and enter into a binding agreement for these services with The Neenan Company.
>
> "SPHS would like to finalize the contract no later than February 26, 2016, contingent upon mutual agreement of terms and approval of applicable governing bodies. It is also contingent upon the closing of the 21 day time period for any request of a hearing under the Administrative Procedures Act related to the Bureau of Labor and Industries['] notice dated December 7, 2015, that the Hospital is not subject to prevailing wage rate laws. If any hearing is held, this contingency will extend until final resolution of the matter."

(Ex. A10, p. 209)

18) The District and SPHS entered into an Addendum to the Lease and Operating Agreement ("Addendum") on December 21, 2015, which included the following provisions:

- SPHS "proposes to construct and operate" a newly constructed healthcare facility and "requests [the District's] consent to demolish the present Hospital and construct a new healthcare facility in its place." (Recital 3)

- The District will continue to be the owner of the hospital and surrounding property. (Recital 2)

- The District will issue bonds of up to $57,000,000 and will contribute the net proceeds of the bonds to finance construction. SPHS will provide funds to furnish and equip the facility in an amount not to exceed $10,000,000. (Section 1)

- "If pursued, [SPHS] shall be solely responsible for soliciting and entering into both the Project design and construct contracts, to which [the District] will not be a party. [The District] shall not be responsible for any supervision or inspection of the design or construction work." (Section 2)

- The hospital is to be "suitable to meet the health care needs of [the District's] residents." (Section 3.B.)

- The project "will be carried out by, and under the control of" SPHS. (Section 3.A.)

- The following project oversight provisions apply:

    - Upon request from the District, SPHS must provide the District "with satisfactory evidence and information regarding any design and/or construction contractor that [SPHS] may select or has entered into a contract with for the provision of materials or services in connection with the Project." (Section 3.A.)
    - SPHS must prepare a budget and, upon request from the District, provide the District with a budgeted total cost for the Project. (Section 3.B.)
    - SPHS must allow the District to inspect the Project to verify it is being done in accordance with the law and the Addendum. (Section 3.C.)
    - The District may review the costs and disbursements. (Section 3.C.)
    - The District must approve any changes to the budget in writing before such costs are incurred. (Section 3.E.)

- The Addendum can be terminated by either party if any of a number of specifically listed contingencies occurs. If the Addendum is terminated, the District must reimburse SPHS "for all outstanding costs, fees and expenses of any kind, direct or indirect, incurred by [SPHS] for work done on the project * * *." (Section 6)

- At the expense of the District, SPHS or its contractors are required to obtain liability insurance. Casualty insurance policies must name the District as a loss payee. (Section 8)

- If the Project is discontinued, a number of remedies can be sought by the District, including the ability to apply for a court-appointed receiver. (Section 9)

(Ex. A10, pp. 210-221)

19) All of the witnesses were credible. However, to the extent witnesses opined about the interpretation of the Addendum contract, the testimony of those witnesses was credited for background/context purposes only.[4] (Entire Record)

CONCLUSIONS OF LAW

1) The Commissioner has jurisdiction over this matter. ORS 279C.817(4).

2) OSBCTC has an interest in whether the proposed project to construct a new hospital in Newport, Oregon would be a public works on which payment of the prevailing rate of wage is or would be required under ORS 279C.840, and it requested a Determination of that question by the Commissioner of the Bureau of Labor and Industries, in the manner required by, and in compliance with OAR 839-025-0005.

3) A Determination was issued, and the OSBCTC properly sought, pursuant to OAR 839-025-0005(7) and ORS 279C.817(4), a hearing under ORS 183.415 in order to challenge the Determination.

4) Under the terms of the Addendum, the proposed New Hospital Project is not a public works project under ORS 279C.800(6)(a)(A) (2015).

5) Payment of the prevailing rate of wage to workers on the Project would not be required under ORS 279C.840.

6) Pursuant to ORS 279C.817(1), the Commissioner of the Bureau of Labor and Industries has the authority under the facts and circumstances of this case to make the determination about whether the New Hospital Project would be a public works on which payment of the prevailing rate of wage would be required under ORS 279C.840.

OPINION

The Agency "shall, upon request of a public agency or other interested persons, make a determination about whether a project or proposed project is or would be a public works on which payment of the prevailing rate of wage is or would be required under ORS 279C.840." SPHS and OSBCTC sought determinations as to whether the

[4] The forum did not find any relevant portion of the Addendum to contain ambiguous terms, so looked to the text of the Addendum itself, rather than to extrinsic evidence and/or witness testimony. In the absence of any ambiguity, the forum's analysis ends and it must construe the words of a contract as a matter of law. *Yogman v. Parrott,* 325 Or 358, 361, 937 P2d 1019 (1997) (citation omitted); *see also* ORS 42.230 (in construing an instrument, "the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such construction is, if possible, to be adopted as will give effect to all").

proposed Project is a public works on which payment of the prevailing wage rate will be required under ORS 279C.840. The Agency determined that the Project was not a public works project and that the prevailing wage rate did not apply.

OSBCTC subsequently brought this case under ORS 279C.817(4), which states "the commissioner shall afford the requester or a person adversely affected or aggrieved by the commissioner's determination a hearing in accordance with ORS 183.413 to 183.470."

ORS 279C.840(1) requires that the prevailing wage rate must be paid to workers "upon all public works" by all contractors and subcontractors unless a statutory exemption applies. The parties have stipulated that the statutory provision at issue is ORS 279C.800(6)(a)(A) (2015), which states:

> "'Public works' includes, but is not limited to:
>
> > "(A) 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[.]"

(Emphasis added).

OSBCTC asserts that the hospital project will be both "carried on" and "contracted for" by the District. First, OSBCTC contends that the "carried on" portion of the definition is met because the project will be built with public funds from bonds and the new hospital will be owned by the District. As well, although SPHS will manage the construction by selecting and monitoring the contractors, the District "holds much more ultimate power than [SPHS] to dictate the course of the project and even its continued existence." Second, OSBCTC argues that the project meets the "contracted for" test because "although the District did not directly contract with a builder, it contracted with [SPHS] for construction of the New Hospital and committed to continue owning the hospital after completion."

In contrast, the Agency first asserts that construction of the new hospital will not be "carried on" by the District because SPHS will oversee the project, and SPHS issued the RFP and evaluated bids for selection. As well, SPHS will contract with the construction firm and will be occupying the new facilities to conduct its business. The Agency also points out that ORS 279C.800(6)(a)(A) does not require a threshold investment by a public agency, while other provisions of ORS 279C.800 do, asserting that the District's monetary investment is not a determining factor. Secondly, the Agency states that the project will not be "contracted for" the District because the District has not contracted with anyone to construct a new hospital. Under the terms of the Addendum, SPHS is not obligated to construct a building; there is not a binding contract requiring construction to occur. Rather, the Addendum discusses how the project will proceed ***if*** construction occurs.

In interpreting a statute, the forum's task is to give effect to the legislative intent behind the statute. ORS 174.020. The forum "examine[s] the text and context of the statute and, to the extent that it is helpful to [the] analysis, legislative history." *Multnomah Cty. Sheriff's Office v. Edwards*, 277 Or App 540 at 550 (citing *State v. Gaines,* 346 Or. 160, 171–72, 206 P.3d 1042 (2009)). The Oregon Court of Appeals recently summarized the process for interpreting statutes as follows:

> "'In interpreting a statute, the court's task is to discern the intent of the legislature.' *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610, 859 P2d 1143 (1993). In discerning that intent, we look at the text and context of the statute, as well as any relevant legislative history. *State v. Gaines*, 346 Or 160, 171-72, 206 P3d 1042 (2009). The plain text is the best evidence of the legislature's intent. *PGE*, 317 Or at 610. Words in common usage, like 'quit,' are construed in accordance with their plain, natural, and ordinary meaning. *State v. Couch*, 341 Or 610, 618, 147 P3d 322 (2006). We may turn to dictionaries in order to determine the plain, natural, and ordinary meaning of a word. *See State v. Higgins*, 165 Or App 442, 445, 998 P2d 222 (2000) ('[D]ictionaries may be consulted to help ascertain the meaning of words within a statute.'). The context of a statutory provision includes other related statutes, *PGE*, 317 Or at 611, as well as prior versions of the statute, *Harris and Harris*, 349 Or 393, 402, 244 P3d 801 (2010).

Loucks v. Beaver Valley's Back Yard Garden Products, 274 Or App 732, 735, 362 P.3d 277 (2015).

WHETHER THE PROJECT WILL BE "CARRIED ON" BY THE DISTRICT

As set forth in the methodology explained above, the first step in interpreting the phrase "carried on *** by any public agency" is to review the plain text of the statute and construe common phrases "in accordance with their plain natural and ordinary meaning." *State v. Couch*, 165 Or App at 445. The applicable definition of the phrase "carr[ied] on" is "to conduct, manage (carry on the new enterprise)." *Webster's Third New Int'l Dictionary*, 344 (unabridged edition 2002). The forum agrees with the Agency that using the plain meaning of "carried on," the District will not be conducting or managing the construction of the new hospital under the terms of the Addendum.

Additionally, because the Agency offered legislative history regarding the phrase "carried on," it will be considered by the forum. As explained in *Columbia-Pacific Building and Construction Trades Council v. Oregon Comm. on Public Broadcasting*, 102 Or App 212, 219, 794 P2d 438 (1990), after considering the legislative history of the statute:

> "To determine whether a [public agency] 'carried on' construction, we look at a number of factors, the most important of which is who exercised the most control over the project."

In this case, the Addendum makes clear that SPHS will actually control the details of the project, with the District providing financial support and having the ability to provide oversight. Accordingly, interpreting the Addendum using the applicable 2015 version of ORS 279C.800(6)(a)(A), the construction of the new hospital will not be "carried on" by the District.

WHETHER THE PROJECT WILL BE "CONTRACTED FOR" THE DISTRICT

In interpreting the phrase "contracted for * * * any public agency," the forum finds that in the context of the Addendum of this case, the phrase could possibly mean "contracted for" the District because it will own the new building ***or*** it could mean "contracted for" SPHS because SPHS will, among other things, hire the construction contractor and will operate the hospital. Accordingly, an analysis of the legislative history of the phrase will be helpful.

The legislative history of the "contracted for" phrase was analyzed extensively in the case of *Portland Development Commission (PDC) v. BOLI*, 216 Or App 72, 171 P3d 1012 (2007), which noted:

> "[The legislative] history shows that, in 1989, the legislature added the phrase 'contracted for' to the definition of 'public works' in specific response to the circumstances that we ultimately addressed in *Columbia-Pacific v. OPB*, 102 Rapp. 212, 794 P.2d 438 (1990). In the mid-1980s, Oregon Public Broadcasting (OPB) developed plans to build a new production facility but subsequently determined that it lacked the resources to immediately fund the construction of such a facility. Accordingly, OPB entered into an agreement with a private developer by which the developer (using private financing) agreed to build the new facility to OPB's specifications, and OPB agreed to lease the facility for up to 20 years, with an option to purchase after five years. *Id.* at 214-15, 794 P.2d 438. The developer began construction in 1987 and did not pay prevailing wage rates for the work performed. Id. In 1988, various labor organizations filed an action to compel BOLI to enforce the Prevailing Wage Rate Law against OPB; BOLI, in turn, filed a cross-complaint against OPB, alleging that the construction of the new facility was a 'public work' within the meaning of former ORS 279.348(3). The trial court granted summary judgment for OPB, concluding that the project was not a 'public work' under the then-extant statutory definition, which was limited to the 'carried on by' formulation.
>
> "It was against that backdrop, as BOLI's (and the unions') appeal from the summary judgment was pending, that the legislature added the 'contracted for' language to the statutory definition of 'public works.' BOLI, while continuing to maintain that the OPB project was, in fact, subject to the prevailing wage requirements, proposed that the 'contracted' language be added to ensure that the statute encompassed circumstances closely, functionally similar to those presented in the OPB case.

"The testimony of BOLI's legal policy adviser before the House Committee on Labor, explaining the purpose of BOLI's proposal, is exemplary:

> "'The intent is to narrowly craft an amendment that would make sure that build-to-suit lease arrangements are covered under the law. It has been the Bureau's consistent position that the OPB project is covered under the law and that I think is— explains why we believe that this amendment creates no new coverage but makes clear that build-to-suit arrangements like that involved in OPB are covered by the law. The amendment is not addressed specifically at any other intention. * * * That is the purpose of that second sentence to make clear that the policy thrust is whether or not the initiation and the reason for existence of the building was the promise to lease on the part of the public agency.'

"Tape Recording, House Committee on Labor, HB 2609, Apr 17, 1989, Tape 114, Side A (statement of Kelly Hagen, Legal Policy Advisor to the Bureau of Labor and Industries). Colloquy among members of the committee further substantiates the focused purpose and limited scope of the proposed amendment. In particular, various legislators raised questions as to whether, under that amendment, the prevailing wage rate statute would apply when a public agency rented only part of the building or leased space for only a very limited period of time. Tape Recording, House Committee on Labor, HB 2609, Apr. 17, 1989, Tape 114, Side A. There is no suggestion that the 'contracted for' language was intended to encompass situations like that here, where the public agency was not a party to the construction contract, did not own the property at the time the work was undertaken, and made no subsequent use of the property.

"The comments of Senator Shoemaker, who carried the bill on the Senate floor, also, and finally, corroborate the narrow scope of the proposed amendment:

> "'When a public agency contracts for the construction of a building, the spending power of the government is at work regardless of the form of the agreement. Ownership is not the critical issue. The issue is whether a project owes its existence to the financial commitment of a public agency. *That commitment may be in the form of a promise to purchase or a promise to lease, either way construction undertaken on the basis of such a commitment is precisely the circumstance in which the prevailing wage rate law is meant to apply*.'

"Tape Recording, Senate Floor Debate, HB 2609, June 15, 1989, Tape 181, Side B (statement of Sen Shoemaker) (emphasis added). Again, there was no suggestion of some broader purpose. In sum, the 1989 amendment was narrowly tailored to ensure that the prevailing wage requirements applied to circumstances analogous to those presented in the OPB case. Nothing more.

> "Given the foregoing history, we agree with the trial court that PDC had not 'contracted for' the Tin Roof construction project. Specifically, where, as here, a public agency merely sells land to a private entity to develop for its own private purpose, without continued participation akin to that presented in the OPB case, the agency has not 'contracted for' the construction, even if the agency retains some control over the type or style of the development to ensure that the development is compatible with the agency's objectives. Accordingly, the trial court correctly allowed PDC's motion for summary judgment.

Id. at 81-83.

The Oregon Court of Appeals subsequently further clarified that the *PDC v. BOLI* ruling demonstrated that "the legislature intended to cover those circumstances that are analogous to when a public agency 'carried on' construction but where the agency instead contracted with a third party to perform the task on the agency's behalf." *State ex rel. Gardner v. City of Salem,* 231 Or App 127, 138, 219 P3d 32 (2009). In other words, the Oregon Court of Appeals interpreted the "contracted for" language to serve a narrow, specific purpose.

The forum agrees with the Agency that the Addendum between SPHS and the District is not a binding commitment for a third party construction contract as was contemplated in the cases discussed above. Rather, if the project proceeds, SPHS will be engaging the contractor. Accordingly, as set forth in the terms of the Addendum, the new project will not be "contracted for" the District.

OSBTC'S EXCEPTIONS

OSBTC submitted 28 pages of Exceptions to the Proposed Order. The exceptions are addressed below.

1. Exceptions to Proposed Findings of Fact – Procedural

In Exceptions II.A. and II.B., OSBCTC requests that revisions be made for clarity and accuracy of the record. The forum GRANTS these exceptions and has modified the language in Findings of Fact – Procedural Nos. 1 and 14 accordingly.

2. Exceptions to Proposed Findings of Fact – The Merits

Oregon's Administrative Procedures Act states: "The findings of fact shall consist of a concise statement of the underlying facts supporting the findings as to each contested issue of fact and as to each ultimate fact required to support the agency's order." ORS 183.470(2). In general, the forum observes that many of the Exceptions that OSBCTC made to the Findings of Fact – the Merits include argument as to the significance of certain facts, as opposed to a "concise statement" of the fact itself. In ruling on the Exceptions, the forum considered the actual facts OSBCTC referenced,

but declined to include the argument and characterizations of the facts contained in the Exceptions.

Exception III.A.

In Exception III.A., OSBCTC requests that the forum include various facts relating to the District's bond measure that OSBCTC contends indicate that "the District, not SPHS was responsible for building the hospital and would primarily stand to benefit." The forum finds that the facts OSBCTC requests to be added are repetitive of findings that show that the District owned the hospital and pursued the bond to fund the construction of a new hospital. *See* Findings of Fact – The Merits 2, 4, 10 and 18. Accordingly, this exception is OVERRULED.

Exception III.B.

Exception III.B. requests that language be added to reflect that the Board approved reimbursing SPHS for $240,000 to Neenan for hospital plans and construction. That portion of the exception is GRANTED, as reflected in revisions made to Finding of Fact – The Merits No. 9, above. The remainder of the exception includes OSBCTC's characterization of facts and, therefore, is OVERRULED.

Exception III.C.

OSBCTC requests in Exception III.C. that revisions be made to Finding of Fact – The Merits No. 12 regarding the RFP process. This exception is GRANTED, in part, as reflected above in revisions made to Finding of Fact – The Merits No. 12. The forum OVERRULES the remainder of this exception as it includes inaccurate statements and its own characterization as to the significance of the facts.

Exception III.D.

Exception III.D. is GRANTED, in part, as reflected in revisions made to Finding of Fact – The Merits No. 13. The remainder of the exception includes OSBCTC's characterization of facts and, therefore is OVERRULED.

Exception III.E.

Exception III.E. is OVERRULED. The decision in this matter is based on the Lease Addendum executed on December 21, 2015 (Ex. A10, pp. 210-221), not the draft version that was "informally agreed to" and was submitted with the initial request for a prevailing wage rate determination submitted by the District on October 21, 2015. Furthermore, the fact that the District submitted its request to BOLI before the Addendum was signed is not relevant.

Exception III.F.

Exception III.F. is OVERRULED because the warranty provision is not pertinent to the forum's analysis.

Exceptions III.G. – III.J.

Exceptions III.G. – III.J. pertain to the testimony of OSBCTC's expert witness, Tary Carlson. Carlson's testimony that "opined about the interpretation of the Addendum contract," "was credited for background/context purposes only" in the Proposed Order. Footnote 5 explained the reasoning for this as follows:

> "The forum did not find any relevant portion of the Addendum to contain [un]ambiguous terms, so looked to the text of the Addendum itself, rather than to extrinsic evidence and/or witness testimony. In the absence of any ambiguity, the forum's analysis ends and it must construe the words of a contract as a matter of law. *Yogman v. Parrott*, 325 Or 358, 361, 937 P2d 1019 (1997) (citation omitted); *see also* ORS 42.230 (in construing an instrument, 'the office of the judge is simply to ascertain and declare what is, in terms or in substance, contained therein, not to insert what has been omitted, or to omit what has been inserted; and where there are several provisions or particulars, such construction is, if possible, to be adopted as will give effect to all')."

OSBCTC's exceptions regarding Carlson's testimony are summarized as follows:

- The testimony of Carlson regarding industry oversight standards should be summarized and included in the forum's order.

- Carlson's testimony regarding whether the District's rights were limited to those standard in the industry should be summarized and included in the forum's order.

- Under the forum's rules regarding the admissibility of evidence in administrative hearings, the forum should rely on extrinsic evidence to determine the meaning of the Lease Addendum. Additionally, even if the forum "determines that that the Lease Addendum was unambiguous, it should also rely on Mr. Carlson's testimony to conclude that the rights granted to the District in the Lease Addendum were similar to those typically granted to the party with the most substantial control over a large construction project."

- There is a "latent ambiguity in the Lease Agreement and [the forum should consider Carlson's] expertise in the particular industry to interpret the contextualized meaning of 'approve,' 'review' and other terms in the Lease Addendum."

First, the rules cited by OSBCTC regarding the admissibility of evidence and the ALJ's duty to conduct a "full and fair inquiry" are not applicable to the analysis. OAR

839-050-0260(1) discusses when evidence "will be admissible." Additionally, 839-050-0200(11) also pertains to the admissibility of evidence and refers to the ALJ's "duty to conduct a full and fair inquiry under ORS 183.415(10)." The testimony of Carlson was admitted into evidence. OSBCTC's exceptions disagree with the weight given to the evidence, not whether or not it should have been admitted into evidence. Accordingly, the application of the *Yogman* decision is not "at odds with BOLI's own regulations." Additionally, although OSBCTC is critical of the forum's application of the *Yogman* case, OSBCTC itself cited to *Yogman* in its post-hearing brief, noting that "the 3-step approach may be a useful framework." Requester's Post-Hearing Brief, p. 37.

Second, in interpreting contracts, "extrinsic evidence of the contracting parties' intent" is considered when a contract provision is "ambiguous." *Yogman*, 325 Or at 363. When interpreting a contract provision, the first step is to examine "the text of the disputed provision, in the context of the document as a whole. If the provision is clear, the analysis ends." *Id.* at 361. Examining the text involves "look[ing] at the four corners of a written contract, and consider[ing] the contract as a whole with emphasis on the provision or provisions in question." *Id., quoting Eagle Industries, Inc. v. Thompson*, 321 Or 398, 405, 900 P2d 475 (1995). OSBCTC argues that the terms "review," "approve," and "other terms" are ambiguous.

In its Post-Hearing brief, OSBCTC argued that the term "review" in Section 3(c)[5] is ambiguous because it "could mean either just to examine, or it could mean to examine and approve or disprove by disbursing funds." However, language in the Addendum addresses the concerns raised by OSBCTC. For example, § 7 of the Addendum provides that the District "will not be obligated to reimburse [SPHS] for any work or material without verification that the work has been performed and the materials are on site." Ex. A10, pp. 216-217. As well, the second paragraph of § 4 states that "[f]unds will be made available to [SPHS] as required to satisfy valid Project payment for work and materials upon approval of the [District] and subject to the availability of bond proceeds. [The District] will be solely responsible to determine and control how bond proceeds will be held, invested and disbursed." Ex. A10, pp. 215-216. Accordingly, there is no need to go outside of the "four corners" of the Addendum.

OSBCTC also argues that the term "approve" in Section 3(e)[6] "could mean merely to provide consent for a different budget appropriation, or 'approve' could mean to determine whether or not to provide consent based on an analysis of the proposed underlying change in design or construction that required a corresponding budget change." It further contends that "Carlson testified that the District, as the entity

[5] Section 3(c) provides that the District has the right to "review Project costs and disbursements, to verify that the costs and disbursements are reasonable and within the limitations of [the] budget." Ex. A10, p. 214.

[6] Section 3(e) states: "Any changes in the budget must be approved by [the District], in writing, prior to incurring that cost. [The District] will not unreasonably withhold consent to [SPHS] for 'line item transfers' where one cost item is increased and another has a corresponding decrease, so long as the over-all Project cost is not increased and its value is not decreased."

required to approve the budget, would have to be involved in making many decisions about the design and construction changes that required corresponding budget changes, and therefore would control those decisions." However, since the Addendum itself shows that the District "would have to be involved" in certain decisions, there is not an ambiguity about that matter. Moreover, Section 2 of the Addendum specifies that SPHS will solicit and enter into design and construction contracts, and that the District will not be a party to those agreements. The Addendum further states that the District will not be responsible for supervising or inspecting the design or construction work. Finally, the issue of "control" is a legal matter to be determined by the forum, not a matter for a witness to provide an opinion on.

OSBCTC also generally states that other provisions in the Addendum are ambiguous, but does not fully explain what is ambiguous about those terms, or why sufficient explanation about those terms is not contained within the Addendum itself.

Finally, even if a provision in the Addendum was found to be ambiguous, the testimony of Carlson would only be considered in interpreting the contract if it was "limited to the circumstances under which the agreement was made." *Harris v. Warren Family Properties*, LLC, 207 Or App 732, 738, 143 P3d 548 (2006) (citations omitted). OSBCTC wants the forum to consider Carlson's testimony regarding "the management, oversight and economic realities of large health care construction projects." Exceptions, p. 7. The portions of Carlson's testimony referenced in the Exceptions involve Carlson using his hospital construction management background to offer opinions about some of the provisions in the Lease Addendum. *Id.* at 7-13. Carlson's testimony did not concern the "circumstances under which the [Addendum] was made." Accordingly, even if there was an ambiguous provision in the Addendum, his testimony is not appropriate extrinsic evidence. Accordingly, Exceptions III.G. – III.J. are OVERULED.

3. Exceptions to Proposed Conclusions of Law

OSBCTC provides 15 pages of arguments as to why it contends that the project was a public works project. Summarized succinctly, OSBCTC asserts:

- The forum should conclude that the project will be "carried on" by the District. The forum should not use the dictionary definition of "carried on." Additionally, under *Columbia-Pacific Building and Construction Trades Council v. Oregon Comm. on Public Broadcasting*, 102 Or App 212, 219, 794 P2d 438 (1990), the "more crucial elements of the development" include who owns the land, the financing of the project and who retains the right to occupy the building.

- The forum should conclude that the District "contracted for" the construction of the project because it contracted with a third party (SPHS) to perform the task of construction on its behalf, and the District "has committed, as of the time of construction, to own or use the improved property."

Whether the Project will be "Carried On" By the District

OSBCTC asserts that the dictionary definition of "carried on" should not be relied on because it "provides no clarity" and because the Oregon Court of Appeals already "construed that term" in the *Columbia-Pacific* case. The dictionary definition of "carr[ied] on" is "to conduct, manage (carry on the new enterprise)." *Webster's Third New Int'l Dictionary*, 344 (unabridged edition 2002). That is consistent with the holding in *Columbia-Pacific* which states that the court will "look at a number of factors, the most important of which is who exercise[s] the most control over the project." 102 Or App at 219.[7] OSBCTC urges the forum to base its decision primarily on the fact that the new hospital building would be owned by the District and because the District will finance the construction through the public bond.[8] While the ownership of the property and financing are factors to be considered, OSBCTC's reliance only on those factors ignores that "*the most important*" factor "is who exercise[s] the most control over the project." *Id.* (Emphasis added). In this case, the forum finds that SPHS will exercise "the most control over the project" because SPHS will be the entity entering into a construction contract and will oversee construction. (Finding of Fact – The Merits No. 18[9]) It will also solicit and enter into both the design and construction contracts, and the District will not be a party to those contracts. *Id.* Moreover, the District will not be responsible for any supervision or inspection of the design or contraction work. *Id.* Therefore, OSBCTC's Exceptions regarding the forum's interpretation of the "carried on" language are OVERRULED.

Whether the Project will be "Contracted For" by the District

OSBCTC asks the forum to conclude that the District "contracted for" the construction of the project because it contracted with SPHS to perform the task of construction on its behalf, and the District "has committed, as of the time of construction, to own or use the improved property." First, OSBCTC incorrectly summarizes the terms of the Addendum. The District did not enter into a contract with SPHS to construct the hospital. Rather, the Addendum sets forth the relationship between the District and SPHS if and when construction occurs, and specifically states that SPHS – not the District – will be entering a contract with a construction company. (Finding of Fact – The Merits No. 18) Second, OSBCTC asserts that the District "has

[7] Additionally, as the Agency pointed out in its Closing Brief, the statutory interpretation method set forth in *State v. Gaines* (and subsequent cases) was not in place at the time *Columbia-Pacific* was issued in 1990.

[8] OSBCTC also argues that the forum should consider statements made by District representatives before and after the passage of the bond measure. None of this information contradicts the language in the Addendum that illustrates which party has the most control over the project and, thus, it has minimal relevance.

[9] Finding of Fact –The Merits No. 18 has been supplemented to include references to Recital 1 and Section 2 of the Addendum to further explain what the roles of SPHS and the District will be if the Project is pursued.

committed, as of the time of construction, to own or use the improved property." However, that argument ignores that the Court of Appeals stated that the "contracted for" language was added to the statute in response to the *Columbia-Pacific* decision and "was narrowly tailored to ensure that the prevailing wage requirements applied to circumstances analogous to those presented in [*Columbia-Pacific*]. Nothing more." *PDC*, 216 Or App at 82-83. The *PDC v. BOLI* ruling demonstrated that "the legislature intended to cover those circumstances that are analogous to when a public agency 'carried on' construction but where the agency instead contracted with a third party to perform the task on the agency's behalf." *State ex rel. Gardner v. City of Salem,* 231 Or App at 138. In this case, the District has not "contracted with a third party to perform" construction of the new hospital on behalf of the District. Instead, the Addendum is a contract that will govern circumstances in the event SPHS – not the District -- enters into a contract for the construction of the new hospital. Therefore, OSBCTC's Exceptions regarding the forum's interpretation of the "contracted for" language are OVERRULED.

Whether the Project is a Public Works Project

Because the projected will not be "carried on" by or "contracted for" the District, it is not a public works project under ORS 279C.800(6)(a)(A). Accordingly, OSBCTC's Exceptions to the forum's conclusion that the Project is not a public works project are OVERRULED.

ORDER

NOW, THEREFORE, as authorized by ORS 279C.817, the Agency's determination, issued pursuant to ORS 279C.817, is hereby **AFFIRMED**.

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