Table of Contents

ADMINISTRATIVE PROCESS

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

❑ After hearing, the forum granted respondent's motion to dismiss the agency's formal charges alleging an OSHA violation when complainant first alleged facts supporting an OSHA violation 118 days after his discharge. ----- ***In the Matter of Stimson Lumber Company, 26 BOLI 150, 153-54, 170 (2005).***

❑ Respondent moved to dismiss the specific charges on the ground that the complainant would have worked in California, not Oregon. The ALJ denied the motion because the respondent hired the complainant in Oregon and paid workers' compensation insurance and unemployment insurance for complainant in Oregon. Under those circumstances, the respondent was an Oregon employer. ***----- In the Matter of Barrett Business Services, Inc., 18 BOLI 82, 85, 104 (1999)***.

Amended, 19 BOLI 16 (1999), withdrawn for reconsideration. Order on reconsideration, 20 BOLI 189 (2000), affirmed, *Barrett Business Services v.*

Bureau of Labor and Industries, 173 Or App 444 (2001).

❑ At the close of the agency's case, respondents moved to dismiss the case on the ground that the commissioner lacked jurisdiction because none of the three subsections of ORS 658.407 specifically authorizes the commissioner to enforce farm/forest labor contractors' duty to provide their workers with written agreements, pursuant to ORS 658.440(1)(g). The forum denied the motion, holding that the commissioner has jurisdiction to enforce all state farm/forest labor statutes. ***----- In the Matter of Paul A. Washburn, 17 BOLI 212, 214, 221-22 (1998)***.

❑ In a sexual harassment case, respondents excepted to the commissioner's jurisdiction to find liability or to assess or award damages for emotional distress in the proposed order as being a violation of respondent's right to trial by jury as guaranteed by the Oregon constitution. The commissioner pointed out that the Oregon court of appeals had concluded that such awards carried out the commissioner's statutory authority to "eliminate the effects of any unlawful practice found." ----- ***In the Matter of Cheuk Tsui, 14 BOLI 272, 288 (1996).***

❑ The commissioner has the authority to accept complaints and investigate, hold hearings on, and award damages for any alleged unlawful practice that is of a "continuing nature," so long as the complaint is filed "within one year of any date of occurrence." ***----- In the Matter of Kenneth Williams, 14 BOLI 16, 24-25 (1995).***

❑ The forum denied respondent's motion to dismiss the specific charges based on the contention that the forum lacked jurisdiction because specific charges were not filed within one year of complainant's administrative complaint or within 90 days of the administrative determination. ***----- In the Matter of Fred Meyer, Inc., 12 BOLI 47, 48-49 (1993).***

❑ When respondent contended that the commissioner lacked jurisdiction because the agency had failed to issue an administrative determination and specific charges within one year of complainant's filing of the administrative complaint, the commissioner found that the agency had issued its administrative determination timely and that there was no statutory requirement as to when the agency must file specific charges against an employer. ***----- In the Matter of Pzazz Hair Designs, 9 BOLI 240, 249-50 (1991).***

❑ The forum acquires jurisdiction when an individual respondent makes an appearance at the hearing and voluntarily submits himself to the jurisdiction of the forum, even when proper service has not been made or attempted on the individual. ***----- In the Matter of Allied Computerized Credit & Coll., Inc., 9 BOLI 206, 214-15 (1991).***

❑ When a complainant believes that he or she has been discriminated against at the place of employment solely because another member of complainant's family works or has worked for respondent, the commissioner has jurisdiction over the persons and the subject matter related to ORS 659.340 violations. ***----- In the Matter of Arkad Enterprises, Inc., 8 BOLI 263, 275-76 (1990).***

Affirmed, *Arkad Enterprises, Inc. v. Bureau of Labor and Industries*, 107 Or App 384, 812 P2d 427 (1991).

❑ When specific charges were not issued within one year from the filing of a civil rights complaint, but the administrative determination and a private right of action notice was issued within one year after filing the complaint, the commissioner had jurisdiction over the complaint. ***----- In the Matter of Willamette Electric Products Company, Inc., 5 BOLI 32, 33-35 (1985).***

❑ When complainant filed a complaint with the Civil Rights Division alleging a violation of ORS 654.062(5), then filed a civil suit alleging a violation of ORS 654.062(5) after the Division issued an administrative determination concluding that substantial evidence of unlawful discrimination existed to support complainant's allegations, then moved to have the civil suit dismissed, the complainant's filing in circuit court did not constitute an election of remedies under ORS 659.121 and the commissioner retained jurisdiction over the complaint. ***----- In the Matter of Scottie's Auto Body Repair, Inc., 4 BOLI 283, 285-91 (1985).***

❑ When complainant's original complaint alleging a violation of ORS 654.062(5)(b) was filed by letter of complainant's attorney to the commissioner within 30 days of the alleged violation, and the letter stated it was a complaint pursuant to a statute within the commissioner's jurisdiction, set forth the facts of the alleged violation, gave complainant's name, town of residence, and home phone number and was signed by the complainant's attorney representative, and a verified complaint referring to the attorney's letter was filed thereafter, the commissioner had jurisdiction over the complaint. ***----- In the Matter of So. Elec. And Pipefitting Corp., 3 BOLI 254, 255-56 (1983).***

❑ When complainant contacted the Civil Rights Division and made a verbal complaint that he was fired based on his complaints about safety hazards within 30 days of his discharge, but did not file a verified complaint with the Division until 38 days after his termination, the commissioner had jurisdiction over the complaint because of the permissive language in ORS 654.062(5)(b) regarding the filing deadline and because of circumstances in the case that excused complainant's failure to comply with the 30 day period for filing. ***----- In the Matter of Day Trucking, Inc., 2 BOLI 83, 90-92 (1981).***

Overruled in part on other grounds, *In the Matter of Western Medical Systems, Inc.,* 8 BOLI 108 (1989).

❑ When complainant filled out and submitted an intake questionnaire to the Civil Rights Division within 30 days of his discharge alleging he was fired based on his complaints about safety hazards, but did not file a verified complaint with the Division until 55 days after his discharge, the commissioner had jurisdiction over the complaint because the filing of the intake questionnaire within 30 days of the complainant's discharge met the statutory requirement of filing a "complaint" under ORS 654.062(5)(b). ***----- In the Matter of Acco Contractors, Inc., 1 BOLI 260, 260-261 (1980).***

❑ In a civil rights complaint, the scope of the Attorney General's charges of discrimination and the public hearing thereon control the terms of the order, and the

proceedings are not in any way limited by the scope of attempted conciliation, as neither the fact nor the extent of conciliation is jurisdictional. ***----- In the Matter of School District No. 1, 1 BOLI 1, 15 (1973).***

> Affirmed in part, reversed in part on other grounds and remanded, *School District No. 1, Multnomah County v. Nilsen, 271 Or 461, 534 P2d 1135 (1975).*
>
> Orders on Remand, 1 BOLI 52 (1976), 1 BOLI 129 (1978).

2.0 COMMISSIONER, ADMINISTRATIVE LAW JUDGE

2.1 --- Duties and Authority

2.1.1 --- In General

❑ In a contested case hearing, the agency could only proceed against the single respondent identified in the notice of hearing and not against an additional employer identified only in the notice of intent and order of determination. ***----- In the Matter of Sabas Gonzalez, 19 BOLI 1, 3 (1999)***.

❑ When part of wage claimant's unpaid wages were earned with an employer who was not a party in the contested case proceeding, the commissioner could not order that employer to pay wages or penalty wages. ***----- In the Matter of Jack Crum Ranches, Inc., 14 BOLI 258, 268 (1995).***

❑ The forum's duty is to provide a full and fair inquiry. ***----- In the Matter of Mary Stewart-Davis, 13 BOLI 188, 200 (1994).***

> Affirmed without opinion, *Stewart-Davis v. Bureau of Labor and Industries,* 136 Or App 212, 901 P2d 268 (1995).

❑ When the hearings referee had refused in the proposed order to reconsider a finding of default against respondents because there was no rule providing for reconsideration, the commissioner held in the final order that the hearings referee had inherent discretionary authority as the commissioner's designee to reconsider his or her own rulings. ***----- In the Matter of 60 Minute Tune, 9 Bureau of Labor and Industries 191, 200 (1991).***

> Affirmed without opinion, *Nida v. Bureau of Labor and Industries,* 119 Or App 508, 852 P2d 974 (1993).

❑ When respondent was in default for failure to file a timely answer, and its motion for reconsideration was denied by the hearings referee, and when respondent renewed its motion for reconsideration at the start of the hearing, the commissioner held that the motion was not appropriate and did not consider it or the agency's responses to it. Referee rulings are always subject to ratification or rejection by the commissioner. ***----- In the Matter of City of Umatilla, 9 BOLI 91, 92 (1990).***

> Affirmed without opinion, *City of Umatilla v. Bureau of Labor and Industries,* 110 Or App 151, 821 P2d 1134 (1991).

❑ When the hearings referee found respondent in default and denied respondent's request for relief from default, and respondent contended that the hearing was improperly held because only the commissioner may decide whether to relieve a party from default, the commissioner ratified the referee's ruling in the final order. ***----- In the Matter of Metco Manufacturing, Inc., 7 BOLI 55, 65 (1987).***

> Affirmed, *Metco Manufacturing, Inc. v. Bureau of Labor and Industries*, 93 Or App 317, 761 P2d 1362 (1988).

❑ The commissioner filed a verified complaint with the Civil Rights Division of BOLI alleging she had reason to believe that respondent's place of public accommodation had engaged in unlawful practices based on complainant's race/color, in violation of ORS 659.037 and ORS 30.670 to 30.685. The complainant was identified only by initials due to her demonstrated fear of retaliation by respondent ***----- In the Matter of The Pub, 6 BOLI 270, 271 (1987).***

❑ Respondent objected to a request by the hearings referee that the agency recompute penalty wages in order to correctly account for claimant's wage and compensation agreement. The forum overruled the objection, stating that the hearings referee has the right and duty to conduct a full and full inquiry and create a complete record. When errors are detected, the hearings referee is empowered to cause them to be corrected. This is especially true when there are arithmetic errors or other similar computation oversights. The issue of penalty wages was squarely before the forum, as it was raised in the order of determination. The charging document may be amended to request increased damages or, when appropriate, penalties to conform to the evidence presented at the contested case hearing. In this case, the employers presented no evidence that they were prejudiced and they did not object to the admission into evidence of claimant's records that formed the basis for the penalty computations. ***----- In the Matter of Anita's Flowers & Boutique, 6 BOLI 258, 259 (1987).***

> Overruled in part on other grounds, *In the Matter of Central Pacific Freight Lines, Inc.,* 7 BOLI 272, 280 (1972).

❑ It is within the discretion of the hearings referee to reverse a previous ruling denying the admission of evidence when the complainant would be substantially prejudiced if the evidence was not received. ***----- In the Matter of Acco Contractors, Inc., 1 BOLI 260, 260-261 (1980).***

2.1.2 --- Threats and Dangerous Weapons

❑ Respondent telephoned the ALJ and demanded that the ALJ recuse himself from the hearing. Because of Reid's threatening tone of voice and invective language, the ALJ perceived the phone calls as threats and arranged for the presence of an Oregon State trooper at the hearing. The ALJ also issued an interim order denying the motion to recuse based on respondent's failure to support the motion with an affidavit establishing the prejudice of the ALJ. ***----- In the Matter of Orion Driftboat and Watercraft Company, LLC, 26 BOLI 137, 141-42 (2005).***

❑ The ALJ granted the agency's motion for an order excluding firearms and other dangerous weapons from the hearings room and adjacent BOLI offices, finding that, as a matter of law, no person, other than a sworn

officer of the law, is permitted to possess a firearm or any dangerous weapon while in or on a public building, including the entire state office building and adjacent parking lot. ***----- In the Matter of Danny Jones, 15 BOLI 25, 31 (1996).***

2.2 --- Conflict of Interest, Bias, Prejudice

❑ Respondent telephoned the ALJ and demanded that the ALJ recuse himself from the hearing. Because of Reid's threatening tone of voice and invective language, the ALJ perceived the phone calls as threats and arranged for the presence of an Oregon State trooper at the hearing. The ALJ also issued an interim order denying the motion to recuse based on respondent's failure to support the motion with an affidavit establishing the prejudice of the ALJ. ***----- In the Matter of Orion Driftboat and Watercraft Company, LLC, 26 BOLI 137, 141-42 (2005).***

❑ Respondent filed an exception asserting that the ALJ "was prejudiced against Respondent at the hearing and * * * biased for the claimants without fair cause." Under the hearing rules, Respondent's bare allegation of prejudice was not timely raised and was denied. ***----- In the Matter of Triple A Construction, LLC, 23 BOLI 79, 84 (2002).***

❑ To disqualify the administrative law judge, a respondent must make a substantial showing of actual prejudice or bias. Bias is not demonstrated merely by the fact that an administrative law judge previously prosecuted cases on behalf of the agency or by the fact that the administrative law judge has professional relationships with other agency employees. ***----- In the Matter of Southern Oregon Flagging, Inc., 18 BOLI 138, 140-41 (1999)***.

❑ The respondent alleged that the administrative law judge was biased because he "was hired by the Commissioner and travels with and dines with the BOLI representatives, agents and case presenters while trying the Commissioner's cases." The forum rejected the claim because the respondent made no showing of actual prejudice or bias. ***----- In the Matter of Barrett Business Services, Inc., 20 BOLI 189, 215-16 (2000)***.

> Affirmed, *Barrett Business Services v. Bureau of Labor and Industries*, 173 Or App 444 (2001).

❑ Respondent moved that the hearing be reset for hearing before an ALJ who was not located in the same office as the agency case presenter, citing perceived inappropriate communications between the case presenter and ALJ by respondent's counsel as the basis for the motion. The ALJ denied the motion on the basis that the perceptions of respondents' counsel were mistaken. ***----- In the Matter of Geoffroy Enterprises, Inc., 15 BOLI 148, 151 (1996).***

❑ When respondents objected to the fact that the case presenter and the ALJ were both employees of the convening authority (the commissioner) and argued that this was inherently unfair and was a violation of due process and equal protection, the ALJ overruled the objection and explained that the case presenter represented the agency and the agency's view and finding from its investigation. Respondents were entitled to a hearing *de* novo. Neither the forum nor respondents were bound by the agency's initial determination. It was the case presenter's duty to present original evidence of the facts to the ALJ so the ALJ could determination whether the agency made the right interpretation when it said that respondents had committed unlawful employment practices. It is a commonality of administrative law that the individual prosecuting and the individual decision maker are employees of the same entity. ***----- In the Matter of A.L.P. Incorporated, 15 BOLI 211, 214, 225 (1997).***

> Affirmed, *A.L.P. Incorporated, v. Bureau of Labor and Industries, 161 Or App 417, 984 P2d 883 (1999).*

❑ The mere fact that an ALJ is an employee of the agency is insufficient to prove bias or prejudice. ***----- In the Matter of A.L.P. Incorporated, 15 BOLI 211, 214 (fn) (1997).***

> Affirmed, *A.L.P. Incorporated, v. Bureau of Labor and Industries, 161 Or App 417, 984 P2d 883 (1999).*

❑ Administrative agencies typically investigate, prosecute, and adjudicate cases within their jurisdiction. This combination of functions by itself does not violate due process. ***----- In the Matter of A.L.P. Incorporated, 15 BOLI 211, 214 (fn) (1997).***

> Affirmed, *A.L.P. Incorporated, v. Bureau of Labor and Industries, 161 Or App 417, 984 P2d 883 (1999).*

❑ Respondent moved for the appointment of an independent hearings referee, alleging that the agency's hearings referees were unable to provide him with a fair hearing due to their conflict of interest as employees of the agency. The forum held that respondent must make a substantial showing of actual bias or prejudice by a referee. The mere fact that a hearings referee is an employee of the agency is insufficient to prove bias or prejudice. ***----- In the Matter of Jose Linan, 13 BOLI 24, 25 (1994).***

❑ Three members of a family were named as respondents and moved to disqualify the hearings referee on the ground that he had heard a prior case in which one of the three was a respondent, another was a witness, and the referee had ruled on their credibility. The forum denied the motion because it did not allege that the referee was related to the parties or had a pecuniary interest in the case, as outlined in OAR 839-50-160. The commissioner held that a prior appearance by a respondent before the referee is an insufficient reason to disqualify the referee without a showing of prejudice or bias. ***----- In the Matter of Clara Rodriguez, 12 BOLI 153, 160 (1994).***

> Affirmed without opinion, *Rodriguez v. Bureau of Labor and Industries, 135 Or App 696, 898 P2d 818 (1995).*

❑ Respondent moved to dismiss the hearing because of alleged prejudice by the administrator of the Wage and Hour Division and the commissioner, and because the hearings referee was an employee of the agency and was thus incapable of giving respondent a fair hearing. The hearings referee denied the motion because neither the administrator nor the commissioner was the final decision maker (the hearings referee was, pursuant to OAR 839-33-095), and respondent had shown no bias by the referee. Respondent had the

burden of showing actual prejudice or bias. The mere fact that the hearings referee was an employee of the agency was insufficient to prove bias or prejudice. In addition, administrative agencies typically investigate, prosecute, and adjudicate cases within their jurisdiction. By itself, this combination of functions does not violate the due process clause. ***----- In the Matter of Clara Perez, 11 BOLI 181, 182-83 (1993).***

❑ Respondent, a state agency, moved at the start of hearing to disqualify the hearings referee because the referee was a member of the same collective bargaining unit as the complainant, and thus was an alleged resultant third party beneficiary to the collective bargaining agreement, which respondent claimed the hearings referee had to construe. The forum denied the motion as untimely, pursuant to OAR 839-30-065(2). When respondent again raised the hearings referee's alleged conflict of interest or bias in its written closing argument, the forum found no such conflict or bias because the legislative placed the parental leave law's enforcement with the agency, the law's coverage included state agencies, and the law did not suggest a different enforcement process here. In addition, the commissioner, not the hearings referee, makes the ultimate determinations of law and fact, and respondent did not attempt to show bias on the part of the commissioner, or that the hearings referee's alleged bias prejudiced respondent. ***----- In the Matter of Oregon Department of Transportation, MVD, 11 BOLI 92, 92-93, 106-07 (1992).***

> Overruled in part on other grounds, *In the Matter of Alaska Airlines, Inc.,* 13 BOLI 47 (1994), affirmed without opinion, *Alaska Airlines, Inc. v. Bureau of Labor and Industries,* 137 Or App 350, 904 P2d 660 (1995), *rev den* 322 Or 644, 912 P2d 375 (1996).

❑ When respondent alleged that the commissioner was biased and had prejudged the matter, the forum held that: 1) respondent has the burden of showing actual prejudice or bias; 2) administrative agencies and their staffs typically investigate, prosecute, and adjudicate cases within their jurisdiction; this combination of functions by itself does not violate the due process clause; 3) without a showing to the contrary, state administrators are assumed to be men and women of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances; and 4) disqualification of the commissioner would be a drastic step. ***----- In the Matter of Albertson's, Inc., 10 BOLI 199, 324-28 (1992).***

> Reversed and remanded on other grounds, Overruled in part on other grounds, *Albertson's, Inc. v. Bureau of Labor and Industries,* 128 Or App 97, 874 P2d 1352 (1994).

❑ No bias or prejudice was found from the agency's handling of discovery in a case in which the agency changed case presenters and counsel several times during the prehearing stages, the respondent requested a large volume of discovery, the agency had limited resources to respond to the requests, the discovery provided was complete and voluminous, the agency made good faith efforts to provide discovery, and the forum granted respondent a three month postponement in the middle of the hearing in order to do additional discovery and preparation. ***----- In the Matter of Albertson's, Inc., 10 BOLI 199, 327 (1992).***

> Reversed and remanded on other grounds, Overruled in part on other grounds, *Albertson's, Inc. v. Bureau of Labor and Industries,* 128 Or App 97, 874 P2d 1352 (1994).

❑ No bias or prejudice was found when the agency amended its charging document soon before the hearing, and the amended document had errors in it. ***----- In the Matter of Albertson's, Inc., 10 BOLI 199, 327 (1992).***

> Reversed and remanded on other grounds, Overruled in part on other grounds, *Albertson's, Inc. v. Bureau of Labor and Industries,* 128 Or App 97, 874 P2d 1352 (1994).

❑ No bias or prejudice was found in the hearings referee's rulings on the evidence, and no bias or prejudice would be inferred. ***----- In the Matter of Albertson's, Inc., 10 BOLI 199, 327-28 (1992).***

> Reversed and remanded on other grounds, Overruled in part on other grounds, *Albertson's, Inc. v. Bureau of Labor and Industries,* 128 Or App 97, 874 P2d 1352 (1994).

❑ Amending a complaint to add an allegation of handicap discrimination to the original allegation of sex discrimination based upon pregnancy is not a demonstration of biased advocacy by the agency, but an example of the agency carrying out its duty to investigate. Amended complaints enable investigations and determination of multiple unlawful motivations in a timely manner. To address such issues serially or not at all could result in a complainant's loss of remedy in an otherwise meritorious case because of an erroneous or incomplete initial complaint. ***----- In the Matter of Baker Truck Corral, Inc., 8 BOLI 118, 137 (1989).***

❑ Respondent claimed it was denied its rights to an impartial tribunal because the hearings referee was a former Civil Rights Division employee. The forum found this assertion to lack merit, holding that the party asserting such a claim must make a substantial showing of actual bias or prejudice. Although the hearings referee had not participated in the investigation leading to the contested case, the forum noted that such participation would not necessarily be reason for disqualify. ***----- In the Matter of the City of Salem, 4 BOLI 1, 43-44 (1983).***

❑ When the respondent failed to move for the disqualification of the hearings referee within the designated time, the forum determined that the respondent waived the right to claim a violation of due process by alleged failure to separate prosecutorial and investigative functions as a defense. ***----- In the Matter of PAPCO, Inc., 3 BOLI 243, 250 (1983).***

2.3 --- Ex Parte Communications

❑ After the hearing, the ALJ made an *ex parte* telephone call to the agency case presenter and asked if the agency would stipulate that respondent paid claimant in full for all hours worked, calculated at the rates respondent agreed to pay claimant ($100 for 24 hour shifts and $8 per hour for 4 hour shifts), including a $50

payment for claimant's single 12 hour shift. The agency stipulated to that fact. ***----- In the Matter of MAM Properties, LLC, 28 BOLI 172, 176 (2007).***

❑ The ALJ contacted the participants individually to schedule a prehearing conference. Respondent's authorized representative told the ALJ he was unavailable for a prehearing conference, but requested that the ALJ permit him to bring an "assistant" to the hearing because he was not familiar with "legal matters" and needed guidance, and the ALJ denied respondent's request after establishing that the proposed assistant was not a member of the Oregon State Bar in accordance with the contested case hearing rules. At the start of hearing, the ALJ disclosed this communication with respondent's authorized representative. ***----- In the Matter of Mermac, Inc., 26 BOLI 218, 220-21 (2005).***

❑ At the outset of the hearing, the ALJ stated that respondent had made *ex parte* phone calls to him on three occasions, that the phone messages had been recorded and the recording made an administrative exhibit, and that the transcribed phone messages had also been made an administrative exhibit. ***----- In the Matter of Orion Driftboat and Watercraft Company, LLC, 26 BOLI 137, 142 (2005).***

❑ When the ALJ notified respondent's attorney by telephone that his motion to appear as counsel *pro hac vice* had been granted, the ALJ disclosed this *ex parte* contact in the interim order granting the motion. ***----- In the Matter of Hermiston Assisted Living, Inc., 23 BOLI 96, 98 (2002).***

❑ At 4:30 p.m. on the afternoon before the scheduled hearing, respondent's wife telephoned the ALJ and stated that she was calling on behalf of respondent, who had developed an abscessed tooth, and sought a postponement because of this medical condition. The ALJ informed her that respondent had three options – bring a medical release signed by a doctor or dentist to the hearing; come to the hearing and let the ALJ evaluate respondent's ability to participate; or simply come to the hearing and participate. The ALJ disclosed this *ex parte* communication on the record when the hearing began on November 20. ***----- In the Matter of Stan Lynch, 23 BOLI 34, 36-37 (2002).***

❑ When the agency case presenter had a family emergency shortly before the time set for hearing and the ALJ made individual telephone contacts with the agency case presenter and respondent to discuss the status of the case, the ALJ issued a written disclosure of these communications to the agency and respondent. ***---- In the Matter of Martha Morrison, 20 BOLI 275, 280 (2000)***.

❑ When the ALJ received a request for an extension of time to file exceptions from respondent and there was no indication that the agency had been served, and the ALJ telephoned the agency case presenter to determine her position on respondent's request, the ALJ issued an interim order disclosing these ex parte contacts. ***----- In the Matter of Goodman Oil Company, Inc., 20 BOLI 218, 227 (2000)***.

❑ After receiving a telephone call from a person who said he had just received a hearing notice and inquired what to do, the ALJ advised the person that he must file a written answer within 20 days of receiving the notice and notified the other participants, in writing, of the ex parte contact. ***----- In the Matter of Murrayhill Thriftway, Inc., 20 BOLI 130, 134 (2000)***.

> Affirmed without opinion, *Burks v. Murrayhill Thriftway, Inc. and Bureau of Labor and Industries*, 174 Or App 405 (2001), rev den 333 Or 400 (2002).

❑ When respondent filed a letter with the forum that did not indicate it had been served on the agency, the forum disclosed the ex parte contact in an interim order. ***----- In the Matter of Barbara Coleman, 19 BOLI 230, 234 (2000)***.

❑ The hearings referee complied with ORS 183.462 and OAR 839-30-101 by notifying the participants of an *ex parte* communication, and of their right to rebut the substance of the communication on the record. ***----- In the Matter of Panda Pizza, 10 BOLI 132, 134 (1992).***

3.0 ATTORNEYS, CASE PRESENTERS, AND AUTHORIZED REPRESENTATIVES

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

❑ When the agency advised the ALJ that respondent's counsel had notified the case presenter that she no longer represented respondent and that all correspondence should be directed to respondent, the ALJ ordered respondent to retain counsel or file a second letter authorizing a representative to appear on its behalf. ***----- In the Matter of Bukovina Express, Inc., 27 BOLI 184, 187 (2006).***

❑ When respondent's counsel advised the ALJ that his firm was withdrawing as legal counsel and that he did not know whether respondent would appear at the hearing or default on the matters, the ALJ issued an order requiring respondent to either retain new legal counsel or submit a letter authorizing a representative to appear on respondent's behalf. ***----- In the Matter of Okechi Village & Health Center, 27 BOLI 156, 159 (2006).***

❑ When respondent's authorized representative stated he was unavailable for a prehearing conference, but requested that the ALJ permit him to bring an "assistant" to the hearing because he was not familiar with "legal matters" and needed guidance, the ALJ denied respondent's request after establishing that the proposed assistant was not a member of the Oregon State Bar in accordance with the contested case hearing rules. ***----- In the Matter of Mermac, Inc., 26 BOLI 218, 220 (2005)***

❑ When an out of state attorney filed an answer to the specific charges, the forum issued an interim order that required respondent to file one of the following: 1) a petition for the attorney to appear on behalf of respondent as counsel *pro hac vice* in accordance with the requirements of ORS 9.241 and UTCR 3.170; (2) a notice of appearance by Oregon counsel as "counsel" is defined in OAR 839-050-0020(8); or, (3) a letter from respondent authorizing an officer or regular employee of Respondent to appear on behalf of respondent as provided in OAR 839-050-0110(2) & (3). The order

stated that respondent would be subject to default if it did not take one of these actions. ***----- In the Matter of Hermiston Assisted Living, Inc., 23 BOLI 96, 98 (2002).***

❑ The forum granted a motion by an out of state attorney to appear as counsel *pro hac vice* on respondent's behalf when he filed a petition meeting the requirements of ORS 9.241 and UTCR 3.170. ***----- In the Matter of Hermiston Assisted Living, Inc., 23 BOLI 96, 98 (2002).***

❑ When a corporate respondent's attorney was suspended from the practice of law, the forum issued an interim order notifying respondent that all corporations or unincorporated associations must be represented by an attorney or an authorized representative at all stages of the hearing. ***----- In the Matter of SQDL Co., 22 BOLI 223, 227 (2001).***

❑ During the ALJ's opening statement, and again during the testimony of an agency witness, respondent requested that the hearing be recessed so he could obtain legal counsel to assist him in understanding the legal ramifications of the exhibits and the forum's procedures. Respondent stated he had a limited ability to comprehend and communicate in English. The ALJ put Respondent under oath and asked him a number of questions to determine Respondent's ability to comprehend and communicate in English and any prior attempts to obtain counsel. The ALJ determined that respondent had consulted counsel prior to hearing and had decided not to bring counsel to the hearing and that respondent was able to comprehend and communicate in English, to understand the allegations of the wage claim, to cross-examine claimant in English, using notes he took in English, and to testify as to facts surrounding claimant's allegations. Based on these factors and OAR 839-050-0110(6), the ALJ denied respondent's request. ***----- In the Matter of Sreedhar Thakkun, 22 BOLI 108, 110-11, 116 (2001).***

❑ When respondent moved, through local counsel, for out of state counsel to appear *pro hac vice* for respondent and accompanied its motion by an affidavit of the out of state counsel and exhibits certifying compliance with the requirements of ORS 9.241 and UTCR 3.170, the forum granted the motion. ***----- In the Matter of Servend International, Inc., 21 BOLI 1, 3 (2000).***

> Affirmed without opinion, *Servend International, Inc. v. Bureau of Labor and Industries,* 183 Or App 533, 53 P3d 471 (2002).

❑ A corporate respondent timely filed an answer to the agency's specific charges through Banas, an out-of-state attorney. The agency filed a motion for an order of default based on respondent's failure to timely file an answer through Oregon counsel. Subsequently, respondent, through Oregon counsel Buono, filed a motion for association of Banas as attorney for respondent and a second motion opposing the agency's motion for order of default, arguing that respondent had complied with the forum's rules by filing a written answer and that the forum's rule that a corporation be represented by counsel applied only to the hearing and not to preliminary matters. The forum granted the agency's motion for default on the basis that a corporation had to be represented by Oregon counsel at all stages of the hearings process and gave respondent ten days to obtain from default for good cause shown. Respondent timely filed a request for relief from default, and the forum withdrew the default order and accepted respondent's answer, citing earlier precedent of relief granted when an answer had been tendered prior to the agency's default motion. ***----- In the Matter of Sears, Roebuck and Company, 18 BOLI 47, 49 (1999)***.

❑ Pursuant to ORS 9.241 and UTCR 3.170, the forum granted respondent's motion to allow their corporate counsel, who was licensed to practice in Ohio, to appear as joint counsel in the proceeding. The forum denied the local counsel's request not to appear at hearing and allow the corporate counsel to represent respondent, citing the forum's interpretation of the requirement of UTCR 3.170 that associated local counsel participate meaningfully in the preparation and hearing in order for out-of-state counsel to continue to appear. ***----- In the Matter of Parker-Hannifin Corporation, 15 BOLI 245, 247-48 (1997).***

❑ When respondent's counsel, who had represented respondent in the proceeding for four months and participated in three postponements, resigned two weeks before the hearing, and respondent then represented herself, subsequently obtaining another attorney one day before the scheduled hearing, the forum refused to postpone the hearing, finding that respondent's request for postponement was untimely and did not demonstrate good cause. ***----- In the Matter of LaVerne Springer, 15 BOLI 47, 50-51 (1996).***

❑ After the noon recess on the first morning of hearing, respondent's attorney told the forum and the agency he had determined during the morning's proceeding that his testimony would be necessary in the case and requested leave to withdraw as counsel of record. The forum granted the request and the hearing recessed so respondent could obtain a new attorney. ***----- In the Matter of Industrial Carbide Tooling, Inc., 15 BOLI 33, 35 (1996).***

❑ When two corporate respondents failed to answer the agency's order of determination and failed to appear at hearing through counsel, the forum found them in default even though a third respondent, an individual, answered the charges and defended at hearing. ***----- In the Matter of Jack Crum Ranches, Inc., 14 BOLI 258, 260-62 (1995).***

❑ When a corporate respondent requested a postponement on the basis that it wanted to pay claimants but could not do so because of a pending grand jury investigation into the corporation and its president and because there were insufficient remaining members of the board of directors to issue a corporate check, the request was denied because the corporate respondent had not filed the motion through an attorney and because the proffered reason given for postponement did not constitute good cause. ***----- In the Matter of Gerald Brown, 14 BOLI 154, 157 (1995).***

❑ When a respondent corporation was in default

because its attorney was suspended from the practice of law two days before the start of the hearing, and thus the corporation was not represented at hearing by an attorney in good standing with the Oregon State Bar, the forum granted relief from default after respondent's attorney showed that neither respondent nor the attorney was aware on the day of hearing that the attorney had been suspended. ***----- In the Matter of Ashlanders Senior Foster Care, Inc., 14 BOLI 54, 60-62 (1995).***

❑ When an out-of-state attorney suggested making a special appearance on behalf of a respondent without associating Oregon counsel, the forum denied the request pursuant to the forum's rules and Oregon statute. ***----- In the Matter of Clara Rodriguez, 12 BOLI 153, 160 (1994).***

> Affirmed without opinion, *Rodriguez v. Bureau of Labor and Industries, 135 Or App 696, 898 P2d 818 (1995).*

❑ A corporate respondent was held in default when the two respondents were a corporation and its owner, the owner filed an answer as president of the corporation, the hearings referee notified respondents that the owner's answer could not serve as the corporation's answer and that the corporation was required by law to be represented by an attorney, and the corporate respondent thereafter failed to file an answer. ***----- In the Matter of Cristobal Lumbreras, 11 BOLI 167, 169 (1993).***

❑ When the principals of a corporate respondent were advised that the corporation needed to be represented by counsel, and one of the principals appeared at hearing but counsel did not represent respondent, the forum found respondent in default. ***----- In the Matter of Z & M Landscaping, Inc., 10 BOLI 174, 175-76 (1992).***

❑ In order to participate at hearing, corporations must be represented by an Oregon attorney as required by ORS 9.160 and OAR 839-30-057. When respondent's corporate president had twice been advised of this requirement by the hearings referee and was given additional time to obtain counsel and file an answer, the commissioner adopted the hearings referee's denial of relief forum default, which held that mere inability to afford an attorney was not a mistake or circumstances for which relief could be granted. ***----- In the Matter of Coos-Bend, Inc., 9 BOLI 221, 223, 228-29 (1991).***

❑ Corporations must be represented by an Oregon attorney as required by ORS 9.320 and OAR 839-30-057. When a corporation's president and sole owner attempted to represent the corporate respondent, the hearings referee refused to allow him to represent the corporation and found it in default. ***----- In the Matter of Allied Computerized Credit & Collections, Inc., 9 BOLI 206, 214 (1991).***

3.2 --- Case Presenters/Authorized Representatives

❑ The ALJ treated a written statement from a respondent LLC that included the statement "[a]s the only member and representative for Bukovina Express LLC I will be present on [h]earing rescheduled for me" as written authorization for the author to appear as Bukovina Express, LLC's authorized representative. ***----- In the Matter of Bukovina Express, Inc., 27 BOLI 184, 190-91 (2006).***

❑ When the agency advised the ALJ that respondent's counsel had notified the case presenter that she no longer represented respondent and that all correspondence should be directed to respondent, the ALJ ordered respondent to retain counsel or file a second letter authorizing a representative to appear on its behalf. ***----- In the Matter of Bukovina Express, Inc., 27 BOLI 184, 187 (2006).***

❑ When respondent's counsel advised the ALJ that his firm was withdrawing as legal counsel and that he did not know whether respondent would appear at the hearing or default on the matters, the ALJ issued an order requiring respondent to either retain new legal counsel or submit a letter authorizing a representative to appear on respondent's behalf. ***----- In the Matter of Okechi Village & Health Center, 27 BOLI 156, 159 (2006).***

❑ In response to respondent's motion for a discovery order requiring the agency to produce copies of interviews, the ALJ ruled that the agency did not have to produce interviews specifically conducted by the agency case presenter. ***----- In the Matter of Logan International, Ltd., 26 BOLI 254, 257-58 (2005).***

❑ When respondent's authorized representative stated he was unavailable for a prehearing conference, but requested that the ALJ permit him to bring an "assistant" to the hearing because he was not familiar with "legal matters" and needed guidance, the ALJ denied respondent's request after establishing that the proposed assistant was not a member of the Oregon State Bar in accordance with the contested case hearing rules. ***----- In the Matter of Mermac, Inc., 26 BOLI 218, 220 (2005)***

❑ When a respondent LLC's answer and request for hearing was filed by respondent's registered agent and not accompanied by written authorization giving the agent the authority to act as authorized representative for respondent, the ALJ issued an interim order stating that respondent must be represented by an attorney or authorized representative and that, except for a letter authorizing a person to appear on behalf of respondent as an authorized representative, the forum would disregard any motions, filings, or other communications from respondent unless they were through an attorney or authorized representative. ----- ***In the Matter of Orion Driftboat and Watercraft Company, LLC, 26 BOLI 137, 138-39 (2005).***

❑ When there were two respondents, an individual and an LLC, and the individual, who was also managing member of the LLC, appeared at hearing, the ALJ asked the individual at the start of the hearing if she intended to represent the LLC as the LLC's authorized representative. When the individual stated that she did intend to represent the LLC as an authorized representative, the ALJ instructed her to write out a statement to that effect before commencing the hearing. ***----- In the Matter of Stephanie Nichols, 24 BOLI 106, 110 (2003).***

❑ When a corporate Respondent's president filed an answer on behalf of Respondent but did not formally designate himself as Respondent's authorized representative, the forum ordered Respondent to provide a letter authorizing him to appear as its authorized representative at hearing and stated that the forum would disregard any motions, filings, or other communications from Respondent unless they were through an attorney or authorized representative. At the hearing, Respondent still had not provided the letter and the ALJ required Respondent's president to submit a handwritten statement authorizing him to appear as Respondent's authorized representative before allowing him to participate in the hearing. ***----- In the Matter of Cedar Landscape, Inc., 23 BOLI 287 (2002).***

❑ Upon receiving a letter from a respondent LLC's attorney stating that he no longer represented respondent, the forum issued an interim order requiring that respondent, as an LLC, file its response and be represented by counsel or an authorized representative. Included in the order was a statement that respondent would be found in default and would not be allowed to participate in the hearing unless it was represented by counsel or an authorized representative. ***----- In the Matter of Westland Resources Group LLC, 23 BOLI 276, 278 (2002).***

❑ When respondent's attorney withdrew as a corporate respondent's counsel and stated that respondent's president wanted to represent respondent in the capacity of authorized representative, the ALJ issued an interim order to the agency and respondent's president stating that respondent must be represented by an authorized representative or attorney. The ALJ also amended the case summary to delete the requirements that respondent submit "a brief statement of any defenses to the claim" and "a statement of any agreed or stipulated facts." ***----- In the Matter of G and G Gutters, Inc., 23 BOLI 135, 137-38 (2002).***

❑ When a corporate respondent's attorney was suspended from the practice of law, the forum issued an interim order notifying respondent that all corporations or unincorporated associations must be represented by an attorney or an authorized representative at all stages of the hearing. ***----- In the Matter of SQDL Co., 22 BOLI 223, 227 (2001).***

❑ At the start of hearing, respondent, who operated his business as a sole proprietorship, renewed his request that a friend act as his "case presenter" or authorized representative during the hearing. The ALJ denied respondent's request based on the rules governing the representation of a party in a contested case hearing - OAR 839-050-0110. ***----- In the Matter of Ilya Simchuk, 22 BOLI 186, 189 (2001).***

❑ At hearing, Respondent's corporate president Yee appeared on Respondent's behalf. Because Respondent had not previously filed a written statement authorizing Yee to be Respondent's authorized representative, the ALJ asked Yee if he intended to act as Respondent's authorized representative and Yee stated that was his intent. The ALJ required Yee to write and submit a brief statement authorizing himself to be Respondent's authorized representative before proceeding with the hearing. ***----- In the Matter of Jo-El, Inc., 22 BOLI 1, 3 (2001).***

❑ The ALJ does not have authority to substitute a different case presenter for the agency case presenter already assigned to the case. ***----- In the Matter of Barbara Coleman, 19 BOLI 230, 243 (2000)***.

❑ The forum denied the request of an individual respondent to have his wife serve as his "authorized representative" during the hearing, noting that only corporations, partnerships, and other associations are entitled to be represented by "authorized representatives." ***----- In the Matter of Tomas Benitez, 19 BOLI 142, 145 (2000)***.

❑ The ALJ granted respondent's discovery motion requesting production of the agency investigator's notes of interviews with witnesses, including those made at the direction of the agency case presenter. ***----- In the Matter of Wing Fong, 16 BOLI 280, 282 (1998).***

❑ The ALJ denied respondent's discovery motion requesting production of the case presenter notes of interviews with witnesses because of the strong public interest in protecting the case presenter's communications with a complainant and other witnesses at a contested case hearing. The ALJ further explained that the real party in interest in the case was the complainant, and ruled that the case presenter's communications with that party and other witnesses were protected from disclosure. ***----- In the Matter of Wing Fong, 16 BOLI 280, 283 (1998).***

❑ The ALJ denied respondent's request to call the agency case presenter as a witness to impeach complainant based on statements that complainant may have made to the case presenter that contradicted complainant's testimony made in the first stage of a reconvened hearing. ***----- In the Matter of Thomas Myers, 15 BOLI 1, 15-16 (1996).***

❑ Respondent objected to the case presenter questioning a respondent witness based upon the restrictions imposed on lay case presenters by the APA and by the forum's rules restricting the agency case presenter from making legal argument. The hearings referee overruled the objections, finding that the rule prohibited the case presenter from argument on the forum's jurisdiction, on the constitutionality of a statute or rule or the application of court precedent to the facts of a particular case before the forum. The limitation on legal argument by the agency's lay case presenter prohibits only legal argument; it does not limit the case presenter's inquiry into factual issues arising in a contested case, including factual issues touching upon the administration of law not directly connected to ORS chapter 659. ***----- In the Matter of Oregon Department of Transportation, MVD, 11 BOLI 92, 93 (1992).***

Overruled in part on other grounds, *In the Matter of Alaska Airlines, Inc.,* 13 BOLI 47 (1994), affirmed without opinion, *Alaska Airlines, Inc. v. Bureau of Labor and Industries,* 137 Or App 350, 904 P2d 660 (1995), *rev den* 322 Or 644, 912 P2d 375 (1996).

3.3 --- Attorney's Fees

❑ The 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 West Coast Grocery Company, 4 BOLI 47, 62 (1983).***

❑ The 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. ***----- 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,* 135 Or App 696, 898 P2d 818 (1995).

❑ The forum awarded complainant $150 in attorney's fees. ***----- In the Matter of School District No. 1, 1 BOLI 1, 15 (1973).***

> Affirmed in part, reversed in part on other grounds and remanded, *School District No. 1, Multnomah County v. Nilsen, 271 Or 461, 534 P2d 1135 (1975).*
>
> Orders on Remand, 1 BOLI 52 (1976), 1 BOLI 129 (1978).

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

❑ When respondent offered the forum a memorandum of law at the outset of the hearing, and the agency objected to its submission, the ALJ ruled that the memorandum would not be accepted. Subsequently, the memorandum was submitted and accepted by the forum as participate of respondents' closing argument. ***--- In the Matter of Geoffroy Enterprises, Inc., 15 BOLI 148, 152 (1996).***

4.0 PARTICIPANTS

❑ In a contested case hearing, the agency could proceed against only the single respondent identified in the notice of hearing and not against an additional employer identified only in the notice of intent and order of determination. ***----- In the Matter of Sabas Gonzalez, 19 BOLI 1, 3 (1999)***.

❑ The ALJ allowed the respondent's wife to assist him in presenting his case based on the respondent's representation that his wife was a partner in the business that was the subject of the hearing. ***----- In the Matter of Manuel Galan, Jr., 17 BOLI 112, 118 (1998)***.

> Affirmed without opinion, *Galan v. Bureau of Labor and Industries*, 167 Or App 259 (2000), rev den 332 Or 137 (2001).

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

❑ In Oregon, a complainant aggrieved by an alleged unlawful employment practice as defined by ORS Chapter 659 may pursue a claim with BOLI through an administrative proceeding or may file a civil suit in circuit court. The remedies available to the complainant are different in the two forums. ***----- In the Matter of Alpine Meadows Landscape, 19 BOLI 191, 218 (2000)***.

❑ Amending a complaint to add an allegation of handicap discrimination to the original allegation of sex discrimination based upon pregnancy is not a demonstration of biased advocacy by the agency, but an example of the agency carrying out its duty to investigate. Amended complaints enable investigations and determination of multiple unlawful motivations in a timely manner. To address such issues serially or not at all could result in a complainant's loss of remedy in an otherwise meritorious case because of an erroneous or incomplete initial complaint. ***----- In the Matter of Baker Truck Corral, Inc., 8 BOLI 118, 137 (1989).***

❑ The commissioner filed a verified complaint with the Civil Rights Division of BOLI alleging she had reason to believe that respondent's place of public accommodation had engaged in unlawful practices based on complainant's race/color, in violation of ORS 659.037 and ORS 30.670 to 30.685. The complainant was identified only by initials due to her demonstrated fear of retaliation by respondent ***----- In the Matter of The Pub, 6 BOLI 270, 271 (1987).***

❑ When respondent moved to dismiss the specific charges alleging complainant had not filed a verified complaint within 30 days as required by ORS 654.062, the forum found that a letter sent by complainant's attorney within 30 days that stated it was a complaint constituted timely filing. ***----- In the Matter of Southern Electrical and Pipefitting Corporation, 3 BOLI 254, 255 (1983).***

❑ When respondent moved to dismiss the proceeding for lack of jurisdiction on the grounds that the complaint was not filed within 30 days after the employee had reasonable grounds to believe he was discharged in violation of ORS 654.062(5), the commissioner determined that the complaint, filed on the 35th day, was timely filed. The commissioner stated that the legislature did not intend to have ORS 654.062(5)(b) impose an absolute jurisdictional time requirement, and that the limitation can be flexibly construed and extended for equitable reasons. In this case, the statutory language was directory instead of mandatory, and a liberal interpretation was appropriate due to the remedial nature of the statute. The purpose of the Oregon Safe Employment Act is to reduce occupational safety hazards, and this remedial purpose would not be served by an absolute bar to filing. In addition, though complainant promptly responded to all BOLI correspondence, he lived in Klamath Falls and was forced to deal with BOLI's Portland office. Finally, respondent was not prejudiced by the five-day delay. ***---- In the Matter of Day Trucking, Inc., 2 BOLI 83, 90-92 (1981).***

> Overruled on other grounds, *In the Matter of Western Medical Systems, Inc.,* 8 BOLI 108, (1989).

❑ When an administrative complaint was not filed with the agency within 30 days after complainant had reasonable cause to believe he was discharged in violation of ORS 654.062(5), the commissioner denied respondent's motion to dismiss, holding that complainant's submission of an intake questionnaire to the agency within 30 days was sufficient. The commissioner noted that complainant contacted the agency's Coos Bay office, which lacked the necessary

forms, forcing complainant to deal with BOLI's Portland office. Complainant was not responsible for any delay, and the commissioner held that technical defects should not be fatal in determining whether statutory filing periods have been met. ***----- In the Matter of Acco Contractors, Inc., 1 BOLI 260, 260-61 (1980).***

❑ After the filing of a complaint, the commissioner may, during or after the investigation, add as respondents additional persons not named as respondents in the original complaint. ***----- In the Matter of School District No. 1, 1 BOLI 1, 15 (1973).***

Affirmed in part, reversed in part on other grounds and remanded, *School District No. 1, Multnomah County v. Nilsen, 271 Or 461, 534 P2d 1135 (1975).*

Orders on Remand, 1 BOLI 52 (1976), 1 BOLI 129 (1978).

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

6.1 --- In General

❑ An administrative determination, issued to a nursing home that was an assumed business name for the individual respondent, satisfied the statutory definitional requirement in ORS 659.095(2) that the name of the respondent be included when the administrative determination named the respondent as the principal of the nursing home and three employees of the home had acted with apparent authority for the respondent in communications with the agency. The administrative determination was "issued" within the meaning of ORS 659.095 when it was mailed to the nursing home. ***----- In the Matter of Sierra Vista Care Center, 9 BOLI 281, 282-84 (1991).***

Affirmed, *Colson v. Bureau of Labor and Industries,* 113 Or App 106, 831 P2d 706 (1992).

6.2 --- Amendments

❑ Respondent filed a motion to dismiss, alleging that the amended administrative determination, which named the owners of a corporate individually, did not relate back to the initial administrative determination that did not name the individual owners, and that the commissioner had no authority to proceed against the individual owners because the amended administrative determination was issued more than one year after the complaint was filed. The forum denied the motion, stating that the agency was not prohibited by statute from continuing the investigation after the issuance of the administrative determination or adding respondents not named in the original complaint. The persons or entities named in the specific charges need not be those named in the administrative determination so long as the issues raised in the specific charges encompass discrimination like or reasonably related to the allegations in the complaint. ***----- In the Matter of Sapp's Realty, Inc., 4 BOLI 232, 237-39 (1985).***

6.3 --- Date of Determination

6.4 --- Date of Issuance

❑ By statute, the commissioner retains authority to resolve civil rights complaints only when he issues a substantial evidence determination within one year after a complaint is filed. ***----- In the Matter of Bob G. Mitchell, 19 BOLI 162, 183 (2000)***.

❑ Respondent moved to dismiss specific charges for lack of jurisdiction because they were not filed within one year of the administrative complaint or within 90 days of the administrative determination. The commissioner denied the motion, ruling that the time limitations expressed in ORS 659.095 and 659.121 governed filings in circuit court and did not affect the commissioner's jurisdiction so long as an administrative determination was issued timely. ***----- In the Matter of Fred Meyer, Inc., 12 BOLI 47, 48-49 (1993).***

❑ Respondent moved to dismiss specific charges on the basis that the commissioner had lost jurisdiction over the matter by failing to issue either a notice advising complainant of the private right of action or specific charges. The forum denied the motion when the facts established the complaint had been filed on October 2, 1980, and the private right of action notice was issued on October 2, 1981, within the one-year period set forth in ORS 659.095. The forum noted that there is no definite statute or administrative rule establishing a time limitation within which specific charges must be issued. ***---- In the Matter of Willamette Electric Products Company, Inc., 5 BOLI 32, 33-34 (1985).***

❑ The forum denied respondent's motion to dismiss specific charges alleging that the commissioner lacked jurisdiction for failure to obtain a conciliation agreement or issue specific charges within one year of the filing of the complaint under ORS 659.095. The forum stated that only a failure to issue an administrative determination within one year of the filing of a complaint can deprive the commissioner of jurisdiction and the issuance of a private right of action notice only serves to notify complainant of rights, rather than divesting the commissioner of jurisdiction. ***----- In the Matter of Scottie's Auto Body Repair, Inc., 4 BOLI 283, 285-86 (1985).***

❑ The forum denied respondent's motion to dismiss that alleged the administrative determination was untimely issued when the complaint was filed on September 16, 1980, the administrative determination dated September 16, 1981, and respondent did not receive it by mail until after September 16, 1981. The forum stated that ORS 659.095 requires the "issuance" of the administrative determination within one year, not the "receipt" thereof. The forum stated that, in computing time periods, the first day is excluded and the last day of the period is included. ***----- In the Matter of Sapp's Realty, Inc., 4 BOLI 232, 235-37 (1985).***

6.5 --- Reconsideration

❑ When the agency issued an administrative determination and found no substantial evidence of unlawful discrimination and decided that complainant's request for reconsideration failed to show "clear and unarguable error or omission which, if corrected, would reverse the administrative determination," then reopened the case for reinvestigation seven months later and issued an amended administrative determination 12 months later finding substantial evidence of discrimination, the commissioner held that the agency

violated OAR 839-03-065 by reopening the case. ***----- In the Matter of Kirsten Corporation, 8 BOLI 195, 203 (1990).***

6.6 --- Service

❑ ORS 659.096 does not require that the administrative determination be formally served on a respondent. Rather, it requires only that the respondent receive notice of the determination. Service of the substantial evidence determination on respondent's attorney constitutes constructive notice to respondents, meeting the requirements of ORS 659.095. ***----- In the Matter of Bob G. Mitchell, 19 BOLI 162, 184 (2000)***.

❑ Even if the agency does not meet the notice requirements of ORS 659.095, that results in dismissal of the specific charges only if the respondent proves that it did not receive sufficient notice to enable it to respond to the allegations in the determination. ***----- In the Matter of Bob G. Mitchell, 19 BOLI 162, 184-85 (2000)***.

❑ Respondent argued in closing that the agency did not properly serve respondent with the administrative determination when it was not personally served or sent by certified mail. The forum stated that the administrative determination is not the type of document that must be served personally or sent by certified mail. ***----- In the Matter of Sapp's Realty, Inc., 4 BOLI 232, 236 (1985).***

6.7 --- Substantial Evidence

❑ In its administrative determination, the agency determined that substantial evidence existed to support the overall allegation of sexual harassment, even though the agency did not find substantial evidence of some of the particulars contained in that complaint. ***----- In the Matter of Safeway Stores, Inc., 6 BOLI 29, 30 (1987).***

7.0 CIVIL RIGHTS CONCILIATION

❑ ORS 659.050 and 659.060 permit, but do not require, the commissioner to cause steps to be taken to settle a civil rights complaint. An attempt to conciliate a complaint is a discretionary procedure of the Civil Rights Division. ***----- In the Matter of WS, Inc., 13 BOLI 64, 92 (1994).***

❑ ORS 659.050 and 659.060 permit, but do not require, the commissioner to cause steps to be taken to settle a civil rights complaint. An attempt to conciliate a complaint is a discretionary procedure of the Civil Rights Division. ***----- In the Matter of WS, Inc., 13 BOLI 64, 92 (1994).***

❑ Pursuant to ORS 659.060(1), the agency found that the interest of justice required a hearing without first proceeding by conference, conciliation, and persuasion. The agency served respondent with specific charges, together with a written notice of the time and place of a hearing. ***----- In the Matter of Portland General Electric Company, 7 BOLI 253, 254 (1988).***

> Affirmed, *Portland General Electric Company v. Bureau of Labor and Industries, 116 Or App 356, 842 P2d 419 (1992),* affirmed, 317 Or 606, 859 P2d 1143 (1993).

❑ Respondent moved to dismiss specific charges, alleging the commissioner had failed, refused, and neglected to engage in conciliation under ORS 659.050. The forum denied the motion, stating there was no substantial evidence to support said allegation and noting that, in any case, the statute "permits, but does not require the commissioner to cause steps to be taken to effect settlement of a civil rights complaint." ***----- In the Matter of United Grocers, Inc., 7 BOLI 1, 8 (1987).*** *See also In the Matter of Lucille's Hair Care (on remand), 5 BOLI 13, 25 (1985), modified as to wage loss and interest, Ogden v. Bureau of Labor,* 68 Or App 235, 682 P2d 802 (1984); *order reinstated, remanded for recalculation of interest, Ogden v. Bureau of Labor,* 299 Or 98, 699 P2d 189 (1985).

❑ Respondent moved to dismiss specific charges, alleging that the agency failed to attempt conciliation. The forum denied the motion on the basis that respondent stipulated at hearing that conciliation had been attempted and failed and, in any case, ORS 659.050 does not impose a duty on the agency to succeed at or even to attempt conciliation. ***----- In the Matter of PAPCO, Inc., 3 BOLI 243, 250 (1983).***

❑ Respondent moved to dismiss specific charges on the grounds that the agency had failed to attempt conciliation in good faith, alleging that respondent made two good faith settlement offers and that the agency misled complainant into believing her claim was of higher value. The forum denied the motion provisionally on the grounds that: 1) the forum would be required to speculate no facts existed to support an award for pain and suffering; 2) the forum was not prepared to say respondent's settlement offer was a full and adequate remedy; and 3) summary disposition of cases is not a favored alternative in the area of administrative law. ***----- In the Matter of Boost Program, 3 BOLI 72, 73-74 (1982).***

❑ When respondent, at a conciliation meeting, denied any unlawful conduct and stated its position in this regarding was final, the commissioner ruled that the agency had made reasonable efforts to resolve the complaint under ORS 659.050(1) and could file specific charges under ORS 659.060(1), despite subsequent correspondence alluding to the possibility of further settlement and conciliation discussions. ***----- In the Matter of Fred Meyer, Inc., 1 BOLI 84, 85 (1978).***

> Affirmed in part, reversed and remanded as to posting and distribution requirements only, *Fred Meyer v. Bureau of Labor,* 39 Or App 253, 592 P2d 564 (1979); rev den 287 Or 129 (1979).
>
> Order on Remand, 1 BOLI 52 (1979).

❑ The scope of the Attorney General's charges of discrimination and the public hearing thereon control the terms of the order, and the proceedings are not in any way limited by the scope of attempted conciliation, as neither the fact nor the extent of conciliation is jurisdictional. ***----- In the Matter of School District No. 1, 1 BOLI 1, 15 (1973).***

> Affirmed in part, reversed in part on other grounds and remanded, *School District No. 1, Multnomah County v. Nilsen, 271 Or 461, 534 P2d 1135 (1975).*
>
> Orders on Remand, 1 BOLI 52 (1976), 1 BOLI 129 (1978).

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

8.1 --- In General

❑ When respondent treated complainant differently than her co-employees on the basis of her disability by closely scrutinizing her down time and keeping her excessively busy, the forum awarded no damages for this treatment because the agency did not allege this different treatment as a basis of discrimination in its specific charges. ***----- In the Matter of Pzazz Hair Designs, 9 BOLI 240, 254 (1991).***

8.2 --- Relationship to Administrative Determination

❑ Because the agency's investigation continues past the substantial evidence determination, the specific charges may include charges supported by evidence that the investigator did not discover. The only limitation is that the specific charges be "reasonably related" to the allegations in the initial complaint. ***----- In the Matter of Sears, Roebuck and Company, 18 BOLI 47, 78 (1999)***.

❑ Allegations in the specific charges that respondent barred complainant from employment based on respondent's erroneous perception and treatment of complainant as having a substantially limiting physical impairment caused by a neck injury were "reasonably related" to allegations in complainant's original complaint that respondent had harassed complainant both because he had filed a workers' compensation claim related to his on-the-job neck/back injury and because of his vision impairment and laid him off because of both the back/neck injury and the visual impairment. ***----- In the Matter of Sears, Roebuck and Company, 18 BOLI 47, 78 (1999)***.

❑ Respondent moved to dismiss the specific charges on the grounds that the administrative determination was issued to Sierra Vista Care Center instead of the individual respondent who owned Sierra Vista Care Center. The forum denied the motion on the basis that the individual respondent was not prejudiced in any way due to the fact that he learned of the administrative determination more than a year after the complaint was filed. ***----- In the Matter of Sierra Vista Care Center, 9 BOLI 281, 282-83, 285-86 (1991).***

> Affirmed, *Colson v. Bureau of Labor and Industries,* 113 Or App 106, 831 P2d 706 (1992).

❑ The rules allow issuance of an administrative determination based on witness statements and other relevant evidence. The evidence at hearing need not be exactly that used in the investigative finding, nor are the specific charges limited to the original complaint, so long as they are reasonably related to the type of discrimination involved. ***----- In the Matter of Baker Truck Corral, Inc., 8 BOLI 118, 136 (1989).***

❑ It is the agency's policy that the allegations and theories of the specific charges define the allegations and theories to be adjudicated through the contested case hearing process, whether or not those allegations and theories are consistent with, or even based on the allegations and theories in the administrative determination. ***----- In the Matter of Jake's Truck Stop, 7 BOLI 199, 211 (1988).***

❑ Respondent filed a motion to dismiss, alleging that the amended administrative determination on which the specific charges were based could not relate back to the initial administrative determination and was therefore untimely issued. The forum denied the motion, holding that specific charges need not be based on the administrative determination, and that the function of the administrative determination is to advise the parties of the facts found by the agency during its investigation and whether the agency has found any substantial evidence to support the allegations in the complaint. Issuance of the administrative determination allows the agency to retain authority to proceed. The specific charges trigger the contested case process. The only limitation on specific charges is that the complainant must have had standing to raise the issues and the issues raised must encompass discrimination only like or reasonably related to the allegations in the complaint. ***----- In the Matter of Sapp's Realty, Inc., 4 BOLI 232, 237-39 (1985).***

❑ When the Civil Rights Division did not find substantial evidence of unequal pay based on sex, but did find substantial evidence of failure to hire based on sex, the commissioner nonetheless incorporated both allegations into the specific charges. ***----- In the Matter of the City of Dallas, 2 BOLI 93, 94 (1981).***

8.3 --- Amendments

8.3.1 --- Prehearing Amendments

❑ The agency moved to amend the formal charges in order to substitute a one paragraph for another in six different places in the formal charges. The agency also changed its prayer for damages to seek lost wages in an amount to be proven at hearing and currently estimated to be approximately $9,200. The paragraph substitution was sought to "clarify for the record that it is respondent's alleged unlawful employment practice as identified in paragraph II.15 and not complainant's actions in paragraph II.14 that form the basis for the agency's allegations that complainant was retaliated against and subjected to unlawful employment practices as a result of his protected activity and membership in a protected class." The ALJ granted the agency's motion, relieved respondent of default, and directed the agency to serve a copy of the amended formal charges on respondent. ***----- In the Matter of Rogue Valley Fire Protection, LLC, 26 BOLI 172, 174 (2005).***

❑ When the agency moved to amend the formal charges by interlineation to correctly spell complainant's name wherever it appeared in the formal charges and to designate complainant's correct address and respondent filed no objection, the forum granted the Agency's motion. ***----- In the Matter of Robb Wochnick, 25 BOLI 265, 267 (2004).***

❑ In a disability case, the agency filed a motion to amend the specific charges to include an allegation that the facts alleged also constituted a violation of ORS 659.447 and 659.448. Respondent did not object, and the forum granted the agency's motion. ***----- In the Matter of Barrett Business Services, Inc., 22 BOLI 77, 79 (2001).***

❑ The ALJ granted the agency's pre-hearing motion to amend the specific charges to add new claims and increase the requested damages when the amendment was based on newly acquired evidence. ***-----*** In ***the Matter of Murrayhill Thriftway, Inc., 20 BOLI 130, 133 (2000)***.

> Affirmed without opinion, *Burks v. Murrayhill Thriftway, Inc. and Bureau of Labor and Industries*, 174 Or App 405 (2001), rev den 333 Or 400 (2002).

❑ When new claims were added to the specific charges three weeks before hearing, the ALJ postponed the hearing date based on the anticipated need for additional discovery. ***----- In the Matter of Murrayhill Thriftway, Inc., 20 BOLI 130, 133 (2000)***.

> Affirmed without opinion, *Burks v. Murrayhill Thriftway, Inc. and Bureau of Labor and Industries*, 174 Or App 405 (2001), rev den 333 Or 400 (2002).

❑ When the agency moved to increase its request for damages for back pay and benefits before hearing, based on recently obtained evidence concerning complainant's pay rate at the date of her termination, and respondent did not object, the ALJ granted the motion, noting that respondent's denial of the new allegations was presumed. ***----- In the Matter of Roseburg Forest Products Co., 20 BOLI 8, 11 (2000)***.

❑ The ALJ granted the agency's motion to amend the specific charges to reduce the amount of back pay sought. ***----- In the Matter of Moyer Theatres, Inc., 18 BOLI 123, 124 (1999)***.

❑ The forum granted the agency's motion to amend the amount claimed in the specific charges for mental suffering from $10,000 to $15,000. ***----- In the Matter of LTM, Incorporated, 17 BOLI 226, 228 (1998)***.

❑ The forum allowed the agency's requested amendment, which served to join an individual respondent personally as a respondent to the specific charges, directed that the agency file its third amended specific charges incorporating all amendments previously allowed by the forum, and directed respondents to answer the new charges, with the option of allowing the existing answer of the corporate respondent to stand. ***----- In the Matter of Body Imaging, P.C., 17 BOLI 162, 164 (1998)***.

> Order on reconsideration, 17 BOLI 162 (1998), affirmed in part, reversed in part, *Body Imaging, P.C. and Paul Meunier, M.D. v. Bureau of Labor and Industries*, 166 Or App 4 (2000).

❑ The ALJ granted the agency's pre-hearing motion to amend the specific charges to increase the amount claimed in damages. ***----- In the Matter of Oregon Department of Fish and Wildlife, 16 BOLI 263, 265 (1998).***

❑ When respondents, a corporation and its owner-president, filed an answer admitting that complainant was an employee of the corporation, and the agency later learned that complainant was actually an employee of a different corporation owned by the same owner-president, the forum granted the agency's motion to amend the specific charges to add a new corporate respondent. ***----- In the Matter of Glenn Walters Nursery, Inc., 11 BOLI 32, 35 (1992).***

❑ Prior to the hearing, the agency moved to amend the specific charges to name the corporate president as an aider and abettor. The forum granted the motion after permitting respondents an opportunity to respond. ***----- In the Matter of Chem-Ray Company, 10 BOLI 163, 154 (1992).***

❑ In a sexual harassment case, respondent moved to make the specific charges more definite and certain, asserting the specific charges were too general to defend against and asking that the specific charges be amended to allege the time and circumstances of each alleged incident. The hearings referee denied the motion, stating that the agency's specific charges referred to repeated instances of the described conduct as occurring in a relatively short and recent time frame and that the agency was not limited in the specific charges to the allegations of the complainant's administrative complaint, so long as the specific charges were reasonably related to the ultimate offense alleged. The hearings referee further found that the recitation of conduct in the specific charges was sufficiently specific to notify respondents that the nature of the conduct alleged was unwelcome and unwanted touching and related conduct due to complainant's sex, and was sufficiently specific to enable respondents to deny and/or explain. ***----- In the Matter of Dunkin' Donuts, Inc., 8 BOLI 175, 182 (1989).***

❑ The forum granted the agency's motion to amend the specific charges when the motion was made well in advance of the hearing and respondent did not object. ***----- In the Matter of Pacific Convalescent Foundation, 4 BOLI 174, 175 (1984).***

❑ Respondent moved to dismiss the specific charges because respondent was erroneously identified as McCall Oil Company. The commissioner denied the motion because the defect was corrected within a week of filing, respondent received prompt notice, and there was no showing by the respondent of prejudice in preparation of its defense as a result of the error. The proper remedy was amendment, not dismissal. ***----- In the Matter of McCoy Oil Company, 3 BOLI 9, 9-10 (1982).***

8.3.2 --- Amendments at Hearing

❑ After a hearing adjourned, and before it reconvened, the agency moved to amend the formal charges to increase the amount claimed in damages to conform to the evidence presented at hearing. The agency sought to increase the amount of back pay sought to $9,680 and the amount of emotional distress damages to $30,000. When the hearing reconvened, respondent objected to the agency's proposed amendment. The ALJ granted the agency's request to increase the amount of back pay sought because the agency had presented evidence supporting that figure without objection from respondent. The ALJ reserved ruling on the increase in emotional distress damages and granted the agency's motion in the proposed order. ***----- In the Matter of Logan International, Ltd., 26 BOLI 254, 260 (2005).***

❑ When the agency moved to amend the specific

charges to claim back pay for complainant for a specific period and respondent did not object, the forum granted the agency's motion. ***----- In the Matter of NES Companies LP, 24 BOLI 68, 70 (2002).***

❑ When respondent moved to amend its answer to substitute former ORS 659.474(a) and (b) for ORS 659A.156(a) or (b) in its first affirmative defense and the agency did not object, the forum granted respondent's motion. ***----- In the Matter of NES Companies LP, 24 BOLI 68, 71 (2002).***

❑ The ALJ granted the agency's motion to amend the amount of back pay sought downward to seek back pay calculated at the rate of $6.50 per hour, 40 hours per week, from August 3, 1999, to June 8, 2000, less $1,813.50 in interim earnings. ***----- In the Matter of H. R. Satterfield, 22 BOLI 198, 200 (2001).***

❑ Prior to opening statements, the agency moved to amend the specific charges to delete its request for lost wages. Respondent did not object and the motion was granted. ***----- In the Matter of Barrett Business Services, Inc., 22 BOLI 77, 79 (2001).***

❑ During the hearing, the agency moved to amend the specific charges to include as damages expenses the complainant incurred by seeking alternative employment in Alaska and transporting his wife and children there. The respondent opposed the motion on the grounds that it was untimely and that the damages sought were not authorized by law. The forum granted the motion because evidence concerning the expenses had come into the record without objection. ***----- In the Matter of Barrett Business Services, Inc., 20 BOLI 189, 192-93 (2000)***.

> Affirmed, *Barrett Business Services v. Bureau of Labor and Industries*, 173 Or App 444 (2001).

❑ At hearing, respondent moved to amend its answer to include the affirmative defense that complainant failed to mitigate her back pay damages. The agency objected on the grounds that failure to mitigate was an affirmative defense that is waived if not raised in a responsive pleading, and respondent had not raised it in its answer. The ALJ reserved ruling on the motion for the proposed order and ruled that respondent would be allowed to present evidence regarding complainant's alleged failure to mitigate. The ALJ granted the agency a continuing objection to any evidence elicited on this issue. Respondent's motion was granted in the proposed order on the basis that failure to mitigate back pay loss is an affirmative defense that does not have to be specifically pleaded by a respondent as a prerequisite to presenting evidence on that issue. ***----- In the Matter of Roseburg Forest Products Co., 20 BOLI 8, 14, 31-32 (2000)***.

❑ The agency moved, at the close of hearing, to amend the specific charges to specify damages for back wages based on the fact that complainant would have been able to work six hours a day until he exhausted his OFLA leave, estimating that complainant would have earned $3,841.20. The forum granted the agency's motion only to the extent that it sought damages based on the fact that complainant would have worked six hours per day until he exhausted his remained OFLA leave, but denied it to the extent that it specified a particular amount of money complainant would have earned during that time. The forum recalculated complainant's back pay based on the fact that complainant would have worked six hours per day, using only two hours of OLFA leave each day, and awarded $7,628.40 in back pay. ***----- In the Matter of Centennial School District No. 28-J, 18 BOLI 176, 194-95 (1999)***.

> Affirmed, *Centennial School District No. 28J v. Oregon Bureau of Labor and Industries*, 169 Or App 489 (2000), rev den 332 Or 56 (2001).

❑ During the hearing, the agency moved to amend the specific charges to include as damages expenses the complainant incurred by seeking alternative employment in Alaska and transporting his wife and children there. The respondent opposed the motion on the grounds that it was untimely and that the damages sought were not authorized by law. The forum granted the motion because evidence concerning the expenses had come into the record without objection. ***----- In the Matter of Barrett Business Services, Inc., 18 BOLI 82, 85, 103-04 (1999)***.

> Amended, 19 BOLI 16 (1999), withdrawn for reconsideration. Order on reconsideration, 20 BOLI 189 (2000), affirmed, *Barrett Business Services v. Bureau of Labor and Industries*, 173 Or App 444 (2001).

❑ The forum granted the agency's unopposed motion to amend the claim for back wages from the $2500 sought in the specific charges to $2,098.11. ***----- In the Matter of Tomkins Industries, Inc., 17 BOLI 192, 194 (1998)***.

❑ During its closing argument, the agency moved to amend the specific charges to add a requested remedy of reinstatement. The forum granted the motion, which respondent opposed, because: complainant's right to reinstatement was a central issue in the case; the ALJ received evidence on that issue; respondent did not argue persuasively that additional evidence on the issue would be needed; and "the remedy requested [was] exactly what the law had required [respondent] to provide." ***----- In the Matter of Tyree Oil, Inc., 17 BOLI 26, 27 (1998)***.

> Reversed, *Tyree Oil, Inc. v. Bureau of Labor and Industries*, 168 Or App 278 (2000).

❑ The ALJ denied the agency's motion to amend the specific charges to conform to the evidence when the respondent had objected to the presentation of evidence on the issues underlying the charge the agency sought to add. ***----- In the Matter of Central Oregon Building Supply, Inc., 17 BOLI 1, 2-3 (1998)***.

> Affirmed without opinion, *Central Oregon Building Supply, Inc. v. Bureau of Labor and Industries*, 160 Or App 700, 981 P2d 402 (1999).

❑ The ALJ granted the agency's motion, made during the hearing, to amend the specific charges to include a new theory of liability. The ALJ also allowed respondents to request a continuance if necessary to meet this new theory and present evidence on it. The agency later withdrew the new claim. ***----- In the Matter of Wing Fong, 16 BOLI 280, 284 (1998).***

❑ During the hearing, the forum granted the agency's

unopposed motion to amend the specific charges to delete the request for back wages. ***----- In the Matter of Katari, Inc., 16 BOLI 149, 151 (1997).***

> Affirmed without opinion, *Katari, Inc. v. Bureau of Labor and Industries,* 154 Or App 192, 957 P2d 1231, rev den, 327 Or 583 (1998).

❑ During the hearing, the agency moved to amend the specific charges to conform the damages requested to the evidence presented and respondent argued that the claimed back wages were calculated wrong and moved to strike the claim for mental suffering. The ALJ granted the agency's motion pursuant to OAR 839-050-0140(2) because the amendments reflected evidence introduced into the record without objection from respondent and denied respondent's motion to strike. ***----- In the Matter of Benn Enterprises, Inc., 16 BOLI 69, 71 (1997).***

❑ At hearing, the ALJ granted the agency's motion to amend the amount of back pay sought downward. ***----- In the Matter of Thomas Myers, 15 BOLI 1, 6 (1996).***

❑ At the start of the hearing, the agency moved to amend the specific charges to name additional respondents as successors in interest based on newly acquired evidence, the forum granted the motion and adjourned the hearing, ruling that the newly named respondents would have to be served with amended specific charges and have the opportunity to file an answer before the hearing could be reconvened. ***----- In the Matter of Thomas Myers, 15 BOLI 1, 2 (1996).***

❑ In a default situation, the charging document sets the limit on the relief that the forum can award. Once a default is granted, the agency cannot amend the specific charges to plead for greater damages to conform to the evidence presented at hearing. ***----- In the Matter of Kenneth Williams, 14 BOLI 15, 26 (1995).*** *See also In the Matter of Salem Construction Company, Inc., 12 BOLI 78, 79 (1993).*

❑ When there was evidence admitted without objection concerning complainant's earnings before and after discharge, the forum allowed the agency's motion to amend the specific charges under OAR 839-50-140 regarding wages alleged to have been lost as a result of complainant's unlawful discharge. ***----- In the Matter of Yellow Freight System, Inc., 13 BOLI 201, 203 (1994).***

❑ In a default case, when the agency moved to amend the charging document after hearing to amend the caption to add "Inc." to the respondent's name, the forum granted the motion because service of the charging document was made upon the registered agent, and all subsequent communications by the forum with the respondent were directed to it in its corporate capacity. The forum concluded that in these circumstances, no prejudice or surprise may be reasonably claimed and that justice was served by granted the motion. ***----- In the Matter of Salem Construction Company, Inc., 12 BOLI 78, 79 (1993).***

❑ In a case in which the agency alleged failure to reinstate a compensably injured worker and discrimination for utilizing the workers' compensation system, when the agency moved at the close of its case to amend the specific charges to include an allegation of violation of ORS 659.420 based on the respondent's assignment of complainant to work beyond her light duty release, and respondent objected to the amendment as untimely and as unsupported by the evidence, the commissioner confirmed the hearings referee's ruling denying the motion because there was no medical evidence that duties assigned were unsuitable and the mere light duty release, without more, was insufficient to allow the trier of fact to evaluate suitability. ***----- In the Matter of Fred Meyer, Inc., 12 BOLI 47, 49 (1993).***

❑ The forum granted the agency's motion to amend the amount of complainant's wage loss from $955 to $1,045 to conform to the proof. ***----- In the Matter of Rose Manor inn, 11 BOLI 281, 283 (1993)***.

❑ OAR 839-30-075, the rule under which a motion to amend the charging document is made, is liberally phrased with the objective that claims closely related to the specific charges be brought before the forum when there is evidence presented to support them. The rule is based on *School District No. 1, Multnomah County v. Nilsen,* 271 Or 461, 534 P2d 1135 (1975), in which the court held that specific charges may encompass discrimination like or reasonably related to the initial complaint. ***----- In the Matter of Chalet Restaurant and Bakery, 10 BOLI 183, 184 (1992).***

> Affirmed without opinion, *JLG4, Inc. v. Bureau of Labor and Industries,* 125 Or App 588, 865 P2d 1344 (1993).

❑ Complainant's original complaint to the agency alleged an involuntary resignation, but the agency erroneously found no substantial evidence of it during investigation because complainant had not reported her supervisor's offensive behavior to respondent's owner. The forum granted the agency's motion to amend the specific charges to include the issue of constructive discharge because evidence at hearing showed that respondent's supervisory employee had created objectively intolerable working conditions to which complainant attributed her resignation, and the employee conditioned complainant's schedule on her rejection of his advances, to which she also attributed her resignation. ***----- In the Matter of Chalet Restaurant and Bakery, 10 BOLI 183, 184 (1992).***

> Affirmed without opinion, *JLG4, Inc. v. Bureau of Labor and Industries,* 125 Or App 588, 865 P2d 1344 (1993).

❑ During the hearing, the agency moved to amend its amended specific charges to conform the back wages and lost benefits damages to the evidence. The motion was granted because the amendments reflected issues and evidence that had been previously introduced into the record without objection from respondent. ***----- In the Matter of Chem-Ray Company, 10 BOLI 163, 165 (1992).***

❑ When evidence was offered and received without objection from which a fact-finder could infer that the corporate sole owner and president urged and instigated acts of the corporation, the forum allowed the agency to amend the specific charges to include the corporate sole owner and president as an additional respondent under ORS 659.030(1)(g), which makes it an unlawful employment practice for any person to aid, abet, incite, compel, or coerce an employer in the doing of any of the

acts forbidden under ORS chapter 659. ***----- In the Matter of Wild Plum Restaurant, Inc., 10 BOLI 19, 20-21, 33 (1991).***

❑ When respondent's case summary included issues not encompassed by respondent's answer, the agency objected to any evidence bearing on the issues and defenses raised for the first time in the case summary as being untimely. Respondent moved to amend the answer to conform to the proffered evidence and defenses and the forum allowed the amendment of the answer when the agency did not cite any prejudice to its case. ***----- In the Matter of William Kirby, 9 BOLI 258, 259-60 (1991).***

❑ During a default hearing, the hearings referee granted the agency's motion to amend the specific charges to correct the date of complainant's first day of work, striking certain paragraphs as superfluous, and amending a paragraph to show percentages of the male and female work force that were paid minimum union scale for their work. ***----- In the Matter of Coos-Bend, Inc., 9 BOLI 221, 224 (1991).***

❑ During the hearing, the hearings referee granted the agency's motions to charge an individual respondent as an aider and abettor and to amend the caption to add another name that the individual respondent sometimes went by, on the basis that the amendments reflected issues and evidence which had been previously introduced into the record without objection from respondents. ***----- In the Matter of Allied Computerized Credit & Coll., Inc., 9 BOLI 207, 209 (1991).***

❑ During the hearing, the agency moved to amend the specific charges to conform the damages requested to the evidence presented at hearing. The agency's motion to increase the prayer for damages to $20,000 was granted. ***----- In the Matter of G & The Flagging Service, Inc, 9 BOLI 67, 70 (1990).***

❑ The agency's motion at the close of hearing to add an additional respondent was denied due to failure of service, notice, and due process. ***----- In the Matter of Community First Building Maintenance, 9 BOLI 1, 2 (1990).***

❑ The agency's motion, made during hearing, to amend the specific charges to conform the damages sought to the evidence presented at hearings referee, was granted. ***----- In the Matter of St. Vincent De Paul, 8 BOLI 293, 295 (1990).*** *See also In the Matter of Albertson's, Inc., 7 BOLI 227, 229 (1988).*

❑ The commissioner did not compute back wages beyond the period that was sought in the pleadings when testimony regarding earnings was uncontroverted, but no amendment was made to increase the amount of back wages sought. ***----- In the Matter of Baker Truck Corral, 8 BOLI 118, 138 (1989).***

❑ A motion to amend the specific charges to conform to the evidence may be granted, pursuant to OAR 839-30-075, when the amendments reflect issues and evidence that were previously introduced into the receive without objection from respondent. ***----- In the Matter of Jake's Truck Stop, 7 BOLI 199, 201 (1988).***

❑ Respondents moved to dismiss the specific charges after the agency had completed its case-in-chief, arguing there was no evidence to support the agency's primary allegation that respondents refused to rent to complainant. The forum denied the motion on the grounds that the agency had introduced evidence that respondents had discouraged complainant from applying to rent and allowed the agency to amend the specific charges to reflect that evidence. ***----- In the Matter of E. Harold Schipporeit, 6 BOLI 113, 160-62 (1987).***

> Affirmed, *Schipporeit v. Roberts,* 93 Or App 12, 760 P2d 1339 (1998), affirmed, *Schipporeit v. Roberts,* 308 Or 199, 778 P2d 953 (1989).

❑ At the start of the hearing, the forum allowed the agency to amend the specific charges to add an addition allegation of discrimination and to add interest to the prayer for damages. The respondent was allowed to amend his answer to respond to the new allegations in the amended specific charges. ***----- In the Matter of Deana Miller, 6 BOLI 12, 13-14 (1986).***

❑ At hearing, the forum allowed the agency to amend the specific charges to add two more items to the agency's prayer for damages on the ground that respondent would not be prejudiced thereby in maintaining its defense on the merits. The forum granted the agency and respondent 30 days to request a reconvenement to present evidence concerning the amendments. ***----- In the Matter of Mini-Mart Foodstores, Inc., 3 BOLI 262, 263 (1983).***

❑ At hearing, the agency moved to amend the specific charges to add the language "and he was disabled from working in that area." The agency's motion was granted on the basis that respondent failed to make a showing of prejudice. ***----- In the Matter of So. Elec. And Pipefitting Corp., 254, 256-57 (1983).***

❑ At hearing, the agency moved to amend the specific charges to change a date on the ground that such an amendment would conform the charges to the evidence presented at hearing. The forum denied the motion on the basis that evidence as to the date was conflicting. ***----- In the Matter of Northwest Tank Repair, 3 BOLI 205, 206 (1982).***

❑ When respondent was present at the hearing, the forum, after presentation of evidence, amended the specific charges to conform to the evidence presented regarding the rate of pay that complainant received at a job taken after the alleged incident. ***----- In the Matter of Pioneer Building Specialties Co., 3 BOLI 123, 124 (1982).***

> Affirmed without opinion, *Pioneer Building Specialties Co. v. Bureau of Labor and Industries*, 63 Or App 871, 667 P2d 583 (1983).

❑ The case caption was amended to include "or color" after "race" when respondent was present at the hearing and made no objection. ***----- In the Matter of Pioneer Building Specialties Co., 3 BOLI 123, 124 (1982).***

> Affirmed without opinion, *Pioneer Building Specialties Co. v. Bureau of Labor and Industries*, 63 Or App 871, 667 P2d 583 (1983).

❑ When the agency moved to amend the specific charges at the close of hearing to add another theory of

discrimination, the forum denied the motion, stating that while amendments conforming to the proof are allowed, no such proof was presented in the case to justify such an amendment. ***----- In the Matter of the City of Coos Bay, 3 BOLI 85, 85 (1982).***

❑ The specific charges were amended at hearing by stipulation of counsel for the agency and respondent. ***----- In the Matter of Dee Westcott, 2 BOLI 29, 30 (1980).***

8.4 --- Date of Issuance

❑ The commissioner denied respondent's motion to dismiss the specific charges for lack of jurisdiction because they were not filed within one year of the administrative determination, ruling that the time limitations expressed in ORS 659.095 and 659.121 governed filings in circuit court and did not affect the commissioner's jurisdiction so long as an administrative determination was issued timely. ***----- In the Matter of Fred Meyer, Inc., 12 BOLI 47, 48-49 (1993).***

❑ Respondent moved to dismiss specific charges on the basis that the commissioner had lost jurisdiction over the matter by failing to issue either a notice advising complainant of the private right of action or specific charges. The forum denied the motion when the facts established the complaint had been filed on October 2, 1980, and the private right of action notice was issued on October 2, 1981, within the one-year period set forth in ORS 659.095. The forum noted that there is no definite statute or administrative rule establishing a time limitation within which specific charges must be issued. ***----- In the Matter of Willamette Electric Products Company, Inc., 5 BOLI 32, 33-34 (1985).***

❑ The forum denied respondent's motion to dismiss specific charges when respondent's motion alleged the commissioner lacked jurisdiction for failure to obtain a conciliation agreement or issue specific charges within one year of the filing of the complaint under ORS 659.095. The forum stated that only a failure to issue an administrative determination within one year of the filing of a complaint can deprive the commissioner of jurisdiction and the issuance of a private right of action notice only serves to notify complainant of rights, rather than divesting the commissioner of jurisdiction. ***----- In the Matter of Scottie's Auto Body Repair, Inc., 4 BOLI 283, 285-86 (1985).***

8.5 --- Notice

❑ At the start of the hearing, the agency moved to amend the specific charges to name additional respondents as successors in interest based on newly acquired evidence, the forum granted the motion and adjourned the hearing, ruling that the newly named respondents would have to be served with amended specific charges and have the opportunity to file an answer before the hearing could be reconvened. ***----- In the Matter of Thomas Myers, 15 BOLI 1, 2 (1996).***

❑ When a respondent has actual notice of the proceedings, the forum acquires jurisdiction when an individual respondent makes an appearance at the hearing and voluntarily submits himself to the jurisdiction of the forum, even when proper service has not been made or attempted on the individual. ***----- In the Matter of Allied Computerized Credit & Coll., Inc., 9 BOLI 206, 214-15 (1991).***

❑ The agency's motion at the close of hearing to add an additional respondent was denied due to failure of service, notice, and due process. ***----- In the Matter of Community First Building Maintenance, 9 BOLI 1, 2 (1990).***

8.6 --- Election of Remedies

❑ Respondent moved to dismiss specific charges alleging a violation of ORS 654.062(5), arguing that the forum lacked jurisdiction because complainant had made an election of remedies under ORS 659.121(4) by filing a civil suit in court. The forum denied the motion, noting there is no language connecting ORS 654.062(5) to 659.121 and the legislative history of ORS 659.121 indicates that the private right of action was intended to supplement, not replace, the rights under ORS chapter 654. ***----- In the Matter of Scottie's Auto Body Repair, Inc., 4 BOLI 283, 285-91 (1985).***

❑ Respondent moved to dismiss specific charges on the grounds that ORS chapter 659 violates the constitutional guarantees of equal protection because it gives complainant the option of proceeding in civil court but does not give respondent the same option. The commissioner denied the motion, stating it was beyond the forum's discretion to determine the constitutionality of legislative enactments. ***----- In the Matter of Doyle's Shoes, Inc., 1 BOLI 295 (1980).***

8.7 --- Exhaustion of Administrative Remedies

❑ The forum denied respondent's motion to dismiss the specific charges based on failure to exhaust administrative remedies, stating that the doctrine of exhaustion relates to entry into the court system and has no relevance to a contested case proceeding. ***----- In the Matter of PAPCO, Inc., 3 BOLI 243, 250 (1983).***

8.8 --- Respondents

❑ When evidence was offered and received without objection from which a fact-finder could infer that the corporate sole owner and president urged and instigated acts of the corporation, the forum allowed the agency to amend the specific charges to include the corporate sole owner and president as an additional respondent under ORS 659.030(1)(g), which makes it an unlawful employment practice for any person to aid, abet, incite, compel, or coerce an employer in the doing of any of the acts forbidden under ORS chapter 659. ***----- In the Matter of Wild Plum Restaurant, Inc., 10 BOLI 19, 20-21, 33 (1991).***

❑ Respondent filed a motion to dismiss, alleging that the amended administrative determination, which named the owners of a corporate individually, did not relate back to the initial administrative determination that did not name the individual owners, and that the commissioner had no authority to proceed against the individual owners because the amended administrative determination was issued more than one year after the complaint was filed. The forum denied the motion, stating that the agency was not prohibited by statute from continuing the investigation after the issuance of the administrative determination or adding respondents

not named in the original complaint. The persons or entities named in the specific charges need not be those issues raised in the specific charges encompass discrimination like or reasonably related to the allegations in the complaint. ***----- In the Matter of Sapp's Realty, Inc., 4 BOLI 232, 237-39 (1985).***

8.9 --- Service

❑ The agency accomplished service on a corporate respondent by serving the Oregon Secretary of State by certified mail as provided in ORS 60.121. ***----- In the Matter of C. C. Slaughters, Ltd., 26 BOLI 186, 187 (2005).***

❑ At the commencement of the hearing, on November 12, 1997, the agency moved for an order finding Canfield, an individual respondent, in default on the grounds that he had been avoiding service but had apparently been served with the specific charges and had not filed an answer, and that he was not present at the hearing. In response to the agency's motion, the ALJ ruled Canfield provisionally in default, subject to proof by the agency that he had been served with the specific charges and proof from Canfield concerning the reason for his alleged default. On November 14, the ALJ withdrew the provisional order of default against Canfield on the basis that he had not been served with the specific charges until November 12. ***----- In the Matter of Murrayhill Thriftway, Inc., 20 BOLI 130, 134 (2000)***.

> Affirmed without opinion, *Burks v. Murrayhill Thriftway, Inc. and Bureau of Labor and Industries*, 174 Or App 405 (2001), rev den 333 Or 400 (2002).

❑ When the agency sent specific charges to respondents, a corporation and its owner-president, by certified mail to the corporate office and to an attorney who was the registered agent for the corporation and the attorney for the individual respondent; and when, after the agency learned that the registered agent for the corporation had resigned and there was no successor in interest, the agency caused the charges to be served on the secretary of state and mailed to the last registered office of the corporation; and those mailings were receipted for by or on behalf of the respective addressees, the ALJ found respondents had been served. ***----- In the Matter of Vision Graphics and Publishing, Inc., 16 BOLI 124, 125-26 (1997).***

❑ The forum has jurisdiction over an individually named respondent who has not been properly served but appears at the hearing and voluntarily submits himself to the jurisdiction of the forum. ***----- In the Matter of Allied Computerized Credit & Coll., Inc., 9 BOLI 206, 214-15 (1991).***

❑ If a corporation dissolves or the registered agent cannot be found, serving the secretary of state is effective service on the corporation. ***----- In the Matter of Allied Computerized Credit & Coll., Inc., 9 BOLI 206, 214 (1991).***

❑ The agency's motion at the close of hearing to add an additional respondent was denied due to failure of service, notice, and due process. ***----- In the Matter of Community First Building Maintenance, 9 BOLI 1, 2 (1990).***

❑ When the state corporations division administratively dissolved a respondent corporation, the agency served the specific charges on the respondent through the secretary of state, pursuant to ORS 60.121. ***----- In the Matter of Dillard Hass Contractor, Inc., 7 BOLI 244, 245 (1988).***

❑ When the specific charges named both Joseph Gaudry and Marc Gaudry as respondents, but the agency failed to personally serve Marc Gaudry, the forum determined that Joseph Gaudry under his dba name was the proper respondent. ***----- In the Matter of Joseph Gaudry, 3 BOLI 32, 33 (1982).***

8.10 --- Sufficiency of Pleadings

8.11 --- Waiver

❑ When complainants and respondent agreed to the facts, they were allowed by stipulation to waive specific charges and notice of hearing and to submit the controversy as to the meaning of those facts directly to the commissioner for final order determination. ***----- In the Matter of School District Union High 7J, 1 BOLI 163 (1979).***

9.0 ORDERS OF DETERMINATION AND NOTICES OF INTENT

9.1 --- In General

❑ Civil penalties assessed cannot exceed those alleged in the notice of intent. ***----- In the Matter of Basilio Piatkoff, 28 BOLI 133, 158 (2007).***

❑ When the agency's charging document referred to 13 monthly payroll periods but the allegations encompassed only 4 of those periods, the forum granted respondent's motion for an order requiring the agency to make the allegations more definite and certain. ***----- In the Matter of The Alphabet House, 24 BOLI 262, 265 (2003).***

❑ The forum found that the respondent had committed only a single violation of OAR 839-016-0025, even though the evidence arguable established that the respondent had committed multiple violations, when the agency had alleged only a single violation in the notice of intent. ***----- In the Matter of Labor Ready, Inc., 20 BOLI 73, 97 (2000)***.

❑ Once respondent has been served with the charging document, it is respondent's responsibility to keep the agency and the forum advised of respondent's address. ***----- In the Matter of Tina Davidson, 16 BOLI 141, 148 (1997).***

❑ Respondents moved to dismiss a notice of proposed revocation that sought to revoke respondents' farm labor contractor license because they failed to make "sufficient" workers' compensation insurance premium payments when due, claiming that the phrase "sufficient payment" was a nullity because it was not used in the rules and that their Oregon and US constitutional rights would be violated if their license was revoked based on this notice. The ALJ denied the motion, finding that the notice adequately stated a claim. Respondents must offer more than a one-sentence

conclusion that respondents' rights are being violated before the ALJ can fairly consider such claims. ***----- In the Matter of Scott Nelson, 15 BOLI 168, 182-83 (1996).***

❑ In a default case, the charging document sets the limit on the issues and relief that the forum can consider. ***----- In the Matter of Robert Arreola, 14 BOLI 34, 40 (1995).***

❑ When the agency's charging document contained a notice of respondent's right to a hearing, a statement of the authority and jurisdiction under which the hearing was to be held, a reference to the particular sections of the statutes and rules involved, a short and plain statement of the matters asserted or charged, a statement of the amount of the penalty imposed, a statement that the party must either pay the penalties or request a hearing within 20 days, a statement concerning waiver of a hearing, and a statement that the order would become final if the respondent failed to make timely the required requests, the forum found that the charging document complied with statutory requirements, even without six exhibits attached to it. ***----- In the Matter of Albertson's, Inc., 10 BOLI 199, 318 (1992).***

> Reversed and remanded on other grounds, Overruled in part on other grounds, *Albertson's, Inc. v. Bureau of Labor and Industries,* 128 Or App 97, 874 P2d 1352 (1994).

❑ When one claim concerning work permits in the agency's charging document referred to the statute and rule involved, charged the violations in the words of the rule, identified each minor by, at a minimum, name, social security number, date of birth, date of hire, and the store name and location where the minor was employed, and stated the amount of the civil penalty the agency proposed to impose, the forum found that no more was required by ORS 183.415 and 653.370 to withstand a defense that the allegation failed to state a claim on which relief could be granted. ***----- In the Matter of Albertson's, Inc., 10 BOLI 199, 311 (1992).***

> Reversed and remanded on other grounds, Overruled in part on other grounds, *Albertson's, Inc. v. Bureau of Labor and Industries,* 128 Or App 97, 874 P2d 1352 (1994).

❑ In a default situation, the amounts stated in the order of determination set the limit on the relief the forum can award. ***----- In the Matter of Ebony Express, Inc., 7 BOLI 91, 97 (1988).***

❑ In a wage claim case when an employer alleged that the order of determination failed to clearly state a claim upon which relief could be granted, the forum held that the allegations in the charging document were sufficiently clear to enable a respondent to reply. The order of determination stated the name of the employer, the period of the wage claim, the alleged number of hours worked, the rate of pay and the amount of wages claimed due. In addition, it set forth the average daily wage, added that more than 30 days had elapsed since the wages became due, the amount of the civil penalty, and the dates upon which interest would begin to accrue on the unpaid wages. ***----- In the Matter of Mary Rock, 7 BOLI 85, 90 (1988).***

❑ When a claimant testified at a default hearing that an NSF check was for wages earned during a period prior to the claim period set forth in the charging document, the forum held that it was unable to order payment on the NSF check since the check was not for wages claimed in the charging document. In a default situation, the charging document sets the limit on the issues and relief that the forum can consider. ***----- In the Matter of Jack Mongeon, 6 BOLI 194, 202 (1987).***

9.2 --- Amendments

❑ The forum did not consider respondent's failure to pay a worker the prevailing wage rate to be a violation of ORS 279.350(1) for the reason that the worker's name was not included in the agency's list of eight underpaid workers in its notice of intent, and the notice was not amended at hearing to include it. ***----- In the Matter of Labor Ready Northwest, Inc., 27 BOLI 83, 135 (2005).***

> Appeal pending.

❑ The agency moved to amend its notice of intent after the hearing to clarify the specific respondent against whom it was seeking civil penalties. Respondent did not oppose the motion and the ALJ granted it. ***----- In the Matter of Labor Ready, Inc., 20 BOLI 73, 78 (2000)***.

9.2.1 --- Prehearing Amendments

❑ The forum granted the agency's unopposed motion to consolidate two cases for hearing involving an order of determination and a notice of intent and to delete Christine Dean Washington and Sunburst II, LLC, as respondents from the agency's order of determination. ***----- In the Matter of MAM Properties, LLC, 28 BOLI 172, 176 (2007).***

❑ The ALJ granted the agency's unopposed motion to amend the order of determination to increase the amount of wages owed one claimant, reflecting the number of hours he worked and the agreed upon hourly rate, to include overtime wages for both claimants, and to include an additional allegation that respondent failed to pay claimants overtime wages pursuant to OAR 839-020-0030(1) and was liable for civil penalties under ORS 653.055(1)(b). ***----- In the Matter of Tallon Kustom Equip., 28 BOLI 32, 34 (2006).***

❑ Prior to hearing, the agency filed a motion to amend its notice to correct scrivener's errors. Respondent did not file a response in opposition to the motion and the forum granted the agency's motion. ***----- In the Matter of Wildfang, Inc., 28 BOLI 1, 2 (2007).***

❑ The forum granted the agency's motion to amend its notice of intent by interlineation to name "Troy Wingate" as the "real party in interest." ***----- In the Matter of Troy Wingate, 27 BOLI 282, 284 (2006).***

❑ The ALJ granted the agency's motion to amend its notice of Intent by interlineation to correct inaccurate citations of statutes and rules. ***----- In the Matter of Troy Wingate, 27 BOLI 282, 283-84 (2006).***

❑ The agency filed a motion to amend the order of determination by interlineation to allege that four wage claimants were entitled to and had received payment from the wage security fund and that the commissioner

was entitled to recovery from respondent the amounts paid out by the fund, plus a 25 percent penalty. The ALJ granted the agency's motion. ***----- In the Matter of Carl Odoms, 27 BOLI 232, 234 (2006).***

❑ The agency filed a second motion to amend its order of determination to seek recovery of the amount of wages paid to claimant from the wage security fund, plus an additional 25 per cent penalty as provided by statute, including an affidavit and documents that showed the agency had determined Bukovina Inc. was no longer in business and had administratively dissolved on February 11, 2005, and that the agency had paid claimant $592.20, less statutory deductions, from the fund. The ALJ issued an order that provisionally denied the agency's motion stating in pertinent part: "If the Agency intends to seek recovery for the Fund, it must either issue a new Order of Determination containing 'a short and plain statement of the matters asserted or charged' and references 'to the particular sections of the statutes and rules involved,' or file another motion to amend by interlineation that clarifies the issues raised in this Order." On the same date, the ALJ issued an order directing the agency to submit a certificate of service showing when, when, and on whom the first amended order of determination was served. ***----- In the Matter of Bukovina Express, Inc., 27 BOLI 184, 189-90 (2006).***

❑ The ALJ granted the agency's motion to amend the order of determination to add a second respondent as a successor when the motion was accompanied by an affidavit from the agency case presenter stating that she had recently become aware that the original respondent had stopped doing business in Oregon and had registered to do business in Washington State, with the only change in business being the company name and address of the company headquarters. The ALJ ordered the agency to serve an amended order of determination on the second respondent and the hearings unit and instructed the new respondent and instructed the second respondent, an LLC, to file an answer to the amended order of determination through counsel or an authorized representative. ***----- In the Matter of Bukovina Express, Inc., 27 BOLI 184, 187-88 (2006).***

❑ The agency moved to amend the order of determination to include citations to ORS 279.334 pertaining to overtime payments on public service contracts, ORS 279.051 pertaining to personal service contracts, and OAR 125-020-0010 through 125-020-0130 pertaining to personal service contracts. The ALJ granted the motion at the start of the hearing. ***----- In the Matter of Okechi Village & Health Center, 27 BOLI 156, 159, 161 (2006).***

❑ The agency advised the forum that the notice of hearing contained an incorrect case number and the forum on its own motion amended the notice of hearing by interlineation to change the case number from 54-05 to 19-05. ***----- In the Matter of Okechi Village & Health Center, 27 BOLI 156, 158 (2006).***

❑ In a prevailing wage rate case, the agency filed a motion to amend its notices in two pending cases against respondent to allege fifteen specific violations only alluded to in the paragraphs in both notices listing "Aggravating Factors." The agency did not seek civil penalties for any of these violations, but merely sought to have them considered as aggravating factors in determining the appropriate amount of civil penalties assessed, if any, after hearing. Respondent filed objections to the motion. The ALJ conducted a prehearing conference to discuss the agency's motion and respondent's objections, then issued an order granting the agency's motion. The order stated that the allegations previously litigated would not be relitigated, but the ALJ would take official notice of the commissioner's prior final orders regarding respondent. ***---- In the Matter of Labor Ready Northwest, Inc., 27 BOLI 83, 89-90 (2006).***

Appeal pending.

❑ The agency filed a request for reconsideration of the ALJ's interim order denying the agency's motion to amend its notice to include 21 certified payroll report violations. In support of its request for reconsideration, the agency stated that the allegations in the original notice (failure to pay the prevailing wage rate) were directly related to and based on the agency's review of 21 certified payrolls submitted by respondent on the project referred to in its original notice and that these were the same 21 certified payrolls referred to in the agency's original motion to amend. Respondents did not object to the agency's motion for reconsideration, and the ALJ granted the motion, finding that "justice requires granting of the agency's original motion." The ALJ required respondents to file an amended answer to the agency's amended certified payroll allegations, stating that the amended allegations would be deemed admitted if respondents did not file a timely amended answer. ***----- In the Matter of Harkcom Pacific, 27 BOLI 62, 65-66 (2005).***

❑ In a prevailing wage rate case, the agency filed a motion to (1) amend its notice of intent to name each of the seven employees alleged to have been underpaid in the agency's notice and state the specific amount of wages each was underpaid, and (2) allege that respondent filed 21 inaccurate certified payroll reports and to assess a $1,000 civil penalty for each violation. The ALJ granted the agency's motion to amend with respect to adding the names of the seven employees alleged to be underpaid and denied the rest of the motion on the basis that the agency had not demonstrated that "justice required" granting the motion. The ALJ required respondents to file an amended answer to the amended notice, stating that the amended allegations regarding the seven employees would be deemed admitted if respondents did not file a timely amended answer. ***----- In the Matter of Harkcom Pacific, 27 BOLI 62, 65 (2005).***

❑ The forum granted the agency's motion to amend the order of determination to delete a respondent, delete the agency's plea for penalty wages and civil penalties, and to add the allegation that "pursuant to ORS 652.414 and OAR 839-001-0500 to 839-001-0560, the bureau determined that the wage claimant in this matter was entitled to and received payment from the wage security fund * * * in the sum of $253.33. The commissioner * * * is entitled by ORS 652.414(3) and OAR 839-001-0560 to recover from the employer the amount paid from the fund, together with a penalty of 25 percent of the sum

paid from the fund or $200, whichever is greater. In this case $200 is the greater amount and that is the penalty amount the agency is seeking along with interest at the legal rate per annum from June 1, 2004 until paid." ***----- In the Matter of Lisa Sanchez, 27 BOLI 56, 57-58 (2005).***

❑ In a prevailing wage rate case, the agency filed two pre-hearing motions to amend its notice of intent, the first to reduce the number of certified payroll violations and amount of civil penalties sought, and the second to delete two words and incorporate an exhibit that identified four of respondents' former employees and the amounts the agency contends they were underpaid in prevailing wages for work performed on the public work at issue. Respondents did not respond or appear at the hearing and the ALJ granted the motions. ***----- In the Matter of Design N Mind, Inc., 27 BOLI 32, 35 (2005).***

❑ In a Wage Security Fund recovery case, the agency filed a motion to amend the order of determination to withdraw its request for penalty wages prior to hearing. Respondent did not object and the ALJ orally granted this motion at hearing. ***----- In the Matter of Jamie Sue Sziisz, 26 BOLI 228, 230 (2005).***

❑ When the agency moved to amend the order of determination to remove an individual respondent because the business was an active Oregon corporation and there was no legal basis that the agency was aware of under which the individual could be held liable, and further moved to delete its request for penalty wages based on its position that the corporate respondent was a successor in interest to a previous employer and "it is the Agency's policy not to pursue penalty wages in such circumstances," the ALJ granted the agency's motion at the start of hearing. ***----- In the Matter of Mermac, Inc., 26 BOLI 218, 220 (2005)***

❑ The agency filed a motion to amend the order of determination to change the amount of penalty wages sought from $2,880 to $4,356, based on the agency's revised penalty wage computation in accordance with OAR 839-001-0470(1)(e). The forum granted the motion after the hearing convened. ***----- In the Matter of Kilmore Enterprises, 26 BOLI 111,114 (2004).***

❑ The agency filed a motion to amend the order of determination to reduce the amount of wages sought by $700. The agency stated that it had come to light that respondent paid the claimant $700, in cash, and Respondent should be credited with having paid that amount. The forum granted the agency's motion and amended the order of determination by interlineation to reflect the $700 reduction. ***----- In the Matter of Kilmore Enterprises, 26 BOLI 111,113 (2004).***

❑ The agency moved to amend the order of determination to add an individual as a respondent because it had recently received information that the individual was an employer within the meaning of ORS 653.310 and should be added as a respondent. Respondent did not file a response to the motion. The forum denied the agency's motion based on its failure to allege sufficient facts on which the forum could find the amendment should be allowed. ***----- In the Matter of Kilmore Enterprises, 26 BOLI 111,113 (2004).***

❑ The forum granted the agency's motion to amend its notice of intent to correct a typographical error when respondent filed no objections. ***----- In the Matter of Rodrigo Ayala Ochoa, 25 BOLI 12, 15 (2003).***

> Affirmed without opinion, *Ochoa v. Bureau of Labor and Industries*, 196 Or App 639, 103 P3d 1212 (2004).

❑ The forum granted the agency's motion to amend its charging document to include an additional respondent over respondent's objection on the ground that the applicable rule merely requires that the agency assert a right to relief arising out of the same transaction or occurrence and that questions of law or fact common to both respondents will arise. ***----- In the Matter of The Alphabet House, 24 BOLI 262, 264 (2003).***

❑ When "Steph's Cleaning Service LLC" was named as the employer in the agency's original charging document, and respondent filed an answer filed by Stephanie Nichols admitting that claimant "had worked for me," the ALJ granted the agency's motion to add "Stephanie Nichols" as an individual respondent and to reduce the amount of unpaid wages sought to $228. ***----- In the Matter of Stephanie Nichols, 24 BOLI 106, 108-09 (2003).***

❑ The agency's order of determination named Barbara Blair dba Mid Valley Mechanical, Employer as the respondent. Respondent Barbara Blair and Robert Blair jointly filed an answer and request for hearing. The answer and request for hearing was typed on letterhead for "Mid Valley Mechanical, CCB#142619" and was signed by "Robert and Barbara Blair D.B.A. Mid Valley Mechanical." The Blairs denied that they had employed claimants or owed any money to them. Before hearing, the agency filed a motion to add Robert Blair as a respondent. The agency accompanied its motion with documentation from the Oregon Construction Contractor's Board showing that Barbara and Robert Blair had declared themselves to be a partnership. The ALJ granted the agency's motion. ***----- In the Matter of Barbara Blair, 24 BOLI 89, 90-91 (2002).***

❑ In a wage claim case, the agency filed a motion for a discovery order seeking documents from respondents that would tend to show that claimants worked for respondents, the amount of money paid by respondents to claimants, and the dates that claimants worked for respondents. The agency provided documentation showing it had informally requested these documents from respondents and had received no response. The ALJ granted the agency's motion. ***----- In the Matter of Barbara Blair, 24 BOLI 89, 90-91 (2002).***

❑ The forum granted the agency's motion to increase the amount of civil penalty wages sought from $5,685.60 to $5,786.40. ***----- In the Matter of Westland Resources Group LLC, 23 BOLI 276, 278, 280 (2002).***

❑ The agency filed a motion to amend the order of determination to correct the wages sought for a wage claimant from $189.50 to $249 and to correct the starting date for when those wages were earned from October 16, 2000, to October 5, 2000. The forum granted the

agency's motion to amend. ***----- In the Matter of Duane Knowlden, 23 BOLI 56, 58-59 (2002).***

❑ In a prevailing wage rate case, the agency filed a prehearing motion to amend the notice of intent to add Howard E. Johnson & Sons Construction Co., Inc. ("HJSCCI") as a named respondent in the proceeding and to debar HJSCCI. Respondents filed no response to the agency's motion, and the ALJ granted it. In order to expedite matters and avoid possible postponement, the ALJ required the Agency to serve HJSCCI with administrative exhibits generated to date in the case and to notify the forum when service was accomplished and provide a mailing address for HJSCCI. ***----- In the Matter of Larson Construction Co., Inc., 22 BOLI 118, 122 (2001).***

❑ The forum granted the agency's pre-hearing motion to amend the caption on the notice to delete the named respondents who were no longer parties to the agency's action. ***----- In the Matter of Bruce D. Huhta, 21 BOLI 249, 251 (2001).***

❑ Before hearing, the agency moved to amend the order of determination to increase the amount of wages sought to $10,723.51 and penalty wages sought to $2,100.00. The proposed amendment was premised on the agency's recalculation of claimant's wages based on the 40-hour workweek admitted in respondent's answer. Respondent filed untimely objections and the forum issued an interim order granting the agency's motion to amend. ***----- In the Matter of Danny Vong Phuoc Truong, 21 BOLI 217, 220 (2001).***

❑ The agency moved to "delete John Wardle as a respondent" based on its satisfaction that Wardle was "in the military serving overseas." The ALJ granted the motion, noting that the hearing as to respondents George Allmendinger and Marion Allmendinger would commence as scheduled. ***----- In the Matter of William George Allmendinger, 21 BOLI 151, 156 (2000).***

❑ Five days before the date set for hearing, the agency moved to amend its notice to: a) Include Gary Hathaway as a worker on the Clatsop Project, instead of the Edgefield Project, who was intentionally paid less than the prevailing rate of wage by respondent, and increase the civil penalties sought to $15,000 for five violations related to the Clatsop Project, and decrease the civil penalties sought to $12,000 on the Edgefield Project regarding the agency's allegations that respondent intentionally paid its employees less than the prevailing rate of wage; b) reduce the number of violations alleged regarding respondents' failure to failure to file accurate and complete certified payroll records on the Clatsop Project to ten, from 11, and decrease the amount of civil penalties sought for these violations from $27,500 to $25,500; c) change the ending date on which respondents failed to file certified payroll reports for the Clatsop Project to March 13, 1999, from June 30, 1999. The ALJ granted the agency's motion at the outset of the hearing. ***----- In the Matter of Johnson Builders, Inc., 21 BOLI 103, 106 (2000).***

❑ The agency filed an unopposed motion to amend the notice of intent that the ALJ granted at the hearing. ***----- In the Matter of Northwest Permastore Systems, Inc., 20 BOLI 37, 40 (2000)***.

> Affirmed, *Northwest Permastore Systems v. Bureau of Labor and Industries,* 172 Or App 427 (2001).

❑ The ALJ granted the agency's unopposed motion to amend the order of determination to include an individual respondent as well as the corporate respondent already named. The motion was based on the corporate respondent's answer, which alleged that it had not existed until a date after the date on which claimant first was employed, and claimant's assertion that "his employment relationship never changed during the time periods at issue in this action, and that at all times he dealt with [the individual] in regards to his employment." The ALJ noted that the individual respondent was the corporation's registered agent, he had been served with the original order of determination, notice of hearing, and all subsequently issued and filed documents, and he would suffer no prejudice or surprise under these circumstances. ***----- In the Matter of Majestic Construction, Inc., 19 BOLI 59, 61-62 (1999)***.

❑ The ALJ granted the agency's pre-hearing motion to amend the order of determination to increase the amount of unpaid wages owed, over respondent's objection that claimant was an independent contractor, not an employee. The ALJ noted that respondent's objection "constituted a defense to the wage claim, but not a reason for disallowing the motion." ***----- In the Matter of Debbie Frampton, 19 BOLI 27, 29 (1999)***.

❑ The ALJ granted the agency's unopposed motion to amend the order of determination to add two new wage claimants, to increase the amount of damages sought and to increase the size of penalty sought. ***----- In the Matter of Catalogfinder, Inc., 18 BOLI 242, 246 (1999)***.

❑ When an individual other than the person originally named as respondent filed an answer to an order of determination and identified herself as the owner of the business that had employed the claimant, the forum granted the agency's motion to add the individual as a second respondent. ***----- In the Matter of Scott A. Andersson, 17 BOLI 15, 16 (1998)***.

❑ The ALJ granted the agency's unopposed motion to amend the order of determination to add two new wage claimants, to increase the amount of damages sought and to increase the size of penalty sought. ***----- In the Matter of Catalogfinder, Inc., 18 BOLI 242, 246 (1999)***.

❑ The forum granted the agency's unopposed motion to amend the notice of intent to change the identification of a contract. ***----- In the Matter of Mike L. Sulffridge, 18 BOLI 22, 27 (1999)***.

> Affirmed without opinion, *Mike Sulffridge dba Mike Sulffridge Contracting, Inc., and A & B Cutters, Inc. v. Bureau of Labor and Industries*, 168 Or App 498 (2000).

❑ When an individual other than the person originally named as respondent filed an answer to an order of determination and identified herself as the owner of the business that had employed the claimant, the forum granted the agency's motion to add the individual as a second respondent. ***----- In the Matter of Scott A. Andersson, 17 BOLI 15, 16 (1998)***.

❑ The forum granted the agency's pre-hearing, unopposed motion to amend the notice of intent to make a correction and to add a new factual allegation as an alternative basis for the proposed penalty. The forum gave respondent the opportunity to file an amended answer. ***----- In the Matter of Richard Cole, 16 BOLI 221, 222 (1997)***

❑ Prior to the start of the hearing, the forum granted the agency's motion to amend its order of determination to increase the amount of wages and penalty wages claimed. ***----- In the Matter of Burrito Boy, Inc, 16 BOLI 1, 3 (1997).***

❑ The forum granted the agency's unopposed pre-hearing motion to amend the notice of intent to change the caption and to correct a contract number. The forum gave respondent the opportunity to file an amended answer. ***----- In the Matter of Andres Bermudez, 16 BOLI 229, 231 (1998).***

❑ The forum granted the agency's motion to amend the charging document to add a new respondent and delete a named respondent when respondent did not object. ***----- In the Matter of Gerald Brown, 14 BOLI 154, 156 (1995).***

❑ The forum granted the agency's pre-hearing motion to amend the notice of intent when respondent did not file a timely response to the motion. ***----- In the Matter of Jose Linan, 13 BOLI 24, 26 (1994).***

❑ The forum granted the agency's pre-hearing motion to amend the order of determination to revise the period covered by claimant's wage claim, the alleged number of hours worked, and the alleged wages earned and due when respondent did not respond to the motion. ***----- In the Matter of John Mathioudakis, 12 BOLI 11, 12 (1993).***

❑ When the agency's pre-hearing proposed amendment to the notice of intent served to make the allegation of violations more definite, did not enhance the penalties sought, and required a more specific level of proof on the participate of the agency, the commissioner confirmed the ruling allowing the amendments. ***----- In the Matter of Jose Rodriguez, 11 BOLI 110, 113 (1992).***

❑ When the forum granted the agency's motion to amend the charging document 13 days before hearing, the forum deemed the new allegations denied by respondent, and respondent was permitted to request a continuance at hearing to enable it to meet evidence of the new allegations. ***----- In the Matter of Albertson's, Inc., 10 BOLI 199, 205 (1992).***

> Reversed and remanded on other grounds, Overruled in part on other grounds, *Albertson's, Inc. v. Bureau of Labor and Industries,* 128 Or App 97, 874 P2d 1352 (1994).

❑ The agency moved to amend its charging document, a notice of proposed denial of a farm labor contractor application, to include allegations of failure to furnish explanations of rights and obligations under the employment agreement with respondent to workers alleged to have been recruited in the original counts. The hearings referee allowed the amendment three weeks prior to hearing and allowed respondent time to answer the amended notice or, in lieu of further answer, the new allegations were deemed denied. ***----- In the Matter of Stancil Jones, 9 BOLI 233, 235 (1991).***

❑ Pursuant to OAR 839-30-075(2), the forum allowed an order of determination to be amended to correct a mathematical error and to add mileage expenses over the employer's objection that mileage expenses were not wages under the statute. ***----- In the Matter of Central Pacific Freight Lines, Inc., 7 BOLI 272, 274 (1989).***

❑ Before hearing, the agency twice moved to amend the original order of determination to include an allegation that the wage claimant was not and should have been paid the minimum wage while employed by respondent during specific times. The employer did not file a response and the motions were granted. ***----- In the Matter of Richard Panek, 4 BOLI 218, 219 (1984).***

9.2.2 --- Amendments at Hearing

❑ The ALJ granted the agency's motion at hearing to amend the order of determination to reduce the amount of unpaid wages sought to $6,393.54 based on the agency's recalculations of the amount of unpaid wages due and owing to claimant. ***----- In the Matter of MAM Properties, LLC, 28 BOLI 172, 176 (2007).***

❑ At the close of the evidentiary part of the hearing, and prior to closing arguments, the agency moved to amend its charges to delete one paragraph and to change another paragraph to read: "respondents Basilio Piatkoff and Natalia Piatkoff have used Northwest Resources, Inc. as their agent to perpetrate a sham or subterfuge within the meaning of OAR 839-015-0142, in violation of ORS 658.440(3)(a)." Respondents did not object and the ALJ granted the agency's motion. ***----- In the Matter of Basilio Piatkoff, 28 BOLI 133, 137 (2007).***

❑ At hearing, the agency moved to amend the order of determination to allege that a wage claimant was employed by respondent from November 15 to December 20, 2004, instead of December 1 to December 17, 2004, as alleged in the original order of determination. The ALJ granted the agency's motion. ***----- In the Matter of Carl Odoms, 27 BOLI 232, 235 (2006).***

❑ During the hearing of a prevailing wage rate case, the agency moved to amend its notice of intent to allege that one worker was underpaid $571.60, instead of $7,306.81, and another worker was underpaid $238.52, instead of $239.94. The ALJ granted the motion. ***----- In the Matter of Harkcom Pacific, 27 BOLI 62, 70 (2005).***

❑ In a Wage Security Fund recovery case, the agency filed a motion to amend the order of determination to withdraw its request for penalty wages prior to hearing. Respondent did not object and the ALJ orally granted this motion at hearing. ***----- In the Matter of Jamie Sue Sziisz, 26 BOLI 228, 230 (2005).***

❑ When the agency moved to amend the order of determination to remove an individual respondent because the business was an active Oregon corporation and there was no legal basis that the agency was aware

of under which the individual could be held liable, and further moved to delete its request for penalty wages based on its position that the corporate respondent was a successor in interest to a previous employer and "it is the agency's policy not to pursue penalty wages in such circumstances," the ALJ granted the agency's motion at the start of hearing. ***----- In the Matter of Mermac, Inc., 26 BOLI 218, 220 (2005)***

❑ At the start of the hearing, the agency moved to amend the order of determination to reduce the amount of wages sought on two wage claimants' behalf, and the amount of penalty wages due to one claimant. Respondent did not object and the ALJ granted the agency's motion. ***----- In the Matter of Gary Lee Lucas, 26 BOLI 198, 200 (2005).***

❑ The agency filed a motion to amend the order of determination to change the amount of penalty wages sought from $2,880 to $4,356, based on the agency's revised penalty wage computation in accordance with OAR 839-001-0470(1)(e). The forum granted the motion after the hearing convened. ***----- In the Matter of Kilmore Enterprises, 26 BOLI 111,114 (2004).***

❑ The agency filed a motion to amend the order of determination to reduce the amount of wages sought by $700. The agency stated that it had come to light that respondent paid the claimant $700, in cash, and respondent should be credited with having paid that amount. The forum granted the agency's motion and amended the order of determination by interlineation to reflect the $700 reduction. ***----- In the Matter of Kilmore Enterprises, 26 BOLI 111,113 (2004).***

❑ The agency moved to amend the order of determination to add an individual as a respondent because it had recently received information that the individual was an employer within the meaning of ORS 653.310 and should be added as a respondent. Respondent did not file a response to the motion. The forum denied the agency's motion based on its failure to allege sufficient facts on which the forum could find the amendment should be allowed. ***----- In the Matter of Kilmore Enterprises, 26 BOLI 111,113 (2004).***

❑ At the conclusion of respondent's testimony, the agency moved to amend the order of determination to allege a violation of ORS 653.045 and OAR 839-020-0080, based on respondent's failure to keep records of the hours and dates worked by claimant. The agency did not seek additional penalties. The ALJ granted the motion over respondent's objection, based on respondent's testimony that he kept no records of the dates and hours worked by claimant. ***----- In the Matter of William Presley, 25 BOLI 56, 59 (2004).***

> Affirmed, *Presley v. Bureau of Labor and Industries,* 200 Or App 113, 112 P3d 485 (2005).

❑ During their closing argument, respondents moved to amend their answer to conform to evidence respondents argued was presented during the hearing showing that in May 2000 respondent corporation engaged "independent contractors," rather than employed workers, to harvest cones on federal and private land. The agency objected to the motion based on respondents' failure to raise the issue in its initial pleading and asserted there was no evidence introduced in support of the proposed amended pleading. The forum granted respondent's motion because respondents raised an "independent contractor" issue in their *opening* statement that was not previously raised in their answer, the agency did not object, and respondents introduced a modicum of evidence during the hearing that could be construed as relevant to that issue. ***----- In the Matter of Rodrigo Ayala Ochoa, 25 BOLI 12, 16-17 (2003).***

> Affirmed without opinion, *Ochoa v. Bureau of Labor and Industries*, 196 Or App 639, 103 P3d 1212 (2004).

❑ At the close of hearing, the agency moved to amend the Notice to include five additional violations of ORS 653.045(1) which requires employers to "make and keep available to the Commissioner * * * for not less than two years, a record or records containing * * * [t]he actual hours worked each week and each pay period by each employee." The agency based its motion on respondent's daughter's testimony that she had "shredded" her copies of employees' hours worked after she filled out the certified payroll records in her charge. Respondent objected on the ground that the witness testimony alone did not support the allegation that respondents failed to make and keep available records of hours worked by each employee, and the forum denied the agency's motion. ***----- In the Matter of Rodrigo Ayala Ochoa, 25 BOLI 12, 16 (2003).***

> Affirmed without opinion, *Ochoa v. Bureau of Labor and Industries*, 196 Or App 639, 103 P3d 1212 (2004).

❑ Prior to opening statements, the agency moved to amend its order of determination and amended order of determination to reflect that the agency was seeking a total of $47,046.31 for reimbursement to the wage security fund, with a 25% penalty, and $23,713.32 in additional unpaid wages. Respondent did not object and the amendment was granted. ***----- In the Matter of SQDL Co., 22 BOLI 223, 229 (2001).***

❑ Prior to opening statements, the agency moved to amend its amended notice of intent to substitute "Larson Construction Co., Inc." for "David M. Larson" based on evidence acquired in discovery. Respondents did not object and the agency's motion was granted. ***----- In the Matter of Larson Construction Co., Inc., 22 BOLI 118, 123 (2001).***

❑ Prior to opening statements, the agency moved to delete two charges from the notice of intent and to reduce civil penalties sought to $20,000. Respondents did not object and the agency's motion was granted. ***----- In the Matter of Larson Construction Co., Inc., 22 BOLI 118, 123 (2001).***

❑ Prior to opening statements, the agency moved to amend the order of determination to add the word "claimants" immediately after the word "wage" in the order. Respondent did not object, and the amendment was granted. ***----- In the Matter of Fjord, Inc., 21 BOLI 260, 263.***

> Affirmed without opinion, *Fjord, Inc. v. Bureau of Labor and Industries,* 186 Or App 566, 65 P3d 1132

(2003).

❑ During the hearing, respondent moved to amend its answer to include a defense stated in its case summary, namely that "Respondent is facially excluded from the definition of 'employer' pursuant to ORS 652.310(b), in that respondent is a 'person[]otherwise falling under the definition of employers so far as the times or amounts of their payments are regulated by laws of the United States.'" The agency objected, arguing this was an affirmative defense that respondent had waived by omitting it from its answer. The ALJ stated he would rule on the motion in the proposed order, and allowed respondent to present witness testimony, over the agency's objection, as an offer of proof in support of this defense. The agency's objection to respondent's offer of proof and amendment was granted in the proposed order. ***----- In the Matter of Fjord, Inc., 21 BOLI 260, 263, 281-282 (2001).***

Affirmed without opinion, *Fjord, Inc. v. Bureau of Labor and Industries,* 186 Or App 566, 65 P3d 1132 (2003).

❑ When the agency moved during the hearing to amend the order of determination to increase the amount of wages and penalty wages owed to three claimants based on evidence produced without objection at hearing that showed claimants were paid on a salary basis, the ALJ deferred ruling until the proposed order, then granted the agency's motion in the proposed order. ***----- In the Matter of Francisco Cisneros, 21 BOLI 190, 194, 210-12 (2001).***

Affirmed without opinion, *Cisneros v. Bureau of Labor and industries,* 187 Or App 114, 66 P3d 1030 (2003).

❑ When the agency and respondent stipulated to the amount of wages claimant was entitled to if the forum concluded that claimant was not an excluded executive employee during the wage claim period, the agency moved, without objection, to amend the order of determination to conform to that figure and ALJ granted the amendment. ***----- In the Matter of Lane-Douglas Construction, Inc., 21 BOLI 36, 39 (2000).***

❑ The ALJ granted the agency's unopposed motion to amend the order of determination to reduce the amount of damages sought, in conformance with the evidence. ***----- In the Matter of Robert N. Brown, 20 BOLI 157, 159 (2000)***.

❑ The ALJ granted the agency's unopposed motion at hearing to dismiss the notice of intent as to one of the respondents. ***----- In the Matter of Labor Ready, Inc., 20 BOLI 73, 77 (2000)***.

❑ The ALJ granted the agency's motion to amend the notice of intent to add an additional alleged violation of the prevailing wage rate laws based on evidence that came into the record without objection. The ALJ ordered that respondents were deemed to have denied the new allegation and granted respondents a continuance to present evidence regarding the new charge. ***----- In the Matter of Labor Ready, Inc., 20 BOLI 73, 77 (2000).***

❑ The ALJ granted the agency's unopposed motion to amend the order of determination to name respondent's husband as an additional respondent when respondent's counsel asserted at hearing that respondent's husband was a co-owner of her business. ***----- In the Matter of Ann L. Swanger, 19 BOLI 42, 45 (1999)***.

❑ At the beginning of the hearing, the agency moved to amend the notice of intent to substitute one contract number for another, based on the contract number that appeared in the respondent's evidence. The ALJ granted the agency's unopposed motion. ***----- In the Matter of Lambertus Sandker, 18 BOLI 277, 280 (1999)***.

❑ During the hearing, the agency moved to amend the notice of intent to conform to the respondent's testimony that he had committed additional violations. The agency explained that it did not wish to bring additional charges against the respondent, but sought only to use the evidence of additional violations to support its argument that the forum should impose enhanced penalties for the violations originally charged. The forum granted the motion but noted that it would have considered evidence of additional violations in determining the appropriate civil penalty even without amendment of the notice of intent. ***----- In the Matter of Lambertus Sandker, 18 BOLI 277, 280 (1999)***.

❑ When the agency case presenter moved to amend the notice of intent just prior to making his closing statement by adding an allegation that respondent had assisted an unlicensed contractor, the forum denied the motion. ***----- In the Matter of Thomas L. Fery, 18 BOLI 220, 222 (1999)***.

❑ In a case in which the respondents defaulted, the ALJ granted the agency's motion to amend the order of determination by reducing the amount of damages sought. ***----- In the Matter of Leslie Elmer DeHart, 18 BOLI 199, 201 (1999)***.

❑ At the start of the hearing, the forum granted the agency's motion to amend its notice of intent by removing a worker's name from one of the notice's allegations and reducing the amount of civil penalties sought by $1,000. The forum also granted the agency's motion to add the same worker's name to a different allegation in the notice of intent and increase the civil penalties sought by $250, and remove two other workers' names from allegations in the notice of intent, reducing the civil penalties sought by $1,250. Finally, respondent objected to and the forum denied the agency's motion to add the names of six workers to two different allegations in the notice of intent on the basis that the amendment was untimely. ***----- In the Matter of Mike L. Sulffridge, 18 BOLI 22, 27-28 (1999)***.

Affirmed without opinion, *Mike Sulffridge dba Mike Sulffridge Contracting, Inc., and A & B Cutters, Inc. v. Bureau of Labor and Industries*, 168 Or App 498 (2000).

❑ The forum granted the agency's unopposed motion to amend the claim for back wages from the $2500 sought in the specific charges to $2,098.11. ***----- In the Matter of Tomkins Industries, Inc., 17 BOLI 192, 194 (1998)***.

❑ The ALJ granted the agency's motion to amend the order of determination to reduce the amount of unpaid

wages claimed when the respondent did not oppose the motion and justice required that the motion be granted. ***----- In the Matter of Thomas J. Heywood, 17 BOLI 144, 146 (1998)***.

❑ The ALJ granted the agency's motion to amend the notice of proposed denial to conform to the evidence when the respondent had not timely objected to the presentation of evidence relevant to the new allegations the agency sought to add to the notice. ***----- In the Matter of Manuel Galan, Jr., 17 BOLI 112, 119 (1998)***.

> Affirmed without opinion, *Galan v. Bureau of Labor and Industries*, 167 Or App 259 (2000), rev den 332 Or 137 (2001).

❑ The ALJ granted the agency's unopposed motion at hearing to amend a notice of intent to include placement on the list of ineligibles and to assess civil penalties. ***----- In the Matter of Larson Construction Co., Inc., 17 BOLI 54, 56 (1998)***.

❑ At hearing, the respondents moved to amend their answer to assert an additional affirmative defense challenging the constitutionality of ORS 279.361. The ALJ granted the motion over the agency's objection, and set a briefing schedule. The respondents later withdrew the affirmative defense. ***----- In the Matter of Larson Construction Co., Inc., 17 BOLI 54, 56 (1998)***.

❑ During its closing argument, the agency moved to amend the specific charges to add a requested remedy of reinstatement. The forum granted the motion, which the respondent opposed, because: complainant's right to reinstatement was a central issue in the case; the ALJ received evidence on that issue; respondent did not argue persuasively that additional evidence on the issue would be needed; and "the remedy requested [was] exactly what the law had required [respondent] to provide." ***----- In the Matter of Tyree Oil, Inc., 17 BOLI 26, 27 (1998)***.

> Reversed, *Tyree Oil, Inc. v. Bureau of Labor and Industries*, 168 Or App 278 (2000).

❑ During the hearing, the agency moved to amend the order of determination to increase the civil penalty claimed, which had been miscalculated. The forum had received evidence without objection regarding the claimant's wage rate and the correct calculation of the penalty. Consequently, the forum granted the agency's motion to amend with regard to the respondent who had appeared at the hearing. The forum denied the motion with regard to the respondent who had not appeared at hearing and had defaulted. In a default situation, the charging document sets the limit on the issues and relief the forum can consider. ***----- In the Matter of Scott A. Andersson, 17 BOLI 15, 17 (1998)***.

❑ At the start of the hearing, the forum granted the agency's motion to amend the charges against a respondent who was in default when the amendment reduced the respondent's obligation. ***----- In the Matter of Odon Salinas, 16 BOLI 42, 45 (1997).***

❑ At the start of the hearing, the forum granted the agency's motion to amend its order of determination to increase the amount of wages claimed and to eliminate a claim for penalty wages. ***----- In the Matter of Frances Bristow, 16 BOLI 28, 31 (1997).***

❑ In a wage claim case, respondent filed exceptions asking the forum to consider her defense of financial inability to pay wages at the time they accrued when some evidence came in at hearing concerning respondent's financial difficulties, but when respondent did not amend her answer to conform to this evidence. The forum rejected the exceptions because the agency had no opportunity to object, to seek discovery, or to present evidence to meet this new issue. ***----- In the Matter of Graciela Vargas, 16 BOLI 246, 257 (1998).***

❑ When the agency moved to amend the notice of intent to include respondents' subcontracting in Oregon for work in Alaska, the commissioner ruled that the Farm Labor Contractor's Act applied to an unlicensed contractor entering into a subcontract in Oregon for the forestation of lands in another state. ***----- In the Matter of Manuel Galan, 15 BOLI 106, 130-31 (1996).***

> Affirmed without opinion, *Staff, Inc. v. Bureau of Labor and Industries,* 148 Or App 451, 939 P2d 174, rev den, 326 Or 57, 944 P2d 947 (1997).

❑ At the start of the hearing in a child labor case, the hearings referee allowed the agency's motion to amend the notice of intent to change the name of a minor and to amend the allegation of unlawful overtime from 20 weeks to 19 weeks, reducing the sought-after civil penalty to $19,000. ***----- In the Matter of Laverne Springer, 15 BOLI 47, 50-51 (1996).***

❑ The forum allowed the agency's amendment to increase the amount of wages sought in a wage claim case when respondent left the hearing before the agency had completed its case, but had the opportunity to cross-examine a claimant upon whose testimony the agency based its motion to amend. ***----- In the Matter of Danny Jones, 15 BOLI 96, 105 (1996).***

❑ The forum granted the agency's motion to amend an order of determination after hearing when respondent was in default for failing to appear at hearings referee, an exhibit attached to the motion supplemented a record of paid wages that was submitted at hearing, and the amendment reduced the amount of wages and penalty wages allegedly owed. ***----- In the Matter of John Hatcher, 14 BOLI 289, 290 (1996).***

❑ When two corporate respondents were in default for failing to file an answer and appear at hearing through counsel and the agency moved to amend the charging document at hearing to conform to the evidence presented, the forum granted the motion reducing the amount of wages sought, denied the motion to add expense items that the corporations had no notice of, and granted the motion to add the expense items against an individual respondent who had answered and defended at hearing. ***----- In the Matter of Jack Crum Ranches, Inc., 14 BOLI 258, 260-62 (1995).***

❑ The forum granted the agency's motion to amend the charging document to conform to the evidence in the record by reducing the amount of wages due and owing and including unpaid overtime. ***----- In the Matter of Sunnyside Enterprises of Oregon, 14 BOLI 170, 174 (1995).***

❑ At a default hearing when respondent did not appear, the forum granted the agency's motion to amend the charging document to correct clerical errors and for clarity. ***----- In the Matter of Robert Arreola, 14 BOLI 34, 35 (1995).***

❑ The hearings referee granted the agency's motion to amend the charging document when evidence supporting an additional theory to bring respondent within the definition of a farm labor contractor came into the record without objection and was addressed directly by respondent. ***----- In the Matter of JoAnn West, 13 BOLI 233, 235 (1994).***

❑ The agency moved at the start of the hearing to amend the order of determination to revise the unpaid wages and penalty wages sought downward, and at the end of the hearing to amend the order of determination to conform to the evidence. The hearings referee granted the motions, the latter over respondent's objection. ***----- In the Matter of Kenny Anderson, 12 BOLI 275, 277 (1994).***

❑ The forum granted the agency's motion to amend the order of determination to include an individual respondent who was present at the hearing to defend the corporation when evidence had been received without objection regarding the individual's connection to the corporation. ***----- In the Matter of La Estrellita, Inc., 12 BOLI 232, 234 (1994).***

❑ The forum amended the order of determination to conform to proof at hearing when the evidence showed that claimant's wage claim arose while the corporate owner was doing business as an individual proprietor before incorporation, and that the individual proprietor was the employer responsible for unpaid wages and penalties. ***----- In the Matter of La Estrellita, Inc., 12 BOLI 232, 234 (1994).***

❑ When the agency moved to increase the wages and penalty claimed based on the evidence at a hearing that respondent did not attend, the forum denied the motion because in a default situation, amounts stated in the order of determination limit the relief the forum can award. ***----- In the Matter of Secretarial Link, 12 BOLI 58, 59 (1993).***

❑ When the agency moved during hearing to amend the order of determination to specifically mention overtime wages earned, and respondent did not object, the motion was granted. ***----- In the Matter of Crystal Heart Books, 12 BOLI 33, 35 (1993).***

❑ In a farm labor contractor license revocation case, the hearings referee granted a motion to amend the charging document to conform to the evidence and to reflect issues presented at hearing, when the amendments reflected issues and evidence that had been previously introduced into the record and addressed without objection from respondent. ***----- In the Matter of Clara Perez, 11 BOLI 181, 183 (1993).***

❑ When the agency moved to amend the charging document at hearing to correct information in it and to delete allegations and respondent objected because it believed the agency should have made the corrections before hearing and because respondent was prejudiced because it had to prepare to meet those deleted allegations, the forum granted the motion because the amendments made the charging document more accurate and deleted allegations. The forum found no prejudice to respondent because most of the amendments deleted allegations. ***----- In the Matter of Albertson's, Inc., 10 BOLI 199, 207 (1992).***

> Reversed and remanded on other grounds, Overruled in part on other grounds, *Albertson's, Inc. v. Bureau of Labor and Industries,* 128 Or App 97, 874 P2d 1352 (1994).

❑ When the agency sought to deny a farm labor contractor's license application, the commissioner granted the agency's motion to amend the charging document to substitute references to ORS 658.445, which deals with revocations, suspensions, and refusals to renew licenses, with ORS 658.420, which deals with the issuance of licenses. ***----- In the Matter of Efim Zyryanoff, 9 BOLI 82, 84 (1990).***

❑ At hearing, the hearings referee granted the agency's motion to amend its pleadings to conform to the evidence when the amendments reflected issues and evidence that had been previously introduced into the record without objection from the respondent. ***----- In the Matter of Xavier Carbajal, 8 BOLI 206, 209 (1990).***

❑ In a farm labor contractor case, when the charging document cited ORS 658.445 as the agency's authority to act, the forum allowed the citation to be amended to act, the forum allowed the citation to be amended to ORS 658.420. ORS 658.445 deals with revocation, suspension, and refusal to renew existing licenses. ORS 658.420 deals with license applications, other than renewals. The forum allowed the amendment, despite the fact that respondent defaulted by failing to appear at the hearing, because the notice was titled "Notice of Denial" and recited factual allegations which, if established, were grounds for denial of an initial license as well as for termination or non-renewal of an existing license. The forum found that the mistaken reference to ORS 658.445 did not prejudice or mislead the applicant, and that the agency's intention to deny the application was clear. ***----- In the Matter of Demetrio Ivanov, 7 BOLI 126, 127, 132 (1988).***

❑ The charging document may be amended to request increased damages or, when appropriate, penalties to conform to the evidence presented at the contested case hearing. Even if the issue was not raised in the order of determination, the hearings referee may allow the pleadings to be amended, and shall do so freely when the presentation of the merits of the action or defense will be served thereby, and the objecting participant fails to satisfy the hearings referee that the admission of such evidence would prejudice the objecting participants in maintaining the action or defense on the merits. In this case, respondent presented no evidence that it was so prejudiced and did not object to the admission into evidence of claimant's records, which were the basis of the penalty computations. ***----- In the Matter of Anita's Flowers & Boutique, 6 BOLI 258, 259 (1987).***

> Overruled on the limited issue of including

reimbursable expenses in wages used to calculate a civil penalty, *In the Matter of Central Pacific Freight Lines, Inc.,* 7 BOLI 272, 280 (1972).

❑ At hearing, the forum allowed the agency to amend the notice of intent in a farm labor contractor case to insert an alternative pleading when respondent did not object. ***----- In the Matter of Deanna Donaca, 6 BOLI 212, 213-14 (1987).***

❑ After the hearing starts, issues not raised in the pleadings may be raised and evidence presented on such issues, provided there is expressed or implied consent of the agency and respondent. Consent will be implied when there is no objection to the introduction of such issues or when the agency or the respondent addresses the issues. In a default situation, the charged party obviously cannot expressly consent to new issues, being raised or the pleadings being amended. Nor can there be implied consent. In order to consent, either expressly or implicitly, a person needs to be notified of the matter requiring the consent and needs an opportunity to consent. In other words, it boils down to a question of due process – did the person have notice of and an opportunity to respond to the new issues? At a default hearing, the charged party cannot object or implicitly consent to issues about which he or she has had no notice or opportunity to respond. Therefore, in a default situation, the charging document sets the limit on the issues and relief that the forum can consider. Put another way, the forum cannot rule on matters falling outside the limits of the charging document. ***----- In the Matter of Jack Mongeon, 6 BOLI 194, 201-02 (1987).***

❑ In a farm labor contractor case, when the issue of whether contractor knowingly reemployed six illegal aliens was not specifically raised in the charging document, but was clearly raised at hearing without objection, the forum viewed the issue as raised within the implied consent of contractor, and therefore treated it in all respects as if it had been specifically raised in the charging document. ***----- In the Matter of Jesus Ayala, 6 BOLI 54, 67 fn (1987).***

❑ The forum granted the agency's motion, made at the start of hearing, to amend the order of determination to correct a typographical error in which the number of hours alleged to have been worked by the wage claimant had been transposed from "480" to "840" and to concomitantly change the amount of wages claimed from "2605" to "$1488." ***----- In the Matter of Cheryl Miller, 5 BOLI 175, 176 (1986).***

9.3 --- Service

❑ When part of wage claimant's unpaid wages were earned with an employer who was not charged and not served in the proceeding, the commissioner did not order that employer to pay wages or penalty wages. ***----- In the Matter of Jack Crum Ranches, Inc., 14 BOLI 258, 268 (1995).***

❑ When the agency established that respondent was served with the order of determination, along with instructions to notify the agency of any change of address, and respondent requested a contested case hearing and filed an answer, the commissioner found that respondent did not appear at the scheduled hearing because of his failure to notify the agency of his address change and held respondent in default. ***----- In the Matter of Kevin McGrew, 8 BOLI 251, 260 (1990).***

❑ In a default situation, personally serving the original charging document on the respondent and depositing the proposed order in regular U.S. mail to respondent's last known address satisfies the service requirements of the APA and the agency's administrative rule. ***----- In the Matter of Jorrion Belinsky, 5 BOLI 1, 12 (1985).***

9.4 --- Notice

❑ Respondents moved to dismiss a notice of proposed revocation that sought to revoke respondents' farm labor contractor license because they failed to make "sufficient" workers' compensation insurance premium payments when due, and claiming that the phrase "sufficient payment" was a nullity because it was not used in the rules and that their Oregon and US constitutional rights would be violated if their license was revoked based on this notice. The ALJ denied the motion, finding that the notice adequately stated a claim. Respondents must offer more than a one-sentence conclusion that respondents' rights are being violated before the ALJ can fairly consider such claims. ***----- In the Matter of Scott Nelson, 15 BOLI 168, 182-83 (1996).***

❑ Because a notice of hearing and its attachments were properly addressed to respondents and were mailed with postage prepaid and not returned undelivered, the hearings referee found that each respondent received the documents and held each respondent in default when they did not appear at the hearing. ***----- In the Matter of Jack Crum Ranches, Inc., 14 BOLI 258, 262, 269 (1995).***

9.5 --- Sufficiency of Pleadings

❑ In a post-hearing memorandum, respondent argued that the agency's failure to question the existence of respondents' LLP in its charging document violated respondents' due process rights by failing to include a "statement of the matters that constitute the violation" in the charging document. The forum rejected respondents' argument, holding that the alleged failure was not a "matter" that constituted an alleged "violation," but a matter that related to the joint and several liability of two respondent partners, both whom were named, along with the LLP, as the employer in the agency's charging document. ***----- In the Matter of Captain Hooks, LLP, 27 BOLI 211, 231 (2006).***

❑ Although the agency proved that two claimants collectively worked more than 40 hours in a given workweek during 10 separate weeks, the forum rejected the agency's claim for overtime pay because of the insufficiency of the pleadings. Specifically, the agency's order of determination did not cite ORS 653.261 or OAR 839-020-0030, the statute and rule requiring overtime pay, and contained no mention that overtime was a factor in computing wages due to the claimants. ***----- In the Matter of Gary Lee Lucas, 26 BOLI 198, 213 (2005).***

❑ In a contested case hearing, the agency could only proceed against the single respondent identified in the notice of hearing and not against an additional employer

identified only in the notice of intent and order of determination. ***----- In the Matter of Sabas Gonzalez, 19 BOLI 1, 3 (1999)***.

❑ When respondent was charged with violating ORS 659.415 and failed to satisfy its obligation of reinstating the complainant by mailing a written offer to complainant's last known address, as required by OAR 839-06-130(5)(a), the commissioner held it was not necessary for the agency to charge the respondent with violations of the rules related to ORS 659.415. "Once the agency has charged a respondent with a violation of the statute, the issues addressed by the rules are clearly within the scope of the issues to be addressed at hearing." ***----- In the Matter of St. Vincent de Paul Salvage Bureau, 8 BOLI 293, 301 (1989).***

❑ In a wage claim case, the employer alleged that the order of determination failed to clearly state a claim upon which relief could be granted. The order of determination stated the name of the employer, the period of the wage claim, the alleged number of hours worked, the rate of pay, the amount of wages claimed due, and set forth the average daily wage, that more than 30 days had elapsed since the wages became due, the amount of penalty wages, and the dates upon which interest would begin to accrue on the unpaid wages. The forum held that the allegations in the order of determination were sufficiently clear to enable the respondent employer to reply. ***----- In the Matter of Mary Rock, 7 BOLI 85, 90 (1988).***

10.0 ANSWER

10.1 --- In General

❑ The ALJ required respondents to file an amended answer to the agency's amended certified payroll allegations, stating that the amended allegations would be deemed admitted if respondents did not file a timely amended answer. ***----- In the Matter of Harkcom Pacific, 27 BOLI 62, 65-66 (2005).***

❑ The ALJ granted the agency's motion to amend with respect to adding the names of the seven employees alleged to be underpaid and required respondents to file an amended answer to the amended notice, stating that the amended allegations regarding the seven employees would be deemed admitted if respondents did not file a timely amended answer. ***----- In the Matter of Harkcom Pacific, 27 BOLI 62, 65 (2005).***

❑ Factual matters alleged in a charging document and not denied in the answer are considered to be admissions. ***----- In the Matter of Orion Driftboat and Watercraft Company, LLC, 26 BOLI 137, 148 (2005).***

❑ After an unrepresented respondent filed an answer to the specific charges, he obtained an attorney who filed an amended answer. The ALJ, on his own motion, allowed substitution of the amended answer for the *pro se* answer. ***----- In the Matter of Murrayhill Thriftway, Inc., 20 BOLI 130, 134 (2000)***.

> Affirmed without opinion, *Burks v. Murrayhill Thriftway, Inc. and Bureau of Labor and Industries*, 174 Or App 405 (2001), rev den 333 Or 400 (2002).

❑ In a wage claim case when respondent filed a request for hearing and an answer stating only "Tory Jason was on a salary, $300 every two weeks, $600 a month. Look at the check. I Captain Jones required for a hearing. Thank you for your time in this matter," the forum determined that the allegations in the order of determination were denied. ***----- In the Matter of Danny Jones, 15 BOLI 25, 26 (1996).***

❑ When respondent's prior counsel had filed an answer and a hearing had been convened, but adjourned prior to completion, and respondent's subsequently obtained counsel attempted to file another answer, the forum granted the agency's motion to strike respondent's second answer on the grounds that an answer had already been filed, the second answer was untimely, and respondent failed to accompany the second answer with a motion to amend. ***----- In the Matter of Thomas Myers, 15 BOLI 1, 5 (1996).***

❑ In a wage claim case, when respondent did not raise an affirmative defense that claimants were exempt from minimum wage and overtime requirements, and there was some evidence in the record to suggest a possible exemption for tow truck drivers under federal law under OAR 839-20-125(3)(a), the forum held that respondent waived the affirmative defense by not raising it in the answer. ***----- In the Matter of Sunnyside Enterprises of Oregon, Inc., 14 BOLI 170, 183 (1995).***

❑ When respondent recited facts in his answer that confirmed and did not controvert the agency's factual assertions of failure to pay wages when due, including admitting that the wage claimant was his employee and that overtime was earned but not paid, the hearings referee recommended and the commissioner granted summary judgment in favor of the agency and the wage claimant. ***----- In the Matter of Victor Klinger, 10 BOLI 36, 42 (1991).***

❑ When respondent's case summary included issues not encompassed by respondent's answer, the agency objected to any evidence bearing on the issues and defenses raised for the first time in the case summary as being untimely, respondent moved to amend the answer to conform to the proffered evidence and defenses, and the agency did not cite any prejudice to its presentation, the forum allowed the amendment of the answer. ***----- In the Matter of William Kirby, 9 BOLI 258, 260 (1991).***

❑ When the hearings referee had allowed amendment of respondent's answer to conform to matters raised for the first time in respondent's case summary, and the agency asked for reconsideration of that ruling on the first day of hearing, claiming prejudice because of a lack of opportunity to interview county police officers present during an incident described by a respondent witness, the forum denied reconsideration, pointing out that both officers were still with the county and available to the agency to present. ***----- In the Matter of William Kirby, 9 BOLI 258, 260 (1991).***

❑ The commissioner defaulted two corporate respondents that failed to submit an answer through counsel, as required by rule and statute, when an individual respondent filed answers "pro se" for himself and the two corporations, arguing that each corporate

respondent could not afford counsel and that a refusal to allow each corporation to file its answer "pro se" was a denial of due process. ***----- In the Matter of Strategic Investments of Oregon, Inc., 8 BOLI 227, 231-33 (1990).***

❑ The forum overruled respondent's objection to evidence involving complainant's mental suffering on the grounds that complainant had a pending claim with the workers' compensation department for stress suffered as a result of harassment alleged in the specific charges. OAR 839-30-060 governs responsive pleadings and provides that the failure of a party to raise an affirmative defense in the answer shall be deemed a waiver of such defense. Relying on ORCP 19(b) that states affirmative defenses include "payment * * * and any other matter constituting an avoidance," the commissioner found that respondent had failed to raise an affirmative defense in the answer to the charges and thereby waived that defense. ***----- In the Matter of United Grocers, Inc., 7 BOLI 1, 4-6 (1987).***

❑ When the employer's poor financial condition was revealed to the agency during investigation and the employer's answer alleged that the employer "could not afford to hire" the claimant and the employer did "not have counsel because I cannot afford one," the forum found that respondent had made her financial inability to pay an issue in the case. ***----- In the Matter of Sheila Wood, 5 BOLI 240, 241 (1986).***

❑ The agency sought to limit respondent from presenting any evidence concerning offset against wages due based on respondent's failure to specifically plead offset in the answer. The forum denied the agency's motion and allowed respondent to present such evidence based on respondent's generic answer that included the language "an affirmative defense." ***----- In the Matter of Godfather's Pizzeria, Inc., 2 BOLI 279, 292-93 (1982).***

10.2 --- Evidentiary Significance (*see also* 20.17, 24.3)

❑ Unsworn and unsubstantiated assertions contained in a respondent's answer may be considered, but are overcome whenever they are contradicted by other credible evidence in the record. ***----- In the Matter of MAM Properties, LLC, 28 BOLI 172, 187 (2007).***

❑ When making factual findings, the forum may consider unsworn assertions contained in respondent's answers to the charging documents, but those assertions are overcome whenever they are controverted by credible evidence in the record. ***----- In the Matter of Tallon Kustom Equip., 28 BOLI 32, 34 (2006).*** *See also In the Matter of Orion Driftboat and Watercraft Company, LLC, 26 BOLI 137, 146 (2005); In the Matter of Peter N. Zambetti, 23 BOLI 234, 241 (2002).*

❑ When respondent did not deny any of the agency's allegations in its answer, all of the agency's allegations were deemed admitted. ***----- In the Matter of Cedar Landscape, Inc., 23 BOLI 287, 293 (2002).***

❑ When a respondent fails to appear at hearing and its total contribution to the record is a request for hearing and an answer that contains only unsworn and unsubstantiated assertions, those assertions are overcome whenever they are contradicted by other credible evidence in the record. ***----- In the Matter of Stan Lynch, 23 BOLI 34, 42 (2002).*** *See also In the Matter of Landco Enterprises, Inc., 22 BOLI 62, 67 (2001); In the Matter of M. Carmona Painting, Inc., 22 BOLI 52, 58 (2001); In the Matter of Keith Testerman, 20 BOLI 112, 127 (2000); In the Matter of Nova Garbush, 20 BOLI 65, 71 (2000); In the Matter of Leslie Elmer DeHart, 18 BOLI 199, 206 (1999); In the Matter of R.L. Chapman Ent. Ltd., 17 BOLI 277, 284 (1999); In the Matter of Scott Andersson, 17 BOLI 15, 21 (1998).*

❑ When default occurs, the forum may give some weight to unsworn assertions contained in an answer unless other credible evidence controverts them. If a respondent is found not to be credible the forum need not give any weight to the assertions, even if they are uncontroverted. ***----- In the Matter of Usra A. Vargas, 22 BOLI 212, 220 (2001).***

❑ When a respondent submits an answer to a charging document, the forum may admit the answer into evidence during hearing and may consider the answer's contents when making findings of fact. When a respondent fails to appear at hearing, the forum may review the answer to determine whether the respondent has set forth any evidence or defense to the charges. ***----- In the Matter of Tina Davidson, 16 BOLI 141, 148 (1997).*** *See also In the Matter of Jewel Schmidt, 15 BOLI 236, 241 (1997); In the Matter of Susan Palmer, 15 BOLI 226, 233 (1997); In the Matter of Mark Johnson, 15 BOLI 139, 141 (1996); In the Matter of John Hatcher, 14 BOLI 289, 300 (1996); In the Matter of Samuel Loshbaugh, 14 BOLI 224, 229 (1995); In the Matter of Katherine Hoffman, 14 BOLI 41, 46 (1995); In the Matter of Robert Arreola, 14 BOLI 34, 40 (1995); In the Matter of Haskell Tallent, 13 BOLI 273, 279 (1994); In the Matter of Blue Ribbon Christmas Trees, Inc., 12 BOLI 209, 220-21 (1994); In the Matter of Tom's TV & VCR Repair, 12 BOLI 110, 116 (1993); In the Matter of Sealing Technology, Inc., 11 BOLI 241, 250 (1993); In the Matter of Amalia Ybarra, 10 BOLI 75, 83 (1991); In the Matter of Jack Mongeon, 6 BOLI 194 (1987); In the Matter of Richard Niquette, 5 BOLI 53 (1986).*

❑ An answer cannot be considered substantive evidence when respondent defaults by failing to appear at hearing and his answer contains nothing but unsworn assertions concerning the merits of the matter. ***----- In the Matter of Art Farbee, 5 BOLI 268, 276 (1986).***

❑ The filing of an answer does not constitute presentation of evidence. No findings of fact or order may be based on uncorroborated assertions contained in the employer's answer. ***----- In the Matter of Ray Carmen, 3 BOLI 15, 18 (1982).***

> Overruled on this point, *In the Matter of Jack Mongeon*, 6 BOLI 194, 201 (1987).

10.3 --- Affirmative Defenses

❑ In an OFLA case in which the agency alleges that respondent unlawfully failed to restore an employee to

the position the employee held prior to taking leave, the respondent may argue that the employee asked not to be restored to that position without pleading that fact as an affirmative defense. ***----- In the Matter of The TJX Companies, Inc., 19 BOLI 97, 102 (1999)***.

❑ A respondent has the burden of proving the affirmative defense of laches and must establish: (1) there was an unreasonable delay by the agency; (2) the agency had full knowledge of facts that would have allowed it to avoid the unreasonable delay; and (3) the unreasonable delay resulted in such prejudice to respondent that it would be inequitable to afford the relief sought by the agency. ***----- In the Matter of Staff, Inc., 16 BOLI 97, 122-23 (1997).***

❑ Respondents were not allowed to present evidence at the hearing showing they were not the real party in interest when respondents had been aware of the existence of this affirmative defense for three months, had not previously raised it, and the agency objected to it. ***----- In the Matter of Geoffroy Enterprises, Inc., 15 BOLI 148, 151-52 (1996).***

❑ In a wage claim case, when respondent did not raise an affirmative defense that claimants were exempt from minimum wage and overtime requirements, and there was some evidence in the record to suggest a possible exemption for tow truck drivers under federal law under OAR 839-20-125(3)(a), the forum held that respondent waived the affirmative defense by not raising it in the answer. ***----- In the Matter of Sunnyside Enterprises of Oregon, Inc., 14 BOLI 170, 183 (1995).***

❑ The forum overruled respondent's objection to evidence involving complainant's mental suffering on the grounds that complainant had a pending claim with the workers' compensation department for stress suffered as a result of harassment alleged in the specific charges. OAR 839-30-060 governs responsive pleadings and provides that the failure of a party to raise an affirmative defense in the answer shall be deemed a waiver of such defense. Relying on ORCP 19(b) that states affirmative defenses include "payment * * * and any other matter constituting an avoidance," the commissioner found that respondent had failed to raise an affirmative defense in the answer to the charges and thereby waived that defense. ***----- In the Matter of United Grocers, Inc., 7 BOLI 1, 4-6 (1987).***

❑ When respondent was not represented by counsel and did not allege the affirmative defense of inability to pay wages in her answer, but stated in her answer that she could not afford counsel, had stated previously to an agency compliance specialist that she could not afford to hire anyone and that she was "starving," and made her financial records available to the agency during the investigation, the forum held that the agency had clear notice that respondent was raising her financial inability to pay as an affirmative defense and allowed respondent to present evidence of her financial inability to pay claimant's wages at the hearing. ***----- In the Matter of Sheila Wood, 5 BOLI 240, 241 (1986).***

11.0 NOTICE OF HEARING

❑ In a contested case hearing, the agency could proceed against only the single respondent identified in the notice of hearing and not against an additional employer identified only in the notice of intent and order of determination. ***----- In the Matter of Sabas Gonzalez, 19 BOLI 1, 3 (1999)***.

❑ When the notice of hearing and attachment, together with copies of other documents, were received by respondent by certified mail at a Hermiston address, and an ALJ's order permitting the hearing to be held by telephone was sent to the same address with postage prepaid and was not returned undelivered, the ALJ found that respondent received the notice of contested case rights and procedures and had notice of the date, time, and manner of hearing. When respondent failed to appear at the hearing in person, did not provide the ALJ a telephone number as ordered, and did not contact the ALJ with any reason for tardiness or nonattendance, the ALJ found respondent in default. ***----- Tina Davidson, 16 BOLI 141, 144, 148 (1997).***

❑ When an individual respondent filed an answer and requested a hearing in response to personal service with an order of determination, and the notice of hearing was served on respondent by regular U.S. mail, postage prepaid, and properly address to respondent and was not returned undelivered, the hearings referee found that respondent had received the notice of hearing and held respondent in default when he did not appear at the hearing. ***----- In the Matter of Samuel Loshbaugh, 14 BOLI 224, 229 (1995).***

❑ When an individual respondent was served with an order of determination alleging unpaid wages and requested a contested case hearing and was later served at his record address with a notice of hearing and an amended order of determination joining a corporation of which he was president and registered agent, the forum held both respondents in default when neither appeared at the hearing. ***----- In the Matter of Blue Ribbon Christmas Trees, Inc., 12 BOLI 209, 211-12 (1994).***

❑ The forum held respondent in default for failure to appear at hearing when respondent was personally served with a charging document, later moved and left no forwarding address, and failed to notify the agency that he had changed his address, and when the notice of hearing was sent to his last known address and returned undelivered. ***----- In the Matter of Mark Vetter, 11 BOLI 25, 30 (1992).***

❑ At hearing, when a person requested to become a party to the case and waived any rights he had regarding service and notice, and understood his potential liability by becoming a party, and when the agency did not object, the forum granted the request. ***----- In the Matter of Dan's Ukiah Service, 8 BOLI 96, 98-99 (1989).***

❑ Respondent requested relief from default on the grounds that he "was not aware that the hearing was on" the scheduled hearing date because he had received an incorrect notice of hearing, was misinformed by agency staff of the hearing date, and never received a correct notice. The forum found that he had been provided with notice of the correct date at least seven times by the agency. In addition, respondent's own letter showed he knew the correct date. The forum held that if respondent

wrote down the wrong hearing date on his appointment calendar, that only showed a simple failure to exercise due care and unilateral carelessness does not constitute excusable mistake or circumstances beyond respondent's control. Respondent's request was denied. ***----- In the Matter of Jack Mongeon, 6 BOLI 194-95 (1987).***

❑ When the forum sent a notice of the time and place of hearing to respondent by certified mail, return receipt requested, and the forum received a return receipt for the notice from the U.S. Postal Service with what appeared to be respondent's signature in the space labeled "I have received the * * * notice," the forum concluded that the notice was duly served on respondent and held a hearing. Subsequently, the envelope with the notice was returned marked "unclaimed." The forum held that applicable law enunciates no requirements for the manner of transmitting a notice of hearing if the respondent has already been personally served with the charging document. Once the charging document has been personally served on a party, the forum can serve its notice of hearing on that party by regular U.S. mail. ***----- In the Matter of Jorrion Belinsky, 5 BOLI 1, 4, 10-12 (1985).***

12.0 CONSOLIDATION OF CASES (*see* 14.9)

13.0 EXPEDITED HEARINGS

❑ The forum granted the agency's motion to change the hearing procedures from those provided in OAR chapter 839, division 50, to the expedited procedures provided in OAR chapter 839, division 33, when the forum had previously granted summary judgment to the agency in a farm labor contractor case, respondent had not responded to the summary judgment motion, the agency could have initially requested the expedited procedure, both procedures provide for summary judgment, the agency was seeking revocation of a license that would soon expire, and the agency sought to avoid a future license denial action based on the same allegations. ***----- In the Matter of Alexander Kuznetsov, 14 BOLI 185, 191-92 (1995).***

❑ The hearings referee denied the agency's motion for an expedited hearing in writing in lieu of a hearing in Salem on the basis that, absent a compelling reason, it was incompatible with the purpose of the expedited hearing rules, which were designed to provide a rapid opportunity for the agency to take licensing action while still affording applicants and licensees an opportunity to be heard. ***----- In the Matter of Jesus Guzman, 14 BOLI 1, 3 (1995).***

❑ When the agency brought a farm labor contractor license revocation action through the expedited hearings referee process of OAR chapter 839, division 33, the hearings referee denied a motion to dismiss the case for the agency's failure to comply with OAR 839-30-070(10), finding the rule inapplicable to an expedited hearing held pursuant to OAR chapter 839, division 33. ***----- In the Matter of Clara Perez, 11 BOLI 181, 183 (1993).***

❑ When the agency requested a hearing under the expedited contested case hearing rules, which have no provision for filing an answer, the forum denied the agency's motion for summary judgment when respondent had insufficient time to respond to the motion before hearing. The forum found that summary judgment was appropriate when there is no factual dispute; here, the forum was unaware of respondent's factual defense, if any. The purpose of the expedited contested case process is to obtain a swift result, while still giving respondent an opportunity to be heard. ***----- In the Matter of Azul Corporation, Inc., 10 BOLI 156, 157 (1992).***

14.0 MOTIONS

14.1 --- Motion to Postpone (*see* 17.0)

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

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

14.4 --- Motion for Change of Hearing Location

❑ The forum granted respondent's unopposed motion to change the location of the hearing to the city in which his witnesses lived. ***----- In the Matter of Andres Bermudez, 16 BOLI 229, 231 (1998).***

❑ When respondent's counsel requested a change in hearing location from Coos Bay, where respondent was located, to Portland, citing a potential need for respondents to have a Cantonese Chinese interpreter, the motion was denied. ***----- In the Matter of Cheuk Tsui, 14 BOLI 272, 273-74 (1996).***

❑ 15 days before hearing, Respondent requested a change of hearing location to the city where respondent's attorney practiced and the agency opposed the change because the case involved more than 50 wage claimants who were located in the area where the hearing was set. The hearings referee denied the request due to the untimeliness of the request, the difficulty of finding a facility for the large number of witnesses, and the location of the witnesses. ***----- In the Matter of Anna Pache, 13 BOLI 249, 252-53 (1994).***

❑ The hearings referee granted the agency's motion to move the place of hearing from Eugene to Portland due to the availability of witnesses and telephone equipment and to promote economy. ***----- In the Matter of William Sarna, 11 BOLI 20, 21 (1992).***

❑ When respondent and the agency joined in a motion to move the hearing location from Pendleton to Baker City, the hearings referee granted the motion. ***----- In the Matter of Baker Truck Corral, 8 BOLI 118, 120-21 (1989).***

14.5 --- Motion to Dismiss

❑ During the hearing, an individual respondent twice moved for summary judgment or dismissal on the issue of his liability for penalty wages and civil penalties on the basis that the agency had not shown a willful failure to pay and that he had established his financial inability to pay the wages at the time they accrued. The ALJ denied the motions. ***----- In the Matter of Captain Hooks, LLP, 27 BOLI 211, 213 (2006).***

❑ During the hearing, an individual respondent moved three times to dismiss the order of determination on the basis that he could not be held personally liable because Captain Hooks, claimant's actual employer, was a limited liability partnership or, in the alternative, a *de facto* limited liability company. The ALJ denied each motion. ***----- In the Matter of Captain Hooks, LLP, 27 BOLI 211, 213 (2006).***

❑ During the hearing, respondent moved that the agency's charges regarding the commissioner's 2001 and 2002 wage surveys be dismissed for two reasons. First, respondent asserted it was unfair for the agency to wait so long after the alleged violations before assessing civil penalties. Second, respondent argued that the charges should be dismissed because the agency had not sent contemporaneous "registered letters" to respondent regarding the 2001 and 2002 violations. The forum rejected both arguments. The agency is not bound by a statute of limitations in this matter and there is no requirement that a "registered letter" be sent to respondent as a precursor to issuing a charging document. ***----- In the Matter of Storm King Construction, Inc., 27 BOLI 46, 49 (2005).***

❑ Respondent moved to dismiss the portion of the formal charges seeking damages on complainant's behalf on the grounds that BOLI lacks subject matter jurisdiction to assess damages, that the seeking of damages exceeds the statutory authority granted to BOLI, and that the Oregon Constitution, specifically Article I § 17 and Amended Article VII § 3, entitles respondent to a jury trial. In a supplementary motion, respondent argued that the present statutory scheme that allows a complainant to make a unilateral election to pursue his or her case in a contested case hearing under the commissioner's jurisdiction or to file a civil suit in circuit court, which would give respondent the option of a jury trial, presents an "equal protection issue" under Article I § 20 of the Oregon Constitution because of its arbitrary nature. The forum denied respondent's motion to dismiss, concluding that respondent was not constitutionally entitled to a jury trial and that the commissioner has the authority to award damages in an administrative hearing. The forum also rejected respondent's equal protection argument. ***----- In the Matter of Emerald Steel Fabricators, Inc., 27 BOLI 242, 245 (2006),***

Appeal pending.

❑ When the forum reconsiders the denial of a respondent's motion to dismiss made at hearing, it must consider all the evidence in the record, not only that evidence presented prior to the time of the motion. ***----- In the Matter of Labor Ready Northwest, Inc., 27 BOLI 83, 132 (2006).***

Appeal pending.

❑ When evaluating a motion to dismiss for failure to establish a prima facie case, the forum views the evidence in the light most favorable to the non-moving participant and the non-moving participant is entitled to the benefit of every reasonable inference which may be drawn from the evidence. ***----- In the Matter of Labor Ready Northwest, Inc., 27 BOLI 83, 131 (2006).***

Appeal pending.

❑ After hearing, the forum granted respondent's motion to dismiss the agency's formal charges alleging an OSHA violation when complainant first alleged facts supporting an OSHA violation 118 days after his discharge. ***----- In the Matter of Stimson Lumber Company, 26 BOLI 150, 153-54, 170 (2005).***

❑ Respondents filed a motion to "dismiss notice of hearing," asking that the notice of hearing be dismissed because the "Order attached to the Notice of Hearing" named "SEAN A. REID" and there was no one named "Sean A. Reid" associated with the respondent LLC. The ALJ denied the motion on the basis that the agency's order of determination named "Sean E. A. Reid" as a respondent and Reid had stated that "Sean E. A. Reid" was his correct name. ***----- In the Matter of Orion Driftboat and Watercraft Company, LLC, 26 BOLI 137, 141 (2005).***

❑ In an OSHA case, respondent moved to dismiss the case prior to hearing. At the start of hearing, the ALJ denied the motion. ***----- In the Matter of Stimson Lumber Company, 26 BOLI 150, 153-54, 170 (2005).***

❑ The ALJ granted respondent's motion to dismiss the agency's OSHA complaint on the basis that complainant's intake questionnaire, which was filed within 30 days of his discharge, failed to sufficiently allege a violation of ORS chapter 654 and his OSHA complaint was not filed until 118 days after his discharge. ***----- In the Matter of Stimson Lumber Company, 26 BOLI 150, 165-72 (2005).***

❑ During the hearing, the ALJ granted the agency's motion to dismiss the wage claim of one of two wage claimants without prejudice. ***----- In the Matter of Adesina Adeniji, 25 BOLI 162, 164 (2004).***

❑ The forum granted the agency's motion to dismiss respondent's counterclaims on the basis that the commissioner lacked the authority to grant relief on the basis of any of the counterclaims respondent asserted in its answer. ***----- In the Matter of The Alphabet House, 24 BOLI 262, 267 (2003).***

❑ When respondent moved to dismiss the agency's allegations in its charging document relating to failure to provide itemized statements of deductions on the basis that the agency had failed to comply with the forum's order requiring the agency to state specific time periods, the forum denied the motion finding, that the agency conformed to the forum's order requiring the agency to clarify its pleadings. ***----- In the Matter of The Alphabet House, 24 BOLI 262, 267 (2003).***

❑ Prior to the agency's opening statement, the agency moved to dismiss its charging document against respondent Bernard Woodard. Woodard's counsel did not object and the ALJ granted the motion. ***----- In the Matter of Venus Vincent, 24 BOLI 155, 158 (2003).***

❑ At hearing, the ALJ granted the agency's motion to dismiss its charges related to respondent's alleged failure to return the 2000 wage survey. ***----- In the Matter of Cedar Landscape, Inc., 23 BOLI 287, 289 (2002).***

❑ When the agency moved to dismiss a wage claim case based on the chapter 7 bankruptcy discharge of respondent, and the ALJ had already issued a proposed order, the ALJ issued an order granting the agency's motion. Later, the agency, through its general counsel, filed a motion stating that the agency's request for dismissal was in error and requesting that the commissioner issue a final order. Respondent filed no objections, and the agency's motion was granted and a final order issued. ***----- In the Matter of Westland Resources Group LLC, 23 BOLI 276, 283 (2002).***

❑ Respondent's post-hearing motion to dismiss the agency's order of determination because of "ALJ prejudice and lack of any real and sufficient evidence on the part of the claimants and false evidence/testimony given in the claimants' case" was denied as untimely. ***----- In the Matter of Triple A Construction, LLC, 23 BOLI 79, 85-86 (2002).***

❑ At the conclusion of the agency's case, respondent moved to dismiss the case on the grounds that the agency had not presented enough evidence to establish a prima facie case. The ALJ denied respondent's motion on the grounds that the agency had arguably presented sufficient evidence to make out its prima facie case. ***----- In the Matter of SQDL Co., 22 BOLI 223, 229 (2001).***

❑ The agency moved to "delete John Wardle as a respondent" based on its satisfaction that Wardle was "in the military serving overseas." The ALJ granted the motion, noting that the hearing as to respondents George Allmendinger and Marion Allmendinger would commence as scheduled. ***----- In the Matter of William George Allmendinger, 21 BOLI 151, 156 (2000).***

❑ Respondent moved to dismiss the specific charges on the ground that complainant would have worked in California, not Oregon. The ALJ denied the motion because respondent hired complainant in Oregon and paid workers' compensation insurance and unemployment insurance for complainant in Oregon. Under those circumstances, respondent was an Oregon employer. ***----- In the Matter of Barrett Business Services, Inc., 20 BOLI 189, 192 (2000).***

> Affirmed, *Barrett Business Services v. Bureau of Labor and Industries*, 173 Or App 444 (2001).

❑ Respondent moved to dismiss the agency's claim for mental suffering damages, contending that Complainant's deposition testimony established that she had not suffered any emotional distress as a result of her termination, that she only sought reinstatement as a remedy, that she was concurrently suffering emotional distress from a source unrelated to her termination, and that the agency had failed to provide respondent with complainant's medical records showing treatment for prior mental conditions. The ALJ denied the motion because complainant's failure to seek medical treatment for her mental suffering, the fact that she may have concurrently experienced mental suffering arising from a different source, and her confusion about any entitlement to mental suffering damages did not negate the agency's claim for mental suffering damages; and it was not clear from the deposition transcript excerpts submitted by respondent that complainant did not experience any mental suffering based on the alleged discriminatory termination. ***----- In the Matter of Roseburg Forest Products Co., 20 BOLI 8, 12-13 (2000)***.

❑ Even if the agency does not meet the notice requirements of ORS 659.095, that results in dismissal of the specific charges only if the respondent proves that it did not receive sufficient notice to enable it to respond to the allegations in the determination. ***----- In the Matter of Bob G. Mitchell, 19 BOLI 162, 184-85 (2000)***.

❑ At the conclusion of the agency's case in chief, respondent moved for a directed verdict on the basis that the agency had failed to establish a prima facie case. The ALJ construed respondent's motion as a motion to dismiss the specific charges and denied it, finding there was sufficient evidence on the record to establish a prima facie case of an unlawful employment practice in violation of ORS 659.410. ***----- In the Matter of ARG Enterprises, Inc., 19 BOLI 116, 119 (2000)***.

❑ The forum construed respondent's motion for a directed verdict as a motion to dismiss the specific charges and denied it because it was based on an inaccurate interpretation of the law. ***----- In the Matter of Dennis Murphy Family Trust, 19 BOLI 69, 72, 93-94 (1999)***.

❑ In a case in which the respondents defaulted by not appearing at hearing, the ALJ granted the agency's motion to dismiss the charges against one respondent. ***----- In the Matter of Leslie Elmer DeHart, 18 BOLI 199, 205-06 (1999)***.

❑ When respondent moved to dismiss the case after the agency rested its case, the forum denied the motion because it was premised on the incorrect assertion that the agency had not proved that complainant qualified for OFLA leave on the day of his termination. ***----- In the Matter of Centennial School District No. 28-J, 18 BOLI 176, 194 (1999)***.

> Affirmed, *Centennial School District No. 28J v. Oregon Bureau of Labor and Industries*, 169 Or App 489 (2000), rev den 332 Or 56 (2001).

❑ At the close of the agency's case, respondents moved to dismiss the case on the ground that the commissioner lacked jurisdiction because none of the three subsections of ORS 658.407 specifically authorizes the commissioner to enforce farm/forest labor contractors' duty to provide their workers with written agreements, pursuant to ORS 658.440(1)(g). The forum denied the motion, holding that the commissioner has jurisdiction to enforce all state farm/forest labor statutes. ***----- In the Matter of Paul A. Washburn, 17 BOLI 212, 214, 221-22 (1998)***.

❑ When respondent moved to dismiss the specific charges based on a purported lack of statutory authority for the forum to grant non-economic damages and demanded a jury trial, the forum denied the motion in its entirety. ***----- In the Matter of A.L.P. Incorporated, 15 BOLI 211, 214, 225 (1997).***

> Affirmed, *A.L.P. Incorporated, v. Bureau of Labor and Industries*, 161 Or App 417, 984 P2d 883 (1999).

❑ Respondents moved to dismiss a notice of

proposed revocation that sought to revoke respondents' farm labor contractor license because they failed to make "sufficient" workers' compensation insurance premium payments when due, and claiming that the phrase "sufficient payment" was a nullity because it was not used in the rules and that their Oregon and US constitutional rights would be violated if their license was revoked based on this notice. The ALJ denied the motion, finding that the notice adequately stated a claim. Respondents must offer more than a one-sentence conclusion that respondents' rights are being violated before the ALJ can fairly consider such claims. ***----- In the Matter of Scott Nelson, 15 BOLI 168, 182-83 (1996).***

❑ The forum denied respondent's motion to dismiss the specific charges based on the contention that the forum lacked jurisdiction because specific charges were not filed within one year of complainant's administrative complaint or within 90 days of the administrative determination. ***----- In the Matter of Fred Meyer, Inc., 12 BOLI 47, 48-49 (1993).***

❑ When the agency brought a farm labor contractor license revocation action through the expedited hearings referee process of OAR chapter 839, division 33, the hearings referee denied a motion to dismiss the case for the agency's failure to comply with OAR 839-30-070(10), finding the rule inapplicable to an expedited hearing held pursuant to OAR chapter 839, division 33. ***----- In the Matter of Clara Perez, 11 BOLI 181, 183 (1993).***

❑ When the agency presented evidence from which a fact-finder could infer that complainant protested unequal pay on the basis of sex, and that the continued disparity created intolerable work conditions for complainant, causing her to resign, the forum denied respondent's motion to dismiss the issue of constructive discharge. ***----- In the Matter of Wild Plum Restaurant, Inc., 10 BOLI 19, 21 (1991).***

❑ When respondent argued that allegedly intolerable working conditions leading to an employee's resignation must be created in order to hold the employer responsible for a constructive discharge, the commissioner stated that the subjective intent tort standard was unsuited to the statutory employment discrimination context and denied respondent's motion to dismiss the issue of constructive discharge. ***----- In the Matter of Wild Plum Restaurant, Inc., 10 BOLI 19, 21 (1991).***

❑ In deciding a motion to dismiss the agency's charges at the close of the agency case, the forum must determine whether the agency has met its initial burden of proof by offering evidence on each element of the violation alleged. ***----- In the Matter of Jerome Dusenberry, 9 BOLI 173, 175 (1991).*** *See also In the Matter of PAPCO, Inc., 3 BOLI 243 (1983).*

❑ When respondent moved to dismiss the case at the end of the agency's case in chief on the grounds that the agency had failed to present a prima facie case of unlawful sex discrimination based on pregnancy, and again moved to dismiss at the end of respondent's evidence, the forum found that there was sufficient evidence presented from which a finder of fact could infer that the complainant's pregnancy was a factor in the termination of her employment and denied the motions. ***----- In the Matter of Strategic Investments of Oregon, Inc., 8 BOLI 227, 229, 249 (1990).***

❑ When the agency failed to follow its rule regarding investigation of civil rights complaints, the commissioner held that "[a]n agency which is vested with discretion by statute may limit its own discretion in its rules. Once it has limited its discretion, the agency 'may be compelled, * * * to act in accordance with its self-imposed limitations.' * * *. The Oregon Supreme Court has said, "[a]dministrative rules and regulations are to be regarded as legislative enactments having the same effect as if enacted by the legislature as part of the original statute.' * * * The Oregon Court of Appeals has said regarding Bureau of Labor and Industries' rules that, "[r]ules prescribing methods of procedure of an administrative board or commission have the effect of law, are binding on the board or commission and must be followed by it so long as they are in effect." Under the facts of this case, OAR 839-03-065 states that an administrative determination is final when the exceptions are not met. The agency did not follow its own rule when it reopened complainant's case in July 1987. When agencies have failed to follow their own rules, the courts have remanded the cases to the agencies with directions that they follow those rules. In this case, to follow the rule means to treat the administrative determination issued in November 1986 as amended, as final. That determination says the agency found no substantial evidence of unlawful discrimination. The commissioner granted respondent's motion for summary judgment and dismissed the complaint and the specific charges according to ORS 659.060(3). ***----- In the Matter of Kristen Corporation, 8 BOLI 195, 205 (1990).***

❑ Respondent moved to dismiss the case, alleging that the agency lacked jurisdiction based on Article I, section 17, and Article VII, section 3 of the Oregon Constitution. The hearings referee initially declined to declare invalid the presumptively valid legislative scheme underlying the agency's contested case proceedings in discrimination cases. The commissioner noted that "this forum and the courts have previously ruled on the cited constitutional issue adversely to the respondents' position" and denied the motion to dismiss. ***----- In the Matter of Dunkin' Donuts, Inc., 8 BOLI 175, 180 (1989).***

❑ When respondent moved to dismiss Dunkin' Donuts, Inc., as an individual respondent and the evidence showed that Dunkin' Donuts, Inc. was a franchiser to two individual respondents and not complainant's employer, the motion was granted. ***----- In the Matter of Dunkin' Donuts, Inc., 8 BOLI 175, 176-77, 192-93 (1989).***

❑ The hearings referee denied respondent's motion to dismiss the charging document made at the end of the agency's case in chief because the evidence failed to support the charges, finding there was sufficient evidence in the record to establish a prima facie case of an unlawful employment practice. ***----- In the Matter of Harry Markwell, 8 BOLI 80, 84 (1989).*** *See also In the*

Matter of United Grocers, Inc., 7 BOLI 1, 6-8 (1987).

❑ Respondents moved to dismiss the specific charges after the agency had completed its case in chief, arguing there was no evidence to support the agency's primary allegation that respondents refused to rent to complainant. The forum denied the motion on the grounds that the agency had introduced evidence that respondents had discouraged complainants from submitting a rent application and allowed the agency to amend the specific charges to reflect that evidence. ***----- In the Matter of E. Harold Schipporeit, 6 BOLI 113, 160-62 (1987).***

> Affirmed, *Schipporeit v. Roberts,* 93 Or App 12, 760 P2d 1339 (1998), affirmed, *Schipporeit v. Roberts,* 308 Or 199, 778 P2d 953 (1989).

❑ When respondent moved to dismiss specific charges alleging the commissioner had failed, refused and neglected to engage in conciliation under ORS 659.050, the forum denied the motion, stating there was no substantial evidence to support this allegation, and noting that the statute permits, but does not require the commissioner to cause steps to be taken to effect settlement of a civil rights complaint**. ----- *In the Matter of Lucille's Hair Care (on remand), 5 BOLI 13, 25 (1985).***

> Modified as to wage loss and interest*, Ogden v. Bureau of Labor,* 68 Or App 235, 682 P2d 802 (1984); order reinstated, remanded for recalculation of interest*, Ogden v. Bureau of Labor,* 299 Or 98, 699 P2d 189 (1985).

❑ The forum denied respondent's motion to dismiss specific charges when respondent's motion alleged the commissioner lacked jurisdiction for failure to obtain a conciliation agreement or issue specific charges within one year of the filing of the complaint under ORS 659.095. The forum stated that only a failure to issue an administrative determination within one year of the filing of a complaint can deprive the commissioner of jurisdiction and the issuance of a private right of action notice only serves to notify complainant of rights, rather than divesting the commissioner of jurisdiction. ***----- In the Matter of Scottie's Auto Body Repair, Inc., 4 BOLI 283, 285-91 (1985).***

❑ Respondent filed a motion to dismiss, alleging that the agency was barred by laches from proceeding on a complaint. Respondent stated that more than three years had elapsed between the filing of the complaint and the issuance of the initial and amended administrative determinations and three and one-half years had elapsed between the filing of the complaint and the issuance of specific charges, and this constituted "undue and unwarranted delay," placing respondent at a disadvantage in defending the case and causing unreasonable expense in locating crucial out-of-state witnesses. The forum denied the motion, stating the respondent has the burden of demonstrating the elements of the defense of laches. "The established rule is, in fact, that the plaintiff against whom the defense is asserted must have had full knowledge of all facts during the period of delay, and the delay must have resulted in prejudicing the defendant to the extent that it would be inequitable to afford the relief sought by the delaying party." When respondent did not need to produce any additional evidence to respond to the amended administrative determination than was required for the initial administrative determination, there was no evidence that out-of-state witnesses would have been in state, had the hearing been held sooner, and there was no showing of prejudice. ***----- In the Matter of Sapp's Realty, Inc., 4 BOLI 232, 240-41 (1985).***

❑ Respondent filed a motion to dismiss, alleging that the amended administrative determination on which the specific charges were based could not relate back to the initial administrative determination and was therefore untimely issued. The forum denied the motion, holding that specific charges need not be based on the administrative determination, and that the function of the administrative determination is to advise the parties of the facts found by the agency during its investigation and whether the agency has found any substantial evidence to support the allegations in the complaint. Issuance of the administrative determination allows the agency to retain authority to proceed. The specific charges trigger the contested case process. The only limitation on specific charges is that the complainant must have had standing to raise the issues and the issues raised must encompass discrimination only like or reasonably related to the allegations in the complaint. ***----- In the Matter of Sapp's Realty, Inc., 4 BOLI 232, 237-39 (1985).***

❑ When respondent moved to dismiss the specific charges alleging complainant had not filed a verified complaint within 30 days as required by ORS 654.062, the forum found that a letter sent by complainant's attorney within 30 days that stated it was a complaint constituted timely filing. ***----- In the Matter of Southern Electrical and Pipefitting Corporation, 3 BOLI 254, 255 (1983).***

❑ Respondent moved to dismiss specific charges, alleging that the agency failed to attempt conciliation. The forum denied the motion on the basis that respondent stipulated at hearing that conciliation had been attempted and failed and, in any case, ORS 659.050 does not impose a duty on the agency to succeed at or even to attempt conciliation. ***----- In the Matter of PAPCO, Inc., 3 BOLI 243, 250 (1983).***

❑ When respondent moved to dismiss the specific charges based on failure to exhaust administrative remedies, the forum denied the motion, stating that the doctrine of exhaustion relates to entry into the court system and has no relevant to a contested case proceeding. ***----- In the Matter of PAPCO, Inc., 3 BOLI 243, 250 (1983).***

❑ When complainant alleged he had been discharged for opposing a safety and health hazard, respondent moved to dismiss the specific charges and complaint at the completion of the agency's case in chief on the grounds that the agency had failed to establish a prima facie case of discrimination. The forum denied the motion, stating that the agency's initial burden of proof at hearing is to offer some evidence in support of its position on each of the constituent elements of the violation alleged. In this case, the agency's initial burden of proof required production of evidence in support of the following elements, each of which must be considered

separately: (1) complainant's opposition to a practice forbidden by ORS 654.001 to 654.295; (2) respondent's knowledge of complainant's opposition to the forbidden practice; (3) the barring or discharge or otherwise discriminatory acts in the compensation or terms, conditions or privileges of employment of complainant by respondent; (4) a causal connection between complainant's opposition and complainant's discharge; and (5) damages resulting from respondent's action. ***----- In the Matter of PAPCO, Inc., 3 BOLI 243, 245-46, 251 (1983).***

❑ Respondent, a public employer, moved to dismiss the specific charges on the grounds that the commissioner had no jurisdiction over the subject matter, alleging that ORS 659.026, which made it an unlawful employment practice for a public employer to discriminate on the basis of age, states that the procedure for an appeal of such decisions does not apply when another statute exists that provides for such administrative review, and that ORS chapter 240 provided for such review. The commissioner denied the motion, noting that ORS chapter 240 was limited to the areas of suspension, reduction, demotion or dismissal. Since complainant alleged that respondent had unlawfully failed to promote her, ORS 659.026, rather than ORS chapter 240, was applicable. ***----- In the Matter of State of Oregon, Department of Human Resources, 3 BOLI 89, 90-91 (1982).***

❑ Respondent moved to dismiss specific charges on the grounds that the agency had failed to attempt conciliation in good faith, alleging that respondent made two good faith settlement offers and that the agency misled complainant into believing her claim was of higher value. The forum denied the motion provisionally on the grounds that: 1) the forum would be required to speculate no facts existed to support an award for pain and suffering; 2) the forum was not prepared to say respondent's settlement offer was a full and adequate remedy; and 3) summary disposition of cases is not a favored alternative in the area of administrative law. ***----- In the Matter of Boost Program, 3 BOLI 72, 73-74 (1982).***

❑ Respondent moved to dismiss the specific charges on the grounds of laches, alleging that one of its witnesses could not fully recall the events and motives of the employment decision in question. The forum denied the motion. Laches requires a showing of actual prejudice. While such prejudice may be shown by the unavailability of witnesses or crucial documentary evidence as a result of the delay, respondent failed to meet the burden of establishing such prejudice when the witness did recall the incidents and was able to testify at hearing. ***----- In the Matter of County of Multnomah, 3 BOLI 52, 66 (1982).***

❑ Respondent moved to dismiss the specific charges and the complaint on the grounds that the complaint was filed on April 14, 1978, more than one year after the alleged discriminatory act. The forum denied the motion because ORS 659.040(1), which was amended to impose the one-year limitation, did not become effective until October 4, 1977. The intent of the legislature that the one year limitation applies only to causes of action occurring on or after the effective date was clear. Testimony indicated that the new statute of limitation was not intended to extinguish a pre-existing cause of action, but to treat the existing cases as they had been previously treated. A pre-amendment right of action would not be affected by passage of the new specific statute of limitations and could be maintained thereafter. ***----- In the Matter of County of Multnomah, 3 BOLI 52, 64-65 (1982).***

❑ Respondent moved to dismiss the specific charges because respondent was erroneously identified as McCall Oil Company. The commissioner denied the motion because the defect was corrected within a week of filing, respondent received prompt notice, and there was no showing by the respondent of prejudice in preparation of its defense as a result of the error. The proper remedy was amendment, not dismissal. ***----- In the Matter of McCoy Oil Company, 3 BOLI 9, 9-10 (1982).***

❑ Respondent moved to dismiss the specific charges due to the loss of evidentiary documents provided to the agency, allegedly while in the agency's sole custody. The forum denied the motion on the grounds that the documents were never in the sole custody of the agency, respondent voluntarily produced them, and respondent did not take reasonable steps to retain the information contained in the missing documents. ***----- In the Matter of Godfather's Pizzeria, Inc., 2 BOLI 279, 291-92 (1982).***

❑ Respondent moved to dismiss the specific charges on the basis that BOLI had failed to make a prompt investigation of the charges, and that such delay was discriminatory, burdensome, and retaliatory against respondent. The forum denied the motion to on the grounds that respondent had failed to demonstrate how the alleged delay had adversely affected his ability to respond to the charges. ***----- In the Matter of Jeffrey Brady, 2 BOLI 58, 58 (1980).***

> Reversed and remanded on other grounds, *Brady v. Bureau of Labor and Industries,* 55 Or App 619, 639 P2d 673 (1982), order on remand, 4 BOLI 211 (1984).

❑ Respondent sought dismissal through the affirmative defense of laches, citing in particular the time between the filing of the complaints and the agency's administrative determination of substantial evidence and that this passage of time contributed to the unavailability of a key witness. The commissioner found that another witness who testified, together with documentary evidence written by the missing witness, negated any prejudice, and that respondent made no showing to establish its efforts to locate the missing witness***. ----- In the Matter of City of Portland, 2 BOLI 41, 53 (1980).***

❑ Respondent's motion to dismiss the specific charges because the pleadings failed to allege proper notice to respondent was denied because ORS chapter 183 requires that notice be given, but does not state that proper notice must be pleaded. ***----- In the Matter of Doyle's Shoes, Inc., 1 BOLI 295, 295 (1980).***

❑ Respondent moved to dismiss specific charges on the grounds that ORS chapter 659 violates the constitutional guarantees of equal protection because it

gives complainant the option of proceeding in civil court but does not give respondent the same option. The commissioner denied the motion, stating it was beyond the forum's discretion to determine the constitutionality of legislative enactments. ***----- In the Matter of Doyle's Shoes, Inc., 1 BOLI 295, 295 (1980).***

❑ Respondent moved to dismiss the specific charges based on laches, contending that the lapse of two years between the alleged discrimination and date of the hearing had prejudiced respondent's defense. The forum denied the motion because respondent did not show a particular area in which it was prejudiced. ***----- In the Matter of Leebo Line Construction, Inc., 1 BOLI 210, 211 (1979).***

❑ In a civil rights case, the forum denied respondent's motion to dismiss based on the alleged failure of BOLI to undertake reasonable conciliation efforts and complainant's failure to exhaust the grievance procedure established by the collective bargaining agreement in attempting to resolve his complaint, determining that exhaustion procedures were not applicable to cases brought under ORS chapter 659. ***----- In the Matter of Fred Meyer, Inc., 1 BOLI 84, 92-92 (1978).***

> Affirmed in part, reversed and remanded as to order posting and distribution requirement only; *Fred Meyer, Inc. v. Bureau of Labor,* 39 Or App 253, 592 P2d 564, rev den 287 Or 129 (1979).
>
> Order on remand, 1 BOLI 179 (1979).

❑ When the agency proposed to revoke or suspend respondent's private employment agency license, and respondent's license expired before the hearing and respondent did not apply for renewal, the forum denied respondent's motion to dismiss, holding that the agency was entitled to create a record with regard to respondent's activities and the expiration of respondent's license did not prevent the agency from proceeding to a final administrative determination as to whether the alleged violations took place and, if they did occur, what sanctions, if any, should be imposed. ***----- In the Matter of Robert Schurman, 1 BOLI 69, 69-72 (1978).***

> Order vacated, *Schurman v. Bureau of Labor,* 36 Or App 841, 585 P2d 758 (1978).

14.6 --- Motion to Strike

❑ The agency filed a motion to strike respondent's affirmative defense of financial inability to pay wages at the time they accrued on the basis that respondent had refused to comply with the ALJ's discovery order. The ALJ denied the agency's motion, stating that the appropriate sanction for failing to comply with a discovery order is the ALJ's refusal to admit evidence that has not been disclosed in response to a discovery order. ***----- In the Matter of Northwest Civil Processing, Inc., 21 BOLI 232, 235 (2001).***

❑ The forum granted the agency's motion to strike respondent's supplemental closing argument because the forum found that the matters discussed in the supplemental closing argument and supporting affidavit were not helpful to its resolution of the case. ***----- In the Matter of Dennis Murphy Family Trust, 19 BOLI 69, 95 (1999)***.

❑ The ALJ granted the agency's unopposed motion to strike two affirmative defenses. ***----- In the Matter of Catalogfinder, Inc., 18 BOLI 242, 246 (1999)***.

❑ During the hearing, the agency moved to amend the specific charges to conform the damages requested to the evidence presented. Respondent argued that the claimed back wages were calculated wrong and moved to strike the claim for mental suffering. The ALJ granted the agency's motion because the amendments reflected evidence introduced into the record without objection forum respondent and denied respondent's motion to strike. ***----- In the Matter of Benn Enterprises, 16 BOLI 69, 71 (1997).***

❑ When respondent's prior counsel had filed an answer and a hearing had been convened, but adjourned prior to completion, and respondent's subsequently obtained counsel attempted to file another answer, the forum granted the agency's motion to strike respondent's second answer on the grounds that an answer had already been filed, the second answer was untimely, and respondent failed to accompany the second answer with a motion to amend. ***----- In the Matter of Thomas Myers, 15 BOLI 1, 5 (1996).***

❑ When the agency moved to strike portions of respondent's amended answer, and respondent objected on the basis of timeliness in that some of the allegations moved against were in the original answer, the forum granted the agency's motion in part. ***----- In the Matter of Robert F. Gonzalez, 12 BOLI 181, 185 (1994).***

❑ The agency moved to strike the part of respondent's answer which purported to state a defense that claimant's hourly rate had been amended to a piece rate basis and which outlined a work rule that allowed respondent to deduct spoiled product and broken tools from claimant's earnings. The hearings referee granted the agency's motion because respondent's attempted defense had no basis in law or fact. ***----- In the Matter of Daniel Burdick, 12 BOLI 66, 76-77 (1993).***

❑ When respondents alleged a bona fide occupational requirement regarding complainant's age as a defense to his discharge, the commissioner granted the agency's motion to strike that defense because no discrimination based on age 18 or older was alleged in the specific charges, and respondents merely asserted what could be a legitimate, nondiscriminatory reason. ***----- In the Matter of Rose Manor Inn, 11 BOLI 281, 283 (1993).***

❑ When the specific charges gave respondents notice of the amount claimed for mental distress and of the general nature of the mental suffering alleged, the commissioner denied respondents' motion to strike or make more definite the mental suffering allegations, noting that the claim could have been clarified through deposition or other discovery. ***----- In the Matter of Rose Manor Inn, 11 BOLI 281, 283 (1993).***

❑ When complainant refused to testify on cross-examination about matters related to his alleged mental suffering, the hearings referee decided not to strike his direct testimony on the issue, but drew an adverse inference from his refusal to testify. ***----- In the Matter of Marvin Clancy, 11 BOLI 205, 208 (1993).***

❑ When respondent was acting as a farm-worker camp operator, the commissioner denied respondent's motion to strike the agency's use of respondent's conviction for violating a city occupancy ordinance as evidence of his failure to comply with the local code. It was not double jeopardy. Respondent may incur a civil penalty for the same act for which he was convicted of violating a local ordinance, even if the latter was a crime. ***----- In the Matter of Jose Rodriguez, 11 BOLI 110, 126 (1992).***

❑ The agency filed a motion to strike the affirmative defense of failure to state a claim from respondent's answer, arguing that it was more appropriately a motion against the pleadings. The forum denied the motion because that defense is appropriately raised in an answer, especially since a respondent in a child labor case does not receive the contested case hearing rules until after it files an answer and a request for hearing; thus, respondent was not alerted to the rule regarding motions to dismiss for failure to state a claim upon which relief can be granted, which must be made within 10 days after issuance of the charging document. ***----- In the Matter of Panda Pizza, 10 BOLI 132, 133 (1992).***

❑ When respondent moved to strike a portion of the specific charges because the agency produced no evidence in its case to support the allegation, the hearings referee granted the motion to a limited extent. ***----- In the Matter of St. Vincent De Paul, 8 BOLI 293, 295 (1990).***

❑ Respondent's motion to strike the portion of the specific charges relating to mental suffering was denied. ***----- In the Matter of Harry Markwell, 8 BOLI 80, 81-83 (1989).***

❑ The forum denied respondent's motion to strike the portion of the specific charges relating to compensatory damages when respondent argued that compensatory damages were only available in race cases, the amount requested was punitive, and the pain and suffering felt by the complainant might be caused by the stress of litigation. ***----- In the Matter of Boost Program, 3 BOLI 72, 73 (1982).***

❑ Respondent moved to strike the specific charges based on lack of timeliness, citing the difficulty in reconstructing events to bring a proper defense. The motion was denied on the grounds that respondent's witness and all relevant documents were still available. ***--- In the Matter of Marion County, 1 BOLI 159, 162 (1978).***

14.7 --- Motion for Telephonic Hearing

❑ When respondent was located in Burns, Oregon, the hearing was scheduled in Portland, and representative filed a motion for a hearing by telephone, the agency did not object to respondent's motion for a telephone hearing and the ALJ granted the motion. ***----- In the Matter of Harney Rock & Paving Co., 22 BOLI 177, 179 (2001).***

❑ The ALJ granted the respondents' unopposed motion for a telephonic hearing that was based on the fact that the respondents lived in Las Vegas, Nevada. ***--- In the Matter of Charles Hurt, 18 BOLI 265, 267 (1999).***

❑ The forum granted the agency's unopposed motion to hold the hearing by telephone. ***----- In the Matter of Richard Cole, 16 BOLI 221, 222 (1997).***

❑ The ALJ granted the agency's motion for a hearing conducted by telephone where respondent, claimant, and an agency witness were located at the time in Salem, Hermiston, and Bend; the evidence was largely documentary; travel by all concerned, including the ALJ, to Pendleton was uneconomical and unnecessary; and respondent did not file any opposition to the motion. ***----- In the Matter of Tina Davidson, 16 BOLI 141, 143, 144 (1997).***

14.8 --- Motion for Protective Order

❑ The agency moved for a protective order regarding complainant's medical information and records and requested the ALJ to review all of the records *in camera* before releasing any information about them to respondent. The ALJ conducted a prehearing conference with the participants to determine the "appropriate scope" of the protective order and determined that some of complainant's written answers to respondent's interrogatories were related to complainant's medical condition and were exempt from public disclosure. The ALJ issued a protective order pertaining to that information but asked the agency to file a second motion requesting that any records submitted by the agency in its case summary be subject to a protective order and deferred ruling on the Agency's motion to protect records during the discovery process until respondent requested additional records. The agency filed a supplemental motion for protective order pursuant to the ALJ's request and requested that any protective order be expanded to cover "any medical information, whether documentary or testimonial in nature, transmitted to respondents and/or the forum in the agency's case summary or during the hearing, including any such evidence submitted in the agency's rebuttal to respondent's case in chief." The ALJ granted the agency's supplemental motion and issued a protective order governing "the use and disposition of medical, psychological, counseling and therapy records of complainant contained in the agency's case summary and respondent's case summary and any testimony at hearing related to complainant's medical or psychological history, counseling or therapy received by complainant, and testimony related to complainant's medical, psychological, counseling and therapy records." ***----- In the Matter of WINCO Foods, Inc., 28 BOLI 259, 261-62 (2007)***

❑ In a civil rights case, the forum granted the agency's unopposed motion and issued a protective order governing the classification, acquisition, and use of complainant's medical records throughout the proceeding. ***----- In the Matter of Trees, Inc., 28 BOLI 218 (2007).***

❑ After the forum issued a protective order, the agency submitted complainant's medical records to the forum for an *in camera* inspection. After inspection, the forum released all of the medical records to respondent. ***----- In the Matter of Trees, Inc., 28 BOLI 218 (2007).***

❑ Before hearing, the agency moved for a protective order regarding complainant's "medical, psychological, counseling, and therapy records." The agency also requested that "to the extent necessary to protect confidential information from public disclosure that the proposed order and final order be issued in duplicate with one copy having the confidential information redacted and the other copy containing the redacted information but clearly marked confidential, not subject to public disclosure or other appropriate wording." The ALJ granted the agency's motion for a protective order regarding the use and disposition of complainant's medical, psychological, counseling and therapy records contained in the case summaries and any testimony at hearing related to medical or psychological history, counseling or therapy he received, and testimony related to his medical, psychological, counseling and therapy records, but denied the agency's request for two separate proposed orders Before hearing, the agency moved for a protective order regarding complainant's "medical, psychological, counseling, and therapy records." The agency also requested that "to the extent necessary to protect confidential information from public disclosure that the proposed order and final order be issued in duplicate with one copy having the confidential information redacted and the other copy containing the redacted information but clearly marked confidential, not subject to public disclosure or other appropriate wording." The ALJ granted the agency's motion for a protective order regarding the use and disposition of complainant's medical, psychological, counseling and therapy records contained in the case summaries and any testimony at hearing related to medical or psychological history, counseling or therapy he received, and testimony related to his medical, psychological, counseling and therapy records, but denied the agency's request for two separate proposed orders and final orders. ***----- In the Matter of Emerald Steel Fabricators, Inc., 27 BOLI 242, 245 (2006).***

Appeal pending.

❑ As part of its case summary, respondent submitted 40 pages of drug screen reports for specific employees of respondent. Although respondent did not request a protective order regarding those documents, the ALJ issued a protective order governing the agency's use and disposition of the documents and any testimony at hearing related to those documents. ***----- In the Matter of Logan International, Ltd., 26 BOLI 254, 259 (2005).***

❑ At the conclusion of hearing, the ALJ ordered the agency to submit complainant's medical and marriage counseling records for the ALJ's *in camera* inspection. The Agency timely submitted the medical and marriage counseling records. After *in camera* review, the ALJ issued a protective order governing the classification, acquisition, and use of the records and subsequently released all of them to respondent. ***----- In the Matter of Stimson Lumber Company, 26 BOLI 150, 153-54, 170 (2005).***

❑ The forum issued a protective order governing the disclosure of medical information submitted in the agency's case summary. ***----- In the Matter of Robb Wochnick, 25 BOLI 265, 267 (2004).***

❑ The agency moved for a protective order in response to respondent's discovery request regarding complainant's medical and psychological records and also requested that the ALJ conduct an *in camera* inspection of the records before releasing the documents to respondent. In response, the ALJ issued a protective order addressing the classification, acquisition, and use of medical and psychological records produced through discovery during the course of the hearing. ***----- In the Matter of Southern Oregon Subway, Inc., 25 BOLI 218, 220 (2004).***

❑ During a hearing in which respondent was held in default, the Agency requested that the forum issue a protective order for three exhibits submitted during the hearing that were part of complainant's medical records. The agency case presenter stated she had provided a copy of the exhibits to respondent's attorney prior to the hearing and to no other persons. After the hearing, the administrative law judge issued a protective order that exempted complainant's medical records from public disclosure and set forth conditions governing their classification, acquisition, and use. ***----- In the Matter of Magno-Humphries, Inc., 25 BOLI 175, 180-81 (2004)***

❑ The ALJ granted the agency's motion, made during the hearing, for a protective order preventing the participants from disclosing the contents of an exhibit containing medical records of residents at respondent's business outside of the contested case hearing process and requiring that those records be placed in a sealed envelope as part of the record. ***----- In the Matter of Sharon Kaye Price, 21 BOLI 78, 80-81 (2000).***

❑ In a civil rights case in which the agency alleged that respondent's unlawful employment practices caused complainant to experience mental suffering, when the agency had refused to make complainant's medical and psychological records available to respondent, the ALJ ordered the agency to provide the records for an *in camera* inspection. The ALJ also granted the agency's motion for a protective order regarding all documents released to respondent's counsel. After reviewing the records *in camera*, the ALJ released complainant's medical records to respondent, subject to a protective order. ***----- In the Matter of ARG Enterprises, Inc., 19 BOLI 116, 119 (2000)***.

❑ When respondent was ordered to submit underlying medical records on which respondent's summary of medical records was based, the last names of the patients' names were redacted and the ALJ issued a protective order set forth conditions governing their classification, acquisition, and use of those records. ***----- In the Matter of Dennis Murphy Family Trust, 19 BOLI 69, 72-73 (1999)***

14.9 --- Motion to Consolidate

❑ The forum granted the agency's unopposed motion to consolidate two cases for hearing involving an order of determination and a notice of intent and to delete Christine Dean Washington and Sunburst II, LLC, as respondents from the agency's order of determination. ***--- In the Matter of MAM Properties, LLC, 28 BOLI 172, 176 (2007).***

❑ At the start of hearing, the ALJ, on her own motion,

consolidated two cases involving two separate orders of determination for the purpose of hearing based on the common respondent and the efficacy of hearing both cases at once. ***----- In the Matter of Jorge E. Lopez, 28 BOLI 10, 14 (2006).***

❑ The agency requested a hearing and filed a motion to consolidate the matters in its order and notice of Intent because they involved the "same events, time period, and participant." The ALJ ordered that the matters be consolidated because she found that both cases had common questions of fact and related questions of law. ***----- In the Matter of Bukovina Express, Inc., 27 BOLI 184, 186 (2006).***

❑ On the same date it requested a hearing, the agency moved to consolidate its civil penalty case with its wage claim case because the cases involved the same events, time periods, and participants. Respondent agreed to consolidation and the ALJ granted the agency's motion. ***----- In the Matter of Okechi Village & Health Center, 27 BOLI 156, 159 (2006).***

❑ Based on the agreement of the ALJ, respondent, and the agency, the forum consolidated two prevailing wage rate cases pending against respondent and rescheduled them to begin on the date already scheduled for the second case scheduled. ***----- In the Matter of Labor Ready Northwest, Inc., 27 BOLI 83, 90-91 (2005).***

Appeal pending.

❑ When the agency moved to consolidate the cases involving its order of determination and its notice of intent on the basis that the cases involved much of the same evidence and identical parties and respondent filed no objections, the ALJ granted the agency's motion. ***----- In the Matter of Gary Lee Lucas, 26 BOLI 198, 200 (2005).***

❑ The forum granted the agency's motion to consolidate the matters alleged in the agency's notice of intent, which alleged records violations, with the agency's order of determination, which alleged respondent owed unpaid wages. ***----- In the Matter of Rubin Honeycutt, 25 BOLI 91, 93 (2003).***

❑ The forum denied the agency's motion to consolidate the cases involving its amended order of determination and its notice of intent because no answer or request for hearing had yet been filed in response to the notice of intent. ***----- In the Matter of The Alphabet House, 24 BOLI 262, 265 (2003).***

❑ When the agency renewed its motion to consolidate the cases involving two charging documents, the forum granted the motion, finding that the charging documents involved common respondents and common issues of fact. ***----- In the Matter of The Alphabet House, 24 BOLI 262, 267 (2003).***

❑ The ALJ granted the agency's motion to consolidate an order of determination and notice of intent issued against respondents. ***----- In the Matter of Stephanie Nichols, 24 BOLI 106, 108-09 (2003).***

❑ The forum granted the agency's motion to consolidate two hearings involving wage claims and the wage security fund based on respondent's lack of objection and the agency's representation that the cases involved the same respondent and had a number of common issues and witnesses. ***----- In the Matter of SQDL Co., 22 BOLI 223, 226-27 (2001).***

❑ The agency moved to consolidate two cases against the same respondent in which the agency alleged the same types of violations and sought the same types of sanctions. In addition, the evidence showing respondent's past history regarding its actions in responding to previous violations of PWR statutes and rules; prior violations, if any, of statutes and rules; and whether respondent knew or should have known of the violations was likely to be similar in both cases. Despite these similarities, the forum denied the agency's motion because the facts regarding the actual violations were be very dissimilar, involving two different projects, two different types of work performed by workers, two different sets of witnesses, and two different sets of exhibits, leading the forum to conclude that consolidation of the cases would not necessarily result in any substantial gain of efficiencies or savings of time for the participants or the forum. ***----- In the Matter of Labor Ready Northwest, Inc., 22 BOLI 245, 247-53 (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).

❑ The agency served a notice of intent on respondent William Allmendinger, who filed an answer and requested a hearing. A hearing was set. Subsequently, the Agency requested a hearing based on a notice of intent involving similar charges against respondents Marion Allmendinger and John Wardle. The agency asked that cases be consolidated for hearing. The ALJ granted the agency's motion to consolidate the two cases. ***----- In the Matter of William George Allmendinger, 21 BOLI 151, 155 (2000).***

❑ The forum granted the agency's unopposed motion to consolidate two hearings involving a common respondent. ***----- In the Matter of Mike L. Sulffridge, 18 BOLI 22, 25 (1999)***.

Affirmed without opinion, *Mike Sulffridge dba Mike Sulffridge Contracting, Inc., and A & B Cutters, Inc. v. Bureau of Labor and Industries*, 168 Or App 498 (2000).

❑ When three sets of specific charges involved common questions of law and fact concerning alleged sexual harassment, the ALJ ordered that they be consolidated in the same contested case hearing. ***----- In the Matter of Vision Graphics and Publishing, Inc., 16 BOLI 124, 125 (1997).***

❑ When charges involving the same facts were brought against respondent by the commissioner and the wage and hour commission, the agency and respondent entered into a written stipulation for a dual hearing before the same hearings referee. ***----- In the Matter of LaVerne Springer, 15 BOLI 47, 51 (1996).***

❑ When the agency moved to consolidate four wage claims against the same respondent, and respondent

moved to sever the claims, the hearings referee granted the motion to consolidate and denied the motion to sever, noting that the cases involved common questions of law or fact and that "[I]n the interest of economy, the forum will hear them together, rather than as four separate hearings, and will issue a single order rather than several." ***----- In the Matter of Sunnyside Enterprises of Oregon, 14 BOLI 170, 172-73 (1995).***

❑ When the agency filed separate charges for each of two complainants alleging the same unlawful practice against the same employer and manager, the forum consolidated the two cases for hearing and issued one order. ***----- In the Matter of Loyal Order of Moose, 13 BOLI 1, 3 (1994).***

❑ When the notices of intent to assess a civil penalty served on each of three respondents involved common questions of law and fact, the forum consolidated the three cases for hearing and issued one final order. ***----- In the Matter of Clara Rodriguez, 12 BOLI 153, 159-60 (1994).***

> Affirmed without opinion, *Rodriguez v. Bureau of Labor and Industries,* 135 Or App 696, 898 P2d 818 (1995).

❑ The hearings referee granted the agency's motion to consolidate two orders of determination for hearing when common questions of law and fact existed. ***----- In the Matter of Tire Liquidators, 10 BOLI 84, 86-87 (1991).***

❑ The agency moved to consolidate two cases involving revocation and refusal to renew issues and to materially amend both notices. Respondent requested a postponement and the forum granted the postponement and consolidated the cases for hearing. ***----- In the Matter of Jesus Ayala, 6 BOLI 54, 55 (1987).***

❑ The forum consolidated two cases for hearing and issued one order when the complaints involved similarities and were filed against the same respondent. ***----- In the Matter of City of Portland, 2 BOLI 41, 42 (1980).***

14.10 --- Motion for Extension of Time

❑ The agency requested and was granted a two week extension of time to file exceptions to the proposed order. ***----- In the Matter of WINCO Foods, Inc., 28 BOLI 259, 262 (2007)***

❑ Approximately three weeks before the hearing, respondent filed a motion for summary judgment. The forum granted the agency's unopposed motion for a 10 day extension of time to respond. ***----- In the Matter of WINCO Foods, Inc., 28 BOLI 259, 261-62 (2007)***

❑ The forum granted respondent's unopposed motion for an extension of time to file exceptions and gave respondent and the agency an additional 20 working days after receipt of the mechanical record to file exceptions. ***----- In the Matter of Labor Ready Northwest, Inc., 28 BOLI 91, 94 (2007).***

> Appeal pending.

❑ The forum granted respondent's unopposed motion for an extension of time to file exceptions and gave respondent and the agency an additional ten working days after receipt of the mechanical record to file exceptions. ***----- In the Matter of Labor Ready Northwest, Inc., 28 BOLI 47, 50 (2007).***

> Appeal pending.

❑ When the agency filed a motion for an extension to file exceptions to the proposed order, the ALJ granted the agency's motion, subject to conditions. First, since respondent had already filed its exceptions, the ALJ ordered that its exceptions, which had been received but not yet been opened by the agency, must remain sealed until such time as the agency filed its exceptions. Second, that respondent was allowed to file an addendum to its exceptions, should it choose to do so. ***----- In the Matter of Labor Ready Northwest, Inc., 27 BOLI 83, 92-93 (2005).***

> Appeal pending.

❑ The ALJ conducted a post-hearing conference requested by respondent in which respondent requested an extension of time to submit written closing argument. The agency objected. After discussion, the ALJ proposed granting a shorter extension of time than requested by respondent. The agency did not object and the ALJ granted the agency and respondent an extension of time to file simultaneous written closing arguments. ***----- In the Matter of Logan International, Ltd., 26 BOLI 254, 261 (2005).***

❑ The forum granted the agency's unopposed motion for an extension of time to respond to the administrative law judge's interim order requiring additional information after the hearing had concluded. ***----- In the Matter of Rubin Honeycutt, 25 BOLI 91, 97-98 (2003).***

❑ Respondent's timely request for an extension of time to file exceptions to the proposed order was granted. ***----- In the Matter of Paul Andrew Flagg, 25 BOLI 1, 3-4 (2003).***

❑ The agency's counsel requested an extension of time to file the agency's post-hearing brief. Respondent did not object, so long as counsel agreed not to look at respondent's brief and closing argument, which had already been filed, before she filed the agency's brief. The ALJ granted the request and extended the deadline. In the interim order, the ALJ ordered counsel not to look at respondent's brief and closing argument, or to receive communications from anyone else regarding the contents of respondent's brief and closing argument prior to filing her brief. ***----- In the Matter of Fjord, Inc., 21 BOLI 260, 26-654 (2001).***

> Affirmed without opinion, *Fjord, Inc. v. Bureau of Labor and Industries,* 186 Or App 566, 65 P3d 1132 (2003).

14.11 --- In General

❑ During his closing statement, respondent moved to have the case referred to arbitration. The ALJ denied the motion, stating that there was no statutory provision for arbitration in wage claim cases. ***----- In the Matter of Orion Driftboat and Watercraft Company, LLC, 26 BOLI 137, 143 (2005).***

❑ Respondent telephoned the ALJ and demanded that the ALJ recuse himself from the hearing. Because of

respondent's threatening tone of voice and invective language, the ALJ perceived the phone calls as threats and arranged for the presence of an Oregon State trooper at the hearing. The ALJ also issued an interim order denying the motion to recuse based on respondent's failure to support the motion with an affidavit establishing the prejudice of the ALJ. ***----- In the Matter of Orion Driftboat and Watercraft Company, LLC, 26 BOLI 137, 141-42 (2005).***

❑ Shortly after the hearing, respondent filed a motion to obtain a copy of the audiotapes from the hearing. That same day, the ALJ granted respondent's motion, stating that the agency was also entitled to a copy of the tapes if it so desired. The agency requested a copy of the audiotapes, and the hearings unit made copies of the audiotapes available to both participants. ***----- In the Matter of Fjord, Inc., 21 BOLI 260, 264 (2001).***

> Affirmed without opinion, *Fjord, Inc. v. Bureau of Labor and Industries,* 186 Or App 566, 65 P3d 1132 (2003).

❑ The forum granted the agency's request that an Oregon State Police officer be present during the hearing to provide security in the event complainant's husband attempted to retaliate against her. ***----- In the Matter of Servend International, Inc., 21 BOLI 1, 4 (2000).***

> Affirmed without opinion, *Servend International, Inc. v. Bureau of Labor and Industries,* 183 Or App 533, 53 P3d 471 (2002).

❑ The forum granted respondent's unopposed request for leave to file a written closing statement after the agency case presenter delivered a verbal closing argument. ***----- In the Matter of Thomas L. Fery, 18 BOLI 220, 222-23 (1999)****. See also In the Matter of Norma Amezola,* 18 BOLI 209, 212 (1999).

❑ The forum denied respondent's motion to make the specific charges more definite and certain and instead treated the motion as a discovery request and ordered the agency to provide respondent with certain information regarding facts referred to in the specific charges. ***----- In the Matter of Oregon Department of Fish and Wildlife, 16 BOLI 263, 264 (1998).***

❑ At the start of the hearing, respondent moved for a ruling that the quantum of proof required to impose the suspension of respondent's right to apply for a forest/farm labor contractor license should be "clear and convincing," rather than a "preponderance," the forum denied the motion and used "preponderance" as the standard. ***----- In the Matter of Manuel Galan, 15 BOLI 106, 114, 133 (1996).***

> Affirmed without opinion, *Staff, Inc. v. Bureau of Labor and Industries,* 148 Or App 451, 939 P2d 174, rev den, 326 Or 57, 944 P2d 947 (1997).

❑ The ALJ granted the agency's motion for an order excluding firearms and other dangerous weapons from the hearings room and adjacent BOLI offices, finding that, as a matter of law, no person, other than a sworn officer of the law, is permitted to possess a firearm or any dangerous weapon while in or on a public building, including the entire state office building and adjacent parking lot. ***----- In the Matter of Danny Jones, 15 BOLI 25, 31 (1996).***

❑ The forum granted the agency's motion to quash a subpoena issued by respondent requiring the Adult & Family Services Division to provide complainant's welfare benefits file on the basis that respondent failed to establish its relevancy. The forum also declined to view the AFS file *in camera*. ***----- In the Matter of Thomas Myers, 15 BOLI 1, 2 (1996).***

❑ The forum granted the agency's motion to change the hearing procedures from those provided in OAR chapter 839, division 50, to the expedited procedures provided in OAR chapter 839, division 33, when the forum had previously granted summary judgment to the agency in a farm labor contractor case, respondent had not responded to the summary judgment motion, the agency could have initially requested the expedited procedure, both procedures provide for summary judgment, the agency was seeking revocation of a license that would soon expire, and the agency sought to avoid a future license denial action based on the same allegations. ***----- In the Matter of Alexander Kuznetsov, 14 BOLI 185, 191-92 (1995).***

❑ The hearings referee granted respondent's unopposed request to conduct the hearing in writing. ***----- In the Matter of Gregory Lisoff, 14 BOLI 127, 128 (1995).***

❑ The hearings referee denied the agency's motion for an expedited hearing in writing in lieu of a hearing in Salem on the basis that, absent a compelling reason, it was incompatible with the purpose of the expedited hearing rules, which were designed to provide a rapid opportunity for the agency to take licensing action while still affording applicants and licensees an opportunity to be heard. ***----- In the Matter of Jesus Guzman, 14 BOLI 1, 3 (1995).***

❑ When respondent did not respond to the agency's informal efforts to obtain discovery, did not file a case summary pursuant to the hearings referee's discovery order, and did not respond to a specific discovery order for employment records, and when respondent offered documents at hearing that he claimed were business records, the hearings referee granted the agency's motion to exclude the documents from the record because respondent did not offer a satisfactory reason for having failed to provide the documents as ordered. The hearings referee found that excluding the documents would not violate the duty to conduct a full and fair hearing. ***----- In the Matter of Martin's Mercantile, 12 BOLI 262, 264-65 (1994).***

❑ When respondent sought to quash an agency subpoena for personnel records of complainant's co-workers on the grounds of relevance and violation of co-worker privacy, the forum denied the motion, ruling that comparative data on other employees may well be relevant in a discrimination case and that the co-worker privacy issue was without merit. ***----- In the Matter of Fred Meyer, Inc., 12 BOLI 47, 51 (1993).***

❑ When the specific charges gave respondents notice of the amount claimed for mental distress and of the general nature of the mental suffering alleged, the commissioner denied respondents' motion to strike or

make more definite the mental suffering allegations, noting that the claim could have been clarified through deposition or other discovery. ***----- In the Matter of Rose Manor Inn, 11 BOLI 281, 283 (1993).***

❑ The agency's motion to strike respondent's defense that complainant was equitably estopped from asserting an equal pay violation by virtue of accepting her job was granted on the basis that equitable estoppel did not apply. ***----- In the Matter of Sunnyside Inn, 11 BOLI 151, 162-63 (1993).***

❑ The agency's motion to strike respondent's "unclean hands" defense was granted. ***----- In the Matter of Sunnyside Inn, 11 BOLI 151, 162-63 (1993).***

❑ The agency was granted summary judgment and moved that the matter proceed to a determination of the sanctions for the violations found and that the hearing be conducted in writing. Respondent opposed the motion and the hearing proceeded as scheduled. ***----- In the Matter of Efrain Corona, 11 BOLI 44, 46 (1992).***

> Affirmed without opinion, *Corona v. Bureau of Labor and Industries,* 124 Or App 211, 861 P2d 1046 (1993).

❑ Respondent filed a motion for an expedited stay of the hearing pursuant to the Attorney General's Model Rule OAR 137-03-090. The hearings referee denied the motion because that rule provides a procedure to stay enforcement of an agency's final order pending judicial review and was therefore not available to respondent to stay the agency's contested case hearing prior to a final order. ***----- In the Matter of Albertson's, Inc., 10 BOLI 199, 205 (1992).***

> Reversed and remanded on other ground, *Albertson's, Inc. v. Bureau of Labor and Industries,* 128 Or App 97, 874 P2d 1352 (1994).

❑ The hearings referee granted the agency's motion that the participants be allowed to submit their closing arguments in writing because of the agency case presenter's illness. ***----- In the Matter of West Linn School District, 3JT, 10 BOLI 45, 48 (1991).***

❑ A motion for a directed verdict at the close of the agency's case is technically improper in an administrative proceeding because no jury is involved. The hearings referee may treat it as a motion to dismiss the specific charges and reserve ruling on it until the final order, since a motion that would be dispositive or conclude the case can only be granted by the commissioner. ***----- In the Matter of Strategic Investments of Oregon, Inc., 8 BOLI 227, 229, 249 (1990).***

❑ In a sexual harassment case, respondent moved to make the specific charges more definite and certain, asserting the specific charges were too general to defend against and asking that the specific charges be amended to allege the time and circumstances of each alleged incident. The hearings referee denied the motion, stating that the agency's specific charges referred to repeated instances of the described conduct as occurring in a relatively short and recent time frame and that the agency was not limited in the specific charges to the allegations of the complainant's administrative complaint, so long as the specific charges were reasonably related to the ultimate offense alleged. The hearings referee further found that the recitation of conduct in the specific charges was sufficiently specific to notify respondents that the nature of the conduct alleged was unwelcome and unwanted touching and related conduct due to complainant's sex, and was sufficiently specific to enable respondents to deny and/or explain. ***----- In the Matter of Dunkin' Donuts, Inc., 8 BOLI 175, 182 (1989).***

❑ When respondent objected before and during the hearing to investigative statements of persons interviewed during the agency's investigation, requested the ability to cross-examine those persons and the investigator, and moved to exclude the statements because they were unreliable and irrelevant and because of respondent's constitutional right to confront witnesses against him, the commissioner overruled the objection and denied the motion. The commissioner held that respondent's argument against the challenged evidence was made moot by the opportunity at hearing for cross-examination of the witnesses and the investigator. ***----- In the Matter of Dunkin' Donuts, Inc., 8 BOLI 175, 178-79 (1989).***

❑ At hearing, when a person requested to become a party to the case and waived any rights he had regarding service and notice, and understood his potential liability by becoming a party, and when the agency did not object, the forum granted the request. ***----- In the Matter of Dan's Ukiah Service, 8 BOLI 96, 98-99 (1989).***

❑ When respondent moved to exclude a portion of the case summary on the grounds that the preparer of the summary had no personal knowledge of facts contained in the agency's file, that the document reflected multiple hearsay, and the summary had no relevance as substantive evidence, the forum denied the motion because: (1) based on the provisions of ORS 183.450(1) and OAR 839-30-120 regarding the admissibility of evidence, the case summary was admissible as evidence; and (2) the Department of Justice had advised the forum by letter that summary evidence, orally or written, is generally admissible in contested case administrative proceedings and that the hearsay nature of such a summary is not a basis for its exclusion. ***----- In the Matter of United Grocers, Inc., 7 BOLI 1, 3 (1987).***

❑ In a farm/forest labor contractor license case, when the agency held a hearing on its notice of intent to refuse to renew respondent's license, and respondent did not reapply to renew his license, the forum granted the agency's motion to re-open the hearing to introduce that evidence and the agency's request that the forum impose civil penalties. The motion was granted after respondent was given full and fair notice and opportunity to respond to the modification of the action sought by the agency and made no response. ***----- In the Matter of Jose Solis, 5 BOLI 180, 199 (1986).***

❑ The forum denied respondent's motion for a directed verdict after the agency had presented its case on the grounds that it is improper in an administrative proceeding when there is no jury. ***----- In the Matter of***

West Coast Grocery Company, 4 BOLI 47, 63 (1983).

❑ When counsel for the agency subpoenaed documents from respondent and respondent filed a motion to quash based on the time and expense that would be needed to comply, the forum reserved ruling on the subpoena until the hearing so that counsel for the agency could determine if the information was necessary. At that time, counsel determined it was not necessary and withdrew the subpoena. ***----- In the Matter of PAPCO, Inc., 3 BOLI 243, 250 (1983).***

❑ When respondent moved to exclude all witnesses, the forum granted respondent's motion with respect to witnesses other than complainant. ***----- In the Matter of Boost Program, 3 BOLI 72, 73-74 (1982).***

❑ When respondent defaulted by failing to show up at hearing and later requested a rehearing, the forum treated the request as a request to reopen and denied it because respondent admitted he knew of the time and place of the hearing; he had adequate notice of the hearing; and he made no efforts to contact BOLI until 108 days after the hearing was held and the proposed order issued. ***----- In the Matter of Ray Carmen, 3 BOLI 15, 16, 18 (1982).***

Overruled in part on other grounds, *In the Matter of Jack Mongeon,* 6 BOLI 194, 201 (1987).

❑ When respondent made a prehearing motion for a continuance on the grounds of lack of personal opportunity for respondent's local attorney to prepare for the hearing, the forum denied the motion because the facts showed that respondent's California attorney, who had associated with the local attorney, had "substantial lawyerly involvement," including negotiations with the agency during the three month period before the hearing; there was no evidence that respondent was denied timely access to the charging document and a corresponding opportunity to prepare a defense; and the motion was untimely and failed to state adequate grounds to support it. The forum also noted that the local attorney was present at every stage of the proceedings, cross-examined witnesses, and objected to the introduction of evidence. Although respondent did not present any witnesses or documents in support of its position, the forum could not find that respondent was inadequately represented. ***----- In the Matter of Robert Schurman, 1 BOLI 69, 72 (1978).***

Order vacated, *Schurman v. Bureau of Labor, 36 Or App 841, 585 P2d 758 (1978).*

15.0 SUMMARY JUDGMENT

❑ Approximately three weeks before the hearing, respondent filed a motion for summary judgment that included a supporting memorandum and a declaration of a witness in support of respondent's motion. The agency requested and was granted a 10 day extension of time to respond. At the start of the hearing, the ALJ denied Respondent's motion and proceeded with the hearing. ***----- In the Matter of WINCO Foods, Inc., 28 BOLI 259, 261-62 (2007)***

❑ The agency filed a second motion for partial summary judgment against "Respondent Troy Wingate," alleging that the agency was entitled to partial summary judgment because respondent admitted in its answer that "he did not timely return the Prevailing Wage Rate survey for 2005." The forum denied the agency's motion because so little time remained before the start of the hearing. ***----- In the Matter of Troy Wingate, 27 BOLI 282, 284 (2006).***

❑ The agency filed a motion for partial summary judgment against "Respondent Troy Wingate Painting," alleging that the agency was entitled to partial summary judgment because respondent admitted in its answer that "he did not timely return the Prevailing Wage Rate survey for 2005." The agency then moved to amend its notice of intent by interlineation to name "Troy Wingate" as the "real party in interest." The agency granted the agency's motion to amend, then denied the agency's motion for partial summary judgment because Troy Wingate Painting, the entity named as the Respondent in the Notice of Intent, was no longer the Respondent in the case. ***----- In the Matter of Troy Wingate, 27 BOLI 282, 284 (2006).***

❑ During the hearing, an individual respondent twice moved for summary judgment or dismissal on the issue of his liability for penalty wages and civil penalties on the basis that the agency had not shown a willful failure to pay and that he had established his financial inability to pay the wages at the time they accrued. The ALJ denied the motions. ***----- In the Matter of Captain Hooks, LLP, 27 BOLI 211, 213 (2006).***

❑ In a prevailing wage rate case, the agency moved for summary judgment on two issues: (1) that respondent had not paid the prevailing wage rate to the seven employees named in the agency's notice, violating *former* ORS 279.350(1); and (2) that respondent filed 21 inaccurate certified payroll reports, violating *former* ORS 279.354(1) when its president certified that each employee had been paid the prevailing wage rate when in fact those employees had not been paid any fringe benefits. The ALJ granted summary judgment on the first issue based on respondent's admission. The ALJ denied summary judgment on the second issue because respondent denied the violations in its amended answer and because the forum was "not prepared to state, at this time, that respondent's certification to an untrue fact" constituted a violation of the statute. ***----- In the Matter of Harkcom Pacific, 27 BOLI 62, 65 (2005).***

❑ A motion for summary judgment may be granted when 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. ***----- In the Matter of Larsen Golf Construction, Inc., 25 BOLI 206, 208 (2004).***

❑ The standard for determining if a genuine issue of material fact exists 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]."

----- In the Matter of Larsen Golf Construction, Inc., 25 BOLI 206, 208 (2004).

❑ In a wage claim case in which the agency moved for summary judgment, the forum granted summary judgment as to the unpaid wages sought based on respondent's admission. The forum also granted the agency's motion on the issue of liability for penalty wages, but ruled that a hearing must be held to establish the total amount earned and total number of hours worked by claimant in the wage claim period so that civil penalty wages could be accurately calculated. ***----- In the Matter of Westland Resources Group LLC, 23 BOLI 276, 282 (2002).***

❑ A motion for summary judgment may be granted when 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).* No genuine issue as to a material fact exists if, based upon the record before the court viewed in a manner most favorable to the adverse party, no objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject of the motion for summary judgment. The adverse party has the burden of producing evidence on any issue raised in the motion as to which the adverse party would have the burden of persuasion at hearing. ***----- In the Matter of Westland Resources Group LLC, 23 BOLI 276, 279-80 (2002).*** *See also In the Matter of Scott Miller, 23 BOLI 243, 248 (2002); In the Matter of Labor Ready, Inc., 22 BOLI 245, 249 (2001); In the Matter of Hickox Enterprises, Inc., 22 BOLI 10, 13, 14 (2001); In the Matter of Cox and Frey Enterprises, Inc., 21 BOLI 175, 178 (2001); In the Matter of Steven D. Harris, 21 BOLI 139, 141-42(2000).*

❑ In a wage claim case, respondent moved for summary judgment on the grounds that the employment agreement signed by claimant required her to arbitrate her wage claim as a matter of law, rendering her wage claim filed with the agency invalid and depriving the agency of jurisdiction. The forum denied respondent's motion on the grounds that the provision in the employment agreement requiring claimant to waive overtime as a condition of her employment rendered the agreement void as a matter of law. ***----- In the Matter of Scott Miller, 23 BOLI 243, 247-50 (2002).***

❑ The agency moved for summary judgment on the basis of claim preclusion. The forum held that claim preclusion applied to the proceeding, but in a manner contrary to that urged by the agency. In its motion for summary judgment, the agency established that the factual transaction at issue in the agency's order of determination had already been litigated in Idaho and a final judgment obtained. When there is an opportunity to litigate the subject in question and a final judgment obtained, as in this case, neither party may later litigate the subject. Therefore, the agency, as well as respondents, was foreclosed from relitigating the factual circumstances originally alleged in the Idaho's determination and subsequently re-alleged in the agency's order of determination. The forum reversed the ALJ's summary judgment ruling in favor of the agency and dismissed the order of determination. ***----- In the Matter of Michael D. Cheney, 23 BOLI 147, 152 (2002).***

❑ In a prevailing wage rate case, the agency moved for partial summary judgment as to respondent's affirmative defenses of claim preclusion, waiver, and estoppel. The forum granted the agency's motion, holding that the undisputed facts, when examined in a light most favorable to respondent, provided no evidence that waiver had taken place or that the elements necessary for claim preclusion existed, and that equitable estoppel was not available to respondent as a matter of law. ***----- In the Matter of Labor Ready Northwest, Inc., 22 BOLI 245, 247-53 (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).

❑ In a wage claim case, when the agency filed a motion for partial summary judgment, alleging there was no dispute as to a number of material facts and the agency was entitled to prevail on its claims for a minimum amount of wages due and owing and civil penalty wages as a matter of law and respondent did not file opposition to the agency's motion, the forum denied the agency's motion, finding there were genuine issues of material fact regarding the amounts paid to two wage claimants by respondent. ***----- In the Matter of Usra A. Vargas, 22 BOLI 212, 215 (2001).***

❑ When the agency moved for summary judgment seven days prior to hearing based on respondent's purported admissions to the unlawful employment practices alleged in the specific charges, the ALJ denied the agency's motion because it was untimely. ***----- In the Matter of H. R. Satterfield, 22 BOLI 198, 200 (2001).***

❑ In an action to recover wage security fund payouts, respondent's failure to deny any of the alleged facts in the agency's notice of intent constituted an admission to all of them, including an admission to the validity of the underlying wage claims, and the forum granted summary judgment to the agency for amounts paid out by the fund and a 25% penalty. ***----- In the Matter of Hickox Enterprises, Inc., 22 BOLI 10, 14 (2001).***

❑ The forum granted the agency's motion for partial summary judgment as to part of the wages sought in the agency's order of determination when undisputed evidence showed that respondent deducted process fees from claimant's payroll draws to cover administrative expenses associated with those draws and those deductions were neither authorized by claimant nor for claimant's benefit. ***----- In the Matter of Cox and Frey Enterprises, 21 BOLI 175, 179-80 (2001).***

❑ The agency moved for partial summary judgment, and the only disputed material fact was whether respondent paid the prevailing wage rate fee required by ORS 279.375 on the subject public works project. In his answer, respondent stated "To the best of our knowledge * * *, [the] Prevailing Wage Fee[s] were paid by our office[.]" In support of its motion, the agency provided an affidavit by the lead worker assigned to the prevailing wage rate section of BOLI's Wage and Hour Division attesting to the fact that BOLI had never

received the prevailing wage rate fee from respondent for the project. The forum stated that if respondent had any evidence that would create a genuine issue of fact as to whether or not he paid the prevailing wage rate fee, he was obligated to provide that evidence in response to the agency's motion to avoid summary judgment. Respondent did not do this. Based on the agency's uncontested affidavit, the forum concluded there was no genuine issue of fact as to whether or not respondent paid the relevant prevailing wage rate fee on the project and granted the agency's motion. ***----- In the Matter of Steven D. Harris, 21 BOLI 139, 142 (2000).***

❑ The evidentiary burden on the participants in a motion for summary judgment is as follows: The moving party has the burden of showing that there are no genuine issues of material fact and that he or she is entitled to judgment as a matter of law. The record on summary judgment is viewed in the light most favorable to the party opposing the motion. ***----- In the Matter of Martha Morrison, 20 BOLI 275, 277-78 (2000)***.

❑ The ALJ granted the agency's motion for partial summary judgment on the issue of liability when the specificity of the agency's pleadings and the admissions in respondent's answer established there was no genuine issue concerning any material fact necessary to establish respondent's 1998 and 1999 violations of ORS 279.359(2). ***----- In the Matter of Martha Morrison, 20 BOLI 275, 280 (2000)***.

❑ The forum granted summary judgment to the agency in a wage claim on the two issues of unpaid wages and penalty wages when the undisputed facts showed that respondent intentionally and unlawfully deducted $105.00 from claimant's paycheck. ***----- In the Matter of Goodman Oil Company, Inc., 20 BOLI 218, 222-23 (2000)***.

❑ A participant in a BOLI contested case hearing is entitled to summary judgment only if the participant demonstrates that no genuine issue of material fact exists and the participant is entitled to judgment as a matter of law. In reviewing a motion for summary judgment, the forum draws all inferences against the moving participant and in favor of the participant opposing the motion. ----- ***In the Matter of F.R. Custom Builders, Inc., 20 BOLI 102, 104 (2000)***. *See also In the Matter of Lambertus Sandker*, 20 BOLI 1, 3 (2000); *In the Matter of Barbara Coleman, 19 BOLI 230, 240 (2000); In the Matter of The TJX Companies, Inc.,* 19 BOLI 97, 100 (1999).

❑ In considering summary judgment motions, the forum gives some evidentiary weight to unsworn assertions in the participants' pleadings and other filings. ***----- In the Matter of F.R. Custom Builders, Inc., 20 BOLI 102, 104 (2000)***. *See also In the Matter of Barbara Coleman, 19 BOLI 230, 240 (2000); In the Matter of The TJX Companies, Inc.*, 19 BOLI 97, 102 (1999).

❑ The ALJ denied the agency's motion for partial summary judgment when an unsworn assertion of the respondent, construed favorably to respondent, created a genuine dispute of material fact. The ALJ rejected the agency's argument that she should find the unsworn assertion to be overcome because it was controverted by other credible evidence in the record. Such a finding would involve weighing evidence and making credibility determinations, which an ALJ may not do in the context of deciding a summary judgment motion. ***----- In the Matter of F.R. Custom Builders, Inc., 20 BOLI 102, 105 (2000)***.

❑ When respondent and the agency jointly filed cross-motions for summary judgment, accompanied by a motion requesting that the issue of respondent's liability be determined based upon the participants' joint stipulation of facts and the pleadings, with both sides being given an opportunity to submit written argument on how the law applies to the facts of the case, the ALJ granted the latter motion and postponed the hearing in order to consider the cross-motions for summary judgment. The ALJ subsequently denied both motions for summary judgment and rescheduled the hearing. ***----- In the Matter of Roseburg Forest Products Co., 20 BOLI 8, 10-11 (2000)***.

❑ The ALJ granted the agency's motion for summary judgment to deny respondent's renewal application for a farm labor contractor license when there was no genuine dispute of that respondent had violated OAR 839-15-520(3)(a) and OAR 839-15-520(3)(d), (n), and (o), and respondent's defense of inability to pay prior civil penalties assessed against him by the commissioner was not applicable to the proceeding. ***----- In the Matter of Lambertus Sandker, 20 BOLI 1, 7-8 (2000)***.

❑ The forum denied respondent's motion for summary judgment, which was based on an assertion that respondent never employed claimant, when the documents attached to the agency's case summary included assertions from which the forum could infer that respondent had employed claimant. ***----- In the Matter of Barbara Coleman, 19 BOLI 230, 242-43 (2000)***.

❑ The forum denied the agency's motion for partial summary judgment because a genuine issue of material fact existed regarding whether complainant requested that she not be restored to the job she held when her leave commenced. ***----- In the Matter of The TJX Companies, Inc., 19 BOLI 97, 101 (1999)***.

❑ The forum will grant a summary judgment motion when no genuine issue of material fact exists and the moving participant is entitled to judgment as a matter of law, as to all or any part of the proceeding. ***----- In the Matter of Thomas J. Heywood, 17 BOLI 144, 146 (1998)***.

❑ The agency moved for summary judgment on the issues of unpaid wages and penalty wages in a case when the respondent admitted owing wages to two former employees. The ALJ denied the motion for two reasons. First, the motion did not include documentary evidence demonstrating that the employees had filed wage claims and assigned them to the agency. Second, the motion sought an amount of unpaid wages less than that sought in the order of determination, which the agency had not moved to modify. ***----- In the Matter of Thomas J. Heywood, 17 BOLI 144, 145 (1998)***.

❑ The ALJ granted the agency's third unopposed summary judgment motion when respondent admitted

he owed wages to two former employees, the record revealed that respondent had owed the wages for more than 30 days, and respondent did not allege a financial inability to pay the wages at the time they accrued. ***----- In the Matter of Thomas J. Heywood, 17 BOLI 144, 147 (1998)****.*

❑ The ALJ denied respondent's motion for summary judgment because there were genuine issues of material fact in dispute. ***----- In the Matter of Tyree Oil, Inc., 17 BOLI 26, 28 (1998)****.*

> Reversed, *Tyree Oil, Inc. v. Bureau of Labor and Industries*, 168 Or App 278 (2000).

❑ Summary judgment was inappropriate in a wage claim case when there was a genuine issue of material fact, in that the hours worked claimed by the agency on claimant's behalf did not entirely agree with those submitted by respondent. ***----- In the Matter of Tina Davidson, 16 BOLI 141, 143-44 (1997).***

❑ Respondents moved for summary judgment on the basis that an assigned wage claim was precluded because claimant had prosecuted another action, based on the same factual transaction as the one at issue in the wage claim, against one of the respondents in district court. The commissioner held that the agency and claimant were the same party for purposes of claim preclusion, and that the agency would be precluded from prosecuting another action against respondent if the second action (the wage claim) was one which was: (1) based on the same factual transaction that was at issue in the first; (2) sought a remedy additional or alternative to the one sought in the court action; and (3) was of such a nature as could have been joined in the first action. ***---- In the Matter of Staff, Inc., 16 BOLI 97, 120-21 (1997).***

❑ Summary judgment may be granted based on issue preclusion. When the case involves the preclusive effect of an administrative proceeding, it is governed by common law. A DCBS decision on an issue may preclude relitigation of the issue in a BOLI proceeding if five requirements are met: (1) The issue in the two proceedings is identical; (2 The issue was actually litigated and was essential to a final decision on the merits in the prior proceeding; (3) The party sought to be precluded has had a full and fair opportunity to be heard on that issue; (4) The party sought to be precluded was a party or was in privity with a party to the prior proceeding; and (5) The prior proceeding was the type of proceeding to which this forum will give preclusive effect. ***----- In the Matter of Scott Nelson, 15 BOLI 168, 175-81 (1996).***

❑ Summary judgment on the basis of issue preclusion was denied respondents when the agency was not a party or in privity with a party in the prior court proceeding. The agency did not become a party to or in privity with a party in that case by filing an *amicus* brief. ***----- In the Matter of Scott Nelson, 15 BOLI 168, 175-81 (1996).***

❑ In a farm labor contractor case, the agency's motion for summary judgment was denied when the evidence offered in support of the motion did not create an inference that respondent had engaged in the alleged violation. ***----- In the Matter of Melvin Babb, 14 BOLI 230, 232-33 (1995).***

❑ The forum the agency's motion for summary judgment when it was supported by documents and affidavits establishing the relevant facts that were unopposed by respondent. ***----- In the Matter of Bill Martinez, 14 BOLI 214, 218-19 (1995).***

❑ The agency moved for summary judgment on the basis that no genuine issue of material fact existed and the agency was entitled to judgment as a matter of law and on the basis of claim preclusion. The forum denied the motion, finding that respondents had raised genuine issues of material fact, and the agency withdrew its motion, conceding that claim preclusion did not apply because there was insufficient privity between the agency and the USFS, the party in the original proceeding against respondent. ***----- In the Matter of Jose Carmona, 14 BOLI 195, 197 (1995).***

❑ As a general rule, when considering a motion for summary judgment, the forum will draw all inferences of fact forum the record against the participant filing the motion and in favor of the participants opposing the motion. ***----- In the Matter of Alexander Kuznetsov, 14 BOLI 185, 191-92 (1995).*** *See also In the Matter of Anastas Sharabarin, 14 BOLI 48, 52-53 (1995); In the Matter of Efrain Corona, 11 BOLI 44, 54 (1992), affirmed without opinion, Corona v. Bureau of Labor and Industries, 124 Or App 211, 861 P2d 1046 (1993).*

❑ When the agency has filed a motion for summary judgment and presents evidence establishing a prima facie case, it is incumbent on respondent to present evidence that, at a minimum, creates an inference that there is a genuine issue of fact in the evidence presented by the agency in support of its prima facie case. ***----- In the Matter of Anastas Sharabarin, 14 BOLI 48, 53 (1995).***

❑ In opposing a motion for summary judgment, a participant may not rest on the mere denials in the participant's pleadings, but must come forward with evidence to show that there are genuine issues of fact. ***----- In the Matter of Anastas Sharabarin, 14 BOLI 48, 53 (1995).***

❑ Evidence need not be presented in affidavit form to be considered sufficiently reliable to support a motion for summary judgment. ***----- In the Matter of Anastas Sharabarin, 14 BOLI 48, 53 (1995).***

❑ The forum granted the agency's motion for summary judgment because the evidence of respondent's statutory violations was uncontroverted. ***----- In the Matter of Juan Gonzalez, 14 BOLI 27, 33 (1995).*** *See also In the Matter of Tolya Meneyev, 14 BOLI 6, 8 (1995).*

❑ Uncontroverted evidence showed that a respondent farm labor contractor entered into a timber thinning contract with the USFS, then failed to show up at prework meetings or to proceed with the work and the USFS terminated the contract for default. Respondent neither appealed that action nor filed an alternative action. The forum granted the agency's motion for summary judgment, finding that no genuine issue of fact

existed and the agency was entitled to judgment as a matter of law on the agency's allegation that respondent violated ORS 658.440(1)(d). ***----- In the Matter of Tolya Meneyev, 14 BOLI 6, 9, 12-13, 14 (1995).***

❑ When uncontroverted evidence showed that a respondent farm labor contractor employed about 40 workers on a USFS contract without providing workers' compensation insurance and that the Workers' Compensation Division fined respondent $1,000 for his failure to provide coverage and he did not appeal that fine, the forum granted the agency's motion for summary judgment, finding that no genuine issue of fact existed and the agency was entitled to judgment as a matter of law on the agency's allegation that respondent violated ORS 658.417(4). ***----- In the Matter of Tolya Meneyev, 14 BOLI 6, 8-9, 13, 14 (1995).***

❑ The forum granted the agency's motion for summary judgment when the respondent farm labor contractor admitted the six violations charged by the agency in his answer and no facts were at issue. ***----- In the Matter of Jefty Bolden, 13 BOLI 292, 299 (1994).***

❑ When the agency was granted summary judgment, then amended its notice of intent, the amendment had the effect of relieving respondent of its default and removed the basis for the summary judgment. ***----- In the Matter of Victor Ovchinnikov, 13 BOLI 123, 128 (1994).***

❑ When a corporation and its majority shareholder were joint applicants for a farm labor contractor license and were jointly named in a notice of intent to deny the license application and, following service on each, the corporate applicant defaulted by failing to answer, a motion for summary denial of the license application of the shareholder applicant was granted by the forum. The core of the forum's ruling was ORS 183.310(2), which precludes the need to present a prima facie case on the record when a party – in this case, the corporate applicant —fails to request a hearing. Since the application of the corporation could be denied without further proceedings, and since the shareholder applicant could not then become licensed from the joint application, the forum concluded that the shareholder's application could be denied on summary judgment. ***----- In the Matter of Victor Ovchinnikov, 13 BOLI 123, 128 (1994).***

❑ When the agency filed two separate motions for partial summary judgment, the forum granted the motions in part. ***----- In the Matter of Jose Linan, 13 BOLI 24, 26, 34-44 (1994).***

❑ Respondent excepted to a proposed order granting the agency's motion for summary judgment on the ground that material facts were in dispute and alleged that respondent was denied due process. The commissioner ruled that respondent's due process concerns were misplaced because the motion was based on those allegations admitted in respondent's answer, plus the material affirmative allegations in the answer upon which respondent relied to defend its alleged unlawful deductions from a wage claimant's pay, making the issue one of law. ***----- In the Matter of Handy Andy Towing, Inc., 12 BOLI 284, 295 (1994).***

❑ When the hearings referee granted the agency's motion for summary judgment on one of two allegations and the agency thereafter dismissed the second allegation and alleged aggravating circumstances and requested that the hearing be canceled, the hearings referee denied the agency's request because respondent, a farm labor contractor, was entitled to an opportunity to present mitigating evidence for the purpose of reducing the amount of the civil penalty to be imposed. ***----- In the Matter of Cristobal Lumbreras, 11 BOLI 167, 169 (1993).***

❑ When respondent worked on a BLM reforestation project under a subcontract and twice failed to provide timely certified payroll records to the commissioner for work his employees performed, the commissioner granted summary judgment against respondent for two violations of ORS 658.417(3) and OAR 839-15-300 and assessed civil penalties for each violation. ***----- In the Matter of Iona Pozdeev, 11 BOLI 146, 150 (1993).***

❑ In a motion for summary judgment, collateral estoppel is applicable in an administrative proceeding. ***----- In the Matter of Efrain Corona, 11 BOLI 44, 57 (1992).***

> Affirmed without opinion, *Corona v. Bureau of Labor and Industries,* 124 Or App 211, 861 P2d 1046 (1993).

❑ In a motion for summary judgment, the pendency of an appeal does not prevent a judgment from being considered for purposed of *res judicata* or collateral estoppel. ***----- In the Matter of Efrain Corona, 11 BOLI 44, 57 (1992).***

> Affirmed without opinion, *Corona v. Bureau of Labor and Industries,* 124 Or App 211, 861 P2d 1046 (1993).

❑ The forum applied the doctrine of collateral estoppel to prevent the relitigation of an issue that respondent had a full and fair opportunity in a previous proceeding to litigate. Here, the identical issue was previously litigated in a Department of Insurance and Financial hearing. The forum gave the DIF final order conclusive effect and granted summary judgment. ***----- In the Matter of Efrain Corona, 11 BOLI 44, 57 (1992).***

> Affirmed without opinion, *Corona v. Bureau of Labor and Industries,* 124 Or App 211, 861 P2d 1046 (1993).

❑ At hearing, the forum granted the agency's motion for summary judgment on two of its allegations after respondents left the hearing before presenting any evidence, and upon a showing by the agency that no genuine issue of fact existed on the two allegations and that the agency was entitled to judgment as a matter of law. ***----- In the Matter of Ivan Skorohodoff, 11 BOLI 8, 12, 18-19 (1992).***

❑ When the hearings referee granted summary judgment as to respondent's alleged violation of law, respondent and the agency subsequent stipulated that if testimony had been taken on the issue, the evidence would have allowed the hearings referee to recommend an award of $2,000 to complainant as compensation for mental suffering. ***----- In the Matter of Douglas County, 11 BOLI 1, 2 (1992).***

❑ When the forum granted an agency motion for summary judgment concerning two affirmative defenses raised in respondent's answer, and respondent later filed an amended answer containing the same two defenses, the forum reaffirmed its earlier ruling and granted summary judgment to the agency with respect to those defenses in respondent's amended answer. ***----- In the Matter of Albertson's, Inc., 10 BOLI 199, 203, 206 (1992).***

> Reversed and remanded on other ground, *Albertson's, Inc. v. Bureau of Labor and Industries,* 128 Or App 97, 874 P2d 1352 (1994).

❑ The forum denied the agency's motion for summary judgment when the agency requested a hearing under the expedited contested case hearing rules, which have no provision for filing an answer, and when respondent had insufficient time to respond to the motion before hearing. The forum found that summary judgment was appropriate when there is no factual dispute. Here, the forum was unaware of respondent's factual defense, if any. The forum noted that the purpose of the expedited contested case process is to obtain a swift result while still giving a respondent an opportunity to be heard. ***----- In the Matter of Azul Corporation, Inc., 10 BOLI 156, 157 (1992).***

❑ When respondent admitted in its answer that three minors under age 18 were employed as drivers to deliver pizza, but argued that the agency misread the regulations prohibiting minors from the occupations of motor vehicle driver and outside helper on public roads or highways, the forum found that the agency's interpretation of the law was correct and granted the agency's motion for summary judgment with respect to those three minors. The forum also granted the agency's motion for summary judgment on the agency's allegations that respondent failed to require minors to produce work permits prior to hire and failed to file employment certificates for minors when respondent did not dispute those facts. ***----- In the Matter of Panda Pizza, 10 BOLI 132, 134, 140-41 (1992).***

❑ When respondent recited facts in his answer that confirmed and did not controvert the agency's factual assertions that respondent acted as a contractor without a license, that he employed more than two workers on contracts, and that he did not provide certified payroll records, the forum granted summary judgment and denied respondent's license application to act as a farm labor contractor. ***----- In the Matter of Miguel Espinoza, 10 BOLI 97, 98-100 (1991).***

❑ When summary judgment is granted, no hearing is required. ***----- In the Matter of Victor Klinger, 10 BOLI 36, 44 (1991).***

❑ When respondent recited facts in his answer that confirmed and did not controvert the agency's factual assertions of a failure to pay wages when due, including admitting that the wage claimant was his employee and that overtime was earned but not paid, the hearings referee recommended and the commissioner granted summary judgment in favor of the agency and the wage claimant. ***----- In the Matter of Victor Klinger, 10 BOLI 36, 41-42 (1991).***

❑ When respondent, the operator of a retail gasoline service station, admitted in his answer that the wage claimant was his employee and that overtime was earned but not paid, and suggested in response to the agency's motion for summary judgment that a factual issue existed as to unfair competition by card-lock service stations being permitted and encouraged by state and local officials, the commissioner found such facts immaterial to the issues and outside the scope of the matters before the forum. The commissioner found that respondent's assertion that his lawsuit against the state fire marshal excused his failure to pay claimant's earned and unpaid overtime wages was without merit and granted summary judgment in favor of the agency and the wage claimant. ***----- In the Matter of Victor Klinger, 10 BOLI 36, 41-43 (1991).***

❑ When no genuine issue of fact existed controverting the order of determination, the hearings referee recommended in a proposed order that summary judgment be granted in favor of the agency and the wage claimant, and the commissioner granted summary judgment in the final order. ***----- In the Matter of Victor Klinger, 10 BOLI 36, 41 (1991).***

❑ A motion for summary judgment is not proper for resolving the issue of successorship in interest because such a determination is necessarily factual in nature. ***----- In the Matter of Pzazz Hair Designs, 9 BOLI 240, 242 (1991).***

❑ When an applicant for a farm labor license admitted in his answer to the charging document that he twice acted as a contractor without a license, the commissioner granted summary judgment to the agency on those two allegations. ***----- In the Matter of Rogelio Loa, 9 BOLI 139, 140 (1990).***

❑ When the agency failed to follow its rule regarding investigation of civil rights complaints, the commissioner held that "[a]n agency which is vested with discretion by statute may limit its own discretion in its rules. Once it has limited its discretion, the agency 'may be compelled, * * * to act in accordance with its self-imposed limitations.' * * *. The Oregon Supreme Court has said, "[a]dministrative rules and regulations are to be regarded as legislative enactments having the same effect as if enacted by the legislature as part of the original statute.' * * * The Oregon Court of Appeals has said regarding Bureau of Labor and Industries' rules that, "[r]ules prescribing methods of procedure of an administrative board or commission have the effect of law, are binding on the board or commission and must be followed by it so long as they are in effect." Under the facts of this case, OAR 839-03-065 states that an administrative determination is final when the exceptions are not met. The agency did not follow its own rule when it reopened complainant's case in July 1987. When agencies have failed to follow their own rules, the courts have remanded the cases to the agencies with directions that they follow those rules. In this case, to follow the rule means to treat the administrative determination issued in November 1986 as amended, as final. That determination says the agency found no substantial evidence of unlawful discrimination. The commissioner granted respondent's motion for summary judgment and

dismissed the complaint and the specific charges according to ORS 659.060(3). ***----- In the Matter of Kristen Corporation, 8 BOLI 195, 205 (1990).***

16.0 CLAIM AND ISSUE PRECLUSION

16.1 --- In General

❑ Preclusion by former adjudication is a doctrine of rules and principles governing the binding effect on a subsequent proceeding of a final judgment previously entered in a claim. It encompasses two doctrines, claim preclusion and issue preclusion. Both claim preclusion and issue preclusion apply to administrative proceedings, provided that the tribunal's decision-making processes include certain requisite characteristics. ***----- In the Matter of Catalogfinder, Inc., 18 BOLI 242, 257 (1999)***.

❑ When an employee leasing company was a joint employer of a wage claimant who brought an earlier court action against the other joint employer, the leasing company was not a party to the court action and was in no position to raise the defense of claim preclusion. ***----- In the Matter of Staff, Inc., 16 BOLI 97, 122 (1997).***

❑ Respondents moved for summary judgment on the basis that an assigned wage claim was precluded because claimant had prosecuted another action, based on the same factual transaction as the one at issue in the wage claim, against one of the respondents in district court. The commissioner held that the agency and claimant were the same party for purposes of claim preclusion, and that the agency would be precluded from prosecuting another action against respondent if the second action (the wage claim) was one which was: (1) based on the same factual transaction that was at issue in the first; (2) sought a remedy additional or alternative to the one sought in the court action; and (3) was of such a nature as could have been joined in the first action. ***In the Matter of Staff, Inc., 16 BOLI 97, 120-21 (1997).***

❑ There are exceptions to the general rule of claim preclusion. A defendant is generally free to waive the right to a combined action. Silence in the face of simultaneous actions based on the same factual transaction constitutes acquiescence. Respondent's failure to object to splitting the claims is effective as an acquiescence in the splitting. In addition, when a statutory scheme contemplates that the contentions arising from a transaction or series of transactions may be split, splitting as contemplated by the statutory scheme is not merged din or barred by a former adjudication concerning the overall transaction. ***----- In the Matter of Staff, Inc., 16 BOLI 97, 121-122 (1997).***

❑ The commissioner held that ORS 652.380(1) and the statutory scheme in ORS chapter 652 regarding wage claims contemplates that the contentions arising from a transaction or series of transactions may be split. Accordingly, a wage claim is not merged in or barred by a judgment from an earlier court action involving reimbursable expenses. ***----- In the Matter of Staff, Inc., 16 BOLI 97, 121-122 (1997).***

❑ A pending appeal does not affect the finality of a judgment for purposes of claim or issue preclusion. ***----- In the Matter of Scott Nelson, 15 BOLI 168, 183 (1996).***

❑ When the agency moved for summary judgment on the basis that no genuine issue of material fact existed and the agency was entitled to judgment as a matter of law and on the basis of claim preclusion, the forum denied the motion, finding that respondents had raised genuine issues of material fact, and the agency withdrew its motion, conceding that claim preclusion did not apply because there was insufficient privity between the agency and the USFS, the party in the original proceeding against respondent. ***----- In the Matter of Jose Carmona, 14 BOLI 195, 197 (1995).***

❑ In a motion for summary judgment, the pendency of an appeal does not prevent a judgment from being considered for purposed of *res judicata* or collateral estoppel. ***----- In the Matter of Efrain Corona, 11 BOLI 44, 57 (1992).***

> Affirmed without opinion, *Corona v. Bureau of Labor and Industries,* 124 Or App 211, 861 P2d 1046 (1993).

16.2 --- Claim Preclusion

❑ The agency moved for summary judgment on the basis of claim preclusion. The forum held that claim preclusion applied to the proceeding, but in a manner contrary to that urged by the agency. In its motion for summary judgment, the agency established that the factual transaction at issue in the agency's order of determination had already been litigated in Idaho and a final judgment obtained. When there is an opportunity to litigate the subject in question and a final judgment obtained, as in this case, neither party may later litigate the subject. Therefore, the agency, as well as respondents, was foreclosed from relitigating the factual circumstances originally alleged in the Idaho's determination and subsequently re-alleged in the agency's order of determination. ***----- In the Matter of Michael D. Cheney, 23 BOLI 147, 152 (2002).***

❑ For claim preclusion to apply, the following elements must exist: (1) There must have been a prior adjudication involving the same parties based on the same factual transaction at issue in the subsequent action or proceeding in which the doctrine of claim preclusion is invoked; (2) The opportunity to litigate the issue, whether or not it was used, must have been present in the former adjudication; and (3) A final determination must have been reached in the prior adjudication. ***----- In the Matter of Michael D. Cheney, 23 BOLI 147, 148-49 (2002).***

❑ Claim preclusion bars the agency from obtaining a final judgment against a respondent, then issuing charges in a subsequent proceeding against the same respondent when the subsequent charges are based on the same factual transaction that was at issue in the first proceeding, seek a remedy additional or alternative to the one sought earlier, and are of such a nature as could have been joined in the first proceeding. ***----- In the Matter of Labor Ready Northwest, Inc., 22 BOLI 245, 252 (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).

❑ The forum granted the agency's motion for summary judgment on respondent's defense of claim preclusion on the basis that a wage claim notice issued by BOLI and its resolution do not constitute a judgment, much less a final judgment, and the sanctions sought by the agency could not have been sought in an action against the bond. ***----- In the Matter of Labor Ready Northwest, Inc., 22 BOLI 245, 252 (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).

❑ Claim preclusion bars the agency and claimants from obtaining a final judgment against a respondent, then issuing charges in a subsequent proceeding against the same respondent when the subsequent charges are based on the same factual transaction that was at issue in the first proceeding, seek a remedy additional or alternative to the one sought earlier, and are of such a nature as could have been joined in the first proceeding. Claim preclusion also bars the respondent, in an action upon the judgment, from using the defenses he or she might have interposed, or did interpose, in the first proceeding. ***----- In the Matter of Catalogfinder, Inc., 18 BOLI 242, 257 (1999)***.

❑ With limited exceptions, claim preclusion does not operate to bind a party to one proceeding to the results of an earlier proceeding to which it was not a party. ***----- In the Matter of Catalogfinder, Inc., 18 BOLI 242, 257 (1999)***.

16.3 --- Issue Preclusion

❑ For issue preclusion to apply, five requirements must be met: (1) the issue(s) in the two proceedings must be identical; (2) the issue(s) must have been actually litigated and essential to a final decision on the merits in the prior proceeding; (3) the party sought to be precluded must have had a full and fair opportunity to be heard on that issue; (4) the party sought to be precluded must have been a party or in privity with a party in the prior proceeding; and (5) the prior proceeding was the type of proceeding to which this forum will give preclusive effect. ***----- In the Matter of Lambertus Sandker, 20 BOLI 1, 4 (2000)***.

❑ Issue preclusion bars future litigation on an issue of fact or law when that issue has been actually litigated and determined in a setting when its determination was essential to the final decision reached. ***----- In the Matter of Catalogfinder, Inc., 18 BOLI 242, 257 (1999)***.

❑ When a respondent defaulted and no actual litigation on the merits occurred, the resulting judgment had no preclusive effect for purposes of an issue preclusion analysis. ***----- In the Matter of Catalogfinder, Inc., 18 BOLI 242, 258 (1999)***.

❑ Respondent filed a motion for summary judgment on portions of the agency's specific charges on the basis of issue preclusion, alleging that the agency was precluded from alleging statutory violations in the specific charges when the agency had found no violation of those statutes in its administrative determination. The forum concluded that the legislature did not intend that the investigative findings of the agency have a preclusive effect and denied respondent's motion. ***----- In the Matter of Sears, Roebuck and Company, 18 BOLI 47, 49-51 (1999)***.

❑ A pending appeal does not affect the finality of a judgment for purposes of claim or issue preclusion. ***----- In the Matter of Scott Nelson, 15 BOLI 168, 183 (1996).***

❑ Summary judgment may be granted based on issue preclusion. When the case involves the preclusive effect of an administrative proceeding, it is governed by common law. A DCBS decision on an issue may preclude relitigation of the issue in a BOLI proceeding if five requirements are met: (1) The issue in the two proceedings is identical; (2 The issue was actually litigated and was essential to a final decision on the merits in the prior proceeding; (3) The party sought to be precluded has had a full and fair opportunity to be heard on that issue; (4) The party sought to be precluded was a party or was in privity with a party to the prior proceeding; and (5) The prior proceeding was the type of proceeding to which this forum will give preclusive effect. ***----- In the Matter of Scott Nelson, 15 BOLI 168, 175-81 (1996).***

❑ Summary judgment on the basis of issue preclusion was denied respondents when the agency was not a party or in privity with a party in the prior court proceeding. The agency did not become a party to or in privity with a party in that case by filing an *amicus* brief. ***----- In the Matter of Scott Nelson, 15 BOLI 168, 175-81 (1996).***

❑ In a motion for summary judgment, collateral estoppel is applicable in an administrative proceeding. ***----- In the Matter of Efrain Corona, 11 BOLI 44, 57 (1992).***

> Affirmed without opinion, *Corona v. Bureau of Labor and Industries,* 124 Or App 211, 861 P2d 1046 (1993).

❑ The forum applied the doctrine of collateral estoppel to prevent the relitigation of an issue that respondent had a full and fair opportunity in a previous proceeding to litigate. Here, the identical issue was previously litigated in a Department of Insurance and Financial hearing. The forum gave the DIF final order conclusive effect and granted summary judgment. ***----- In the Matter of Efrain Corona, 11 BOLI 44, 57 (1992).***

> Affirmed without opinion, *Corona v. Bureau of Labor and Industries,* 124 Or App 211, 861 P2d 1046 (1993).

❑ The forum refused to apply the doctrine of collateral estoppel to the issue of complainant's constructive discharge when respondent sought to bar adjudication of the issue based on a prior adjudication by the Employment Division. ***----- In the Matter of West Coast Truck Lines, 2 BOLI 192, 216-18 (1981).***

> Affirmed without opinion, *West Coast Truck Lines, Inc. v. Bureau of Labor and Industries*, 63 Or App 383, 665 P2d 882 (1983).

17.0 POSTPONEMENTS

❑ The forum granted Respondent's unopposed motion for postponement based on the unavailability of a key witness at the time set for hearing. ***----- In the Matter of Labor Ready Northwest, Inc., 28 BOLI 91, 94 (2007).***

Appeal pending.

❑ The ALJ reset the hearing date after respondent made an unopposed request for postponement. ***----- In the Matter of Tallon Kustom Equip., 28 BOLI 32, 34 (2006).***

❑ The ALJ granted the agency's unopposed motion to postpone the hearing based on a claimant's out-of-state travel plans on the scheduled hearing date. ***----- In the Matter of Tallon Kustom Equip., 28 BOLI 32, 34 (2006).***

❑ When an individual respondent's former bookkeeper requested a postponement on respondent's behalf because of respondent's emergency medical condition and enclosed documentation of that medical condition, the ALJ issued an interim order granting the request for postponement on the condition that respondent, or someone he authorized, file a signed declaration with the hearings unit authorizing the bookkeeper to act on his behalf regarding information concerning his health. Respondent timely filed a declaration and the ALJ rescheduled the hearing. ***----- In the Matter of Captain Hooks, LLP, 27 BOLI 211, 213 (2006).***

❑ On the day before the hearing, the hearings unit received an unsigned request for postponement for a corporate respondent from an unknown courier. The request stated that respondent could not afford an attorney or authorized representative and asked for a postponement to enable time to find funds for an attorney or authorized representative. In response the ALJ left messages at respondent's two known telephone numbers, advising that respondent must appear at the time set for hearing with counsel or an authorized representative, or be found in default. ***----- In the Matter of Okechi Village & Health Center, 27 BOLI 156, 160 (2006).***

❑ Respondent, through counsel, requested that the hearing date be moved due to a trial previously set to begin on the scheduled hearing date. The agency agreed to the new date and the ALJ issued an order granting respondent's request and rescheduling the hearing. ***----- In the Matter of Okechi Village & Health Center, 27 BOLI 156, 159 (2006).***

❑ Respondent moved to postpone the hearing because respondent's attorney had a previously set trial that conflicted with the hearing date. The agency did not object and the ALJ granted respondent's motion and rescheduled the hearing. ***----- In the Matter of Emerald Steel Fabricators, Inc., 27 BOLI 242, 245 (2006).***

Appeal pending.

❑ The ALJ denied respondent's motion to reset the hearing based on the agency's alleged failure to provide complete discovery, stating that respondent had not established "good cause" because it had not shown that the agency had withheld discoverable information nor that respondent was entitled to a deposition of the complainant. ***----- In the Matter of Logan International, Ltd., 26 BOLI 254, 257-58 (2005).***

❑ When respondent's attorney filed a motion to postpone the hearing based on a conflict with another case set for the same time that involved multiple parties and had been reset on a number of occasions, the ALJ reset the hearing when respondent's attorney filed a clarification that he represented one of the parties in the conflicting case. ***----- In the Matter of Logan International, Ltd., 26 BOLI 254, 257 (2005).***

❑ On November 25, 2003, respondent moved for a postponement of the hearing. The agency did not object and the forum granted respondent's motion on November 26, 2003. The hearing was rescheduled for January 27, 2004. ***----- In the Matter of Stimson Lumber Company, 26 BOLI 150, 157 (2005).***

❑ Respondents moved for a postponement 12 days before the hearing date based on respondents' need to be represented by an attorney and current inability to afford an attorney, because the agency had refused to accept respondents' settlement offers, and because respondents needed more time to file a discovery order. The agency objected on the basis that it had lined up its witnesses and was prepared to proceed, and because respondents had agreed three months earlier to the date set for hearing. The forum denied respondents' motion because respondents had not stated good cause. ***----- In the Matter of Orion Driftboat and Watercraft Company, LLC, 26 BOLI 137, 139 (2005).***

❑ The forum denied respondent's motion for a postponement of the hearing because it was untimely. ***----- In the Matter of Robb Wochnick, 25 BOLI 265, 267 (2004).***

❑ Respondent moved for a postponement of the hearing based upon respondent's counsel's previously planned vacation, the agency declined to take a position on respondent's request, and the forum thereafter denied the motion based upon respondent's failure to show good cause for postponement. Subsequently, the forum granted respondent's motion after respondent's counsel submitted an affidavit supporting the factual basis for the motion. ***----- In the Matter of Southern Oregon Subway, Inc., 25 BOLI 218, 220 (2004).***

❑ Respondent's motion for a postponement of the hearing based upon respondent's counsel's previously planned vacation, the agency declined to take a position on respondent's request, and the forum thereafter denied the motion based upon respondent's failure to show good cause for postponement. ***----- In the Matter of Southern Oregon Subway, Inc., 25 BOLI 218, 220 (2004).***

❑ When a corporate respondent, through counsel, moved for a continuance the day before hearing, after respondent had been found in default and denied relief from default, the administrative law judge denied respondent's motion. ***----- In the Matter of Magno-Humphries, Inc., 25 BOLI 175, 180 (2004).***

❑ When respondents moved for a postponement of the hearing date and the agency advised the hearings unit that it did not intend to file a response to the motion, the forum granted respondents' motion and the hearing

was rescheduled and the case summary due date was changed. ***----- In the Matter of Rodrigo Ayala Ochoa, 25 BOLI 12, 15 (2003).***

> Affirmed without opinion, *Ochoa v. Bureau of Labor and Industries*, 196 Or App 639, 103 P3d 1212 (2004).

❑ Respondent's request for a postponement, made the day before the hearing on the grounds that he believed his failure to file a case summary prior to hearing would result in his inability to submit evidence he felt was important to his case, was denied. ***----- In the Matter of Paul Andrew Flagg, 25 BOLI 1, 3 (2003).***

❑ When respondent became increasingly disruptive during the hearing, interrupted the agency's direct examination, and declined to cross examine the wage claimant and, instead, requested a postponement of the hearing to allow respondent additional time to rebut the agency's case, the forum denied respondent's request after determining that respondent had received the notice of hearing, the forum's orders, including the case summary order, and had adequate time to prepare for hearing. ***----- In the Matter of TCS Global Corp., 24 BOLI 246, 253 (2003).***

❑ The forum reset the hearing when respondent filed a motion to postpone the hearing based on its assertion that counsel had a scheduling conflict on the hearing date and the agency did not object. ***----- In the Matter of Devon Peterson, 24 BOLI 189, 190 (2003).***

❑ The forum denied respondent's motion to postpone the hearing on the basis that respondent's inability to take complainant's deposition did not meet the good cause requirement. ***----- In the Matter of Entrada Lodge, Inc., amended final order on remand, 24 BOLI 125, 128 (2003).***

> Reversed and remanded for reconsideration, *Entrada Lodge, Inc. v. Bureau of Labor and Industries*, 184 Or App 315, 56 P3d 444 (2002).

❑ The forum denied respondent's motion for a postponement that would allow him time to appeal the ALJ's ruling on his motion for summary judgment in the "formal court system," allow him time to engage in discovery, and allow time for a pending U. S. Supreme Court case to resolve. ***----- In the Matter of Scott Miller, 23 BOLI 243, 251 (2002).***

❑ Respondent's second motion for postponement, filed one week before the scheduled hearing, was based on a pending lawsuit against BOLI in federal court that respondent filed a week earlier. The agency objected, and the forum denied respondent's motion because it was untimely and did not show good cause. ***----- In the Matter of Scott Miller, 23 BOLI 243, 252-53 (2002).***

❑ During a pre-hearing conference, respondent's counsel moved for a postponement. The agency did not object, and the ALJ granted the motion, resetting the hearing and the due date for case summaries. ***----- In the Matter of Hermiston Assisted Living, Inc., 23 BOLI 96, 98-99 (2002).***

❑ On November 29, 2001, respondent moved for a postponement of the hearing set for December 18, 2001, because of respondent's preplanned trip out of the country. The agency objected. Two weeks later, the agency requested a postponement of the hearing due to an increased workload brought on by a longer than usual hearing and because another hearing was continued to the same week as the scheduled hearing. The forum denied respondent's request for a postponement because it was untimely and failed to show good cause. On the same date, the forum granted the agency's request for a postponement because "both participants [had] expressed a desire to postpone the hearing and [the forum found] that the interests of justice [would] best be served" to change the hearing date. Four days later, the agency requested the hearing date be reset to February 2001 because the agency case presenter had previously scheduled a vacation during the last two weeks of January. The forum granted the agency's request for a continuance and the hearing was rescheduled to commence on February 11, 2002. ***----- In the Matter of Arnold J. Mitre, 23 BOLI 46, 48-49 (2002).***

❑ At 4:30 p.m. on the afternoon before the scheduled hearing, respondent's wife telephoned the ALJ and stated that she was calling on behalf of respondent, who had developed an abscessed tooth, and sought a postponement because of this medical condition. The ALJ informed her that respondent had three options – bring a medical release signed by a doctor or dentist to the hearing; come to the hearing and let the ALJ evaluate respondent's ability to participate; or simply come to the hearing and participate. The ALJ disclosed this *ex parte* communication on the record when the hearing began on November 20. On November 20, 2001, at 9 a.m., respondent did not appear for the hearing. The ALJ went on the record and announced that he would wait until 9:30 a.m., pursuant to OAR 839-050-0330, to commence the hearing and that respondents would be in default if they did not make an appearance by that time. About 9:15 a.m., respondent appeared at the hearing and informed the ALJ he had tried to call to say he would be late, but was unable to make a connection. Respondent brought a dentist's statement with him verifying that he had an abscessed tooth and had been given a prescription for antibiotics and pain medication. Respondent stated that he was in severe pain at that time and would like a postponement. The agency did not object to respondent's request for a postponement and the hearing was rescheduled for 9:30 a.m. on December 19, 2001, at the same location. ***----- In the Matter of Stan Lynch, 23 BOLI 34, 36-37 (2002).***

❑ On June 18, 2001, respondent requested that the hearing be postponed until September 5 or 6, 2001. The agency did not oppose respondent's motion and on June 19, 2001, the forum issued an order granting the motion and reset the hearing date for September 5, 2001. ***----- In the Matter of State Adjustment, Inc., 23 BOLI 19, 20 (2002).***

❑ When respondent retained substitute counsel after its original counsel was suspended from the practice of law and substitute counsel filed a motion for postponement five days before the hearing based on the complexity of the case and his corresponding need for more time to prepare for the hearing, the ALJ concluded that respondent had shown good cause and there was

no reasonable alternative to postponement. ***----- In the Matter of SQDL Co., 22 BOLI 223, 227-28 (2001).***

❑ When respondent moved to postpone the hearing based on its need to complete discovery and coordinate out of state witness testimony and the agency did not object, the ALJ granted the motion and reset the hearing. ***----- In the Matter of Wal-Mart Stores East, Inc., 22 BOLI 27, 30 (2001).***

❑ Five days before hearing, the agency case presenter notified the ALJ and respondent, in writing, of his grandmother's serious health condition and stated that he might be asking for an emergency postponement. The following day, the ALJ conducted a prehearing conference with respondent's counsel and the agency case presenter to discuss postponement of the hearing based on the serious medical condition of the case presenter's grandmother. As a result of the conference, the ALJ postponed the hearing and issued an interim order rescheduling the hearing. ***----- In the Matter of Wal-Mart Stores East, Inc., 22 BOLI 27, 31 (2001).***

❑ When respondent filed objections to the agency's motion to postpone based on assignment of a new case presenter to the case, arguing that the agency had already had seven months to prepare its case, and stating that respondent was prepared to stipulate to the validity of the 93 underlying wage claims, leaving respondent's successor liability as the only issue at hearing, the ALJ denied the agency's motion, basing the ruling on respondent's statement that it was prepared to stipulate to the validity of the 93 underlying wage claims. The ALJ's order stated the ALJ would reconsider the agency's motion if respondent declined to enter into this stipulation. ***----- In the Matter of Fjord, Inc., 21 BOLI 260, 262-63.***

> Affirmed without opinion, *Fjord, Inc. v. Bureau of Labor and Industries,* 186 Or App 566, 65 P3d 1132 (2003).

❑ Respondent's motion for postponement was granted when respondent's counsel had a previously scheduled civil trial that conflicted with the hearing date and the agency did not object. ***----- In the Matter of Northwest Civil Processing, Inc., 21 BOLI 232, 234 (2001).***

❑ Counsel for a respondent who had been named and served after the hearing was scheduled filed a motion to postpone the hearing of consolidated cases involving respondent. The agency filed a timely opposition to the motion. The ALJ granted the motion to postpone by order dated May 17, 2000, because: no previous postponements had been requested or granted; the request was timely; the second notice of hearing issued an unusually short time before the scheduled hearing date; respondent's counsel had a previously scheduled vacation; and respondent had not delayed obtaining counsel. Because of these circumstances, particularly the very short time between issuance of the second notice and the scheduled hearing date, the ALJ found that the scheduling conflict of respondent's attorney constituted good cause for postponement. ***----- In the Matter of William George Allmendinger, 21 BOLI 151, 155 (2000).***

❑ When the agency moved to postpone the hearing based on the unavailability of the agency's key witness and respondent did not oppose the motion, the ALJ granted the motion and changed the deadline for filing case summaries. ***----- In the Matter of Contractor's Plumbing Service, Inc., 20 BOLI 257, 259 (2000)***.

❑ Respondent filed a motion for a postponement in which it alleged that the agency would not cooperate in arranging discovery depositions that respondent needed to conduct "to ensure that respondent has a full and fair opportunity to present its case at the contested hearing." Respondent simultaneously filed a motion for a discovery order to be allowed to take the deposition of complainant. The forum issued an interim order denying respondent's motion to take complainant's deposition on the basis that respondent had failed to seek discovery through an informal exchange of information before requesting a discovery order to take complainant's deposition. In the same order, the forum denied respondent's motion for a postponement on the basis that respondent's inability to make an informal arrangement to take complainant's deposition did not meet the good cause requirement of OAR 839-050-0020(10). ***----- In the Matter of Entrada Lodge, Inc., 20 BOLI 229, 231-32 (2000)***.

> Reversed and remanded for reconsideration, *Entrada Lodge, Inc. v. Bureau of Labor and Industries*, 184 Or App 315, 56 P3d 444 (2002), final order on remand 24 BOLI 125 (2003).

❑ The ALJ granted respondent's motion for postponement based on the previously scheduled vacation plans of respondent's counsel. ***----- In the Matter of Barrett Business Services, Inc., 20 BOLI 189, 191-92 (2000).***

> Affirmed, *Barrett Business Services v. Bureau of Labor and Industries*, 173 Or App 444 (2001).

❑ The ALJ recessed the hearing for approximately two weeks because the agency's final rebuttal witness was not able to testify because of a medical emergency. ***----- In the Matter of Barrett Business Services, Inc., 20 BOLI 189, 193 (2000).***

> Affirmed, *Barrett Business Services v. Bureau of Labor and Industries*, 173 Or App 444 (2001).

❑ After respondent left a voicemail message for the ALJ requesting a postponement, the ALJ informed respondent that he needed to file the request in writing and serve it on the agency. ***----- In the Matter of Robert N. Brown, 20 BOLI 157, 159 (2000)***.

❑ Six days before the scheduled hearing date, respondent requested a postponement of the hearing because he had been in California for two weeks dealing with his brother's serious illness and might be called away on the day of hearing to meet with his brother's estranged wife's attorneys. The ALJ denied the motion on the basis that it was untimely and did not show good cause for a postponement. ***----- In the Matter of Robert N. Brown, 20 BOLI 157, 159 (2000)***.

❑ When new claims were added to the specific charges three weeks before hearing, the ALJ postponed the hearing date based on the anticipated need for additional discovery. ***----- In the Matter of Murrayhill***

Thriftway, Inc., 20 BOLI 130, 133 (2000).

> Affirmed without opinion, *Burks v. Murrayhill Thriftway, Inc. and Bureau of Labor and Industries*, 174 Or App 405 (2001), rev den 333 Or 400 (2002).

❑ Respondent's motion for a postponement "to accommodate the conclusion of a pending NLRB arbitration set for July 10, 1998 which bears on the matters in dispute in this proceeding" was opposed by the agency and denied by the ALJ on the grounds that the commissioner would not necessarily be bound by the result in the other matter, and that the pendency of another proceeding involving similar issues did not warrant a postponement of the hearing. ***----- In the Matter of Northwest Permastore Systems, Inc., 20 BOLI 37, 39 (2000)***.

> Affirmed, *Northwest Permastore Systems v. Bureau of Labor and Industries,* 172 Or App 427 (2001).

❑ When respondent and the agency jointly filed cross-motions for summary judgment, accompanied by a motion requesting that the issue of respondent's liability be determined based upon the participants' joint stipulation of facts and the pleadings, with both sides being given an opportunity to submit written argument on how the law applies to the facts of the case, the ALJ granted the latter motion and postponed the hearing in order to consider the cross-motions for summary judgment. The ALJ subsequently denied both motions for summary judgment and rescheduled the hearing. ***----- In the Matter of Roseburg Forest Products Co., 20 BOLI 8, 10-11 (2000)***.

❑ Instead of filing a timely case summary, respondent filed a letter stating that she was unable to complete the case summary for medical reasons. The forum construed the letter as a motion for postponement and extension of deadline for case summaries. ***----- In the Matter of Barbara Coleman, 19 BOLI 230, 234 (2000)***.

❑ The forum denied respondent's motion for indefinite postponement, which respondent claimed she needed because medication she was taking adversely affected her mental state. The forum concluded that respondent would receive a full and fair hearing despite her use of the medication because: respondent was able to participate in other matters requiring concentration, memory, and mental exertion, such as working at her mortgage business and pursuing malpractice litigation; respondent's claim that her mental state would preclude her from participating in the hearing was suspiciously belated, as respondent had not made the claim during earlier contacts with the agency case presenter; and respondent was lucid, able to understand the instructions of the ALJ, and responded logically to questions put to her by the ALJ and the case presenter during a teleconference regarding her postponement motion. ***----- In the Matter of Barbara Coleman, 19 BOLI 230, 235-36 (2000)***.

❑ Although the forum rejected respondent's request for an indefinite postponement, it did allow a short postponement and extension of time for filing case summaries because of respondent's ongoing health issues and the relatively short notice she received regarding the hearing date. ***----- In the Matter of Barbara Coleman, 19 BOLI 230, 236 (2000)***.

❑ The forum rejected respondent's second motion for indefinite postponement, which was based in part on respondent's newly retained attorney's assertion of a need for additional time to prepare for the hearing and a conflict between the hearing date and a contract that respondent's counsel had to provide legal services to the University of Oregon. The forum found that these assertions did not constitute good cause for a postponement. Respondent unreasonably delayed retaining counsel for several months after she was aware that the matter would go to hearing and did not raise the issue of needing to retain counsel when she first moved for postponement. In addition, respondent's second motion was untimely because she filed it after the deadline the ALJ imposed for filing any additional motions for postponement. Finally, it appeared that the scheduling conflict would not prevent counsel from assisting respondent in preparing for hearing, and might not preclude counsel's presence during the hearing. The forum also held that, under the circumstances, two weeks was a sufficient amount of time for respondent's counsel to prepare for hearing in this case, which involved only a single wage claim. ***----- In the Matter of Barbara Coleman, 19 BOLI 230, 238-39 (2000)***.

❑ The forum found that respondent's attorney's assertion that respondent's medical condition made it difficult for her to gather information did not present good cause for postponement of the hearing. "Nothing filed with this forum * * * comes close to establishing that respondent is legally incompetent, and respondent has made no such claim. As the forum stated in [an earlier] order, respondent spoke lucidly and logically during the * * * teleconference, stated that she was able to work at her business several hours each day, and was able to recall details of events that occurred many months ago. The forum continues to find that respondent will be able to effectively participate in the contested case hearing, with or without counsel, and will receive a full and fair hearing regarding the disputed wage claim. Respondent's depression does not constitute good cause for further delay of the hearing." The forum did grant respondent a second extension of time in which to file her case summary. ***----- In the Matter of Barbara Coleman, 19 BOLI 230, 238-39 (2000)***.

❑ The ALJ granted respondents' unopposed motion for postponement, which was based on the fact that respondents' attorney already had another trial set for the day of hearing. ***----- In the Matter of Alpine Meadows Landscape, 19 BOLI 191, 193 (2000)***.

❑ The forum granted respondents' postponement motion, which was based on the fact that one of respondent's key witnesses had a prescheduled out-of-state vacation for the week of the hearing, when the agency objected to any extended delay, but stated that it would be amenable to a brief postponement. ***----- In the Matter of Bob G. Mitchell, 19 BOLI 162, 165 (2000)***.

❑ The ALJ granted respondent's unopposed motion for postponement, which was based on a scheduling conflict of respondent's counsel. ***----- In the Matter of ARG Enterprises, Inc., 19 BOLI 116, 118 (2000)***.

❑ The ALJ granted respondents' motion for postponement, which was based on the fact that one of the respondents would be having major dental surgery the day before the hearing was set to commence, making it extremely difficult for her to attend or communicate at the hearing. ***----- In the Matter of Ann L. Swanger, 19 BOLI 42, 44 (1999)***.

❑ The ALJ denied respondent's motion for postponement, which was based in part on a scheduling conflict of respondent's counsel. First, there was no evidence that the matter on respondent's counsel's schedule that conflicted with the hearing had been set before the notice of hearing issued in this case. "If [that matter] was set after this contested case hearing was scheduled, [counsel] should have asked for a continuance in that matter." In addition, respondent's counsel knew of the possible conflict for weeks before filing the motion and did not respond to the attempts the agency made at that time to resolve the conflict. Under those circumstances, the scheduling conflict did not amount to good cause for postponement of the hearing. ***----- In the Matter of Sabas Gonzalez, 19 BOLI 1, 5-6 (1999)***.

❑ Respondent's absence from the country because of his mother's illness did not constitute good cause for postponement of the hearing when: the postponement motion did not indicate how long respondent had known of the illness, how long respondent had been absent from Oregon, or even whether the illness was such that respondent's presence in Mexico was advisable; the motion did not include any documentation supporting the few factual assertions made; and the motion was made only shortly before the scheduled hearing date. To ease any hardship on respondent, the ALJ ordered that he could appear at the hearing either in person or by telephone, and that the agency would pay any long-distance and international telephone charges associated with his appearance. ***----- In the Matter of Sabas Gonzalez, 19 BOLI 1, 5-6 (1999)***.

❑ The ALJ granted the agency's unopposed motion for a postponement, which was based on the unavailability of the agency employee who investigated the case and was expected to be the agency's primary witness. ***----- In the Matter of Lambertus Sandker, 18 BOLI 277, 279 (1999)***.

❑ The ALJ denied respondents' motion for postponement of the hearing, which was based on an asserted need for additional time to conduct discovery and respondents' counsel's busy schedule during the summer months. The ALJ did postpone the hearing for two weeks to alleviate personal hardship on respondents' counsel. ***----- In the Matter of Southern Oregon Flagging, Inc., 18 BOLI 138, 140 (1999)***.

❑ The ALJ granted respondent's unopposed motion for postponement, which was based on previously scheduled conflicting commitments of respondents' counsel. ***---- In the Matter of Moyer Theatres, Inc., 18 BOLI 123, 124 (1999)***.

❑ The ALJ granted the agency's unopposed motion for postponement, based on the reassignment of the case from one case presenter to another. ***---- In the Matter of Moyer Theatres, Inc., 18 BOLI 123, 125 (1999)***.

❑ The ALJ granted the agency's second unopposed motion for postponement, which was based on the serious health condition of the case presenter. ***---- In the Matter of Moyer Theatres, Inc., 18 BOLI 123, 125 (1999)***.

❑ When the agency and respondents filed a joint motion for postponement of a consolidated hearing, the forum granted the motion. ***----- In the Matter of Mike L. Sulffridge, 18 BOLI 22, 25 (1999)***.

> Affirmed without opinion, *Mike Sulffridge dba Mike Sulffridge Contracting, Inc., and A & B Cutters, Inc. v. Bureau of Labor and Industries*, 168 Or App 498 (2000).

❑ Respondent's motion for a postponement to accommodate the conclusion of a pending NLRB arbitration bearing on matters in dispute before the forum was opposed by the agency and denied by the forum on the grounds that the commissioner would not necessarily be bound by the result in the other matter, and that the pendency of another proceeding involving similar issues did not warrant a postponement of the hearing. ***----- In the Matter of Northwest Permastore, 18 BOLI 1, 2 (1999)***.

> Affirmed, *Northwest Permastore Systems v. Bureau of Labor and Industries,* 172 Or App 427 (2001).

❑ Respondent moved for a postponement of the hearing based on his assertions that: he had not received the notice of hearing until one week before the scheduled hearing date and did not have time to prepare for the hearing; he was out of town on a hunting trip; and he was amazed the case had been set for hearing. The forum denied respondent's request. Respondent failed to show good cause for the postponement because the delay in respondent receiving the notice of hearing was due to respondent's failure to notify the forum of his change of address. Moreover, the request for postponement was untimely when it was made only four days before hearing. ***----- In the Matter of Troy R. Johnson, 17 BOLI 285, 287-88 (1999)***.

❑ The forum granted respondent's motion to postpone the hearing. ***----- In the Matter of LTM, Incorporated, 17 BOLI 226, 228 (1998)***.

❑ The forum postponed the hearing based on respondent's health and directed that the participants explore available dates for hearing. ***----- In the Matter of Body Imaging, P.C., 17 BOLI 162, 164 (1998)***.

> Affirmed in part, reversed in part, *Body Imaging, P.C. and Paul Meunier, M.D. v. Bureau of Labor and Industries*, 166 Or App 54 (2000).

❑ The ALJ granted respondent's request for postponement that was based on respondent's assertion that he was moving from Estacada, Oregon, to Joseph, Oregon, and did not have access to his business records. ***----- In the Matter of Manuel Galan, Jr., 17 BOLI 112, 116-17 (1998)***.

> Affirmed without opinion, *Galan v. Bureau of Labor and Industries*, 167 Or App 259 (2000), rev den 332 Or 137 (2001).

❑ The forum denied respondent's motion to postpone the hearing based on the workload of respondent's counsel when there was no actual conflict between the hearing date and any of counsel's other commitments. ***----- In the Matter of David Creager, 17 BOLI 102, 104 (1998)***.

❑ The ALJ granted respondent's unopposed motion to postpone the hearing to allow time for submission and ruling on a motion for summary judgment. ***----- In the Matter of Tyree Oil, Inc., 17 BOLI 26, 27 (1998)***.

> Reversed, *Tyree Oil, Inc. v. Bureau of Labor and Industries*, 168 Or App 278 (2000).

❑ The ALJ denied respondent's motion to postpone the hearing because of a conflict between the hearing date and the settlement conference in another matter when respondent's counsel had received the BOLI notice of hearing before the settlement conference was scheduled. ***----- In the Matter of Central Oregon Building Supply, Inc., 17 BOLI 1, 2 (1998)***.

> Affirmed without opinion, *Central Oregon Building Supply, Inc. v. Bureau of Labor and Industries,* 160 Or App 700, 981 P2d 402 (1999).

❑ The forum granted respondent's motion to postpone the hearing based on the unavailability of an essential witness. ***----- In the Matter of Oregon Department of Fish and Wildlife, 16 BOLI 263, 264 (1998).*** *See also In the Matter of Portland Custom Interiors, Inc., 14 BOLI 82, 83 (1995); In the Matter of Albertson's, Inc., 10 BOLI 199, 204 (1992),* reversed and remanded on other ground, *Albertson's, Inc. v. Bureau of Labor and Industries,* 128 Or App 97, 874 P2d 1352 (1994); *In the Matter of Baker Truck Corral, 8 BOLI 118, 120 (1989).*

❑ When the agency had advised respondent many times before hearing of her right to obtain counsel, and when respondent did not decide to do so until the hearing began, the forum refused to postpone the hearing to allow her obtain the services of counsel, holding that respondent's due process rights had not been violated and the ALJ had not violated his duty to conduct a full and fair hearing. ***----- In the Matter of Graciela Vargas, 16 BOLI 246, 261 (1998).***

❑ Respondent moved to reopen the record and claimed in her exceptions that she did not obtain a full and fair hearing, that a continuance should have been granted, that the ALJ abused his discretion by not postponing the hearing to allow her to get an attorney, and that she was unsophisticated and did not understand the process. The forum denied the motion on all but one matter and found that respondent had received a full and fair hearing because she had the assistance before and at hearing of her bilingual bookkeeper, she had been advised repeatedly before hearing of the wisdom of obtaining counsel, she did not request an attorney until the hearing began, and the ALJ explained the process to her during hearing and assisted her in questioning witnesses. ***----- In the Matter of Graciela Vargas, 16 BOLI 246, 260-61 (1998).***

❑ The forum granted respondent's unopposed motion for postponement based on respondent's wish to travel out of the country to be with a relative who had emergency surgery. ***----- In the Matter of Andres Bermudez, 16 BOLI 229, 231 (1998).***

❑ The AL granted the agency's unopposed request for a postponement of the hearing based on a conflict with the case presenter's previously scheduled vacation and associated non-refundable airline tickets. ***----- In the Matter of James Breslin, 16 BOLI 200, 201 (1997).***

> Affirmed without opinion, *Breslin v. Bureau of Labor and Industries,* 158 Or App 247, 972 P2d 1234 (1999).

❑ The forum granted respondent's unopposed motion to postpone the hearing based on a conflict with previously scheduled depositions in another case. ***----- In the Matter of Katari, Inc., 16 BOLI 149, 151 (1997).***

> Affirmed without opinion, *Katari v. Bureau of Labor and Industries,* 154 Or App 192, 957 P2d 1231, rev den, 327 Or 583 (1998).

❑ When respondent moved for postponement, contending it had not received promised discovery from another respondent, that it did not have all of the exhibits, and that it had had a transcript of an earlier part of the hearing for only one week, the ALJ denied the motion. Respondent renewed the motion at the start of the reconvened hearing and the ALJ denied it again because it was untimely and respondent had not demonstrated adequate efforts to complete discovery or review the discovery it already had during the 4+ months leading up to the reconvened hearing. ***----- In the Matter of Staff, Inc., 16 BOLI 97, 100 (1997).***

❑ The forum granted the agency's unopposed motions, made during the presentation of the agency's case in chief and after respondent's counsel and representative had left the hearing, to add another entity as a respondent, and to amend the order of determination to conform to the evidence by increasing the amount of wages claimed. The hearing reconvened several months later, after the new respondent filed an answer. ***----- In the Matter of Staff, Inc., 16 BOLI 97, 100 (1997).***

❑ Settlement negotiations are not a basis for postponement. ***----- In the Matter of Benn Enterprises, 16 BOLI 69, 70 (1997).***

❑ Respondent failed to show good cause for a postponement when respondent's motion was received the day before the hearing was to convene in Bend; the alleged conflicting matter – a hearing before the Federal Contract Appeals Board, USDA – was scheduled after the BOLI hearing was scheduled and respondent made no showing of an attempt to get the USDA hearing reset; and respondent, despite claims of inadequate discovery from the agency, had made no previous discovery requests and had not complied with a discovery order. ***----- In the Matter of Manuel Galan, 16 BOLI 51, 55-56, 66-67 (1997).***

> Affirmed without opinion, *Galan v. Bureau of Labor and Industries*, 154 Or App 762 (2000), 763 P2d 755, rev den 327 Or 553, 971P2d 409 (1998).

❑ Respondent requested a postponement one day before hearing on the basis that the agency had failed to provide discovery and that motion was denied as untimely. At hearing, respondent renewed its motion,

requesting discovery of agency telephone logs and bills, copies of agency position descriptions, information about witnesses, and disclosure of any *ex parte* communications. The ALJ denied the requested postponement because the information respondent wanted did not exist, was irrelevant, had already been provided, or was burdensome to produce, and there had been no *ex parte* communication. ***----- In the Matter of Manuel Galan, 16 BOLI 51, 57-58 (1997).***

> Affirmed without opinion, *Galan v. Bureau of Labor and Industries*, 154 Or App 762 (2000), 763 P2d 755, rev den 327 Or 553, 971P2d 409 (1998).

❑ The ALJ may grant a postponement request upon a showing of good cause, *i.e.*, excusable mistake or circumstances beyond the participant's control. ***----- In the Matter of Manuel Galan, 16 BOLI 51, 67 (1997).***

> Affirmed without opinion, *Galan v. Bureau of Labor and Industries*, 154 Or App 762 (2000), 763 P2d 755, rev den 327 Or 553, 971P2d 409 (1998).

❑ On the third day of hearing, respondent moved for a postponement because she was ill and the forum granted the motion. ***----- In the Matter of Frances Bristow, 16 BOLI 28, 31 (1997).***

❑ When respondent's local attorney requested a postponement because he had only been recently retained and would need a reasonable amount of time to review the matter in order to file an answer, conduct discovery, and prepare for hearing, the ALJ granted the motion. ***----- In the Matter of Parker-Hannifin Corporation, 15 BOLI 245, 247 (1997).***

❑ The ALJ granted respondent's motion for postponement to facilitate a discovery deposition,. ***----- In the Matter of Thomas Harrington, 15 BOLI 276, 278 (1997).***

❑ When respondent requested a postponement of the hearing because she had an adult care home and could not find a relief person for the date of hearing or successive days, and when the agency opposed the request because it was ready to proceed and had subpoenaed witnesses, the ALJ denied the request because respondent had not shown good cause for a postponement. The ALJ noted that there were over 30 days between the date the notice of hearing was issued and the date of the scheduled hearing, and this should have been ample time to find a relief person for the expected one-day hearing. ***----- In the Matter of Jewel Schmidt, 15 BOLI 236, 237 (1997).***

❑ The ALJ granted respondent's motion for postponement when respondent was involved in an automobile accident and was bedridden and provided documentary and photographic evidence to support her request and the agency did not oppose the motion. ***----- In the Matter of Jewel Schmidt, 15 BOLI 236, 237 (1997).***

❑ The ALJ granted the agency's oral motion, made on behalf of the agency and respondent, for postponement of the hearing based on additional time required to complete discovery. ***----- In the Matter of Geoffroy Enterprises, Inc., 15 BOLI 148, 150-51 (1996).***

❑ Respondents moved for a 60-day postponement to complete discovery, alleging that the agency refused to cooperate by allowing interview of its employees. The ALJ ruled that respondents could have subpoenaed the witnesses for deposition and that failure to complete discovery was not a reason to delay hearing when the participants do not agree on the delay. ***----- In the Matter of Manuel Galan, 15 BOLI 106, 113 (1996).***

> Affirmed without opinion, *Staff, Inc. v. Bureau of Labor and Industries*, 148 Or App 451, 939 P2d 174, rev den, 326 Or 57, 944 P2d 947 (1997).

❑ Respondents sought postponement of the hearing until the agency adopted rules defining recruiting, soliciting and supplying as used in ORS 658.405. Respondents argued that the formal rulemaking procedures set forth in ORS chapter 183 were required. Finding that "recruit" and "solicit" were previously defined in *In the Matter of Leonard Williams,* 8 BOLI 57 (1989), the commissioner ruled that to be an example of rulemaking through a contested case decision. ***----- In the Matter of Manuel Galan, 15 BOLI 106, 114, 133 (1996).***

> Affirmed without opinion, *Staff, Inc. v. Bureau of Labor and Industries*, 148 Or App 451, 939 P2d 174, rev den, 326 Or 57, 944 P2d 947 (1997).

❑ Eight days before hearing, respondent's counsel requested a postponement because he was attending a seminar during the week before hearing and would have insufficient time to prepare. The forum denied the request because respondent failed to show good cause and because the request was untimely. ***----- In the Matter of Tony Chan, 15 BOLI 68, 70 (1996).***

❑ When respondent's attorney, who represented respondent for four months and participated in three postponements, resigned two weeks before hearing, and respondent obtained another attorney one day before the scheduled hearing, the forum refused to postpone the hearing, finding that respondent's request for postpone was untimely and did not demonstrate good cause. ***----- In the Matter of LaVerne Springer, 15 BOLI 47, 50-51 (1996).***

❑ After the hearing had already started, the agency's motion for postponement was granted when the motion was coupled with a motion to amend the specific charges to add two previously unnamed respondents as successors in interest based on newly acquired evidence and respondent did not object. ***----- In the Matter of Thomas Myers, 15 BOLI 1, 3 (1996).***

❑ Respondent's request for postponement, based on the fact that respondent's new counsel had been previously scheduled to appear at a trial scheduled the same date as the scheduled hearing, was granted on the grounds that respondent had not requested a previous postponement, the request was timely, and there was no reasonable alternative to a postponement. ***----- In the Matter of Thomas Myers, 15 BOLI 1, 3-4 (1996).***

❑ When a corporate respondent requested a postponement on the basis that it wanted to pay claimants but could not do so because of a pending grand jury investigation into the corporation and its president, and because there were insufficient remaining members of the board of directors to issue a corporate

check, the request was denied because the corporate respondent had not failed the motion through an attorney and because the proffered reason given for postponement did not constitute good cause. ***----- In the Matter of Gerald Brown, 14 BOLI 154, 157 (1995).***

❑ When respondent requested a postponement because of a conflict with a prior proceeding in another forum and the agency did not object, the hearing date was reset. ***----- In the Matter of Fidel Hernandez, 14 BOLI 149, 152 (1995).***

❑ When respondent's attorney requested a postponement eight days before hearing because he had recently been retained and discovery would be delayed because of an IRS audit, the agency opposed the motion because it was ready to proceed even without the requested discovery, the motion was untimely, and a postponement would delay the hearing for three months, the forum denied the motion, holding that inability to complete discovery is not an automatic basis for a postponement, the motion was untimely, the agency was prepared to proceed, and the forum was unwilling to delay the matter for three months. ***----- In the Matter of Ashlanders Senior Foster Care, Inc., 14 BOLI 54, 56-57 (1995).***

❑ When respondent requested a postponement nine days before the hearing on the basis that she could not get off work to attend the hearing and would like to reschedule it and the agency opposed the motion based on its untimely nature and the agency's readiness to proceed, the hearings referee denied the motion. ***----- In the Matter of Katherine Hoffman, 14 BOLI 41, 43 (1995).***

❑ The hearings referee granted the agency's motion for a postponement until July when the agency's compliance specialist who had investigated the case would be out of state on the dates set for hearing, and a significant number of the claimants, who were migrant workers, would be out of the area until late July. ***----- In the Matter of Anna Pache, 13 BOLI 249, 252-53 (1994).***

❑ When the first notice of hearing was issued on March 25, the hearing was reset for July 26 to accommodate many claimants who were migrant farm workers, respondent's attorney withdrew on May 3, and respondent requested a postponement on July 1 on the grounds that she was unable to prepare for hearing in the time remaining or to afford an attorney and it was inconvenient to attend the hearing during the berry harvest, the agency opposed the motion because the hearing had been set during the harvest season because the claimants would then be present and able to testify. The hearings referee found that respondent failed to show good cause for a postponement. ***----- In the Matter of Anna Pache, 13 BOLI 249, 251-52 (1994).***

❑ When respondent retained an attorney 15 days before hearing and the attorney requested a postponement in order to prepare for hearing and to avoid potential losses to respondent if the hearing were held during the height of the berry harvest and requested, in the alternative, that the hearing be bifurcated to take the agency's witnesses as scheduled and allow respondent more time to prepare her defense, and the agency opposed the request, the hearings referee denied the motion to postpone the hearing because respondent had not shown good cause, but granted the request to bifurcate the hearing as a reasonable alternative to a postponement. ***----- In the Matter of Anna Pache, 13 BOLI 249, 252-53 (1994).***

❑ After a full day of hearing, respondent requested a postponement of the hearing to obtain an attorney. The forum advised respondent that such a postponement was not permitted once a hearing had begun and denied the request. ***----- In the Matter of Victor Ovchinnikov, 13 BOLI 123, 131 (1994).***

❑ When the hearing had been scheduled months in advance and respondent had tentative representation by at least three attorneys in the interim, the forum denied respondent's motion for postponement for the purpose of obtaining counsel. ***----- In the Matter of Clara Rodriguez, 12 BOLI 153, 161 (1994).***

> Affirmed without opinion, *Rodriguez v. Bureau of Labor and Industries*, 135 Or App 696, 898 P2d 818 (1995).

❑ Three days before hearing, a corporate respondent's president requested a postponement because he had not been able to hire an attorney to represent respondent. The forum found that respondent failed to show good cause and denied the request because the postponement request should have been made by an attorney, it was untimely because respondent had five months from the time respondent's attorney withdrew in order to hire another attorney, the president had previously failed to notify the agency or the hearings unit that respondent had no attorney, and it was unacceptable to postpone the hearing until some indefinite date when the president would decide respondent was financially able to hire an attorney. ***----- In the Matter of S.B.I., Inc., 12 BOLI 102, 104-05 (1993).***

❑ A corporate respondent's president appeared at hearing without an attorney and requested a postponement in order to get an attorney, claiming he had fired respondent's attorney, then left for Alaska to fish for four months and he did not have his mail forwarded because he was on a fishing boat, and the agency objected because it had witnesses ready to testify and was ready to proceed. The hearings referee denied respondent's request because respondent had five months to hire a new attorney, the president knew this matter would be set for hearings referee and that respondent needed an attorney, it was the president's responsibility to hire an attorney, and he had failed to notify the forum that respondent had no attorney until three working days before hearing. ***----- In the Matter of S.B.I., Inc., 12 BOLI 102, 105 (1993).***

❑ When respondent's attorney requested a postponement because he had recently joined a new law firm and was assigned this case and the hearing conflicted with other matters assigned to him, the hearings referee denied the motion because it was untimely and "the internal management of counsel's office" did not qualify as good cause for a postponement.

----- In the Matter of John Mathioudakis, 12 BOLI 11, 12 (1993).

❑ The hearings referee denied the agency's motion for a postponement because the case presenter had been assigned to a recently prioritized contested case and there was a shortage of staff,. ***----- In the Matter of Sunnyside Inn, 11 BOLI 151, 153 (1993).***

❑ Respondent filed a motion for postponement two days before hearing. The hearings referee denied respondent's motion because it was untimely, no actual conflict existed in respondent's counsel's schedule, counsel's workload alone was insufficient to justify a postponement, the agency had five witnesses under subpoena for the hearing, and the record could be left open to accommodate a witness whom respondent said was unavailable. ***----- In the Matter of Clara Perez, 11 BOLI 181, 182 (1993).***

❑ Respondent's motion for postponement of a hearing scheduled in a parental leave case because another case involving the same issue was pending before the court of appeals was denied by the hearings referee on the basis that the possibility of further appeal or reversal is present in all litigation and the commissioner cannot cease enforcement activity each time the agency's position or policy is opposed by an accused respondent through appeal or otherwise. ***----- In the Matter of Oregon Department of Transportation, MVD, 11 BOLI 92, 94, 106-07 (1992).***

> Overruled in part on other grounds, *In the Matter of Alaska Airlines, Inc.,* 13 BOLI 47 (1994), affirmed without opinion, *Alaska Airlines, Inc. v. Bureau of Labor and Industries,* 137 Or App 350, 904 P2d 660 (1995), *rev den* 322 Or 644, 912 P2d 375 (1996).

❑ When a respondent who was not represented by counsel at hearing declined to present any evidence, including his own testimony, without first consulting counsel, the forum refused to delay the hearing for respondent to consult counsel when respondent had over three months to do so prior to hearing. ***----- In the Matter of René Garcia, 11 BOLI 85, 86 (1992).***

❑ When the agency was granted summary judgment and the only issue remaining was the sanctions to be imposed, the hearings referee denied respondent's motion for a postponement due to the need to conduct discovery. ***----- In the Matter of Efrain Corona, 11 BOLI 44, 47 (1992).***

> Affirmed without opinion, *Corona v. Bureau of Labor and Industries,* 124 Or App 211, 861 P2d 1046 (1993).

❑ The forum granted a postponement when one participant requested it because discovery was not completed and the other participant either supported or did not oppose the motion. ***----- In the Matter of Albertson's, Inc., 10 BOLI 199, 201, 204 (1992).***

> Reversed and remanded on other ground, *Albertson's, Inc. v. Bureau of Labor and Industries,* 128 Or App 97, 874 P2d 1352 (1994).

❑ When the agency's case presenter resigned from the agency and the newly assigned case presenter had insufficient time before hearing to prepare, the hearings referee found that the agency had shown good cause for a postponement of the hearing. ***----- In the Matter of Tire Liquidators, 10 BOLI 84, 86-87 (1991).***

❑ When respondent's grandmother became ill and respondent had to travel to Texas to retrieve her son who was staying with the grandmother, and respondent requested a postponement the day before the hearing was to begin, the forum found that respondent had shown good cause for a postponement. ***----- In the Matter of Amalia Ybarra, 10 BOLI 75, 77 (1991).***

❑ When a respondent who had received timely notice of hearing and had retained counsel called the hearings referee at the start of the hearing and stated he was in Alaska and unable to attend the hearing, that he had retained counsel in Salem, and that he needed a postponement, the hearings referee denied the postponement and found respondent in default for failure to appear at hearing. Respondent was granted the opportunity to request relief from default. ***----- In the Matter of Rainbow Auto Parts and Dismantlers, 10 BOLI 66, 68-69 (1991).***

❑ The forum denied respondent's motion for postponement for failure to demonstrate good cause when respondent moved for a postponement two months before the scheduled hearing on the basis that he was no longer represented by counsel, that he was surprised that the hearing was set so soon after the answer, and that the hearing date was inconvenient for a witness and to his own plans for a three month vacation. ***----- In the Matter of Kenneth Vanderwall, 9 BOLI 148, 149-50 (1990).***

❑ When respondent moved for a postponement to accommodate an out-of-state witness and the agency objected to the postponement but was willing to have the witness appear by telephone, the hearings referee denied the request for postponement. ***----- In the Matter of Arkad Enterprises, Inc., 8 BOLI 263, 265 (1990).***

> Affirmed, *Arkad Enterprises v. Bureau of Labor and Industries,* 107 Or App 384, 812 P2d 427 (1991).

❑ When respondent, at the start of the hearing, requested a postponement in order to hire an attorney, saying he had elected not to hire an attorney because he thought the case would settle, the agency objected and presented evidence that it had advised the contractor several times to obtain counsel. The hearings referee found that contractor had adequate notice of the hearing and adequate opportunity to consult an attorney and had not been misled by the agency to avoid seeking counsel, and denied respondent's request. ***----- In the Matter of Xavier Carbajal, 8 BOLI 206, 208-09 (1990).***

❑ When respondent moved to postpone the hearing based on the unavailability of respondent's counsel due to a previously scheduled court appearance on the date of the hearing, the hearings referee found respondent had shown good cause and granted the motion. ***----- In the Matter of Dunkin' Donuts, Inc., 8 BOLI 175, 176-77, 181-82 (1989).***

❑ When a respondent in a disability case moved for postponement due to the pre-planned vacation of respondent's attorney, the hearings referee denied the

motion, explaining that personal plans of counsel did not qualify as good cause, particularly when associate counsel had appeared and was available. ***----- In the Matter of Casa Toltec, 8 BOLI 149, 151-52 (1989).***

❑ Respondent in a disability case moved for postponement based on complainant's untimely medical releases that delayed the submission of medical records under subpoena. The hearings referee granted a postponement and ruled that, in the event of further applications for postponement, the participants would have to appear before the hearings referee for a presentation on the record of responsibility and reasons for further delay. ***----- In the Matter of Casa Toltec, 8 BOLI 149, 153 (1989).***

❑ The hearings referee granted respondent's motion for postponement because the agency had not produced any documents that were the subject of a discovery order due to a state employees' strike. ***----- In the Matter of Waylon & Willies, Inc., 7 BOLI 68, 70 (1988).***

❑ When respondent requested a postponement in response to the agency's request to consolidate hearings on separate revocation and refusal to renew issues and to materially amend both notices, the forum granted the postponement and consolidated the hearings. ***----- In the Matter of Jesus Ayala, 6 BOLI 54, 55 (1987).***

❑ The forum granted a one-week postponement when respondent obtained a new attorney just prior to the date of hearing. ***----- In the Matter of Sapp's Realty, Inc., 4 BOLI 232, 233-34 (1985).***

❑ When respondent alleged in exceptions to the proposed order that the hearings referee had "pressured" respondent into accepting a hearing date that was too early to allow adequate preparation, the forum found no merit to this argument when rulings on requests for postponement were promptly conveyed to respondent, there was no indication that the postponement granted was insufficient to allow for preparation, and respondent had two months and three weeks to prepare for hearing. ***----- In the Matter of Sapp's Realty, Inc., 4 BOLI 232, 233-34 (1985).***

❑ After a hearing had already begun, respondent's attorney had a letter hand delivered to the presiding officer requesting that the hearing be rescheduled due to the fact that the attorney had a trial that day. The forum denied the request when the facts showed both respondent and his attorney had due notice of the time and date of the hearing, the attorney's trial had been previously scheduled and did not constitute an emergency situation, and to reschedule would have created a hardship for complainant. ***----- In the Matter of Joseph Gaudry, 3 BOLI 32, 33 (1982).***

18.0 INFORMAL DISPOSITIONS, SETTLEMENT (*see also* 25.3)

❑ When the forum cancels a hearing based upon a respondent's agreement on the record to sign settlement documents and to pay wages and penalties, and the respondent thereafter fails to execute the documents and make the payments as agreed within the time allowed by the forum, the commissioner may enter a final order against the respondent based on the record of settlement. ***----- In the Matter of Advantage Aviation Assoc., Inc., 17 BOLI 97, 101 (1998)***.

❑ At the start of the hearing, the forum dismissed the charges against certain respondents after the agency and counsel for those respondents orally presented the terms of an informal disposition of the charges and agreed to submit an executed consent order at a later date. ***----- In the Matter of Odon Salinas, 16 BOLI 42, 45 (1997).***

❑ After the commissioner issued a final order and respondents filed a petition for judicial review and requested an order staying the enforcement of the final order pending resolution of the appeal, the commissioner and respondents entered into a settlement agreement and the commissioner withdrew the final order for reconsideration. Subsequently, the commissioner issued an amended final order in which the findings of fact, conclusions of law, and opinion remained unchanged from the original final order, and the "order" section was amended to reflect the terms of the settlement agreement. ***----- In the Matter of Scott Nelson, 15 BOLI 168, 184 (1996).***

❑ Respondents' failure to fully execute a settlement by payment of the stipulated amount within ten days after the hearing date, or by such date as modified by the verbal order of the ALJ in the record, constitutes failure to submit fully executed settlement documentation and non-compliance within the substance of the agreement, allowing the terms of settlement as placed on the record to form the basis for a final order. ***----- In the Matter of Hart Industries, Inc., 15 BOLI 144, 147-48 (1996).***

❑ The commissioner used the terms of settlement placed on the record to form the basis of the final order when a hearing was canceled after respondents agreed on the record to sign a consent order providing for payment of civil penalties and prohibiting reapplication for a farm labor contractor license for a period of three years, and when respondents then failed to sign the consent order or pay the agreed penalties. ***----- In the Matter of Fidel Hernandez, 14 BOLI 153-54 (1995).***

❑ When the agency and respondent, an unlicensed service dealer and technician of consumer electronic entertainment equipment, agreed to settle a contested case on the date of hearing and put the settlement terms on the record, and respondent then failed to comply with the terms of the settlement by failing to execute the settlement documents and to pay the agreed upon civil penalty of $500, the commissioner used the terms of the settlement placed on the record to form the basis of a final order, and ordered respondent to deliver a check for $500 to the agency. ***----- In the Matter of Dale Bryant, 14 BOLI 111, 114 (1995).***

❑ The terms of settlement as placed on the record formed the basis for a final order when respondent failed to submit settlement documents or cooperate in the preparation and execution of settlement documents within ten days after the hearing date, or by such date as modified by the verbal order of the hearings referee on the record. ***----- In the Matter of Portland Custom Interiors, Inc., 14 BOLI 82, 85 (1995).***

19.0 DISCOVERY

19.1 --- In General

❑ Respondent filed a motion to interview complainant and included a "First Set of Interrogatories" as an alternative to the interview. After considering respondent's motion and the agency's objection to the interview, the forum denied the motion and issued an order compelling complainant to answer the interrogatories. ***----- In the Matter of WINCO Foods, Inc., 28 BOLI 259, 261 (2007)***

❑ When respondent filed a motion compelling the agency to provide information leading to the whereabouts of a key agency witness and the agency stated that it did not know the present whereabouts of that witness, the forum ordered the agency to provide respondent with any information it had regarding the current address of the witness that had not already been provided. ***----- In the Matter of Logan International, Ltd., 26 BOLI 254, 257-58 (2005).***

❑ When the forum granted the agency's motion for a discovery order two days after it was filed and respondent later filed timely objections to the motion, the forum construed the objections as a motion for reconsideration of its discovery order. ***----- In the Matter of Tomas Benitez, 19 BOLI 142, 145 (2000)***.

❑ The forum denied respondent's motion to make the specific charges more definite and certain and instead treated the motion as a discovery request and ordered the agency to provide respondent with certain information regarding facts referred to in the specific charges. ***----- In the Matter of Oregon Department of Fish and Wildlife, 16 BOLI 263, 264 (1998).***

❑ Respondent failed to show good cause for a postponement when respondent's motion was received the day before the hearing was to convene in Bend; the alleged conflicting matter – a hearing before the Federal Contract Appeals Board, USDA – was scheduled after the BOLI hearing was scheduled and respondent made no showing of an attempt to get the USDA hearing reset; and respondent, despite claims of inadequate discovery from the agency, had made no previous discovery requests and had not complied with a discovery order. ***---- In the Matter of Manuel Galan, 16 BOLI 51, 55-56, 66-67 (1997).***

> Affirmed without opinion, *Galan v. Bureau of Labor and Industries*, 154 Or App 762 (2000), 763 P2d 755, rev den 327 Or 553, 971P2d 409 (1998).

❑ The hearings referee sustained the agency's objection to respondent's discovery request for the commissioner's final orders, consent order, or other alternative dispositions in cases when the agency had respond to interrogatories that had been sent to respondent. ***----- In the Matter of Emerald Steel Fabricators, Inc., 27 BOLI 242, 245-46 (2006).***

> Appeal pending.

❑ Respondent served a subpoena for a deposition and a subpoena *duces tecum* on a potential witness for records related to complainant's subsequent employment and testimony related to those records. The agency opposed respondent's subpoenas. The ALJ proposed that a license should be revoked, denied, or not renewed due to violations of specified statutes and rules. ***----- In the Matter of Efrain Corona, 11 BOLI 44, 47 (1992).***

> Affirmed without opinion, *Corona v. Bureau of Labor and Industries,* 124 Or App 211, 861 P2d 1046 (1993).

❑ When respondent requested that the forum admit and seal the agency's investigative file for the court of appeals, should the court review the forum's denial of a motion to compel relating to information in the file, the forum granted the motion because the agency did not object and stated it did not need the file while the matter was pending. The file was sealed and not considered in the formulation of the proposed order respondent final order. ***----- In the Matter of Lucille's Hair Care, 3 BOLI 286, 287 (1983).***

> Modified as to wage loss and interest*, Ogden v. Bureau of Labor,* 68 Or App 235, 682 P2d 802 (1984); order reinstated, remanded for recalculation of interest*, Ogden v. Bureau of Labor,* 299 Or 98, 699 P2d 189 (1985).
>
> [ED: The court of appeals found that respondent's motion to compel production of the agency investigative file for respondent's inspection should have been granted because the public records law exemption of civil rights investigative files from public disclosure did not apply in an employment discrimination proceeding between the commissioner and respondent and that the ordinary rules of discovery apply, but the denial was harmless because the information would not have affected the result. The Supreme Court declined the commissioner's petition to further address the issue because it the court of appeals decided in the commissioner's favor.]
>
> Order on remand, 5 BOLI 13, 30-31 (1985).

19.2 --- Documents

❑ The agency filed a motion for a discovery order to compel respondent to provide certain described documents and to respond to three interrogatories. With its motion, the agency included copies of its informal request, its first set of interrogatories, and respondent's response to the informal discovery request in which respondent claimed it had no information related to claimant to provide the agency. The ALJ granted the agency's motion. ***----- In the Matter of Bukovina Express, Inc., 27 BOLI 184, 187 (2006).***

❑ The ALJ granted the agency's motion for a discovery order to require respondent to produce relevant documents that had been sought on an informal basis and not provided and to compel respondent to issued an interim order ruling that respondent had not complied with the forum's rule that requires a party seeking to take a deposition to file a motion, and that respondent could not take the witness's deposition until it filed such a motion and the forum granted respondent's motion. The ALJ ruled that the witness must comply with the subpoena *duces tecum* and produce the documents sought by respondent. ***----- In the Matter of Logan International, Ltd., 26 BOLI 254, 257, 259 (2005).***

❑ Respondent filed a motion in which it alleged that the agency had withheld "materials relating to telephone conferences with complainant and perhaps others following the issuance of the 'substantial evidence determination'" and argued that this prejudiced respondent and inhibited its ability to prepare case summaries and prepare fully for the hearing. In response, the agency represented that the complete investigatory files had been provided to respondent, that the agency had contacted complainant after the issuance of the substantial evidence determination and the notes of this interview were not copied with the investigatory files. The Agency further stated that additional witnesses had been contacted in anticipation of litigation. To the extent not already provided to respondent, the ALJ ordered the agency to deliver records of all interviews, including handwritten and typed notes and any recording conducted with complainant and any other witnesses regarding the case, excluding interviews specifically conducted by the agency case presenter, but including interviews conducted by any other BOLI employee or BOLI agent, whether or not acting under the agency case presenter's direction, and including interviews conducted from the time complainant initiated his complaint. ***----- In the Matter of Logan International, Ltd., 26 BOLI 254, 257-58 (2005).***

❑ When the agency filed a motion for a discovery order seeking documents and represented that these documents had been previously requested and not provided, the ALJ found that the relevancy of the requested discovery was apparent and issued a discovery order requiring respondents to provide the documents sought by the agency. ***----- In the Matter of Orion Driftboat and Watercraft Company, LLC, 26 BOLI 137, 139 (2005).***

❑ In a wage claim case, the agency moved for a discovery order requiring respondent to provide the agency with documents related to claimant's employment with respondent that included, among other things, all documents showing dates and hours worked by claimant, all payments made by respondent to claimant, and claimant's complete personnel records. Respondent did not object and the ALJ issued a discovery order requiring respondent to provide the agency with the requested documents. ***----- In the Matter of Adesina Adeniji, 25 BOLI 162, 164 (2004).***

❑ The forum granted the agency's motion for respondent to produce eight categories of documents when respondent filed no objections. ***----- In the Matter of Rodrigo Ayala Ochoa, 25 BOLI 12, 14 (2003).***

> Affirmed without opinion, *Ochoa v. Bureau of Labor and Industries*, 196 Or App 639, 103 P3d 1212 (2004).

❑ The agency filed a motion for a discovery order and to compel answers to interrogatories, supporting its motion with a statement of relevancy and documentation of unsuccessful informal attempts to obtain the requested documents and information. The ALJ granted the Agency's motion. ***----- In the Matter of William Presley, 25 BOLI 56, 58 (2004).***

> Affirmed, *Presley v. Bureau of Labor and Industries,* 200 Or App 113, 112 P3d 485 (2005).

❑ The forum granted the agency's motion for discovery order over respondent's objection that the agency's request for payroll documents was overly broad, finding that the agency had requested documents that were directly related to its allegations and had clearly defined the scope of its request. ***----- In the Matter of The Alphabet House, 24 BOLI 262, 268 (2003).***

❑ In a wage claim case, the agency filed a motion for a discovery order seeking documents from respondents that would tend to show that claimants worked for respondents, the amount of money paid by respondents to claimants, and the dates that claimants worked for respondents. The agency provided documentation showing it had informally requested these documents from respondents and had received no response. The ALJ granted the agency's motion. ***----- In the Matter of Barbara Blair, 24 BOLI 89, 90-91 (2002).***

❑ The agency moved for a discovery order that required respondent to produce five categories of documents and provided a statement indicating the relevance of four categories of the requested documents requested, along with a copy of its informal discovery request. Respondent filed no response to the agency's motion, and the forum issued an interim order granting the motion and requiring respondent to produce four of the five requested categories of documents to the agency. ***----- In the Matter of Toni Kuchar, 23 BOLI 265, 267-68 (2002).***

❑ In a wage claim case, respondent's motion for a discovery order requiring the agency to produce documents related to the enforcement of arbitration provisions in employment contracts was denied because that issue was not before the forum. Respondent's request for "all statistics that are already being calculated and maintained by the BOLI regarding the number of cases submitted to the BOLI and the ultimate disposition of those cases" was denied on the grounds that it was "vague, overbroad, and imposes an undue burden on the agency to produce information" that respondent had not established was relevant or likely to lead to relevant information. Respondent's request for information the agency had regarding any actual or potential bias on the part of its employees was denied because of its vague and overly broad nature and its lack of probative value. ***----- In the Matter of Scott Miller, 23 BOLI 243, 251-52 (2002).***

❑ When the agency moved for a discovery order requiring respondents to produce four categories of documents, accompanied its motion with documentation of its informal discovery request, the relevance of the documents sought was readily apparent, and respondents filed no objections, the forum granted the agency's motion. Respondents filed no response to the Agency's motion. ***----- In the Matter of Peter N. Zambetti, 23 BOLI 234, 236-37 (2002).***

❑ When the agency moved for a discovery order that required respondent to produce five categories of documents and respondent filed no response to the agency's motion, the forum issued an interim order that granted the agency's motion and required respondent to produce all of the requested documents to the agency

within five days. ***----- In the Matter of Triple A Construction, LLC, 23 BOLI 79, 82-83 (2002).***

❑ In a wage claim case, the agency moved for a discovery order requiring respondent to produce documents related to claimant's relationship to respondent, payments made by respondent to Claimant, work performed by claimant for respondent, as well as other documents related to respondent's affirmative defenses. The agency provided documentation that the documents requested had previously been sought twice by informal request several months earlier and represented that the documents had not yet been provided. In addition, the agency also provided a statement indicating the relevancy of all documents sought. Respondent did not object and the ALJ granted the agency's request in its entirety. ***----- In the Matter of Heiko Thanheiser, 23 BOLI 68, 71 (2002).***

❑ The agency filed a motion for a discovery order seeking nine categories of documents and responses to four written interrogatories, providing a statement describing the relevancy of the documents and responses sought, as well as documentation that the same documents and information sought had been requested on an informal basis and not provided. Respondent did not object, and the ALJ granted the agency's motion. ***----- In the Matter of Duane Knowlden, 23 BOLI 56, 58-59 (2002).***

❑ The agency moved for a discovery order that required respondent to produce five categories of documents, including a copy of its informal discovery request mailed earlier to respondent and a statement indicating the relevance of the documents requested. Respondent filed no response to the agency's motion and the ALJ granted the agency's motion. ***----- In the Matter of Arnold J. Mitre, 23 BOLI 46, 48-49 (2002).***

❑ The agency filed a motion for a discovery order requesting the production of documents relevant to the allegations contained in its notice and requiring respondent to respond to two interrogatories. Respondent did not object to the agency's motion and the forum issued an interim order granting it. ***----- In the Matter of Labor Ready Northwest, Inc., 22 BOLI 245, 247-53 (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).

❑ The agency moved for a discovery order that required respondent to produce seven categories of documents and provided a statement indicating the relevance of the documents requested. Respondent filed no response to the agency's motion, and the forum issued an interim order granting the motion and requiring respondent to produce all of the requested documents to the agency. ***----- In the Matter of Arthur Lee, 22 BOLI 99, 101 (2001).***

❑ The agency filed a motion for a discovery order seeking numerous documents related to complainant's application for employment with respondent and respondent's hiring procedures, attaching documentation that the same documents had been requested informally on two occasions and a statement showing how the documents requested were likely to produce information generally relevant to the case. Respondent did not object to the agency's motion and the forum granted it in its entirety. ***----- In the Matter of Barrett Business Services, Inc., 22 BOLI 77, 79 (2001).***

❑ The agency moved for a discovery order deeming certain facts as admitted or, in the alternative, prohibiting respondent from introducing evidence contrary to those facts, basing its motion on respondent's failure to respond to the agency's previous informal request for admissions or denial of certain facts at issue. Respondent did not respond to the agency's motion, and the forum issued a discovery order requiring respondent to admit or deny those facts no later than the day prior to hearing. When respondent did not appear at hearing, the ALJ, relying on ORCP 45 for guidance, deemed as admitted the facts for which admission was sought in the agency's motion. ***----- In the Matter of Arthur Lee, 22 BOLI 99, 102-3 (2001).***

❑ In a civil rights case alleging hostile work environment, the agency moved for a discovery order requesting that respondent produce 18 categories of documents. Respondent filed a response indicating it had already produced documents responsive to some of the categories of requested documents and that there were no relevant documents responsive to other categories. Respondent had specific objections to three categories of the requested documents. The ALJ conducted a prehearing conference with respondent's counsel and the agency case presenter regarding the agency's motion for discovery order. At the conclusion of the conference, after narrowing the scope of the agency's request, the ALJ ordered respondent to provide to the agency three categories of documents that included records showing other respondent employees in Oregon who have been disciplined for creating a "hostile work environment," "for spreading rumors and lies," and those disciplined in any manner in the relevant time period. ***----- In the Matter of Wal-Mart Stores East, Inc., 22 BOLI 27, 30 (2001).***

❑ The agency filed a motion to strike respondent's affirmative defense of financial inability to pay wages at the time they accrued on the basis that respondent had refused to comply with the ALJ's discovery order. The ALJ denied the agency's motion, stating that the appropriate sanction for failing to comply with a discovery order is the ALJ's refusal to admit evidence that has not been disclosed in response to a discovery order. ***----- In the Matter of Northwest Civil Processing, Inc., 21 BOLI 232, 235 (2001).***

❑ Respondent moved for a discovery order requiring the agency to produce four categories of documents but failed to specify the relevance of two of the categories. The agency objected on the basis that the requests in those two particular categories were overly broad and not likely to produce information relevant to the wage claim. The forum granted respondent's motion for the two categories of requested documents to which the agency had no objections. ***----- In the Matter of Northwest Civil Processing, Inc., 21 BOLI 232, 234-35 (2001).***

❑ The agency moved for a discovery order that required respondent to produce nine categories of documents and provided a statement indicating the relevance of the documents requested. Respondent filed no response to the agency's motion, and the forum issued an interim order granting the agency's motion. ***---- In the Matter of Northwest Civil Processing, Inc., 21 BOLI 232, 234 (2001).***

❑ In a wage claim case, the agency moved for a discovery order requesting a complete list of respondent's employees during the claimant's employment, any and all documentation showing dates and hours worked by and wages paid to the claimant, and the original calendars from which respondent had previously made and submitted copies to the agency. The agency characterized the latter request as a "new request for discovery," provided documentation showing that the other requested items had previously been requested on an informal basis, but did not include a statement of relevancy for any of the requested documents. The forum issued an interim order granting the agency's motion for a discovery order in part. The forum denied the agency's request for a complete list of respondent's employees during claimant's employment on the basis that the relevancy of the request was not apparent. The forum also denied the agency's request for original calendars because the agency had not first sought the calendars through informal discovery. ***----- In the Matter of Danny Vong Phuoc Truong, 21 BOLI 217, 220 (2001).***

❑ When the agency renewed its previously denied motion for a discovery order, providing a statement indicating the relevancy of the sought after documents and stating that the agency had made informal attempts to obtain the requested calendars, the forum granted the agency's motion. ***----- In the Matter of Danny Vong Phuoc Truong, 21 BOLI 217, 220 (2001).***

❑ The ALJ granted the agency's motion for a discovery order as to eight of nine categories of documents sought, but did not grant the agency's motion as to the remaining information because the relevance of the requested information (names, phone numbers, and addresses of all of respondent's employees between April 1, 1999, and June 1, 1999) was not apparent from the motion. The agency filed a supplemental motion for discovery order in which it explained the relevancy of that information, and the ALJ granted the supplemental motion. ***----- In the Matter of Sharon Kaye Price, 21 BOLI 78, 80 (2000).***

❑ When the agency filed a motion for a discovery order seeking documents relevant to the claimant's wage claim that had been unsuccessfully sought through an informal exchange of information, the ALJ issued a discovery order requiring respondent to produce the documents sought by the agency, noting that any objections filed by respondent would be treated as a request for reconsideration of the discovery order. Respondent then timely filed objections to the agency's motion for a discovery order, noting that most of the requested documents had been provided and that some of the requested documents did not appear reasonably likely to produce information generally relevant to the case. In response, the ALJ conducted a pre-hearing conference with the purpose of attempting to resolve any outstanding discovery issues. Based on stipulations made during that conference and because the agency had not yet received the documents sent by respondent in response to the agency's request for discovery, the ALJ scheduled a follow-up conference. During that conference, the agency case presenter stated she had reviewed the documents provided by respondent and withdrew the agency's request for any additional documentation. Accordingly, the ALJ ruled that respondent did not need to provide any additional documents in response to the forum's discovery order. ***--- In the Matter of Lane-Douglas Construction, Inc., 21 BOLI 36, 38-39 (2000).***

❑ The ALJ granted the agency's motion requiring respondent to produce 11 of the 12 categories of documents requested from respondent. ***--- In the Matter of Contractor's Plumbing Service, Inc., 20 BOLI 257, 259 (2000)***.

❑ The ALJ granted the agency's motion for a discovery order, finding that the relevance of the documents sought was apparent. ***----- In the Matter of Nova Garbush, 20 BOLI 65, 67 (2000)***.

❑ At hearing, and prior to opening statements, respondent moved for a discovery order requiring the agency to produce complainant's medical records that the agency had not yet provided, consisting of handwritten notes from her counselor. The agency objected on the basis of timeliness and privilege. Respondent indicated the documents were sought in order to determine if they revealed other contemporaneous stresses in complainant's life that might affect her potential mental suffering damages. Respondent and the agency agreed that respondent made an informal discovery request after complainant's deposition, that the agency had obtained the requested documents, and that most of them had already been provided to respondent. The ALJ granted respondent's motion, ruling that under the circumstances, the requirement of a "full and fair inquiry" under ORS 183.415 was controlling. The ALJ also noted that any claim of privilege complainant may have had under OEC 504 (Psychotherapist-patient privilege) or OEC 504-4 (Clinical social worker-client privilege) was waived by the agency's claim for mental suffering on her behalf. The ALJ ruled that he would conduct an *in camera* review of the sought-after documents at the lunch break, and issue a protective order covering any documents that were released to respondent. The ALJ ruled he would only release records created within a two year period prior to complainant's discharge that contained information showing another potential cause for complainant's post-discharge mental suffering. After *in camera* review, the ALJ released several pages of complainant's medical records, placed the remainder under seal, and issued a protective order covering the released documents. ***----- In the Matter of Roseburg Forest Products Co., 20 BOLI 8, 13-14 (2000)***.

❑ The forum granted the agency's motion for discovery order over respondent's objections when the documents the agency sought were relevant to the allegations in the notice of intent. ***----- In the Matter of Tomas Benitez, 19 BOLI 142, 145 (2000)***.

❑ In a civil rights case in which the agency alleged that respondent's unlawful employment practices caused complainant to experience mental suffering, and when the agency had refused to make complainant's medical and psychological records available to respondent, the ALJ ordered the agency to provide the records for an *in camera* inspection. The ALJ also granted the agency's motion for a protective order regarding all documents released to respondent's counsel. After reviewing the records *in camera*, the ALJ released complainant's medical records to respondent subject to a protective order. ***----- In the Matter of ARG Enterprises, Inc., 19 BOLI 116, 119 (2000)***.

❑ When respondent, a residential care facility, agreed to produce redacted copies of the medical records of residents other than complainant, the forum issued a protective order preventing the participants from disclosing the records to anybody outside of the hearing. ***----- In the Matter of Dennis Murphy Family Trust, 19 BOLI 69, 72-73 (1999)***.

❑ The forum granted the agency's unopposed motion for a discovery order seeking documents related to: a respondent's corporate status; its alleged financial inability to pay claimant's accrued wages; any predecessor businesses; hours and days worked by claimant and other employees; the financial interest, if any, that certain individuals had in the corporate respondent; and payroll records from the period encompassed by claimant's wage claim. ***----- In the Matter of Majestic Construction, Inc., 19 BOLI 59, 61 (1999)***.

❑ The ALJ granted the agency's motion for a discovery order requiring respondents to produce certain documents. The ALJ also required the agency to file a statement showing how respondents' production of certain other documents sought in the agency's motion (telephone and electric bills) would be likely to lead to the discovery of relevant information. The agency subsequently filed a statement explaining that production of those records likely would lead to evidence relevant to respondents' affirmative defense of inability to pay the wages, and the ALJ issued a second discovery order requiring respondents to produce the requested records. ***----- In the Matter of Ann L. Swanger, 19 BOLI 42, 44 (1999)***.

❑ In a wage claim case, the agency moved for a discovery order seeking documents related to the number of hours claimant worked, the amount she was paid, evidence indicating she was an independent contractor, and documentation of respondents' alleged financial inability to pay claimant's wages at the time they became due. The forum granted the motion and ordered respondents to produce all requested documents to the agency by a certain date, noting that simply providing the documents at the hearing would not suffice. ***----- In the Matter of Debbie Frampton, 19 BOLI 27, 29-30 (1999)***.

❑ In a civil rights case in which the agency alleged complainant experienced mental suffering as a result of her discharge, the forum granted respondents' motion for a discovery order requiring the agency and complainant to produce "copies of all medical reports, records and writings in the possession, control or within the ability of the Bureau of Labor and Industries or complainant to obtain" regarding complainant's alleged mental suffering. ***----- In the Matter of Mark & Linda McClaskey, 17 BOLI 254, 255-56 (1998)***.

❑ In a civil rights case in which the agency alleged complainant was discharged due to her pregnancy, the forum granted respondents' motion for a discovery order requiring the agency and complainant to produce "copies of all medical reports, records and writings in the possession, control or within the ability of the Bureau of Labor and Industries or complainant to obtain" regarding complainant's alleged ability to work until January 1, 1997, and her physical condition during her pregnancy in the four and one-half months leading up to her discharge. ***----- In the Matter of Mark & Linda McClaskey, 17 BOLI 254, 255-56 (1998)***.

❑ The ALJ granted respondent's discovery motion requesting production of the investigator's notes of interviews with witnesses, including those made at the direction of the agency case presenter. ***----- In the Matter of Wing Fong, 16 BOLI 280, 282 (1998).***

❑ The ALJ denied respondent's discovery motion requesting production of the case presenter notes of interviews with witnesses because of the strong public interest in protecting the case presenter's communications with a complainant and other witnesses at a contested case hearing. The ALJ further explained that the real party in interest in the case was the complainant, and ruled that the case presenter's communications with that party and other witnesses were protected from disclosure. ***----- In the Matter of Wing Fong, 16 BOLI 280, 283 (1998).***

❑ Respondent requested a postponement one day before hearing on the basis that the agency had failed to provide discovery and that motion was denied as untimely. At hearing, respondent renewed its motion, requesting discovery of agency telephone logs and bills, copies of agency position descriptions, information about witnesses, and disclosure of any *ex parte* communications. The ALJ denied the requested postponement because the information respondent wanted did not exist, was irrelevant, had already been provided, or was burdensome to produce, and there had been no *ex parte* communication. ***----- In the Matter of Manuel Galan, 16 BOLI 51, 57-58 (1997).***

> Affirmed without opinion, *Galan v. Bureau of Labor and Industries*, 154 Or App 762 (2000), 763 P2d 755, rev den 327 Or 553, 971P2d 409 (1998).

❑ When respondent moved for a blanket discovery order allowing counsel to request unspecified documents from complainant, the agency case presenter, or anyone treating complainant for post-traumatic stress disorder, the ALJ required complainant to provide records of anyone diagnosing or treating complainant for post-traumatic stress disorder and records of anyone treating complainant for the mental suffering alleged for an *in camera* inspection. ***----- In the Matter of Parker-Hannifin Corporation, 15 BOLI 245, 247-48 (1997).***

❑ The forum granted the agency's unopposed motion and required respondent to produce the originals of

various WH-151 and WH-153 forms at hearing. ***----- In the Matter of Andres Bermudez, 16 BOLI 229, 231 (1998).***

❑ The forum granted respondent's unopposed motion to require the agency to produce certain documents and to permit the deposition of the complainant. ***----- In the Matter of Benn Enterprises, 16 BOLI 69, 70 (1997).***

❑ When the agency advised the hearings referee that it had not received documents requested from respondents and requested a discovery order for their production, the hearings referee issued a discovery order requiring respondents to produce those documents previously requested by the agency. ***----- In the Matter of Jack Crum Ranches, Inc., 14 BOLI 258, 260-62 (1995).***

❑ When the agency moved to reopen the record to submit additional evidence of an abrupt change in ownership in respondent's business that had taken place and warranted additional discovery to determine a potential successor in interest, the motion was granted and the hearings referee granted the agency's corresponding motions to depose respondent's corporate president and compel the production of certain documents. ***----- In the Matter of Sunnyside Enterprises of Oregon, 14 BOLI 170, 174 (1995).***

❑ In a sex discrimination case based on unequal pay, respondents moved for a discovery order requiring complainant to provide copies of her income tax returns covering a ten-year period before her employment with respondents. The hearings referee denied the motion because later tax returns, which were relevant to the claimed damages period, had already been provided and the earlier returns were too remote in time. ***----- In the Matter of Sunnyside Inn, 11 BOLI 151, 152-53 (1993).***

❑ In a disability case, respondent moved that the hearings referee issue a subpoena *duces tecum* to complainant requiring her to appear for deposition and to produce certain documents because complainant had refused to accept service and to sign a release for medical records. Relying on an affidavit of respondent's counsel, the agency's response, the Oregon APA, the A.G.'s Model Rules, the Oregon Rules of Civil Procedure, and the Oregon Rules of Evidence regarding privilege, the hearings referee granted the motion and issued a subpoena for deposition and production of documents to complainant. The hearings referee attached a copy of the forum's rulings, some of which were limiting respondent protective, on the items listed in respondents' motion for production of documents. The ruling also provided that the agency would be precluded from offering evidence at hearing regarding any items that complainant refused to provide. ***----- In the Matter of Casa Toltec, 8 BOLI 149, 152-53 (1989).***

❑ In a disability case, respondent moved for production of documentary evidence from both the agency and complainant and the hearings referee directed the agency to make available any and all information in its possession to which the ordinary rules of discovery apply. With regard to complainant, the hearings referee noted that complainant was not a party, but was a compellable witness, and directed the agency to produce any evidence requested in the motion over which it had power or authority. ***----- In the Matter of Casa Toltec, 8 BOLI 149, 151-52 (1989).***

❑ The forum granted respondent's request for a subpoena to have complainant appear with documents from the agency file, but production was limited to those not protected by the confidentiality provisions of ORS 192.500(1)(h) and OAR 839-03-080(1). ***----- In the Matter of Southern Electrical and Pipefitting Corporation, 3 BOLI 254, 255 (1983).***

[ED: But see *Ogden v. Bureau of Labor*, 68 Or App 235, 682 P2d 802 (1984), affirmed in part, reversed in part, 299 Or 98, 699 P2d 189 (1985).

19.3 --- Interrogatories

❑ Respondent filed a motion to interview complainant and included a "First Set of Interrogatories" as an alternative to the interview. After considering respondent's motion and the agency's objection to the interview, the forum denied the motion and issued an order compelling complainant to answer the interrogatories. ***----- In the Matter of WINCO Foods, Inc., 28 BOLI 259, 261 (2007)***

❑ The agency filed a motion for a discovery order to compel respondent to provide certain described documents and to respond to three interrogatories. With its motion, the agency included copies of its informal request, its first set of interrogatories, and respondent's response to the informal discovery request in which respondent claimed it had no information related to claimant to provide the agency. The ALJ granted the agency's motion. ***----- In the Matter of Bukovina Express, Inc., 27 BOLI 184, 187 (2006).***

❑ The ALJ granted the agency's motion for a discovery order to require respondent to produce relevant documents that had been sought on an informal basis and not provided and to compel respondent to respond to interrogatories that had been sent to respondent. ***----- In the Matter of Emerald Steel Fabricators, Inc., 27 BOLI 242, 245-46 (2006).***

Appeal pending.

❑ Respondent sought an order compelling the deposition of the complainant. The ALJ denied respondent's request on the basis that respondent had not demonstrated that other methods discovery were so inadequate that respondent would be substantially prejudiced by the denial of respondent's motion. The ALJ noted that respondent had not established that the information that it sought could not be obtained through interrogatories, and apparently had not served any yet. ***--- In the Matter of Logan International, Ltd., 26 BOLI 254, 257 (2005).***

❑ When the agency filed a motion for a discovery order seeking documents and represented that these documents had been previously requested and not provided, the ALJ directed the agency to issue interrogatories if it wished to obtain responses to the non-documentary information sought in its motion for discovery order. ***----- In the Matter of Orion Driftboat and Watercraft Company, LLC, 26 BOLI 137, 139***

(2005).

❑ The agency filed a motion for a discovery order and to compel answers to interrogatories, supporting its motion with a statement of relevancy and documentation of unsuccessful informal attempts to obtain the requested documents and information. The ALJ granted the agency's motion. ***----- In the Matter of William Presley, 25 BOLI 56, 58 (2004).***

> Affirmed, *Presley v. Bureau of Labor and Industries,* 200 Or App 113, 112 P3d 485 (2005).

❑ The agency filed a motion for a discovery order seeking nine categories of documents and responses to four written interrogatories, providing a statement describing the relevancy of the documents and responses sought, as well as documentation that the same documents and information sought had been requested on an informal basis and not provided. Respondent did not object, and the ALJ granted the agency's motion. ***----- In the Matter of Duane Knowlden, 23 BOLI 56, 58-59 (2002).***

❑ The agency filed a motion for a discovery order requesting the production of documents relevant to the allegations contained in its notice and requiring respondent to respond to two interrogatories. Respondent did not object to the agency's motion and the forum issued an interim order granting it. ***----- In the Matter of Labor Ready Northwest, Inc., 22 BOLI 245, 247-53 (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).

❑ The commissioner denied respondent's motion requiring complainant to answer eight interrogatories because the forum's administrative rules provided for depositions, but not interrogatories. ***----- In the Matter of City of Portland, 6 BOLI 203, 204 (1987).***

19.4 --- Requests for Admissions

❑ When the agency filed a motion for a discovery order requesting that respondent respond to five requests for admissions, the forum issued an interim order ruling that respondent must respond to the agency's request for admissions within eight days or the requested admissions would be deemed admitted. When respondent did not respond, the forum relied on the requested admissions in granting the agency summary judgment on the issue of liability for civil penalty wages. ***----- In the Matter of Westland Resources Group LLC, 23 BOLI 276, 278, 281 (2002).***

❑ The agency moved for a discovery order deeming certain facts as admitted or, in the alternative, prohibiting respondent from introducing evidence contrary those facts, basing its motion on respondent's failure to respond to the agency's previous informal request for admissions or denial of certain facts at issue. Respondent did not respond to the agency's motion, and the forum issued a discovery order requiring respondent to admit or deny those facts no later than the day prior to hearing. When respondent did not appear at hearing, the ALJ, relying on ORCP 45 for guidance, deemed as admitted the facts for which admission was sought in the agency's motion. ***----- In the Matter of Arthur Lee, 22 BOLI 99, 102-3 (2001).***

❑ The forum granted respondent's motion to request admissions from complainant and the agency case presenter. ***----- In the Matter of Parker-Hannifin Corporation, 15 BOLI 245, 247-48 (1997).***

19.5 --- Depositions

❑ Respondent sought an order compelling the deposition of the complainant. The ALJ denied respondent's request on the basis that respondent had not demonstrated that other methods discovery were so inadequate that respondent would be substantially prejudiced by the denial of respondent's motion. The ALJ noted that respondent had not established that the information that it sought could not be obtained through interrogatories, and apparently had not served any yet. ***----- In the Matter of Logan International, Ltd., 26 BOLI 254, 257 (2005).***

❑ Respondent served a subpoena for a deposition and a subpoena *duces tecum* on a potential witness for records related to complainant's subsequent employment and testimony related to those records. The agency opposed respondent's subpoenas. The ALJ issued an interim order ruling that respondent had not complied with the forum's rule that requires a party seeking to take a deposition to file a motion, and that respondent could not take the witness's deposition until it filed such a motion and the forum granted respondent's motion. The ALJ ruled that the witness must comply with the subpoena *duces tecum* and produce the documents sought by respondent. ***----- In the Matter of Logan International, Ltd., 26 BOLI 254, 257, 259 (2005).***

❑ When respondent failed to seek discovery through an informal exchange of information before requesting a discovery order, the forum denied respondent's motion to take complainant's deposition and noted that an informal attempt to arrange for a deposition did not constitute an attempt to seek discovery through an informal exchange of information. ***----- In the Matter of Entrada Lodge, Inc., amended final order on remand, 24 BOLI 125, 128 (2003).***

> Reversed and remanded for reconsideration, *Entrada Lodge, Inc. v. Bureau of Labor and Industries*, 184 Or App 315, 56 P3d 444 (2002).

❑ On August 24, 1999, respondent moved to take a complainant's deposition. On August 30, the agency objected based on complainant's unavailability prior to the hearing. At the conclusion of a pre-hearing conference, the ALJ found that a deposition was appropriate based on the materiality of complainant's testimony and the short time (two weeks) remaining before hearing and issued a discovery order allowing respondent to depose complainant the day before the hearing. Neither respondent's motion, the agency's objections, nor the ALJ's order were served on complainant's private attorney. On September 13, complainant's private attorney learned of the ALJ's order and immediately filed objections stating his unavailability at the time set for depositions. The ALJ was unable to reach agreement between complainant's attorney, the

agency, and respondent as to a satisfactory alternate time for taking complainant's deposition. Over respondent's objection, the ALJ rescinded the discovery order allowing the deposition and ruled that he would allow respondent "considerable leeway at the hearing during cross-examination of complainant to inquire into the same areas" respondent's counsel would have inquired into in the deposition. ***----- In the Matter of Servend International, Inc., 21 BOLI 1, 3-6 (2000).***

> Affirmed without opinion, *Servend International, Inc. v. Bureau of Labor and Industries,* 183 Or App 533, 53 P3d 471 (2002).

❑ Respondent filed a motion for a discovery order to be allowed to take the complainant's deposition. The agency filed objections to respondent's request to take complainant's deposition, arguing that respondent's request was untimely and failed to demonstrate why a deposition rather than informal or other means of discovery was necessary. The forum issued an interim order denying respondent's motion to take complainant's deposition on the basis that respondent had failed to seek discovery through an informal exchange of information before requesting a discovery order to take complainant's deposition. The forum noted that an informal attempt to arrange for a deposition did not constitute an attempt to seek discovery through an informal exchange of information. --- ***In the Matter of Entrada Lodge, Inc., 20 BOLI 229, 231-32 (2000)***.

> Reversed and remanded for reconsideration, *Entrada Lodge, Inc. v. Bureau of Labor and Industries*, 184 Or App 315, 56 P3d 444 (2002), final order on remand 24 BOLI 125 (2003).

❑ The ALJ granted respondent's motion to depose the complainant on the basis that the agency did not object and that a complainant's testimony is normally material, despite the fact that respondent did not make a showing of the materiality of the complainant's testimony, did not explain why a deposition rather than informal or other means of discovery was necessary, and did not request that the witness's testimony be taken before a notary public or other person authorized by law to administer oaths. ***---- In the Matter of Barrett Business Services, Inc., 20 BOLI 189, 193 (2000).***

> Affirmed, *Barrett Business Services v. Bureau of Labor and Industries*, 173 Or App 444 (2001).

❑ When respondent filed a motion asking to take the deposition of complainant, stating that absent a deposition, respondent would be unable to effectively determine if the agency's request for $27,6570 in back wages and $20,000 for mental suffering and reinstatement on behalf of complainant was appropriate, and the agency did not object, the ALJ granted the motion. ***----- In the Matter of Roseburg Forest Products Co., 20 BOLI 8, 11 (2000)***.

❑ The forum granted respondent's unopposed motion to depose complainant. ***----- In the Matter of Dennis Murphy Family Trust, 19 BOLI 69, 71 (1999)***.

❑ The ALJ granted respondents' motion to depose complainant and her mother when respondents made a showing of materiality and the agency had agreed to make the witnesses available for deposition. ***---- In the Matter of Moyer Theatres, Inc., 18 BOLI 123, 125 (1999)***.

❑ The forum granted respondent's unopposed motion to require the agency to produce certain documents and to permit the deposition of the complainant. ***----- In the Matter of Benn Enterprises, 16 BOLI 69, 70 (1997).***

❑ The forum granted respondent's motion to depose complainant and the agency's motion to depose two of respondent's employees. ***----- In the Matter of Parker-Hannifin Corporation, 15 BOLI 245, 247-48 (1997).***

❑ When respondent moved for a 60-day postponement to complete discovery, alleging that the agency refused to cooperate by allowing interview of its employees, the ALJ ruled that respondents could have subpoenaed the witnesses for deposition and that failure to complete discovery was not a reason to delay hearing when the participants do not agree on the delay. ***----- In the Matter of Manuel Galan, 15 BOLI 106, 113 (1996).***

> Affirmed without opinion, *Staff, Inc. v. Bureau of Labor and Industries*, 148 Or App 451, 939 P2d 174, rev den, 326 Or 57, 944 P2d 947 (1997).

❑ The hearings referee granted the agency's motion to reopen the record to submit additional evidence of an abrupt change in ownership in respondent's business that had taken place and warranted additional discovery to determine a potential successor in interest. The hearings referee granted the agency's corresponding motions to depose respondent's corporate president and compel the production of certain documents. ***----- In the Matter of Sunnyside Enterprises of Oregon, 14 BOLI 170, 174 (1995).***

❑ The hearings referee granted the agency's motion to quash a notice of deposition that respondent had served on the commissioner because it did not appear that the commissioner was a material witness in the case. ***----- In the Matter of Albertson's, Inc., 10 BOLI 199, 202 (1992).***

> Reversed and remanded on other grounds, Overruled in part on other grounds, *Albertson's, Inc. v. Bureau of Labor and Industries,* 128 Or App 97, 874 P2d 1352 (1994).

❑ When respondent used complainant's prior deposition to point out alleged inconsistencies between her testimony and her deposition, the entire deposition was admitted as an exhibit for impeachment purposes. ***---- In the Matter of Sierra Vista Care Center, 9 BOLI 281, 282-83, 285-86 (1991).***

> Affirmed, *Colson v. Bureau of Labor and Industries,* 113 Or App 106, 831 P2d 706 (1992).

❑ Respondent objected at hearing to the testimony of two witnesses whom the agency intended to present by telephone. The hearings referee overruled the objection, stating that telephone testimony in administrative hearings was permissible and was allowed by the forum's own rules. The commissioner subsequently denied the same motion, which was renewed on the basis that the unavailability of the witnesses in Oregon had deprived respondents of the opportunity to depose those witnesses. The forum observed that a party is generally responsible in civil proceedings for locating

and deposing potential witnesses. In this case, because the record did not reflect that discovery was delayed or withheld by the agency or that respondents sought the forum's assistance in deposing the witnesses, the hearings referee stated he could not rule that respondents were deprived of the opportunity for discovery. ***----- In the Matter of Dunkin' Donuts, Inc., 8 BOLI 175, 177, 192-93 (1989).***

❑ Respondent in a disability case moved that the hearings referee issue a subpoena *duces tecum* to complainant requiring her to appear for deposition and to produce certain documents because complainant had refused to accept service and to sign a release for medical records. Relying on an affidavit of respondent's counsel, the agency's response, the Oregon APA, the A.G.'s Model Rules, the Oregon Rules of Civil Procedure, and the Oregon Rules of Evidence regarding privilege, the hearings referee granted the motion and issued a subpoena for deposition and production of documents to complainant. The hearings referee attached a copy of the forum's rulings, some of which were limiting respondent protective, on the items listed in respondents' motion for production of documents. The ruling also provided that the agency would be precluded from offering evidence at hearing regarding any items that complainant refused to provide. ***----- In the Matter of Casa Toltec, 8 BOLI 149, 152-53 (1989).***

❑ After hearing oral and written arguments, the forum denied the agency's motion to compel respondent to answer certain questions she had refused to answer during her deposition. ***----- In the Matter of E. Harold Schipporeit, 6 BOLI 113, 115 (1987).***

> Affirmed, *Schipporeit v. Roberts,* 93 Or App 12, 760 P2d 1339 (1998), affirmed, *Schipporeit v. Roberts,* 308 Or 199, 778 P2d 953 (1989).

❑ During hearing, the agency offered as evidence a deposition of the employer that the agency had taken in preparation for hearing, and respondent objected to its admission. The forum admitted the deposition without limitation because: (1) ORS 45.250(1)(b) states that, at a trial, a motion hearing, or an interlocutory proceeding, a deposition may be used against any party for any purpose; (2) this administrative forum follows the more relaxed and general standard that evidence of a type commonly relief upon by reasonably prudent persons in the conduct of their serious affairs is admissible; and (3) under either the general administrative standard or the specific civil standard, the employer's deposition was admissible. ***----- In the Matter of Godfather's Pizzeria, Inc., 2 BOLI 279, 281 (1982).***

19.6 --- Public Records

❑ The agency submitted two memoranda written by the agency's case presenter to the hearings referee for a ruling on whether they were exempt from public disclosure under the public records law. The hearings referee ruled that the two memoranda were exempt from disclosure because they were communications with the agency of an advisory nature and were preliminary to a final agency action. With regard to the agency's former case presenter, the hearings referee found that the public interest in encouraging her frank communications with agency staff clearly outweighed the public interest in the disclosure of those communications, notwithstanding allegations of bias or prejudice, and held that the case presenter could not be examined about the contents of the memoranda. ***----- In the Matter of Albertson's, Inc., 10 BOLI 199, 203-04 (1992).***

> Reversed and remanded on other ground, *Albertson's, Inc. v. Bureau of Labor and Industries,* 128 Or App 97, 874 P2d 1352 (1994).

❑ Respondent requested that the forum admit and seal the agency's investigative file for the court of appeals, should the court review the forum's denial of a motion to compel relating to information in the file. The forum granted the motion because the agency did not object and stated it did not need the file while the matter was pending. The file was sealed and not considered in the formulation of the proposed order respondent final order. ***----- In the Matter of Lucille's Hair Care, 3 BOLI 286, 287 (1983).***

> Modified as to wage loss and interest*, Ogden v. Bureau of Labor,* 68 Or App 235, 682 P2d 802 (1984); order reinstated, remanded for recalculation of interest*, Ogden v. Bureau of Labor,* 299 Or 98, 699 P2d 189 (1985).
>
> [ED: The court of appeals found that respondent's motion to compel production of the agency investigative file for respondent's inspection should have been granted because the public records law exemption of civil rights investigative files from public disclosure did not apply in an employment discrimination proceeding between the commissioner and respondent and that the ordinary rules of discovery apply, but the denial was harmless because the information would not have affected the result. The Supreme Court declined the commissioner's petition to further address the issue because it the court of appeals decided in the commissioner's favor.]
>
> Order on remand, 5 BOLI 13, 30-31 (1985).

❑ The forum granted respondent's request for a subpoena to have complainant appear with documents from the agency file, but production was limited to those not protected by the confidentiality provisions of ORS 192.500(1)(h) and OAR 839-03-080(1). ***----- In the Matter of Southern Electrical and Pipefitting Corporation, 3 BOLI 254, 255 (1983).***

> [ED: But see *Ogden v. Bureau of Labor*, 68 Or App 235, 682 P2d 802 (1984), affirmed in part, reversed in part, 299 Or 98, 699 P2d 189 (1985).

❑ Respondent requested that the forum issue a subpoena requiring that the assistant attorney general assigned to represent the agency appear and produce the official case file. The forum granted the request and ordered the assistant attorney general to appear with the file and produce documents therein to the extent that there was no conflict with the provisions of ORS 192.500(1)(h) and OAR 839-03-080(1). Pursuant to ORS 192.500(1)(h), a respondent is not entitled to access to confidential investigative files until the complainant is resolved under ORS 659.050 or a final administrative determination is made under ORS 659.060 unless public interest requires earlier disclosure. Respondent's access to the investigative file is also barred by OAR 839-03-080(1) until the complaint

is closed unless public interest requires disclosure. ***----- In the Matter of PAPCO, Inc., 3 BOLI 243, 245, 251 (1983).***

> ED.: But see *Ogden v. Bureau of Labor and Industries,* 68 Or App 235, 682 P2d 802 (1984), affirmed in part, reversed in part, 299 Or 98, 699 P2d 189 (1985).

19.7 --- Failure to Produce

❑ Despite the assertions in its lengthy and fact specific answer filed through counsel, respondent failed to appear or otherwise provide a scintilla of evidence to support those contentions. If the assertions were true, respondent could have appeared at the hearing with the requisite proof. ***----- In the Matter of Okechi Village & Health Center, 27 BOLI 156, 167 (2006).***

❑ Respondent filed a motion in which it alleged that the agency had withheld "materials relating to telephone conferences with complainant and perhaps others following the issuance of the 'substantial evidence determination'" and argued that this prejudiced respondent and inhibited its ability to prepare case summaries and prepare fully for the hearing. In response, the agency represented that the complete investigatory files had been provided to respondent, that the agency had contacted complainant after the issuance of the substantial evidence determination and the notes of this interview were not copied with the investigatory files. The agency further stated that additional witnesses had been contacted in anticipation of litigation. To the extent not already provided to respondent, the ALJ ordered the agency to deliver records of all interviews, including handwritten and typed notes and any recording conducted with complainant and any other witnesses regarding the case, excluding interviews specifically conducted by the agency case presenter, but including interviews conducted by any other BOLI employee or BOLI agent, whether or not acting under the agency case presenter's direction, and including interviews conducted from the time complainant initiated his complaint. ***----- In the Matter of Logan International, Ltd., 26 BOLI 254, 257-58 (2005).***

❑ When respondent did not respond to the agency's informal efforts to obtain discovery, did not file a case summary pursuant to the hearings referee's discovery order, and did not respond to a specific discovery order for employment records, and when respondent offered documents at hearing that he claimed were business records, the hearings referee granted the agency's motion to exclude the documents from the record because respondent did not offer a satisfactory reason for having failed to provide the documents as ordered. The hearings referee found that excluding the documents would not violate the duty to conduct a full and fair hearing. ***----- In the Matter of Martin's Mercantile, 12 BOLI 262, 264-65 (1994).***

❑ When a respondent is properly served with a request for discovery and fails to respond, the hearings officer may refuse to admit evidence that was not disclosed in response to the discovery order. ***----- In the Matter of Daniel Burdick, 12 BOLI 66, 76 (1993).***

❑ When a respondent failed to supply records of claimant's employment requested by the agency during its investigation, avoided service of a subpoena for the records, and ignored a prehearing discovery order for the records, the forum excluded those records from evidence when respondent attempted to use them at hearing. ***----- In the Matter of Daniel Burdick, 12 BOLI 66, 67, 76 (1993).***

❑ When respondents failed to produce payroll records to the agency after two discovery orders issued by the hearings referee, but offered those records at hearing, the forum excluded the evidence from the hearing because respondents did not give a satisfactory reason for having failed to produce the documents and excluding it would not violate the duty to conduct a full and fair hearing because the document was unreliable. ***----- In the Matter of Sylvia Montes, 11 BOLI 268, 269-70 (1993).***

❑ The agency objected to two documents offered by respondent on the grounds that neither document had been included with respondent's case summary and neither was submitted during the investigation when the investigator asked for documents and claimed to be prejudiced. The hearings referee received the documents, ruling that their relevance outweighed any claimed prejudice. ***----- In the Matter of German Auto Parts, Inc., 9 BOLI 110, 112 (1990).***

> Affirmed, *German Auto Parts, Inc. v. Bureau of Labor and Industries,* 111 Or App 522, 826 P2d 1026 (1992).

❑ When the agency objected at hearing to respondent's submission of purported time records for claimant because those records had been requested during the investigation and by subpoena *duces tecum* prior to the hearing and had not been disclosed and respondent made no effort to comply with the subpoena, the hearings referee did not receive the records. ***----- In the Matter of Dan's Ukiah Service, 8 BOLI 96, 98 (1989).***

19.8 --- Subpoenas

❑ During the hearing, respondent claimed that the wage claimant had telephoned respondent's witness and intimidated her from testifying. Respondent asked the ALJ to do something about this situation. The ALJ gave respondent three options: (1) the ALJ would issue a subpoena for the witness; (2) if respondent did not want a subpoena, the ALJ would leave the record open for the witness's testimony until the end of the hearing; (3) respondent could testify as to what the witness told him concerning claimant's alleged intimidation and the ALJ would give respondent's testimony its appropriate weight. Respondent did not exercise any of these three options. ***----- In the Matter of William Presley, 25 BOLI 56, 59 (2004).***

> Affirmed, *Presley v. Bureau of Labor and Industries,* 200 Or App 113, 112 P3d 485 (2005).

❑ Respondent moved for the forum to issue a *subpoena duces tecum* to the commissioner requiring him to produce certain documents, or in the alternative, a subpoena to an unnamed agency employee who could explain the documents, together with a subpoena for the commissioner concerning alleged conversations

between respondent and the commissioner, and the agency objected. The forum denied Respondent's request for a *subpoena duces tecum* to obtain the majority of documents sought in respondent's requests based on respondent's failure to show that the requests either sought information relevant to the case or that the specific information sought was reasonably likely to produce information generally relevant to the case.

The forum granted respondent's requests for two categories of documents and issued a *subpoena duces tecum* for respondent to serve on the administrator of the Wage & Hour Division, whom the agency case presenter had named, at the forum's request, as the custodian of the records sought by respondent. The forum mailed the *subpoena duces tecum* to respondent, and informed respondent that it was responsible for serving the subpoena and paying applicable witness fees, if any.

The forum treated respondent's request to obtain the testimony of the commissioner as a motion for a *subpoena ad testificandum* and denied the request based on respondent's failure to make a showing that the alleged conversations between respondent and the commissioner were in any way related to the hearing.

The forum also treated respondent's motion to obtain the testimony of an unnamed BOLI employee who could explain the documents sought by respondent as a motion for a *subpoena ad testificandum*, and denied the request on the basis that it could not issue a *subpoena ad testificandum* to an unnamed individual. ***----- In the Matter of Schneider Equipment, Inc., 21 BOLI 60, 64-65 (2000).***

❑ During discussion of pre-hearing matters, the agency served respondent with a subpoena and witness fees. On respondent's motion, the forum quashed the subpoena on the ground that the agency had not identified respondent as a witness in its case summary. ***----- In the Matter of Barbara Coleman, 19 BOLI 230, 244 (2000)***.

❑ The forum granted the unrepresented respondent's request for the issuance of subpoenas to two possible witnesses, noting that respondent's request suggested that the two individuals might have information related to the case. The forum sent the subpoenas to respondent along with an order stating that it was respondent's responsibility to serve the subpoenas and to pay applicable witness and mileage fees. ***----- In the Matter of Tomas Benitez, 19 BOLI 142, 145 (2000)***.

❑ Respondent moved for a 60-day postponement to complete discovery, alleging that the agency refused to cooperate by allowing interview of its employees. The ALJ ruled that respondents could have subpoenaed the witnesses for deposition and that failure to complete discovery was not a reason to delay hearing when the participants do not agree on the delay. ***----- In the Matter of Manuel Galan, 15 BOLI 106, 113 (1996).***

> Affirmed without opinion, *Staff, Inc. v. Bureau of Labor and Industries*, 148 Or App 451, 939 P2d 174, rev den, 326 Or 57, 944 P2d 947 (1997).

❑ Respondent objected to an agency subpoena for respondent's investigative file involving complainant's allegations of sexual harassment, claiming that its internal investigation was privileged as work product containing confidential information and that disclosure would have a chilling effect on its ability to investigate employee complaints. The forum ruled that respondent's investigation was discoverable since it dealt with the same facts as the hearing. ***----- In the Matter of Fred Meyer, Inc., 15 BOLI 77, 79 (1996).***

> Affirmed, *Fred Meyer, Inc. v. Bureau of Labor and Industries,* 152 Or App 301, 954 P2d 804 (1998).

❑ Respondent objected to an agency subpoena for the personnel file of complainant's alleged harasser in a sexual harassment case on the grounds of relevancy and invasion of privacy. The ALJ ruled that the alleged harasser's personnel file was relevant for discovery purpose and ordered that it be made available to the agency. ***----- In the Matter of Fred Meyer, Inc., 15 BOLI 77, 79 (1996).***

> Affirmed, *Fred Meyer, Inc. v. Bureau of Labor and Industries*, 152 Or App 301, 954 P2d 804 (1998).

❑ The forum granted the agency's motion to quash a subpoena issued by respondent requiring the Adult & Family Services Division to provide complainant's welfare benefits file on the basis that respondent failed to establish its relevance. The forum also declined to view the AFS file *in camera*. ***----- In the Matter of Thomas Myers, 15 BOLI 1, 2 (1996).***

❑ When the agency notified the hearings referee that the wage claimant would appear at hearing by telephone and respondent requested a subpoena for the claimant to secure her personal appearance at hearing, the forum denied the request due to claimant's status as a witness, not a party, under the provisions of OAR 839-50-020(14). ***----- In the Matter of Mario Pedroza, 13 BOLI 220, 222 (1994).***

❑ When respondent failed to supply records of claimant's employment requested by the agency during its investigation, avoided service of a subpoena for the records, and ignored a prehearing discovery order for the records, the forum excluded those records from evidence when respondent attempted to use them at hearing. ***----- In the Matter of Daniel Burdick, 12 BOLI 66, 67, 76 (1993).***

❑ When respondent sought to quash an agency subpoena for personnel records of complainant's co-workers on the grounds of relevance and violation of co-worker privacy, the forum denied the motion, ruling that comparative data on other employees may well be relevant in a discrimination case and that the co-worker privacy issue was without merit. ***----- In the Matter of Fred Meyer, Inc., 12 BOLI 47, 51 (1993).***

❑ Respondent agreed to allow the agency to inspect certain documents described in the agency's subpoena *duces tecum* after respondent's motion to quash the subpoena was denied. ***----- In the Matter of Oregon State Correctional Institution, 9 BOLI 7, 9 (1990).***

❑ Respondent in a disability case moved for postponement based on complainant's untimely medical releases that delayed the submission of medical records under subpoena. The hearings referee granted a postponement and ruled that, in the event of further

applications for postponement, the participants would have to appear before the hearings referee for a presentation on the record of responsibility and reasons for further delay. ***----- In the Matter of Casa Toltec, 8 BOLI 149, 153 (1989).***

❑ In a disability case, respondent moved that the hearings referee issue a subpoena *duces tecum* to complainant requiring her to appear for deposition and to produce certain documents because complainant had refused to accept service and to sign a release for medical records. Relying on an affidavit of respondent's counsel, the agency's response, the Oregon APA, the A.G.'s Model Rules, the Oregon Rules of Civil Procedure, and the Oregon Rules of Evidence regarding privilege, the hearings referee granted the motion and issued a subpoena for deposition and production of documents to complainant. The hearings referee attached a copy of the forum's rulings, some of which were limiting respondent protective, on the items listed in respondents' motion for production of documents. The ruling also provided that the agency would be precluded from offering evidence at hearing regarding any items that complainant refused to provide. ***----- In the Matter of Casa Toltec, 8 BOLI 149, 152-53 (1989).***

❑ When the agency objected at hearing to respondent's submission of purported time records for claimant because those records had been requested during the investigation and by subpoena *duces tecum* prior to the hearing and had not been disclosed and respondent made no effort to comply with the subpoena, the hearings referee did not receive the records. ***----- In the Matter of Dan's Ukiah Service, 8 BOLI 96, 98 (1989).***

❑ The forum granted respondent's request for a subpoena to have complainant appear with documents from the agency file, but production was limited to those not protected by the confidentiality provisions of ORS 192.500(1)(h) and OAR 839-03-080(1). ***----- In the Matter of Southern Electrical and Pipefitting Corporation, 3 BOLI 254, 255 (1983).***

> [ED: But see *Ogden v. Bureau of Labor*, 68 Or App 235, 682 P2d 802 (1984), affirmed in part, reversed in part, 299 Or 98, 699 P2d 189 (1985).

❑ When counsel for the agency subpoenaed documents from respondent and respondent filed a motion to quash based on the time and expense that would be needed to comply, the forum reserved ruling on the subpoena until the hearing so that counsel for the agency could determine if the information was necessary. At that time, counsel determined it was not necessary and withdrew the subpoena. ***----- In the Matter of PAPCO, Inc., 3 BOLI 243, 245 (1983).***

❑ Due to the short time before hearing, the forum made an oral ruling granting respondent's request for a subpoena requiring the attendance of a complainant. ***----- In the Matter of PAPCO, Inc., 3 BOLI 243, 244 (1983).***

19.9 --- Case Summaries

❑ At the outset of hearing, respondent moved to add the exhibits originally attached to R-19, the agency's investigative report submitted with respondent's case summary, as exhibit R-20. Respondent's counsel represented that the added documents had been provided to respondent by the agency. The agency did not object to adding R-20 to respondent's case summary, reserving the right to object to the admission of the documents. The ALJ also ruled that if respondent wanted to question the author of the investigative report about the documents respondent was responsible for providing her with copies of those documents. ***----- In the Matter of Labor Ready Northwest, Inc., 27 BOLI 83, 91 (2005).***

> Appeal pending.

❑ Six days before the hearing, respondent's counsel filed a letter stating that Tim Adams, respondent's general counsel, who was listed by respondent as a witness on respondent's case summary, was unable to attend the hearing and that respondent would be represented at the hearing by "Corporate Counsel Aaron Roblan." The letter also stated that it was respondent's intent to have Roblan testify in place of Adams. At the outset of hearing, respondent moved to substitute Roblan's name for that of Adams as a witness in respondent's case summary. The ALJ granted respondent's motion, on the condition that Adams would not be allowed to testify at the hearing. Respondent did not subsequently call Adams as a witness at the hearing. ***----- In the Matter of Labor Ready Northwest, Inc., 27 BOLI 83, 91 (2005).***

> Appeal pending.

❑ When the ALJ ordered additional discovery two weeks before the date set for hearing, the ALJ also ordered that both sides could submit addendums to their case summaries related to responses to interrogatories or any additional evidence provided by the agency to respondent as a result of the ALJ's discovery order. ***----- In the Matter of Logan International, Ltd., 26 BOLI 254, 257-58 (2005).***

❑ After the agency's opening statement, respondent stated that he wanted to call the agency case presenter as a witness. The ALJ denied the motion on the basis that respondents had not submitted a case summary. ***----- In the Matter of Orion Driftboat and Watercraft Company, LLC, 26 BOLI 137, 142 (2005).***

❑ At the end of the agency's case in chief, the agency asked to have respondent testify as a witness. Respondent objected and the ALJ sustained respondent's objection on the basis that the agency had not listed respondent as a witness on its case summary. ***----- In the Matter of Orion Driftboat and Watercraft Company, LLC, 26 BOLI 137, 142 (2005).***

❑ Respondent moved for sanctions against the agency based on respondent's perception that the agency had not timely provided respondent with its case summary. On the same date, the ALJ conducted a pre-hearing conference with respondent's counsel and the agency case presenter to address respondent's motion. At the conclusion of the conference, the ALJ found the facts regarding the case summary receipt dates did not warrant sanctions against the agency and denied respondent's motion. The ALJ further found that due to the imminence of the hearing and the delay respondent's

counsel experienced in receiving the agency's case summary, counsel's case preparation was impeded. After the pre-hearing conference, the ALJ issued an interim order postponing the hearing date for one day "to afford Respondent equal preparation time." ***----- In the Matter of Southern Oregon Subway, Inc., 25 BOLI 218, 221 (2004).***

❑ The agency moved for a discovery order and respondent was ordered to produce documents requested in the agency's motion. Respondent produced no documents in response to the discovery order and did not file a case summary because he perceived the case would settle before hearing and because he had attached some of the documents sought by the agency to his original answer. During the hearing, respondent offered seven exhibits that the agency objected to on the grounds that the exhibits all contained information that should have been included in respondent's case summary and that was also subject to the forum's discovery order. The ALJ sustained the agency's objection and did not admit respondent's exhibits. The ALJ allowed respondent to make an offer of proof concerning each exhibit. During the hearing, the Agency moved that respondent's testimony concerning the specific contents of the seven exhibits be disregarded as an appropriate sanction for respondent's failure to submit a case summary or comply with the ALJ's discovery order. The ALJ granted the agency's motion, and considered respondent's testimony with regard to those exhibits solely as an offer of proof. ***----- In the Matter of Adesina Adeniji, 25 BOLI 162, 164-65 (2004)***.

❑ In a wage claim case, respondent did not submit a case summary. During the hearing, respondent offered three exhibits into evidence consisting of a purchase order showing the trade-in value for a 1972 Chevrolet Caprice, respondent's time clock, and a blank timecard used in respondent's time clock. The agency objected on the basis that they should have been and were not provided as part of respondent's case summary, and the ALJ sustained the agency's objection and did not receive these three exhibits. ***----- In the Matter of William Presley, 25 BOLI 56, 59 (2004).***

> Affirmed, *Presley v. Bureau of Labor and Industries,* 200 Or App 113, 112 P3d 485 (2005).

❑ On the first day of hearing, respondent asked when his witnesses would be able to testify and the agency case presenter stated that she would object to all respondent's witnesses except for respondent, based on respondent's failure to submit a case summary and the agency's resultant lack of opportunity to interview any of respondent's witnesses. After discussion, the agency case presenter agreed that the basis for her objection would be cured if she had the opportunity to interview respondent's witnesses before they testified. The ALJ ruled that the witnesses listed in a witness list provided by respondent in response to a discovery order would be allowed to testify on the condition that respondent produced those witnesses for interviews with the agency case presenter by noon the second day of hearing. ***----- In the Matter of William Presley, 25 BOLI 56, 59 (2004).***

> Affirmed, *Presley v. Bureau of Labor and Industries,* 200 Or App 113, 112 P3d 485 (2005).

❑ When respondent objected to the agency's case summary, contending it had received the case summary the day before the hearing and was prejudiced by the agency's failure to provide it in a timely manner, the forum admitted the case summary when it determined (1) that the envelope containing the case summary bore a postmark that established it was timely filed and (2) an agency employee responsible for internal controls regarding the agency's mailroom procedures testified that the envelope was in fact postmarked and placed in a US Postal Service receptacle in the normal course of business. ***----- In the Matter of Entrada Lodge, Inc., amended final order on remand, 24 BOLI 125, 129 (2003).***

> Reversed and remanded for reconsideration, *Entrada Lodge, Inc. v. Bureau of Labor and Industries*, 184 Or App 315, 56 P3d 444 (2002).

❑ The forum granted the agency's motion to add Robert Blair as a respondent and issued an amended interim order for case summaries that was identical to the first order except that the amended order was also sent to Robert Blair. ***----- In the Matter of Barbara Blair, 24 BOLI 89, 91 (2002).***

❑ When, prior to opening statements, the agency gave the forum a supplemental case summary and respondent did not object, the forum received it as an administrative exhibit. ***----- In the Matter NES Companies LP, 24 BOLI 68, 70 (2002).***

❑ When respondent did not file a case summary listing five witnesses it sought to call during the hearing and the agency had no prior notice of its intent to call the witnesses, the forum found the agency would be prejudiced based on its inability to prepare to meet the witnesses' testimony and that a continuance would not cure the problem. The forum found that respondent's reliance on someone other than its authorized representative to file the case summary was not a satisfactory reason for not filing a case summary and that the agency would not receive a fair hearing if respondents were allowed to call the witnesses. The forum ruled that respondent would only be allowed to call the authorized representative as a witness but allowed respondent to make an offer of proof stating the substance of the testimony of each witness. ***----- In the Matter of The Alphabet House, 24 BOLI 262, 268-69 (2003).***

❑ Respondent filed a case summary due on February 8, 2002, 40 minutes before the time set for hearing on February 20, 2002. Respondent's case summary listed eight witnesses that respondent intended to call. At the same time, respondent attached a number of documents as exhibits that were responsive to the ALJ's February 6, 2002, discovery order requiring that the documents be produced by February 11, 2002. Respondent stated at hearing that his attorney had all his paperwork and that he was unable to provide these documents sooner because he had no access to his paperwork until February 17, 2002, when he picked them up at the attorney's house. During the presentation of his case, respondent sought to call the eight witnesses listed in his

case summary to testify on his behalf. The agency objected on the basis of untimely submission of respondent's case summary and the forum sustained the agency's objection. Respondent also attempted to offer all of the documents accompanying his case summary into evidence. The agency objected on the basis of timeliness and the forum sustained the agency's objection on the basis that respondent had not provided a satisfactory reason for filing the case summary late and because excluding the evidence would not violate the ALJ's duty to conduct a full and fair inquiry. ***----- In the Matter of Heiko Thanheiser, 23 BOLI 68, 71 (2002).***

❑ At the outset of the hearing, respondent stated that he wanted to call as witnesses two individuals who had accompanied him to the hearing. Respondent stated that one would testify as to his character, and the other would testify that he did not open his mail for a long time because he had a "breakdown." The agency objected to the testimony of both individuals on the grounds of relevancy and that respondent had not filed a case summary naming them as witnesses. The ALJ sustained the agency's objection. ***----- In the Matter of Sreedhar Thakkun, 22 BOLI 108, 111 (2001).***

❑ During the presentation of his case, respondent attempted to call a telephonic witness to testify that he had actually performed the work that the agency alleged claimant had performed and was not paid for. Respondent represented that the witness had done the work after claimant left respondent's employment. The agency objected on the grounds that respondent had not filed a case summary naming the witness and the agency would be unduly prejudiced if the witness was allowed to testify. The ALJ determined that respondent did not have a satisfactory reason for not filing a case summary, that the agency would be unduly prejudiced by allowing the witness to testify, and that excluding the witness's testimony would not violate the ALJ's responsibility to conduct a "full and fair" inquiry. ***----- In the Matter of Sreedhar Thakkun, 22 BOLI 108, 111, 117 (2001).***

❑ During the hearing, respondent sought to introduce testimony of its secretary, Guy Bowie. The agency objected to that testimony on the grounds that respondent had not filed a case summary, that the agency did not know that Bowie had knowledge of any facts relevant to the case, and that the agency, therefore, would be prejudiced if Bowie were allowed to testify to facts that the agency would not be prepared to rebut. The ALJ sustained the agency's objection and did not allow Bowie to testify. ***----- In the Matter of Green Planet Landscaping, Inc., 21 BOLI 130, 133 (200)***.

❑ Respondent sought to call her husband as a witness and the agency objected on the grounds that respondent had not submitted a case summary listing witnesses she intended to call, and that the agency would be prejudiced by its inability to prepare for cross-examination of him. Respondent was unable to articulate a satisfactory reason for not submitting a case summary. After determining that excluding the husband's testimony would not violate the duty to conduct a full and fair inquiry under ORS 183.415(10), the ALJ excluded him from testifying. ***----- In the Matter of Martha Morrison, 20 BOLI 275, 281 (2000)***.

❑ After the agency presented its case, respondent sought to introduce the evidence of Ryder, respondent's president, and respondent's current office manager, Sandy. Respondent's counsel acknowledged that he had received the ALJ's case summary order, which required him to identify witnesses and documentary evidence he planned to introduce at hearing, and that he had not filed a case summary. Respondent's counsel did not offer a satisfactory reason for having failed to file the case summary. The ALJ refused to allow respondent to call Sandy as a witness because respondent's failure to file a case summary meant that the agency had no notice that Sandy might testify and no opportunity to prepare to meet her testimony. The ALJ did allow respondent to call Ryder as a witness because: the forum has permitted individual respondents to testify on their own behalf even when they were not identified as witnesses in a case summary; Ryder was the president of respondent, a small corporation with only two shareholders; Ryder was in charge of respondent's operations; and the agency suffered only minimal prejudice, as Ryder's involvement in the events at issue and his desire to testify could not have come as a surprise. ***---- In the Matter of Contractor's Plumbing Service, Inc., 20 BOLI 257, 260 (2000)***.

❑ Respondent sought to introduce certain documents even though it had not filed a case summary. The agency case presenter had received copies of those documents prior to hearing, but had not chosen to include them in her own case summary and did not have them with her at hearing. Respondent also did not have the documents and asked the ALJ to leave the record open so the agency's copies of the documents could be entered into evidence after the hearing. The ALJ denied respondent's request because introducing the documents after the end of the hearing would deprive both the agency and the ALJ of the opportunity to question witnesses about the documents. ***---- In the Matter of Contractor's Plumbing Service, Inc., 20 BOLI 257, 260 (2000)***.

❑ The ALJ refused to admit as evidence two documents offered by respondent at hearing, when respondent had not provided the documents as part of a case summary, did not articulate a satisfactory reason for not having provided the documents with a case summary, and excluding the documents – which did not contain material evidence – would not violate the ALJ's duty to conduct a full and fair inquiry. The ALJ did allow respondent to submit the documents and describe their contents as an offer of proof. ***----- In the Matter of Robert N. Brown, 20 BOLI 157, 159-60 (2000)***.

❑ During discussion of pre-hearing matters, the agency served respondent with a subpoena and witness fees. On respondent's motion, the forum quashed the subpoena on the ground that the agency had not identified respondent as a witness in its case summary. ***---- In the Matter of Barbara Coleman, 19 BOLI 230, 244 (2000)***.

❑ The ALJ granted the agency's unopposed motion

for an extension of time in which to file its case summary. ***----- In the Matter of ARG Enterprises, Inc., 19 BOLI 116, 118 (2000)***.

❑ The agency and respondent were ordered to submit case summaries. When respondent did not submit a case summary to the hearings unit, but (1) verbally informed the agency case presenter, prior to the hearing, of the names two witnesses she intended to call as witnesses, and (2) sent a letter to the agency case presenter, which the case presenter received the day before hearing, naming three potential witnesses, the forum treated respondent's letter as a belated case summary and received a copy of it into evidence as an administrative exhibit. ***----- In the Matter of Norma Amezola, 18 BOLI 209, 211 (1999)***.

❑ When respondent offered as an exhibit the written statement of a witness that had not been submitted with a case summary, the agency had no notice that respondent intended to rely on any sort of statement from the witness until it received a late case summary from respondent the day before the hearing, respondent did not offer a satisfactory reason for having failed to timely identify the author as a witness or as the author of a written statement to be offered into evidence, and the ALJ concluded from respondent's offer of proof that she would not violate her duty to conduct a full and fair inquiry by excluding the proffered exhibit, the forum excluded the statement from evidence. ***----- In the Matter of Norma Amezola, 18 BOLI 209, 212 (1999)***.

❑ The forum declined to reopen the record to allow respondent to produce new evidence identified for the first time in respondent's exceptions when respondent failed to submit a case summary and did not give a reason why he could not have presented that evidence at hearing. ***----- In the Matter of Diran Barber, 16 BOLI 190, 199 (1997).***

❑ The forum allowed the participants to submit supplements to their case summaries. ***----- In the Matter of Vision Graphics and Publishing, Inc., 16 BOLI 21, 30 (1997).***

❑ When respondent did not respond to the agency's informal efforts to obtain discovery, did not file a case summary pursuant to the hearings referee's discovery order, and did not respond to a specific discovery order for employment records, and when respondent offered documents at hearing that he claimed were business records, the hearings referee granted the agency's motion to exclude the documents from the record because respondent did not offer a satisfactory reason for having failed to provide the documents as ordered. The hearings referee found that excluding the documents would not violate the duty to conduct a full and fair hearing. ***----- In the Matter of Martin's Mercantile, 12 BOLI 262, 264-65 (1994).***

❑ When respondent's case summary included issues not encompassed by respondent's answer, the agency objected to any evidence bearing on the issues and defenses raised for the first time in the case summary as being untimely. Respondent moved to amend the answer to conform to the proffered evidence and defenses and the forum allowed the amendment of the answer when the agency did not cite any prejudice to its case. ***----- In the Matter of William Kirby, 9 BOLI 258, 259-60 (1991).***

❑ When the agency objected to two documents offered by respondent on the grounds that neither document had been included with respondent's case summary and neither was submitted during the investigation when the investigator asked for documents, and the agency claimed to be prejudiced, the hearings referee received the documents, ruling that their relevance outweighed any claimed prejudice. ***----- In the Matter of German Auto Parts, Inc., 9 BOLI 110, 112 (1990).***

❑ A case summary was timely filed when it was received on the next business day after its due date, which was a holiday. ***----- In the Matter of Strategic Investments of Oregon, Inc., 8 BOLI 227, 229 (1990).***

❑ Respondent moved to exclude a portion of the case summary on the grounds that the preparer of the summary had no personal knowledge of facts contained in the agency's file, that the document reflected multiple hearsay, and the summary had no relevance as substantive evidence. The forum denied the motion because: (1) based on the provisions of ORS 183.450(1) and OAR 839-30-120 regarding the admissibility of evidence, the case summary was admissible as evidence; and (2) the Department of Justice had advised the forum by letter that summary evidence, orally or written, is generally admissible in contested case administrative proceedings and that the hearsay nature of such a summary is not a basis for its exclusion. ***----- In the Matter of United Grocers, Inc., 7 BOLI 1, 3 (1987).***

19.10 --- Medical Records (*see also* 14.8)

❑ At the conclusion of hearing, the ALJ ordered the agency to submit complainant's medical and marriage counseling records for the ALJ's *in camera* inspection. The agency timely submitted the medical and marriage counseling records. After *in camera* review, the ALJ issued a protective order governing the classification, acquisition, and use of the records and subsequently released all of them to respondent. ***----- In the Matter of Stimson Lumber Company, 26 BOLI 158, 170 (2005).***

❑ The agency moved for a protective order in response to respondent's discovery request regarding complainant's medical and psychological records and also requested that the ALJ conduct an *in camera* inspection of the records before releasing the documents to respondent. In response, the ALJ issued a protective order addressing the classification, acquisition, and use of medical and psychological records produced through discovery during the course of the hearing, then release to respondent unredacted copies of all medical records submitted by the agency for the ALJ's *in camera* review. ***----- In the Matter of Southern Oregon Subway, Inc., 25 BOLI 218, 220 (2004).***

❑ At hearing, and prior to opening statements, respondent moved for a discovery order requiring the agency to produce complainant's medical records that the agency had not yet provided, consisting of handwritten notes from her counselor. The agency objected on the basis of timeliness and privilege.

Respondent indicated the documents were sought in order to determine if they revealed other contemporaneous stresses in complainant's life that might affect her potential mental suffering damages. Respondent and the agency agreed that respondent made an informal discovery request after complainant's deposition, that the agency had obtained the requested documents, and that most of them had already been provided to respondent. The ALJ granted respondent's motion, ruling that under the circumstances, the requirement of a "full and fair inquiry" under ORS 183.415 was controlling. The ALJ also noted that any claim of privilege complainant may have had under OEC 504 (Psychotherapist-patient privilege) or OEC 504-4 (Clinical social worker-client privilege) was waived by the agency's claim for mental suffering on her behalf. The ALJ ruled that he would conduct an *in camera* review of the sought-after documents at the lunch break, and issue a protective order covering any documents that were released to respondent. The ALJ ruled he would only release records created within a two year period prior to complainant's discharge that contained information showing another potential cause for complainant's post-discharge mental suffering. After *in camera* review, the ALJ released several pages of complainant's medical records, placed the remainder under seal, and issued a protective order covering the released documents. ***----- In the Matter of Roseburg Forest Products Co., 20 BOLI 8, 13-14 (2000)***.

❑ In a civil rights case in which the agency alleged complainant experienced mental suffering as a result of her discharge, the forum granted respondents' motion for a discovery order requiring the agency and complainant to produce "copies of all medical reports, records and writings in the possession, control or within the ability of the Bureau of Labor and Industries or complainant to obtain" regarding complainant's alleged mental suffering. ***----- In the Matter of Mark & Linda McClaskey, 17 BOLI 254, 255-56 (1998)***.

❑ In a civil rights case in which the agency alleged complainant was discharged due to her pregnancy, the forum granted respondents' motion for a discovery order requiring the agency and complainant to produce "copies of all medical reports, records and writings in the possession, control or within the ability of the Bureau of Labor and Industries or complainant to obtain" regarding complainant's alleged ability to work until January 1, 1997, and her physical condition during her pregnancy in the four and one-half months leading up to her discharge. ***----- In the Matter of Mark & Linda McClaskey, 17 BOLI 254, 255-56 (1998)***.

❑ When respondent moved for a blanket discovery order allowing counsel to request unspecified documents from complainant, the agency case presenter, or anyone treating complainant for post-traumatic stress disorder, the ALJ required complainant to provide records of anyone diagnosing or treating complainant for post-traumatic stress disorder and records of anyone treating complainant for the mental suffering alleged for an *in camera* inspection. ***----- In the Matter of Parker-Hannifin Corporation, 15 BOLI 245, 247-48 (1997).***

❑ Respondent in a disability case moved for postponement based on complainant's untimely medical releases that delayed the submission of medical records under subpoena. The hearings referee granted a postponement and ruled that, in the event of further applications for postponement, the participants would have to appear before the hearings referee for a presentation on the record of responsibility and reasons for further delay. ***----- In the Matter of Casa Toltec, 8 BOLI 149, 153 (1989).***

❑ In a disability case, respondent moved that the hearings referee issue a subpoena *duces tecum* to complainant requiring her to appear for deposition and to produce certain documents because complainant had refused to accept service and to sign a release for medical records. Relying on an affidavit of respondent's counsel, the agency's response, the Oregon APA, the A.G.'s Model Rules, the Oregon Rules of Civil Procedure, and the Oregon Rules of Evidence regarding privilege, the hearings referee granted the motion and issued a subpoena for deposition and production of documents to complainant. The hearings referee attached a copy of the forum's rulings, some of which were limiting respondent protective, on the items listed in respondents' motion for production of documents. The ruling also provided that the agency would be precluded from offering evidence at hearing regarding any items that complainant refused to provide. ***----- In the Matter of Casa Toltec, 8 BOLI 149, 152-53 (1989).***

20.0 EVIDENCE

20.1 --- In General

❑ While the forum may draw on the Oregon Evidence Code for guidance in a matter not addressed in this forum's contested case hearing rules, these proceedings are not governed by the Oregon Evidence Code. ***----- In the Matter of Gordy's Truck Stop, LLC, 28 BOLI 200, 215 (2007).***

❑ At hearing, the agency moved to substitute substituted two-sided copies of four exhibits for the agency's original exhibits submitted with its case summary because the back page had not been copied on the original exhibits. Respondent did not object and the ALJ granted the agency's motion. ***----- In the Matter of Basilio Piatkoff, 28 BOLI 133, 137 (2007).***

❑ During the hearing, the ALJ requested and received information related to unsolicited bulk e-mail from America Online by facsimile transmission and provided the participants with copies of the documents provided by America Online. ***----- In the Matter of Robb Wochnick, 25 BOLI 265, 268 (2004).***

❑ The forum is not required to explain why it chooses which evidence to believe; likewise, if from a basic finding of fact the forum could rationally infer a further fact, the forum need not explain the rationale by which the inferred fact is reached. ***----- In the Matter of Scott Miller, 23 BOLI 243, 264-65 (2002).***

❑ Respondent's failure to produce records required by statute or to otherwise provide any credible evidence of the number of hours worked by the claimants was considered because it was an aid to the forum in evaluating the credibility of the claimants. ***----- In the Matter of Francisco Cisneros, 21 BOLI 190, 216 (2001).***

Affirmed without opinion, *Cisneros v. Bureau of Labor and industries,* 187 Or App 114, 66 P3d 1030 (2003).

❑ In a wage claim case, respondent filed exceptions asking the forum to consider her defense of financial inability to pay wages at the time they accrued when some evidence came in at hearing concerning respondent's financial difficulties, but when respondent did not amend her answer to conform to this evidence. The forum rejected the exceptions because the agency had no opportunity to object, to seek discovery, or to present evidence to meet this new issue. ***----- In the Matter of Graciela Vargas, 16 BOLI 246, 257 (1998).***

❑ When there is conflicting evidence in the record, the forum need not discuss why it chose which evidence to believe. Likewise, if the forum could rationally infer a further fact from a basic finding, the forum need not explain the rationale by which the inferred fact was reached. ***----- In the Matter of Scott Nelson, 15 BOLI 168, 169 (1996).***

❑ The forum may draw on the Oregon Evidence Code for guidance in matters not addressed in the forum's administrative rules. ***----- In the Matter of Dan Cyr Enterprises, 11 BOLI 172, 179 (1993).*** *See also In the Matter of Marvin Clancy, 11 BOLI 205, 214 (1993); In the Matter of Harry Markwell, 8 BOLI 80, 91(1989).*

❑ The rules allow issuance of an administrative determination based on witness statements and other relevant evidence. The evidence at hearing need not be exactly that used in the investigative finding, number are the specific charges limited to the original complaint, so long as they are reasonably related to the type of discrimination involved. ***----- In the Matter of Baker Truck Corral, 8 BOLI 118, 136 (1989).***

❑ In a default case, when respondent raised new facts in her exceptions to the proposed order that were not part of the hearing record, the commissioner held that respondent lost her opportunity to present evidence at hearing when she was held in default and did not consider any facts asserted by respondent in her exceptions that were not presented at hearing. ***----- In the Matter of Peggy's Café, 7 BOLI 281, 288 (1989).***

❑ The forum may draw on the Oregon Rules of Civil Procedure or the Oregon Evidence Code for guidance in matters not addressed in the forum's administrative rules, but the proceedings are not governed by the rules of civil proceeding or the evidence code. ***----- In the Matter of United Grocers, Inc., 7 BOLI 1, 2 (1987).***

❑ The hearings referee asked the agency to submit the claimant's wage claim and assignment of wages to the forum, and the agency did so after hearing. The documents were admitted as exhibits. ***----- In the Matter of Cheryl Miller, 5 BOLI 175, 176 (1986).***

❑ The forum admitted the determination of the Oregon Workers' Compensation Board and considered it as evidence. ***----- In the Matter of KBOY Radio Station, 5 BOLI 94, 96 (1986).***

❑ In an age discrimination case, respondent argued that the agency's counsel should have disclosed the existence of a witness whose testimony would be exculpatory to the hearings referee. The commissioner determined that no compelling authority was cited in support of the argument that an obligation exists to disclose possible exculpatory testimony in a civil administrative proceeding, despite the fact that the witness had apparently told the agency's counsel that he had been complainant's supervisor and had laid off complainant without knowing complainant's age. ***----- In the Matter of Treplex, Inc., 2 BOLI 221, 224-25 (1982).***

❑ At the request of the parties, the hearings referee conducted an onsite inspection of the employment area involved in the case and made findings of fact from the inspection. ***----- In the Matter of City/County Computer Center, 1 BOLI 197, 199 (1979).***

❑ In determining that complainant's Ceylonese accent did not adversely affect his ability to understand and be understood in English in a job involving telephone price quotation and taking orders as significant duties, the hearings referee's reliance upon his own auditory observation as well as on the evidence of a previous employer and the absence of customer complaints was adopted by the commissioner in refuting respondent's assertion that complainant's foreign accent would be offensive to the American public. ***----- In the Matter of Midas Muffler Shops, 1 BOLI 111, 117 (1976).***

20.2 --- Admissibility

❑ The agency offered an exhibit consisting of a printout from the Oregon corporations division reflecting respondents' business status that was obtained by the agency case presenter through the internet. The agency did not lay a foundation for its introduction through a witness and it was not a self-authenticating document. Respondents objected and the ALJ stated he would rule on its admissibility in the proposed order. In the proposed order, the ALJ admitted the printout, ruling that while not every document printed out from the internet can be considered reliable as to its ultimate source and the accuracy of its information, information obtained from the State of Oregon's official website is "evidence of the type commonly relied upon by reasonably prudent persons in the conduct of their serious affairs." ***----- In the Matter of Orion Driftboat and Watercraft Company, LLC, 26 BOLI 137, 142-43, 149 (2005).***

❑ When respondent did not deny any of the agency's allegations in its answer, all of the agency's allegations were deemed admitted. ***----- In the Matter of Cedar Landscape, Inc., 23 BOLI 287, 293 (2002).***

❑ The forum may not consider new facts presented in exceptions in preparing a final order. ***----- In the Matter of Scott Miller, 23 BOLI 243, 263 (2002).***

❑ The agency offered two exhibits as rebuttal evidence, both of which appeared to be job descriptions similar in form and substance to job descriptions already offered into evidence by respondent. Respondent objected to the admission of both documents. The ALJ did not receive one exhibit because it did not rebut any evidence on the record. The ALJ received the second exhibit because differences between it and respondent's job descriptions raised the question of which was claimant's actual job description***. ----- In the Matter of Lane-Douglas Construction, Inc., 21 BOLI 36, 39-40 (2000).***

❑ After hearing respondent offered affidavits of eight persons, four of who had testified at hearing. The agency objected to the admission of the affidavits. The ALJ did not receive into evidence the affidavits of persons who were not called as witnesses at hearing because the agency had no opportunity to cross-examine them and did not receive the affidavit of witnesses who did testify at hearing because they were untimely. None of the affidavits were considered in the formulation of the final order. ***----- In the Matter of Thomas Harrington, 15 BOLI 276, 278 (1997).***

❑ The agency objected to the presentation of any evidence by respondents purporting to show that any other party other than respondents owned the business in question during the period encompassed by the claimants' wage claims, claiming prejudice based on inability to prepare due to lack of prior notice of this affirmative defense. When respondents' counsel confirmed he had known of this evidence for the prior three months, the ALJ granted the agency's objection. ***----- In the Matter of Geoffroy Enterprises, Inc., 15 BOLI 148, 151-52 (1996).***

❑ The standard used by this forum in determining whether or not to admit evidence is whether it is "of the type commonly relied upon by reasonably prudent persons in the conduct of their serious affairs." ***----- In the Matter of Anastas Sharabarin, 14 BOLI 48, 53 (1995).***

❑ When respondent's appointment book was a more reliable record of claimant's hours worked than her memory and witnesses commented on the book, the forum properly admitted it even though respondent did not formally offer it into evidence. ***----- In the Matter of Mary Stewart-Davis, 13 BOLI 188, 199-200 (1994).***

> Affirmed without opinion, *Stewart-Davis v. Bureau of Labor and Industries,* 136 Or App 212, 901 P2d 268 (1995).

❑ When the agency requested that the forum admit into the record a tape recording of earlier proceedings in which a previous enforcement action was resolved, the hearings referee ordered the tape transcribed and admitted the original transcript into the record. ***----- In the Matter of Robert F. Gonzalez, 12 BOLI 181, 183-84(1994).***

❑ When a respondent defaulted by failing to attend the hearing and the agency was unable to locate witnesses it had interviewed during its investigation, the hearings referee admitted investigator's testimony and written narratives of the witness interviews. ***----- In the Matter of Rare Construction, Inc., 12 BOLI 1, 3 (1993).***

❑ Respondent sought to introduce evidence purporting to outline settlement terms discussed during the investigation for the purpose of showing that mental suffering damages claimed in the specific charges were not previously claimed by the agency. The forum refused to admit the evidence, ruling that specific settlement offers and counteroffers were not admissible regarding the merits of a claim. ***----- In the Matter of Lebanon Public Schools, 11 BOLI 294, 295 (1993).***

> Affirmed without opinion, *Brigham v. Bureau of Labor and Industries,* 129 Or App 304, 79 P2d 245 (1994).

❑ Prior to hearing, the hearings referee ruled that respondent, with the proper foundation, might offer a videotape of the work site involved in the matter. ***----- In the Matter of Snyder Roofing & Sheet Metal, Inc., 11 BOLI 61, 63 (1992).***

❑ When the inquiry involves the employer's treatment of an employee based on the employee's protected class, comparative evidence bearing on the employer's treatment of other employees of the same protected class, whether direct or circumstantial, is both relevant and admissible. ***----- In the Matter of Jerome Dusenberry, 9 BOLI 173, 175 (1991).*** *See also In the Matter of Dunkin' Donuts, Inc., 8 BOLI 175, 176-77, 179 (1989).*

❑ Respondent introduced a document from the Employment Division listing unemployment benefits paid to complainant for the purpose of offsetting back pay. The agency objected on the basis that the forum did not recognize such an offset. The hearings referee admitted the document for the limited purpose of showing a diligent search for alternate employment following complainant's discharge, and denied the offset. ***----- In the Matter of German Auto Parts, Inc., 9 BOLI 110, 111, 129-31(1990).***

> Affirmed, *German Auto Parts, Inc. v. Bureau of Labor and Industries*, 111 Or App 522, 826 P2d 1026 (1992).

❑ When the agency objected to two documents offered by respondent on the grounds that neither document had been included with respondent's case summary and neither was submitted during the investigation when the investigator asked for documents, and the agency claimed to be prejudiced, the hearings referee received the documents, ruling that their relevance outweighed any claimed prejudice. ***----- In the Matter of German Auto Parts, Inc., 9 BOLI 110, 112 (1990).***

> Affirmed, *German Auto Parts, Inc. v. Bureau of Labor and Industries*, 111 Or App 522, 826 P2d 1026 (1992).

❑ Respondent offered evidence about complainant's claim for unemployment benefits in an attempt to offset a portion those benefits because they were unlawfully obtained and the agency objected. The forum found that eligibility for such benefits was a determination made by the Employment Division under its rules, and that determination was not subject to collateral attack in this forum, that a proper showing of ineligibility for those benefits could be made in this forum only by evidence of a final determination by the Employment Division to that effect, and that respondent's avenue for obtaining such a determination was with the Employment Division, not with the commissioner. ***----- In the Matter of Russ Berrie & Co., Inc., 9 BOLI 49, 50 (1990).***

❑ Investigative interview statements by respondent's agents, even if "double hearsay," are admissible in an administrative hearing. Statements by a party's agents that are against the party's interest are admissible in other forums as well. The reliability of and weight to be given to such testimony is within the purview of the trier of fact. ***----- In the Matter of Baker Truck Corral, 8 BOLI 118, 135 (1989).***

❑ When a document was offered into evidence and the author was not listed as a witness for the agency, the forum held that the document was admissible and appropriate weight would be given to it, citing OAR 839-30-120 regarding admissible evidence. ***----- In the Matter of United Grocers, Inc., 7 BOLI 1, 3 (1987).***

❑ The agency offered handwritten and formal typed summaries of witness statements that were created by an agency investigator who was deceased at the time of hearing. The forum admitted the notes pursuant to OAR 839-30-120, finding that the notes in question were obtained from the agency file, an official file of the State of Oregon, maintained in the ordinary course of business. The summaries were given appropriate weight. ***----- In the Matter of United Grocers, Inc., 7 BOLI 1, 3-4 (1987).***

❑ Respondent moved to exclude a portion of the case summary on the grounds that the preparer of the summary had no personal knowledge of facts contained in the agency's file, that the document reflected multiple hearsay, and the summary had no relevance as substantive evidence. The forum denied the motion because: (1) based on the provisions of ORS 183.450(1) and OAR 839-30-120 regarding the admissibility of evidence, the case summary was admissible as evidence; and (2) the Department of Justice had advised the forum by letter that summary evidence, orally or written, is generally admissible in contested case administrative proceedings and that the hearsay nature of such a summary is not a basis for its exclusion. ***----- In the Matter of United Grocers, Inc., 7 BOLI 1, 3 (1987).***

❑ The forum admitted legislative history of ORS 659.029 over the agency's objection because it was relevant to the legislative intent. ***----- In the Matter of Portland Electric & Plumbing Co., 4 BOLI 82, 83 (1983).***

❑ When respondent refused to allow the agency investigator to tape record her interview with respondent's human resources manager and the investigator testified at hearing concerning that interview, the forum accepted the written record of the investigator's interview, accompanied by the investigator's affidavit, into evidence, but did not accept the investigator's summary of conclusions, as it is the responsibility of the forum to reach its own conclusions. ***----- In the Matter of West Coast Grocery Company, 4 BOLI 47, 62-63 (1983).***

❑ Respondent submitted a sworn statement of complainant's supervisor after the hearing as an addendum to his written argument. The forum did not receive it into evidence because it was improperly introduced. ***----- In the Matter of Lynn Edwards, 3 BOLI 134, 137 (1982).***

❑ During hearing, the agency offered as evidence a deposition of the employer that the agency had taken in preparation for hearing, and respondent objected to its admission. The forum admitted the deposition without limitation because: (1) ORS 45.250(1)(b) states that, at a trial, a motion hearing, or an interlocutory proceeding, a deposition may be used against any party for any purpose; (2) this administrative forum follows the more relaxed and general standard that evidence of a type commonly relief upon by reasonably prudent persons in the conduct of their serious affairs is admissible; and (3) under either the general administrative standard or the specific civil standard, the employer's deposition was admissible. ***----- In the Matter of Godfather's Pizzeria, Inc., 2 BOLI 279, 281 (1982).***

❑ Over respondent's objection that the police officer who created the report was not called to testify, the forum admitted an official police report because it attested on its face to being a contemporaneous and official recording of relevant events perceived by an officer of the Portland Bureau of Police and was therefore admissible under OAR 839-01-035. ***----- In the Matter of Godfather's Pizzeria, Inc., 2 BOLI 279, 299-300 (1982).***

❑ In a civil rights case, when respondent alleged complainant was fired due to his refusal to cut his sideburns, the forum admitted photographs of complainant taken intermittently over the 2½ years prior to his discharge over respondent's objection that the photographs were not taken when complainant was actually at work. ***----- In the Matter of Barker Motors, Inc., 2 BOLI 169, 174-75 (1981).***

❑ Evidence offered regarding conciliation attempts made subsequent to the issuance of the administrative determination was admitted for the limited purpose of showing continuing acts of discrimination. ***----- In the Matter of Marv Tonkin Ford Sales, Inc., 1 BOLI 41, 42 (1976).***

20.3 --- Admissions (*see also* 10.2)

❑ Respondent's statements that he owed two claimants some money did not constitute an admission that he was their employer when he was the manager of the restaurant at which claimant was employed. ***----- In the Matter of Jorge E. Lopez, 28 BOLI 10, 21 (2006).***

❑ The agency alleged that respondent never completed and returned commissioner's 2001 and 2002 wage surveys. Respondent did not deny these allegations in its answer and was held to have admitted the allegations. ***----- In the Matter of Storm King Construction, Inc., 27 BOLI 46, 54 (2005).***

❑ The agency alleged that respondent received the commissioner's wage survey in 2001, 2002, and 2004. Respondent did not deny these allegations in its answer and was held to have admitted the allegations. ***----- In the Matter of Storm King Construction, Inc., 27 BOLI 46, 52 (2005).***

❑ In its response to the agency's motion to amend, respondent, through its president, asserted that claimant was paid $12 per hour for the work he performed. The forum deemed the statement an admission that claimant worked for an agreed upon rate of $12 per hour for the work he performed. ***----- In the Matter of Kilmore Enterprises, 26 BOLI 111,122 (2004).***

❑ The agency alleged that respondent was an employer in 2001, 2002, and 2004. Respondent did not deny this allegation in its answer and in its answer and was held to have admitted the allegations. ***----- In the Matter of Storm King Construction, Inc., 27 BOLI 46,***

52 (2005).

❑ The forum concluded that claimant was owed the wages claimed based on respondent's admission in its answer that it owed claimant the amount sought. ***----- In the Matter of Westland Resources, Inc., 23 BOLI 276, 280 (2002).***

❑ When a wage claimant's testimony and documentary evidence were unreliable and insufficient to determine the amount and extent of work that two wage claimants performed, the forum relied on respondent's admission that claimants performed a specific number of hours to determine the number of hours claimants worked for respondent. ***----- In the Matter of Duane Knowlden, 23 BOLI 56, 65 (2002).*** *See also In the Matter of Usra A. Vargas, 22 BOLI 212, 222 (2001).*

❑ Based on respondent's admission, the forum concluded that respondent had agreed to pay a wage claimant $8 per hour for the first two hours he worked and $10 per hour thereafter. ***----- In the Matter of Usra A. Vargas, 22 BOLI 212, 220 (2001).***

❑ In a prevailing wage rate wage survey case, respondent's failure to deny that it received the 2000 survey forms was held to be an admission that respondent received the forms. ***----- In the Matter of Spot Security, Inc., 22 BOLI 170, 176 (2001).*** *See also In the Matter of WB Painting and Decorating, Inc., 22 BOLI 18, 20 (2001), amended 22 BOLI 27 (2001).*

❑ In a prevailing wage rate wage survey case, respondent's failure to deny that it was an "employer" was held to be an admission that respondent was a "person" for purposes of ORS 279.359. ***----- In the Matter of Spot Security, Inc., 22 BOLI 170, 176 (2001).*** *See also In the Matter of Landco Enterprises, Inc., 22 BOLI 62, 67 (2001).*

❑ The agency moved for a discovery order deeming certain facts as admitted or, in the alternative, prohibiting respondent from introducing evidence contrary those facts, basing its motion on respondent's failure to respond to the agency's previous informal request for admissions or denial of certain facts at issue. Respondent did not respond to the agency's motion, and the forum issued a discovery order requiring respondent to admit or deny those facts no later than the day prior to hearing. When Respondent did not appear at hearing, the ALJ, relying on ORCP 45 for guidance, deemed as admitted the facts for which admission was sought in the agency's motion. ***----- In the Matter of Arthur Lee, 22 BOLI 99, 102-3 (2001).***

❑ The forum relied on ORCP 45 to determine the appropriate sanction for respondent's failure to respond to a request for admissions. ***----- In the Matter of Arthur Lee, 22 BOLI 99, 106 (2001).***

❑ In an action to recover wage security fund payouts, respondent's failure to deny any of the alleged facts in the agency's notice of intent constituted an admission to all of them, including an admission to the validity of the underlying wage claims, and the forum granted summary judgment to the agency for amounts paid out by the fund and a 25% penalty. ***----- In the Matter of Hickox Enterprises, Inc., 22 BOLI 10, 14 (2001).***

❑ When counsel for respondent stated in his opening statement that Philips Products was a division of respondent and no one claimed otherwise, the forum accepted counsel's statement as an admission that Philips Products was a division of respondent. ***----- In the Matter of Tomkins Industries, Inc., 17 BOLI 192, 194 (1998)***.

❑ The forum granted respondent's motion to request admissions from complainant and the agency case presenter. ***----- In the Matter of Parker-Hannifin Corporation, 15 BOLI 245, 247-48 (1997).***

❑ When respondent chose to appear without counsel and to examine and cross-examine witnesses himself and made declarative statements while not under oath, rather than asking questions and despite cautions from the ALJ and objections from the agency, the forum accepted respondent's declarative statements that were to his economic disadvantage as true. ***----- In the Matter of Danny Jones, 15 BOLI 96, 103-04 (1996).***

❑ The forum granted the agency's motion for summary judgment when the respondent farm labor contractor admitted the six violations charged by the agency in his answer and no facts were at issue. ***----- In the Matter of Jefty Bolden, 13 BOLI 292, 299 (1994).***

❑ When a respondent submits an answer to a charging document, the agency need not produce any evidence regarding facts admitted in the respondent's answer. ***----- In the Matter of Mega Marketing, 9 BOLI 133, 137 (1990).***

❑ Respondent's default by virtue of failure to file an answer results in the admission of factual matters alleged in the specific charges and the waiver of any affirmative defenses. Respondent also loses the right to address by any means, including cross-examine, issues raised in the specific charges. ***----- In the Matter of Peggy's Café, 7 BOLI 281, 286 (1989).***

20.4 --- Affidavits

❑ The forum ruled that it would receive respondent's affidavit into evidence only if respondent were made available for cross-examination as the agency had requested. Because the agency eventually had the opportunity to cross-examine respondent, the affidavit later was received into evidence. ***----- In the Matter of Barbara Coleman, 19 BOLI 230, 244 (2000)***.

❑ When respondent asserted that claimant had threatened to have respondent's witnesses arrested if they testified at hearing, the forum denied respondent's motion to have the witnesses submit affidavits in lieu of testifying, but allowed them to testify by telephone. ***----- In the Matter of Barbara Coleman, 19 BOLI 230, 245 (2000)***.

❑ After hearing respondent offered affidavits of eight persons, four of whom had testified at hearing. The agency objected to the admission of the affidavits. The ALJ did not receive into evidence the affidavits of persons who were not called as witnesses at hearing because the agency had no opportunity to cross-examine them and did not receive the affidavit of witnesses who did testify at hearing because they were untimely. None of the affidavits were considered in the

formulation of the final order. ***----- In the Matter of Thomas Harrington, 15 BOLI 276, 278 (1997).***

❑ Evidence need not be presented in affidavit form to be considered sufficiently reliable to support a motion for summary judgment. ***----- In the Matter of Anastas Sharabarin, 14 BOLI 48, 53 (1995).***

20.5 --- Confidential Business Records

❑ During the hearing, respondent objected to the admission of claimant's time records into evidence on the basis they contained the names of respondent's clients and were confidential business records. The agency objected to the timeliness of the objection and argued that the records were central to the issues in the case. The participants agreed that respondent released the documents to the agency prior to the hearing and did not claim a privilege at that time. The ALJ found that the time records were central to the issues before the forum and that respondent had not timely objected to them based on a privilege. After finding that the names of respondent's clients were not particularly pertinent to the case, the ALJ ordered the names be redacted from any records submitted as evidence in the record and ordered the participants to refrain from referring to respondent's clients by name during witness testimony. The agency was also ordered to return any and all copies of the time records that were not submitted as evidence to respondent after the hearing and retain only those documents necessary to maintain its record of the proceeding. ***----- In the Matter of Scott Miller, 23 BOLI 243, 253 (2002).***

20.6 --- Credibility (*see also* 22.0)

❑ An ALJ's credibility findings are accorded substantial deference by the forum and, absent compelling reasons for rejecting such findings, they are not disturbed. ***----- In the Matter of Robb Wochnick, 25 BOLI 265, 290 (2004).***

❑ A witness false in one part of the testimony of the witness is to be distrusted in others. ***----- In the Matter of Guy L. Buyserie, 25 BOLI 246, 250 (1992).***

❑ Respondent's failure to produce records required by statute or to otherwise provide any credible evidence of the number of hours worked by the claimants was considered because it was an aid to the forum in evaluating the credibility of the claimants. ***----- In the Matter of Francisco Cisneros, 21 BOLI 190, 216 (2001).***

> Affirmed without opinion, *Cisneros v. Bureau of Labor and industries,* 187 Or App 114, 66 P3d 1030 (2003).

❑ The ALJ judged the credibility of testimony "based upon its inherent probability, its internal consistency, whether it was corroborated, whether it was contradicted by other evidence, and whether human experience demonstrated it was logically incredible." ***----- In the Matter of Central Oregon Building Supply, Inc., 17 BOLI 1, 13 (1998)***.

> Affirmed without opinion, *Central Oregon Building Supply, Inc. v. Bureau of Labor and Industries*, 160 Or App 700, 981 P2d 402 (1999).

❑ The fact that witnesses admitted having lied under oath in a prior proceeding to which respondent was a party while complainant worked for respondent was relevant to the credibility of the witnesses and to the effect of the prior proceeding on the atmosphere in the work place relative to complainant's mental distress claim. The commissioner found that such evidence did not substantially prejudice respondent's rights. ***----- In the Matter of Pzazz Hair Designs, 9 BOLI 240, 256 (1991).***

❑ When the forum found the testimony of the claimant and her witnesses contradictory and not credible, the forum adopted ORS 10.095(3) as instructive – that a witness false in one part of the testimony of the witness is to be distrusted in other parts. ***----- In the Matter of Sheila Wood, 5 BOLI 240, 252 (1986).***

20.7 --- Cross Examination

❑ Respondent moved for leave to "testify in writing" by submitting certain documents she had authored instead of appearing as a witness. The agency objected to the proposal on the ground that it would not give the agency an adequate opportunity for cross-examination. The agency also formally requested an opportunity to cross-examine respondent as the author of the documents she proposed to submit in lieu of her testimony. The ALJ denied respondent's motion, stating that the question to be decided was not whether respondent could "testify in writing" but, rather, whether each of the documents respondent proposed to offer would be accepted into evidence if respondent were not available for cross-examination. ***----- In the Matter of Barbara Coleman, 19 BOLI 230, 244 (2000)***.

❑ The forum ruled that it would receive respondent's affidavit into evidence only if respondent were made available for cross-examination as the agency had requested. Because the agency eventually had the opportunity to cross-examine respondent, the affidavit later was received into evidence. ***----- In the Matter of Barbara Coleman, 19 BOLI 230, 244 (2000)***.

❑ The forum ruled that it would receive respondent's answer as substantive evidence whether or not respondent was made available for cross-examination by the agency. ***----- In the Matter of Barbara Coleman, 19 BOLI 230, 245 (2000)***.

❑ The forum ruled that it would receive a letter from respondent to the forum as substantive evidence of the matters asserted only if the agency were given an opportunity to cross-examine respondent. Because the agency eventually had that opportunity, the document later was received into evidence. ***----- In the Matter of Barbara Coleman, 19 BOLI 230, 245 (2000)***.

❑ The agency requested that respondents make two people available for cross-examination who had prepared documents that respondents had included as exhibits to their case summary. The ALJ issued a letter to respondents and the agency explaining the possible consequences if respondents failed to make the witnesses available and instructing respondents as to how they might go about making the witnesses available to the agency. ***----- In the Matter of Debbie Frampton, 19 BOLI 27, 30 (1999)***.

❑ After hearing respondent offered affidavits of eight persons, four who had testified at hearing. The agency objected to the admission of the affidavits. The ALJ did not receive into evidence the affidavits of persons who were not called as witnesses at hearing because the agency had no opportunity to cross-examine them and did not receive the affidavit of witnesses who did testify at hearing because they were untimely. None of the affidavits were considered in the formulation of the final order. ***----- In the Matter of Thomas Harrington, 15 BOLI 276, 278 (1997).***

❑ The forum allowed the agency's amendment to increase the amount of wages sought in a wage claim case when respondent left the hearing before the agency had completed its case, but had the opportunity to cross-examine a claimant upon whose testimony the agency based its motion to amend. ***----- In the Matter of Danny Jones, 15 BOLI 96, 105 (1996).***

❑ When the hearing was adjourned after the agency had put on its case and respondent's counsel had an opportunity to cross-examine the agency's witnesses, the forum did not allow respondent's replacement counsel to cross-examine agency witnesses again when the hearing reconvened. ***----- In the Matter of Thomas Myers, 15 BOLI 1, 5 (1996).***

❑ To protect the agency's ability to cross-examine the witnesses, the hearings referee ordered a respondent and his wife, who testified by telephone from their home in Idaho, not to consult with each other during the course of the testimony of either of them. ***----- In the Matter of Marvin Clancy, 11 BOLI 205, 207 (1993).***

❑ When complainant refused to testify on cross-examine about matters related to his alleged mental suffering, the hearings referee decided not to strike his direct testimony on the issue, but drew an adverse inference from his refusal to testify. ***----- In the Matter of Marvin Clancy, 11 BOLI 205, 208 (1993).***

20.8 --- Exclusion (*see also* 19.74)

❑ The agency moved for a discovery order and respondent was ordered to produce documents requested in the agency's motion. Respondent produced no documents in response to the discovery order and did not file a case summary because he perceived the case would settle before hearing and because he had attached some of the documents sought by the agency to his original answer. During the hearing, respondent offered seven exhibits that the agency objected to on the grounds that the exhibits all contained information that should have been included in respondent's case summary and that was also subject to the forum's discovery order. The ALJ sustained the agency's objection and did not admit respondent's exhibits. The ALJ allowed respondent to make an offer of proof concerning each exhibit. During the hearing, the Agency moved that respondent's testimony concerning the specific contents of the seven exhibits be disregarded as an appropriate sanction for respondent's failure to submit a case summary or comply with the ALJ's discovery order. The ALJ granted the agency's motion, and considered respondent's testimony with regard to those exhibits solely as an offer of proof. ***----- In the Matter of Adesina Adeniji, 25 BOLI 162, 164-65 (2004)***.

❑ In a wage claim case, respondent did not submit a case summary. During the hearing, respondent offered three exhibits into evidence consisting of a purchase order showing the trade-in value for a 1972 Chevrolet Caprice, respondent's time clock, and a blank timecard used in respondent's time clock. The agency objected on the basis that they should have been and were not provided as part of respondent's case summary, and the ALJ sustained the agency's objection and did not receive these three exhibits. ***----- In the Matter of William Presley, 25 BOLI 56, 59 (2004).***

> Affirmed, *Presley v. Bureau of Labor and Industries,* 200 Or App 113, 112 P3d 485 (2005).

❑ The ALJ excluded respondent's witnesses from testifying and excluded documents proffered by respondent as exhibits when respondent did not file its case summary until the morning of hearing and the agency objected on the basis of timeliness. The forum sustained the agency's objection on the basis that respondent had not provided a satisfactory reason for filing the case summary late and because excluding the evidence would not violate the ALJ's duty to conduct a full and fair inquiry. ***----- In the Matter of Heiko Thanheiser, 23 BOLI 68, 71, 77 (2002).***

❑ At the outset of the hearing, respondent stated that he wanted to call as witnesses two individuals who had accompanied him to the hearing. Respondent stated that one would testify as to his character, and the other would testify that he did not open his mail for a long time because he had a "breakdown." The agency objected to the testimony of both individuals on the grounds of relevancy and that respondent had not filed a case summary naming them as witnesses. The ALJ sustained the agency's objection. ***----- In the Matter of Sreedhar Thakkun, 22 BOLI 108, 111 (2001).***

❑ During the presentation of his case, respondent attempted to call a telephonic witness to testify that he had actually performed the work that the agency alleged claimant had performed and was not paid for. Respondent represented that the witness had done the work after claimant left respondent's employment. The agency objected on the grounds that respondent had not filed a case summary naming the witness and the agency would be unduly prejudiced if the witness was allowed to testify. The ALJ determined that respondent did not have a satisfactory reason for not filing a case summary, that the agency would be unduly prejudiced by allowing the witness to testify, and that excluding the witness's testimony would not violate the ALJ's responsibility to conduct a "full and fair" inquiry. ***----- In the Matter of Sreedhar Thakkun, 22 BOLI 108, 111, 117 (2001).***

❑ Respondent sought to call her husband as a witness and the agency objected on the grounds that respondent had not submitted a case summary listing witnesses she intended to call, and that the agency would be prejudiced by its inability to prepare for cross-examination of him. Respondent was unable to articulate a satisfactory reason for not submitting a case summary. After determining that excluding the husband's testimony would not violate the duty to

conduct a full and fair inquiry under ORS 183.415(10), the ALJ excluded him from testifying. ***----- In the Matter of Martha Morrison, 20 BOLI 275, 281 (2000)***.

❑ Respondent sought to introduce certain documents even though it had not filed a case summary. The agency case presenter had received copies of those documents prior to hearing, but had not chosen to include them in her own case summary and did not have them with her at hearing. Respondent also did not have the documents and asked the ALJ to leave the record open so the agency's copies of the documents could be entered into evidence after the hearing. The ALJ denied respondent's request because introducing the documents after the end of the hearing would deprive both the agency and the ALJ of the opportunity to question witnesses about the documents. ***---- In the Matter of Contractor's Plumbing Service, Inc., 20 BOLI 257, 260 (2000)***.

❑ After the Agency presented its case, respondent sought to introduce the evidence of Ryder and respondent's current office manager, Sandy. Respondent's counsel acknowledged that he had received the ALJ's case summary order, which required him to identify witnesses and documentary evidence he planned to introduce at hearing, and that he had not filed a case summary. Respondent's counsel did not offer a satisfactory reason for having failed to file the case summary. The ALJ refused to allow respondent to call Sandy as a witness because respondent's failure to file a case summary meant that the Agency had no notice that Sandy might testify and no opportunity to prepare to meet her testimony. The ALJ did allow respondent to call Ryder as a witness because: the forum has permitted individual respondents to testify on their own behalf even when they were not identified as witnesses in a case summary; Ryder was the president of respondent, a small corporation with only two shareholders; Ryder was in charge of respondent's operations; and the Agency suffered only minimal prejudice, as Ryder's involvement in the events at issue and his desire to testify could not have come as a surprise. ***---- In the Matter of Contractor's Plumbing Service, Inc., 20 BOLI 257, 261 (2000)***.

❑ The ALJ refused to admit as evidence two documents offered by respondent at hearing, when respondent had not provided the documents as part of a case summary, did not articulate a satisfactory reason for not having provided the documents with a case summary, and excluding the documents – which did not contain material evidence – would not violate the ALJ's duty to conduct a full and fair inquiry. The ALJ did allow respondent to submit the documents and describe their contents as an offer of proof. ***----- In the Matter of Robert N. Brown, 20 BOLI 157, 159-60 (2000)***.

❑ In a farm labor contracting case, the attorney for a non-party farmer objected to the introduction of certain documents the agency had obtained from the farm on the ground that the agency improperly had contacted the farm directly, rather than through its counsel. The attorney also claimed that the documents were obtained improperly because the agency obtained them in preparation for hearing and did not get them by use of a subpoena or by consent of the farm. After ascertaining that there had not been a pending proceeding against the farm at the time of the agency's alleged improper contact, the ALJ overruled the objection. ***----- In the Matter of Tomas Benitez, 19 BOLI 142, 147 (2000)***.

❑ The ALJ denied respondent's motions to exclude from evidence the agency's notice of substantial evidence determination, the complainant's original BOLI complaint, and BOLI's letter to respondent accompanying the notice of substantial evidence determination. ***----- In the Matter of ARG Enterprises, Inc., 19 BOLI 116, 119 (2000)***.

❑ When respondent offered as evidence the written statement of a witness that provided essentially the same information that the witness had already given in her testimony, the forum excluded the proffered exhibit as unduly repetitious. ***----- In the Matter of Norma Amezola, 18 BOLI 209, 211 (1999)***.

❑ When respondent offered as an exhibit the written statement of a witness that had not been submitted with a case summary, the agency had no notice that respondent intended to rely on any sort of statement from the witness until it received a late case summary from respondent the day before the hearing, respondent did not offer a satisfactory reason for having failed to timely identify the author as a witness or as the author of a written statement to be offered into evidence, and the ALJ concluded from respondent's offer of proof that she would not violate her duty to conduct a full and fair inquiry by excluding the proffered exhibit, the forum excluded the statement from evidence. ***----- In the Matter of Norma Amezola, 18 BOLI 209, 212 (1999)***.

❑ Respondents were not allowed to present evidence at hearing to show that respondents were not the real party in interest when respondents had been aware of the existence of this affirmative defense for three months, had not previously raised it, and the agency objected to it. ***----- In the Matter of Geoffroy Enterprises, Inc., 15 BOLI 148, 151-52 (1996).***

❑ When a respondent failed to supply records of claimant's employment requested by the agency during its investigation, avoided service of a subpoena for the records, and ignored a prehearing discovery order for the records, the forum excluded those records from evidence when respondent attempted to use them at hearing. ***----- In the Matter of Daniel Burdick, 12 BOLI 66, 67, 76 (1993).***

❑ When respondent did not respond to the agency's informal efforts to obtain discovery, did not file a case summary pursuant to the hearings referee's discovery order, and did not respond to a specific discovery order for employment records, and when respondent offered documents at hearing that he claimed were business records, the hearings referee granted the agency's motion to exclude the documents from the record because respondent did not offer a satisfactory reason for having failed to provide the documents as ordered. The hearings referee found that excluding the documents would not violate the duty to conduct a full and fair hearing. ***----- In the Matter of Martin's Mercantile, 12 BOLI 262, 264-65 (1994).***

❑ When respondent moved to exclude written

investigative statements of persons interviewed during the agency's investigation, and respondent had an opportunity to cross-examine two of the witnesses and the investigator who wrote the investigative statements, the forum did not exclude the documents. ***----- In the Matter of Dunkin' Donuts, Inc., 8 BOLI 175, 178 (1989).***

❑ When the agency objected at hearing to respondent's submission of purported time records for claimant because those records had been requested during the investigation and by subpoena *duces tecum* prior to the hearing and had not been disclosed and respondent made no effort to comply with the subpoena, the hearings referee did not receive the records. ***----- In the Matter of Dan's Ukiah Service, 8 BOLI 96, 98 (1989).***

❑ Respondent moved to exclude a portion of the case summary on the grounds that the preparer of the summary had no personal knowledge of facts contained in the agency's file, that the document reflected multiple hearsay, and the summary had no relevance as substantive evidence. The forum denied the motion because: (1) based on the provisions of ORS 183.450(1) and OAR 839-30-120 regarding the admissibility of evidence, the case summary was admissible as evidence; and (2) the Department of Justice had advised the forum by letter that summary evidence, orally or written, is generally admissible in contested case administrative proceedings and that the hearsay nature of such a summary is not a basis for its exclusion. ***----- In the Matter of United Grocers, Inc., 7 BOLI 1, 3 (1987).***

❑ The agency offered handwritten and formal typed summaries of witness statements that were created by an agency investigator who was deceased at the time of hearing. The forum admitted the notes pursuant to OAR 839-30-120, finding that the notes in question were obtained from the agency file, an official file of the State of Oregon, maintained in the ordinary course of business. The summaries were given appropriate weight. ***----- In the Matter of United Grocers, Inc., 7 BOLI 1, 3-4 (1987).***

❑ When respondent moved to exclude all witnesses, the forum granted respondent's motion with respect to witnesses other than complainant. ***----- In the Matter of Boost Program, 3 BOLI 72, 73-74 (1982).***

20.9 --- Failure to Produce

❑ In a farm labor contractor case, respondent acknowledged that a forestation contract to which it was a party contained a provision prohibiting respondent from assigning or subcontracting the work without prior written consent, but argued that this did not prove the contract prohibited subcontracting, reasoning that the agency only offered pages 3 and 12 of the contract into evidence, and there might have been other provisions in the contract that qualified the subcontracting provision. The forum rejected respondent's argument because it was in respondent's power to produce the entire contract to prove that point, and respondent did not do so, despite an earlier request for a copy of the contract from the agency, and despite respondent's knowledge, from the agency's case summary, that the agency intended to offer only a portion of the contract into evidence. ***----- In the Matter of Basilio Piatkoff, 28 BOLI 133, 161 (2007).***

❑ Respondent's testimony was internally consistent for the most part, but his credibility regarding the hours worked by claimant was undermined by his failure to provide existing original records in his control subject to the ALJ's discovery order that would have provided conclusive evidence as to claimant's start and finish time each shift, the key issue in this case. ***----- In the Matter of Adesina Adeniji, 25 BOLI 162, 168 (2004).***

❑ Respondent kept no record of the days or hours claimant worked in July and August 2001. Claimant credibly testified that respondent recorded her September 2001 hours on a calendar that hung on a wall in respondent's shop and that the calendar disappeared after claimant filed her wage claim. When respondent acknowledged the calendar, but claimed the hours noted belonged to her niece with the same name as claimant, offered no evidence to support her claim, and did not comply with a discovery order requiring her to produce such information, the forum drew an adverse inference from respondent's failure to produce the calendar and relied on claimant's testimony and planner to determine the amount and extent of work she performed for respondent. ***----- In the Matter of Toni Kuchar, 23 BOLI 265, 274-75 (2002).***

❑ Respondent's failure to produce records required by statute or to otherwise provide any credible evidence of the number of hours worked by the claimants was considered because it was an aid to the forum in evaluating the credibility of the claimants. ***----- In the Matter of Francisco Cisneros, 21 BOLI 190, 216 (2001).***

> Affirmed without opinion, *Cisneros v. Bureau of Labor and Industries*, 187 Or App 114, 66 P3d 1030 (2003).

❑ When the agency has documents within its control that would substantiate testimony, but fails to produce them without explanation, the bare testimony may be accorded little weight. ***----- In the Matter of Southern Oregon Flagging, Inc., 18 BOLI 138, 168 (1999)***.

❑ Respondent's testimony was evaluated not only by its own intrinsic weight, but also according to the evidence that was in his power to produce. If weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory evidence is within the power of the participant to produce, the evidence offered should be viewed with distrust. ***----- In the Matter of Kenny Anderson, 12 BOLI 275, 280 (1994).***

❑ When respondent did not respond to the agency's informal efforts to obtain discovery, did not file a case summary pursuant to the hearings referee's discovery order, and did not respond to a specific discovery order for employment records, and when respondent offered documents at hearing that he claimed were business records, the hearings referee granted the agency's motion to exclude the documents from the record because respondent did not offer a satisfactory reason for having failed to provide the documents as ordered. The hearings referee found that excluding the documents would not violate the duty to conduct a full and fair hearing. ***----- In the Matter of Martin's***

Mercantile, 12 BOLI 262, 264-65 (1994).

❑ When a respondent failed to supply records of claimant's employment requested by the agency during its investigation, avoided service of a subpoena for the records, and ignored a prehearing discovery order for the records, the forum excluded those records from evidence when respondent attempted to use them at hearing. ***----- In the Matter of Daniel Burdick, 12 BOLI 66, 67, 76 (1993).***

20.10 --- Habit, Routine Practice

❑ Respondent called two employees of complainant's subsequent employer as witnesses and the agency objected to their testimony as irrelevant and immaterial. Respondent represented that the witnesses were called to provide evidence that would show habit, routine, and pattern and practice of complainant that related to the formal charges, and that respondent planned to offer documents that documented complainant's application, performance and discharge from his subsequent employer based on their testimony. Respondent further represented that the witnesses were being called as impeachment witnesses with regard to complainant's employment application at his subsequent employer. The ALJ ruled that he would allow the witnesses to testify about complainant's employment application at his subsequent employer to show prior inconsistent statements by complainant, but would consider the remainder of their testimony as an offer of proof and rule on its admissibility and the admissibility of the other exhibits proposed order. In the proposed order, the ALJ sustained the agency's objection to all of the witnesses' testimony about complainant's actual work performance at his subsequent employer and related exhibits because none of the testimony relating to performance issues met OEC 406(2)'s definition of "habit." ***----- In the Matter of Logan International, Ltd., 26 BOLI 254, 261, 276-77 (2005).***

20.11 --- Hearsay

❑ In a sexual harassment case, the forum rejected respondent's argument that whatever three witnesses experienced, observed, or were told by other employees related to respondent, was irrelevant and constituted inadmissible character evidence because those witnesses "had no personal knowledge of the events asserted as a basis for this claim." ***----- In the Matter of Gordy's Truck Stop, LLC, 28 BOLI 200, 215 (2007).***

❑ When the agency investigator interviewed 22 of respondent's workers who told the investigator they had not been fully paid and the investigator testified as to those statements, the commissioner overruled respondent's exception based on the workers' hearsay statements, stating there was nothing in the record to indicate that the investigator's testimony was unreliable. ***----- In the Matter of Mohammad Khan, 15 BOLI 191, 207-11 (1996).***

❑ When respondent excepted to being held liable in the proposed order for the racial comments of his manager, arguing that the agency's evidence consisted of hearsay from friends of complainant, the commissioner found that the manager admitted the substance of his remarks to the investigator and at hearing, that respondent acknowledged that the manager had repeated similar language to him, and overruled respondent's objection. ***----- In the Matter of Auto Quencher, 13 BOLI 14, 23 (1994).***

❑ When respondent objected before and during the hearing to investigative statements of persons interviewed during the agency's investigation, requested the ability to cross-examine those persons and the investigator, and moved to exclude the statements because they were unreliable and irrelevant and because of respondent's constitutional right to confront witnesses against him, the commissioner overruled the objection and denied the motion. The commissioner held that respondent's argument against the challenged evidence was made moot by the opportunity at hearing for cross-examination of the witnesses and the investigator. ***----- In the Matter of Dunkin' Donuts, Inc., 8 BOLI 175, 178-79 (1989).***

❑ Investigative interview statements by respondent's agents, even if "double hearsay," are admissible in an administrative hearing. Statements by a party's agents that are against the party's interest are admissible in other forums as well. The reliability of and weight to be given to such testimony is within the purview of the trier of fact. ***----- In the Matter of Baker Truck Corral, 8 BOLI 118, 135 (1989).***

❑ Respondent moved to exclude a portion of the case summary on the grounds that the preparer of the summary had no personal knowledge of facts contained in the agency's file, that the document reflected multiple hearsay, and the summary had no relevance as substantive evidence. The forum denied the motion because: (1) based on the provisions of ORS 183.450(1) and OAR 839-30-120 regarding the admissibility of evidence, the case summary was admissible as evidence; and (2) the Department of Justice had advised the forum by letter that summary evidence, orally or written, is generally admissible in contested case administrative proceedings and that the hearsay nature of such a summary is not a basis for its exclusion. ***----- In the Matter of United Grocers, Inc., 7 BOLI 1, 3 (1987).***

❑ In a child labor case, when the evidence about one minor's age was the hearsay testimony of another minor, the forum ruled that hearsay evidence is admissible and may be relied upon to make a decision. ***----- In the Matter of Northwest Advancement, Inc., 6 BOLI 71, 95 (1987).***

> Affirmed, *Northwest Advancement, Inc. v. Bureau of Labor*, 96 Or App 146, 772 P2d 943 (1989). See also *Northwest Advancement, Inc. v. Bureau of Labor,* 96 Or App 133, 772 P2d 934 (1989).

20.12 --- Inferences

❑ Evidence includes inferences. There may be more than one inference to be drawn from the basic fact found; it is the forum's task to decide which inference to draw. The absence of direct evidence of respondent's specific intent in a civil rights case is not determinative because such intent may be shown by circumstantial evidence. ***----- In the Matter of WINCO Foods, Inc., 28 BOLI 259, 300 (2007).*** *See also In the Matter of Trees, Inc., 28 BOLI 218, 249 (2007).*

❑ The forum inferred that Respondent failed to keep available for inspection 13 weekly time sheets that were not provided to the agency. Had respondent kept these records, it would have provided them when it provided eight of claimant's 21 weekly time sheets. Respondent's failure to keep and make these 13 weekly time sheets available to the commissioner for inspection was a violation of ORS 653.045(2). ***----- In the Matter of MAM Properties, LLC, 28 BOLI 172, 194 (2007).***

❑ Proof includes both facts and inferences. ***----- In the Matter of Labor Ready Northwest, Inc., 27 BOLI 83, 132 (2005).***

Appeal pending.

❑ When complainant and respondent agreed that complainant reported to respondent's managers that employees in the shipping department were using drugs, complainant testified at hearing that he believed employees were using methamphetamine, but did not report a specific drug or report that "illegal" drugs were being used, the forum inferred that complainant's managers assumed complainant was reporting illegal drug use based on the fact that the managers considered administering drug tests to shipping department employees based on complainant's report, the type of drugs that respondent's drug screening service screened for, and the fact that the managers considered that complainant's report raised a safety issue. ***----- In the Matter of Logan International Ltd., 26 BOLI 254, 279 (2005).***

❑ Respondent's admission that it owed $11,591.36 in unpaid wages to claimant established respondent's knowledge that it failed to pay claimant those wages. The forum inferred from that knowledge that respondent did acted voluntarily and as a free agent in failing to pay those wages, and there was no evidence that allowed the forum to view respondent's failure to pay claimant in any other light. The forum concluded that Respondent's failure to pay claimant's wages was willful. ***----- In the Matter of Westland Resources, Inc., 23 BOLI 276, 280 (2002).***

❑ Respondent kept no record of the days or hours claimant worked in July and August 2001. Claimant credibly testified that respondent recorded her September 2001 hours on a calendar that hung on a wall in respondent's shop and that the calendar disappeared after claimant filed her wage claim. When respondent acknowledged the calendar, but claimed the hours noted belonged to her niece with the same name as claimant, offered no evidence to support her claim, and did not comply with a discovery order requiring her to produce such information, the forum drew an adverse inference from respondent's failure to produce the calendar and relied on claimant's testimony and planner to determine the amount and extent of work she performed for respondent. ***----- In the Matter of Toni Kuchar, 23 BOLI 265, 274-75 (2002).***

❑ The forum is not required to explain why it chooses which evidence to believe; likewise, if from a basic finding of fact the forum could rationally infer a further fact, the forum need not explain the rationale by which the inferred fact is reached. ***----- In the Matter of Scott Miller, 23 BOLI 243, 264-65 (2002).***

❑ Respondent readily acknowledged that complainant was the best candidate of three job applicants and specifically asked an Employment Department representative to let complainant know she was being considered for the job and indicated she was the best qualified. After complainant complained to the Employment Department about respondent's statement that he was a married man and would have to check with his wife before hiring a woman, Respondent then called an Employment Department representative and angrily complained about the complaint complainant filed and the "type of people" the program was sending him, stating he "didn't need this kind of problem" and, by his attitude, conveyed to her that he was no longer interested in using the program. The forum inferred from these facts that but for complainant's complaint to the Department, respondents would have hired her for the training position. ***----- In the Matter of H.R. Satterfield, 22 BOLI 198, 209-10 (2001).***

❑ In a civil rights case alleging discrimination on the basis of marital status, when the Agency produced no evidence showing that comments by respondent's assistant manager were made because of the marital status of Complainant and her boyfriend, the forum declined to conclude that the purported comments created an inference they were directed toward Complainant because of her marital status and the marital status of the co-worker she was admittedly dating. ***----- In the Matter of Wal-Mart Stores East, Inc., 22 BOLI 27, 48 (2001).***

❑ The agency's burden of proof of showing the amount and extent of work performed by a wage claimant can be met by producing sufficient evidence from which "a just and reasonable inference may be drawn." When an employer produces no records of hours or dates worked by claimants, the commissioner may rely on evidence produced by the agency, including credible testimony by the claimants, "to show the amount and extent of the employee's work as a matter of just and reasonable inference," and "may then award damages to the employee, even though the result be only approximate." ***----- In the Matter of Francisco Cisneros, 21 BOLI 190, 213-14 (2001).***

Affirmed without opinion, *Cisneros v. Bureau of Labor and industries,* 187 Or App 114, 66 P3d 1030 (2003).

❑ The forum declined to draw an inference sought by the agency as to respondent's correct address in 1998 based on evidence that a 1998 wage survey sent to respondent was not returned to the Employment Department, that respondent returned a 1999 postcard sent to the purported 1998 address, and that respondent received the 1999 wage survey but denied it in the answer. ***----- In the Matter of Green Planet Landscaping, Inc., 21 BOLI 130, 138 (2000).***

❑ When respondent had informed the Employment Department that its correct address was on the Odell Highway, and that address remained Respondent's correct address through the time of hearing, the Employment Department mailed the 1999 wage survey and follow-up reminders to respondent at the correct Odell Highway address, and none of those documents was ever returned to the Employment Department as

"undeliverable" or for any other reason, the forum inferred that respondent received the 1999 wage survey. Based on this evidence and respondent's admission that it never returned the 1999 wage survey by the deadline set by the commissioner, the agency proved that respondent violated ORS 279.359(2). ***----- In the Matter of Green Planet Landscaping, Inc., 21 BOLI 130, 138-39 (2000).***

❑ Respondent's internal memorandum citing complainant's medical leave in connection with her termination and the testimony of respondent's personnel manager that complainant was discharged based on working for another employer without respondent's permission, and that he felt it was unfair of complainant to take advantage of respondent's policy set up to benefit its employees created an inference that complainant's medical leave was a motivating factor in respondent's decision to terminate complainant. However, based on respondent's LNDR and the forum's finding that complainant's medical leave was mentioned in the memorandum to provide historical context, not cause, that evidence was insufficient to establish specific intent. This evidence is also insufficient to establish that complainant's use of OFLA played "a substantial role" in her discharge, which would have triggered a "mixed motive" analysis under OAR 839-005-015. ***----- In the Matter of Roseburg Forest Products Co., 20 BOLI 8, 29 (2000)***.

❑ Evidence of the pervasiveness of harassment may give rise to an inference of knowledge or establish constructive knowledge. ***----- In the Matter of Wing Fong, 16 BOLI 280, 294 (1998).***

❑ Complainant, a cocktail waitress, claimed that respondent's manager cut her hours in half after he learned she was pregnant. When the evidence showed that (1) complainant had no agreement with respondent for any set number of work hours per day or per week; (2) waitresses' hours normally varied each week; and (3) the summer was respondent's slowest season and everyone's hours were reduced, the commissioner held that the agency did not prove that respondent cut complainant's hours significantly, much less in half. The preponderance of credible evidence in the whole record regarding work hours did not prove that complainant was treated differently than other non-pregnant cocktail waitresses, nor did it support an inference that respondent cut complainant's hours because she was pregnant. ***----- In the Matter of Benn Enterprises, Inc., 16 BOLI 69, 76 (1997).***

❑ When there is conflicting evidence in the record, the forum need not discuss why it chose which evidence to believe. Likewise, if the forum could rationally infer a further fact from a basic finding, the forum need not explain the rationale by which the inferred fact was reached. ***----- In the Matter of Scott Nelson, 15 BOLI 168, 169 (1996).***

❑ When complainant, a black person, was deliberately assaulted by his white supervisor and the supervisor made no comments that directly linked the assault to complainant's race or color, the forum held that the supervisor's inconsistent statements about the incident, coupled with his routine racial harassment of complainant, made it reasonable to infer that, given the totality of the circumstances, complainant's race or color played a key role in the incident. ***----- In the Matter of Gardner Cleaners, Inc., 14 BOLI 240, 253 (1995).***

❑ The commissioner inferred from the evidence that complainant's national origin played a key role in complainant's discharge and found that the agency had established a prima facie case. ***----- In the Matter of Yellow Freight System, Inc., 13 BOLI 201, 218 (1994).***

❑ When there was evidence that respondent was hostile toward unemployment claims by casual employees, but there was no evidence that respondent had actual notice that complainant's appeal of the denial of unemployment benefits was successful, the commissioner declined to infer that complainant's discharge for her testimony at the unemployment compensation hearing. ***----- In the Matter of Lebanon Public Schools, 11 BOLI 294, 308 (1993).***

> Affirmed without opinion, *Brigham v. Bureau of Labor and Industries,* 129 Or App 304, 79 P2d 245 (1994).

❑ Evidence includes inferences. ***----- In the Matter of Flavors Northwest, 11 BOLI 215, 229 (1993).*** *See also In the Matter of Sierra Vista Care Center, 9 BOLI 281, 296-97 (1991), a*ffirmed, *Colson v. Bureau of Labor and Industries,* 113 Or App 106, 831 P2d 706 (1992).

❑ When complainant refused to testify on cross-examine about matters related to his alleged mental suffering, the hearings referee decided not to strike his direct testimony on the issue, but drew an adverse inference from his refusal to testify. ***----- In the Matter of Marvin Clancy, 11 BOLI 205, 208 (1993).***

❑ Evidence includes inferences. More than one inference may be drawn from the basic fact found; the forum's task is to decide which inference to draw. ***----- In the Matter of Sierra Vista Care Center, 9 BOLI 281, 296-97 (1991).***

> Affirmed, *Colson v. Bureau of Labor and Industries,* 113 Or App 106, 831 P2d 706 (1992).

❑ The absence of direct evidence of a respondent's agent's specific intent is not determinative because such intent may be shown by circumstantial evidence. Evidence includes inferences. More than one inference may be drawn from the basic fact found; the forum's task is to decide which inference to draw. The absence of direct evidence of specific intent does not necessarily require that the different treatment test be used. ***----- In the Matter of Sierra Vista Care Center, 9 BOLI 281, 296-97 (1991).***

> Affirmed, *Colson v. Bureau of Labor and Industries,* 113 Or App 106, 831 P2d 706 (1992).

❑ When respondent sought to have an inference drawn that complainant did not mitigate her damages because she did not produce certain documents related to her employment search after her termination in response to a subpoena *duces tecum*, the forum denied the motion for sanctions. ***----- In the Matter of Sierra Vista Care Center, 9 BOLI 281, 284-85, 285-86 (1991).***

> Affirmed, *Colson v. Bureau of Labor and Industries,* 113 Or App 106, 831 P2d 706 (1992).

❑ When respondent's manager knew of complainant's injury on the day it happened, created a "sham" memorandum to give the appearance that performance-related reasons caused the discharge, and terminated complainant within three or four days, the commissioner inferred that complainant's reporting of the injury played a key role in the termination, and concluded that respondent knowingly and purposely terminated complainant because she had reported an injury. ***----- In the Matter of Sierra Vista Care Center, 9 BOLI 281, 296 (1991).***

> Affirmed, *Colson v. Bureau of Labor and Industries,* 113 Or App 106, 831 P2d 706 (1992).

❑ When the evidence established that complainant suffered from alcoholism in 1986 and successfully completed treatment and attended AA meetings thereafter, it was reasonable to infer that her subsequent treatment for alcoholism in July 1988 was caused by her disability and the commissioner held that complainant had a record of having a disability and was protected under ORS 659.425(1)(b). ***----- In the Matter of Pzazz Hair Designs, 9 BOLI 240, 252 (1991).***

❑ Proof includes both facts and inferences. An inferential fact is an inference or conclusion from evidence. ***----- In the Matter of City of Umatilla, 9 BOLI 91, 104 (1990).***

> Affirmed without opinion, *City of Umatilla v. Bureau of Labor and Industries,* 110 Or App 151, 821 P2d 1134 (1991).

❑ Complainant was unlawfully discharged by respondent's employee, who represented that he had authority to fire complainant. Respondent raised the defense that that employee did not have such authority or, if he did, he was acting outside the scope of his employment. The commissioner inferred that the employee had the power to discharge complainant because of the employee's assertion of the authority, his exercise of that authority, respondent's subsequent failure to put complainant back to work, and respondent's misrepresentation of a form that complainant signed, which said that she voluntarily quit. ***----- In the Matter of Franko Oil Company, 8 BOLI 279, 288-89 (1990).***

❑ When complainant was discharged after cooperating in an Accident Prevention Division inspection, the forum concluded that his cooperation played a key role in his discharge. The commissioner inferred that respondent's contentions that complainant was "getting out of hand" and was "very insubordinate" flowed directly from the complainant's cooperation with the agent from the Accident Prevention Division. ***----- In the Matter of Arkad Enterprises, Inc., 8 BOLI 263, 277 (1990).***

> Affirmed, Arkad Enterprises, Inc. v. Bureau of Labor and Industries, 107 Or App 384, 812 P2d 427 (1991).

Respondent reinstated complainant to his tree faller job for 13 days after his release to return to his former job following an on-the-job injury, then respondent permanently laid off complainant. Respondent recalled workers who had not been injured and hired 25 new workers, although it knew complainant wanted the work and could do the work. The evidence showed that respondent treated another injured worker the same way respondent treated complainant. The commissioner found that respondent treated complainant differently from uninjured workers, and those facts permit the reasonable inference that respondent discharged complainant because of his membership in the protected class of injured workers. Respondent, who was in default, submitted no evidence to support its suggested nondiscriminatory reasons for the discharge. The commissioner found respondent's reasons not credible and held that respondent violated ORS 659.410. ***----- In the Matter of Dillard Hass Contractor, Inc., 7 BOLI 244, 251-52 (1988).***

❑ When respondent's agent knew or should have known that a female complainant was underpaid in comparison with certain male workers doing substantially similar work, and when respondent rejected a proposal to raise complainant's pay to be commensurate with that of those males doing substantially similar work, the commissioner inferred that respondent's decision was based on sex. ***----- In the Matter of City of Roseburg, 4 BOLI 105, 152 (1984).***

> Affirmed, *Bureau of Labor and Industries v. City of Roseburg*, 75 Or App 306, 706 P2d 956 (1985), rev den 300 Or 545, 715)2d 92 (1986).

❑ In all matters brought under ORS 659.030, respondent has the burden of establishing facts mitigating the damages to be awarded to a complainant. A complainant is probably the only and certainly the best source of evidence of mitigation efforts. When a complainant is totally unresponsive to respondent's questions concerning mitigation and could reasonably be expected to be able to supply such information, the forum must infer that the answers, if given, would not have furthered complainant's claim. ***----- In the Matter of Lucille's Hair Care, 3 BOLI 286, 302 (1983).***

> Modified as to wage loss and interest*, Ogden v. Bureau of Labor,* 68 Or App 235, 682 P2d 802 (1984); order reinstated, remanded for recalculation of interest*, Ogden v. Bureau of Labor,* 299 Or 98, 699 P2d 189 (1985).
>
> Order on remand, 5 BOLI 13, 29 (1985).

❑ When the complainant showed that she had worked for respondent in another location satisfactorily; she had worked for respondent for 27 days in a manner which she had reasonably believed was satisfactory; and she was discharged after telling her supervisor she was pregnant, the commissioner found this evidence was an adequate prima facie case. The inference was raised and a presumption created that respondent's discharge of complainant was more likely than not based upon her sex and pregnancy. ***----- In the Matter of K-Mart Corporation, 3 BOLI 194, 200, 202 (1982).***

❑ When an employer has some good cause to discharge an employee, the discharge may still violate ORS 654.062(5)(a) if the employer's knowledge of the employee's opposition to safety hazards plays a key role in the employer's decision. The word "because" in that statute demands knowledge and action upon that knowledge to constitute retaliatory intent, a state of mind that is rarely susceptible to direct proof and which must

be inferred from the facts of the case. In this case, the commissioner found that the agency's evidence was entirely circumstantial, lacked sufficient corroboration to permit the inference that the employee's opposition was a key factor in his discharge, and that the close proximity in time between the discharge and the act of opposition, by itself, was insufficient to permit the inference of a discriminatory intent. ***----- In the Matter of Dee Wescott, 2 BOLI 29, 38-39 (1980).***

❑ When there was substantial, undisputed and well-documented evidence of respondent's dissatisfaction with complainant's work before complainant filed a complaint with the Civil Rights Division, and the unsatisfactory performance continued after the filing, the commissioner was unable to infer from the mere sequence of an involuntary discharge following the complaint that the discharge was in retaliation for the complaint. ***----- In the Matter of Dee Wescott, 2 BOLI 29, 40 (1980).***

❑ The commissioner considered statements made by respondent's president to a Civil Rights Division investigator regarding his general beliefs about black persons to infer that the adverse employment decision made by respondent was based on race. ***----- In the Matter of Sierra Tile Manufacturing, Inc., 1 BOLI 291, 294 (1980).***

❑ Complainant called respondent to respond to a job advertisement. The commissioner found that respondent's president, even though he was not told that complainant was black, inferred from complainant's "drawl" that he was black and, based on his beliefs about black employees, refused to consider complainant for the job in violation of ORS 659.030(1)(a). ***----- In the Matter of Sierra Tile Manufacturing, Inc., 1 BOLI 291, 292-94 (1980).***

20.13 --- Inspection of Documents Referred to During Testimony

❑ At hearing, complainant referred to notes of events that occurred during his employment that he made after he filed his complaint. The hearings referee allowed respondent's counsel to inspect those notes, but denied respondent's request to inspect other notes in complainant's possession, stating that respondent was "fishing" without prior timely discovery. ***----- In the Matter of German Auto Parts, Inc., 9 BOLI 110, 111 (1990).***

Affirmed, *German Auto Parts, Inc. v. Bureau of Labor and Industries*, 111 Or App 522, 826 P2d 1026 (1992).

20.14 --- Judicial & Official Notice

❑ The forum took official notice of the commissioner's three prior final orders to which respondent was a party. ***----- In the Matter of Labor Ready Northwest, Inc., 28 BOLI 91, 108-110 (2007).***

Appeal pending.

❑ The forum overruled respondent's objection to the forum taking official notice of prior adjudicatory actions against respondent. ***----- In the Matter of Labor Ready Northwest, Inc., 28 BOLI 91, 94 (2007).***

Appeal pending.

❑ The forum took official notice of the contents of a press release issued by the commissioner. ***----- In the Matter of Labor Ready Northwest, Inc., 28 BOLI 47, 87 (2007).***

❑ The commissioner also took notice that a newly constructed public high school was unusable for the purpose for which it was intended without the equipment and furniture that respondent's workers carried into the high school and assembled. ***----- In the Matter of Labor Ready Northwest, Inc., 28 BOLI 47, 73-74 (2007).***

Appeal pending.

❑ In considering whether complainant' was substantially limited in his inability to eat, the commissioner took notice that the average person in the general population does not become nauseated and vomit after eating. ***----- In the Matter of Emerald Steel Fabricators, Inc., 27 BOLI 242, 266 (2006).***

Appeal pending.

❑ When the agency moved for the ALJ to take judicial notice of OAR 437-003-0503, the ALJ granted the agency's motion and took judicial notice of that administrative rule. ***----- In the Matter of Rogue Valley Fire Protection, LLC, 26 BOLI 172, 174 (2005)***

❑ At the start of hearing, the agency moved the forum to take judicial notice of OAR 918-282-0000, *et seq.*, a copy of which was attached to the agency's motion. Respondent did not object to the motion and the forum took notice of the administrative rules pertaining to the licensing of electricians in Oregon. ***----- In the Matter of Stimson Lumber Company, 26 BOLI 150, 153-54, 170 (2005).***

❑ The ALJ took official notice of the hearings unit's practice and procedure to include with the notice of hearing copies of the summary of contested case rights and procedures and the complete contested case hearing rules. ***----- In the Matter of TCS Global Corp., 24 BOLI 246, 251 (2003).***

❑ In a wage survey case, the forum declined to "take what amount[ed] to official notice" of the fact that an employer's failure to submit a completed survey could result in the "skewing of the established rates." ***----- In the Matter of WB Painting and Decorating, Inc., 22 BOLI 18, 26 (2001), amended 22 BOLI 27 (2001).***

❑ When two of three respondents had been the subjects of prior final orders of the commissioner, the forum took official notice of those orders and admitted a copy of each into the record. ***----- In the Matter of Clara Rodriguez, 12 BOLI 153, 160 (1994).***

Affirmed without opinion, *Rodriguez v. Bureau of Labor and Industries*, 135 Or App 696, 898 P2d 818 (1995).

❑ Following the hearing, but prior to issuing a proposed order, the hearings referee took official notice of the written legislative history of the bills that became the parental leave law. With notice to the participants, the legislative history was admitted as administrative exhibits. ***----- In the Matter of Portland General Electric Company, 8 BOLI 253, 256 (1988).***

Affirmed, *Portland General Electric Company v.*

Bureau of Labor and Industries, 116 Or App 606, 842 P2d 419 (1992); affirmed , 317 Or 606, 859 P2d 1143 (1993).

❑ In a sex/pregnancy case, the forum took official notice of the fact that among human beings, only females become pregnant. ***----- In the Matter of International Kings Table, Inc., 3 BOLI 29, 31 (1982).***

❑ The forum declined respondent's request that it take judicial notice that it is common in most restaurants in the Portland area to have sex-segregated waiter/bus person work forces because no evidence was presented to show this assertion was accurate, and even if it was accurate, it did not establish a BFOR based upon sex and was therefore not a valid defense. ***----- In the Matter of Love's Woodpit Barbeque Restaurant, 3 BOLI 18, 28 (1982).***

20.15 --- Presumptions

❑ Pursuant to 839-020-0004(33), a respondent was presumed to have known the requirements of OAR 839-020-0012. Based on this presumption, the forum found that respondent willfully violated OAR 839-020-0012 on 11 occasions. ***----- In the Matter of MAM Properties, LLC, 28 BOLI 172, 192 (2007).***

❑ ORS 652.414(1) requires the commissioner to pay a wage claimant out of the WSF when he has determined that the wage claim is valid, the employer against whom the claim was filed has ceased doing business, the employer is without sufficient assets to pay the wage claim, and the wage claim cannot otherwise be fully and promptly paid. When respondent did not appear at the hearing to contest the recovery action and, in the absence of contrary evidence, the forum applied the presumption that an "[o]fficial duty has been regularly performed." ORS 40.135(1)(j). ***----- In the Matter of Bukovina Express, Inc., 27 BOLI 184, 199 (2006).***

❑ A presumption is a rule of law requiring that once a basic fact is established the forum must find a certain presumed fact, in the absence of evidence rebutting that presumed fact. ***----- In the Matter of Storm King Construction, Inc., 27 BOLI 46, 53 (2005).***

❑ When respondent did not admit or specifically deny that he received the commissioner's 2004 wage survey, the agency proved it was sent to respondent by first class mail, and respondent testified that this has always been his address, the forum held that ORE 311(1)(q) created a rebuttable presumption that respondent received the wage surveys and reminder notices sent by the Employment Department to that address and concluded that respondent received the 2004 wage survey. ***----- In the Matter of Storm King Construction, Inc., 27 BOLI 46, 53 (2005).***

❑ To resolve the issue of whether or not respondent had received the commissioner's 2000 wage survey when credible evidence showed it was sent by first class mail to respondent's correct address and respondent denied receiving it, the forum took guidance from the Oregon Rules of Evidence, specifically ORE 311(1)(q), which creates a rebuttable presumption that "[A] letter duly directed and mailed was received in the regular course of the mail." The forum found that testimony by respondent witnesses as to the lack of "recollection" by respondent's corporate officers who received respondent's mail and the lack of a "record" as legally insufficient to overcome the presumption that respondent received the wage surveys and reminder notices. ***----- In the Matter of Harney Rock & Paving Co., 22 BOLI 177, 184 (2001).***

❑ In cases involving payouts from the wage security fund, when (1) there is credible evidence that a determination on the validity of the claim was made, (2) there is credible evidence as to the means by which that determination was made, and (3) BOLI has paid out money from the fund and seeks to recover that money, a rebuttable presumption exists that the agency's determination is valid for the sums actually paid out. The presumption may be rebutted by credible evidence to the contrary. ***----- In the Matter of Catalogfinder, Inc., 18 BOLI 242, 260 (1999)***.

❑ When the evidence established that complainant's termination followed an OR-OSHA inspection of respondent's worksite by two days and that respondent's owner believed at the time of the inspection and termination that complainant had filed the OR-OSHA complaint, a rebuttable presumption was created, absent another explanation, that complainant was terminated due to the filing of the safety complaint with OR-OSHA. ***----- In the Matter of Industrial Carbide Tooling, Inc., 15 BOLI 33, 46 (1996).***

❑ Complainant alleged he was terminated due to his opposition to safety hazards and respondent alleged he had been laid off due to a reduction in work force. When the evidence presented showed complainant was terminated immediately following his discovery and discussion of a letter from the Accident Prevision Division concerning safety hazards and that he was discharged from an unfinished task for which he was replaced by another employee, the forum determined this established a rebuttable presumption that, absent another explanation, complainant was terminated due to his opposition to safety hazards. ***----- In the Matter of PAPCO, Inc., 3 BOLI 243, 252 (1983).***

❑ When the complainant showed that she had worked for respondent in another location satisfactorily; she had worked for respondent for 27 days in a manner which she had reasonably believed was satisfactory; and she was discharged after telling her supervisor she was pregnant, the commissioner found this evidence was an adequate prima facie case. The inference was raised and a presumption created that respondent's discharge of complainant was more likely than not based upon her sex and pregnancy. ***----- In the Matter of K-Mart Corporation, 3 BOLI 194, 200, 202 (1982).***

20.16 --- Privileges

❑ During the hearing, complainant and his wife waived their privilege by consenting to the disclosure of the marriage counseling records and complainant waived his privilege regarding the medical records. ***----- In the Matter of Stimson Lumber Company, 26 BOLI 150, 158 (2005).***

20.17 --- Rebuttal and Impeachment

❑ The forum rejected two agency exhibits offered in rebuttal of respondent's case on the basis that they did

not rebut any evidence in respondent's case. ***----- In the Matter of Labor Ready Northwest, Inc., 27 BOLI 83, 92 (2005).***

Appeal pending.

❑ When respondent called two persons as impeachment and rebuttal witnesses and the agency objected to their testimony on the grounds that neither was listed in respondent's case summary, the ALJ ruled that he would consider their testimony as an offer of proof and rule on its admissibility in the proposed order. After reviewing the record, the ALJ rejected part of their testimony and admitted part of their testimony. ***----- In the Matter of Logan International, Ltd., 26 BOLI 254, 260 (2005).***

❑ After the hearing, respondent filed a motion requesting that it be allowed to call its manager as a rebuttal witness, with her testimony limited to the scope of testimony given by an agency witness during that witness's rebuttal testimony on the agency's behalf. Respondent based its motion on the provisions of OAR 839-050-0250(7) and "as a matter of fundamental fairness." The forum denied respondent's motion, holding that a respondent has the opportunity to present evidence to rebut the agency's case-in-chief but does not have the right to present evidence to rebut evidence presented by the agency in rebuttal of respondent's evidence. As the agency bears the burden of proof, the agency is entitled to the last word in the case. This interpretation does not prevent the forum from conducting a full and fair inquiry. ***----- In the Matter of Hermiston Assisted Living, 23 BOLI 96, 99-100 (2002).***

20.18 --- Relevancy

❑ In a sexual harassment case, the forum rejected respondent's argument that whatever three witnesses experienced, observed, or were told by other employees related to respondent, was irrelevant and constituted inadmissible character evidence because those witnesses "had no personal knowledge of the events asserted as a basis for this claim." ***----- In the Matter of Gordy's Truck Stop, LLC, 28 BOLI 200, 215 (2007).***

❑ In a sexual harassment case, credible evidence that respondent made inappropriate comments or gestures to other female employees and that some of those employees complained to a supervisor and co-worker about that behavior was relevant to whether respondent touched complainant's breast deliberately or accidentally. ***----- In the Matter of Gordy's Truck Stop, LLC, 28 BOLI 200, 215 (2007).***

❑ During a wage claim hearing, the agency attempted to elicit evidence regarding an individual respondent's receipt of a substantial amount of funds from an auto accident settlement. Respondent objected because he received the funds two years after claimant left his company's employment. The agency argued that the evidence was relevant to disprove the individual respondent's affirmative defense of financial inability to pay at the time the wages accrued because the claim could have been sold, before settlement, to a private company in the business of buying claims of that nature for their potential value. The ALJ sustained the objection, but allowed the agency to make an offer of proof and respondent's attorney to respond. ***----- In the Matter of Captain Hooks, LLP, 27 BOLI 211, 213-14 (2006).***

❑ In a prevailing wage rate case, the ALJ sustained respondent's relevancy objection to exhibits purporting to establish "prior violations" when the dates on the exhibits showed that the alleged violations were actually subsequent alleged violations and there was no evidence that respondent actually employed one wage claimant whose claim was represented in five of the exhibits. ***----- In the Matter of Labor Ready Northwest, Inc., 27 BOLI 83, 129-30 (2005).***

Appeal pending.

❑ During the hearing, the agency offered an investigative interview and letter from a physician. Respondent objected to both exhibits on relevance grounds and the ALJ reserved ruling on respondent's objections until the proposed order. The ALJ subsequently found both exhibits relevant and admitted both. ***----- In the Matter of Robb Wochnick, 25 BOLI 265, 268 (2004).***

❑ In a wage claim case, respondent's motion for a discovery order requiring the agency to produce documents related to the enforcement of arbitration provisions in employment contracts was denied because that issue was not before the forum. Respondent's request for "all statistics that are already being calculated and maintained by the BOLI regarding the number of cases" submitted to the BOLI and the ultimate disposition of those cases was denied on the grounds that it was "vague, overbroad, and imposes an undue burden on the agency to produce information" that respondent had not established was relevant or likely to lead to relevant information. Respondent's request for information the agency had regarding any actual or potential bias on the part of its employees was denied because of its vague and overly broad nature and its lack of probative value. ***----- In the Matter of Scott Miller, 23 BOLI 243, 251-52 (2002).***

❑ Two exhibits were offered, but not received based on their lack of relevance. A third exhibit was offered but not received based on its lack of foundation or probative value. ***----- In the Matter of Schneider Equipment, Inc., 21 BOLI 60, 61 (2000).***

❑ When the proposed order found that a respondent had sexually harassed a female complainant, causing emotional damage, respondents excepted to the proposed order's failure to include a factual finding regarding an incident when complainant, while on a camping trip, had swam in the nude in the company of strangers. The commissioner rejected the exception on the basis that the proposed finding, which reflected on complainant's life outside work, had no bearing on whether respondent discriminated against her in terms and conditions of employment by subjecting her to sexual harassment. ***----- In the Matter of Cheuk Tsui, 14 BOLI 272, 286-87 (1996).***

❑ In the context of discrimination law, when the nature of the offense alleged is that it was motivated by the victim's membership in a statutorily protected class, the

manner in which other members of that class have allegedly been treated is clearly relevant to the inquiry. To the extent that comparative evidence relating to the protected class at issue may also reflect prior bad acts by respondent, that evidence will not be excluded. ***----- In the Matter of Howard Lee, 13 BOLI 281, 292 (1994).***

❑ In a farm labor contractor case when the agency sought to revoke respondent's license and assess civil penalties, evidence concerning aggravating and mitigating circumstances are relevant. ***----- In the Matter of Clara Perez, 11 BOLI 181, 195 (1993).***

❑ The fact that witnesses admitted having lied under oath in a prior proceeding to which respondent was a party while complainant worked for respondent was relevant to the credibility of the witnesses and to the effect of the prior proceeding on the atmosphere in the work place relative to complainant's mental distress claim. The commissioner found that such evidence did not substantially prejudice respondent's rights. ***----- In the Matter of Pzazz Hair Designs, 9 BOLI 240, 256 (1991).***

❑ When the inquiry involves the employer's treatment of an employee based on the employee's protected class, comparative evidence bearing on the employer's treatment of other employees of the same protected class, whether direct or circumstantial, is both relevant and admissible. ***----- In the Matter of Jerome Dusenberry, 9 BOLI 173, 175 (1991).*** *See also In the Matter of Dunkin' Donuts, Inc., 8 BOLI 175, 176-77, 179 (1989).*

❑ When the agency objected to two documents offered by respondent on the grounds that neither document had been included with respondent's case summary and neither was submitted during the investigation when the investigator asked for documents, and the agency claimed to be prejudiced, the hearings referee received the documents, ruling that their relevance outweighed any claimed prejudice. ***----- In the Matter of German Auto Parts, Inc., 9 BOLI 110, 112 (1990).***

> Affirmed, German Auto Parts, Inc. v. Bureau of Labor and Industries, 111 Or App 522, 826 P2d 1026 (1992).

❑ When a respondent brought out evidence of complainant's moral character and her relations with other men in an attempt to besmirch her and to focus attention away from his own behavior, none of it was relevant to the issue of whether respondent discriminated against complainant in terms and conditions of her employment on the basis of sex by subjecting her to sexual harassment on the job. The commissioner held that complainant's life outside of work had no bearing on whether or not respondent had sexually harassed her. ***----- In the Matter of Stop Inn Drive In, 7 BOLI 97, 114 (1988).***

❑ The forum admitted legislative history of ORS 659.029 over the agency's objection because it was relevant to the legislative intent. ***----- In the Matter of Portland Electric & Plumbing Co., 4 BOLI 82, 83 (1983).***

❑ When complainant alleged that respondent did not hire her as a dental technician because of her sex, the commissioner found that evidence of respondent's male/female employee ratio in the entire dental office was irrelevant because it concerned more than the dental technicians, the "work force at issue." ***----- In the Matter of Jeffrey Brady, 2 BOLI 58, 62 (1984).***

> Reversed and remanded for clarification of finding of sex discrimination, *Brady, DMD v. Bureau of Labor and Industries,* 55 Or App 619, 639 P2d 673 (1982).
>
> Amended order on remand, 4 BOLI 211 (1984).

❑ Respondent testified that complainant filed a similar complaint of sex discrimination with EEOC, as well as one against another employer. The commissioner found this evidence irrelevant because the allegations in the Bureau complaint against respondent must be measured on their own merits. ***----- In the Matter of Jeffrey Brady, 2 BOLI 58, 61-62 (1984).***

> Reversed and remanded for clarification of finding of sex discrimination, *Brady, DMD v. Bureau of Labor and Industries,* 55 Or App 619, 639 P2d 673 (1982).
>
> Amended order on remand, 4 BOLI 211 (1984).

❑ Complainant alleged that she was not hired due to her sex. Evidence was presented that respondent hired a female before the year complainant applied and another the year after complainant applied. The commissioner found this evidence irrelevant because it did not pertain to the year in which respondent failed to hire complainant. ***----- In the Matter of Jeffrey Brady, 2 BOLI 58, 60-61 (1984).***

> Reversed and remanded for clarification of finding of sex discrimination, *Brady, DMD v. Bureau of Labor and Industries,* 55 Or App 619, 639 P2d 673 (1982).
>
> Amended order on remand, 4 BOLI 211 (1984).

20.19 --- Reliability

❑ Evidence need not be presented in affidavit form to be considered sufficiently reliable to support a motion for summary judgment. ***----- In the Matter of Anastas Sharabarin, 14 BOLI 48, 53 (1995).***

❑ When respondent's appointment book was a more reliable record of claimant's hours worked than her memory and witnesses commented on the book, the forum properly admitted it even though respondent did not formally offer it into evidence. ***----- In the Matter of Mary Stewart-Davis, 13 BOLI 188, 199-200 (1994).***

> Affirmed without opinion, *Stewart-Davis v. Bureau of Labor and Industries,* 136 Or App 212, 901 P2d 268 (1995).

❑ Investigative interview statements by respondent's agents, even if "double hearsay," are admissible in an administrative hearing. Statements by a party's agents that are against the party's interest are admissible in other forums as well. The reliability of and weight to be given to such testimony is within the purview of the trier of fact. ***----- In the Matter of Baker Truck Corral, 8 BOLI 118, 135 (1989).***

❑ When a female complainant had previously been awarded promotion unsuccessfully sought by males, and there were documented warnings concerning her unauthorized early leaving of her work station and

excessive socializing on the job, and there was unsupported opinion testimony from some males that she was treated differently from other females, the commissioner found that her discharge for leaving her early was not based on her sex. ***----- In the Matter of Jeld-Wen, Inc., 2 BOLI 163, 164-67 (1981).***

20.20 --- Stipulations

❑ At hearing, the agency and respondent stipulated to an exhibit that summarized complainant's claim for out of pocket expenses totaling $412 that accrued after he was demoted. ***----- In the Matter of Trees, Inc., 28 BOLI 218, 251-52 (2007).***

❑ After the hearing, the ALJ made an *ex parte* telephone call to the agency case presenter and asked if the agency would stipulate that respondent paid claimant in full for all hours worked, calculated at the rates respondent agreed to pay claimant ($100 for 24 hour shifts and $8 per hour for 4 hour shifts), including a $50 payment for claimant's single 12 hour shift. The agency stipulated to that fact. ***----- In the Matter of MAM Properties, LLC, 28 BOLI 172, 176 (2007).***

❑ The agency and respondent stipulated that the ALJ's written summary of testimony recorded on a blank tape was "an adequate representation of the record." ***----- In the Matter of Logan International, Ltd., 26 BOLI 254, 260 (2005).***

❑ Respondent and the agency stipulated to the first three elements of the agency's prima facie case at the start of the hearing. ***----- In the Matter of Southern Oregon Subway, Inc., 25 BOLI 218, 221, 235 (2004).***

❑ At the start of the hearing, the agency and respondent stipulated to various facts at issue in the agency's specific charges. ***----- In the Matter of Barbara Bridges, 25 BOLI 107, 109 (2003).***

At the start of the hearing, the agency and respondents orally stipulated to various facts at issue in the agency's notice of intent. ***----- In the Matter of Rodrigo Ayala Ochoa, 25 BOLI 12, 15 (2003).***

> Affirmed without opinion, *Ochoa v. Bureau of Labor and Industrie*s, 196 Or App 639, 103 P3d 1212 (2004).

❑ The agency and respondent agreed to consolidate two cases seeking debarment of respondent from prevailing wage rate jobs and stipulated that if the commissioner imposed debarment in both cases, the periods of debarment would run concurrently. ***----- In the Matter of Labor Ready Northwest, Inc., 23 BOLI 156, 163 (2002).***

> Appeal pending.

❑ At the start of hearing, respondent and the agency orally stipulated that the wage claimants were on the premises of Santiam Auto car lot located at 3650 Portland Road, Salem, Oregon, between April 16 and April 27, 2000. ***----- In the Matter of Triple A Construction, LLC, 23 BOLI 79, 84 (2002).***

❑ At the start of hearing, the participants stipulated to the admission of agency exhibits A-1 and A-2 and further stipulated that complainant's rate of pay during her employment was $7.00 per hour. ***----- In the Matter of State Adjustment, Inc., 23 BOLI 19, 21 (2002).***

❑ At the start of hearing, the agency and respondent stipulated to the admission into the record of agency exhibits A-8 through A-11. ***----- In the Matter of Randall Stuart Bates, 23 BOLI 1, 3 (2002).***

❑ In a wage security fund case, respondent and the agency entered into a number of stipulations at the outset of the hearing, including the validity of the underlying wage claims, that the commissioner had made a determination that the wage claimants were entitled to and had received payment from the fund in a specified amount, and as to the admission of a number of exhibits. ***----- In the Matter of SQDL Co., 22 BOLI 223, 228 (2001).***

❑ Prior to opening statements, respondent stipulated that "Fjord, Inc." and "Fjord, Ltd." were the same company. ***----- In the Matter of Fjord, Inc., 21 BOLI 260, 263 (2001).***

> Affirmed without opinion, *Fjord, Inc. v. Bureau of Labor and Industries,* 186 Or App 566, 65 P3d 1132 (2003).

❑ Prior to opening statements, the agency and respondent stipulated that respondent was claimant's employer, that claimant was employed by respondent from November 17, 1998, through June 7, 2000, and that respondent paid claimant $24,785 in total. ***----- In the Matter of Danny Vong Phuoc Truong, 21 BOLI 217, 221 (2001).***

❑ Prior to opening statements, the agency and respondent stipulated that a number of exhibits would be admitted without objection, and that claimant was entitled to $5,803.13 in unpaid overtime wages, based on 309.5 hours worked during the wage claim period over 40 hours in a given work week, if the forum concluded that claimant was not an excluded executive employee during the wage claim period. ***----- In the Matter of Lane-Douglas Construction, Inc., 21 BOLI 36, 39 (2000).***

❑ During the lunch break on the first day of hearing, the participants agreed to stipulate to the allegations in certain paragraphs of the notice of intent. The case presenter read the stipulations into the record after the break and respondent acknowledged his agreement with the case presenter's reading of the stipulations. ***----- In the Matter of Tomas Benitez, 19 BOLI 142, 147 (2000)***.

❑ At the start of the hearing, respondents stipulated that Lane Hampton, the claimant present at the hearing, was the "Lane B. Hampton" to whom respondent had referred in her answer. ***----- In the Matter of Ann L. Swanger, 19 BOLI 42, 45 (1999)***.

❑ The participants stipulated to certain facts at the commencement of the hearing. ***----- In the Matter of Lambertus Sandker, 18 BOLI 277, 280 (1999)***.

❑ At the start of the hearing, the participants made a number of joint stipulations that clarified the scope of the agency's allegations in its notice of intent. ***----- In the Matter of Mike L. Sulffridge, 18 BOLI 22, 27 (1999)***.

> Affirmed without opinion, *Mike Sulffridge dba Mike*

Sulffridge Contracting, Inc., and A & B Cutters, Inc. v. Bureau of Labor and Industries, 168 Or App 498 (2000).

❑ The participants submitted a statement of stipulated facts prior to the hearing. ***----- In the Matter of Northwest Permastore, 18 BOLI 1, 3 (1999)***.

Affirmed, *Northwest Permastore Systems v. Bureau of Labor and Industries,* 172 Or App 427 (2001).

❑ During the hearing, the participants stipulated to three changes in dates in the specific charges and also submitted a document listing certain stipulated facts. ***----- In the Matter of LTM, Incorporated, 17 BOLI 226, 229 (1998)***.

❑ At a prehearing conference, the agency and respondent stipulated to facts that were admitted by the pleadings, as identified in the agency's case summary. Those facts were admitted into the record by the ALJ at the start of the hearing. ***----- In the Matter of Industrial Carbide Tooling, Inc., 15 BOLI 33, 34 (1996).***

❑ At a prehearing conference, the agency and respondent stipulated to facts that were admitted by the pleadings, including the fact that complainant was a disabled person. Other stipulations were made during the hearing and were reflected in the findings. ***----- In the Matter of WS, Inc., 13 BOLI 64, 66 (1994).***

❑ At the start of the hearing, the agency and respondent stipulated to certain facts that were admitted into the record. ***----- In the Matter of Crystal Heart Books Co., 12 BOLI 33, 35 (1993). WS, Inc., 13 BOLI 64, 66 (1994).*** *See also In the Matter of Pzazz Hair Designs, 9 BOLI 240, 242 (1991); In the Matter of St. Vincent De Paul, 8 BOLI 293, 295 (1990); In the Matter of Daniel Duron, 8 BOLI 23, 24-25 (1989).*

❑ At the end of the hearing, the agency and respondents agreed to stipulate to complainant's back wages. The hearings referee left the record open for two weeks for that stipulation. ***----- In the Matter of Dan Cyr Enterprises, 11 BOLI 172, 175 (1993).***

❑ When the hearings referee granted summary judgment as to respondent's alleged violation of law, respondent and the agency subsequent stipulated that if testimony had been taken on the issue, the evidence would have allowed the hearings referee to recommend an award of $2,000 to complainant as compensation for mental suffering. ***----- In the Matter of Douglas County, 11 BOLI 1, 2 (1992).***

❑ During the hearing, the participants stipulated that should agency staff responsible be called to testify, they would testify that the summaries of interviews were compiled by the interviewer from notes taken at the time of the interview and were part of the regularly kept agency file, and that the notice of administrative determination of substantial evidence was approved for issuance. ***----- In the Matter of Russ Berrie & Co., Inc., 9 BOLI 49, 51 (1990).***

❑ At a prehearing conference, the agency and respondent stipulated to facts that were admitted by the pleadings, as well as to several other facts that were admitted to the record. ***----- In the Matter of Franko Oil Company, 8 BOLI 279, 281 (1990).***

❑ During the hearing, upon the urging of the hearings referee, the participants agreed on the record to a number of factual stipulations. ***----- In the Matter of Casa Toltec, 8 BOLI 149, 154 (1989).***

❑ When the agency and respondent stipulated to the amount of damages to be paid to complainant, should liability be found in a final order, the forum was precluded from considering any damages that may have accrued after the date of the hearing. ***----- In the Matter of City of Cannon Beach, 3 BOLI 115, 123 (1982).***

❑ By stipulation of counsel for the agency and counsel for the respondent, the specific charges were amended at hearing. ***----- In the Matter of Dee Wescott, 2 BOLI 29, 30 (1980).***

❑ Before hearing, the agency and respondent stipulated to the amount of back pay owed to complainant, should respondent be found liable. ***----- In the Matter of City/County Computer Center, 1 BOLI 197, 198 (1979).***

❑ Prior to the hearing, respondent and the agency agreed to have the case decided based on a joint stipulation of facts and written briefs. ***----- In the Matter of Eastern Airline, Inc., 1 BOLI 193, 194 (1979).***

❑ When the agency and respondent agreed to the facts, they were allowed by stipulation to waive hearing and submit the controversy in writing as to the meaning of those facts to the designated hearings referee for a proposed order. ***----- In the Matter of Eastern Airline, Inc., 1 BOLI 193, 194 (1979).***

❑ When the agency and respondent agreed to the facts, they were allowed by stipulation to waive specific charges and notice of hearing and to submit the controversy in writing as to the meaning of those facts directly to the commissioner for a final order. ***----- In the Matter of School District Union High 7J, 1 BOLI 163, 163 (1979).***

20.21 --- Sufficiency

❑ The forum accepts the testimony of a claimant as sufficient evidence to prove work was performed and from which to draw an inference of the extent of that work, when that testimony is credible. ***----- In the Matter of Sunnyside Enterprises of Oregon, 14 BOLI 170, 174 (1995).*** *See also In the Matter of Dan's Ukiah Service, 8 BOLI 96, 106 (1989); In the Matter of Sheila Wood, 5 BOLI 240, 253-54 (1986).*

❑ When the agency proved that 20 wage claimants had filed and assigned wage claims, and the agency presented 10 of the wage claimants plus four other witnesses who collectively gave testimony regarding the employment and wages owed to all 20, the commissioner was able to find the precise amounts owed to each of the 20 claimants. ***----- In the Matter of Blue Ribbon Christmas Trees, Inc., 12 BOLI 209, 213-220 (1994).***

20.22 --- Witnesses (*see also* 22.0)

❑ After the agency's opening statement, respondent stated that he wanted to call the agency case presenter as a witness. The ALJ denied the motion on the basis that respondents had not submitted a case summary. ****----**

- In the Matter of Orion Driftboat and Watercraft Company, LLC, 26 BOLI 137, 142 (2005).

❑ At the end of the agency's case in chief, the agency asked to have respondent testify as a witness. Respondent objected and the ALJ sustained respondent's objection on the basis that the agency had not listed respondent as a witness on its case summary. ***----- In the Matter of Orion Driftboat and Watercraft Company, LLC, 26 BOLI 137, 142 (2005).***

❑ On the first day of hearing, respondent asked when his witnesses would be able to testify and the agency case presenter stated that she would object to all respondent's witnesses except for respondent, based on respondent's failure to submit a case summary and the agency's resultant lack of opportunity to interview any of respondent's witnesses. After discussion, the agency case presenter agreed that the basis for her objection would be cured if she had the opportunity to interview respondent's witnesses before they testified. The ALJ ruled that the witnesses listed in a witness list provided by respondent in response to a discovery order would be allowed to testify on the condition that respondent produced those witnesses for interviews with the agency case presenter by noon the second day of hearing. ***----- In the Matter of William Presley, 25 BOLI 56, 59 (2004).***

Affirmed, *Presley v. Bureau of Labor and Industries,* 200 Or App 113, 112 P3d 485 (2005).

❑ When the hearings referee had allowed amendment of respondent's answer to conform to matters raised for the first time in respondent's case summary, and the agency asked for reconsideration of that ruling on the first day of hearing, claiming prejudice because of a lack of opportunity to interview county police officers present during an incident described by a respondent witness, the forum denied reconsideration, pointing out that both officers were still with the county and available to the agency to present. ***----- In the Matter of William Kirby, 9 BOLI 258, 260 (1991).***

20.23 --- Unsworn Statements (*see also* 10.2, 24.3)

❑ When making factual findings, the forum may consider unsworn assertions contained in a defaulting respondent's answer, but those assertions are overcome whenever controverted by other credible evidence. ***----- In the Matter of Sue Dana, 28 BOLI 22, 29 (2006).***

❑ Although the forum may consider an answer when making factual findings, unsworn and unsubstantiated assertions in the answer are overcome whenever controverted by other credible evidence. ***----- In the Matter of Orion Driftboat and Watercraft Company, LLC, 26 BOLI 137, 146 (2005).***

❑ When default occurs, the forum may give some weight to unsworn assertions contained in an answer unless other credible evidence controverts them. If a respondent is found not to be credible the forum need not give any weight to the assertions, even if they are uncontroverted. ***----- In the Matter of Usra A. Vargas, 22 BOLI 212, 220 (2001).***

❑ When a respondent fails to appear at hearing and its total contribution to the record is a request for hearing and an answer that contains only unsworn and unsubstantiated assertions, those assertions are overcome whenever they are contradicted by other credible evidence in the record. ***----- In the Matter of Landco Enterprises, Inc., 22 BOLI 62, 67 (2001).*** *See also In the Matter of M. Carmona Painting, Inc., 22 BOLI 52, 58 (2001); In the Matter of WB Painting and Decorating, Inc., 22 BOLI 18, 20 (2001), amended 22 BOLI 27 (2001); In the Matter of Keith Testerman, 20 BOLI 112, 127 (2000); In the Matter of Nova Garbush, 20 BOLI 65, 71 (2000); In the Matter of Catalogfinder, Inc., 18 BOLI 242, 264-64 (1999); In the Matter of Leslie Elmer DeHart, 18 BOLI 199, 206 (1999).*

❑ The ALJ denied the agency's motion for partial summary judgment when an unsworn assertion of the respondent, construed favorably to respondent, created a genuine dispute of material fact. The ALJ rejected the agency's argument that she should find the unsworn assertion to be overcome because it was controverted by other credible evidence in the record. Such a finding would involve weighing evidence and making credibility determinations, which an ALJ may not do in the context of deciding a summary judgment motion. ***----- In the Matter of F.R. Custom Builders, Inc., 20 BOLI 102, 105 (2000)***.

❑ When some claimants seeking wages in excess of the amounts paid by the Wage Security Fund did not testify at hearing and the only evidence in the record regarding their pay rates and hours worked was their wage claim forms, the forum concluded that the agency failed to establish a prima facie case that the respondent owed those wages. ***----- In the Matter of Catalogfinder, Inc., 18 BOLI 242, 263-64 (1999)***.

❑ In a default situation when a respondent's total contribution to the record is a request for a hearing and an answer that contains nothing but unsworn and unsubstantiated assertions, those assertions are overcome whenever they are controverted by credible evidence in the record. ***----- In the Matter of Tina Davidson, 16 BOLI 141, 148 (1997).*** *See also In the Matter of Jewel Schmidt, 15 BOLI 236, 237 (1997); In the Matter of Susan Palmer, 15 BOLI 226, 233 (1997); In the Matter of Robert Arreola, 14 BOLI 34, 40 (1995); In the Matter of Jack Mongeon, 6 BOLI 194, 201 (1987).*

❑ When a respondent submits an answer to a charging document, the forum may admit the answer into evidence during hearing and may consider the answer's contents when making findings of fact. If the respondent fails to appear at hearing, the forum may review the answer to determine whether respondent has set forth any evidence or defense to the charges. ***----- In the Matter of Tina Davidson, 16 BOLI 141, 148 (1997).*** *See also In the Matter of Jack Mongeon, 6 BOLI 194, 201 (1987); In the Matter of Richard Niquette, 5 BOLI 53 (1986).*

❑ When respondent appeared without counsel and made declarative statements rather than asking questions of witnesses, the forum disregarded all respondent's self serving statements, but accepted as evidence statements that were against respondent's economic interest. ***----- In the Matter of Danny Jones,***

15 BOLI 96, 104 (1996).

20.24 --- Evidence Requested by Forum

❑ At the conclusion of hearing, the ALJ directed the agency case presenter to submit penalty wage calculations based on Claimant's testimony at hearing. ***----- In the Matter of Westland Resources Group LLC, 23 BOLI 276, 278, 283 (2002).***

❑ In a prevailing wage rate case, at the end of the first day of hearing the ALJ adjourned the hearing and, on his own motion, in the company of the agency case presenter, respondents' counsel, and respondent's representative, the ALJ visited and made observations at the job site at issue in the hearing. At the conclusion of the site visit, the ALJ instructed the agency case presenter and respondents' counsel to each take photographs of the municipal building and its adjacent parking lot and to submit them to the forum. ***----- In the Matter of Larson Construction Co., Inc., 22 BOLI 118, 123 (2001).***

❑ At the close of hearing, the hearings referee directed the agency to provide the forum with a copy of the agreement between the agency and the City of Portland for the enforcement of Portland City Code chapter 23.01. The agreement, as amended, was subsequently admitted into the record. ***----- In the Matter of Dandelion Enterprises, Inc., 14 BOLI 133, 136 (1995).***

❑ At the direction of the hearings referee, respondents and the agency filed written arguments and exhibits concerning an appropriate civil penalty. ***----- In the Matter of Gregory Lisoff, 14 BOLI 127, 128 (1995).***

❑ During the hearing, the hearings referee requested original copies of complainant's W-2 tax forms because some copies of those forms in other exhibits were unreadable. ***----- In the Matter of Fred Meyer, Inc., 9 BOLI 157, 159 (1990).***

❑ During the hearing, the hearings referee requested and received from the agency a replacement page for an exhibit. The replacement page, which was more readable than the original page, was inserted into the hearing record and the original was removed. ***----- In the Matter of Lee's Cafe, 8 BOLI 1, 4 (1989).***

❑ During the hearing, the hearings referee asked the agency to recomputed penalty wages in order to correctly account for claimant's wage and compensation agreement, and this request was upheld over respondent's objection in the final order. ***----- In the Matter of Anita's Flowers & Boutique, 6 BOLI 258, 259 (1987).***

> Overruled on the limited issue of including reimbursable expenses in wages used to calculate a civil penalty, *In the Matter of Central Pacific Freight Lines, Inc.,* 7 BOLI 272, 280 (1972).

❑ After hearing, the agency submitted a copy of an exhibit as requested by the forum, as well as more readable copies of certain exhibits, which were substituted for copies submitted at hearing. ***----- In the Matter of Deanna Donaca, 6 BOLI 212, 214 (1987).***

❑ The hearings referee asked respondent to submit copies of payroll records during the hearing and admitted them as an exhibit. ***----- In the Matter of Tim's Top Shop, 6 BOLI 166, 16768 (1987).***

❑ The hearings referee asked the agency to submit the claimant's wage claim and assignment of wages to the forum, which the agency did after the hearing. The documents were admitted as exhibits. ***----- In the Matter of Cheryl Miller, 5 BOLI 175, 176 (1986).***

20.25 --- Agency Policy Statement

❑ When an agency policy statement is a "directive, standard, regulation or statement of general applicability that implements, interprets or prescribes law or policy, or describes the procedure or practice requirements of [the] agency," that statement is a rule binding on the agency until the agency amends or repeals it or until it is declared invalid by a court. ***----- In the Matter of Charles Hurt, 18 BOLI 265, 274-75 (1999)***.

❑ If the agency wishes the forum to consider its policy or its interpretations of statutes or rules, it should offer evidence regarding the policy or interpretation during the hearing. ***----- In the Matter of Southern Oregon Flagging, Inc., 18 BOLI 138, 168 (1999)***.

21.0 PROOF

21.1 --- In General

❑ When a respondent defaults, the agency needs only to establish a prima facie case to support the allegations in its charging document in order to prevail. ***----- In the Matter of MAM Properties, LLC, 28 BOLI 172, 187 (2007).***

❑ When respondent objected that it was improper for the forum to award $25,000 in mental suffering damages based solely on the testimony of complainant and his wife, the forum held that the testimony of a single credible witness is sufficient to prove any element of a claim, including damages. ***----- In the Matter of Centennial School District, 18 BOLI 176, 198 (1999)***.

> Affirmed, *Centennial School District No. 28J v. Oregon Bureau of Labor and Industries*, 169 Or App 489 (2000), rev den 332 Or 56 (2001).

❑ If the agency wishes the forum to consider its policy or its interpretations of statutes or rules, it should offer evidence regarding the policy or interpretation during the hearing. ***----- In the Matter of Southern Oregon Flagging, Inc., 18 BOLI 138, 168 (1999)***.

❑ When the agency has documents within its control that would substantiate testimony, but fails to produce them without explanation, the bare testimony may be accorded little weight. ***----- In the Matter of Southern Oregon Flagging, Inc., 18 BOLI 138, 168 (1999)***.

❑ Because the agency must present a prima facie case before the respondent has a burden to prove any defense, the agency presents its case first. ***----- In the Matter of Manuel Galan, Jr., 17 BOLI 112, 118-19 (1998)***.

> Affirmed without opinion, *Galan v. Bureau of Labor and Industries*, 167 Or App 259 (2000), rev den 332 Or 137 (2001).

❑ In a default case, when respondent's only contribution to the record was his answer, and when credible evidence in the record effectively controverted the unsworn and unsubstantiated assertions in the answer, the forum held that it is not the burden of the agency or the forum to disprove respondent's defense. ***----- In the Matter of Robert Arreola, 14 BOLI 34, 40 (1995).***

21.2 --- Standard of Proof

❑ The forum applied the clear and convincing evidence standard to the agency's five allegations that respondents made misrepresentations, false statements, and willfully concealed information on their joint farm labor license application. ***----- In the Matter of Rodrigo Ayala Ochoa, 25 BOLI 12, 46 (2003).***

> Affirmed without opinion, *Ochoa v. Bureau of Labor and Industries*, 196 Or App 639, 103 P3d 1212 (2004).

❑ Respondents argued that the quantum of proof should be "clear and convincing" rather than a preponderance when one of the sanctions sought by the agency was further denial of the right to apply for a farm/forest labor contractor's license based on respondent's misrepresentation. The commissioner held that the issue was application or qualification for a license, not revocation of an existing license, and that a preponderance was the proper evidentiary standard. ***----- In the Matter of Manuel Galan, 15 BOLI 106, 114, 133 (1996).***

> Affirmed without opinion, *Staff, Inc. v. Bureau of Labor and Industries,* 148 Or App 451, 939 P2d 174, rev den, 326 Or 57, 944 P2d 947 (1997).

❑ The forum applies the "clear and convincing" evidentiary standard to alleged violations of ORS 658.440(3)(a), which prohibits a farm labor contractor license applicant from making "any misrepresentation, false statement or willful concealment" in the application. ***----- In the Matter of Alejandro Lumbreras, 12 BOLI 117, 126 (1993).***

❑ A preponderance of the evidence is the correct standard in this forum. A preponderance of evidence means "more probably true than false." ***----- In the Matter of Sunnyside Inn, 11 BOLI 151, 165 (1993).***

❑ The forum applied a clear and convincing evidentiary standard to the agency's allegations that respondent made misrepresentations on her license application. ***----- In the Matter of Amalia Ybarra, 10 BOLI 75, 83 (1991).***

❑ Emotional distress damages are recoverable in an employment discrimination case when emotional distress is established by a preponderance of the evidence. ***----- In the Matter of Jerome Dusenberry, 9 BOLI 173, 190 (1991).***

❑ State agencies conducting administrative proceedings, including licensing actions, should generally apply preponderance of the evidence as the standard of proof. In the case of a license disciplinary action premised upon fraud or misrepresentation, agencies should use clear and convincing evidence as the standard of proof. Clear and convincing evidence is defined as "evidence which is free from confusion, fully intelligible and distinct and for which the truth of the facts is highly probable." The commissioner applied this clear and convincing standard to two allegations that the applicant made a misrepresentation, false statement and/or willful concealment in his application. ***----- In the Matter of Rogelio Loa, 9 BOLI 139, 146 (1990).***

❑ When the agency contends that representations were false, fraudulent and misleading, the agency must establish these motivations by a preponderance of the evidence. ***----- In the Matter of Leonard Williams, 8 BOLI 57, 75 (1989).***

> But see: *In the Matter of Rogelio Loa, 9 BOLI 139,140 (1990).*

❑ The forum held that respondent must prove a bona fide occupational requirement by clear and convincing evidence. ***----- In the Matter of School District No. 1, 1 BOLI 1, 13 (1973).***

> Affirmed in part, reversed in part on other grounds and remanded, *School District No. 1, Multnomah County v. Nilsen, 271 Or 461, 534 P2d 1135 (1975).*
>
> Orders on Remand, 1 BOLI 52 (1976), 1 BOLI 129 (1978).

21.3 --- Burden of Proof

21.3.1 --- In General

❑ The agency has the burden to establish, by a preponderance of the evidence, that respondent violated the statutes in the manner alleged. ***----- In the Matter of Mohammad Khan, 15 BOLI 191, 207-11 (1996).***

❑ Respondent has the burden of showing actual prejudice or bias by the agency. ***----- In the Matter of Albertson's, Inc., 10 BOLI 199, 324 (1992).***

> Reversed and remanded on other ground, *Albertson's, Inc. v. Bureau of Labor and Industries,* 128 Or App 97, 874 P2d 1352 (1994).

21.3.2 --- Wage & Hour Cases

❑ Respondent has the burden of presenting evidence to support the affirmative defense that claimant was a professional who was exempt from statutory overtime requirements. ***----- In the Matter of Scott Miller, 23 BOLI 243, 259 (2002).***

❑ In determining the amount of civil penalty, the forum must consider all aggravating and mitigating factors. Respondent bears the burden of proving mitigating circumstances. ***----- In the Matter of Larson Construction Co., Inc., 22 BOLI 118, 155, 157 (2001).***

❑ Respondent had the burden of proof of establishing the affirmative defense that claimant was exempt as an "executive employee" from the overtime requirements of ORS 653.261 and OAR 839-020-0030(1). ***----- In the Matter of Lane-Douglas Construction, Inc., 21 BOLI 36, 53-54 (2000).***

❑ A wage claimant bears the burden of proving he or she performed work for which she was not properly compensated. ***----- In the Matter of Rubin Honeycutt, 25 BOLI 91, 103 (2003).*** *See also In the Matter of Paul Andrew Flagg, 25 BOLI 1, 10 (2003); In the Matter of Rubin Honeycutt, 23 BOLI 224, 232 (2002); In the Matter*

of Debbie Frampton, 19 BOLI 27, 38 (1999).

❑ Respondent has the burden of proving its affirmative defense that claimant was an independent contractor and not respondent's employee. ***----- In the Matter of Gary Lee Lucas, 26 BOLI 198, 210 (2005).***

Appeal pending.

See also In the Matter of Orion Driftboat and Watercraft Company, 26 BOLI 137, 146 (2005); In the Matter of Adesina Adeniji, 25 BOLI 162, 169 (2004); In the Matter of William Presley, 25 BOLI 56, 69 (2004), affirmed, Presley v. Bureau of Labor and Industries, 200 Or App 113, 112 P3d 485 (2005); In the Matter of Rubin Honeycutt, 23 BOLI 224, 232 (2002); In the Matter of Leslie Elmer DeHart, 18 BOLI 199, 206-07(1999).

❑ Respondent has the burden to show its financial inability to pay wages at the time they were due. When a respondent's answer includes this defense but the respondent produces no supporting evidence, a claimant's right to penalty wages is not overcome. ***----- In the Matter of R.L. Chapman Ent. Ltd.*, *17 BOLI 277, 284-85 (1999)***.

❑ It is the agency's burden to prove that the respondent employer failed to pay the prevailing rate of wage. ***----- In the Matter of Southern Oregon Flagging, Inc., 18 BOLI 138, 162 (1999)***.

❑ Respondents have the burden of proving estoppel by a preponderance of the evidence. ***----- In the Matter of Larson Construction Co., Inc., 17 BOLI 54, 74 (1998)***.

❑ Respondent did not meet its burden of proving its affirmative defense that the commissioner's classification of standpipe erection workers as boilermakers was incorrect. ***----- In the Matter of Northwest Permastore, 18 BOLI 1, 17-18 (1999), reconsidered 20 BOLI 37 (2000).***

Affirmed, *Northwest Permastore Systems v. Bureau of Labor and Industries,* 172 Or App 427 (2001).

❑ In wage claim cases, the claimant has the burden of proving that he performed work for which he was not properly compensated. The burden of proving the amount and extent of work performed by claimant can be met by producing sufficient evidence from which a just and reasonable inference may be drawn. The forum will accept the credible testimony of the claimant to prove such work was performed and from which to draw an inference of the extent of that work. Upon this showing, the burden shifts to the respondent to produce evidence to negative the reasonableness of the inference to be drawn forum the employee's evidence. ***---- In the Matter of Anna Pache, 13 BOLI 249, 269-71 (1994).*** *See also In the Matter of Mario Pedroza, 13 BOLI 220, 229 (1994); In the Matter of Sylvia Montes, 11 BOLI 268, 275-76 (1993).*

❑ When an employer has kept no records of an employee's work, the agency has the burden of first proving that the employee performed work for which he was improperly paid. The burden of proving the amount and extent of work performed by claimant can be met by producing sufficient evidence from which a just and reasonable inference may be drawn. The forum will accept the credible testimony of the claimant as sufficient evidence. Upon this showing, the burden shifts to the respondent to produce evidence to negative the reasonableness of the inference to be drawn forum the employee's evidence to prove such work was performed and from which to draw an inference of the extent of that work. ***----- In the Matter of Mario Pedroza, 13 BOLI 220, 230 (1994).***

❑ When a wage claimant has been a regular hourly employee, and an employer seeks to deny liability for wages by asserting that, at a certain point during employment the claimant's status changed from employee to either independent contractor or partner, and the claimant disputes this, the employer has the burden of proving the change in status. ***----- In the Matter of Superior Forest Products, 4 BOLI 223, 231 (1984).***

21.3.3 --- Civil Rights Cases

❑ To prevail in a case involving charges of sexual harassment, the agency must prove its allegations by a preponderance of the evidence. ***---- In the Matter of Moyer Theatres, Inc., 18 BOLI 123, 136 (1999)***.

❑ In a sex discrimination case, the commissioner stated that Oregon courts have rejected any burden shifting and the burden of proving unlawful discrimination remains with the agency throughout the case. ***----- In the Matter of Motel 6, 13 BOLI 175, 186 (1994).***

❑ The burden of proving inability to accommodate is upon the employer. Once the employer presents credible evidence indicating accommodation of the complainant would not reasonably be possible, the complainant may not remain silent and has the burden of coming forward with evidence concerning his individual capabilities and suggestions for possible accommodations to rebut the employer's evidence. ***----- In the Matter of WS, Inc., 13 BOLI 64, 86-87 (1994).***

❑ In a sexual harassment case, the hearings referee denied respondent's motion to make the specific charges more definite and certain, stating that the agency need not plead finite items of evidence in framing the charges, as the agency will have the burden at hearing of presenting evidence to support any fact or proposition alleged. ***----- In the Matter of Dunkin' Donuts, Inc., 8 BOLI 175, 182 (1989).***

❑ To establish a prima facie case of an unlawful employment practice based on religion under ORS 659.030(1)(a), the agency must plead and prove that (1) complainant had a bona fide religious belief; (2) he informed respondent of his religious views and that they were in conflict with his responsibilities as an employee; and (3) he was discharged because of his observance of that belief. Once the agency has established a prima facie case, the burden shifts to respondent to prove that it made good faith efforts to accommodate complainant's religious beliefs***. ----- In the Matter of Albertson's, Inc., 7 BOLI 227, 240 (1988).***

❑ Although the language of ORS 659.415 appears to impose an absolute duty on an employer to reinstate an injured worker, the employer may defend a complaint

brought under ORS 659.415 on the ground that an employee was denied reinstatement for "just cause." This is an affirmative defense and the employer has the burden of proving the defense by a preponderance of the evidence. ***----- In the Matter of Pacific Convalescent Foundation, Inc., 4 BOLI 174, 184 (1984).***

❑ In an injured worker case, the agency does not have to prove that the employee was terminated or denied reinstatement because the employee sustained a compensable injury, but merely has to prove that the employee sustained the injury and thereafter was denied reinstatement to an available position. Once the agency has presented a prima facie case, an employer has the burden of proving by a preponderance of the evidence that termination or denial of the right to reinstatement was for a separate, nondiscriminatory reason. ***----- In the Matter of Northwest Tank Repair, 3 BOLI 205, 213 (1982).***

❑ When complainant alleged she had been discharged on the basis of sex, the forum stated that the burden of proof was on complainant to show that respondent discriminated against her because of her sex. The forum concluded that complainant had not rebutted respondent's showing that she was discharged for the legitimate, nondiscriminatory reason of falsifying her time records. ***----- In the Matter of Lynn Edwards, 3 BOLI 134, 137 (1982).***

❑ The burden of proof to establish that a requirement is necessary to the normal operation of the employer's business (BFOR defense) is on the employer, not upon the labor commissioner, the complainant, or the attorney general. ***----- In the Matter of School District No. 1, 1 BOLI 1, 17 (1973).***

> Affirmed in part, reversed in part on other grounds and remanded, *School District No. 1, Multnomah County v. Nilsen, 271 Or 461, 534 P2d 1135 (1975).*
>
> Orders on Remand, 1 BOLI 52 (1976), 1 BOLI 129 (1978).

❑ The administrative rule requiring the attorney general to have the burden of proof applies only to the specific charges of discrimination and not to matters of defense. There is no administrative rule of the commissioner that specifies respondent's burden of proof, since defenses are not required to be plead in contested cases under ORS chapter 183. ***----- In the Matter of School District No. 1, 1 BOLI 1, 17 (1973).***

> Affirmed in part, reversed in part on other grounds and remanded, School District No. 1, Multnomah County v. Nilsen, 271 Or 461, 534 P2d 1135 (1975).
>
> Orders on Remand, 1 BOLI 52 (1976), 1 BOLI 129 (1978).

21.4 --- Burden of Production

❑ In wage claim cases, the claimant has the burden of proving that he performed work for which he was not properly compensated. The burden of proving the amount and extent of work performed by claimant can be met by producing sufficient evidence from which a just and reasonable inference may be drawn. The forum will accept the credible testimony of the claimant to prove such work was performed and from which to draw an inference of the extent of that work. Upon this showing, the burden shifts to the respondent to produce evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. ***---- In the Matter of Anna Pache, 13 BOLI 249, 269-71 (1994).*** *See also In the Matter of Mario Pedroza, 13 BOLI 220, 229 (1994); In the Matter of Sylvia Montes, 11 BOLI 268, 275-76 (1993).*

❑ When an employer has kept no records of an employee's work, the agency has the burden of first proving that the employee performed work for which he was improperly paid. The burden of proving the amount and extent of work performed by claimant can be met by producing sufficient evidence from which a just and reasonable inference may be drawn. The forum will accept the credible testimony of the claimant as sufficient evidence. Upon this showing, the burden shifts to the respondent to produce evidence to negative the reasonableness of the inference to be drawn from the employee's evidence to prove such work was performed and from which to draw an inference of the extent of that work. ***----- In the Matter of Mario Pedroza, 13 BOLI 220, 230 (1994).***

❑ The employee has the burden of proving that he performed work for which he was not properly compensated. Under the minimum wage law, the employer has the duty to keep proper records of wages, hours and other conditions and practices of employment. When the employer's records are inaccurate or inadequate and the employer cannot offer convincing substitutes, an employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden shifts to the respondent to produce evidence to negative the reasonableness of the inference to be drawn from the employee's evidence. If the employer fails to produce such evidence, the forum may then award damages to the employee, even though the result be only approximate. ***----- In the Matter of Sylvia Montes, 11 BOLI 268, 275-76 (1993).***

❑ Respondent bears the burden of rebutting the inference of discrimination established by the complainant's prima facie case. While not an onerous burden, respondent nonetheless must come forward with some evidence to substantiate its rebuttal or defense. ***---- In the Matter of Franko Oil Company, 8 BOLI 279, 288-89 (1990).***

❑ When the agency succeeds in making a prima facie case of discrimination, the burden shifts to respondent must articulate some legitimate, nondiscriminatory reason for its action. If respondent carries this burden, the agency then has to opportunity to show that respondent's reason was pretextual. This Division of intermediate evidentiary burdens serves to bring the parties expeditiously and fairly to the ultimate question whether the agency has persuaded the forum that the respondent discriminated against the complainant. ***----- In the Matter of K-Mart Corporation, 3 BOLI 194, 199 (1982).***

21.5 --- Mitigation

❑ In a civil rights hearing, respondent had the burden of showing that complainant failed to mitigate her damages. ***----- In the Matter of RJ's All American Restaurant, 12 BOLI 14, 32-32 (1993).*** *See also Allied Computerized Credit & Collections, Inc., 9 BOLI 206, 217 (1991); In the Matter of Lee's Cafe, 8 BOLI 1, 4 (1989); In the Matter of Love's Woodpit Barbeque Restaurant, 3 BOLI 18, 26 (1982); In the Matter of City of Portland, 2 BOLI 41, 42 (1980).*

❑ Respondent has the burden to elicit evidence to prove mitigation. When respondent took no steps to elicit this evidence by taking action such as requesting complainant to produce tax records or income, the forum determined that there was no evidence to establish that respondent took reasonable steps to meet that burden. When complainant testified he had worked during the period between termination and the hearing, the forum used the minimum number of hours to reduce complainant's damages and resolved ambiguities against respondent. ***----- In the Matter of 3 Son Loggers, Inc., 5 BOLI 65, 81 (1986).***

❑ In all matters brought under ORS 659.030, respondent has the burden of establishing facts mitigating the damages to be awarded to a complainant. A complainant is probably the only and certainly the best source of evidence of mitigation efforts. When a complainant is totally unresponsive to respondent's questions concerning mitigation and could reasonably be expected to be able to supply such information, the forum must infer that the answers, if given, would not have furthered complainant's claim. ***----- In the Matter of Lucille's Hair Care, 3 BOLI 286, 302 (1983).***

> Modified as to wage loss and interest*, Ogden v. Bureau of Labor,* 68 Or App 235, 682 P2d 802 (1984); order reinstated, remanded for recalculation of interest*, Ogden v. Bureau of Labor,* 299 Or 98, 699 P2d 189 (1985).
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> Order on remand, 5 BOLI 13, 29 (1985).

❑ Respondent has the burden of proving that complainant failed to use reasonable care and diligence in seeking employment, and that jobs were available which, with reasonable diligence, complainant could have discovered and for which complainant was qualified. ***----- In the Matter of Veneer Services, Inc., 2 BOLI 179, 186 (1981).***

> Affirmed without opinion, *Veneer Services, Inc. v. Bureau of Labor and Industries,* 58 Or App 76, 648 P2d 426 (1982).

21.6 --- Civil Rights Cases, Generally

❑ Respondent bears the burden of rebutting the inference of discrimination established by the complainant's prima facie case. While not an onerous burden, respondent nonetheless must come forward with some evidence to substantiate its rebuttal or defense. ***----- In the Matter of Franko Oil Company, 8 BOLI 279, 288-89 (1990).***

21.7 --- Wage & Hour Cases, Generally

❑ A partnership is never presumed and the burden of proving it is on the party alleging it. ***----- In the Matter of Crystal Heart Books Co., 12 BOLI 33, 42 (1993).***

21.8 --- Affirmative Defenses

21.8.1 --- In General

❑ Respondent must prove the defense of equitable estoppel by a preponderance of the evidence. ***----- In the Matter of Albertson's, Inc., 10 BOLI 199, 299 (1992).***

> Reversed and remanded on other ground, *Albertson's, Inc. v. Bureau of Labor and Industries,* 128 Or App 97, 874 P2d 1352 (1994).

❑ When respondent raised as an affirmative defense that complainant signed a Satisfaction of Final Order that operated to extinguish respondent's obligation to complainant, the commissioner rejected the defense because complainant was not a party to the case, but was a witness for the agency in an enforcement action. ***----- In the Matter of City of Portland – Civil Service Board (Second Addendum to Order), 6 BOLI 203, 211 (1987).***

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

❑ It is respondent's burden to establish respondent's financial inability to pay a claimant's wages. ***----- In the Matter of Kenny Anderson, 12 BOLI 275, 283 (1994).*** *See also In the Matter of William Sama, 11 BOLI 20, 25 (1992); In the Matter of Victor Klinger, 10 BOLI 36, 44-45 (1991).*

❑ The employer has the burden of proving financial inability to pay wages at the time they accrued. Testimony of an employer, even when credible, is not ordinarily sufficient by itself to prove financial inability to pay. ***----- In the Matter of Sheila Wood, 5 BOLI 240, 255 (1986).***

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

❑ The administrative procedure used by the agency to process a civil rights complaint, including conference, conciliation, and persuasion, is not a matter the agency needs to plead and prove in a contested case. If a respondent believes the agency has not followed the procedure, it can raise that issue as an affirmative defense. When a respondent raises the issue, it has the burden of presenting evidence to support its affirmative defense. ***----- In the Matter of WS, Inc., 13 BOLI 64, 92 (1994).***

❑ When complainant was out of work for three weeks between her discharge and her new job and worked two days for a Safeway store in those three weeks, the commissioner found "no evidence to show that she worked during hours which would require any income from that job to be treated as a set off against her lost wages. Such evidence is in the nature of an affirmative defense, which is the respondent's burden to plead and prove. By defaulting, respondent waived her right to present that defense. ***----- In the Matter of Peggy's Café, 7 BOLI 281, 288 (1989).***

❑ Although the language of ORS 659.415 appears to impose an absolute duty on an employer to reinstate an injured worker, the employer may defend a complaint brought under ORS 659.415 on the ground that an

employee was denied reinstatement for "just cause." This is an affirmative defense and the employer has the burden of proving the defense by a preponderance of the evidence. ***----- In the Matter of Pacific Convalescent Foundation, Inc., 4 BOLI 174, 184 (1984).***

❑ When respondent asked the forum to take judicial notice that it is common in most restaurants in the Portland area to have sex-segregated waiter/bus person work forces, the forum declined to do so because no evidence was presented to show this assertion was accurate, and even if it was accurate, it did not establish a BFOR based upon sex and was therefore not a valid defense. ***----- In the Matter of Love's Woodpit Barbeque Restaurant, 3 BOLI 18, 28 (1982).***

❑ The burden of proof to establish that a requirement is necessary to the normal operation of the employer's business (BFOR defense) is on the employer, not upon the labor commissioner, the complainant, or the attorney general. ***----- In the Matter of School District No. 1, 1 BOLI 1, 17 (1973).***

> Affirmed in part, reversed in part on other grounds and remanded, *School District No. 1, Multnomah County v. Nilsen, 271 Or 461, 534 P2d 1135 (1975).*
>
> Orders on Remand, 1 BOLI 52 (1976), 1 BOLI 129 (1978).

❑ The administrative rule requiring the attorney general to have the burden of proof applies only to the specific charges of discrimination and not to matters of defense. There is no administrative rule of the commissioner that specifies respondent's burden of proof, since defenses are not required to be plead in contested case under ORS chapter 183. ***----- In the Matter of School District No. 1, 1 BOLI 1, 17 (1973).***

> Affirmed in part, reversed in part on other grounds and remanded, School District No. 1, Multnomah County v. Nilsen, 271 Or 461, 534 P2d 1135 (1975).
>
> Orders on Remand, 1 BOLI 52 (1976), 1 BOLI 129 (1978).

❑ Respondent bears the burden of establishing, by a preponderance, that an otherwise discriminatory act was allowable because of a bona fide occupational requirement. ***----- In the Matter of Bend Millworks Company, 1 BOLI 214, 219 (1979).***

21.9 --- Offers of Proof

❑ The agency asked the ALJ for permission to "submit a request for judicial notice within three days after the hearing that would provide the information that would enable the forum to make an educated ruling" related to the agency's offer of proof. Specifically, the agency asked to provide information "about the existence of legitimate businesses in the community that do nothing but lend money to plaintiffs in lawsuits * * * if you have a good, valid, legitimate lawsuit against a solvent third party, there are entities that will pay you cash for assignment of plaintiff's rights." The ALJ denied the agency's request. ***----- In the Matter of Captain Hooks, LLP, 27 BOLI 211, 214 (2006).***

❑ During a wage claim hearing, the agency attempted to elicit evidence regarding an individual respondent's receipt of a substantial amount of funds from an auto accident settlement. Respondent objected because he received the funds two years after claimant left his company's employment. The agency argued that the evidence was relevant to disprove the individual respondent's affirmative defense of financial inability to pay at the time the wages accrued because the claim could have been sold, before settlement, to a private company in the business of buying claims of that nature for their potential value. The ALJ sustained the objection, but allowed the agency to make an offer of proof and respondent's attorney to respond. ***----- In the Matter of Captain Hooks, LLP, 27 BOLI 211, 213-14 (2006).***

❑ Respondent called two employees of complainant's subsequent employer as witnesses and the agency objected to their testimony as irrelevant and immaterial. Respondent represented that the witnesses were called to provide evidence that would show habit, routine, and pattern and practice of complainant that related to the formal charges, and that respondent planned to offer documents that documented complainant's application, performance and discharge from his subsequent employer based on their testimony. Respondent further represented that the witnesses were being called as impeachment witnesses with regard to complainant's employment application at his subsequent employer. The ALJ ruled that he would allow the witnesses to testify about complainant's employment application at his subsequent employer to show prior inconsistent statements by complainant, but would consider the remainder of their testimony as an offer of proof and rule on its admissibility and the admissibility of the other exhibits proposed order. In the proposed order, the ALJ sustained the agency's objection to all of the witnesses' testimony about complainant's actual work performance at his subsequent employer and related exhibits because none of the testimony relating to performance issues met OEC 406(2)'s definition of "habit." ***----- In the Matter of Logan International, Ltd., 26 BOLI 254, 261, 276-77 (2005).***

❑ When respondent called two persons as impeachment and rebuttal witnesses and the agency objected to their testimony on the grounds that neither was listed in respondent's case summary, the ALJ ruled that he would consider their testimony as an offer of proof and rule on its admissibility in the proposed order. After reviewing the record, the ALJ rejected part of their testimony and admitted part of their testimony. ***----- In the Matter of Logan International, Ltd., 26 BOLI 254, 260 (2005).***

❑ The agency moved for a discovery order and respondent was ordered to produce documents requested in the agency's motion. Respondent produced no documents in response to the discovery order and did not file a case summary because he perceived the case would settle before hearing and because he had attached some of the documents sought by the agency to his original answer. During the hearing, respondent offered seven exhibits that the agency objected to on the grounds that the exhibits all contained information that should have been included in respondent's case summary and that was also subject to

the forum's discovery order. The ALJ sustained the agency's objection and did not admit respondent's exhibits. The ALJ allowed respondent to make an offer of proof concerning each exhibit. During the hearing, the Agency moved that respondent's testimony concerning the specific contents of the seven exhibits be disregarded as an appropriate sanction for respondent's failure to submit a case summary or comply with the ALJ's discovery order. The ALJ granted the agency's motion, and considered respondent's testimony with regard to those exhibits solely as an offer of proof. ***----- In the Matter of Adesina Adeniji, 25 BOLI 162, 164-65 (2004)***.

❑ When respondent did not file a case summary listing five witnesses it sought to call during the hearing and the agency had no prior notice of its intent to call the witnesses, the forum found the agency would be prejudiced based on its inability to prepare to meet the witnesses' testimony and that a continuance would not cure the problem. The forum found that Respondent's reliance on someone other than its authorized representative to file the case summary was not a satisfactory reason for not filing a case summary and that the agency would not receive a fair hearing if respondents were allowed to call the witnesses. The forum ruled that respondent would only be allowed to call the authorized representative as a witness but allowed respondent to make an offer of proof stating the substance of the testimony of each witness. ***----- In the Matter of The Alphabet House, 24 BOLI 262, 268-69 (2003).***

❑ The ALJ excluded the testimony of a witness due to his lack of direct knowledge of the matters pertaining to claimant's wage claim after allowing respondent to make an offer of proof, concluding that she would not violate her duty to conduct a full and fair inquiry by excluding the proffered testimony. ***----- In the Matter of Northwest Civil Processing, Inc., 21 BOLI 232, 235 (2001).***

❑ Respondent's authorized representative was allowed to make verbal offers of proof for all respondent exhibits that the forum did not receive into evidence. ***----- In the Matter of Schneider Equipment, Inc., 21 BOLI 60, 61 (2000).***

❑ The ALJ refused to admit as evidence two documents offered by respondent at hearing, when respondent had not provided the documents as part of a case summary, did not articulate a satisfactory reason for not having provided the documents with a case summary, and excluding the documents – which did not contain material evidence – would not violate the ALJ's duty to conduct a full and fair inquiry. The ALJ did allow respondent to submit the documents and describe their contents as an offer of proof. ***----- In the Matter of Robert N. Brown, 20 BOLI 157, 159-60 (2000)***.

❑ When respondent offered as an exhibit the written statement of a witness that had not been submitted with a case summary, the agency had no notice that respondent intended to rely on any sort of statement from the witness until it received a late case summary from respondent the day before the hearing, respondent did not offer a satisfactory reason for having failed to timely identify the author as a witness or as the author of a written statement to be offered into evidence, and the ALJ concluded from respondent's offer of proof that she would not violate her duty to conduct a full and fair inquiry by excluding the proffered exhibit, the forum excluded the statement from evidence. ***----- In the Matter of Norma Amezola, 18 BOLI 209, 212 (1999)***.

22.0 WITNESSES

22.1 --- In General

❑ The forum denied respondent's request to call the agency case presenter as a witness to impeach complainant's testimony based on statements that complainant may have made to the case presenter between the original hearing and its reconvenement that contradicted complainant's testimony at the original hearing. ***----- In the Matter of Thomas Myers, 15 BOLI 1, 5 (1996).***

❑ The hearings referee denied respondent's request for a subpoena to secure the personal appearance of claimant at hearing due to claimant's status as a witness, not a party, under the provisions of OAR 839-50-020(14). ***----- In the Matter of Mario Pedroza, 13 BOLI 220, 222 (1994).***

❑ In a disability case, after reviewing the participants' case summaries, the hearings referee advised the participants that the State of Oregon epidemiologist would testify at hearing as the forum's witness on the subject of HIV infection in general, and that both the agency case presenter and respondents' counsel could question the witness following questioning by the hearings referee. ***----- In the Matter of Casa Toltec, 8 BOLI 149, 153 (1989).***

❑ Due to the sensitive nature of complainant's disability of alcoholism, the agency and respondent stipulated that complainant could b referred to throughout the contested case proceeding as "Jane Doe," and her mother, a witness, as "Mrs. Doe." ***----- In the Matter of Pzazz Hair Designs, 9 BOLI 240, 256 (1991).***

❑ At hearing, respondent objected to the testimony of two witnesses whom the agency intended to present by telephone. The hearings referee overruled the objection, stating that telephone testimony in administrative hearings was permissible and was allowed by the forum's own rules. ***----- In the Matter of Dunkin' Donuts, Inc., 8 BOLI 175, 177, 192-93 (1989).***

❑ In a commissioner's complaint case alleging race discrimination in public accommodation, the complainant was identified only by initials due to her demonstrated fear of retaliation by respondent. ***----- In the Matter of The Pub, 6 BOLI 270 (1987).***

22.2 --- Credibility

22.2.1 --- In General

❑ This forum has long applied ORS 10.095(3) that states: "That a witness false in one part of the testimony of the witness is to be distrusted in other parts." ***----- In the Matter of Tallon Kustom Equip., 28 BOLI 32, 46 (2006).*** *See also In the Matter of Guy L. Buyserie, 25 BOLI 246, 250 (1992).*

❑ The ALJ's finding that a witness was credible was

not inconsistent with his finding that the witness adopted a deliberately difficult attitude. "In some instances, attitude may demonstrate a lack of credibility. In this case, it did not." ***----- In the Matter of Alpine Meadows Landscape, 19 BOLI 191, 221 (2000)***.

❑ When claimant did not testify at hearing, the forum accepted the assertions in his affidavit and wage claim calendar as fact because: the affidavit was a sworn statement; claimant indicated at the time he signed the affidavit that he would not be available for hearing; certain facts in the affidavit were corroborated by another witness; respondent admitted to the agency investigator that he worked with claimant; other individuals confirmed that claimant had worked for respondent and had not been paid; respondent provided the agency with no time or payroll records for claimant; and no information in the record controverted the affidavit or wage claim calendar. ***----- In the Matter of Belanger General Contracting, 19 BOLI 17, 21-22 (1999)***.

❑ The ALJ judged the credibility of testimony "based upon its inherent probability, its internal consistency, whether it was corroborated, whether it was contradicted by other evidence, and whether human experience demonstrated it was logically incredible." ***----- In the Matter of Central Oregon Building Supply, Inc., 17 BOLI 1, 13 (1998)***.

> Affirmed without opinion, *Central Oregon Building Supply, Inc. v. Bureau of Labor and Industries*, 160 Or App 700, 981 P2d 402 (1999).

❑ In determining the credible of the witnesses' testimony, the ALJ observed the demeanor of each witness; assessed the consistency of the testimony and its inherent probability, whether the testimony was corroborated or contradicted by other evidence, and whether human experience demonstrated the testimony was logically incredible; and considered any bias the witness might have. ***----- In the Matter of Graciela Vargas, 16 BOLI 246, 258 (1998).***

❑ When an interpreter's translations were accurate and reliable, and with an understanding of the limitations, difficulties, and inaccuracies that are associated with translations, the forum found that claimant's testimony about his hours worked, the calendars he filled out for the agency showing his hours worked, and the notations he made on his check stubs showing his hours worked were unreliable. His testimony on several key points was not corroborated and not credible. His calendars were inconsistent with the time cards he filled out and with the notations he made on his check stubs. His memory was unreliable and his testimony was inconsistent on important information such as how many time cards he filled out each pay period. In contrast to other credible evidence in the record, he asserted he was never paid a salary and never agreed to be paid a salary. Accordingly, the forum gave little or no weight to claimant's testimony except that which was corroborated by other credible evidence. ***----- In the Matter of Burrito Boy, Inc., 16 BOLI 1, 6 (1997).***

❑ Respondent's testimony was evaluated not only by its own intrinsic weight, but also according to the evidence that was in his power to produce. If weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory evidence is within the power of the participant to produce, the evidence offered should be viewed with distrust. ***----- In the Matter of Kenny Anderson, 12 BOLI 275, 280 (1994).***

❑ Respondents excepted to the credibility findings n the proposed order. The commissioner rejected the exceptions, noting that the credibility of testimony can be determined by its inherent probability or improbability, by possible internal inconsistencies, by whether it is corroborated or contradicted by other testimony or evidence, and by whether human experience demonstrates it as logically incredible. ***----- In the Matter of Robert Gonzalez, 12 BOLI 181, 200 (1994).***

❑ When respondent's president's testimony lacked internal consistency, was contradicted by credible evidence, and was improbable, the forum found his testimony not credible and did not believe much of his testimony, even when other evidence did not contradict it. ***----- In the Matter of S.B.I., Inc., 12 BOLI 102, 107 (1993).***

❑ When important points in complainant's testimony were contradicted by credible evidence and by complainant's own statements given during the investigation and during a deposition and complainant was a convicted felon, the commissioner found complainant's testimony unreliable and not credible. ***----- In the Matter of Marvin Clancy, 11 BOLI 205, 210-11, 213-14 (1993).***

❑ When a witness lied under oath at hearing, had felony convictions and a conviction for initiating a false report, was biased, and gave testimony that was uncorroborated and contradicted by credible testimony, the commissioner found the witness's testimony unreliable and gave it no weight whenever it was contradicted by credible evidence. In some cases, the witness's testimony was not believed even when other evidence did not controvert it. ***----- In the Matter of Dan Cyr Enterprises, 11 BOLI 172, 177, 179 (1993).***

❑ The forum has long applied ORS 10.095(3) – a witness false in part of the witness's testimony is to be distrusted in other parts. ***----- In the Matter of Dan Cyr Enterprises, 11 BOLI 172, 177, 179 (1993).*** *See also In the Matter of Lee's Cafe, 8 BOLI 1, 18 (1989); In the Matter of Sheila Wood, 5 BOLI 240, 252-53 (1986); In the Matter of Chem-Ray Company, 10 BOLI 163, 170-71, 173 (1992).*

❑ In evaluating the credibility of testimony, the hearings referee evaluated its inherent probability, its internal consistency, whether it was corroborated, whether it was contradicted by other evidence, and whether human experience demonstrated it was logically incredible. ***----- In the Matter of Glenn Walters Nursery, Inc., 11 BOLI 32, 42-43 (1992).***

❑ The credibility of witness testimony can be determined by its inherent probability or improbability, possible internal inconsistencies, whether it was corroborated, whether it was contradicted by other evidence, and whether human experience demonstrates it is logically incredible. ***----- In the Matter of***

Albertson's, Inc., 10 BOLI 199, 304 (1992).

> Reversed and remanded on other ground, *Albertson's, Inc. v. Bureau of Labor and Industries,* 128 Or App 97, 874 P2d 1352 (1994).

❑ When complainant's testimony was unbelievable on a number of points, the forum gave no weight to any of his testimony that was controverted by credible evidence. In some cases, his testimony was not believed even when other evidence did not controvert it. ***----- In the Matter of Chem-Ray Company, 10 BOLI 163, 170-71, 173 (1992).***

❑ The forum found a witness's testimony not credible when his testimony contained inconsistencies and was controverted by credible evidence, and when a respondent who was the witness's father had disinherited the witness because the respondent suspected the witness of stealing from respondent's business. ***----- In the Matter of Chem-Ray Company, 10 BOLI 163, 170-71, 173 (1992).***

❑ The fact that witnesses admitted having lied under oath in a prior proceeding to which respondent was a party while complainant worked for respondent was relevant to the credibility of the witnesses and to the effect of the prior proceeding on the atmosphere in the work place relative to complainant's mental distress claim. ***----- In the Matter of Pzazz Hair Designs, 9 BOLI 240, 256 (1991).***

❑ In a disability case in which respondent refused to hire complainant because of a degenerative back disease, complainant's testimony was given less weight whenever it conflicted with other credible evidence because he had significant memory loss regarding important events in his medical history and he misunderstood the workers' compensation claim process, leaving his testimony unreliable. ***----- In the Matter of Fred Meyer, Inc., 9 BOLI 157, 168 (1990).***

❑ The forum did not believe the testimony of agency witnesses that was internally inconsistent or contradicted other facts established in the record. ***----- In the Matter of Dunkin' Donuts, Inc., 8 BOLI 175, 193 (1989).***

❑ When a witness's recollection of key events was "vague" and "poor" and the witness had a limited opportunity to observe the complainant's work performance, the commissioner only credited those portions of a witness's testimony that were verified by or consistent with other credible evidence in the record. ***---- In the Matter of Baker Truck Corral, 8 BOLI 118, 131-32 (1989).***

❑ When respondent's manager testified that an event that occurred 7-10 days after complainant was told she was laid off was the cause of complainant's termination, the commissioner found this cast serious doubt on the manager's credibility and only credited those portions of his testimony that were verified by and consistent with other credible evidence in the record. ***----- In the Matter of Baker Truck Corral, 8 BOLI 118, 132 (1989).***

❑ The commissioner inferred bias when respondent's witness was the son-in-law of respondent's owner. When that testimony contained inconsistencies that became magnified as he attempted to offer explanations on complainant's lack of skill, a key participate of respondent's defense, the commissioner held that the witness's testimony was not credible and it was given less weight whenever it conflicted with other credible evidence in the record. In some cases, his testimony was not believed even when other evidence did not controvert it. ***----- In the Matter of Western Medical Systems, Inc., 8 BOLI 108, 112-13 (1989).***

❑ When a respondent owner's testimony was controverted by his own notes and by the credible testimony of other witnesses, was inconsistent with testimony given by a respondent witness at an Employment Division hearing, and when he had no memory of an important meeting or of an interview with an agency investigator and revealed a hostile attitude toward complainant, the commissioner found the witness not credible and gave his testimony less weight whenever it conflicted with other credible evidence in the record. In some cases, his testimony was not believed even when other evidence did not controvert it. ***----- In the Matter of Western Medical Systems, Inc., 8 BOLI 108, 113 (1989).***

❑ Complainant was found not credible when her testimony on important points was inconsistent or her memory failed, she was caught and convicted of forgery of respondent's signature on drug prescriptions, she lied to police, she made inconsistent statements regarding the forgery, and her testimony was contradicted on many points by credible evidence. ***----- In the Matter of Harry Markwell, 8 BOLI 80, 91 (1989).***

❑ Respondent's testimony was not credible when his motives and beliefs were inconsistent and baffling and his testimony was inconsistent on important points. ***----- In the Matter of Harry Markwell, 8 BOLI 80, 91-92 (1989).***

❑ Respondent's wife's obvious bias, by itself, was not enough to make the hearings referee conclude that her testimony was not credible. ***----- In the Matter of Harry Markwell, 8 BOLI 80, 92 (1989).***

❑ The commissioner found the testimony of a witness to be credible and gave it appropriate weight when she testified to her "impressions" and "feelings" about certain conversations she recalled but could not recall what was actually said. The commissioner noted that witnesses routinely give summaries or their impressions of conversations, that no witness can be expected to recall verbatim conversations that took place more than a year earlier and, at the time, were not particularly notable, and the finder of fact may give such testimony appropriate weight. ***----- In the Matter of Harry Markwell, 8 BOLI 80, 95 (1989).***

❑ When complainant failed to complete her thoughts and much of her testimony was either unclear or incomprehensible, she contradicted herself, and her assertions were refuted by persuasive testimony of other witnesses, the commissioner found her testimony not credible. ***----- In the Matter of Safeway Stores, Inc., 6 BOLI 29, 52 (1987).***

❑ When the forum determined complainant was not a credible witness and found co-workers and respondent's managers to be credible, the forum gave much greater

weight to the testimony of the latter when it differed from complainant's testimony. ***----- In the Matter of Safeway Stores, Inc., 6 BOLI 29, 53 (1987).***

❑ The commissioner attributed complainant's evasiveness to her aggressively protective and sometimes hostile response to respondent's counsel, whom she clearly saw as an adversary, rather than to lack of truthfulness. ***----- In the Matter of Lucille's Hair Care, 3 BOLI 286, 299 (1983).***

> Modified as to wage loss and interest, *Ogden v. Bureau of Labor,* 68 Or App 235, 682 P2d 802 (1984); order reinstated, remanded for recalculation of interest, *Ogden v. Bureau of Labor,* 299 Or 98, 699 P2d 189 (1985).
>
> Order on remand, 5 BOLI 13, 30-31 (1985).

❑ The forum gave a witness's testimony little weight when his demeanor at hearing was haughty, flippant, and impetuous, and his responses to questions did not reflect the serious, deliberate consideration that is requisite to reliable testimony. ***----- In the Matter of Dee Wescott, 2 BOLI 29, 31 (1980).***

❑ When respondent's agent testified that he did not speak with complainant about job content, then later stated that he always reviewed the job with job applicants, his testimony was found to be inconsistent and greater weight was given to complainant's testimony. ***----- In the Matter of Healthways Food Center, 1 BOLI 205, 207 (1979).***

❑ A black complainant alleged that an apartment manager violated a rent agreement honored by the previous manager, made racial remarks to her, and evicted her because of her race. When complainant's witnesses known to be present during the relevant events were not called at hearing or deposed and complainant's testimony was internally inconsistent, the commissioner found that the eviction was for refusal to pay rent. ***----- In the Matter of Scott Paskett, 1 BOLI 190, 192-93 (1979).***

22.2.2 --- ALJ's Credibility Findings

❑ Demeanor-based credibility findings are integral to the fact-finding process in all cases of factual disputes involving credibility and veracity. ***----- In the Matter of Trees, Inc., 28 BOLI 218, 256 (2007).***

❑ The ALJ properly gave less weight to those witnesses whose demeanor did not reflect the serious, deliberate consideration that is requisite to reliable testimony. ***----- In the Matter of Trees, Inc., 28 BOLI 218, 257 (2007).***

❑ In this forum, an ALJ's credibility findings are accorded substantial deference and, absent convincing reasons for rejecting those findings, they are not disturbed. ***----- In the Matter of Trees, Inc., 28 BOLI 218, 257 (2007).*** *See also In the Matter of Gordy's Truck Stop, LLC, 28 BOLI 200, 215 (2007); . In the Matter of Robb Wochnick, 25 BOLI 265, 290 (2004).*

❑ An ALJ's credibility findings are accorded substantial deference by the forum. Absent convincing reasons for rejecting those findings, they will not be disturbed. ***----- In the Matter of Staff, Inc., 16 BOLI 97, 117 (1997).*** *See also In the Matter of Howard Lee, 13 BOLI 281, 291-92 (1994); In the Matter of Western Medical Systems, Inc., 8 BOLI 108, 117 (1989).*

22.2.3 --- Prior Convictions

❑ The forum found that a witness's two signed and notarized statements were not credible, in part because the agency introduced impeachment evidence showing he was recently convicted of a felony and a second crime involving dishonesty and, although the record established the witness was available, he did not appear and explain the circumstances of his prior convictions. ***----- In the Matter of Trees, Inc., 28 BOLI 218, 243 (2007).***

❑ When important points in complainant's testimony were contradicted by credible evidence and by complainant's own statements given during the investigation and during a deposition and complainant was a convicted felon, the commissioner found complainant's testimony unreliable and not credible. ***----- In the Matter of Marvin Clancy, 11 BOLI 205, 210-11, 213-14 (1993).***

❑ When a witness's credibility was challenged with evidence of prior convictions, the forum took guidance from Oregon Rule of Evidence 609, which permits the receipt of evidence of conviction of certain crimes for the purpose of attacking the credibility of a witness. The hearings referee received evidence that the witness had felony convictions and a conviction for Initiating a False Report, which by its nature involves false statement. ***----- In the Matter of Dan Cyr Enterprises, 11 BOLI 172, 177, 179 (1993).***

22.3 --- Cross-Examination

❑ When the hearing was adjourned after the agency had put on its case and respondent's counsel had an opportunity to cross-examine the agency's witnesses, the forum did not allow respondent's replacement counsel to cross-examine agency witnesses again when the hearing reconvened. ***----- In the Matter of Thomas Myers, 15 BOLI 1, 5 (1996).***

❑ When complainant refused to testify on cross-examine about matters related to his alleged mental suffering, the hearings referee decided not to strike his direct testimony on the issue, but drew an adverse inference from his refusal to testify. ***----- In the Matter of Marvin Clancy, 11 BOLI 205, 208 (1993).***

22.4 --- Exclusion (*see also* 20.7)

❑ At the outset of the hearing, the agency objected to the presence of respondent's manager who had discharged complainant and was listed as a witness in the agency's and respondent's case summaries. Respondent represented the manager was present as the natural person designated to assist him in the presentation of respondent's case, pursuant to OAR 839-050-0150(3)(e), and the ALJ overruled the agency's objection. ***----- In the Matter of Logan International, Ltd., 26 BOLI 254, 259 (2005).***

❑ On the first day of hearing, respondent asked when his witnesses would be able to testify and the agency case presenter stated that she would object to all respondent's witnesses except for respondent, based on

respondent's failure to submit a case summary and the agency's resultant lack of opportunity to interview any of respondent's witnesses. After discussion, the agency case presenter agreed that the basis for her objection would be cured if she had the opportunity to interview respondent's witnesses before they testified. The ALJ ruled that the witnesses listed in a witness list provided by respondent in response to a discovery order would be allowed to testify on the condition that respondent produced those witnesses for interviews with the agency case presenter by noon the second day of hearing. ***----- In the Matter of William Presley, 25 BOLI 56, 59 (2004).***

Affirmed, *Presley v. Bureau of Labor and Industries,* 200 Or App 113, 112 P3d 485 (2005).

❑ At the outset of the hearing, respondent stated that he wanted to call as witnesses two individuals who had accompanied him to the hearing. Respondent stated that one would testify as to his character, and the other would testify that he did not open his mail for a long time because he had a "breakdown." The agency objected to the testimony of both individuals on the grounds of relevancy and that respondent had not filed a case summary naming them as witnesses. The ALJ sustained the agency's objection. ***----- In the Matter of Sreedhar Thakkun, 22 BOLI 108, 111 (2001).***

❑ During the presentation of his case, respondent attempted to call a telephonic witness to testify that he had actually performed the work that the agency alleged claimant had performed and was not paid for. Respondent represented that the witness had done the work after claimant left respondent's employment. The agency objected on the grounds that respondent had not filed a case summary naming the witness and the agency would be unduly prejudiced if the witness was allowed to testify. The ALJ determined that respondent did not have a satisfactory reason for not filing a case summary, that the agency would be unduly prejudiced by allowing the witness to testify, and that excluding the witness's testimony would not violate the ALJ's responsibility to conduct a "full and fair" inquiry. ***----- In the Matter of Sreedhar Thakkun, 22 BOLI 108, 111, 117 (2001).***

❑ The ALJ excluded the testimony of a witness due to his lack of direct knowledge of the matters pertaining to claimant's wage claim after allowing respondent to make an offer of proof, concluding that she would not violate her duty to conduct a full and fair inquiry by excluding the proffered testimony. ***----- In the Matter of Northwest Civil Processing, Inc., 21 BOLI 232, 235 (2001).***

❑ After the agency completed presentation of its case in chief, respondent's counsel stated his intent to call two witnesses, a current and past employee, as witnesses. Neither witness was listed in respondent's case summary. Respondent's counsel stated that he had only learned of the existence of these witnesses that morning, and had disclosed their names to the agency case presenter just prior to the start of the hearing. Respondent's counsel also stated that these witnesses were claimant's former co-workers and would be testifying about the hours worked by claimant. The agency objected on the grounds that the witnesses had not been disclosed in respondent's case summary and that the agency would be prejudiced by its inability to adequately question the witnesses due to lack of opportunity for preparation. The ALJ ruled that the witnesses would be allowed to testify, but that the hearing would be continued to give the agency an adequate opportunity to prepare for their testimony. Respondent's counsel agreed to make the witnesses available for questioning in private by the agency case presenter, before they testified, after the hearing recessed for the day. The agency case presenter agreed that would cure the prejudice to the agency, and the hearing was recessed while the case presenter conducted a private interview with both witnesses to determine if the services of an interpreter were required. The case presenter determined she did not need an interpreter, and the forum excused the forum's interpreter for the day. The case presenter then conducted private interviews with both witnesses, the hearing reconvened at the next day, and both witnesses were allowed to testify. ***----- In the Matter of Danny Vong Phuoc Truong, 21 BOLI 217, 221 (2001).***

❑ During the hearing, respondent sought to introduce testimony of its secretary, Guy Bowie. The agency objected to that testimony on the grounds that respondent had not filed a case summary, that the agency did not know that Bowie had knowledge of any facts relevant to the case, and that the agency, therefore, would be prejudiced if Bowie were allowed to testify to facts that the agency would not be prepared to rebut. The ALJ sustained the agency's objection and did not allow Bowie to testify. ***----- In the Matter of Green Planet Landscaping, Inc., 21 BOLI 130, 133 (2000)***.

❑ Respondent sought to call her husband as a witness and the agency objected on the grounds that respondent had not submitted a case summary listing witnesses she intended to call, and that the agency would be prejudiced by its inability to prepare for cross-examination of him. Respondent was unable to articulate a satisfactory reason for not submitting a case summary. After determining that excluding the husband's testimony would not violate the duty to conduct a full and fair inquiry under ORS 183.415(10), the ALJ excluded him from testifying. ***----- In the Matter of Martha Morrison, 20 BOLI 275, 281 (2000)***.

❑ After the Agency presented its case, respondent sought to introduce the evidence of Ryder and respondent's current office manager, Sandy. Respondent's counsel acknowledged that he had received the ALJ's case summary order, which required him to identify witnesses and documentary evidence he planned to introduce at hearing, and that he had not filed a case summary. Respondent's counsel did not offer a satisfactory reason for having failed to file the case summary. The ALJ refused to allow respondent to call Sandy as a witness because respondent's failure to file a case summary meant that the agency had no notice that Sandy might testify and no opportunity to prepare to meet her testimony. The ALJ did allow respondent to call Ryder as a witness because: the forum has permitted individual respondents to testify on their own behalf even when they were not identified as witnesses in a case summary; Ryder was the president of

respondent, a small corporation with only two shareholders; Ryder was in charge of respondent's operations; and the agency suffered only minimal prejudice, as Ryder's involvement in the events at issue and his desire to testify could not have come as a surprise. ---- ***In the Matter of Contractor's Plumbing Service, Inc., 20 BOLI 257, 261 (2000)***.

❑ The ALJ refused to admit as evidence two documents offered by respondent at hearing, when respondent had not provided the documents as part of a case summary, did not articulate a satisfactory reason for not having provided the documents with a case summary, and excluding the documents – which did not contain material evidence – would not violate the ALJ's duty to conduct a full and fair inquiry. The ALJ did allow respondent to submit the documents and describe their contents as an offer of proof. ----- ***In the Matter of Robert N. Brown, 20 BOLI 157, 159-60 (2000)***.

❑ The ALJ excluded witnesses on his own motion. ***---- In the Matter of Ann L. Swanger, 19 BOLI 42, 45 (1999)***.

❑ When respondent did not respond to the agency's informal efforts to obtain discovery, did not file a case summary pursuant to the hearings referee's discovery order, and did not respond to a specific discovery order for employment records, and when respondent offered documents at hearing that he claimed were business records, the hearings referee granted the agency's motion to exclude the documents from the record because respondent did not offer a satisfactory reason for having failed to provide the documents as ordered. The hearings referee found that excluding the documents would not violate the duty to conduct a full and fair hearing. ***----- In the Matter of Martin's Mercantile, 12 BOLI 262, 264-65 (1994).***

❑ When respondent moved to exclude written investigative statements of persons interviewed during the agency's investigation, and respondent had an opportunity to cross-examine two of the witnesses and the investigator who wrote the investigative statements, the forum did not exclude the documents. ***----- In the Matter of Dunkin' Donuts, Inc., 8 BOLI 175, 178 (1989).***

❑ The forum denied respondent's motion to exclude complainant from the hearing on the grounds that complainant was merely a witness. ***----- In the Matter of Pacific Convalescent Foundation, Inc., 4 BOLI 174, 176 (1984).***

❑ When respondent moved to exclude all witnesses, the forum granted respondent's motion with respect to witnesses other than complainant. ***----- In the Matter of Boost Program, 3 BOLI 72, 73-74 (1982).***

22.5 --- Expert Witnesses

❑ The agency filed a supplemental case summary stating that "Susan Foster, Certified Vocational Counselor, will be a witness for the wage claimants." During the hearing, respondent objected when the agency called Foster as an expert witness. Respondent's objection was two-fold. First, because the agency had not named Foster as a witness in its initial case summary, and second, because the Agency's supplemental case summary failed to state that Foster was being called as an expert witness or state Foster's qualifications and the substance of the facts and opinions to which she was expected to testify. The ALJ ruled that Foster could testify, but that respondent was entitled to a continuance for the purpose of providing the testimony of its own expert witness. ***----- In the Matter of Elisha, Inc., 25 BOLI 125, 128 (2004).***

> Affirmed without opinion, *Elisha, Inc. v. Bureau of Labor & Industries*, 198 Or App 285, 108 P3d 1219 (2005).

❑ When respondent did not hire complainant as a truck driver after respondent's doctor determined complainant was at "present risk of probable incapacitation," the commissioner gave greater weight to the testimony of respondent's doctor than to that of complainant's doctor because respondent's doctor was specialized in occupational medicine, specifically in head, neck and spine injuries, and was experienced in assessing risks of injury. Complainant's doctor did not have that specialized training or experience, had treated complainant primarily for high blood pressure, and did not believe anyone could assess the risk of injury. In addition, another doctor specializing in occupational medicine agreed with respondent's doctor's assessment, other medical evidence agreed with the doctor's findings, and the scope of his examination, a pre-employment examination, was more relevant to the issues in the case than the ODOT examination performed by complainant's doctor. ***----- In the Matter of Fred Meyer, Inc., 9 BOLI 157, 170-72 (1990).***

❑ When respondent moved to exclude all witnesses, the forum granted respondent's motion with respect to witnesses other than complainant. ***----- In the Matter of Boost Program, 3 BOLI 72, 73-74 (1982).***

❑ The medical testimony of a cardiologist who had treated and monitored complainant's heart condition for eight years as to complainant's ability to perform appliance sales duties was given greater weight than that of a general practitioner who examined complainant for ½ hour before rejecting him for such employment. ***---- In the Matter of Montgomery Ward and Company, Inc., 1 BOLI 62, 65-66 (1976).***

> Reversed, *Montgomery Ward v. Bureau of Labor*, 28 Or App 747, 561 P2d 637, reversed and remanded, 280 Or 163, 570 P2d 76 (1977).
>
> Order on remand, 1 BOLI 100 (1978).
>
> Affirmed as modified (removing general damages as unsupported), *Montgomery Ward v. Bureau of Labor*, 42 Or App 159, 600 P2d 542 (1979).

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

❑ Respondent's failure to call witnesses listed on respondent's case summary who presumably would have testified as to the dates and hours worked by claimants and respondent's minimal testimony concerning dates and hours worked by claimants was considered because it was an aid to the forum in evaluating the credibility of the claimants. ***----- In the Matter of Francisco Cisneros, 21 BOLI 190, 216 (2001).***

Affirmed without opinion, *Cisneros v. Bureau of Labor and industries,* 187 Or App 114, 66 P3d 1030 (2003).

❑ When claimant did not testify at hearing, the forum accepted the assertions in his affidavit and wage claim calendar as fact because: the affidavit was a sworn statement; claimant indicated at the time he signed the affidavit that he would not be available for hearing; certain facts in the affidavit were corroborated by another witness; respondent admitted to the agency investigator that he worked with claimant; other individuals confirmed that claimant had worked for respondent and had not been paid; respondent provided the agency with no time or payroll records for claimant; and no information in the record controverted the affidavit or wage claim calendar. ***----- In the Matter of Belanger General Contracting, 19 BOLI 17, 21-22 (1999)***.

❑ When complainant refused to testify on cross-examine about matters related to his alleged mental suffering, the hearings referee decided not to strike his direct testimony on the issue, but drew an adverse inference from his refusal to testify. ***----- In the Matter of Marvin Clancy, 11 BOLI 205, 208 (1993).***

❑ A named respondent's failure to testify allows the conclusion that, had that person testified, it would not have contributed to respondent's defense. The absence of testimony of a corporate respondent's principal officer, who was available and whose actions appear from other evidence to have been pivotal in the occurrences under scrutiny, permitted the same conclusion. ***----- In the Matter of German Auto Parts, Inc., 9 BOLI 110, 128 (1990).***

Affirmed, *German Auto Parts, Inc. v. Bureau of Labor and Industries*, 111 Or App 522, 826 P2d 1026 (1992).

See also In the Matter of Sapp's Realty, Inc., 4 BOLI 232, 282 (1985).

❑ When complainant worked satisfactorily as a bookkeeper for respondent for nearly three months and was terminated immediately after she advised her supervisor that she was pregnant, the forum determined that complainant was unlawfully discharged because of her sex, in violation of ORS 659.030(1), when respondent could not support its defense that complainant was discharged for poor work performance. Respondent merely provided statements to that effect, but the supervisor who allegedly made the statement failed to appear at hearing and the personnel manager could not verify the statements. ***----- In the Matter of K-Mart Corporation, 3 BOLI 194, 200-02 (1982).***

❑ A black complainant alleged that an apartment manager violated a rent agreement honored by the previous manager, made racial remarks to her, and evicted her because of her race. When complainant's witnesses known to be present during the relevant events were not called at hearing or deposed and complainant's testimony was internally inconsistent, the commissioner found that the eviction was for refusal to pay rent. ***----- In the Matter of Scott Paskett, 1 BOLI 190, 192-93 (1979).***

22.7 --- Interpreters (*see also* 23.0)

❑ The forum granted respondent's motion for an interpreter to translate the testimony of one of respondent's witnesses. ***----- In the Matter of Barbara Coleman, 19 BOLI 230, 240 (2000)***.

❑ When an interpreter's translations were accurate and reliable, and with an understanding of the limitations, difficulties, and inaccuracies that are associated with translations, the forum found that claimant's testimony about his hours worked, the calendars he filled out for the agency showing his hours worked, and the notations he made on his check stubs showing his hours worked were unreliable. ***----- In the Matter of Burrito Boy, Inc., 16 BOLI 1, 6 (1997).***

22.8 --- Tampering with Witness

❑ During the hearing, respondent claimed that the wage claimant had telephoned respondent's witness and intimidated her from testifying. Respondent asked the ALJ to do something about this situation. The ALJ gave respondent three options: (1) the ALJ would issue a subpoena for the witness; (2) if respondent did not want a subpoena, the ALJ would leave the record open for the witness's testimony until the end of the hearing; (3) respondent could testify as to what the witness told him concerning claimant's alleged intimidation and the ALJ would give respondent's testimony its appropriate weight. Respondent did not exercise any of these three options. ***----- In the Matter of William Presley, 25 BOLI 56, 59 (2004).***

Affirmed, *Presley v. Bureau of Labor and Industries,* 200 Or App 113, 112 P3d 485 (2005).

❑ When respondent asserted that claimant had threatened to have respondent's witnesses arrested if they testified at hearing, the forum denied respondent's motion to have the witnesses submit affidavits in lieu of testifying, but allowed them to testify by telephone. ***----- In the Matter of Barbara Coleman, 19 BOLI 230, 245 (2000)***.

❑ When it came time for one of respondent's witnesses to testify, the forum learned that he was testifying from respondent's office, located only a short distance from the hearing room, and that respondent had left the hearing to let the witness into her office. Accordingly, the ALJ cautioned the witness at the beginning of his testimony that he should provide his own answers to the questions asked and not look to respondent for guidance. ***----- In the Matter of Barbara Coleman, 19 BOLI 230, 246 (2000)***.

❑ Tampering with a witness undermines the fairness of the contested case hearing process and requires the forum to take whatever measures are needed to maintain that fairness. This may include striking or disregarding any tainted evidence. ***----- In the Matter of Graciela Vargas, 16 BOLI 246, 258-59 (1998).***

❑ When a claimant attempted to bribe a potential witness before hearing, but the with did not testify and there was no evidence that any other witness was tampered with or gave false testimony for the claimant, the forum found that the attempted bribe damaged

claimant's credibility, but did not undermine the other evidence in the record that supported his wage claim. ***----- In the Matter of Graciela Vargas, 16 BOLI 246, 258 (1998).***

22.9 --- Telephone Witnesses

❑ When respondent requested in writing that the agency show good cause for the telephone testimony of two witnesses or not allow them to testify, the ALJ permitted telephone testimony from two agency witnesses pursuant to OAR 839-050-0250(11). ***----- In the Matter of Triple A Construction, LLC, 23 BOLI 79, 83 (2002).***

❑ When respondent asserted that claimant had threatened to have respondent's witnesses arrested if they testified at hearing, the forum denied respondent's motion to have the witnesses submit affidavits in lieu of testifying, but allowed them to testify by telephone. ***----- In the Matter of Barbara Coleman, 19 BOLI 230, 245 (2000)***.

❑ The forum granted the agency's unopposed motion to hold the hearing by telephone. ***----- In the Matter of Richard Cole, 16 BOLI 221, 222 (1997).***

❑ When the notice of hearing and attachment, together with copies of other documents, were received by respondent by certified mail at a Hermiston address, and when an ALJ's order permitting the hearing to be held by telephone was sent to the same address with postage prepaid and was not returned undelivered, the ALJ found that respondent received the notice of contested case rights and procedures and had notice of the date, time, and manner of hearing. When respondent failed to appear at the hearing in person, did not provide the ALJ a telephone number as ordered, and did not contact the ALJ with any reason for tardiness or nonattendance, the ALJ found respondent in default. ***----- Tina Davidson, 16 BOLI 141, 144, 148 (1997).***

❑ The ALJ granted the agency's motion for a hearing conducted by telephone where respondent, claimant, and an agency witness were located at the time in Salem, Hermiston, and Bend; the evidence was largely documentary; travel by all concerned, including the ALJ, to Pendleton was uneconomical and unnecessary; and respondent did not file any opposition to the motion. ***----- In the Matter of Tina Davidson, 16 BOLI 141, 143, 144 (1997).***

❑ When the agency notified the hearings referee that the wage claimant would appear at hearing by telephone and respondent requested a subpoena for the claimant to secure her personal appearance at hearing, the forum denied the request due to claimant's status as a witness, not a party, under the provisions of OAR 839-50-020(14). ***----- In the Matter of Mario Pedroza, 13 BOLI 220, 222 (1994).***

❑ To protect the agency's ability to cross-examine the witnesses, the hearings referee ordered a respondent and his wife, who testified by telephone from their home in Idaho, not to consult with each other during the course of the testimony of either of them. ***----- In the Matter of Marvin Clancy, 11 BOLI 205, 207 (1993).***

❑ When respondent moved for a postponement to accommodate an out-of-state witness and the agency objected to the postponement but was willing to have the witness appear by telephone, the hearings referee denied the request for postponement. ***----- In the Matter of Arkad Enterprises, Inc., 8 BOLI 263, 265 (1990).***

> Affirmed, *Arkad Enterprises v. Bureau of Labor and Industries,* 107 Or App 384, 812 P2d 427 (1991).

❑ When respondent objected at hearing to the testimony of two witnesses whom the agency intended to present by telephone, the hearings referee overruled the objection, stating that telephone testimony in administrative hearings was permissible and was allowed by the forum's own rules. ***----- In the Matter of Dunkin' Donuts, Inc., 8 BOLI 175, 177, 192-93 (1989).***

22.10 --- Confidentiality

❑ When one of respondent's managers was present as an observer throughout the hearing, and complainant's former supervisor was also present as the natural person designated to assist respondent's counsel in the presentation of respondent's case, the ALJ ordered that those two persons and complainant were not to discuss any testimony given or statements made at hearing with anyone else except the agency case presenter or respondent's counsel until the hearing was concluded. The ALJ also ordered the agency case presenter and respondent's counsel to not discuss any witness testimony given at hearing with any other witnesses until the hearing was concluded. ***----- In the Matter of Logan International, Ltd., 26 BOLI 254, 259 (2005).***

❑ The ALJ instructed all witnesses who testified at the hearing not to discuss their testimony with any other witnesses until the hearing was concluded. ***----- In the Matter of Logan International, Ltd., 26 BOLI 254, 259 (2005).***

❑ At the request of the agency and with no objection by respondent, a portion of a witness's testimony was taken *in camera*. The verbatim tape-recorded record of that testimony was sealed and ordered to remain sealed unless requested by the forum's counsel and reviewing court in any appeal of the final order. ***----- In the Matter of Tim's Top Shop, 6 BOLI 166, 167-68 (1987).***

22.11 --- Other

❑ After the agency's opening statement, respondent stated that he wanted to call the agency case presenter as a witness. The ALJ denied the motion on the basis that respondents had not submitted a case summary. ***----- In the Matter of Orion Driftboat and Watercraft Company, LLC, 26 BOLI 137, 142 (2005).***

❑ At the end of the agency's case in chief, the agency asked to have respondent testify as a witness. Respondent objected and the ALJ sustained respondent's objection on the basis that the agency had not listed respondent as a witness on its case summary. ***----- In the Matter of Orion Driftboat and Watercraft Company, LLC, 26 BOLI 137, 142 (2005).***

❑ During the hearing, respondent's authorized representative inquired about calling the commissioner, who had been listed as a witness on respondent's case summary, and administrator of BOLI's Wage and Hour

Division, who had not been listed as a witness on respondent's case summary, as witnesses to testify on respondent's behalf. The ALJ advised respondent's authorized representative that he had no authority to compel the testimony of any witness who had not been served with a *subpoena ad testificandum* and did not require the commissioner or administrator to testify as witnesses. ***----- In the Matter of Schneider Equipment, Inc., 21 BOLI 60, 65-66 (2000).***

❑ When an attorney for a non-party witness objected to the agency's questions and invoked the witness's Fifth Amendment privilege on the ground that her answers might tend to incriminate her of criminal acts, the ALJ ordered the witness to answer the agency's questions. ***----- In the Matter of Tomas Benitez, 19 BOLI 142, 147 (2000)***.

23.0 INTERPRETERS

❑ Respondent filed an exception asserting that its authorized representative was Iranian by birth and English was not his first language and that its case was damaged because the ALJ did not allow an assistant present to aid respondent's authorized representative with the proceedings. The forum noted that respondent did not request an interpreter in accordance with the contested case hearing rules, noted that the record showed that respondent's authorized representative made no assertion at any time prior to or during the hearing or otherwise demonstrate that he was unable to speak or understand the English language, and denied respondent's exception. ***----- In the Matter of Mermac, Inc., 26 BOLI 218, 227 (2005)***

❑ At the start of hearing, after a brief conversation with respondent, the ALJ determined that respondent would be able to participate effectively in the hearing, which involved subtle legal and factual issues, only with the services of an interpreter. Accordingly, the ALJ appointed a qualified Ukrainian interpreter to translate the proceeding for respondent. The interpreter advised the forum that she had another commitment during the afternoon proceeding and the ALJ appointed a qualified Russian interpreter to translate the remainder of the proceeding. Prior to interpreting the proceedings, both interpreters stated their credentials on the record and took an oath or affirmation to translate the proceedings truthfully and accurately to the best of their ability. ***----- In the Matter of Ilya Simchuk, 22 BOLI 186, 189 (2001).***

❑ At hearing, respondent requested for the first time that the hearing be recessed so he could obtain an interpreter to assist him in understanding the forum's procedures and to better communicate. Respondent stated he had a limited ability to comprehend and communicate in English. The ALJ put respondent under oath and asked him a number of questions to determine respondent's ability to comprehend and communicate in English. The ALJ determined that that respondent was able to comprehend and communicate in English, to understand the allegations of the wage claim, to cross-examine claimant in English, using notes he took in English, and to testify as to facts surrounding claimant's allegations. Based on these factors, the ALJ denied respondent's request. ***----- In the Matter of Sreedhar Thakkun, 22 BOLI 108, 110-11, 116 (2001).***

❑ The forum granted respondent's motion for an interpreter to translate the testimony of one of respondent's witnesses. ***----- In the Matter of Barbara Coleman, 19 BOLI 230, 240 (2000)***.

❑ The agency opposed respondent's pre-hearing motion for an interpreter to translate the proceedings for his benefit, asserting that respondent spoke English fluently and that respondent's request was untimely because it was not filed 20 days prior to hearing. The forum rejected the agency's argument that it should deny respondent's request as untimely, holding that it had inherent authority to consider late-filed requests, especially when, as here, the Hearings Unit already had arranged for the services of an interpreter at the agency's request (for translation of documents). The ALJ stated that she would rule at the beginning of the contested case hearing whether respondent was able to speak English effectively enough so that he was not entitled to the services of an interpreter. At that time, the ALJ had a short conversation with respondent in which she determined that he was able to speak conversational English. However, the ALJ also found that respondent did not read much English and would be able to participate effectively in the hearing, which involved subtle legal and factual issues, only with the services of an interpreter. Accordingly, the ALJ appointed a certified and qualified interpreter to translate the entirety of the proceedings for respondent. The ALJ noted that she was not prejudging or ruling on respondent's ability to conduct business in English, to the extent that might be an issue in the case. ***----- In the Matter of Tomas Benitez, 19 BOLI 142, 145-46 (2000)***.

❑ A qualified and certified interpreter testified as a witness regarding the accuracy of an English translation of claimant's Spanish affidavit. ***----- In the Matter of Belanger General Contracting, 19 BOLI 17, 21 (1999)***.

❑ A qualified and certified interpreter translated the entire proceeding for claimant's benefit. ***----- In the Matter of Sabas Gonzalez, 19 BOLI 1, 7 (1999)***.

❑ The forum granted the agency's pre-hearing request that a Spanish interpreter be available during the hearing for the benefit of the wage claimant. A certified translator was present throughout the hearing and, under oath or affirmation, translated the proceedings in their entirety. ***----- In the Matter of Norma Amezola, 18 BOLI 209, 211 (1999)***.

❑ In the interest of expediency, the ALJ allowed a witness to communicate through an interpreter, despite the witness's ability to speak English and his late request for an interpreter. ***----- In the Matter of Manuel Galan, Jr., 17 BOLI 112, 118 (1998)***.

> Affirmed without opinion, *Galan v. Bureau of Labor and Industries*, 167 Or App 259 (2000), rev den 332 Or 137 (2001).

❑ Respondent's counsel moved for the appointment of a Pakistani-speaking interpreter based on respondent's limited English and the anticipated presentation of non-English speaking witnesses from Pakistan or India. The agency objected, citing affidavits of agency staff

concerning respondent's dealing with the agency in English, but had no objection to a Punjabi-speaking interpreter for the witnesses. The hearings referee appointed respondent's brother to serve as interpreter for the witnesses speaking Punjabi because no other Punjabi-speaking interpreter could be found in Oregon. During the hearing, the hearings referee also appointed an interpreter for a Spanish speaking witness. ***----- In the Matter of Mohammad Khan, 15 BOLI 191, 194-95 (1996).***

❑ The ALJ denied respondent's motion for an interpreter for himself at the hearing, noting that, in a prior proceeding, the forum found that respondent could speak and understand English. The forum ruled that the proper standard for appointment of an interpreter is that the person involved in the contested case hearing cannot speak or understand the English language; mere difficulty is not enough. ***----- In the Matter of Manuel Galan, 15 BOLI 106, 112 (1996).***

> Affirmed without opinion, *Staff, Inc. v. Bureau of Labor and Industries,* 148 Or App 451, 939 P2d 174, rev den, 326 Or 57, 944 P2d 947 (1997).

❑ When the agency moved for the appointment of a Spanish-speaking interpreter based on the anticipated testimony of several agency witnesses who could not speak or understand English and suggested a particular agency employee, the forum appointed an interpreter who was not an employee of the agency when respondent objected to the appointment of an agency employee. ***----- In the Matter of Manuel Galan, 15 BOLI 106, 112 (1996).***

> Affirmed without opinion, *Staff, Inc. v. Bureau of Labor and Industries,* 148 Or App 451, 939 P2d 174, rev den, 326 Or 57, 944 P2d 947 (1997).

❑ In a prehearing conference, the ALJ determined that respondent was able to speak and understand English and would not need an interpreter. ***----- In the Matter of Tomas Benitez, 15 BOLI 19, 20 (1996).***

❑ The forum granted respondent's motion to appoint a Cantonese Chinese interpreter. ***----- In the Matter of Cheuk Tsui, 14 BOLI 272, 288 (1996).***

❑ The forum provided two interpreters for a deaf complainant. ***----- In the Matter of WS, Inc., 13 BOLI 64, 65 (1994).***

❑ The forum appointed an interpreter for a claimant who could not speak, read, or write English, and who could speak, but not read or write Spanish. An employee of the agency acted as an interpreter for respondent's president, who spoke English with a Russian accent. ***----- In the Matter of S.B.I., Inc., 12 BOLI 102, 103 (1993).***

❑ When an official interpreter had not been provided and respondent's son could translate for respondent, the forum overruled the agency's motion to exclude respondent's son except during his own testimony, finding that any prejudice to the agency was outweighed by the need of respondent, for whom English was a second language, to converse with his counsel during the hearing. ***----- In the Matter of Jose Rodriguez, 11 BOLI 110, 113 (1992).***

24.0 DEFAULTS

24.1 --- In General

❑ When a respondent defaults, the agency needs only to establish a prima facie case to support the allegations in its charging document in order to prevail. ***----- In the Matter of MAM Properties, LLC, 28 BOLI 172, 187 (2007).*** *See also In the Matter of Okechi Village & Health Center, 27 BOLI 156, 161 (2006); In the Matter of Design N Mind, Inc., 27 BOLI 32, 41 (2005); In the Matter of Mega Marketing, 9 BOLI 133, 137 (1990); See also In the Matter of Peggy's Café, 7 BOLI 281, 286 (1989).*

❑ When respondent did not appear at the hearing and no one had contacted the agency case presenter, the ALJ, or the hearings unit to state that respondent would not be making an appearance, the ALJ declared respondent in default and commenced the hearing. ***----- In the Matter of MAM Properties, LLC, 28 BOLI 172, 176 (2007).***

❑ After the hearing, the ALJ made an *ex parte* telephone call to the agency case presenter and asked if the agency would stipulate that respondent paid claimant in full for all hours worked, calculated at the rates respondent agreed to pay claimant ($100 for 24 hour shifts and $8 per hour for 4 hour shifts), including a $50 payment for claimant's single 12 hour shift. The agency stipulated to that fact. ***----- In the Matter of MAM Properties, LLC, 28 BOLI 172, 176 (2007).***

❑ When respondent did not appear at the time and place set for hearing and no one appeared on its behalf or advised the ALJ of any reason for the failure to appear, the ALJ ruled that respondent was in default, having been properly served with the notice of hearing, and having failed to appear at the hearing. ***----- In the Matter of Tallon Kustom Equip., 28 BOLI 32, 34 (2006).*** *See also In the Matter of Troy Melquist dba RedCellX, Inc., 27 BOLI 171, 173 (2006); In the Matter of Rogue Valley Fire Protection, LLC, 26 BOLI 172, 181 (2005); In the Matter of Cleopatra's, Inc., 26 BOLI 132, 127 (2005); In the Matter of Millennium Internet, Inc., 25 BOLI 200, 205 (2004); In the Matter of Larsen Golf Construction, Inc., 25 BOLI 200, 216 (2004); In the Matter of Magno-Humphries, Inc., 25 BOLI 175, 192 (2004); In the Matter of Kathy Morse, 25 BOLI 75, 78-79 (2004); In the Matter of Venus Vincent, 24 BOLI 155, 163 (2003); In the Matter of Procom Services, Inc., 24 BOLI 238, 243 (2003); In the Matter of G and G Gutters, Inc., 23 BOLI 135, 144 (2002); In the Matter of Duane Knowlden, 23 BOLI 56, 64 (2002), In the Matter of Stan Lynch, 23 BOLI 34, 42 (2002); In the Matter of Peter N. Zambetti, 23 BOLI 234, 241 (2002); In the Matter of Usra A. Vargas, 22 BOLI 212, 220 (2001); In the Matter of Arthur Lee, 22 BOLI 99, 106 (2001); In the Matter of Spot Security, Inc., 22 BOLI 170, 175 (2001); In the Matter of Landco Enterprises, Inc., 22 BOLI 62, 67 (2001); In the Matter of M. Carmona Painting, Inc., 22 BOLI 52, 54 (2001); In the Matter of WB Painting and Decorating, Inc., 22 BOLI 18, 20 (2001), amended 22 BOLI 27 (2001); In the Matter of Executive Transport, Inc., 17 BOLI 81, 92 (1998).*

❑ When respondent did not appear at the time and place set for hearing and no one appeared on her

behalf, the ALJ found respondent to be in default, and commenced the hearing. ***----- In the Matter of Sue Dana, 28 BOLI 22, 24-25 (2006).*** *See also In the Matter of Peter N. Zambetti, 23 BOLI 234, 237 (2002).*

❑ When respondent defaulted, the agency was required to establish a prima facie case on the record to support the allegations in its charging documents. ***----- In the Matter of Tallon Kustom Equip., 28 BOLI 32, 34 (2006).*** *See also In the Matter of Sue Dana, 28 BOLI 22, 29 (2006); In the Matter of Jorge E. Lopez, 28 BOLI 10, 17-18 (2006); In the Matter of Bukovina Express, Inc., 27 BOLI 184, 199 (2006)**;** In the Matter of Troy Melquist dba RedCellX, Inc., 27 BOLI 171, 180 (2006); In the Matter of Lisa Sanchez, 27 BOLI 56, 61 (2005).In the Matter of Odon Salinas, 16 BOLI 42, 50-51 (1997); In the Matter of Peggy's Café, 7 BOLI 281, 286 (1989).*

❑ When respondent failed to appear at hearing and the forum found Respondent in default pursuant to OAR 839-050-0330. ***----- In the Matter of Jorge E. Lopez, 28 BOLI 10, 17 (2006).***

❑ In a default case, when the record included evidence that conflicted with the agency's contention and was not supplemented with evidence showing why the duly registered owners should be disregarded, the agency did not make the requisite showing that respondent employed claimants and the orders of determination were dismissed. ***----- In the Matter of Jorge E. Lopez, 28 BOLI 10, 22 (2006).***

❑ When the ALJ commenced the hearing at 9:00 a.m. on May 2, 2006, respondent had not yet appeared at the hearing and had not contacted the agency case presenter, the ALJ, or the hearings unit to state that he would not be making an appearance. The ALJ waited until 9:30 a.m. to commence the hearing, then declared respondent in default and commenced the hearing. ***----- In the Matter of Carl Odoms, 27 BOLI 232, 235 (2006).***

❑ A corporate respondent did not appear at the hearing with counsel or an authorized representative and was found in default. ***----- In the Matter of Bukovina Express, Inc., 27 BOLI 184, 199 (2006).***

❑ Respondent did not appear at the time and place set for hearing and no one appeared on its behalf. The ALJ placed the substance of the prehearing telephone contact with respondent on the record, found respondent to be in default, and commenced the hearing. ***----- In the Matter of Okechi Village & Health Center, 27 BOLI 156, 161 (2006).***

❑ When the ALJ commenced the hearing at 10 a.m. as scheduled, respondent had not yet appeared at the hearing and had not contacted the agency case presenter, the ALJ, or the hearings unit to state that she would not be making an appearance. The ALJ waited until 10:30 a.m. to commence the hearing, then declared respondent in default and commenced the hearing. ***----- In the Matter of Lisa Sanchez, 27 BOLI 56, 57-58 (2005).***

❑ Respondent did not make an appearance at the hearing, and the ALJ waited 30 minutes to commence the hearing, then declared respondent in default and commenced the hearing. ***----- In the Matter of Jamie Sue Sziisz, 26 BOLI 228, 230 (2005).*** *See also In the Matter of Rogue Valley Fire Protection, LLC, 26 BOLI 172, 174 (2005).*

❑ When the agency filed a motion for an order of default 12 days before the hearing date based on respondent's failure to file an answer to the formal charges after being served with the documents, respondent had not responded to the agency's motion at the time the hearing commenced, and respondent did not appear at the time set for hearing and had not notified the forum that it would be late or would not attend the hearing, the ALJ waited 60 minutes to commenced the hearing, then granted the agency's motion for order of default based on respondent's failure to file an answer. ***----- In the Matter of C. C. Slaughters, Ltd., 26 BOLI 186, 188 (2005).***

❑ Respondent did not file a request for relief from default within the time allowed and the ALJ issued a default order stating that respondent would not be permitted to present evidence or participate in any manner in the hearing under the applicable rules. ***----- In the Matter of Cleopatra's, Inc., 26 BOLI 125, 127 (2005).***

❑ The Agency filed a motion for default after respondent failed to file an answer within 20 days after the formal charges were issued. The ALJ granted the agency's motion and issued a notice of default noting that the formal charges issued on August 5, 2004, that respondent was required to file an answer within 20 days and failed to do so, and that it was in default under OAR 839-050-0330(1)(a). Respondent was advised it had ten days from the date the notice of default issued to request relief from default through counsel or an authorized representative as provided in the contested case hearing rules. ***----- In the Matter of Cleopatra's, Inc., 26 BOLI 125, 127 (2005).***

❑ When respondent did not appear at the time set for hearing, nobody appeared on respondent's behalf, and no one had notified the forum that respondent would not be appearing at the hearing, the ALJ waited 30 minutes past the time set for hearing and declared respondent to be in default and commenced the hearing. ***----- In the Matter of Northwest Pizza, Inc., 25 BOLI 79, 81 (2004).*** *See also In the Matter of Procom Services, Inc., 24 BOLI238, 240 (2003); In the Matter of Venus Vincent, 24 BOLI 155, 158 (2003); In the Matter of Westland Resources Group LLC, 23 BOLI 276, 283 (2002); In the Matter of Usra A. Vargas, 22 BOLI 212, 215-16 (2001); In the Matter of Spot Security, Inc., 22 BOLI 170, 172 (2001); In the Matter of Landco Enterprises, Inc., 22 BOLI 62, 63 (2001); In the Matter of M. Carmona Painting, Inc., 22 BOLI 52, 54 (2001); In the Matter of WB Painting and Decorating, Inc., 22 BOLI 18, 20 (2001), amended 22 BOLI 27 (2001); In the Matter of Bruce D. Huhta, 21 BOLI 249, 252 (2001); In the Matter of William George Allmendinger, 21 BOLI 151, 156 (2000); In the Matter of Johnson Builders, Inc., 21 BOLI 103, 106-7 (2000); In the Matter of Sharon Kaye Price, 21 BOLI 78, 80 (2000); In the Matter of Keith Testerman, 20 BOLI 112, 127 (2000); In the Matter of Nova Garbush, 20 BOLI 65, 71 (2000); In the Matter of Catalogfinder, Inc., 18 BOLI 242, 247, 255 (1999); In the Matter of Leslie Elmer DeHart, 18 BOLI 199, 201, 205*

(1999).

❑ The agency filed a motion for an order of default based on respondent's failure to file an answer to the formal charges after being served with the documents and after being sent a notice by the agency that the agency would seek a default order if respondent did not file an answer within ten days. Based on respondent's failure to file an answer, the ALJ granted the agency's motion and found respondent to be in default. The ALJ issued an interim order stating that respondent had ten days to seek relief from default by means of a written request. ***----- In the Matter of Northwest Pizza, Inc., 25 BOLI 79, 81 (2004).***

❑ When respondents did not appear for the hearing and had not earlier notified the hearings unit that they would not be present at the hearing, the ALJ went on the record and announced that he would wait until 10:30 a.m., pursuant to OAR 839-050-0330, to commence the hearing and that respondents would be in default if they did not make an appearance by that time. When respondents did not appear by 10:30 a.m., the ALJ declared respondents to be in default and commenced the hearing. ***----- In the Matter of Barbara Blair, 24 BOLI 89, 91-92 (2002).*** *See also In the Matter of Duane Knowlden, 23 BOLI 56, 59 (2002).*

❑ At 10 a.m. on April 23, 2002, the time scheduled for hearing, respondent had not made an appearance. Subsequently, no one appeared on behalf of respondent and no one contacted the hearings unit to state that Respondent would be late or would not appear. At 10:30, the ALJ declared respondent to be in default and commenced the hearing. ***----- In the Matter of G and G Gutters, Inc., 23 BOLI 135, 138 (2002).***

❑ The ALJ declared respondents to be in default one-half hour after the time set for hearing when they did not appear at hearing, had not previously announced that they would not appear, and nobody appeared on their behalf. ***----- In the Matter of Stan Lynch, 23 BOLI 34, 37 (2002).*** *See also In the Matter of Majestic Construction, Inc., 19 BOLI 59, 62 (1999); In the Matter of Belanger General Contracting*, *19 BOLI 17, 19 (1999); In the Matter of Sabas Gonzalez, 19 BOLI 1, 5-6 (1999).*

❑ Before the hearing, Respondent's counsel of record notified the forum by telephone that he no longer represented respondent and that neither he nor his former client would be appearing at the hearing for reasons that remain unclear. When respondent failed to appear and no one appeared on his behalf at hearing, the forum found respondent in default pursuant to OAR 839-050-0330. ***----- In the Matter of Arthur Lee, 22 BOLI 99, 106 (2001).***

❑ When respondent did not appear at the hearing on by 10:30 a.m., the time set for hearing, the ALJ recessed the hearing until 11:00 a.m. Respondent did not appear by 11:00 a.m. and the ALJ declared him in default and commenced the hearing. ***----- In the Matter of Steven D. Harris, 21 BOLI 139, 143 (2000).***

❑ When respondents did not appear at the time set for hearing, the ALJ went on the record and announced that he would wait until 9:30 a.m. to commence the hearing and that respondents would be in default if they did not make an appearance by that time. At 9:15 a.m. respondent Washington telephoned and asked where the hearing was and what time it started, claiming he had no prior notice of the hearing date, time, or location. The ALJ advised him of the hearing location and that he needed to arrive no later than 9:30 a.m. if he wished to avoid being in default. Respondent Washington did not appear at the hearing by 9:30 a.m. and the ALJ declared both respondents to be in default. ***----- In the Matter of Bubbajohn Howard Washington, 21 BOLI 91, 93-94 (2000).***

❑ A respondent who is represented by counsel has the right to leave the hearing and appear only through counsel, and such an action will not place the respondent in default. ***----- In the Matter of Barbara Coleman, 19 BOLI 230, 244 (2000)***.

❑ A corporate respondent timely filed an answer to the agency's specific charges through Banas, an out-of-state attorney. The agency filed a motion for an order of default based on respondent's failure to timely file an answer through Oregon counsel. Subsequently, respondent, through Oregon counsel Buono, filed a motion for association of Banas as attorney for respondent and a second motion opposing the agency's motion for order of default, arguing that respondent had complied with the forum's rules by filing a written answer and that the forum's rule that a corporation be represented by counsel applied only to the hearing and not to preliminary matters. The forum granted the agency's motion for default on the basis that a corporation had to be represented by Oregon counsel at all stages of the hearings process and gave respondent ten days to obtain relief from default for good cause shown. Respondent timely filed a request for relief from default, and the forum withdrew the default order and accepted respondent's answer, citing earlier precedent of relief granted when an answer had been tendered prior to the agency's default motion. ***----- In the Matter of Sears, Roebuck and Company, 18 BOLI 47, 49 (1999)***.

❑ When the respondent filed an answer and request for hearing, but did not appear at hearing, the ALJ held it in default. ***----- In the Matter of R.L. Chapman Ent. Ltd., 17 BOLI 277, 279-80, 283 (1999)***.

❑ In default cases, the respondent may not present evidence, examine witnesses, or otherwise participate in the hearing. ***----- In the Matter of Executive Transport, Inc., 17 BOLI 81, 92 (1998)***. *See also In the Matter of Kenneth Williams, 14 BOLI 16, 24 (1995); In the Matter of City of Umatilla, 9 BOLI 91, 95 (1990), affirmed without opinion*, *City of Umatilla v. Bureau of Labor and Industries, 110 Or App 151, 821 P2d 1134 (1991).*

❑ It is the charged respondent's responsibility to keep the agency and the forum advised of respondent's address once respondent has been served w the charging document. When the notice of hearing and attachment, together with copies of other documents, were received by respondent by certified mail at a Hermiston address, and when an ALJ's order permitting the hearing to be held by telephone was sent to the same address with postage prepaid and was not returned undelivered, the ALJ found that respondent

received the notice of contested case rights and procedures and had notice of the date, time, and manner of hearing. When respondent failed to appear at the hearing in person, did not provide the ALJ a telephone number as ordered, and did not contact the ALJ with any reason for tardiness or nonattendance, the ALJ found respondent in default. ***----- Tina Davidson, 16 BOLI 141, 144, 148 (1997).***

❑ In a default situation, the agency is obligated to present a prima facie case in support of the specific charges and to establish damages. The agency meets this burden by submitting credible testimony and documentary evidence acceptable to the forum. ***----- In the Matter of Vision Graphics and Publishing, Inc., 16 BOLI 124, 136 (1997).*** *See also In the Matter of Vision Graphics and Publishing, Inc., 16 BOLI 21, 25 (1997); In the Matter of Dandelion Enterprises, Inc., 14 BOLI 133, 145 (1995);In the Matter of Soapy's, Inc., 14 BOLI 86, 94-95 (1995); In the Matter of Kenneth Williams, 14 BOLI 16, 24 (1995); In the Matter of Salem Construction Company, Inc., 12 BOLI 78, 88 (1993); In the Matter of C. Vogar'd Amezcua, 11 BOLI 197, 203 (1993); In the Matter of Stancil Jones, 9 BOLI 233, 239 (1991); In the Matter of City of Umatilla, 9 BOLI 91, 103-04 (1990), affirmed without opinion, City of Umatilla v. Bureau of Labor and Industries, 110 Or App 151, 821 P2d 1134 (1991); In the Matter of Courtesy Express, Inc., 8 BOLI 139, 147 (1989); In the Matter of Dillard Hass Contractor, Inc., 7 BOLI 244, 250 (1988); In the Matter of Ebony Express, 7 BOLI 91, 95 (1988); In the Matter of Metco Manufacturing, Inc., 7 BOLI 55, 66 (1987), affirmed, Metco Manufacturing, Inc. v. Bureau of Labor and Industries, 93 Or App 317, 761 P2d 1362 (1988); In the Matter of Associated Oil Company, 6 BOLI 240, 251 (1987); In the Matter of Jack Mongeon, 6 BOLI 194, 201 (1987); In the Matter of Cheryl Miller, 5 BOLI 175, 179 (1986); In the Matter of Fred Vankeirsbilck, 5 BOLI 90, 93-94 (1986); In the Matter of Michael Burke, 5 BOLI 47, 52 (1985).*

❑ Respondents were in default when they failed to file an answer. ***----- In the Matter of Vision Graphics and Publishing, Inc., 16 BOLI 124, 126 (1997).***

❑ The ALJ found a respondent to be default when he was served with the notice of intent, was notified by mail of the hearing, and did not appear at the hearing. ***----- In the Matter of Odon Salinas, 16 BOLI 42, 45 (1997).***

❑ When respondent did not appear at the hearing and did not contact the agency or the hearings unit prior to or at the time set for hearing, the ALJ waited 30 minutes before resuming the hearing, then found respondent in default and proceeded with the hearing. ***----- In the Matter of Jewel Schmidt, 15 BOLI 236, 238 (1997.*** *See also In the Matter of Susan Palmer, 15 BOLI 226, 228 (1997); Mark Johnson, 15 BOLI 139, 140 (1996); In the Matter of Danny Jones, 15 BOLI 25, 27 (1996); In the Matter of John Hatcher, 14 BOLI 289, 292 (1996); In the Matter of Gerald Brown, 14 BOLI 154, 157 (1995); In the Matter of Haskell Tallent, 13 BOLI 273, 275 (1994); In the Matter of Javier Garcia, 13 BOLI 93, 96 (1994).*

❑ When two corporate respondents failed to answer the agency's order of determination and failed to appear at hearing through counsel, the forum found them in default even though a third respondent, an individual, answered the charges and defended at hearing. ***----- In the Matter of Jack Crum Ranches, Inc., 14 BOLI 258, 260-62 (1995).***

❑ At the close of the hearing, the hearings referee ruled that respondent was in default when respondent did not appear at the hearing and did not advise the hearings referee of any reason for tardiness or non-attendance. ***----- In the Matter of Samuel Loshbaugh, 14 BOLI 224, 225 (1995).***

❑ The forum found respondents in default when specific charges and a notice of hearing were personally served on respondents, respondents failed to answer, and the agency moved for an order of default. ***----- In the Matter of Dandelion Enterprises, Inc., 14 BOLI 133, 135, 145 (1995).***

❑ When a corporation and its majority shareholder were joint applicants for a farm labor contractor license and were jointly named in a notice of intent to deny the license application and, following service on each, the corporate applicant defaulted, a motion for summary denial of the license application of the shareholder applicant was granted by the forum. The core of the forum's ruling was ORS 183.310(2), which precludes the need to present a prima facie case on the record when a party – in this case, the corporate applicant —fails to request a hearing. Since the application of the corporation could be denied without further proceedings, and since the shareholder applicant could not then become licensed from the joint application, the forum concluded that the shareholder's application could be denied on summary judgment. ***----- In the Matter of Victor Ovchinnikov, 13 BOLI 123, 128 (1994).***

❑ When an individual respondent was served with an order of determination alleging unpaid wages and requested a contested case hearing and was later served at his record address with a notice of hearing and an amended order of determination joining a corporation of which he was president and registered agent, the forum held both respondents in default when neither appeared at the hearing. ***----- In the Matter of Blue Ribbon Christmas Trees, Inc., 12 BOLI 209, 211-12 (1994).***

❑ When a corporate respondent's president requested and was denied a postponement of the hearing in order to get an attorney and showed up at hearing without an attorney for respondent and again requested a postponement, the forum denied the request and found respondent in default for failing to appear at hearing. ***----- In the Matter of S.B.I., Inc., 12 BOLI 102, 104-05 (1993).***

❑ When respondent arrived at the place of the hearing but left before the hearings referee started the hearing on the record, the forum found respondent in default for failing to appear, according to OAR 839-50-330(1)(b). ***----- In the Matter of RJ's All American Restaurant, 12 BOLI 24, 26 (1993).***

❑ A corporate respondent was held in default when the two respondents were a corporation and its owner, the owner filed an answer as president of the corporation, the hearings referee notified respondents

that the owner's answer could not serve as the corporation's answer and that the corporation was required by law to be represented by an attorney, and the corporate respondent thereafter failed to file an answer. ***----- In the Matter of Cristobal Lumbreras, 11 BOLI 167, 169 (1993).***

❑ When the principals of a corporate respondent were advised that the corporation needed to be represented by counsel, and one of the principals appeared at hearing but respondent was not represented by counsel, the forum found respondent in default pursuant to OAR 839-30-057 and 839-30-185(1)(b). ***----- In the Matter of Z & M Landscaping, Inc., 10 BOLI 174, 175-76 (1992).***

❑ When a respondent who had received timely notice of hearing and had retained counsel called the hearings referee at the start of the hearing and stated he was in Alaska and unable to attend the hearing, that he had retained counsel in Salem, and that he needed a postponement, the hearings referee denied the postponement and found respondent in default for failure to appear at hearing. Respondent was granted the opportunity to request relief from default. ***----- In the Matter of Rainbow Auto Parts and Dismantlers, 10 BOLI 66, 68-69 (1991).***

❑ Corporations must be represented by an Oregon attorney as requested by ORS 9.320 and OAR 839-30-057. When a corporation's president and sole owner attempted to represent the corporate respondent, the hearings referee refused to allow him to represent the corporation and found it in default. ***----- In the Matter of Allied Computerized Credit & Collections, Inc., 9 BOLI 206, 214 (1991).***

❑ Noting that a contested case hearing under ORS chapter 659 does not occur in a vacuum but is preceded b an administrative complaint, an investigation, an administrative determination finding substantial evidence of violation, and conciliation, the commissioner observed that the party's neglect or inattention concerning the process involved in convening hearing could not be justified, and confirmed the hearings referee's finding of default. ***----- In the Matter of 60 Minute Tune, 9 BOLI 191, 202 (1991).***

> Affirmed without opinion, *Nida v. Bureau of Labor and Industries,* 119 Or App 508, 852 P2d 974 (1993).

❑ A respondent who was in default and his attorney were not allowed to present evidence or otherwise participate in a contested case hearing. ***----- In the Matter of 60 Minute Tune, 9 BOLI 191, 202 (1991).***

> Affirmed without opinion, *Nida v. Bureau of Labor and Industries,* 119 Or App 508, 852 P2d 974 (1993).

❑ When respondent was in default for failure to file a timely answer, its motion for reconsideration was denied by the hearings referee, and respondent renewed its motion for reconsideration at the start of the hearing, the commissioner held that the motion was not appropriate and did not consider it or the agency's responses to it. Referee rulings are always subject to ratification or rejection by the commissioner. ***----- In the Matter of City of Umatilla, 9 BOLI 91, 92 (1990).***

> Affirmed without opinion, *City of Umatilla v. Bureau of Labor and Industries,* 110 Or App 151, 821 P2d 1134 (1991).

See also In the Matter of Metco Manufacturing, Inc., 7 BOLI 55, 66 (1987), affirmed, Metco Manufacturing, Inc. v. Bureau of Labor and Industries, 93 Or App 317, 761 P2d 1362 (1988).

❑ When the agency established that respondent was served with the order of determination, along with instructions to notify the agency of any change of address, and respondent requested a contested case hearing and filed an answer, the commissioner found that respondent's non-appearance at the scheduled hearing resulted from his failure to notify the agency of is address change and found respondent in default. ***----- In the Matter of Kevin McGrew, 8 BOLI 251, 260 (1990).***

❑ The commissioner defaulted two corporate respondents that failed to submit an answer through counsel, as required by rule and statute, when an individual respondent filed answers "pro substantial evidence" for himself and the two corporations, arguing that each corporate respondent could not afford counsel and that a refusal to allow each corporation to file its answer "pro substantial evidence" was a denial of due process. ***----- In the Matter of Strategic Investments of Oregon, Inc., 8 BOLI 227, 231-33 (1990).***

❑ Respondent's default by virtue of failure to file an answer results in the admission of factual matters alleged in the specific charges and the waiver of any affirmative defenses. Respondent also loses the right to address by any means, including cross-examine, issues raised in the specific charges. ***----- In the Matter of Peggy's Café, 7 BOLI 281, 286 (1989).***

❑ A respondent who requested a contested case hearing in response to an order of determination and failed to appear at the scheduled hearing was found in default. ***----- In the Matter of Jack Mongeon, 6 BOLI 194, 201 (1987).***

❑ When neither respondent nor her representative appeared at hearing and her total contribution to the record was a request for hearing and a letter that contained only unsworn and unsubstantiated assertions, respondent was found in default. ***----- In the Matter of Cheryl Miller, 5 BOLI 175, 179 (1986).***

❑ In a default situation, the forum's task is to determine if the agency has made a prima facie case on the record that the employer has violated the law. ***----- In the Matter of Fred Vankeirsbilck, 5 BOLI 90, 93-94 (1986).***

❑ When a farm/forest labor contractor was notified of the agency's intent to assess a civil penalty for acting as a farm/forest labor contractor without a valid license and the contractor requested a hearing but did not appear, the contractor was held in default. ***----- In the Matter of Michael Burke, 5 BOLI 47, 52 (1985).***

❑ A respondent who received notice of the time and place of hearing but did not appear was held in default. ***---- In the Matter of Ray Carmen, 3 BOLI 15, 16 (1982).***

> Overruled in part on other grounds, *In the Matter of Jack Mongeon,* 6 BOLI 194, 201 (1987).

24.2 --- Amendments

❑ The ALJ granted the agency's motion at a default hearing to amend the order of determination to reduce the amount of unpaid wages sought to $6,393.54 based on the agency's recalculations of the amount of unpaid wages due and owing to Claimant. ***----- In the Matter of MAM Properties, LLC, 28 BOLI 172, 176 (2007).***

❑ The agency moved to amend the formal charges in order to substitute a one paragraph for another in six different places in the formal charges. The agency also changed its prayer for damages to seek lost wages in an amount to be proven at hearing and currently estimated to be approximately $9,200. The paragraph substitution was sought to "clarify for the record that it is respondent's alleged unlawful employment practice as identified in paragraph II.15 and not complainant's actions in paragraph II.14 that form the basis for the agency's allegations that complainant was retaliated against and subjected to unlawful employment practices as a result of his protected activity and membership in a protected class." The ALJ granted the agency's motion, relieved respondent of default, and directed the agency to serve a copy of the amended formal charges on respondent. ***----- In the Matter of Rogue Valley Fire Protection, LLC, 26 BOLI 172, 174 (2005)***

❑ After a wage claim hearing when respondent was held in default, the ALJ, on her own motion, amended the caption to correct a spelling error and conform the caption to the agency's order of determination. ***----- In the Matter of Usra A. Vargas, 22 BOLI 212, 216 (2001).***

❑ In a case in which respondents defaulted, the ALJ granted the agency's motion to amend the order of determination by reducing the amount of damages sought. ***----- In the Matter of Leslie Elmer DeHart, 18 BOLI 199, 201 (1999)***.

❑ The forum granted the agency's motion to amend the charging document to correct clerical errors and for clarity at a default hearing when respondent failed to appear. ***----- In the Matter of Robert Arreola, 14 BOLI 34, 35 (1995).***

❑ In a default situation, the charging document sets the limit on the relief that the forum can award. Once a default is granted, the agency cannot amend the specific charges to plead for greater damages to conform to the evidence presented at hearing. ***----- In the Matter of Kenneth Williams, 14 BOLI 15, 26 (1995).*** *See also In the Matter of Salem Construction Company, Inc., 12 BOLI 78, 79 (1993).*

❑ When a party has been found in default with respect to a charging document and the charging document is then amended as to that party, the amendment has the effect of relieving the party of its default, to the extent that the party has an opportunity to answer all charges in the amended charging document, including charges identical to those made in the initial charging document. ***----- In the Matter of Victor Ovchinnikov, 13 BOLI 123, 128 (1994).***

24.3 --- Answer as Evidence (*see also* 10.2, 20.17)

❑ Unsworn and unsubstantiated assertions contained in a respondent's answer may be considered, but are overcome whenever they are contradicted by other credible evidence in the record. ***----- In the Matter of MAM Properties, LLC, 28 BOLI 172, 187 (2007).***

❑ When making factual findings, the forum may consider unsworn assertions contained in respondent's answers to the charging documents, but those assertions are overcome whenever they are controverted by credible evidence in the record. ***----- In the Matter of Tallon Kustom Equip., 28 BOLI 32, 34 (2006).*** *See also In the Matter of Bukovina Express, Inc., 27 BOLI 184, 199 (2006); In the Matter of Troy Melquist dba RedCellX, Inc., 27 BOLI 171, 180 (2006); In the Matter of Okechi Village & Health Center, 27 BOLI 156, 166 (2006); In the Matter of Design N Mind, Inc., 27 BOLI 32, 41 (2005); In the Matter of Millennium Internet, Inc., 25 BOLI 200, 205 (2004). See also In the Matter of Peter N. Zambetti, 23 BOLI 234, 241 (2002).*

❑ When a respondent fails to appear at hearing and its total contribution to the record is a request for hearing and an answer that contains only unsworn and unsubstantiated assertions, those assertions are overcome whenever they are contradicted by other credible evidence in the record. ***----- In the Matter of Stan Lynch, 23 BOLI 34, 42 (2002).*** *See also In the Matter of Landco Enterprises, Inc., 22 BOLI 62, 67 (2001); In the Matter of M. Carmona Painting, Inc., 22 BOLI 52, 58 (2001); In the Matter of WB Painting and Decorating, Inc., 22 BOLI 18, 20 (2001), amended 22 BOLI 27 (2001); In the Matter of Bruce D. Huhta, 21 BOLI 249, 257 (2001); In the Matter of Steven D. Harris, 21 BOLI 139, 149 (2000); In the Matter* of *Johnson Builders, Inc., 21 BOLI 103, 122 (2000); In the Matter of Bubbajohn Howard Washington, 21 BOLI 91, 99 (2000); In the Matter of Sharon Kaye Price, 21 BOLI 78, 87 (2000); In the Matter of William George Allmendinger, 21 BOLI 151, 170 (2000); In the Matter of Keith Testerman, 20 BOLI 112, 127 (2000); In the Matter of Nova Garbush, 20 BOLI 65, 71 (2000); In the Matter of Leslie Elmer DeHart, 18 BOLI 199, 206 (1999); In the Matter of R.L. Chapman Ent. Ltd., 17 BOLI 277, 284 (1999); In the Matter of Scott A. Andersson, 17 BOLI 15, 21 (1998).*

❑ When default occurs, the forum may give some weight to unsworn assertions contained in an answer unless other credible evidence controverts them. If a respondent is found not to be credible the forum need not give any weight to the assertions, even if they are uncontroverted. ***----- In the Matter of Procom Services, Inc., 24 BOLI 238, 243 (2003).*** *See also In the Matter of Usra A. Vargas, 22 BOLI 212, 220 (2001).*

❑ In a default situation, when a respondent's total contribution to the record is a request for hearing and an answer that contains only unsworn and unsubstantiated assertions, those assertions are overcome whenever they are contradicted by other credible evidence in the record. ***----- In the Matter of Tina Davidson, 16 BOLI 141, 148 (1997).*** *See also In the Matter of Jewel Schmidt, 15 BOLI 236, 238 (1997); In the Matter of Danny Jones, 15 BOLI 25, 31 (1996); In the Matter of John Hatcher, 14 BOLI 289, 300 (1996); In the Matter of Samuel Loshbaugh, 14 BOLI 224, 229 (1995); In the Matter of S.B.I., Inc., 12 BOLI 102, 109 (1993); In the*

Matter of Mark Vetter, 11 BOLI 25, 31 (1992); In the Matter of William Sarna, 11 BOLI 20, 24 (1992); In the Matter of Amalia Ybarra, 10 BOLI 75, 83 (1991); In the Matter of Rainbow Auto Parts and Dismantlers, 10 BOLI 66, 73 (1991); In the Matter of Jack Mongeon, 6 BOLI 194, 201 (1987).

❑ When a respondent submits an answer to a charging document, the forum may admit the answer into evidence during hearing and may consider the answer's contents when making findings of fact. When a respondent fails to appear at hearing, the forum may review the answer to determine whether the respondent has set forth any evidence or defense to the charges. ***----- In the Matter of Tina Davidson, 16 BOLI 141, 148 (1997).*** *See also In the Matter of Jewel Schmidt, 15 BOLI 236, 238 (1997); In the Matter of Danny Jones, 15 BOLI 25, 31 (1996); In the Matter of Samuel Loshbaugh, 14 BOLI 224, 225 (1995); In the Matter of Mark Vetter, 11 BOLI 25, 30 (1992); In the Matter of William Sarna, 11 BOLI 20, 24 (1992); In the Matter of Rainbow Auto Parts and Dismantlers, 10 BOLI 66, 73 (1991); In the Matter of Waylon & Willies, Inc., 7 BOLI 68, 74 (1988); In the Matter of Jack Mongeon, 6 BOLI 194, 201 (1987); In the Matter of Richard Niquette, 5 BOLI 53, 60 (1986).*

❑ In a default case, when respondent's only contribution to the record was his answer and credible evidence in the record effectively controverted the unsworn and unsubstantiated assertions in the answer, the forum held that it is not the burden of the agency or the forum to disprove respondent's defense. ***----- In the Matter of Robert Arreola, 14 BOLI 34, 40 (1995).***

24.4 --- Forum's Responsibility

❑ When a respondent defaults, the forum must determine whether the agency has established a prima facie case supporting the allegations of the charging document. ***----- In the Matter of Keith Testerman, 20 BOLI 112, 126 (2000)***. *See also In the Matter of Nova Garbush*, 20 BOLI 65, 71 (2000); *In the Matter of Majestic Construction, Inc., 19 BOLI 59, 67 (1999); In the Matter of Belanger General Contracting, 19 BOLI 17, 25 (1999)*; *In the Matter of Catalogfinder, Inc., 18 BOLI 242, 255 (1999); In the Matter of Leslie Elmer DeHart*, 18 BOLI 199, 206 (1999); *In the Matter of R.L. Chapman Ent. Ltd.*, 17 BOLI 277, 283 (1999); *In the Matter of Harold Zane Block,* 17 BOLI 150, 161 (1998); *In the Matter of Scott A. Andersson*, 17 BOLI 15, 21 (1998).

❑ When the agency alleged that two respondents in a wage claim case were business partners, and one of the partners defaulted by failing to respond to the order of determination, the forum relieved the defaulting respondent from default and dismissed the order of determination against her based on the agency's failure to prove that the two respondents intended to form a partnership. ***----- In the Matter of Harold Zane Block, 17 BOLI 150, 161 (1998)***.

❑ In a default situation, the forum's responsibility is to determine whether the agency has established a prima facie case supporting the allegations of the charging document on the record. ***----- In the Matter of Tina Davidson, 16 BOLI 141, 148 (1997).*** *See also In the Matter of Jewel Schmidt, 15 BOLI 236, 241 (1997); In the Matter of Susan Palmer, 15 BOLI 226, 233 (1997); In the Matter of Mark Johnson, 15 BOLI 139, 141 (1996); In the Matter of Danny Jones, 15 BOLI 25, 31 (1996); In the Matter of John Hatcher, 14 BOLI 289, 300 (1996); In the Matter of Jack Crum Ranches, Inc., 14 BOLI 258, 269 (1995); In the Matter of Samuel Loshbaugh, 14 BOLI 224, 229 (1995); In the Matter of Katherine Hoffman, 14 BOLI 41, 46 (1995); In the Matter of Robert Arreola, 14 BOLI 34, 40 (1995); In the Matter of Haskell Tallent, 13 BOLI 273, 279 (1994); In the Matter of S.B.I., Inc., 12 BOLI 102, 109 (1993); In the Matter of Tom's TV & VCR Repair, 12 BOLI 110, 116 (1993); In the Matter of Daniel Burdick, 12 BOLI 66, 77 (1993); In the Matter of Ivan Skorohodoff, 11 BOLI 8, 18 (1992); In the Matter of Mark Vetter, 11 BOLI 25, 30 (1992); In the Matter of William Sarna, 11 BOLI 20, 24 (1992); In the Matter of Z & M Landscaping, Inc., 10 BOLI 174, 180 (1992); In the Matter of Amalia Ybarra, 10 BOLI 75, 83 (1991); In the Matter of Rainbow Auto Parts and Dismantlers, 10 BOLI 66, 73 (1991); In the Matter of Rogelio Loa, 9 BOLI 139, 146 (1990); In the Matter of Mary Rock, 7 BOLI 85, 89 (1988); In the Matter of Waylon & Willies, Inc., 7 BOLI 68, 74 (1988); In the Matter of John Cowdrey, 5 BOLI 291, 298 (1986); In the Matter of Art Farbee, 5 BOLI 268, 276 (1986); In the Matter of Judith Irene Wilson, 5 BOLI 219, 226 (1986); In the Matter of Fred Vankeirsbilck, 5 BOLI 90, 93-94 (1986); In the Matter of Michael Burke, 5 BOLI 47, 52 (1985).*

❑ In a default case, when respondent's only contribution to the record was his answer and credible evidence in the record effectively controverted the unsworn and unsubstantiated assertions in the answer, the forum held that it is not the burden of the agency or the forum to disprove respondent's defense. ***----- In the Matter of Robert Arreola, 14 BOLI 34, 40 (1995).***

❑ The hearings referee refused to reconsider a finding of default against respondents in the proposed order because there was no rule providing for reconsideration. In the final order, the commissioner held that the hearings referee had inherent discretionary authority as the commissioner's designee to reconsider his or her own rulings. ***----- In the Matter of 60 Minute Tune, 9 BOLI 191, 209 (1991).***

> Affirmed without opinion, *Nida v. Bureau of Labor and Industries,* 119 Or App 508, 852 P2d 974 (1993).

24.5 --- Limits on Damages/Relief

❑ In a default situation, when a specific amount of damages for emotional distress is sought, the charging document sets the limit on the relief the forum can award. ***----- In the Matter of Rogue Valley Fire Protection, LLC, 26 BOLI 172, 185 (2005).***

❑ Generally, the forum's award of damages for lost wages may not be larger than the specific amount alleged in the charging document "because that is the figure of which respondent employer had notice prior to default." ***----- In the Matter of Rogue Valley Fire Protection, LLC, 26 BOLI 172, 184 (2005).***

❑ In a default case, when the amended formal charges sought "lost wages in an amount to be proven at hearing and currently estimated to be approximately $9,200," the forum concluded it had the authority to award complainant the amount of lost wages actually

proven at the hearing, or $10,749.60, because respondent had notice of the approximate amount of lost wages and that the agency intended to prove the specific amount of lost wages at the hearing. ***----- In the Matter of Rogue Valley Fire Protection, LLC, 26 BOLI 172, 184 (2005).***

❑ During the course of a hearing at which respondents had not appeared, the agency moved to amend the order of determination to increase the amount of unpaid wages and penalty wages claimed. The forum denied the motion. In a default situation, amounts stated in the order of determination limit the relief the forum can award. ***----- In the Matter of Majestic Construction, Inc., 19 BOLI 59, 62 (1999)***. *See also In the Matter of Scott A. Andersson, 17 BOLI 15, 17, (1998).*

❑ When a respondent employer is in default, the forum's award of damages for lost wages is limited to the amount alleged in the charges because that is the figure respondent had notice of before the default. ***----- In the Matter of Vision Graphics and Publishing, Inc., 16 BOLI 124, 140 (1997).***

❑ In a default situation, the charging document sets the limit on the relief the forum can award. When the amount of penalty wages calculated by the forum was greater than the amount prayed for in the order of determination, the forum awarded the latter amount. ***----- In the Matter of Mark Johnson, 15 BOLI 139, 144 (1996).*** *See also In the Matter of Robert Arreola, 14 BOLI 34, 40 (1995); In the Matter of Ebony Express, Inc., 7 BOLI 91, 95 (1988).*

❑ In a default situation, the charging document sets the limit on the relief that the forum can award. Once a default is granted, the agency cannot amend the specific charges to plead for greater damages to conform to the evidence presented at hearing. ***----- In the Matter of Kenneth Williams, 14 BOLI 15, 26 (1995).***

❑ In default cases, the issues raised and the relief requested in the charging document set limits on both the theories and damages on which the forum can rule. The implied consent to evidence elicited at hearing without objection, on which a motion to amend to conform to the evidence is based, is absent in default cases. ***----- In the Matter of Salem Construction Company, Inc., 12 BOLI 78, 79 (1993).***

❑ When the agency's specific charges alleged a wage loss of $6,000, and this was the only figure that respondent had notice of before default, the complainant's recovery was limited to that amount even if evidence at hearing and the resulting calculation showed a higher wage loss. Pre-order interest may be calculated for those portions of the lost wages plead which should have been paid. ***----- In the Matter of 60 Minute Tune, 9 BOLI 191, 204 (1991).***

> Affirmed without opinion, *Nida v. Bureau of Labor and Industries,* 119 Or App 508, 852 P2d 974 (1993).

❑ When claimant testified at a wage claim default hearing that an NSF check was for wages earned during a period before the claim period stated in the charging document, the forum held that it was unable to order payment on the NSF check because the check was not for wages claimed in the charging document. In a default situation, the charging document sets the limit on the issues and relief that the forum can consider. ***----- In the Matter of Jack Mongeon, 6 BOLI 194, 202 (1987).***

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

❑ When a corporate respondent failed to file an answer through counsel or an authorized representative within 20 days after the formal charges issued and the agency moved for an order of default, the forum found respondent in default and issued an order stating that respondent had 10 days to request relief from default through counsel or an authorized representative. ***----- In the Matter of Magno-Humphries, Inc., 25 BOLI 175, 179 (2004).***

> Affirmed without opinion, *Magno-Humphries, Inc. dba Magno-Humphries Laboratories Incorporated v. Bureau of Labor and Industries,* 210 Or App 466, 151 P3d 960 (2007), *rev den* 342 Or 523, 156 P3d 69 (2007).

❑ A respondent who is represented by counsel has the right to leave the hearing and appear only through counsel, and such an action will not place the respondent in default. ***----- In the Matter of Barbara Coleman, 19 BOLI 230, 244 (2000)***.

❑ A corporate respondent timely filed an answer to the agency's specific charges through Banas, an out-of-state attorney. The agency filed a motion for an order of default based on respondent's failure to timely file an answer through Oregon counsel. Subsequently, respondent, through Oregon counsel Buono, filed a motion for association of Banas as attorney for respondent and a second motion opposing the agency's motion for order of default, arguing that respondent had complied with the forum's rules by filing a written answer and that the forum's rule that a corporation be represented by counsel applied only to the hearing and not to preliminary matters. The forum granted the agency's motion for default on the basis that a corporation had to be represented by Oregon counsel at all stages of the hearings process and gave respondent ten days to obtain relief from default for good cause shown. Respondent timely filed a request for relief from default, and the forum withdrew the default order and accepted Respondent's answer, citing earlier precedent of relief granted when an answer had been tendered prior to the agency's default motion. ***----- In the Matter of Sears, Roebuck and Company, 18 BOLI 47, 49 (1999)***.

❑ The forum found a corporate respondent in default when it failed to appear through counsel at hearing. ***----- In the Matter of Executive Transport, Inc., 17 BOLI 81, 92 (1998)***.

❑ When a respondent employer is in default, the forum's award of damages for lost wages is limited to the amount alleged in the charges because that is the figure respondent had notice of before the default. ***----- In the Matter of Vision Graphics and Publishing, Inc., 16 BOLI 124, 140 (1997).***

❑ In a default situation, the charging document sets the limit on the relief the forum can award. When the

amount of penalty wages calculated by the forum was greater than the amount prayed for in the order of determination, the forum awarded the latter amount. ***----- In the Matter of Mark Johnson, 15 BOLI 139, 144 (1996).*** *See also In the Matter of Robert Arreola, 14 BOLI 34, 40 (1995); In the Matter of Ebony Express, Inc., 7 BOLI 91, 95 (1988).*

❑ In a default situation, the charging document sets the limit on the relief that the forum can award. Once a default is granted, the agency cannot amend the specific charges to plead for greater damages to conform to the evidence presented at hearing. ***----- In the Matter of Kenneth Williams, 14 BOLI 15, 26 (1995).***

❑ In default cases, the issues raised and the relief requested in the charging document set limits on both the theories and damages on which the forum can rule. The implied consent to evidence elicited at hearing without objection, on which a motion to amend to conform to the evidence is based, is absent in default cases. ***----- In the Matter of Salem Construction Company, Inc., 12 BOLI 78, 79 (1993).***

❑ When the agency's specific charges alleged a wage loss of $6,000, and this was the only figure that respondent had notice of before default, the complainant's recovery was limited to that amount even if evidence at hearing and the resulting calculation showed a higher wage loss. Pre-order interest may be calculated for those portions of the lost wages plead which should have been paid. ***----- In the Matter of 60 Minute Tune, 9 BOLI 191, 204 (1991).***

> Affirmed without opinion, *Nida v. Bureau of Labor and Industries,* 119 Or App 508, 852 P2d 974 (1993).

❑ When claimant testified at a wage claim default hearing that an NSF check was for wages earned during a period before the claim period stated in the charging document, the forum held that it was unable to order payment on the NSF check because the check was not for wages claimed in the charging document. In a default situation, the charging document sets the limit on the issues and relief that the forum can consider. ***----- In the Matter of Jack Mongeon, 6 BOLI 194, 202 (1987).***

24.7 --- Relief from Default

❑ The agency moved to amend the formal charges in order to substitute a one paragraph for another in six different places in the formal charges. The agency also changed its prayer for damages to seek lost wages in an amount to be proven at hearing and currently estimated to be approximately $9,200. The paragraph substitution was sought to "clarify for the record that it is respondent's alleged unlawful employment practice as identified in paragraph II.15 and not complainant's actions in paragraph II.14 that form the basis for the agency's allegations that complainant was retaliated against and subjected to unlawful employment practices as a result of his protected activity and membership in a protected class." The ALJ granted the agency's motion, relieved respondent of default, and directed the agency to serve a copy of the amended formal charges on respondent. ***----- In the Matter of Rogue Valley Fire Protection, LLC, 26 BOLI 172, 174 (2005).***

❑ Respondent did not file a request for relief from default within the time allowed and the ALJ issued a default order stating that respondent would not be permitted to present evidence or participate in any manner in the hearing under the applicable rules. ***----- In the Matter of Cleopatra's, Inc., 26 BOLI 125, 127 (2005).***

❑ When a corporate respondent failed to file an answer through counsel or an authorized representative within 20 days after the formal charges issued and the agency moved for an order of default, the forum found respondent in default and issued an order stating that respondent had 10 days to request relief from default through counsel or an authorized representative. ***----- In the Matter of Magno-Humphries, Inc., 25 BOLI 175, 179 (2004).***

> Affirmed without opinion, *Magno-Humphries, Inc. dba Magno-Humphries Laboratories Incorporated v. Bureau of Labor and Industries,* 210 Or App 466, 151 P3d 960 (2007), *rev den* 342 Or 523, 156 P3d 69 (2007).

❑ A corporate respondent's request for relief from default was denied when it was untimely filed and not filed by counsel or an authorized representative. ***----- In the Matter of Magno-Humphries, Inc., 25 BOLI 175, 179-80 (2004).***

> Affirmed without opinion, *Magno-Humphries, Inc. dba Magno-Humphries Laboratories Incorporated v. Bureau of Labor and Industries,* 210 Or App 466, 151 P3d 960 (2007), *rev den* 342 Or 523, 156 P3d 69 (2007).

❑ When a corporate respondent, through counsel, moved to set aside an order of default and alternatively moved for relief from default more than two months after respondent had been denied relief from default, respondent's motion was denied. ***----- In the Matter of Magno-Humphries, Inc., 25 BOLI 175, 180 (2004).***

> Affirmed without opinion, *Magno-Humphries, Inc. dba Magno-Humphries Laboratories Incorporated v. Bureau of Labor and Industries,* 210 Or App 466, 151 P3d 960 (2007), *rev den* 342 Or 523, 156 P3d 69 (2007).

❑ The agency filed a motion for an order of default based on respondent's failure to file an answer to the formal charges after being served with the documents and after being sent a notice by the agency that the agency would seek a default order if respondent did not file an answer within ten days. Based on respondent's failure to file an answer, the ALJ granted the agency's motion and found respondent to be in default. The ALJ issued an interim order stating that respondent had ten days to seek relief from default by means of a written request. ***----- In the Matter of Northwest Pizza, Inc., 25 BOLI 79, 81 (2004).***

❑ Respondent Washington appeared at the hearing at 9:50 a.m., 20 minutes after the ALJ declared him in default. He advised the ALJ he had never received a copy of the notice of hearing, and the ALJ allowed him to state, on the record, why he should not be declared in default. At the conclusion of Washington's statements, which included a statement that his attorney had not informed him of the hearing date, the ALJ concluded that Washington had not stated facts to support a finding of

good cause for not appearing timely at the hearing and denied him relief from default. ***----- In the Matter of Bubbajohn Howard Washington, 21 BOLI 91, 94 (2000).***

❑ At the commencement of the hearing, on November 12, 1997, the agency moved for an order finding Canfield, an individual respondent, in default on the grounds that he had been avoiding service but had apparently been served with the specific charges and had not filed an answer, and that he was not present at the hearing. In response to the agency's motion, the ALJ ruled Canfield provisionally in default, subject to proof by the agency that he had been served with the specific charges and proof from Canfield concerning the reason for his alleged default. On November 14, the ALJ withdrew the provisional order of default against Canfield on the basis that he had not been served with the specific charges until November 12. ***----- In the Matter of Murrayhill Thriftway, Inc., 20 BOLI 130, 134 (2000)***.

> Affirmed without opinion, *Burks v. Murrayhill Thriftway, Inc. and Bureau of Labor and Industries*, 174 Or App 405 (2001), rev den 333 Or 400 (2002).

❑ A corporate respondent timely filed an answer to the agency's specific charges through Banas, an out-of-state attorney. The agency filed a motion for an order of default based on respondent's failure to timely file an answer through Oregon counsel. Subsequently, respondent, through Oregon counsel Buono, filed a motion for association of Banas as attorney for respondent and a second motion opposing the agency's motion for order of default, arguing that respondent had complied with the forum's rules by filing a written answer and that the forum's rule that a corporation be represented by counsel applied only to the hearing and not to preliminary matters. The forum granted the agency's motion for default on the basis that a corporation had to be represented by Oregon counsel at all stages of the hearings process and gave respondent ten days to obtain relief from default for good cause shown. Respondent timely filed a request for relief from default, and the forum withdrew the default order and accepted Respondent's answer, citing earlier precedent of relief granted when an answer had been tendered prior to the agency's default motion. ***----- In the Matter of Sears, Roebuck and Company, 18 BOLI 47, 49 (1999)***.

❑ When respondent did not appear or contact the forum at the time and place set for hearing and was held in default, then called the ALJ the next day and said she mistakenly thought the hearing was set for a later date, the ALJ notified her by letter that she was in default and told her how to request relief from default, but received no request for such relief. ***----- In the Matter of Jewel Schmidt, 15 BOLI 236, 238 (1997).***

❑ Two individuals named as respondents were relieved from default based on their failure to timely file an answer when the agency filed a motion to substitute a corporate respondent for the two individuals and the motion was granted. ***----- In the Matter of Thomas Myers, 15 BOLI 1, 3 (1996).***

❑ A respondent who was defaulted for failure to timely answer the specific charges and also denied relief from default filed exceptions. The commissioner declined to consider respondent's exceptions, stating that they were part of the record, but would not be considered in the final order. ***----- In the Matter of Dandelion Enterprises, Inc., 14 BOLI 133, 148 (1995).***

❑ When respondent did not file a timely answer, was found in default, and requested relief from default on the grounds that respondent "no longer had an office or registered agent in Oregon and respondent's employee who signed for receipt of the specific charges had not brought the charges to the attention" of respondent's secretary/treasurer/majority stockholder, the forum denied relief from default on the basis of documentary evidence showing that respondent was still an active corporation in Oregon at the time of service and that the address of respondent's registered agent remained the same. ***----- In the Matter of Earth Science Technology, Inc., 14 BOLI 115, 117 (1995).***

> Affirmed without opinion, Earth Science Technology, Inc. v. Bureau of Labor and Industries, 141 Or App 439, 917 P2d 1077 (1996).

❑ When a respondent corporation was in default because its attorney was suspended from the practice of law two days before the start of the hearing, and thus the corporation was not represented at hearing by an attorney in good standing with the Oregon State Bar, the forum granted relief from default after respondent's attorney showed that neither respondent nor the attorney was aware on the day of hearing that the attorney had been suspended. ***----- In the Matter of Ashlanders Senior Foster Care, Inc., 14 BOLI 54, 60-62 (1995).***

❑ An individual respondent was granted relief from default on the grounds that he had relied upon his attorney to answer the agency's amended notice, and the attorney had failed to do so, constituting an excusable mistake or circumstance over which respondent had no control. ***----- In the Matter of Victor Ovchinnikov, 13 BOLI 123, 127 (1994).***

❑ The forum issued an order of default when a corporate respondent failed to file an answer and a request for hearing through an attorney, finding that respondent's claimed inability to afford an attorney did not constitute good cause for relief from default. ***----- In the Matter of Victor Ovchinnikov, 13 BOLI 123, 127 (1994).***

❑ The forum denied respondent's request for relief from default when respondent failed to answer the specific charges. ***----- In the Matter of Alaska Airlines, Inc., 13 BOLI 47, 49 (1994).***

> Affirmed without opinion, *Alaska Airlines, Inc. v. Bureau of Labor and Industries*, 137 Or App 350, 904 P2d 660 (1995), rev den 322 Or 644, 912 P2d 375 (1996).

❑ When respondent failed to timely file an answer to the specific charges and later wrote a letter admitting that he "failed to understand that I had only 20 days for written response," the forum ruled that respondent had not shown good cause and denied respondent relief from default. ***----- In the Matter of Short Stop Cafe, 12 BOLI 201, 203 (1994).***

❑ When respondent was late to the hearing but arrived within 30 minutes of the specified time, the hearings referee exercised his discretion and relieved respondent of default. ***----- In the Matter of Daniel Burdick, 12 BOLI 66, 69 (1993).***

❑ When respondent filed an answer before any motion for or finding of default, the hearings referee cited OAR 839-50-050 as granting the referee discretion to accept a document that was untimely filed and withdrew a subsequent notice of default. ***----- In the Matter of Fred Meyer, Inc., 12 BOLI 47, 50 (1993).***

❑ Respondents failed to file a timely answer and were found in default. Respondents requested relief from default in a supplemental request in which they presented facts not presented in their first request and their attorney swore that the failure to properly docket the deadline for filing an answer to the charges was due to an "electronic glitch" in a new computerized docketing system. The forum granted relief from default, finding that a system error in the computer docketing system that caused the system to fail to flag the date for filing an answer was a circumstance over which respondents had no control. ***----- In the Matter of Glenn Walters Nursery, Inc., 11 BOLI 32, 34-35 (1992).***

❑ A showing of prejudice is not an element in evaluating the sufficiency of a request for relief from default. ***----- In the Matter of Glenn Walters Nursery, Inc., 11 BOLI 32, 33-34 (1992).***

❑ When a respondent who had received timely notice of hearing and had retained counsel called the hearings referee at the start of the hearing and stated he was in Alaska and unable to attend the hearing, that he had retained counsel in Salem, and that he needed a postponement, the hearings referee denied the postponement and found respondent in default for failure to appear at hearing. Respondent was granted the opportunity to request relief from default. ***----- In the Matter of Rainbow Auto Parts and Dismantlers, 10 BOLI 66, 68-69 (1991).***

❑ In order to participate at hearing, corporations must be represented by an Oregon attorney as required by ORS 9.160 and OAR 839-30-057. When respondent's corporate president had twice been advised of this requirement by the hearings referee and was given additional time to obtain counsel and file an answer, the commissioner adopted the hearings referee's denial of relief forum default, which held that mere inability to afford an attorney was not a mistake or circumstances for which relief could be granted. ***----- In the Matter of Coos-Bend, Inc., 9 BOLI 221, 223, 228-29 (1991).***

❑ Relief from default may be granted if good cause is established, meaning either that the failure to answer or attend was due to circumstances beyond the party's control, or due to an excusable mistake. An excusable mistake exists when the party mistakenly acts or fails to act due to being misled by facts or circumstances inviting the mistaken behavior and which would mislead a reasonable person under like or similar circumstances. ***----- In the Matter of 60 Minute Tune, 9 BOLI 191, 201-02 (1991).***

Affirmed without opinion, *Nida v. Bureau of Labor and Industries,* 119 Or App 508, 852 P2d 974 (1993).

❑ When respondent was held in default for failure to file an answer, the commissioner granted relief from default upon respondent's showing that it had timely served answers on the agency and the complainant and intended to and believed it had failed a copy of the answer with the hearings unit. ***----- In the Matter of Fred Meyer, Inc., 9 BOLI 157, 158 (1990).***

❑ When specific charges were mailed to and received by respondent and its attorney, a letter was later mailed to them notifying them of a change of hearings referee, and no answer was subsequently filed by respondent, the forum found respondent in default. The forum denied respondent's request for relief from default because the attorney's reasons for not filing a timely answer – a death in the attorney's family and a vacation replacement for the attorney's regular secretary – did not meet the forum's "good cause" standard. The attorney's reasons did not account for his associate's role in the matter, and the associate had been involved in the case before the answer was due. He claimed an extended absence from his office, but that occurred before the specific charges were served on him. He also claimed that he was in the office for only three hours during the 15 days before the answer was due, but failed to show with any particularity his activities or locations and the commissioner declined to infer that the attorney or respondent were subjected to circumstances over which the party had no control. The commissioner found that the absences of the attorneys, the absence of the regular secretary when the specific charges were served, and the failure of the substitute secretary to bring the specific charges to the attorney's attention did not constitute excusable mistakes. ***----- In the Matter of City of Umatilla, 9 BOLI 91, 108-09 (1990).***

Affirmed without opinion, *City of Umatilla v. Bureau of Labor and Industries,* 110 Or App 151, 821 P2d 1134 (1991).

❑ The commissioner has established a "bright line" in cases involving requests for relief from default when a respondent has failed to file a timely answer to the specific charges and has confirmed the hearings referee's ruling when the referee has found respondents in default and has refused to relieve the default upon request. The "good cause" standard enunciated in prior final orders is that the "excusable mistake or circumstances over which the party had no control" means that there must be a superseding or intervening event which prevents timely compliance. ***----- In the Matter of City of Umatilla, 9 BOLI 91, 107-08 (1990).***

Affirmed without opinion, *City of Umatilla v. Bureau of Labor and Industries,* 110 Or App 151, 821 P2d 1134 (1991).

❑ When a respondent that was in default argued that neither the agency nor the forum would have been prejudiced by the hearings referee allowing the answer to be received and allowing the respondent to participate in the hearing, the commissioner held that a showing of prejudice to the agency and/or the forum is not an element in determining that a party is in default, and respondent defaulted when it failed to file a timely answer. In addition, a showing of prejudice is not an

element in evaluating the sufficiency of a request for relief from default. ***----- In the Matter of City of Umatilla, 9 BOLI 91, 109 (1990).***

> Affirmed without opinion, *City of Umatilla v. Bureau of Labor and Industries,* 110 Or App 151, 821 P2d 1134 (1991).

❑ When respondent defaulted because it failed to file a timely answer, the commissioner granted relief from default because respondent's attorney had reasonably relied on incorrect information from respondent's registered agent regarding the time for filing the answer. ***----- In the Matter of Franko Oil Company, 8 BOLI 279, 281 (1990).***

❑ Respondent was relieved of default based on submission of medical verification that he was unable to attend the hearing because of his health. ***----- In the Matter of Strategic Investments of Oregon, Inc., 8 BOLI 227, 234 (1990).***

❑ When respondent was in default because it failed to file a timely answer, the forum denied respondent's request for relief from default because respondent failed to show good cause. ***----- In the Matter of Colonial Motor Inn, 8 BOLI 45, 46-47 (1989).*** *See also In the Matter of Palomino Café and Lounge, Inc., 8 BOLI 32, 34 (1989).*

❑ When respondent failed to file a responsive pleading within the time required and requested relief from default with a supporting affidavit and exhibits and an answer, the forum denied the request. ***----- In the Matter of Peggy's Café, 7 BOLI 281, 283 (1989).***

❑ When the hearings referee denied respondent's request from default and respondent asserted that only the commissioner may relieve a party from default and that the hearing was improperly held, the commissioner found that nothing in the definitions section of the hearings rules was intended to limit the authority granted to the hearings referee by the commissioner. The forum found that the hearings referee had made past rulings on requests for relief from default and the commissioner had adopted those rulings. ***----- In the Matter of Metco Manufacturing, Inc., 7 BOLI 55, 65 (1987).***

> Affirmed, *Metco Manufacturing, Inc. v. Bureau of Labor and Industries*, 93 Or App 317, 761 P2d 1362 (1988).

❑ The commissioner may relieve a party from default when the party can show that the default was the result of an excusable mistake or circumstances beyond the control of the party. In this case, the forum found that contacts with an agency employee do not constitute the filing of a written answer, and respondent's failure to become "fully aware of the default provision" is neither an excusable mistake nor a circumstance beyond its control. ***----- In the Matter of Metco Manufacturing, Inc., 7 BOLI 55, 57 (1987).***

> Affirmed, Metco Manufacturing, Inc. v. Bureau of Labor and Industries, 93 Or App 317, 761 P2d 1362 (1988).

❑ Respondent requested relief from default on the grounds that he "was not aware that the hearing was on" the scheduled hearing date because he had received an incorrect notice of hearing, was misinformed by agency staff of the hearing date, and never received a correct notice. The forum found that he had been provided with notice of the correct date at least seven times by the agency. In addition, respondent's own letter showed he knew the correct date. The forum held that if respondent wrote down the wrong hearing date on his appointment calendar, that only showed a simple failure to exercise due care and unilateral carelessness does not constitute excusable mistake or a circumstances beyond respondent's control. Respondent's request was denied. ***----- In the Matter of Jack Mongeon, 6 BOLI 194-95 (1987).***

25.0 RECORD OF HEARING

25.1 --- Reopening the Record

❑ The ALJ reopened the evidentiary portion of the contested case record and ordered the agency and respondent to submit additional documentation pertaining to the disposition of complainant's whistleblower complaint. ***----- In the Matter of Stimson Lumber Company, 26 BOLI 158, 159 (2005).***

❑ In a default case, respondent argued that a full and fair adjudication could not occur without respondent's evidence in the record and for that reason the administrative law judge must reopen the record for its consideration. The administrative law judge refused to reopen the record on the grounds that OAR 839-050-0330(3) prohibits a party in default from participating in the hearing in any way. ***----- In the Matter of Magno-Humphries, 25 BOLI 179, 184 (2004).***

❑ In a default case, respondent argued that due process required that the record be reopened to consider respondent's evidence. The forum denied respondent's motion, finding that respondent had ample notice and opportunity to avoid default, but through either neglect or inattention failed to take the necessary steps that would have prevented its exclusion from participation in the contested case hearing. ***----- In the Matter of Magno-Humphries, Inc., 25 BOLI 175, 184-85 (2004)***

> Affirmed without opinion, *Magno-Humphries, Inc. dba Magno-Humphries Laboratories Incorporated v. Bureau of Labor and Industries,* 210 Or App 466, 151 P3d 960 (2007), *rev den* 342 Or 523, 156 P3d 69 (2007).

❑ On her own motion, and in order to fully and fairly adjudicate the matter before the forum, the administrative law judge reopened the evidentiary portion of the hearing to take additional evidence and ordered the agency and respondent to provide additional specified information. ***----- In the Matter of Rubin Honeycutt, 25 BOLI 91, 93-94 (2003).***

❑ The administrative law judge reopened the evidentiary record and convened the participants by teleconference to take additional testimony from a witness, and both participants were given an opportunity to question the witness about matters raise by the judge. ***----- In the Matter of Paul Andrew Flagg, 25 BOLI 1, 3 (2003).***

❑ Respondent requested that the record be reopened to allow respondent the opportunity to "rebut" the proposed order and "enter additional evidence." Respondent made no showing that it had received new evidence that was previously unavailable. The forum denied respondent's motion because respondent presented no additional evidence at all to consider. ***----- In the Matter of Triple A Construction, LLC, 23 BOLI 79, 86 (2002).***

❑ The ALJ, on her own motion, issued an order reopening the contested case record for two purposes. First, to allow respondent's counsel to review the notes an agency witness used to refresh her memory and to cross-examine the witness upon them if desired. Second, to determine the specific date that complainant began work at subsequent employment so the ALJ could compute any back pay damages that might be awarded. ***----- In the Matter of H. R. Satterfield, 22 BOLI 198, 201 (2001).***

❑ The forum issued an interim order reopening the record for the purpose of obtaining the agency's statement on whether or not the agency intended to accept respondent Marion Allmendinger's consent to debarment for three years in settlement of the charges against her in the agency's second notice of intent. ***----- In the Matter of William George Allmendinger, 21 BOLI 151, 157 (2000).***

❑ After the issuance of the final order, respondent's attorney notified the agency's case presenter that neither the proposed nor the final orders had been served on him. After confirming this fact, the commissioner issued an order entitled "Order Withdrawing Final Order For Purpose of Reconsideration." The commissioner ordered that the ALJ reissue the proposed order and serve it on respondent's attorney so that respondent would have the opportunity to file exceptions. An amended proposed order was reissued pursuant to that order. ***---- In the Matter of Entrada Lodge, Inc., 20 BOLI 229, 233 (2000)***.

> Reversed and remanded for reconsideration, *Entrada Lodge, Inc. v. Bureau of Labor and Industries*, 184 Or App 315, 56 P3d 444 (2002).

❑ When a respondent asserted in exceptions that he had discovered relevant information not available at the time of hearing, the ALJ sent the participants a letter describing the requirements for reopening the record and set a deadline by which respondent should file an affidavit and any new exhibits. The respondent never filed those documents and the record, therefore, remained closed. ***----- In the Matter of Scott A. Andersson, 17 BOLI 15, 17 (1998)***.

❑ The forum granted respondent's motion to reopen the record to submit a complete copy of an exhibit that was submitted in incomplete form at hearing. ***----- In the Matter of Oregon Department of Fish and Wildlife, 16 BOLI 263, 265 (1998).***

❑ Respondent moved to reopen the record and claimed in her exceptions that she did not obtain a full and fair hearing, that a continuance should have been granted, that the ALJ abused his discretion by not postponing the hearing to allow her to get an attorney, and that she was unsophisticated and did not understand the process. The forum denied the motion on all but one matter and found that respondent had received a full and fair hearing because she had the assistance before and at hearing of her bilingual bookkeeper, she had been advised repeatedly before hearing of the wisdom of obtaining counsel, she did not request an attorney until the hearing began, and the ALJ explained the process to her during hearing and assisted her in questioning witnesses. ***----- In the Matter of Graciela Vargas, 16 BOLI 246, 260-61 (1998).***

❑ The forum granted respondent's motion to reopen the record to present evidence that a wage claimant had attempted to bribe a potential witness. ***----- In the Matter of Graciela Vargas, 16 BOLI 246, 248 (1998).***

❑ The forum declined to reopen the record to allow respondent to produce new evidence identified for the first time in respondent's exceptions when respondent failed to submit a case summary and did not give a reason why he could not have presented that evidence at hearing. ***----- In the Matter of Diran Barber, 16 BOLI 190, 199 (1997).***

❑ After hearing respondent offered affidavits of eight persons, four of who had testified at hearing. The agency objected to the admission of the affidavits. The ALJ did not receive into evidence the affidavits of persons who were not called as witnesses at hearing because the agency had no opportunity to cross-examine them and did not receive the affidavit of witnesses who did testify at hearing because they were untimely. None of the affidavits were considered in the formulation of the final order. ***----- In the Matter of Thomas Harrington, 15 BOLI 276, 278 (1997).***

❑ When the agency moved to reopen the record to submit additional evidence of an abrupt change in ownership in respondent's business that had taken place and warranted additional discovery to determine a potential successor in interest, the motion was granted and the hearings referee granted the agency's corresponding motions to depose respondent's corporate president and compel the production of certain documents. ***----- In the Matter of Sunnyside Enterprises of Oregon, 14 BOLI 170, 174 (1995).***

❑ At the agency's request, the hearings referee reopened the record to allow the agency to submit a statement of agency policy concerning the interpretation of ORS 659.550(1) and to augment the theory upon which the case was submitted. The hearings referee also requested that the agency submit other additional evidence. ***----- In the Matter of Earth Science Technology, Inc., 14 BOLI 115, 117 (1995).***

> Affirmed without opinion, *Earth Science Technology, Inc. v. Bureau of Labor and Industries*, 141 Or App 439, 917 P2d 1077 (1996).

❑ One week after the hearing, the hearings referee reopened the record to accept additional evidence regarding the status of respondent's farm/forest labor contractor license. The hearings referee gave the agency and respondent 10 days to submit additional evidence. ***----- In the Matter of Tolya Meneyev, 14 BOLI 6, 8 (1995).***

❑ After the record closed, the hearings referee reopened the record to receive evidence on vacation leave taken by the wage claimant in 1990 and 1991, then subsequently received into the record a stipulation between the agency and respondent specifying the number of vacation days taken by claimant in 1990 and 1991. ***----- In the Matter of Mario Pedroza, 13 BOLI 220, 223 (1994).***

❑ When an individual respondent excepted to the proposed order, claiming that certain witnesses were untruthful and that there were witnesses who could verify his version of the facts, the commissioner found that respondent was represented by counsel at hearing, that the time and place to present that evidence was at the hearing, that the referee had given all participants the opportunity to present evidence, that the ultimate decision was limited to the record developed at hearing, and there was no indication that the record was incomplete. ***----- In the Matter of Loyal Order of Moose, 13 BOLI 1, 13 (1994).***

❑ The agency moved to reopen the record to introduce the testimony of a witness and attached five exhibits to show it had used due diligence before hearing to secure the testimony of the witness and to show what the testimony was expected to include. The hearings referee granted the motion, finding that the witness's testimony was necessary to fully and fairly adjudicate the case, and that the agency had made a diligent effort to contact and subpoena the witness before hearing. ***----- In the Matter of Clackamas County Collection Bureau, Inc., 12 BOLI 129, 131 (1994).***

❑ The hearings referee granted the agency's unopposed motion to reopen the record to submit affidavits regarding the respondent's president's credibility and received the affidavits. ***----- In the Matter of S.B.I., Inc., 12 BOLI 102, 105 (1993).***

❑ The forum denied respondents' exception to be allowed to present new evidence that was not presented on the record at hearing on the basis that respondents offered no credible reason why the new evidence could not have been gathered before hearing, why some of that evidence was not produced before the hearing as twice ordered by the hearings referee, and why the new evidence was not presented at hearing. ***----- In the Matter of Sylvia Montes, 11 BOLI 268, 280 (1993).***

❑ Respondent moved to reopen the record based on evidence that respondent argued would cause the hearings referee to modify or amend the proposed order. The hearings referee reopened the record, admitted the proffered evidence, obtained the agency's view, but declined to modify or amend the proposed order, which was adopted by the commissioner in a final order. ***----- In the Matter of Lee Schamp, 10 BOLI 1, 3 (1991).***

❑ The hearings referee requested a statement of policy from the agency after the record closed. ***----- In the Matter of Andres Ivanov, 11 BOLI 253, 256 (1993).***

❑ After the hearings referee, the hearings referee reopened the record on his own motion to accept information from complainant's workers' compensation file, an official file kept in the regular course of business. ***----- In the Matter of Community First Building Maintenance, 9 BOLI 1, 2 (1990).***

❑ When evidence received during hearing regarding complainant's post-discharge employment history was insufficient to find facts about complainant's back wage damages, the hearings referee reopened the hearing record to accept additional evidence. The agency and respondents later submitted a letter with stipulated facts regarding complainant's employment history. ***----- In the Matter of Lee's Cafe, 8 BOLI 1, 4 (1989).***

❑ When respondent objected to a request by the hearings referee that the agency recompute penalty wages in order to correctly account for claimant's wage and compensation agreement, the forum overruled the objection, stating that the hearings referee has the right and duty to conduct a full and full inquiry and create a complete record. When errors are detected, the hearings referee is empowered to cause them to be corrected. This is especially true when there are arithmetic errors or other similar computation oversights. ***----- In the Matter of Anita's Flowers & Boutique, 6 BOLI 258, 259 (1987).***

> Overruled on the limited issue of including reimbursable expenses in wages used to calculate a civil penalty, *In the Matter of Central Pacific Freight Lines, Inc.,* 7 BOLI 272, 280 (1972).

❑ After the proposed order was issued, the forum granted the agency's unopposed request to reopen the record for the purpose of supplementing the record with new information that the agency alleged would materially affect the proposed order. ***----- In the Matter of Jose Solis, 5 BOLI 180, 182 (1986).***

❑ After a proposed order was issued in the agency's favor, the forum denied respondent's request to reopen the record based on the hearings referee's lack of objectivity. ***----- In the Matter of Love's Woodpit Barbeque Restaurant, 3 BOLI 18, 28 (1982).***

❑ Respondent was held in default based on his failure to appear at the hearing, then requested a rehearing before the final order was issued. The request was treated as a request to reopen the record and was denied. ***----- In the Matter of Ray Carmen, 3 BOLI 15, 16 (1982).***

> Overruled in part on other grounds, *In the Matter of Jack Mongeon,* 6 BOLI 194, 201 (1987).

❑ When respondent moved to reopen the case to present further evidence and hearing had already taken place on four separate dates over a period of six months, the commissioner denied the motion on the grounds that respondent had ample opportunity to present the information at hearing. ***----- In the Matter of McCoy Oil Company, 3 BOLI 9, 9-10 (1982).***

25.2 --- Reconvenement

❑ The ALJ recessed the hearing for approximately two weeks because the agency's final rebuttal witness was not able to testify because of a medical emergency. ***----- In the Matter of Barrett Business Services, Inc., 20 BOLI 189, 193 (2000).***

> Affirmed, *Barrett Business Services v. Bureau of Labor and Industries*, 173 Or App 444 (2001).

❑ After a hearing was held, but before a proposed order was issued, the ALJ reconvened the hearing to allow a respondent who had not been served with specific charges until the first day of the hearing to present his defense. ***----- In the Matter of Murrayhill Thriftway, Inc., 20 BOLI 130, 134 (2000)***.

> Affirmed without opinion, *Burks v. Murrayhill Thriftway, Inc. and Bureau of Labor and Industries*, 174 Or App 405 (2001), rev den 333 Or 400 (2002).

❑ The forum granted the agency's unopposed motions, made during the presentation of the agency's case in chief and after respondent's counsel and representative had left the hearing, to add another entity as a respondent, and to amend the order of determination to conform to the evidence by increasing the amount of wages claimed. The hearing reconvened several months later, after the new respondent filed an answer. ***----- In the Matter of Staff, Inc., 16 BOLI 97, 100 (1997).***

❑ During the hearing, when the agency had not completed its case and respondent had not yet testified, an emergency arose that requested respondent's absence from the hearing. The hearings referee adjourned the proceeding, subject to a reconvenement at a future date. The hearing reconvened approximately 13 months later. ***----- In the Matter of Ashlanders Senior Foster Care, Inc., 14 BOLI 54, 58 (1995).***

❑ At hearing, the forum allowed the agency to amend the specific charges to add two more items to the agency's prayer for damages on the ground that respondent would not be prejudiced thereby in maintaining its defense on the merits. The forum granted the agency and respondent 30 days to request a reconvenement to present evidence concerning the amendments. ***----- In the Matter of Mini-Mart Foodstores, Inc., 3 BOLI 262, 263 (1983).***

❑ When a witness subpoenaed by the agency did not appear at hearing, the hearings referee kept the record open for seven days to allow the agency to make a request for a reconvenement to present the witness's testimony, then granted the agency's motion to reconvene for that purpose when the agency subsequently located the witness. ***----- In the Matter of Godfather's Pizzeria, Inc., 2 BOLI 279, 282-83 (1982).***

❑ After the hearing had adjourned, the forum denied respondent's motion to reconvene the hearing for the purpose of offering a compilation of evidence already received. ***----- In the Matter of City of Portland, 2 BOLI 21, 22 (1980).***

> Order on reconsideration, 2 BOLI 71 (1981), reversed, *Civil Service Board of the City of Portland v. Bureau of Labor and Industries*, 61 Or App 70, 655 P2d 1080 (1982), reversed and final order reinstated, 298 Or 307, 692 P2d 569 (1984).

25.3 --- Settlement (*see also* 18.0)

❑ When the forum cancels a hearing based upon a respondent's agreement on the record to sign settlement documents and to pay wages and penalties, and the respondent thereafter fails to execute the documents and make the payments as agreed within the time allowed by the forum, the commissioner may enter a final order against the respondent based on the record of settlement. ***----- In the Matter of Advantage Aviation Assoc., Inc., 17 BOLI 97, 101 (1998)***.

❑ Respondents' failure to fully execute a settlement by payment of the stipulated amount within ten days after the hearing date, or by such date as modified by the verbal order of the ALJ in the record, constitutes failure to submit fully executed settlement documentation and non-compliance within the substance of the agreement, allowing the terms of settlement as placed on the record to form the basis for a final order. ***----- In the Matter of Hart Industries, Inc., 15 BOLI 144, 147-48 (1996).***

❑ The commissioner used the terms of settlement placed on the record to form the basis of the final order when a hearing was canceled after respondents agreed on the record to sign a consent order providing for payment of civil penalties and prohibiting reapplication for a farm labor contractor license for a period of three years, and when respondents then failed to sign the consent order or pay the agreed penalties. ***----- In the Matter of Fidel Hernandez, 14 BOLI 153-54 (1995).***

❑ When the agency and respondent, an unlicensed service dealer and technician of consumer electronic entertainment equipment, agreed to settle a contested case on the date of hearing and put the settlement terms on the record, and respondent then failed to comply with the terms of the settlement by failing to execute the settlement documents and to pay the agreed upon civil penalty of $500, the commissioner used the terms of the settlement placed on the record to form the basis of a final order, and ordered respondent to deliver a check for $500 to the agency. ***----- In the Matter of Dale Bryant, 14 BOLI 111, 114 (1995).***

❑ The terms of settlement as placed on the record formed the basis for a final order when respondent failed to submit settlement documents or cooperate in the preparation and execution of settlement documents within ten days after the hearing date, or by such date as modified by the verbal order of the hearings referee on the record. ***----- In the Matter of Portland Custom Interiors, Inc., 14 BOLI 82, 85 (1995).***

❑ The agency and respondent's attorney confirmed by letter a settlement of a disputed wage claim and the attorney stipulated by another letter that respondent was indebted to a wage claimant for back wages and recited an understanding that respondent had ten days to pay the debt before it became a judgment of record. The hearings referee approved the settlement in a ruling which provided that the hearings referee would recommend a final order against respondent for the stipulated amount if respondent did not make the payment as stipulated. When respondent did not make the stipulated payment, the commissioner treated the entire record, including the stipulation, as the basis for a proposed order and issued a final order against respondent for the amount of the stipulated wages. ***----- In the Matter of Chris Jensen, 9 BOLI 219, 221 (1991).***

25.4 --- Transcription

❑ When a hearing was adjourned after three days and scheduled to reconvene several months later, the ALJ ordered a transcript of the hearing to be prepared before

the hearing reconvened. While the transcript was being prepared, the transcriber determined that the first tape from the hearing was blank. When the ALJ mailed a transcript of the hearing to the agency and respondent's counsel, the ALJ ordered that the transcript was not to be shared with any witnesses at the hearing, whether they had or had not already testified. The ALJ also prepared a written summary of blank tape from his hearing notes, provided it to the agency and respondent's counsel, and asked if they would stipulate that his summary was "an adequate representation of the record during [the blank tape]." ***----- In the Matter of Logan International, Ltd., 26 BOLI 254, 259-60 (2005).***

❑ When respondent's counsel was forced to resign after the hearing had begun, due to the need for him to testify at hearing, and the hearing was reconvened three months later, the forum ordered that a copy of the tape recording of the proceedings be provided to respondent's new counsel. The forum also provided a transcription of that tape recording to the agency and respondent prior to reconvenement. ***----- In the Matter of Industrial Carbide Tooling, Inc., 15 BOLI 33, 35 (1996).***

❑ When the hearing was originally convened on March 21, 1995, and then reconvened on January 9, 1996, the ALJ granted the agency's motion to have a transcript of the original proceedings prepared and provided a copy to the agency and respondent prior to reconvenement. ***----- In the Matter of Thomas Myers, 15 BOLI 1, 3-4 (1996).***

❑ When 13 months elapsed between the original date of hearing and its reconvenement, the hearings referee, on his own motion, caused the earlier testimony to be transcribed and gave the participants copies of the transcript for use during the reconvenement. ***----- In the Matter of Ashlanders Senior Foster Care, Inc., 14 BOLI 54, 62 (1995).***

❑ The forum does not transcribe the record unless a final order is appealed. Tapes from hearing can be provided. ***----- In the Matter of Albertson's, Inc., 10 BOLI 199, 207 (1992).***

> Reversed and remanded on other ground, *Albertson's, Inc. v. Bureau of Labor and Industries,* 128 Or App 97, 874 P2d 1352 (1994).

❑ Respondent and the agency stipulated that, should the mechanical recording of the hearing be defective, the hearings referee's proposed findings of fact would constitute the record of the hearing. ***----- In the Matter of Day Trucking, Inc., 2 BOLI 83, 84 (1981).***

> Overruled in part on other grounds, *In the Matter of Western Medical Systems, Inc.,* 8 BOLI 108 (1989).

25.5 --- Leaving the Record Open

❑ At the conclusion of hearing, the ALJ left the hearing record open to allow respondent additional time to produce documents clarifying four agency exhibits that were previously received as evidence in the record. The record closed after respondent's counsel sent a letter to the hearings unit waiving the opportunity to present additional records. ***----- In the Matter of Randall Stuart Bates, 23 BOLI 1, 3 (2002).***

❑ The forum granted respondent's unopposed request to file a written closing statement after the agency case presenter delivered a verbal closing argument. ***----- In the Matter of Thomas L. Fery, 18 BOLI 220, 222-3 (1999).*** *See also In the Matter of Norma Amezola,* 18 BOLI 209, 212 (1999).

❑ At the close of the hearing, the ALJ asked the agency and respondent to submit briefs discussing whether complainant's alleged depression had rendered him unable to perform any of the essential functions of his job. ***----- In the Matter of Centennial School District No. 28-J, 18 BOLI 176, 177 (1999).***

> Affirmed, *Centennial School District No. 28J v. Oregon Bureau of Labor and Industries*, 169 Or App 489 (2000), rev den 332 Or 56 (2001).

❑ The ALJ requested written closing arguments from respondents and the agency at the close of the hearing, and subsequently orally agreed to extend the due date for written argument pursuant to a stipulation of respondents' counsel and the agency case presenter. ----- ***In the Matter of Paul A. Washburn, 17 BOLI 212, 214 (1998).***

❑ At the close of testimony, the participants mutually agreed to submit written argument in accordance with a schedule set by the ALJ. Submissions under that schedule as modified with the approval of the ALJ were timely made and the record closed with receipt of the final submission. ***----- In the Matter of Body Imaging, P.C., 17 BOLI 162, 165 (1998).***

> Affirmed in part, reversed in part, *Body Imaging, P.C. and Paul Meunier, M.D. v. Bureau of Labor and Industries*, 166 Or App 54 (2000).

❑ At the close of testimony, due to prior commitments of the ALJ and the agency case presenter, the ALJ ordered simultaneous written closing arguments from the participants. ***----- In the Matter of Thomas Harrington, 15 BOLI 276, 278 (1997).***

❑ At the close of hearing, the participants agreed to submit the case on written argument and the hearings referee announced a schedule for submitting argument. The record closed after the submissions were timely received. ***----- In the Matter of Mohammad Khan, 15 BOLI 191, 195 (1996).*** *See also In the Matter of Mario Pedroza, 13 BOLI 220, 223 (1994).*

❑ In a default case, the ALJ left the record open for two weeks at the hearing to allow the agency to submit a statement of agency policy. The document was timely submitted and received as an exhibit. ***----- In the Matter of Mark Johnson, 15 BOLI 139, 141 (1996).***

❑ At the close of the hearing, the hearings referee left the record open to allow respondent to submit an exhibit, which was received eight days later. ***----- In the Matter of Jack Crum Ranches, Inc., 14 BOLI 258, 262 (1995).***

❑ At the conclusion of a farm labor contractor hearing, the hearings referee left the record open to receive certain contract inspection sheets. Those sheets and an exhibit comparing the information in them was submitted and received. ***----- In the Matter of Jose Carmona, 14 BOLI 195, 197 (1995).***

❑ At the close of the hearing, the agency requested additional time to supplement the record with information concerning a bank account. The hearings referee granted the motion and gave respondent additional time to respond if it wished to do so. ***----- In the Matter of Northwest Fitness Supply Company, 12 BOLI 246, 248 (1994).***

❑ At the close of the hearing, the participants and the hearings referee agreed that closing arguments would be submitted in writing, with initial arguments due simultaneously, and rebuttal arguments due after that. ***----- In the Matter of Robert F. Gonzalez, 12 BOLI 181, 186 (1994)***; *In the Matter of Flavors Northwest, 11 BOLI 215, 217 (1993); In the Matter of Marvin Clancy, 11 BOLI 205, 208 (1993); In the Matter of Baker Truck Corral, 8 BOLI 118, 121 (1989).*

❑ The hearings referee left the record open for 10 days after the hearing to allow respondents to submit evidence that respondent's corporate status had been reinstated. ***----- In the Matter of Crystal Heart Books Co., 12 BOLI 33, 35 (1993).***

❑ During the hearing, the hearings referee directed respondent to submit payroll check stubs or records and left the record open for 17 days for respondent to submit those records and the agency to respond to them or to request the opportunity to examine respondent's bookkeeper. ***----- In the Matter of Crystal Heart Books Co., 12 BOLI 33, 35 (1993).***

❑ The hearings referee left the record open for 12 days to advise whether they would call a subpoenaed witness who had failed to appear at the hearing to testify. ***----- In the Matter of Dan Cyr Enterprises, 11 BOLI 172, 175 (1993).***

❑ At the end of the hearing, the agency and respondents agreed to stipulated to complainant's back wages. The hearings referee left the record open for two weeks for that stipulation. ***----- In the Matter of Dan Cyr Enterprises, 11 BOLI 172, 175 (1993).***

❑ During the hearing, the hearings referee granted respondent's unopposed request to submit an exhibit after the hearing and left the record open. When respondent timely submitted the exhibit, it was admitted into the record. ***----- In the Matter of Efrain Corona, 11 BOLI 44, 47 (1992).***

> Affirmed without opinion, *Corona v. Bureau of Labor and Industries,* 124 Or App 211, 861 P2d 1046 (1993).

❑ The hearings referee granted the agency case presenter's motion to allow the participants to submit closing arguments in writing, based on the illness of the case presenter. ***----- In the Matter of West Linn School District, 3JT, 10 BOLI 45, 48 (1991).***

❑ The hearings referee left the record open for two weeks to allow respondent an opportunity to supplement the record with additional written documentation and supply the forum with the names, addresses, and phone numbers of additional witnesses he intended to call. ***----- In the Matter of Allied Computerized Credit & Collections, Inc., 9 BOLI 206, 207 (1991).***

❑ The hearings referee granted the agency's motion to keep the record open for 15 days after the hearing ended so the agency could submit a statement of policy regarding respondent's partnership status and false, fraudulent and misleading representations and affidavit evidence from the USFS on the same issue and wage claim arising under the USFC contract central to the case. Respondent was ordered to submit copies of his 1985 and 1986 tax returns. ***----- In the Matter of Leonard Williams, 8 BOLI 57, 59-60 (1989).***

❑ The hearings referee allowed respondent to submit a post-hearing affidavit for a witness and to supplement an uncontroverted exhibit and an agency exhibit regarding a bankruptcy failed by complainant, all of which were admitted to the record. ***----- In the Matter of Albertson's, Inc., 7 BOLI 227, 229 (1988).***

25.6 --- Other

❑ When the cassette tape recording the testimony of two witnesses was defective, but the participants agreed that the summary of their testimony that the ALJ prepared from his notes accurately reflected the testimony of the two witnesses and would be accepted as their testimony, the ALJ did not require those witnesses to testify again. ***----- In the Matter of NES Companies, LP, 24 BOLI 68, 71-72 (2002).***

❑ When the cassette tape recording a witness's testimony was defective and the ALJ was unable to reconstruct the witness's testimony from his notes, the ALJ required the witness to testify again. The ALJ disregarded his notes of the witness's original testimony. ***----- In the Matter of NES Companies, LP, 24 BOLI 68, 79 (2002).***

❑ When the ALJ discovered, approximately two hours after the start of the hearing, that the proceedings had not been properly recorded on audiotape, the ALJ notified the participants of the problem and required the two witnesses who had already testified to testify again. ***----- In the Matter of Mark & Linda McClaskey, 17 BOLI 254, 255-56 (1998)***.

26.0 LEGAL MEMORANDUMS, BRIEFS, STATEMENTS OF AGENCY POLICY

26.1 --- Briefs and Memorandums

❑ At the conclusion of closing arguments, the ALJ granted respondent's request to submit a legal brief on the agency's prima facie case, burden of proof, and the necessity that the respondent knew or believed that complainants had made a complaint. The agency requested an opportunity to respond to respondent's brief and to discuss a case that respondent argued as controlling the outcome of this case. The ALJ granted the agency's request and set a filing deadline. ***----- In the Matter of Hermiston Assisted Living, 23 BOLI 96, 99-100 (2002).***

❑ After the agency timely filed its post-hearing brief through its assistant attorney general, the ALJ observed that she had not signed and dated the agency's brief. The ALJ returned a copy of the brief, along with an interim order instructing her to sign and date it, and refile it. ***----- In the Matter of Hermiston Assisted Living, Inc., 23 BOLI 96, 99 (2002).***

❑ Prior to opening statements, the agency provided the forum with a legal memorandum from the attorney general's office interpreting Oregon's whistleblower statute. Respondent did not object and it was received as an administrative exhibit. ***----- In the Matter of Hermiston Assisted Living, Inc., 23 BOLI 96, 99 (2002).***

❑ At the conclusion of the hearing, the ALJ directed the participants to submit closing arguments in writing, and to submit briefs on the issue of whether or not respondent was a successor employer. ***----- In the Matter of Fjord, Inc., 21 BOLI 260, 264 (2001).***

> Affirmed without opinion, *Fjord, Inc. v. Bureau of Labor and Industries,* 186 Or App 566, 65 P3d 1132 (2003).

❑ After the hearing, the ALJ ordered the agency and respondent to file briefs answering specific legal questions. ***----- In the Matter of Dennis Murphy Family Trust, 19 BOLI 69, 73-74 (1999)***.

❑ The ALJ granted the agency's unopposed motion for an extension of time in which to file a post-hearing brief. ***----- In the Matter of Dennis Murphy Family Trust, 19 BOLI 69, 74 (1999)***.

❑ When respondent filed a post-hearing brief that was not requested by the hearings referee, the referee disregarded it. ***----- In the Matter of John Mathioudakis, 12 BOLI 11, 13 (1993).***

❑ The hearings referee requested post-hearing briefs from respondent and the agency. ***----- In the Matter of Fred Meyer, Inc., 9 BOLI 157, 159 (1990).***

❑ At the close of hearing, the hearings referee requested a statement of agency policy and a brief from respondents. The statement and brief were timely received and became part of the record. ***----- In the Matter of Strategic Investments of Oregon, Inc., 8 BOLI 227, 234 (1990).***

❑ Pursuant to requests from respondent and the agency, and in accordance with OAR 839-30-155, the hearings referee allowed post-hearing briefs to be submitted. ***----- In the Matter of Albertson's, Inc., 7 BOLI 227, 229 (1988).***

26.2 --- Statements of Agency Policy

❑ At the conclusion of hearing, the ALJ ordered the agency to submit a statement of its policy to verify its position that complainant's intake questionnaire satisfied the agency's complaint policy. ***----- In the Matter of Stimson Lumber Company, 26 BOLI 150, 158 (2005).***

❑ After the close of the hearing, the ALJ asked the agency to submit a brief or statement of agency policy answering two questions. The ALJ gave respondent two weeks after the agency filed its brief in which to file a response. ***----- In the Matter of Labor Ready, Inc., 20 BOLI 73, 77 (2000).***

❑ When an agency policy statement is a "directive, standard, regulation or statement of general applicability that implements, interprets or prescribes law or policy, or describes the procedure or practice requirements of [the] agency," that statement is a rule binding on the agency until the agency amends or repeals it or until it is declared invalid by a court. ***----- In the Matter of Charles Hurt, 18 BOLI 265, 274-75 (1999)***.

❑ At hearing, the agency submitted a statement of agency policy setting forth its interpretation of "serious health condition" and "essential functions" as those terms are used in the OFLA. Respondent argued that it was not bound by the policy expressed in the agency's statement because it had not been enacted pursuant to notice and comment rulemaking. The forum found that the legislature did not expressly require the agency to enact rules defining these terms, and that the agency was entitled to explain its interpretation of the statutory terms at a contested case hearing. ***----- In the Matter of Centennial School District No. 28-J, 18 BOLI 176, 196 (1999)***.

> Affirmed, *Centennial School District No. 28J v. Oregon Bureau of Labor and Industries*, 169 Or App 489 (2000), rev den 332 Or 56 (2001).

❑ If the agency wishes the forum to consider its policy or its interpretations of statutes or rules, it should offer evidence regarding the policy or interpretation during the hearing. ***----- In the Matter of Southern Oregon Flagging, Inc., 18 BOLI 138, 168 (1999)***.

❑ At hearing, the agency submitted a statement of agency policy setting forth its interpretation of "serious health condition" and "essential functions" as those terms are used in the OFLA. Respondent argued that it was not bound by the policy expressed in the agency's statement because it had not been enacted pursuant to notice and comment rulemaking. The forum found that the legislature did not expressly require the agency to enact rules defining these terms, and that the agency was entitled to explain its interpretation of the statutory terms at a contested case hearing. ***----- In the Matter of Centennial School District No. 28-J, 18 BOLI 176, 196 (1999)***.

> Affirmed, *Centennial School District No. 28J v. Oregon Bureau of Labor and Industries*, 169 Or App 489 (2000), rev den 332 Or 56 (2001).

❑ After the proposed order was issued, the forum asked the agency for a statement of agency policy regarding aider and abettor liability. ***----- In the Matter of Body Imaging, P.C., 17 BOLI 162, 165 (1998)***.

> Affirmed in part, reversed in part, *Body Imaging, P.C. and Paul Meunier, M.D. v. Bureau of Labor and Industries*, 166 Or App 54 (2000).

❑ In a default case, the ALJ left the record open for two weeks at the hearing to allow the agency to submit a statement of agency policy. The document was timely submitted and received as an exhibit. ***----- In the Matter of Mark Johnson, 15 BOLI 139, 141 (1996).***

❑ At the agency's request, the hearings referee reopened the record to allow the agency to submit a statement of agency policy concerning the interpretation of ORS 659.550(1) and to augment the theory upon which the case was submitted. The hearings referee also requested that the agency submit other additional evidence. ***----- In the Matter of Earth Science Technology, Inc., 14 BOLI 115, 117 (1995).***

Affirmed without opinion, *Earth Science Technology, Inc. v. Bureau of Labor and Industries*, 141 Or App 439, 917 P2d 1077 (1996).

❑ At the close of hearing in a default case, the hearings referee requested that the agency file a written statement of agency policy regarding the effect of a party's failure to actually receive a notice of hearing after making an appearance through filing an answer to the charging document and requesting a hearing. ***----- In the Matter of Kevin McGrew, 8 BOLI 251, 253 (1990).***

❑ At the close of hearing, the hearings referee requested a statement of agency policy and a brief from respondents. The statement and brief were timely received and became part of the record. ***----- In the Matter of Strategic Investments of Oregon, Inc., 8 BOLI 227, 234 (1990).***

❑ The hearings referee granted the agency's motion to keep the record open for 15 days after the hearing ended so the agency could submit a statement of policy regarding respondent's partnership status and false, fraudulent and misleading representations and affidavit evidence from the USFS on the same issue and wage claim arising under the USFC contract central to the case. Respondent was ordered to submit copies of his 1985 and 1986 tax returns. ***----- In the Matter of Leonard Williams, 8 BOLI 57, 59-60 (1989).***

❑ Pursuant to OAR 839-30-165, the agency submitted a statement of policy to the hearings referee w/in ten days from the issuance of the proposed order and respondent submitted a reply brief. The commissioner denied the agency's request to submit a reply to respondent's reply brief, holding that the rule provided for the submission of exceptions from a party and a statement of policy from the agency and no other submissions were allowed unless the hearings referee so requested. ***----- In the Matter of Albertson's, Inc., 7 BOLI 227, 239 (1988).***

26.3 --- Written Closing Arguments

❑ At the conclusion of the hearing, the agency and respondent both asked to submit written closing arguments in lieu of oral argument. The ALJ granted the motion and set a deadline for filing closing arguments. ***---- In the Matter of Logan International, Ltd., 26 BOLI 254, 261 (2005).***

❑ The ALJ ordered the participants to submit written closing arguments to the forum and to each other and set a date for the agency to submit its written rebuttal, if any. ***----- In the Matter of Stimson Lumber Company, 26 BOLI 158, 158 (2005).*** *See also In the Matter of Southern Oregon Subway, Inc., 25 BOLI 218, 221, 235 (2004).*

❑ At the conclusion of the hearing, the ALJ directed the participants to submit closing arguments in writing, and to submit briefs on the issue of whether or not respondent was a successor employer. ***----- In the Matter of Fjord, Inc., 21 BOLI 260, 264 (2001).***

Affirmed without opinion, *Fjord, Inc. v. Bureau of Labor and Industries,* 186 Or App 566, 65 P3d 1132 (2003).

❑ At the conclusion of the hearing, the ALJ instructed the agency case presenter to submit the agency's closing argument in writing. ***----- In the Matter of Johnson Builders, Inc., 21 BOLI 103, 107 (2000).***

❑ At the close of testimony, due to prior commitments of the ALJ and the agency case presenter, the ALJ ordered simultaneous written closing arguments from the participants. ***----- In the Matter of Thomas Harrington, 15 BOLI 276, 278 (1997).***

❑ At the close of hearing, the participants agreed to submit the case on written argument and the hearings referee announced a schedule for submitting argument. The record closed after the submissions were timely received. ***----- In the Matter of Mohammad Khan, 15 BOLI 191, 195 (1996).*** *See also In the Matter of Mario Pedroza, 13 BOLI 220, 223 (1994).*

❑ At the close of the hearing, the participants and the hearings referee agreed that closing arguments would be submitted in writing, with initial arguments due simultaneously, and rebuttal arguments due after that. ***---- In the Matter of Robert F. Gonzalez, 12 BOLI 181, 186 (1994)***; *In the Matter of Flavors Northwest, 11 BOLI 215, 217 (1993); In the Matter of Marvin Clancy, 11 BOLI 205, 208 (1993); In the Matter of Baker Truck Corral, 8 BOLI 118, 121 (1989).*

❑ The hearings referee granted the agency case presenter's motion to allow the participants to submit closing arguments in writing, based on the illness of the case presenter. ***----- In the Matter of West Linn School District, 3JT, 10 BOLI 45, 48 (1991).***

27.0 FULL AND FAIR INQUIRY

❑ In a default case, respondent argued that a full and fair adjudication could not occur without respondent's evidence in the record and for that reason the administrative law judge must reopen the record for its consideration. The ALJ refused to reopen the record on the grounds that OAR 839-050-0330(3) prohibits a party in default from participating in the hearing in any way. ***---- In the Matter of Magno-Humphries, 25 BOLI 179, 184 (2004).***

❑ When respondent did not file a case summary listing five witnesses it sought to call during the hearing and the agency had no prior notice of its intent to call the witnesses, the forum found the agency would be prejudiced based on its inability to prepare to meet the witnesses' testimony and that a continuance would not cure the problem. The forum found that respondent's reliance on someone other than its authorized representative to file the case summary was not a satisfactory reason for not filing a case summary and that the agency would not receive a fair hearing if respondents were allowed to call the witnesses. The forum ruled that respondent would only be allowed to call the authorized representative as a witness but allowed respondent to make an offer of proof stating the substance of the testimony of each witness. ***----- In the Matter of The Alphabet House, 24 BOLI 262, 268-69 (2003).***

❑ After the hearing, respondent filed a motion requesting that it be allowed to call its manager as a rebuttal witness, with her testimony limited to the scope

of testimony given by an agency witness during that witness's rebuttal testimony on the agency's behalf. Respondent based its motion on the provisions of OAR 839-050-0250(7) and "as a matter of fundamental fairness." The forum denied respondent's motion, holding that a respondent has the opportunity to present evidence to rebut the agency's case-in-chief but does not have the right to present evidence to rebut evidence presented by the agency in rebuttal of respondent's evidence. As the agency bears the burden of proof, the agency is entitled to the last word in the case. This interpretation does not prevent the forum from conducting a full and fair inquiry. ***----- In the Matter of Hermiston Assisted Living, 23 BOLI 96, 99-100 (2002).***

❑ A "full and fair inquiry" is an inquiry that is both full *and* fair. It can be argued that the hearing is not "full" unless every piece of evidence relevant to the charges and answer offered by the agency and respondent are admitted into the record. However, it is hardly fair to allow a participant to provide witness names and exhibits to support its case in chief for the first time at hearing, when the forum ordered them to be produced earlier, and the other participant has had no prior opportunity to interview the witnesses or investigate the veracity of the exhibits. The forum concluded that the ALJ's exclusion of respondent's witnesses and exhibits produced for the first time at the start of hearing did not violate respondent's right to a full and fair hearing. ***----- In the Matter of Heiko Thanheiser, 23 BOLI 68, 78 (2002).***

❑ During the presentation of his case, respondent attempted to call a telephonic witness to testify that he had actually performed the work that the agency alleged claimant had performed and was not paid for. Respondent represented that the witness had done the work after claimant left respondent's employment. The agency objected on the grounds that respondent had not filed a case summary naming the witness and the agency would be unduly prejudiced if the witness was allowed to testify. The ALJ determined that respondent did not have a satisfactory reason for not filing a case summary, that the agency would be unduly prejudiced by allowing the witness to testify, and that excluding the witness's testimony would not violate the ALJ's responsibility to conduct a "full and fair" inquiry. ***----- In the Matter of Sreedhar Thakkun, 22 BOLI 108, 111, 117 (2001).***

❑ The ALJ excluded the testimony of a witness due to his lack of direct knowledge of the matters pertaining to claimant's wage claim after allowing respondent to make an offer of proof, concluding that she would not violate her duty to conduct a full and fair inquiry by excluding the proffered testimony. ***----- In the Matter of Northwest Civil Processing, Inc., 21 BOLI 232, 235 (2001).***

❑ Respondent sought to call her husband as a witness and the agency objected on the grounds that respondent had not submitted a case summary listing witnesses she intended to call, and that the agency would be prejudiced by its inability to prepare for cross-examination of him. Respondent was unable to articulate a satisfactory reason for not submitting a case summary. After determining that excluding the husband's testimony would not violate the duty to conduct a full and fair inquiry under ORS 183.415(10), the ALJ excluded him from testifying. ***----- In the Matter of Martha Morrison, 20 BOLI 275, 281 (2000)***.

❑ The ALJ refused to admit as evidence two documents offered by respondent at hearing, when respondent had not provided the documents as part of a case summary, did not articulate a satisfactory reason for not having provided the documents with a case summary, and excluding the documents – which did not contain material evidence – would not violate the ALJ's duty to conduct a full and fair inquiry. The ALJ did allow respondent to submit the documents and describe their contents as an offer of proof. ***----- In the Matter of Robert N. Brown, 20 BOLI 157, 159-60 (2000)***.

❑ When respondent offered as an exhibit the written statement of a witness that had not been submitted with a case summary, the agency had no notice that respondent intended to rely on any sort of statement from the witness until it received a late case summary from respondent the day before the hearing, respondent did not offer a satisfactory reason for having failed to timely identify the author as a witness or as the author of a written statement to be offered into evidence, and the ALJ concluded from respondent's offer of proof that she would not violate her duty to conduct a full and fair inquiry by excluding the proffered exhibit, the forum excluded the statement from evidence. ***----- In the Matter of Norma Amezola, 18 BOLI 209, 212 (1999)***.

❑ Respondent moved to reopen the record and claimed in her exceptions that she did not obtain a full and fair hearing, that a continuance should have been granted, that the ALJ abused his discretion by not postponing the hearing to allow her to get an attorney, and that she was unsophisticated and did not understand the process. The forum denied the motion on all but one matter and found that respondent had received a full and fair hearing because she had the assistance before and at hearing of her bilingual bookkeeper, she had been advised repeatedly before hearing of the wisdom of obtaining counsel, she did not request an attorney until the hearing began, and the ALJ explained the process to her during hearing and assisted her in questioning witnesses. ***----- In the Matter of Graciela Vargas, 16 BOLI 246, 260-61 (1998).***

❑ When respondent did not respond to the agency's informal efforts to obtain discovery, did not file a case summary pursuant to the hearings referee's discovery order, and did not respond to a specific discovery order for employment records, and when respondent offered documents at hearing that he claimed were business records, the hearings referee granted the agency's motion to exclude the documents from the record because respondent did not offer a satisfactory reason for having failed to provide the documents as ordered. The hearings referee found that excluding the documents would not violate the duty to conduct a full and fair hearing. ***----- In the Matter of Martin's Mercantile, 12 BOLI 262, 264-65 (1994).***

❑ When respondents failed to produce payroll records to the agency after two discovery orders issued by the hearings referee, but offered those records at hearing, the forum excluded the evidence from the hearing

because respondents did not give a satisfactory reason for having failed to produce the documents and excluding it would not violate the duty to conduct a full and fair hearing because the document was unreliable. ***----- In the Matter of Sylvia Montes, 11 BOLI 268, 269-70 (1993).***

❑ The forum's duty is to provide a full and fair inquiry. ***----- In the Matter of Mary Stewart-Davis, 13 BOLI 188, 200 (1994).***

Affirmed without opinion, *Stewart-Davis v. Bureau of Labor and Industries,* 136 Or App 212, 901 P2d 268 (1995).

❑ The agency moved to reopen the record to introduce the testimony of a witness and attached five exhibits to show it had used due diligence before hearing to secure the testimony of the witness and to show what the testimony was expected to include. The hearings referee granted the motion, finding that the witness's testimony was necessary to fully and fairly adjudicate the case, and that the agency had made a diligent effort to contact and subpoena the witness before hearing. ***----- In the Matter of Clackamas County Collection Bureau, Inc., 12 BOLI 129, 131 (1994).***

28.0 PROPOSED ORDERS

28.1 --- In General

28.2 --- Exceptions

❑ The agency requested and was granted a two week extension of time to file exceptions to the proposed order. In the meantime, respondent timely filed exceptions and was granted the opportunity to submit an addendum in rebuttal within seven days from the date the agency filed its exceptions if the agency's exceptions addressed respondent's exceptions. ***----- In the Matter of WINCO Foods, Inc., 28 BOLI 259, 262 (2007)***

❑ The forum granted respondent's unopposed motion for an extension of time to file exceptions and a copy of the mechanical recording of the hearing and gave respondent and the agency an additional 20 working days after receipt of the mechanical record to file exceptions. ***----- In the Matter of Labor Ready Northwest, Inc., 28 BOLI 91, 94 (2007).***

Appeal pending.

❑ The forum granted Respondent's motions for an extension of time to file exceptions and a copy of the mechanical recording of the hearing and gave respondent and the agency an additional ten working days after receipt of the mechanical record to file exceptions. ***----- In the Matter of Labor Ready Northwest, Inc., 28 BOLI 47, 50 (2007).***

Appeal pending.

❑ The forum did not consider the agency's argument on issues that the agency did not properly raise and prove at hearing. ***----- In the Matter of Jorge E. Lopez, 28 BOLI 10, 20-21 (2006).***

❑ Respondents, through counsel, filed exceptions to the ALJ's proposed order disputing the ALJ's conclusion that respondent defaulted by failing to appear at hearing with counsel or an authorized representative. The forum held it was barred from considering respondent's exceptions based on OAR 839-050-0330(3), but included respondent's exceptions in the record. ***----- In the Matter of Bukovina Express, Inc., 27 BOLI 184, 208-09 (2006).***

❑ When the agency filed a motion for an extension of time to file exceptions to the proposed order, the ALJ granted the agency's motion, subject to conditions. First, since respondent had already filed its exceptions, the ALJ ordered that its exceptions, which had been received but not yet been opened by the agency, must remain sealed until such time as the agency filed its exceptions. Second, that respondent was allowed to file an addendum to its exceptions, should it choose to do so. ***----- In the Matter of Labor Ready Northwest, Inc., 27 BOLI 83, 91-92 (2006).***

Appeal pending.

❑ When respondent's failure to timely file exceptions was the product of a technical error or malfunction, the forum found that the interests of justice were best served by the acceptance and consideration of respondent's exceptions and addressed them in the final order. ***----- In the Matter of Guy L. Buyserie, 25 BOLI 246, 247 (1992).***

❑ Respondent's timely request for an extension of time to file exceptions to the proposed order was granted. ***----- In the Matter of Paul Andrew Flagg, 25 BOLI 1, 3-4 (2003).***

❑ Respondents, who had been held in default, filed exceptions to the proposed order that were made part of the record but not considered because of respondents' default. ***----- In the Matter of Venus Vincent, 24 BOLI 155, 158 (2003).***

❑ A wage claimant is not a party to the contested case proceeding and therefore is not a participant for the purpose of filing exceptions to the proposed order. ***----- In the Matter of Vidal and Jody Soberon, 24 BOLI 98, 101 (2002).***

❑ Respondent's exception that there was no discussion in the proposed order regarding respondent's claim that the agency investigator "tried to use heavy handed and illegal tactics to force respondent not to exercise his legal rights on appeal" was rejected because there was no evidence in the record that warranted a discussion on this issue. ***----- In the Matter of Scott Miller, 23 BOLI 243, 264 (2002).***

❑ The forum may not consider new facts presented in exceptions in preparing a final order. ***----- In the Matter of Scott Miller, 23 BOLI 243, 263 (2002).***

❑ An ALJ's credibility findings are accorded substantial deference and will not be disturbed, absent convincing reasons for rejecting such findings. ***----- In the Matter of Scott Miller, 23 BOLI 243, 262 (2002.***

❑ The forum did not consider respondent's exceptions when they were filed by respondent's corporate president, respondent had been represented throughout the proceedings by counsel, and the corporate president had not been authorized to appear on behalf of respondent. ***----- In the Matter of Fjord, Inc., 21 BOLI***

260, 264, 297 (2001).

> Affirmed without opinion, *Fjord, Inc. v. Bureau of Labor and Industries,* 186 Or App 566, 65 P3d 1132 (2003).

❑ When respondent did not request an extension of time to file exceptions to the proposed order and filed exceptions two days after the deadline set out in the proposed order, the forum found that respondent's exceptions to the proposed order were not timely filed and did not consider them. ***----- In the Matter of Triple A Construction, LLC, 23 BOLI 79, 84 (2002).***

❑ Respondent filed supplemental exceptions to the proposed order and a request for a new hearing with a new ALJ, with the right to depose complainant prior to the hearing. Respondent alleged its inability to depose complainant violated its due process rights and caused severe prejudice to respondent at the hearing. Respondent's request was denied, for reasons stated in the final order. ***----- In the Matter of Servend International, Inc., 21 BOLI 1, 6 (2000).***

> Affirmed without opinion, *Servend International, Inc. v. Bureau of Labor and Industries,* 183 Or App 533, 53 P3d 471 (2002).

❑ When respondent's exceptions were filed untimely, the forum did not consider them. ***---- In the Matter of Contractor's Plumbing Service, Inc., 20 BOLI 274 (2000)***.

❑ After the issuance of the final order, respondent's attorney notified the agency's case presenter that neither the proposed nor the final orders had been served on him. After confirming this fact, the commissioner issued an order entitled "Order Withdrawing Final Order For Purpose of Reconsideration." The commissioner ordered that the ALJ reissue the proposed order and serve it on respondent's attorney so that respondent would have the opportunity to file exceptions. An amended proposed order was reissued pursuant to that order. Respondent's attorney filed exceptions, which were considered in the amended final order. ***--- In the Matter of Entrada Lodge, Inc., 20 BOLI 229, 233 (2000)***.

> Reversed and remanded for reconsideration, *Entrada Lodge, Inc. v. Bureau of Labor and Industries*, 184 Or App 315, 56 P3d 444 (2002), final order on remand 24 BOLI 125 (2003).

❑ The commissioner found respondent's exceptions to the ALJ's proposed order to be "well taken" and changed the language found objectionable by respondent in drafting the final order. ***----- In the Matter of Labor Ready, Inc., 20 BOLI 73, 101 (2000)***.

❑ The ALJ granted the agency's unopposed motion for an extension of time in which to file exceptions to the proposed order, which was based on the case presenter's work schedule and upcoming move of her personal residence. ***----- In the Matter of Ann L. Swanger, 19 BOLI 42, 46 (1999)***.

❑ When respondents argued in an exception that the proposed order should contain more factual findings, the forum held there was no legal requirement that the order summarize all evidence that was offered. ***----- In the Matter of Mark & Linda McClaskey, 17 BOLI 254, 275 (1998)***.

❑ When exceptions were due by September 21, 1998, unless a request for extension was submitted by that date, and the forum received a letter on September 28, 1998, postmarked September 24, 1998, that bore respondent's signature and requested additional time for filing exceptions, the forum denied the request as untimely and ordered that any untimely exceptions that might later be filed would be disregarded. ***----- In the Matter of Harold Zane Block, 17 BOLI 150, 152 (1998)***.

❑ Respondent's failure to notify the forum of a change of address, and consequent late receipt of the proposed order, did not present good cause for failure to file timely exceptions to the proposed order. Nonetheless, the forum granted respondent's motion for an extension of time in which to file exceptions. ***----- In the Matter of David Creager, 17 BOLI 102, 104-05 (1998)***.

❑ In the proposed order, the ALJ proposed awarding the complainant $15,000.00 damages for mental suffering. The agency filed an exception to that amount that the forum described as "well taken." In the final order, the commissioner awarded the complainant $20,000.00 damages for mental suffering. ***----- In the Matter of Executive Transport, Inc., 17 BOLI 81, 96-97 (1998)***.

❑ When a respondent asserted in exceptions that he had discovered relevant information not available at the time of hearing, the ALJ sent the participants a letter describing the requirements for reopening the record, and set a deadline by which respondent should file an affidavit and any new exhibits. The respondent never filed those documents and the record, therefore, remained closed. ***----- In the Matter of Scott A. Andersson, 17 BOLI 15, 17 (1998)***.

❑ In a wage claim case, respondent filed exceptions asking the forum to consider her defense of financial inability to pay wages at the time they accrued when some evidence came in at hearing concerning respondent's financial difficulties, but when respondent did not amend her answer to conform to this evidence. The forum rejected the exceptions because the agency had no opportunity to object, to seek discovery, or to present evidence to meet this new issue. ***----- In the Matter of Graciela Vargas, 16 BOLI 246, 257 (1998).***

❑ Respondent moved to reopen the record and claimed in her exceptions that she did not obtain a full and fair hearing, that a continuance should have been granted, that the ALJ abused his discretion by not postponing the hearing to allow her to get an attorney, and that she was unsophisticated and did not understand the process. The forum denied the motion on all but one matter and found that respondent had received a full and fair hearing because she had the assistance before and at hearing of her bilingual bookkeeper, she had been advised repeatedly before hearing of the wisdom of obtaining counsel, she did not request an attorney until the hearing began, and the ALJ explained the process to her during hearing and assisted her in questioning witnesses. ***----- In the Matter of***

Graciela Vargas, 16 BOLI 246, 260-61 (1998).

❑ The forum makes its decisions based exclusively on the record made at hearing. Any new facts presented or issues raised in exceptions shall not be considered by the commissioner in preparing the final order. ***----- In the Matter of Diran Barber, 16 BOLI 190, 199 (1997).*** *See also In the Matter of Scott Nelson, 15 BOLI 168, 188 (1996).*

❑ The forum declined to reopen the record to allow respondent to produce new evidence identified for the first time in respondent's exceptions when respondent failed to submit a case summary and did not give a reason why he could not have presented that evidence at hearing. ***----- In the Matter of Diran Barber, 16 BOLI 190, 199 (1997).***

❑ When the agency investigator interviewed 22 of respondent's workers who told the investigator they had not been fully paid and the investigator testified as to those statements, the commissioner overruled respondent's exception based on the workers' hearsay statements, stating there was nothing in the record to indicate that the investigator's testimony was unreliable. ***----- In the Matter of Mohammad Khan, 15 BOLI 191, 210-11 (1996).***

❑ When the proposed order found that a respondent had sexually harassed a female complainant, causing emotional damage, respondents excepted to the proposed order's failure to include a factual finding regarding an incident when complainant, while on a camping trip, had swam in the nude in the company of strangers. The commissioner rejected the exception on the basis that the proposed finding, which reflected on complainant's life outside work, had no bearing on whether respondent discriminated against her in terms and conditions of employment by subjecting her to sexual harassment. ***----- In the Matter of Cheuk Tsui, 14 BOLI 272, 286-87 (1996).***

❑ In a sexual harassment case, respondents excepted to the commissioner's jurisdiction to find liability or to assess or award damages for emotional distress in the proposed order as being a violation of respondents' right to trial by jury as guaranteed by the Oregon constitution. The commissioner rejected respondents' exception for the reason that the Oregon court of appeals had concluded that such awards carried out the commissioner's statutory duty to "eliminate the effects of any unlawful practice found." ***----- In the Matter of Cheuk Tsui, 14 BOLI 272, 288 (1996).***

❑ Respondent's timely request to file exceptions was granted, and an additional 30-day extension was granted when respondents obtained new counsel who timely requested an extension to listen to the hearing tapes. Respondents' third request for an extension was denied. ***----- In the Matter of Gardner Cleaners, Inc., 14 BOLI 240, 241-42 (1995).***

❑ A respondent who was defaulted for failure to timely answer the specific charges and also denied relief from default filed exceptions. The commissioner declined to consider respondent's exceptions, stating that they were part of the record, but would not be considered in the final order. ***----- In the Matter of Dandelion Enterprises, Inc., 14 BOLI 133, 148 (1995).***

❑ Respondent excepted to a proposed order granting the agency's motion for summary judgment on the ground that material facts were in dispute and alleged that respondent was denied due process. The commissioner ruled that respondent's due process concerns were misplaced because the motion was based on those allegations admitted in respondent's answer, plus the material affirmative allegations in the answer upon which respondent relied to defend its alleged unlawful deductions from a wage claimant's pay, making the issue one of law. ***----- In the Matter of Handy Andy Towing, Inc., 12 BOLI 284, 295 (1994).***

❑ The forum denied respondents' exception to be allowed to present new evidence that was not presented on the record at hearing on the basis that respondents offered no credible reason why the new evidence could not have been gathered before hearing, why some of that evidence was not produced before the hearing as twice ordered by the hearings referee, and why the new evidence was not presented at hearing. ***----- In the Matter of Sylvia Montes, 11 BOLI 268, 280 (1993).*** *See also In the Matter of Marvin Clancy, 11 BOLI 205, 214 (1993); In the Matter of Albertson's, Inc., 10 BOLI 199, 208 (1992), r*eversed and remanded on other ground, *Albertson's, Inc. v. Bureau of Labor and Industries,* 128 Or App 97, 874 P2d 1352 (1994).

❑ When the agency requested and was granted two extensions of time to file exceptions to the proposed order and filed the exceptions late, citing a computer failure on the date the exceptions were due, the commissioner did not consider the exceptions because she found that the computer was unavailable for less than two hours, and no damaged documents were reported to the Information Services Unit of the agency. ***---- In the Matter of Fred Meyer, Inc., 9 BOLI 157, 159 (1990).***

❑ Respondent challenged the hearings referee's credibility findings in its exceptions. The forum declined to change the findings, stating that a hearings referee's credibility findings are accorded substantial deference by the forum and will not be disturbed, absent convincing reasons for rejecting them. ***----- In the Matter of Western Medical Systems, Inc., 8 BOLI 108, 117 (1989).***

❑ In a default case, respondent filed exceptions giving reasons why she failed to answer the specific charges. The commissioner held that those assertions had already been considered and ruled upon by the hearings referee in his denial of respondent's request for relief from default and reaffirmed that ruling. ***----- In the Matter of Peggy's Café, 7 BOLI 281, 288 (1989).***

❑ In a default case, when respondent raised new facts in her exceptions to the proposed order that were not part of the hearing record, the commissioner held that respondent lost her opportunity to present evidence at hearing when she was held in default and did not consider any facts asserted by respondent in her exceptions that were not presented at hearing. ***----- In the Matter of Peggy's Café, 7 BOLI 281, 288 (1989).***

❑ Pursuant to OAR 839-30-165, the agency submitted a statement of policy to the hearings referee w/in ten days from the issuance of the proposed order and respondent submitted a reply brief. The commissioner denied the agency's request to submit a reply to respondent's reply brief, holding that the rule provided for the submission of exceptions from a party and a statement of policy from the agency and no other submissions were allowed unless the hearings referee so requested. ***----- In the Matter of Albertson's, Inc., 7 BOLI 227, 239 (1988).***

❑ The commissioner found that respondent's exceptions were untimely filed and did not consider them when the proposed order was issued on February 22, exceptions were due on March 3, and respondent's exceptions were received by the hearings unit on March 7 and dated March 4. ***----- In the Matter of Dan Stoller, 7 BOLI 116, 118-19 (1988).***

❑ The forum denied respondent's request for oral argument on its exceptions to the proposed order. ***----- In the Matter of Mark Tracton, 5 BOLI 129, 131 (1986).*** *See also In the Matter of Desiderio Salazar, 4 BOLI 154, 158 (1984).*

❑ Respondent alleged in exceptions to the proposed order that the hearings referee had "pressured" respondent into accepting a hearing date that was too early to allow adequate preparation. The forum found no merit to this argument when rulings on requests for postponement were promptly conveyed to respondent, there was no indication that the postponement granted was insufficient to allow for preparation, and respondent had two months and three weeks to prepare for hearing. ***----- In the Matter of Sapp's Realty, Inc., 4 BOLI 232, 233-34 (1985).***

❑ Respondent requested oral argument on its exceptions to the proposed order because the matter was "of such financial and precedential significance to respondent." The commissioner denied the request because respondent amply set forth its position in 32 pages of exceptions and the matter did "not involve extraordinary circumstances that necessitate other than normal procedure. ***----- In the Matter of City of Salem, 4 BOLI 1, 43 (1983).***

❑ The forum denied respondent's request to reopen the record based on the hearings referee's alleged lack of objectivity because respondent had not previously raised the issue and at no time presented any evidence to support its allegation. ***----- In the Matter of Love's Woodpit Barbeque Restaurant, 3 BOLI 18, 28 (1982).***

29.0 CONSTITUTIONALITY

❑ The forum rejected respondent's exception to numerous factual findings on the ground that they were based on "irrelevant hearsay and character evidence" that should not have been allowed and that the inclusion of such evidence in the factual findings "violates due process" and Oregon Evidence Code provisions. ***----- In the Matter of Gordy's Truck Stop, LLC, 28 BOLI 200, 215 (2007).***

❑ In a post-hearing memorandum, respondent argued that the agency's failure to question the existence of respondents' LLP in its charging document violated respondents' due process rights by failing to include a "statement of the matters that constitute the violation" in the charging document. The forum rejected respondents' argument, holding that the alleged failure was not a "matter" that constituted an alleged "violation," but a matter that related to the joint and several liability of two respondent partners, both whom were named, along with the LLP, as the employer in the agency's charging document. ***----- In the Matter of Captain Hooks, LLP, 27 BOLI 211, 231 (2006).***

❑ Respondent asserted that his federal and state due process rights were denied because the proposed order was issued 13 months after the contested case hearing, constituting an unreasonable delay and a severe impediment to respondent's ability to respond to the allegations in the formal charges. The commissioner held that respondent's due process rights had not been violated on the grounds that neither the APA nor OAR 839-050-0000 *et seq* impose a time limit for issuing proposed or final orders in contested cases, that respondent was given notice of the matters asserted by the agency and of his opportunity for a hearing, and that at hearing respondent was represented by counsel and was afforded ample opportunity to respond to each and every allegation. ***----- In the Matter of Robb Wochnick, 25 BOLI 265, 291 (2004).***

❑ When Respondent's answer was signed by respondent's corporate president, but respondent did not file a letter authorizing the president to appear on behalf of respondent, respondent asserted that the administrative law judge's refusal to grant it relief from default constituted a denial of equal protection and was discrimination against a protected minority class for respondent's business, respondent's corporate president being a "Philippine-American U.S. Citizen." Respondent asserted that its motion would have been granted if it had been signed by the corporate president of Nike or the president of the University of Oregon. The forum upheld its denial because the administrative rules governing the hearing require that the authorized representative must file a letter authorizing the person to appear on behalf of the party, and respondent's corporate president had not done that. ***----- In the Matter of Magno-Humphries, Inc., 25 BOLI 175, 183-84 (2004).***

> Affirmed without opinion, *Magno-Humphries, Inc. dba Magno-Humphries Laboratories Incorporated v. Bureau of Labor and Industries,* 210 Or App 466, 151 P3d 960 (2007), *rev den* 342 Or 523, 156 P3d 69 (2007).

❑ In a default case, respondent argued that due process required that the record be reopened to consider respondent's evidence. The forum denied respondent's motion, finding that respondent had ample notice and opportunity to avoid default, but through either neglect or inattention failed to take the necessary steps that would have prevented its exclusion from participation in the contested case hearing. ***----- In the Matter of Magno-Humphries, Inc., 25 BOLI 175, 184-85 (2004).***

> Affirmed without opinion, *Magno-Humphries, Inc. dba Magno-Humphries Laboratories Incorporated v.*

Bureau of Labor and Industries, 210 Or App 466, 151 P3d 960 (2007), *rev den* 342 Or 523, 156 P3d 69 (2007).

❑ When respondent filed exceptions including the argument that its inability to depose complainant violated its due process rights and caused severe prejudice to respondent at the hearing, the commissioner held that respondent was not denied due process. ***----- In the Matter of Servend International, Inc., 21 BOLI 1, 6 (2000).***

Affirmed without opinion, *Servend International, Inc. v. Bureau of Labor and Industries,* 183 Or App 533, 53 P3d 471 (2002).

❑ Respondent argued that the statutory scheme of ORS Ch. 659, which provides different sets of remedies depending on whether a complainant chooses to file a civil suit or utilize BOLI's administrative hearing process, violated Article I, section 20 of the Oregon Constitution. The forum rejected respondent's defense because the challenged statutory scheme did not discriminate against a true class, because it was not impermissibly based on persons' immutable characteristics, and because it was rationally based. ***----- In the Matter of Alpine Meadows Landscape, 19 BOLI 191, 218-20 (2000).***

❑ When the agency had advised respondent many times before hearing of her right to obtain counsel, and when respondent did not decide to do so until the hearing began, the forum refused to postpone the hearing to allow her obtain the services of counsel, holding that respondent's due process rights had not been violated and the ALJ had not violated his duty to conduct a full and fair hearing. ***----- In the Matter of Graciela Vargas, 16 BOLI 246, 261 (1998).***

❑ Respondents objected to the fact that the case presenter and the ALJ were both employees of the convening authority (the commissioner) and argued that this was inherently unfair and was a violation of due process and equal protection. The ALJ overruled the objection and explained that the case presenter represented the agency and the agency's view and finding from its investigation. Respondents were entitled to a hearing *de* novo. Neither the forum nor respondents were bound by the agency's initial determination. It was the case presenter's duty to present original evidence of the facts to the ALJ so the ALJ could determination whether the agency made the right interpretation when it said that respondents had committed unlawful employment practices. It is a commonality of administrative law that the individual prosecuting and the individual decision maker are employees of the same entity. ***----- In the Matter of A.L.P. Incorporated, 15 BOLI 211, 214, 225 (1997).***

Affirmed, *A.L.P. Incorporated, v. Bureau of Labor and Industries*, 161 Or App 417, 984 P2d 883 (1999).

❑ Administrative agencies typically investigate, prosecute, and adjudicate cases within their jurisdiction. This combination of functions by itself does not violate due process. ***----- In the Matter of A.L.P. Incorporated, 15 BOLI 211, 214 (fn) (1997).***

Affirmed, *A.L.P. Incorporated, v. Bureau of Labor and Industries*, 161 Or App 417, 984 P2d 883 (1999).

❑ Respondents moved to dismiss a notice of proposed revocation that sought to revoke respondents' farm labor contractor license because they failed to make "sufficient" workers' compensation insurance premium payments when due, and claiming that the phrase "sufficient payment" was a nullity because it was not used in the rules and that their Oregon and US constitutional rights would be violated if their license was revoked based on this notice. The ALJ denied the motion, finding that the notice adequately stated a claim. Respondents must offer more than a one-sentence conclusion that respondents' rights are being violated before the ALJ can fairly consider such claims. ***----- In the Matter of Scott Nelson, 15 BOLI 168, 182-83 (1996).***

❑ The commissioner held that the constitutional prohibitions against *ex post facto* laws did not apply in a case when the agency sought to revoke respondent's farm labor contractor license. ***----- In the Matter of Scott Nelson, 15 BOLI 168, 189 (1996).***

❑ In a sexual harassment case, respondents excepted to the commissioner's jurisdiction to find liability or to assess or award damages for emotional distress in the proposed order as being a violation of respondents' right to trial by jury as guaranteed by the Oregon constitution. The commissioner rejected respondents' exception for the reason that the Oregon court of appeals had concluded that such awards carried out the commissioner's statutory duty to "eliminate the effects of any unlawful practice found." ***----- In the Matter of Cheuk Tsui, 14 BOLI 272, 288 (1996).***

❑ When the agency charged respondent with a violation of ORS 658.440(1)(d) for breaching a contract with his insurance company by failing to pay his workers' compensation insurance premiums when due, and also charged that he had an unsatisfied judgment in favor of the insurance company for the unpaid premiums, the commissioner considered the judgment when she assessed respondent's character, competence, and reliability. The agency's two charges did not constitute double jeopardy, since double jeopardy takes two trials to raise the issue. ***----- In the Matter of Jose Linan, 13 BOLI 24, 36 (1994).***

❑ Oregon's farm labor contractor law applies to the recruitment of workers in Oregon to perform work outside of Oregon. Regulation of such recruitment is within the constitutional power of Oregon to regulate and is not preempted by federal law. ***----- In the Matter of Jose Linan, 13 BOLI 24, 36 (1994).***

❑ Respondent excepted to a proposed order granting the agency's motion for summary judgment on the ground that material facts were in dispute and alleged that respondent was denied due process. The commissioner ruled that respondent's due process concerns were misplaced because the motion was based on those allegations admitted in respondent's answer, plus the material affirmative allegations in the answer upon which respondent relied to defend its alleged unlawful deductions from a wage claimant's pay, making the issue one of law. ***----- In the Matter of Handy Andy Towing, Inc., 12 BOLI 284, 295 (1994).***

❑ Respondent moved to dismiss the hearing because of alleged prejudice by the administrator of the Wage and Hour Division and the commissioner, and because the hearings referee was an employee of the agency and was thus incapable of giving respondent a fair hearing. The hearings referee denied the motion because neither the administrator nor the commissioner was the final decision maker (the hearings referee was, pursuant to OAR 839-33-095), and respondent had shown no bias by the referee. Respondent had the burden of showing actual prejudice or bias. The mere fact that the hearings referee was an employee of the agency was insufficient to prove bias or prejudice. In addition, administrative agencies typically investigate, prosecute, and adjudicate cases within their jurisdiction. By itself, this combination of functions does not violate the due process clause. ***----- In the Matter of Clara Perez, 11 BOLI 181, 182-83 (1993).***

❑ When respondent was acting as a farm-worker camp operator, the commissioner denied respondent's motion to strike the agency's use of respondent's conviction for violating a city occupancy ordinance as evidence of his failure to comply with the local code. It was not double jeopardy. Respondent may incur a civil penalty for the same act for which he was convicted of violating a local ordinance, even if the latter was a crime. ***----- In the Matter of Jose Rodriguez, 11 BOLI 110, 126 (1992).***

❑ When respondent alleged that the commissioner was biased and had prejudged the matter, the forum held that: 1) respondent has the burden of showing actual prejudice or bias; 2) administrative agencies and their staffs typically investigate, prosecute, and adjudicate cases within their jurisdiction; this combination of functions by itself does not violate the due process clause; 3) without a showing to the contrary, state administrators are assumed to be men and women of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances; and 4) disqualification of the commissioner would be a drastic step. ***----- In the Matter of Albertson's, Inc., 10 BOLI 199, 324-28 (1992).***

> Reversed and remanded on other grounds, Overruled in part on other grounds, *Albertson's, Inc. v. Bureau of Labor and Industries,* 128 Or App 97, 874 P2d 1352 (1994).

❑ Respondent argued that statutes and rules, if held to support the commissioner's authority to award emotional distress damages, were unconstitutional under the 14th Amendment to the U.S. Constitution and under Article 1, sections 10 and 16 of the Oregon Constitution because of a lack of standards upon which to base such an award. The commissioner rejected the argument, citing prior cases. ***----- In the Matter of Jerome Dusenberry, 9 BOLI 173, 190 (1991).***

❑ The agency's motion at the close of hearing to add an additional respondent was denied due to failure of service, notice, and due process. ***----- In the Matter of Community First Building Maintenance, 9 BOLI 1, 2 (1990).***

❑ The commissioner defaulted two corporate respondents that failed to submit an answer through counsel, as required by rule and statute, when an individual respondent filed answers "pro se" for himself and the two corporations, arguing that each corporate respondent could not afford counsel and that a refusal to allow each corporation to file its answer "pro se" was a denial of due process. ***----- In the Matter of Strategic Investments of Oregon, Inc., 8 BOLI 227, 231-33 (1990).***

❑ When respondent objected before and during the hearing to investigative statements of persons interviewed during the agency's investigation, requested the ability to cross-examine those persons and the investigator, and moved to exclude the statements because they were unreliable and irrelevant and because of respondent's constitutional right to confront witnesses against him, the commissioner overruled the objection and denied the motion. The commissioner held that respondent's argument against the challenged evidence was made moot by the opportunity at hearing for cross-examination of the witnesses and the investigator. ***----- In the Matter of Dunkin' Donuts, Inc., 8 BOLI 175, 178-79 (1989).***

❑ After the hearing starts, issues not raised in the pleadings may be raised and evidence presented on such issues, provided there is expressed or implied consent of the agency and respondent. Consent will be implied when there is no objection to the introduction of such issues or when the agency or the respondent addresses the issues. In a default situation, the charged party obviously cannot expressly consent to new issues, being raised or the pleadings being amended. Nor can there be implied consent. In order to consent, either expressly or implicitly, a person needs to be notified of the matter requiring the consent and needs an opportunity to consent. In other words, it boils down to a question of due process – did the person have notice of and an opportunity to respond to the new issues? At a default hearing, the charged party cannot object or implicitly consent to issues about which he or she has had no notice or opportunity to respond. Therefore, in a default situation, the charging document sets the limit on the issues and relief that the forum can consider. Put another way, the forum cannot rule on matters falling outside the limits of the charging document. ***----- In the Matter of Jack Mongeon, 6 BOLI 194, 201-02 (1987).***

❑ When respondent argued that Oregon's child labor laws deprived respondent and its minor employees of their constitutional rights to commercial free speech, the forum held that it was not authorized to declare its own rules were violative of constitutional guarantees when the attorney general's office had advised BOLI that Oregon's child labor statutes and regulations were "constitutionally sound as written, and as applied." ***----- In the Matter of Northwest Advancement, Inc., 6 BOLI 99-100 (1987).***

> Affirmed, *Northwest Advancement, Inc. v. Bureau of Labor*, 96 Or App 146, 772 P2d 943 (1989). See also *Northwest Advancement, Inc. v. Bureau of Labor*, 96 Or App 133, 772 P2d 934 (1989).

❑ When the respondent failed to move for the disqualification of the hearings referee within the

designated time, the forum determined that the respondent waived the right to claim a violation of due process by alleged failure to separate prosecutorial and investigative functions as a defense. ***----- In the Matter of PAPCO, Inc., 3 BOLI 243, 250 (1983).***

❑ Respondent moved to dismiss specific charges on the grounds that ORS chapter 659 violates the constitutional guarantees of equal protection because it gives complainant the option of proceeding in civil court but does not give respondent the same option. The commissioner denied the motion, stating it was beyond the forum's discretion to determine the constitutionality of legislative enactments. ***----- In the Matter of Doyle's Shoes, Inc., 1 BOLI 295 (1980).***

30.0 EFFECT OF ARBITRATION AGREEMENT

❑ In a wage claim case, respondent moved for summary judgment on the grounds that the employment agreement signed by claimant required her to arbitrate her wage claim as a matter of law, rendering her wage claim filed with the agency invalid and depriving the agency of jurisdiction. The forum denied respondent's motion on the grounds that the provision in the employment agreement requiring claimant to waive overtime as a condition of her employment rendered the agreement void as a matter of law. ***----- In the Matter of Scott Miller, 23 BOLI 243, 247-50 (2002)***