

BRAD AVAKIAN
COMMISSIONER



CHRISTIE HAMMOND
DEPUTY COMMISSIONER

BUREAU OF LABOR AND INDUSTRIES

**BEFORE THE COMMISSIONER
OF THE BUREAU OF LABOR AND INDUSTRIES
OF THE STATE OF OREGON**

In the Matter of:

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

Respondents.

Case No. **28-15**

**FINDINGS OF FACT
ULTIMATE FINDINGS OF FACT
CONCLUSIONS OF LAW
OPINION
ORDER**

SYNOPSIS

Respondent Portland Flagging, LLC ("Portland Flagging"), A D Traffic Control Services, LLC ("A D Traffic"), and Tri-Star Flagging, LLC ("Tri-Star") failed to pay the prevailing wage rate to two workers on public works projects when they did not make timely payments to the workers' fringe benefit accounts. On behalf of one worker, the Commissioner ordered Portland Flagging and A D Traffic to pay remaining unpaid wages and liquidated damages in the amount of \$2,069.00 plus interest. On behalf of a second worker, the Commissioner ordered Portland Flagging and A D Traffic to pay remaining unpaid wages and liquidated damages in the amount of \$3,357.74 plus interest, and ordered Tri-Star to pay \$404.78 plus interest.

1 The above-entitled case came on regularly for hearing before Kari Furnanz,
2 designated as Administrative Law Judge ("ALJ") by Brad Avakian, Commissioner of the
3 Bureau of Labor and Industries for the State of Oregon. The hearing was held in the W.
4 W. Gregg Hearing Room of the Oregon Bureau of Labor and Industries, located at 800
5 NE Oregon Street, Suite 1045, Portland, Oregon on the following dates: March 3, 5 and
6 April 8, 9, 2015

7 The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by
8 Administrative Prosecutor Adriana Ortega, an employee of the Agency. Evan Williams
9 was the authorized representative for Portland Flagging, A D Traffic, Tri-Star, LLC;
10 Portland Safety Equipment, LLC; Phoenix Construction Group, Inc.; SBG Construction
11 Services LLC; GNC Construction Services LLC, and presented the case on behalf of
12 those Respondents and himself. Respondent Kenya Smith was also present at the
13 hearing.
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15 The Agency called Compliance Specialist Monique Soria-Pons and Starley
16 Martell (by telephone) as witnesses. Respondents called Alene Watkins and Kenya
17 Smith as witnesses.

18 The forum received into evidence:

- 19 a) Administrative exhibits X1 through X29;
 - 20 b) Agency exhibits A1 through A23, and A26 through A28.¹
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23 ¹ Exhibits A26 and A27 (spreadsheets prepared by the Compliance Specialist with calculations of
24 remaining wages owed to Penn and Martell) were not officially offered or received into evidence during
25 the hearing. However, the Compliance Specialist testified in detail as to how she arrived at the
calculations in those spreadsheets by referring to Exhibits A5, A6 and A14 (timesheets and flagging job
receipts provided to the Agency by Respondents). Given that A26 and A27 were referred to extensively
throughout the testimony of the Compliance Specialist, it is helpful to have those exhibits as part of the
case record. Therefore, the forum takes official notice of A26 and A27 for demonstrative or illustrative

1 c) Respondents' exhibits R1, R2, R4, R10 and R11. Respondents' exhibits
2 R7 and R8 were received for demonstrative purposes only, except that pages 2 and 49
3 of Exhibit R7 and pages 2, 4 and 6 of Exhibit R8 were not admitted for any purpose.

4 Having fully considered the entire record in this matter, I, Brad Avakian,
5 Commissioner of the Bureau of Labor and Industries, hereby make the following
6 Findings of Fact (Procedural and on the Merits), Ultimate Findings of Fact,² Conclusions
7 of Law, Opinion, and Order.

8 **FINDINGS OF FACT – PROCEDURAL**

9 1) On August 1, 2013, the Agency issued an Order of Determination (OOD)
10 for Files 13-1378 and 13-1126 to A D Traffic. The OOD alleged that A D Traffic failed to
11 pay wage claimants all prevailing wage rate wages owed, and requested an award of
12 unpaid wages and liquidated damages on behalf of the wage claimants. (Ex. X1a)

13 2) An answer and request for hearing from A D Traffic was received by
14 BOLI's Wage and Hour Division on September 13, 2013. In the answer, A D Traffic
15 denied the Agency's allegations. (Ex. X1b)

16 3) On November 11, 2014, BOLI's Contested Case Coordinator issued a
17 Notice of Hearing to Respondents A D Traffic, Tri-Star and Portland Flagging, the
18 Agency, and Claimants setting the time and place of hearing for 9:00 a.m. on February
19 10, 2015, at BOLI's Portland office. Together with the Notice of Hearing, the forum sent
20 a copy of the Order of Determination, a multi-language warning notice, a document
21 entitled "Summary of Contested Case Rights and Procedures" containing the
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25 purposes only. The final computation of wages owed to Penn and Martell is based on the testimony at
hearing and other exhibits admitted into evidence which support the contents of A26 and A27.

² The Ultimate Findings of Fact required by OAR 839-050-0370(1)(b)(B) are subsumed within the
Findings of Fact – The Merits.

1 information required by ORS 183.413, a document entitled "Servicemembers Civil Relief
2 Act (SCRA) Notification, and a copy of the forum's contested case hearings rules, OAR
3 839-050-000 to 839-050-0445. (Exs. X2, X2a-X2e)

4 4) On December 1, 2014, the ALJ issued an Interim Order seeking
5 clarification as to the identity of Respondents, noting that the OOD listed A D Traffic as
6 the sole employer, but the Notice of Hearing also listed Tri-Star and Portland Flagging in
7 the case caption. The Agency filed a response on December 9, 2014, stating that the
8 exclusion of Tri-Star and Portland Flagging from the OOD was an oversight, and that it
9 would be filing an Amended OOD to include Tri-Star and Portland Flagging as
10 Respondents. (Ex. X3, X7)

11 5) On January 7, 2015, a letter was submitted to the ALJ from Evan Williams
12 which stated that he was the authorized representative and "acting as President" for A D
13 Traffic, Tri-Star, Portland Flagging and Portland Safety Equipment. (Ex. 29)³

14 6) The Agency filed a motion for summary judgment on January 16, 2015,
15 asserting that there is no genuine issue of material fact regarding Respondents' failure
16 to pay unpaid wages. On January 21, 2015, the ALJ issued an Interim Order extending
17 the deadline for filing the response to the summary judgment motion until January 26,
18 2015. Respondents' authorized representative Evan Williams timely filed a response to
19 the motion on January 26, 2015. (Exs. X8 - X10)

20 7) The Agency issued an Amended Order OOD on January 28, 2015, which
21 added Portland Flagging, Tri-Star, and Portland Safety Equipment as Employers. (Ex.
22 X12)
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25 ³ The original letter is in the file for Contested Case No. 37-13. The ALJ placed a copy of the letter,
marked as Ex. X29, in the file for Contested Case No. 28-15.

1 8) On February 2, 2015, the ALJ issued an Interim Order postponing the
2 hearing, and set a new hearing date of March 3, 2015. (Ex. X15)

3 9) The ALJ issued an interim order on February 4, 2015, granting the
4 Agency's motion to compel documents relating to Respondents' corporate structures
5 and relationships, including the names of Respondents' employees. After the Agency
6 filed a supplemental motion to compel, on February 9, 2015, the ALJ issued an interim
7 order requiring Respondents to provide the dates of employment for the employees of
8 Tri-Star, A D Traffic and Portland Flagging. (Ex. X17, X19)

9 10) A telephone prehearing conference was held on February 12, 2015, to
10 discuss concerns Respondents raised by email about complying with the Interim Order
11 of February 9, 2015. On February 13, 2015, the ALJ issued an interim order requiring
12 Respondents to provide copies of W-4 forms for the employees of Tri-Star, A D Traffic
13 and Portland Flagging. (Ex. X20)

14 11) On February 20, 2015, the ALJ issued an interim order denying the
15 Agency's motion for summary judgment. The ALJ's interim order is reprinted below:
16

17 **Introduction**

18 "On August 1, 2013, the Agency issued an Order of Determination (OOD)
19 for Files 13-1378 and 13-1126 to Respondent A D Traffic Control Services, LLC.
20 On January 28, 2015, the Agency issued an Amended OOD which named the
21 following additional Respondents in the caption: Portland Flagging LLC dba A D
22 Traffic Control Services; Tri-Star Flagging LLC; and Portland Safety Equipment
23 LLC.⁴ The violations alleged in the OOD were: (1) Respondent A D Traffic
24 Control Services, LLC was the employer of wage claimants Eric Penn and
25 Starley Martell; (2) the employer failed to fully compensate wage claimants at the
prevailing wage rates pursuant to ORS 279C.840; and (3) the employer failed to

⁴ Aside from adding the three additional Respondents to the caption, there were no other differences between the amended and the original OOD. Therefore, except when necessary, this ruling will refer to the operative charging document as simply the "OOD" without reference to the amendments in the caption of the amended pleading.

1 fully compensate wage claimants at daily overtime rates pursuant to ORS
279C.540.

2 "The OOD asserted that the employer owed the wage claimants
3 \$5,694.99, together with interest thereon. The OOD also asked that \$5,694.99 in
4 liquidated damages, along with interest, be assessed based on the employer's
violations.

5 "The Agency filed a motion for summary judgment on January 16, 2015,
6 asserting that there is no genuine issue of material fact regarding Respondents'
7 failure to pay unpaid wages. On January 21, 2015, I issued an Interim Order
8 extending the deadline for filing the response to the summary judgment motion
until January 26, 2015. Respondents' authorized representative Evan Williams
timely filed a response to the motion on January 26, 2015.

9 **"Summary Judgment Standard**

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

13 ' * * * No genuine issue as to a material fact exists if, based upon
14 the record before the court viewed in a manner most favorable to
15 the adverse party, no objectively reasonable juror could return a
16 verdict for the adverse party on the matter that is the subject of the
17 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].'

18 "ORCP 47C.

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

23 **"ANALYSIS**

24 "In its motion, the Agency argues that Respondents violated ORS
25 279C.840 by withholding fringe benefit amounts from the paychecks of two wage
claimants and then failing to deposit the withdrawn amounts into a fringe benefit

1 plan as required by ORS 279C.800(1)(a). It is the Agency's burden to prove that
2 an employer did not pay all deducted fringe benefits into the employer's fringe
3 benefit plan. *In the Matter of Green Thumb Landscape and Maintenance, Inc.*,
4 32 BOLI 185, 198 (2013).

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“1. Liability of Respondents Portland Flagging LLC dba A D Traffic Control Services, Tri-Star Flagging LLC and Portland Safety Equipment LLC

“The Agency's motion asserts that 'Respondents' violated ORS 279C.800(1)(a). However, I note that the motion was submitted prior to the filing of the Amended OOD which added Portland Flagging LLC dba A D Traffic Control Services, Tri-Star Flagging LLC and Portland Safety Equipment LLC as Respondents. At the time the motion was filed, A D Traffic Control Services LLC was the only named Respondent. Even if I were to consider the allegations against the three new Respondents, the Amended OOD contains no information about these newly added Respondents, and the text in the body of the Amended OOD only identifies A D Traffic Control Services, LLC as the 'employer.' There is no reference to the other three Respondents and no explanation of their role in this matter. Finally, while the Agency's exhibits contain information suggesting a relationship between the newly added Respondents and A D Traffic, the documents fail explain the role of those three Respondents in relation to the wage claimants this matter and there is no sworn testimony from an affidavit or declaration which explains the significance of the documents. Therefore, to the extent the Agency is requesting summary judgment on behalf of Respondents Portland Flagging LLC dba A D Traffic Control Services, Tri-Star Flagging LLC and Portland Safety Equipment LLC, the Agency's motion is **DENIED** as to those Respondents.

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

“As previously stated, the Agency asserts that A D Traffic Control Services LLC was the employer of two wage claimants, and that it withdrew fringe benefit funds from the claimants' paychecks without depositing those amounts into a fringe benefit plan or otherwise paying the amounts to them. The Agency asserts that the alleged violations occurred between May 4, 2011 – April 12, 2013, for Eric Penn, and from August 13, 2012 – October 14, 2012, for Starley Martell. Respondents do not dispute that A D Traffic Control Services, LLC employed the wage claimants or that fringe benefit funds were withdrawn from the wage claimants' paychecks. However, Respondents argue that all of the deducted fringe benefit payments have been deposited into The Contractors. Plan. Accordingly, Respondents contend that they do not owe any unpaid wages to the wage claimants.

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"a. Summary of the Agency's Evidence

"In support of its motion the Agency submitted copies of the following documents for each wage claimant:

- Completed wage claim form and assignment of wages. (Exs. 1, 10)
- BOLI's Notices of Claim to Respondents. (Exs. 3, 12)
- Computer print-outs from the Oregon Secretary of State's website regarding Respondents. (Ex. 2)
- Correspondence from the Agency to Respondents during the investigation, including the Agency's calculations as to wages determined to be owed to claimants. (Ex. 4, 7, 9, 15)
- Payroll records Respondents provided to the Agency. (Exs. 5, 6, 13, 14)
- The Agency's original OOD. (Ex. 16)
- Return of Service documents from a Clackamas County Sheriff's Deputy, reflecting service on the registered agent for A D Traffic Control Services LLC, on August 2, 2013. (Ex. 17)
- A Notice of Intent to Issue Final Order by Default to Respondents issued by the Agency on August 19, 2013. (Ex. 18)
- Letters that Respondents submitted to the Agency dated September 10, 2013 and September 13, 2013. (Exs. 19 and 20)

"Additionally, the Agency submitted the following on behalf of Claimant Penn:

- A document that purports to be an account statement from Claimant Penn's retirement plan for January 1, 2013 to March 31, 2013. The statement reflected a vested balance of \$1542.24 and indicated that no contributions were made during that time period. (Ex. 8)

"The following was also submitted on behalf of Claimant Martell:

- A BOLI Notice of Notice of Public Works which stated that construction on the French Creek Road (Detroit) was a public works project. (Ex. 11)

"The Agency argues that, based on its calculations, Claimant Penn was owed \$2,607.65 and Claimant Martell was owed \$3,087.34 in unpaid wages. The Agency further asserts that Respondents are liable for liquidated damage in an additional amount equal to the unpaid wages, pursuant to ORS 279C.855.

"b. Summary of Respondents' Opposition

"In their Opposition, Respondents submitted the following evidence and arguments:

- Claimant Penn's first timesheet and payroll. (Ex. R-1⁵)
- Claimant Penn's letter of resignation dated May 29, 2014 and marked 'received' on June 3, 2014. (Ex. R-2)
- Two pages of a 'Transaction History' computer print-out and a one page 'CITT Monthly Hours and Contribution Report' that Respondents have identified as Claimant Penn's 'fringe statement and NWCC contribution.' (Ex. R-3)
- Claimant Martell's first timesheet and payroll. (Ex. R-4)
- Claimant Martell's letter of resignation. (Ex. R-5)
- A one page 'Transaction History' computer print-out and three pages of 'CITT Monthly Hours and Contribution Report' that Respondents have identified as Claimant Martell's 'fringe statement and NWCC contribution.' (Ex. R-6)

"Respondents argue that all fringe benefit payments for both claimants were made for the 2011 and 2013 years, but that the fringe benefit plan payments for the 2012 year 'were paid late but were in fact paid to [each] claimant while still employed.' They further argue that no liquidated damages are due since there were no unpaid wages.

"c. *Admissibility of Exhibits*

"Neither the Agency nor Respondents submitted any affidavit, declaration or sworn testimony to authenticate their respective exhibits in conformance with ORCP 47D. *Demaray v. Dept. of Env'tl. Quality*, 127 Or App 494, 497, 873 P2d 403, rev den, 319 Or 625 (1994). However, unless a party objects to the authenticity of an exhibit, all documents submitted by each side can be considered as part of the record for purposes of this motion. See *Drey v. KPFF, Inc.*, 205 Or App 31, 36, 132 P3d 663, 665 (2006), citing *Splinters, Inc. v. Andersen/Weitz*, 192 Or App 632, 638, 87 P3d 689 (2004). Since no party objected to the authenticity of the opposing party's exhibits, I will consider all of the exhibits when ruling on this motion.⁶

"In Respondents' Opposition, they argue that they did not receive various documents from BOLI, specifically:

- Agency Exhibit 2 (the Notice of Claim referenced in paragraph b),
- Agency Exhibits 7 and 9 (Agency letters to Respondents referenced in paragraphs f and h), and

⁵ Respondents' individual exhibits were not labeled with numbers, but were attached to a Case Summary Form which listed the exhibits and identified them by number.

⁶ At the upcoming hearing, the parties are encouraged to enter stipulations as to the authenticity of documents where there is agreement or, if not in agreement, the parties should be prepared to present testimony to explain what each document is, who prepared or wrote on the document, where the document came from and when it was sent and/or received.

- Agency Exhibit 15 (Agency letter and spreadsheet referenced in paragraph I).

"Respondents' Opposition, p. 1.

"Respondents further assert that Agency Exhibits 13 and 14 were provided to the Agency on June 26, 2013, not July 3, 2013, as stated in the Agency's motion. Accordingly, in the absence of sworn testimony, an affidavit or declaration which establishes the date these documents were sent to and/or received from Respondents, I find that Respondents have raised an issue as to the dates Agency Exhibits 2, 7, 9 and 15, and the date Exhibits 13 and 14 were received by BOLI. See *Sisters of St. Joseph of Peace, Health, & Hosp. Servs. v. Wyllie*, 120 Or App 474, 477, 852 P2d 941, 942 (1993) (noting there was a genuine dispute concerning a material issue of fact when the evidence consisted of an unauthenticated consent form signed by an unknown person, and the defendant said that the signature was not his). Therefore, when ruling on this motion, I will not consider the dates Exhibits 2, 7, 9, 13, 14 and 15 were allegedly sent to or received from Respondents.

"c. *Analysis of the Admissible Evidence*

"i. *Claimant Penn*

"The Agency's Prevailing Wage Specialist calculated the unpaid wages owed to Claimant Penn as follows:

	\$12,158.93	(Total Earned)
(minus)	\$7,998.26	(Wages Paid)
(minus)	<u>\$1,553.02</u>	(Contributions to The Contractors Plan)
Total Wages Due:	\$2,607.65	

"(Agency Ex. 9, p. 2) The alleged underpayments occurred between the July 16, 2011, and April 6, 2013, pay periods. The 'Total Wages Due' amount of \$2,607.65 included \$2,305.38 in fringe benefit payments that were allegedly not made into Claimant Penn's retirement account on his behalf.⁷ The Agency also submitted a statement from The Contractors Plan for the time period January 1 – March 31, 2015, that showed an ending balance in the account of \$1,542.24, and no contributions made during that time period. (Agency Ex. 8)

⁷ To arrive at the figure of \$2,305.38, I subtracted the amount of \$1,553.02 at the bottom of the "Fringes Paid" column of the Compliance Specialist's spreadsheet from the amount of \$3,858.40 in the "Fringes Due" column.

1 "The remainder of the alleged unpaid wages owing to Claimant Penn
2 appear to be attributable to unpaid overtime for the weeks ending September 1,
3 2012 and September 15, 2012, and underpayment for hours worked in the week
4 ending September 22, 2012. *Id.* An explanation as to how this additional
5 amount was calculated was not provided. When viewing the evidence in the light
6 most favorable to Respondents for summary judgment purposes, I am unable to
7 determine how the additional \$302.27 in alleged unpaid wages was calculated
8 and find that the Agency has not satisfied its burden as to this amount of alleged
9 unpaid wages.

10 "Next, I evaluate the response in Respondents' Opposition to the
11 allegations of \$2,305.38 in unpaid wages due to nonpayment of fringe benefit
12 plan contributions.

13 "Respondents assert that all fringe benefit contributions for Claimant Penn
14 were paid on time in 2011 and 2013, but that 'payments for the year 2012 were
15 paid late but were in fact paid to the claimant while still employed.'
16 (Respondents' Opposition, p. 1) Respondents submitted exhibits that they claim
17 demonstrate that they made the following contributions to The Contractors Plan
18 on Claimant Penn's behalf:

<u>Date</u>	<u>Contribution</u>
9/30/2011	\$178.40
9/30/2011	\$1,318.90
8/31/2012	\$1,050.95
9/30/2012	\$811.73
3/31/2013	\$128.50
4/30/2013	\$67.46
4/30/2013	\$276.28
Total	\$3,832.22

19 "(Respondents' Ex. R-3, pp. 1-2) Respondents also submitted a 'CITT Month
20 Hours and Contribution Report' that appears to reflect payments made on
21 October 19, 2012, on behalf of Claimant Penn for the September 2012 time
22 period. (Respondents' Ex. R-3, p. 3) However, it is unclear from the CITT report
23 whether this payment is the same as the \$811.73 payment reflected in the table
24 above. Respondents' exhibits appear to directly contradict the spreadsheet
25 submitted by the Agency, as well as Claimant Penn's statement from The
Contractors Plan. (Compare Agency Exs. 8 and 9, p. 2 with R-3, pp. 1-3) The
forum has previously recognized that factors such as fluctuating market
conditions can account for differences between retirement account statement
balances and the amounts contributed by an employer. *See, e.g. Green Thumb*,
32 BOLI at 198. Without sworn testimony from witnesses knowledgeable about
the contributions to the plan, the evidence is unclear as to the amounts
contributed and the dates on which contributions were made. Accordingly,

1 viewing the evidence submitted by both sides in the light most favorable to
2 Respondents, I find that there is a question of fact as to whether there are any
3 unpaid wages owed to Claimant Penn. Therefore, the Agency's motion for
4 summary judgment is **DENIED** as to Claimant Penn.⁸

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"ii. Claimant Martell

"The Agency's Prevailing Wage Specialist calculated the unpaid wages owed to Claimant Martell as follows:

	\$8,728.38	(Total Earned)
(minus)	\$5,601.04	(Wages Paid)
(minus)	<u>\$0</u>	(Contributions to The Contractors Plan)
Total Wages Due:	\$3,087.34	

9 "(Agency Ex. 15, p. 2) The alleged underpayments occurred between the August
10 18, [2012], and October 6, 2012, pay periods.

11 "Respondents assert that all fringe benefit contributions for Claimant
12 Martell were paid on time in 2013, but that 'payments for the year 2012 were paid
13 late but were in fact paid to the claimant while still employed.' (Respondents'
14 Opposition, p. 1) Respondents submitted an exhibit that they claim
15 demonstrates that they made the following contribution to The Contractors Plan
16 on Claimant Martell's behalf:

<u>"Date</u>	<u>Contribution</u>
11/30/2012	\$2,534.60

17 "(Respondents' Ex. R-6, p. 1) Respondents also submitted three 'CITT Monthly
18 Hours and Contribution Reports' that appear to reflect payments made on behalf
19 of Claimant Martell on September 21, 2012, and November 15, 2012, for the
20 September – October 2012 time period. (Respondents' Ex. R-3, p. 3) However,
21 it is unclear from the CITT reports whether these payments are the same as that
22 \$2,534.60 payment referenced above. Respondents' exhibits appear to directly
23 contradict the spreadsheet submitted by the Agency outlining the alleged unpaid
24 fringe benefit payments. Without sworn testimony from witnesses
25 knowledgeable about the contributions to the plan, the evidence is unclear as to
the amounts contributed and the dates on which contributions were made.
Accordingly, viewing the evidence submitted by both sides in the light most

⁸ Contributions to fringe benefit plans must be made on a regular basis and not less often than quarterly. OAR 839-025-0043(1). It is unclear from the evidence in this case what affect any late payments may have on the Agency's claims. However, since the OOD alleges claims for *unpaid* wages and there is no claim for *late* retirement plan contributions, there is no need for me to examine that issue at this time.

1 favorable to Respondents, I find that there is a question of fact as to whether
2 there are any unpaid wages owed to Claimant Martell. Therefore, the Agency's
3 motion for summary judgment is also **DENIED** as to Claimant Martell.⁹

3 "3. Liability of Respondents for Liquidated Damages

4 "Because the Agency has not yet established whether any of the
5 Respondents violated ORS 279C.840, there is a question of fact as to whether
6 Respondents are responsible for liquidated damages pursuant to ORS
7 279C.855(1). Therefore, the Agency's motion for summary judgment requesting
8 liquidated damages is **DENIED**.

7 "**CONCLUSION**

8 "The Agency's motion is **DENIED** in its entirety. The hearing for Case No.
9 28-15 will begin as scheduled at **9:00 a.m. on March 3, 2015**, as stated in my
10 Interim Order of February 2, 2015."

10 (Ex. X21)

11 The ALJ's ruling on the Agency's motion for summary judgment is hereby
12 **CONFIRMED**.

13 12) A telephone prehearing conference was held on February 26, 2015, to
14 discuss concerns raised by the Agency concerning the upcoming hearing date. The
15 Agency indicated it would be filing another amended OOD and would be moving to
16 consolidate this matter with Case No. 55-15 because it arises out of the same facts.
17 The ALJ issued an interim order which stated, in part:

18 "After a discussion of the above-referenced issues during the conference
19 and the fact that Respondents were entitled to the allotted time to respond to the
20 amended allegations, I proposed that the hearing proceed on March 3, 2015, to
21 determine only the issues of whether the wage claimants were entitled to unpaid
22 wages and liquidated damages. The remaining issues would be addressed at a
23 hearing on a later date. Both Ms. Ortega and Mr. Williams indicated their
24 agreement with this proposal.

25 ⁹ As referenced above with respect to Claimant Penn, the OOD has asserted claims for *unpaid* wages
and there is no claim for *late* retirement plan contributions. Therefore, there is also no need for me to
examine that issue with respect to Claimant Martell at this time.

1 "Therefore, I hereby rule that the hearing date of March 3, 2015, remains
2 intact and will only address the topics of whether the wage claimants are entitled
3 to unpaid wages and liquidated damages. The record will remain open as to the
4 remainder of the issues to be addressed. At the conclusion of the March 3
5 hearing, I will hold a conference with Ms. Ortega and Mr. Williams to schedule a
6 date for a hearing on the remaining issues in the case."

7 (Ex. X23)

8 13) On February 27, 2015, the Agency issued a Second Amended OOD which
9 added Phoenix Construction Group, SBG Construction Services LLC, GNC
10 Construction Services, LLC and Evan Williams as Employers. Summarized, the
11 Second Amended OOD alleged:

- 12 • Respondents failed to timely pay the fringe benefits portion of wage claimant Eric
13 Penn's prevailing wages in the amount of \$2,607.65 on public works projects.
- 14 • Respondents failed to timely pay the fringe benefits portion of wage claimant
15 Starley Martell's prevailing wages in the amount of \$3,087.34 on a public works
16 project.
- 17 • Respondents were required to compensate the wage claimants at not less than
18 the prevailing wage states pursuant to ORS 279C.840 and daily overtime rates
19 pursuant to ORS 279C.540 when work was performed on public works projects.
- 20 • Pursuant to ORS 279C.855 and OAR 839-025-0080, Respondents are liable for
21 \$5,694.99 in unpaid prevailing wages due and \$5,694.99 in liquidated damages.

22 (Ex. X24)

23 14) The contested case hearing in this matter began on March 3, 2015, and
24 went into recess that afternoon at Respondents' request due to a possible medical
25 emergency. (Hearing Record)

15) On March 4, 2015, the ALJ issued an interim order summarizing rulings
made during the hearing which stated:

"The purpose of this order is to summarize the ruling I made on the record
at yesterday's hearing as to information Respondents sought to introduce into
evidence regarding contributions made to The Contractor's Plan, specifically

1 Exhibits R-7 at pages 2 and 49 and R-8 at pages 2, 4-6.¹⁰ Those pages are not
2 admitted into evidence, but the issue will be handled as follows:

- 3 • Respondents may submit The Contractors Plan documents that
4 were referenced by Kenya Smith yesterday which she said were
5 received in an email from Nancy Caldwell. These documents must
6 be submitted to BOLI's Contested Case Coordinator, with copies to
7 Ms. Ortega and me, no later than 5:00 pm today. Please submit
8 both these by both hard copy and email.
- 9 • Respondents may call Ms. Caldwell as a telephone witness when
10 the hearing re-convenes tomorrow. Respondents must "reply all" to
11 the email sent to the participants this morning as soon as possible
12 to let me know when Ms. Caldwell will be available to testify by
13 telephone tomorrow.
- 14 • Respondents may submit signed copies of the CITT contribution
15 reports which were on pages 4-6 of Exhibit 8. These documents
16 must be submitted to BOLI's Contested Case Coordinator, with
17 copies to Ms. Ortega and me, no later than 5:00 pm today. Please
18 submit both these by both hard copy and email.
- 19 • The Agency has the right to object to any of the new evidence that
20 is offered at hearing tomorrow.
- 21 • If the Agency determines that additional witnesses or exhibits need
22 to be offered into evidence to address any new information
23 provided by Respondents, Ms. Ortega can notify me of that
24 tomorrow and we will discuss a procedure to allow the Agency to
25 submit additional witnesses and exhibits, if necessary.
- Kenya Smith must be present when the hearing re-convenes
tomorrow so that Ms. Ortega can continue her cross examination of
the witness.

"I have not yet ruled that any of the above-referenced testimony or documents is
admissible. At this time the hearing is scheduled to re-convene at **9:00 a.m.**
tomorrow, Thursday, March 5, 2015."

(Ex. X24a)

16) The hearing reconvened on March 5, 2015, and went into recess. On
March 9, 2015, the ALJ issued an interim order stating:

¹⁰This information was also summarized in an email sent to the participants.

1 "This Interim Order will summarize the rulings made on the record when
the hearing adjourned Thursday, March 5, 2015:

- 2
- 3 • At the Agency's request, I am allowing the Agency to submit revised
4 spreadsheets with corrections to the amount of wages owed to both wage
5 claimants. The revised spreadsheets must be filed and served no later than
6 **March 13, 2015**. I have not yet ruled that the revised spreadsheets are
7 admissible, and Respondents retain the right to object to any revised
8 spreadsheets when the documents are offered into evidence by the Agency.
 - 9 • Respondents are permitted to file an addendum to their case summary for the
10 sole purpose of introducing additional exhibits and/or testimony in response to
11 any revisions made to the spreadsheets by Ms. Soria-Pons. Any addendum
12 to Respondents' case summary must be filed by **March 31, 2015**.
 - 13 • The hearing will re-convene at **9:00 a.m. on April 7, 2015**, at which time the
14 Agency may call Compliance Specialist Monique Soria-Pons to testify about
15 any revisions made to the spreadsheets.
 - 16 • At the conclusion of the proceedings on April 7, 2015, the record will remain
17 open with respect to the revised allegations in the Second Amended Order of
18 Determination and we will discuss a date for concluding the hearing to
19 address those issues.

20 * * *

21 (Ex. X25)

22 17) A letter filed with the forum dated March 13, 2015, signed by "Evan
23 Williams, Managing Member," stated that Evan Williams was the authorized
24 representative for all of the Respondent companies and that he was "acting as
25 President" for the companies named in that action. (*In the Matter of Portland Flagging,
LLC, 34 BOLI Orders 208, __ (2015)*)

18) On March 20, 2015, the ALJ granted the Agency's unopposed motion to
consolidate Case Nos. 28-15 and 55-15.¹¹ (Ex. X26)

¹¹ The two cases were consolidated so that the common facts could be presented in one hearing without duplication of evidence. For the sake of clarity and to assist the parties in understanding the forum's rulings, proposed and final orders will be issued separately in Case Nos. 28-15 and 55-15.

1 19) On April 6, 2015, the Agency filed a letter with notice that it was arranging
2 for security to be present when the hearing resumed due to safety concerns.
3 Respondents objected to the need for security, and the parties were permitted to state
4 their positions regarding the need for security when the hearing reconvened on April 8,
5 2015. The Agency referenced comments made by Evan Williams and presented
6 documentation of his criminal history. Respondents disagreed that the criminal history
7 was relevant. The ALJ overruled Respondents' objections. An Oregon State Police
8 Trooper was present for all remaining proceedings. (Ex. X28, Hearing Record)

9 20) The hearing reconvened on April 8, 2015, and recessed after closing
10 arguments on April 9, 2015. (Hearing Record)

11 21) On April 10, 2015, the issue of the liability of the remainder of the
12 Respondents was bifurcated from the claims against Portland Flagging, and then
13 consolidated with Case Nos. 28-15, 37-13 and 14-14. The hearing for those
14 consolidated matters was postponed until pending default issues were fully resolved in
15 related cases involving all Respondents, and those will be addressed in a separate
16 Final Order. (*In the Matter of Portland Flagging, LLC*, 34 BOLI 208, __ (2015))

17 22) The ALJ marked a copy of a printout of the following website as Ex. X27:
18 http://www.oregon.gov/BOLI/WHD/PWR/docs/PWR_FAQ_04-2014.pdf. The document
19 was attached as an appendix to the Proposed Order. (Ex. X27)

20 23) The ALJ issued a proposed order on January 12, 2016, that notified the
21 participants they were entitled to file exceptions to the proposed order within ten days of
22 its issuance. Neither the Agency nor Respondents filed any exceptions.
23
24
25

FINDINGS OF FACT – THE MERITS

1
2 1) Portland Flagging LLC dba A D Traffic Control employed wage claimants
3 Penn and Martell on various public works projects in 2011 and 2012. (*In the Matter of*
4 *Portland Flagging, LLC*, 34 BOLI 208, __ (2015))

5 2) With respect to Martell, the Notice of Public Works for the French Creek
6 project Martell reflected that Portland Flagging was the flagging subcontractor. Portland
7 Flagging operated under the assumed business name of "A D Traffic." Time sheets,
8 payroll records and retirement plan contribution statements for Martell and Penn during
9 2011 and 2013 all use some form of the name "A D Traffic." The statement for Martell's
10 account with The Contractors Plan is addressed to "A D Traffic Control Services, LLC."
11 Throughout the contested case process, Portland Flagging and A D Traffic shared the
12 same business address. (Exs. A5, A6, A11, p. 2, A13, A14; *In the Matter of Portland*
13 *Flagging, LLC*, 34 BOLI 208, __ (2015); Hearing Record)

14 3) Martell did not receive timely prevailing wage rate wages earned in the
15 amount of \$2,326.88, which represents \$233.16 in unpaid wages and overtime wages
16 and \$2,093.72 in late prevailing wage fringe benefit payments. (Testimony of Martell &
17 Soria-Pons; Exs. A13, A14, A27)

18 4) When calculating whether prevailing wage fringe benefits payments that
19 are owed to wage claimants, the Wage and Hour Division has a practice of crediting
20 amounts an employer made into a claimant's fringe benefit account when the Division
21 receives reliable documentation verifying that contributions were made. (Testimony of
22 Soria-Pons)

23 5) Some funds were deposited into Martell's fringe benefit account on
24 November 18, 2013. (Ex. R11)
25

1 6) The amount owing to Martell should be reduced by amounts in her fringe
2 benefit account totaling \$2,583.95. (Stipulation of the Parties)

3 7) A total of \$3,358.86 was deducted from Penn's paychecks in 2011 and
4 2012 as fringe benefits. (Testimony of Soria-Pons; Exs. A5, A6, A26, R10)

5 8) Deposits were made into Penn's fringe benefit account for A D Traffic as
6 follows:

7 \$1,318.90 on November 7, 2011
8 \$178.40 on November 8, 2011
9 \$1,050.95 on November 18, 2013
 \$811.73 on September 13, 2013
 Total: \$3,359.98

10 (Ex. R10, p. 4)

11 9) The funds Portland Flagging and A D Traffic withheld from the paychecks
12 of Penn and Martell in 2011 and 2012 were not deposited within the calendar quarter in
13 which they earned those wages. (Testimony of Soria-Pons; Stipulation of the Parties;
14 Ex. R10)

15 10) Tri-Star Flagging, LLC employed Penn on the Rose City project during
16 March and April of 2013. (Exs. A5, A6)

17 11) Fringe benefit payments were withheld from Penn's paycheck while he
18 worked for Tri-Star and were deposited into his Tri-Star fringe benefit account on the
19 following dates:

Payroll Week Ending Date	Fringe amount withheld	Fringe Account Deposits
3/30/2013	\$128.50	\$128.50 on June 27, 2013
4/6/2013	\$276.28	\$276.28 on October 31, 2013
Total	\$404.78	

23 (Testimony of Soria-Pons; Exs. A5, A26, R10)
24
25

1 into account the evidence offered by Respondents to dispute the calculations in her
2 initial spreadsheets. When the hearing resumed, she testified in detail about her
3 revised calculations of wages owing to Martell in the amount of \$2,326.88, which
4 represented \$233.16 in unpaid wages and overtime wages and \$2,093.72 in prevailing
5 wage fringe benefit payments. She also testified in detail to explain her revised
6 calculations of wages owing to Penn in the amount of \$2,416.64, which represented
7 \$154.28 in unpaid wages and overtime wages and \$2,262.35 in unpaid prevailing wage
8 fringe benefit payments. During her testimony, she cross-referenced the timesheets for
9 each worker to support the calculations in her testimony. Respondents admitted that
10 the fringe benefit payments owed to Martell and Penn were not timely deposited.

11 The Agency and Respondents stipulated that \$2,583.95 amount of fringe benefit
12 payments were paid into an account with The Contractor's Plan in Martell's name.
13 Respondents contend that while some fringe benefit contributions were paid late, the
14 funds were ultimately deposited into the account of Penn. The Agency disputes that
15 contention.
16

17 **A. Failure to Pay the Prevailing Wage Rate**

18 It is the Agency's burden to prove that an employer did not pay all deducted
19 fringe benefits into the employer's fringe benefit plan. *In the Matter of Green Thumb*
20 *Landscape and Maintenance, Inc.*, 32 BOLI 185, 198 (2013). Contributions to fringe
21 benefit plans must be made on a regular basis and not less often than quarterly. OAR
22 839-025-0043(1). Prevailing wage payments must be made to employees "in cash [or]
23 by the making of contributions of a type referred to in ORS 279C.800(1)(a)." ORS
24 279C.840(1). ORS 279C.800(1)(a) defines prevailing wage fringe benefit payments as
25

1 the "rate of contribution a contractor or subcontractor makes irrevocably to a trustee or
2 to a third person under a plan, fund or program." In a companion case involving civil
3 penalties for this same conduct, the forum ruled that the late contributions to the
4 accounts of Penn and Martell do not satisfy the requirements of ORS 279C.840(1) and
5 ORS 279C.800(1)(a). *In the Matter of Portland Flagging, LLC*, 34 BOLI Orders 208, ___
6 (2015).

7 The prevailing wage rate regulations do not provide a definition of the term
8 "quarterly," but the Agency has provided the following guidance on BOLI's website:

9 "Not less often than quarterly' means that the fringe benefit portion of
10 wages must be contributed to a bona fide plan, fund or program at least once
11 every three months within an established consecutive twelve month period. The
12 contribution must represent payment to the plan, fund or program for amounts
earned in the three month period immediately prior to the contribution date.

13 "An established twelve month period may be a calendar year, fiscal year,
14 plan year, or other consecutive twelve month period as determined by the
15 employer. The beginning of the twelve month period may be changed only if the
16 change is intended to be permanent, and is not designed to evade the timely
17 payment of contributions into a bona fide plan, fund or program. *If an employer
does not determine a consecutive twelve month period the default period shall be
18 a calendar year; that is, from 12:00 midnight on January 1 to 11:59 p.m.
19 December 31, each year.*

20 "As an example, using the calendar year as the established consecutive
21 twelve month period, a contractor or subcontractor establishes a contribution
22 date of April 15 for the payment of fringe benefits earned between January 1 and
23 March 31 into the plan, fund or program; consequently, amounts earned between
24 April 1 and June 30 must be contributed into the plan, fund or program on or
25 before July 15; amounts earned between July 1 and September 30 must be
contributed into the plan, fund or program on or before October 15; and amounts
earned between October 1 and December 31 must be contributed into the plan,
fund or program on or before January 15."

(X27, *Prevailing Wage Rate: FAQ's*, p. 6 (emphasis added)). Using the formula set
forth in the Agency's example, the quarterly contribution schedule for employers who

1 either use the standard calendar year or who have not determined their own
2 consecutive 12-month period is as follows:

<u>Payroll Dates</u>	<u>Fringe Benefit Account Contribution Deadline</u>
January 1-March 31	April 15
April 1-June 30	July 15
July 1-September 30	October 15
October 1- December 31	January 15

3
4
5
6
7 An Agency's interpretation of its own rule is entitled to deference "if that
8 interpretation is plausible and is not inconsistent with the rule in its context or with some
9 other source of law." *AT & T Corp. v. Dept. of Rev.*, 357 Or 691, 702, 358 P3d 973, 978
10 (2015). The Agency's interpretation, as articulated above, is consistent with other
11 Oregon laws which define a "calendar quarter" as "the period of three consecutive
12 months ending on March 31, June 30, September 30 or December 31." See, e.g. ORS
13 657.010(4)(unemployment tax contribution); ORS 314.515(1)(outlining installment
14 schedule for payment of a corporation's estimated tax to the Department of Revenue).¹²
15 Therefore, the above-referenced quarterly payment schedule should be applied to the
16 facts of this case, because the Agency's interpretation of the regulation is "plausible and
17 . . . not inconsistent with the rule in its context or with some other source of law." *AT &*
18 *T Corp.*, 357 Or at 702.

19
20 The Compliance Specialist's calculations also included some unpaid overtime
21 wages. Subcontractors required by ORS 279C.540 to pay overtime wages must pay
22 overtime wages for all hours worked on Saturdays. Those wages must be paid on the
23

24 ¹² With respect to retirement plan contributions, the Agency's deadlines appear to offer a more generous
25 timeframe to employers than the current federal standards which require contributions to pension
accounts to be made on a more frequent basis. See, e. g. 29 CFR 2510.3-102(b)(1). C.f. 29 CFR
2510.3-102(c) (allowing up to 90 days for contributions to welfare benefit plans, which are also included in
the definition of a fringe benefit account for purposes of prevailing wage law).

1 subcontractor's "regular payday." The Agency sustained its burden in proving that
2 those wages were not paid.

3 Thus, the Agency sustained its burden of proof in demonstrating that the untimely
4 deposit of funds into the fringe benefit accounts of Penn and Martell violated the
5 requirement to pay the prevailing wage rate.¹³

6 **B. Liquidated Damages**

7 A "subcontractor . . . that violates the provisions of ORS 279C.840 is liable to the
8 workers affected . . . in an additional amount equal to the unpaid wages as liquidated
9 damages." ORS 279C.855(1). Since violations of ORS 279C.840 were established,
10 Martell and Penn are entitled to an award of liquidated damages equal to the amount of
11 unpaid wages.

12 **C. Identity of Employers and Calculation of Amounts Owed**

13 Subcontractors who fail to pay prevailing wages are liable to the workers affected
14 for the unpaid wages and liquidated damages. ORS 279C.855(1). The evidence
15 established that at various times Martell and Penn worked as flaggers for either
16 Portland Flagging, A D Traffic and/or Tri-Star. Therefore, it is necessary to examine
17 which employers are responsible for unpaid wages and liquidated damages, and the
18 exact amounts owing to each claimant.

19
20
21 ¹³ The exact amounts to be paid to each claimant are explained in detail in Section C, *infra*. The funds
22 that must be paid to Penn exceed what was requested by the Agency in the OOD and at hearing, and the
23 amounts to be paid to Martell are lower than the Agency sought. This is primarily due to the fact that
24 there was evidence introduced by Respondents at hearing that was not available to the Compliance
25 Specialist when she prepared and updated her spreadsheet calculations. "[D]amages flowing from
statutory wage violations are awarded based on the actual evidence at the hearing, regardless of the
allegations in the OOD." *In the Matter of Charlene Marie Anderson dba Domestic Rescue*, 33 BOLI 253,
261 (2014), *citing In the Matter of Francisco Cisneros*, 21 BOLI 190, 213 (2001), *aff'd without opinion*,
Cisneros v. Bureau of Labor and Industries, 187 Or App 114, 66 P3d 1030 (2003). *See also In the Matter*
of C.S.R.T., LLC, and Robert P. Sabo, 33 BOLI 263, 271 (2014) (noting that the commissioner has the
authority to award penalty wages exceeding those sought in the OOD).

1 1. Martell

2 Time sheets labeled as "job receipts" show that Martell worked on the Oregon 22
3 – French Creek Road US20 project ("French Creek"). (Ex. A14) Portland Flagging
4 previously admitted that it employed Martell. (Finding of Fact – Merits, No. 1) Thus,
5 Portland Flagging is a subcontractor liable for all of the unpaid wages and liquidated
6 damages owing to Martell. The evidence at hearing also established that A D Traffic
7 Control was a joint employer of Martell for her work on that subcontract for the reasons
8 set forth below.

9 In general, a joint employment relationship exists when two associated
10 employers share control of an employee. Joint or co-employers are responsible, both
11 individually and jointly, for compliance with all applicable provisions of Oregon's wage
12 and hour laws. *In the Matter of Laura M. Jaap*, 30 BOLI 110, 126 (2009). To determine
13 whether there is a joint employment relationship, the forum has previously relied on the
14 federal Fair Labor Standards Act ("FLSA"), specifically 29 CFR § 791.2 and prior final
15 orders applying the regulation. A joint employment relationship is established under the
16 FLSA when employers have an agreement to share the services of an employee that is
17 mutually beneficial to the employer(s), where one employer acts directly or indirectly in
18 the interest of the other employer with respect to the employee, where the employers
19 share direct or indirect control of the employee, or where one employer controls the
20 other employer. 29 C.F.R. § 791.2.

21 The forum previously found that an individual respondent and a corporate
22 respondent jointly employed a claimant when they: (1) shared an interest in the property
23 being developed on a construction site; (2) the individual respondent controlled and
24 25

1 directed the work performed by claimant and other laborers on the construction site and
2 signed their paychecks, which he paid to them as a sole proprietor using an assumed
3 business name; (3) the corporate respondent maintained an office where claimant and
4 other laborers submitted their timesheets and controlled, to some extent, how, when,
5 and whether claimant would be paid; and (4) the facts supported an inference that the
6 claimant was under the simultaneous control of Respondents and simultaneously
7 performed services for both. *In the Matter of Kurt E. Freitag*, 29 BOLI 164, 299-301
8 (2007), *aff'd* 243 Or App 389, 256 P.3d 1099 (2011). The forum has also found an
9 individual and two corporate respondents to be liable as joint employers when they
10 shared work crews and equipment, the claimant performed work that benefited all three
11 respondents, and the claimant was issued separate paychecks drawn on the accounts
12 of each respondent. *In the Matter of Jack Crum Ranches, Inc.*, 14 BOLI 258, 271
13 (1995).
14

15 With respect to Martell, the Notice of Public Works for the French Creek project
16 reflected that Portland Flagging was the flagging subcontractor. (Ex. A11, p. 2)
17 Portland Flagging previously admitted that it operated under the assumed business
18 name of "A D Traffic." Time sheets, payroll records and retirement plan contribution
19 statements for Martell all use some form of the name "A D Traffic." The statement for
20 Martell's account with The Contractors Plan is addressed to "A D Traffic Control
21 Services, LLC." Throughout the contested case process, Portland Flagging and A D
22 Traffic shared the same business address. Considering all of these factors together,
23 the Agency has sustained its burden in establishing that Martell was jointly employed by
24
25

1 both Portland Flagging and A D Traffic Control. Therefore, both corporate entities are
2 responsible for the amounts owing to her.

3 At the hearing, the parties stipulated that Respondents should be given credit for
4 the \$2,583.95 which was paid into an account with The Contractor's Plan in Martell's
5 name. OAR 839-050-0280(1). Accordingly, the wages and liquidated damages owing
6 to Martell are calculated¹⁴ as follows:

7	\$2,326.88	Gross earned, unpaid, due and payable wages
8	+ \$2,326.88	Liquidated damages
9	\$4,653.76	(Subtotal)
10	- \$2,583.95	Credit based on Stipulation of Parties
11	\$2,069.81	Total Wages & Liquidated Damages Owed to Martell by Portland Flagging & A D Traffic (Plus Interest)

12 2. Penn

13 Portland Flagging and A D Traffic

14 Penn was also jointly employed by both Portland Flagging and A D Traffic
15 Control during 2011 and 2012 for the same reasons that these employers jointly
16 employed Martell. The Compliance Specialist testified that the following fringe benefit
17 payments were withheld from Penn's paycheck while he worked for joint employers
18 Portland Flagging and A D Traffic:

19 Portland Flagging and A D Traffic:

20
21
22 ¹⁴ Martell is also entitled to receive prejudgment interest as requested in the Second Amended OOD.
23 Prejudgment interest accrues on obligations the date they become due. *In the Matter of Charlene Marie
24 Anderson dba Domestic Rescue*, 33 BOLI at 261, citing ORS 82.010(1)(a). Because of the late fringe
25 benefit payments which the parties stipulated should be credited to the amounts owed to Martell, the
calculation of interest is not straightforward and simple. Thus, a more detailed explanation follows.
Martell's last day of work was October 3, 2012. Accordingly, deposits into her fringe benefit account
should have been made by the quarterly due date of January 15, 2013. Interest on the sum of the unpaid
wages and liquidated damages (\$4,653.76 in total) accrued from January 15, 2013 until a portion of the
amount owing was deposited into The Contractor's Plan on November 18, 2013. She is entitled to
interest on the remaining amount owed of \$2,069.81 from January 15, 2013 until paid.

Week Ending Date	Fringe amount	Date Fringe Deposit Due
7/16/2011	\$178.40	10/15/2011
7/23/2011	\$94.80	10/15/2011
7/30/2011	\$325.88	10/15/2011
8/6/2011	\$367.35	10/15/2011
8/13/2011	\$225.15	10/15/2011
8/20/2011	\$112.58	10/15/2011
8/27/2011	\$77.03	10/15/2011
9/3/2011	\$0.00	10/15/2011
9/10/2011	\$77.03	10/15/2011
8/18/2012-1	\$197.60	10/15/2012
8/18/2012-2	\$114.95	10/15/2012
8/25/2012-1	\$78.65	10/15/2012
8/25/2012-2	\$339.63	10/15/2012
8/25/2012-3	\$172.90	10/15/2012
8/25/2012-4	\$26.13	10/15/2012
9/1/2012-1	\$290.23	10/15/2012
9/1/2012-2	\$61.75	10/15/2012
9/8/2012	\$222.30	10/15/2012
9/15/2012	\$160.55	10/15/2012
9/22/2012	\$108.90	10/15/2012
9/29/2012	\$127.05	10/15/2012
Total Due from Portland Flagging & A D Traffic	\$3,358.86	

No deposits were made into a fringe benefit account for Penn until after the due dates reflected above. Thus, Portland Flagging & A D Traffic are responsible for payment of \$3,358.86 in unpaid wages plus an equal amount in liquidated damages, resulting in a total of \$6,717.72, plus interest.¹⁵

When calculating the amount of remaining prevailing wage payments owed to workers, the Agency has a practice of subtracting the amounts deposited into fringe benefit accounts when the Agency receives reliable documentation verifying the

¹⁵ The calculation of the interest reflected in the instructions at the end of this document was made using the same methodology that was used when calculating the interest owing to Martell.

1 amounts of the deposits. Like the late fringe benefit deposits into Martell's account,
2 Portland Flagging and A D Traffic should also be credited for the late benefit plan
3 contributions¹⁶ it made into Penn's account which were as follows:

Fringe Plan Deposits (Ex. R10, p. 4)
\$1,318.90 on 11/7/2011
\$178.40 on 11/8/2011
\$1,050.95 on 11/18/2013
\$811.73 on 9/13/2013
Total late deposits: \$3,359.98

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8 Thus, Portland Flagging and A D Traffic are responsible for payment of the
9 \$3,357.74 balance remaining (\$6,717.72 minus late deposits of \$3,359.98), plus
10 interest.

11 Tri-Star

12 In March and April of 2013, Penn worked on the Kodiak 2 project. It is
13 undisputed that Penn worked for Tri-Star at the time of this project. Thus, Tri-Star is
14 responsible for payment of unpaid fringe benefits during this time period. The
15 Compliance Specialist testified that the following fringe benefit payments were withheld
16 from Penn's paycheck while he worked for Tri-Star:
17

Week Ending Date	Fringe amount	Date Fringe Deposit Due	Fringe Plan Deposits (Ex. R10, p. 1)
3/30/2013	\$128.50	4/15/2013	\$128.50 on 6/27/2013 - late
4/6/2013	\$276.28	7/15/2013	\$276.28 on 10/31/2013 - late
Total Due from Tri-Star	\$404.78		

18
19
20
21 Thus, Tri-Star is responsible for payment of the sum of \$404.78 in unpaid wages
22 plus an equal amount in liquidated damages, resulting in a total of \$809.56. However,
23
24

25 ¹⁶ The Compliance Specialist did not have access to the documentation of the amounts deposited into Penn's accounts when she prepared her calculations. However, this information was received into evidence at the hearing. (Ex. R10)

1 Tri-Star should be credited for the late benefit plan contributions it remitted totaling
2 \$404.78. (Ex. R10) Thus, Tri-Star is responsible for payment of the \$404.78 balance
3 remaining, plus interest.

4 **D. Additional Named Respondents**

5 The issue of the liability of the remaining Respondents has been bifurcated and
6 that portion of the case was consolidated with Case Nos. 55-15, 37-13 and 14-14 into a
7 separate proceeding. *In the Matter of Portland Flagging, LLC*, 34 BOLI at __. No
8 further discussion is required as to the merits.

9 **ORDER¹⁷**

10 A. NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner
11 of the Bureau of Labor and Industries hereby orders Respondents **Portland Flagging,**
12 **LLC** and **A D Traffic Control Services, LLC**, to deliver to the Administrative
13 Prosecution Unit of the Bureau of Labor and Industries, 1045 State Office Building, 800
14 NE Oregon Street, Portland, Oregon 97232-2180, the following:

15 1) A certified check payable to the Bureau of Labor and Industries in
16 trust for **Starley Martell** in the amount of **\$2,069.81** representing the
17 remaining amount owed for unpaid wages and liquidated damages, less
appropriate lawful deductions, plus

- 18 • Interest at the legal rate on the sum of \$2,583.95 from January
19 15, 2013, until November 18, 2013; plus
20 • Interest at the legal rate on the sum of \$2,069.81 from January
15, 2013, until paid.

21 2) A certified check payable to the Bureau of Labor and Industries in
22 trust for **Eric Penn** in the amount of **\$3,357.74** representing the total owed
23 for unpaid wages and liquidated damages, less appropriate lawful
deductions, plus

24
25 ¹⁷ A detailed explanation regarding the methodology for calculating the prejudgment interest in this case
is set forth in footnote 15, *supra*.

- Interest at the legal rate on the sum of \$1,318.90 from October 15, 2011, until November 7, 2011; plus
- Interest at the legal rate on the sum of \$178.40 from October 15, 2011, until November 8, 2011; plus
- Interest at the legal rate on the sum of \$1,050.95 from October 15, 2012, until November 18, 2013; plus
- Interest at the legal rate on the sum of \$811.73 from October 15, 2012, until November 18, 2013; plus
- Interest at the legal rate on the sum of \$3,357.74 from October 15, 2013, until paid.

B. NOW, THEREFORE, as authorized by ORS 652.332, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **Tri-Star Flagging, LLC**, to deliver to the Administrative Prosecution Unit of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, the following:

A certified check payable to the Bureau of Labor and Industries in trust for **Eric Penn** in the amount of **\$404.78** representing the remaining amount owed for unpaid wages and liquidated damages, less appropriate lawful deductions, plus

- Interest at the legal rate on the sum of \$128.50 from April 15, 2013, until June 27, 2013; plus
- Interest at the legal rate on the sum of \$276.28 from June 15, 2013, until October 21, 2013; plus
- Interest at the legal rate on the sum of \$404.78 from June 1, 2013, until paid.



Brad Avakian, Commissioner
Bureau of Labor and Industries

ISSUED ON 2-1-16