In the Matter of

EMERALD STEEL FABRICATORS, INC.,

Case No. 30-04

Final Order of Commissioner Dan Gardner

Issued September 16, 2005

SYNOPSIS

Complainant, a disabled person, used medical marijuana to reduce the symptoms of debilitating medical conditions caused by Complainant's mental and physical impairments. Complainant requested reasonable accommodation for these limitations. Respondent failed to reasonably accommodate Complainant by not engaging in a meaningful interactive process with him to determine if his limitations could be reasonably accommodated and by not providing him with reasonable accommodation that was available in violation of ORS 659A.112(2)(e). Respondent also denied an employment opportunity to Complainant based on based on Respondent's need to make reasonable accommodation to Complainant's physical and mental impairments in violation of ORS 659A.112(2)(f). Respondent did not discharge Complainant because he was a disabled person in violation of ORS 659A.112(1). Respondent did not utilize standards, criteria or methods of administration that have the effect of discrimination on the basis of disability in violation of ORS 659A.112(2)(c). Respondent did not use qualification standards, employment tests or other selection criteria that screen out or tend to screen out a disabled person or a class of disabled persons in violation of ORS 659A.112(2)(g). Complainant was awarded $8,013.50 in back pay and $20,000 in damages for emotional distress. ORS 659A.112(1), ORS 659A.112(2)(c), ORS 659A.112(2)(e), ORS 659A.112(2)(f), ORS 659A.112(2)(g).

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Dan Gardner, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on January 24, 2005, at the Bureau's office located at 1400 Executive Parkway, Suite 200, Eugene, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter Cynthia L. Domas, an employee of the Agency. Complainant Anthony Scevers was present throughout the hearing and was not represented by counsel. Terence J. Hammons, attorney at law, represented Respondent. Donald Mathews, Respondent's owner, was present throughout the hearing for the purpose of assisting Respondent's counsel in the presentation of Respondent's case.

The Agency called the following witnesses: Anthony Scevers, Complainant; Stella Eller, Complainant's mother; John Eller, Complainant's stepfather; Kelly White, Complainant's supervisor while Complainant worked at Respondent's facility; Elizabeth Price, Human Resources Director for Peterson Pacific; and Dr. Grant Higginson (telephonic), Public Health Officer for the state of Oregon.

Respondent called the following witnesses: Donald Mathews, Respondent's owner; Patricia Edwards, sales associate for Staffing Services; and Kelly White.

The forum received into evidence:

a) Administrative exhibits X-1 through X-42 (submitted or generated prior to hearing) and exhibit X-43 (submitted at hearing);

b) Agency exhibits A-1 through A-12, A-14 (submitted prior to hearing), and A-16 (submitted at hearing);

c) Respondent exhibits R-1 through R-9 (submitted prior to hearing) and R-10 (submitted at hearing).

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

FINDINGS OF FACT – PROCEDURAL

1) On or about May 15, 2003, Complainant filed a verified complaint with the Agency's Civil Rights Division alleging that he was the victim of the unlawful employment practices of Respondent. The Division found substantial evidence of said practices on the part of Respondent.

2) On July 26, 2004, the Agency issued Formal Charges alleging that Respondent discriminated against Complainant by denying him employment and discharging him because of his disability in violation of ORS 659A.112(1) and ORS 659A.112(2)(c) & (g) and by failing to reasonably accommodate his disability in violation of ORS 659A.112(2)(e) & (f). The Agency sought damages of "[l]ost wages, including but not limited to, lost benefits and out-of-pocket expenses in an amount to be proven at hearing and estimated to be $20,000" and "for mental, emotional and physical suffering in the amount of $25,000."

3) On July 26, 2004, the forum served the Formal Charges on Respondent, accompanied by the following: a) a Notice of Hearing setting forth November 16, 2004, in Eugene, Oregon, as the time and place of the hearing in this matter; b) a Summary of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case process; and d) a

separate copy of the specific administrative rule regarding responsive pleadings.

4) On August 2, 2004, Respondent, through counsel, filed a motion 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.

5) On August 11, 2004, the Agency moved for a protective order regarding Complainant's "medical, psychological, counseling, and therapy records." The Agency further 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."

6) On August 26, 2004, the ALJ issued an interim order denying Respondent's motions to dismiss and to strike. The ALJ concluded that Respondent was not constitutionally entitled to a jury trial, citing *Cornelison v. Seabold,* 254 Or 401, 404-05 (1969) for the proposition that a party is constitutionally entitled to a jury trial only "in the classes of cases wherein the right was customary at the time the constitution was adopted." The ALJ relied on *Williams v. Joyce*, 4 Or App 482, 501 (1971), *Fred Meyer, Inc. v. Bureau of Labor,* 39 Or App 253 (1979), and *City of Portland v. Bureau of Labor and Industries,* 61 Or App 182, 193 (1982) in support of the conclusion that the Commissioner has the authority to award damages in an administrative hearing. Finally, the ALJ relied in the Commissioner's holding in *In the Matter of Alpine Meadows Landscape Maintenance, LLC*, 19 BOLI 191, 118-220 (2000) as the basis for rejecting Respondent's equal protection argument.

7) On September 3, 2004, the ALJ issued an interim order granting 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. The ALJ postponed ruling on the Agency's request for two separate proposed orders and final orders. That request is hereby **DENIED**. That ruling is confirmed.

8) On September 9, 2004, Respondent, through counsel, filed an answer to the Formal Charges.

9) On October 7, 2004, Respondent filed a motion to postpone the hearing because Respondent's attorney had a previously set trial anticipated to begin on November 1 and last for at least two weeks. The Agency did not object and the ALJ granted Respondent's motion, rescheduling the hearing to begin on January 24, 2005.

10) On December 23, 2004, the Agency filed a motion for a discovery order to require Respondent to produce relevant documents that had been sought on an informal basis and not provided and an order to compel Respondent to respond to interrogatories sent to Respondent on November 18, 2004.

11) On January 3, 2005, the ALJ granted the Agency's motions. The ALJ issued an interim order requiring Respondent to provide the sought after documents to the Agency case presenter and respond to the interrogatories no later than January 10, 2005.

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

13) The ALJ issued a proposed order on March 24, 2005, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. Respondent filed exceptions that are discussed in the Opinion section of this Final Order.

FINDINGS OF FACT – THE MERITS

1) At all times material, Respondent Emerald Steel Fabricators, Inc. was an Oregon employer involved in the manufacturing of steel products and employed six or more employees.

2) Complainant was born in 1973. In 1992, he joined the U.S. Army. While in the Army, he began experiencing emotional problems. In August 1994, an Army psychiatrist examined Complainant and diagnosed his problems as "correlates of anxiety and stress." The Army psychiatrist recommended that Complainant be discharged from the Army as "the quickest and most effective way to relieve this stress and anxiety." Complainant was honorably discharged from the Army shortly thereafter based on the psychiatrist's recommendation.

3) Between 1994 and 1999, Complainant recurrently experi-

enced depression, anxiety, and nausea. During that time, he took Buspar, Wellbutrin, and Amitriptyline. He began smoking marijuana in the late 1990s to lessen his nausea.

4) Between 1996 and 2003, Complainant experienced ongoing depression, sleep disorder, anxiety, nausea, vomiting, severe stomach cramps, and panic attacks. Notes in his medical records indicate that his nausea, stomach cramps, and vomiting were associated with his anxiety and panic attacks. He consulted with a number of physicians and a number of drugs were prescribed at different times to treat his symptoms, including Buspar, Wellbutrin, Prozac, Zoloft, Xanax, Klonopin, Amitriptyline, Promethazine, Phenergan, and Paxil. In the late 1990s, Complainant began using marijuana and found that it gave him more relief from his nausea than the prescription drugs.

5) From 2000 to 2003, Complainant had trouble eating. He was frequently nauseous, vomited a lot and couldn't keep anything down. He lost weight at times and got very little sleep.

6) In April 2002, Complainant consulted with Dr. Phillip Leveque, a licensed Oregon physician, about obtaining an Oregon Medical Marijuana ("OMM") card.

7) In order to obtain an OMM card, an individual must satisfy three primary requirements. First, the individual must provide personal information, including photo identification and their physician's address. Second, pay a $55 fee for a new application or renewal, unless the individual is "financially handicapped," in which case the fee is $20. Third, provide a written statement by the individual's attending physician confirming: (1) that the applicant has one of the debilitating medical conditions that are listed in the Oregon Medical Marijuana Act ("OMMA"), and (2) that the attending physician believes that the patient may benefit from the use of medical marijuana.

8) Dr. Leveque recommended that Complainant administer medical marijuana by "inhalation," with a frequency of "5-7" times per day. He noted in the "Attending Physician's Statement" required by the OMM program that Complainant had the following debilitating medical conditions: "severe nausea and vomiting" and "chronic cramps," adding that "Cannabis gives good relief." Dr. Leveque also completed a document entitled "Reiveiw [sic] of Patient Medical Records" in which he indicated that Complainant's previous physician had documented Complainant's "chronic cramps N & V."

9) The Oregon Health Division issued OMM card number 09812 to Complainant on June 11, 2002. Complainant renewed his card when it expired on June 11, 2003. Complainant did not renew it when it expired in 2004 because he could not afford to see the doctor and pay the fees for the card.

10) Complainant worked as a lathe and grinder operator from September 1994 to June 1995. Complainant worked as a drill press operator and CNC machinist for Rosen from 1995 to 2001, The work he performed involved "setup, operate CNC milling machines, lathes, manual mills and lathes; make parts to complex blueprints with high tolerance work." Rosen laid off Complainant due to lack of work.

11) In 2003, Respondent used Staffing Services, Inc. ("SSI"), a temporary employment agency located in Eugene, Oregon, to screen and refer workers to Respondent.

12) In 2003, Respondent's agreement with SSI included a stipulation that all prospective workers referred to Respondent were to undergo a drug screen by SSI before starting work at Respondent's facility. SSI itself had a written drug testing policy that stated, in pertinent part:

> "To help ensure a safe and healthful working environment, job applicants and employees may be asked to provide body substance samples (such as urine and/or blood) to determine the illicit or illegal use of drugs and alcohol. Refusal to submit to drug testing may result in disciplinary action, up to and including termination of employment. "

13) On January 13, 2003, Complainant filled out an employment application at SSI.

14) Sometime in the following week, SSI referred Complainant to an interview at Respondent's shop for a position as drill press operator. At that time, Complainant was working at Shamrock Steel, a fabrication shop, where his duties included operating the burn table and big drill and general shop help.

15) SSI did not ask Complainant to take a drug test before referring him to Respondent's workplace or at any time during Complainant's employment with Respondent. Edwards, SSI's sales associate, did not tell Complainant about SSI's requirement for a drug test.

16) Complainant went to Respondent's shop and was interviewed by Kelly White, Respondent's machine shop foreman. White offered employment to Complainant, who accepted. During the interview, White told Complainant that at the end of 90 days Respondent required prospective permanent employees to take a pre-employment drug screen before they could be hired as permanent employees.

17) Respondent's policy when hiring temporary employees referred by SSI is to use them a minimum of three months. After that, they are evaluated as to whether they will be needed any further. If Respondent decides there is enough work to justify hiring them, they are required to undergo a comprehensive drug screen at a local hospital. The purpose of the drug screen is to

test for the presence of illegal drugs.

18) Respondent has a written drug policy that is printed on its "Conditional Job Offer" form, a form that is shown to prospective employees at the time Respondent makes them a conditional job offer. In pertinent part, it reads:

> "Emerald Steel Fabricators, Inc. is committed to providing a safe and drug-free workplace. Reporting for work under the influence of alcohol or controlled or illegal drugs is strictly prohibited. While on Emerald Steel premises or during working hours, no employee may use, possess, distribute, sell, or be under the influence of alcohol, controlled or illegal drugs, or any other substance that may impair job performance or pose a hazard to the safety and welfare of the employee or other individuals."

Complainant was never shown a copy of that policy.

19) Complainant did not tell anyone at SSI or Respondent when he applied for work that he had an OMM card because he was afraid he wouldn't be hired.

20) Complainant reported to work at Respondent's facility on January 23, 2003, about a week after his interview. Neither White nor anyone else working at Respondent's asked Complainant at that time or any other time to take a drug test or if he had taken a drug test at SSI.

21) Respondent hired Complainant because of increased orders from Peterson Pacific, a logging equipment manufacturer whose orders comprised "90-95%" of the work done in Respondent's machine shop.

22) Complainant's basic work schedule at Respondent's was 7 a.m. – 4:30 p.m., Monday through Friday. His starting wage was $10 per hour. Complainant averaged five hours of overtime work per week.

23) White was Complainant's immediate supervisor throughout his employment with Respondent and told Complainant when to report to work and what work to perform.

24) During Complainant's employment at Respondent, SSI's interactions with Complainant were limited to delivering paychecks to Respondent once a week for distribution of wages to Complainant and other temporary employees SSI referred to Respondent.

25) Respondent employed two temporary employees referred by SSI – Bill Chance and George McGeorge -- during Complainant's first week of employment with Respondent. Chance and McGeorge were paid $8 per hour. McGeorge began work at Respondent on December 23, 2002, as a helper/clean-up person in Respondent's machine shop.[1]

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[1] No evidence was offered to show Chance's job duties or the area in which he worked.

26) While Complainant worked at Respondent's facility, SSI issued his paychecks. His paychecks were initially based on a $10 per hour wage rate. In turn, SSI billed Respondent $14.50 for every straight time hour that Complainant worked.

27) During Complainant's employment, Respondent had 20-25 fulltime employees.

28) Complainant was hired to operate a drill press in Respondent's machine shop and Complainant performed that job while employed by Respondent.

29) Complainant showed up for work on time and performed his work satisfactorily. White never disciplined Complainant and never talked to him about his attitude or any work related issues.

30) On two occasions, Complainant told White that he liked his job and wanted to keep it.

31) White gave Complainant a $1 per hour raise on March 1, 2003, raising his pay to $11 per hour. White's general policy is to give temporary employees a raise three to four weeks after hire if their work is satisfactory.

32) Complainant continued to experience nausea and severe stomach cramps while in Respondent's employ, usually in the morning but sometimes throughout the day.

33) Complainant used medical marijuana one to three times per day while employed by Respondent. It gave him partial relief from his nausea and stomach cramps. He never used medical marijuana at work or on Respondent's property. The number of times he used it depended on his symptoms that day.

34) While Complainant was employed with Respondent, there were eight employees in the machine shop, including Complainant and White. All eight employees could operate the drill press. Complainant, Larry Groesbeck and Chris Quest were the primary drill press operators during Complainant's employ. The other employees operated a lathe (manual and CNC) and did millwork (CNC).

35) On March 6, 2003, Complainant told White that he needed to let him know about his "medical problem" to see if it affected his chances of being hired as a regular employee. Complainant told White he had an OMM card. White asked Complainant if he had tried other medication for his medical problem. Complainant said he had, but medical marijuana worked best for him. Complainant told White he was hoping to be hired as a regular employee by Respondent, that he needed White to be aware of his medical problem, and that he hoped this information would not get him fired. Complainant did not identify his specific medical problem, but showed White his OMM card and the paperwork completed by Dr. Leveque[2] as part of Complainant's

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[2] *See* Finding of Fact 8 – The Merits, *supra.*

application for his OMM card. White told Complainant he did not know the answer, but he would talk it over with his boss.

36) Prior to Complainant's disclosure of his use of medical marijuana, White did not suspect that Complainant used marijuana or any other drug.

37) White met with Mathews and told him that Complainant had an OMM card, that Complainant used medical marijuana for a medical condition, and that Complainant wanted to know if Respondent was going to hire him as a regular employee. In response to Mathews's inquiry, White told Mathews that Complainant said it was the only drug he could take that alleviated his medical problem. White also told Mathews that Complainant was doing a reasonably good job. Mathews and White discussed whether Complainant would be hired and decided there was no need to keep Complainant on fulltime or hire him as a regular employee.[3]

38) From the time Complainant told White about his OMM card until Complainant's termination, neither Mathews nor White asked Complainant if there was anything Respondent could do to help Complainant with his medical problem or made any additional inquiry about Complainant's medical problem.

39) On March 13, 2003, Complainant told White that he needed to move to a different residence and needed to know if Respondent was going to hire him. White told Complainant he wasn't needed to work for Respondent anymore.

40) Respondent employed eight other temporary employees referred by SSI during Complainant's employment with Respondent. Five worked in Respondent's fabrication shop as welders or painters. Two worked as "Helper/Clean-up" in Respondent's machine shop. There is no evidence as to the duties performed by Bill Chance, the eighth temporary employee. At the time of Complainant's discharge, Chance, who was paid $8 per hour, was the only temporary employee working in the machine shop.

41) On March 25, 2003, Respondent hired Russ Williams as a temporary helper in the machine shop. On April 2, 2003, Respondent hired Joseph Jordan as a temporary helper in the machine shop. On April 21, 2003, Respondent hired Wade Risley as a temporary CNC lathe operator in the machine shop. Between June 1 and June 30, 2003, Respondent hired five temporary employees in the fabrication shop. Williams,

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[3] White's specific testimony in this regard was:

Q. "Whose decision was it to terminate Mr. Scevers?"

A. "Don and I both discussed it. He [Complainant] had asked for a decision and we did not see a need to keep him on fulltime or hire him and he needed to know whether or not that was going to happen."

Jordan, and Risley were still employed in Respondent's machine shop on June 30, 2003.[4] There is no evidence as to how long Williams, Jordan, and Risley continued to be employed by Respondent or as to their wage rate.

42) After Complainant's discharge, Respondent did not hire any temporary employees to operate the drill press in the machine shop. Instead, other permanent employees in Respondent's machine shop operated the drill press. Respondent has not hired any permanent, fulltime employees since Complainant's discharge.

43) Peterson Pacific had a substantial slowdown in work in June 2003.

44) Complainant had been optimistic and excited about his job with Respondent. He felt distraught and depressed when he was terminated and experienced heightened anxiety and sleep disturbance because of his discharge. These feelings were "pretty severe" for three weeks, at which time Complainant's anxiety, depression, and sleeplessness returned to their normal levels.

45) Complainant had to borrow money to keep his rental place after his discharge. Complainant collected unemployment benefits and was still collecting unemployment benefits at the time of the hearing.

46) Complainant was depressed and pessimistic and had a lot of negative feelings before going to work for Respondent. He had financial troubles before he started work for Respondent and continued to experience financial troubles after his discharge from Respondent's employment.

47) Respondent referred Complainant back to SSI after discharging him. Complainant went to SSI, where Edwards told Complainant she would find other employment for him. Thereafter, Complainant called SSI every morning until September 10, 2003, when Edwards referred Complainant to a labor job at Rosboro that involved stacking lumber and sweeping up sawdust and veneer chunks. That job was a temporary job on graveyard shift (11 p.m. to 7 a.m.) that paid $13.77 per hour. Complainant worked one hour, then left because of pain in his low back.

48) After Respondent discharged him, Complainant asked about work at Shamrock and was told no jobs were available. Complainant also looked for work with other employers.

49) On or about November 1, 2003, Complainant started work for Chrome World as a CNC machinist. Complainant was paid

[4] The forum infers that Williams, Jordan, and Risley were still working for Respondent as of June 30, 2003, based on Mathews's sworn responses to the Agency's interrogatories in which the Agency asked for "a list of all employees that were laid off during the time period November 1, 2002, through June 30, 2003." Williams, Jordan, and Risley were not listed in Respondent's answer.

$14 per hour. He worked Monday through Friday and started on swing shift before being transferred to day shift. He worked for approximately one month, earning $3,095.75 in gross wages. He was fired on December 1, 2003. He was upset and distressed over being fired.

50) Kelly White, Patricia Edwards, Elizabeth Price, and Grant Higginson were credible witnesses and the forum has credited their testimony in its entirety.

51) Don Mathews gave credible testimony at the hearing, but his sworn answers relating to Respondent's reasons for discharging Complainant that he made in response to the Agency's interrogatories were not credible, for reasons explained in the Opinion. Mathews's testimony at hearing was believed when it was corroborated by other credible testimony, but the forum has not believed the statements he made in his response to the Agency's interrogatories regarding the reasons for Complainant's discharge.

52) Stella Eller was a credible witness. Her testimony about Complainant's medical and emotional state and behavior, both before and after Respondent's employment, was candid and consistent with Complainant's medical records. Her testimony has been credited in its entirety.

53) John Eller, Complainant's stepfather, testified primarily about his observations of Complainant's medical problems and Complainant's reaction to being discharged by Respondent. His testimony regarding Complainant's post-discharge emotional distress corroborated the testimony of Complainant and Stella Eller, his wife and Complainant's mother. However, his testimony was somewhat exaggerated. For example, he described Complainant as being "devastated" at being terminated, adding that "[Complainant] worried himself sick" over it, and further testified that Complainant "frantically" began looking for other work. Neither Complainant nor Stella Eller, who was in a better position to observe Complainant's emotional distress than her husband, described Complainant's emotional distress in such dramatic terms. Consequently, the forum has only credited his testimony regarding Complainant's emotional distress when it was corroborated by the credible testimony of Stella Eller and Complainant.

54) Complainant was extremely soft spoken, difficult to hear, and did not make eye contact with anyone present at the hearing. He expressed no emotion whatsoever in his testimony or demeanor, even when testifying about his emotional distress. With two exceptions, his testimony was internally consistent and consistent with prior statements concerning the issues in the hearing. First, Complainant told the Agency's investigator that he had not used marijuana before the medical marijuana program, whereas he testified at hearing that he used marijuana for six

years before obtaining his OMM card, a fact he also previously reported to at least two physicians. Second, Complainant testified that he reported his OMM card to White about two to three weeks after he was hired, then later testified he reported his card to White one week prior to his discharge. Since Complainant worked seven consecutive weeks (January 23 – March 15, 2003), this creates an inconsistency of three to four weeks. Because Respondent does not dispute the "one week prior" reporting date, the forum has concluded that that Complainant first reported his OMM card to White one week prior to his discharge. The forum has credited all of Complainant's testimony except for these two inconsistencies.

ULTIMATE FINDINGS OF FACT

1) At all times material, Respondent Emerald Steel Fabricators, Inc. was an Oregon employer involved in the manufacturing of steel products and employed six or more employees, including Complainant.

2) From 1992 until the time of hearing, Complainant has continually suffered from an anxiety disorder, panic attacks, nausea, vomiting, and severe stomach cramps that have substantially limited his ability to eat.

3) The Oregon Health Division issued OMM card number 09812 to Complainant on June 11, 2002, with an expiration date of June 11, 2003, based on the recommendation of a licensed physician.

4) On January 23, 2003, Respondent employed Complainant as a drill press operator.

5) Complainant worked an average of 45 hours per week while employed by Respondent. His starting wage was $10 per hour. His work was satisfactory and he was given a raise to $11 per hour on March 1, 2003.

6) Complainant used medical marijuana one to three times per day while employed by Respondent. He never used medical marijuana at work or on Respondent's property. Before March 6, 2003, his supervisor did not suspect that Complainant used marijuana or any other drug.

7) On March 6, 2003, Complainant told White, his supervisor, that he had an OMM card and used medical marijuana for a medical problem. Complainant showed White the paperwork completed by Dr. Leveque as part of Complainant's application for his OMM card. White asked Complainant if he had tried any other medications to deal with his medical problem.

8) White met with Mathews, Respondent's owner, and told him that Complainant had an OMM card and that Complainant used medical marijuana for a medical condition.

9) From the time Complainant told White about his OMM card until Complainant's discharge, neither Mathews nor White asked Complainant if there was anything Respondent could do to help Complainant with his medical

problem or made any additional inquiry about Complainant's medical problem.

10) On March 13, 2003, White discharged Complainant.

11) There was work available for Complainant in Respondent's machine shop through June 30, 2003.

12) Respondent could have reasonably accommodated Complainant.

13) Respondent did not show that providing Complainant with reasonable accommodation would have imposed an undue hardship on the operation of Respondent's business.

14) Respondent did not discharge Complainant because he is a disabled person.

15) Complainant experienced substantial emotional distress for three weeks as a result of his discharge from Respondent's employment.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent was an employer subject to the provisions of ORS 659A.100 to ORS 659A.139.

2) The actions, inactions, statements, and motivations of Donald Mathews and Kelly White are properly imputed to Respondent.

3) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the persons and subject matter herein and the authority to eliminate the effects of any unlawful employment practice found. ORS 659A.800 to ORS 659A.865.

4) At all times material herein, Complainant was a "disabled person" as defined by ORS 659A.100(1)(a).

5) Complainant requested reasonable accommodation for his physical and mental limitations. Respondent violated ORS 659A.112(2)(e) by failing to engage in a meaningful interactive process with Complainant to determine if his limitations could be reasonable accommodated and by not providing him with reasonable accommodation that was available.

6) Respondent violated ORS 659A.112(2)(f).by denying employment opportunities to Complainant based on Respondent's need to make reasonable accommodation to Complainant's physical and mental impairments.

7) Respondent did not discharge Complainant because of his disability in violation of ORS 659A.112(1).

8) Respondent did not apply standards, criteria or methods of administration to Complainant that had the effect of discrimination based on Complainant's disability and did not violate ORS 659A.112(2)(c).

9) Respondent did not apply qualification standards to Complainant that screened him out or tended to screen him out because he was a disabled person and did not violate ORS 659A.112(2)(g).

10) Pursuant to ORS 659A.850, the Commissioner of the Bureau of Labor and Industries has the authority under the facts and circumstances of this case to award Complainant lost wages resulting from Respondent's unlawful employment practice and to award money damages for emotional distress sustained and to protect the rights of Complainant and others similarly situated. The sum of money awarded and the other actions required of Respondent in the Order below are an appropriate exercise of that authority.

OPINION

RESPONDENT WAS COMPLAINANT'S EMPLOYER

In its answer, Respondent raised the defense that SSI, not Respondent, was Complainant's employer. "Employer" is defined in ORS 659A.001(4) as "any person who, in this state, directly or through an agent, engages or uses the personal service of one or more employees, reserving the right to control the means by which such service is or will be performed." A "person" includes a corporation. ORS 659A.001(9). An employer must employ "six or more persons" to be subject to the provisions of ORS chapter 659A.100 to ORS 659A.145. ORS 659A.109.

It is undisputed that SSI was a temporary employment service that hired Complainant and referred him to Respondent, who employed six or more persons, for an interview. SSI paid Complainant's wages, billing Respondent for the amount of Complainant's wages, plus a premium. While Complainant performed work for Respondent, his work was supervised and controlled by Respondent, as were the terms and conditions of his employment. SSI's only appearance at Respondent's workplace while Complainant worked there was to deliver weekly paychecks for Complainant and SSI's other employees. Based on these facts, the forum concludes that Respondent was Complainant's employer.[5]

COMPLAINANT IS A "DISABLED PERSON"

The Agency has alleged that Respondent unlawfully discriminated against Complainant in violation of ORS 659A.112(1), ORS 659A.112(2)(c), ORS 659A.112(2)(e), ORS 659A.112(2)(f), and ORS 659A.112(2)(g). To be protected by those statutes, a Complainant must be a "disabled person." A "disabled person" is "an individual who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impair-

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[5] *See also In the Matter of Servend International, Inc.,* 21 BOLI 1 (2000), *aff'd without opinion, Servend International, Inc. v. Bureau of Labor and Industries,* 183 Or App 533, 53 P3d 471 (2002) (respondent and temporary employment service who referred all temporary employees to respondent were found to be joint employers of complainant under similar circumstances).

ment or is regarded as having such an impairment." ORS 659A.100(1)(a)

A. Complainant has mental and physical impairments.

OAR 839-006-0205(10) defines "physical or mental impairment" as:

> "any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neurological, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin and endocrine; or any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities."

Undisputed testimony by Complainant and his mother and Complainant's medical records established that Complainant has suffered from a number of physiological disorders or conditions and mental or psychological disorders for at least 10 years. Among the conditions and disorders are nausea, severe stomach cramps, and vomiting, which affect the digestive system; anxiety, depression, and panic attacks, which are emotional illnesses; and sleep disorder. Complainant's medical records indicate that his nausea and vomiting have been associated with his anxiety and panic attacks. Complainant's medical records also confirm that Dr. Leveque recommended medical marijuana for him to treat his chronic nausea, stomach cramps, and vomiting. The forum concludes that Complainant's depression, anxiety, panic attacks, sleep disorder, long-term nausea, stomach cramps, and vomiting constitute physical and mental impairments as defined in OAR 839-006-0205(10).

B. Complainant's physical and mental impairments substantially limit one or more of Complainant's major life activities.

ORS 659A.100(2)(a) provides that "[m]ajor life activity includes but is not limited to, self-care, ambulation, communication, transportation, education, socialization, employment and ability to acquire, rent or maintain property. OAR 839-006-0205(6)(a) further provides that "[e]xamples of specific major life activities include, but are not limited to, walking, sitting, standing, lifting, reaching, speaking, interacting with others, seeing, hearing, breathing, learning, sleeping, performing manual tasks, reproduction and working." Complainant's medical records documented that Complainant's anxiety and panic attacks trigger his nausea, stomach cramps, and vomiting, which in turn make it difficult or impossible for him to eat,[6]

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[6] *See Fraser v. Goodale,* 342 F3d 1032, 1039 (9th Cir. 2003), *cert. den.* 541 U.S. 937, 124 S.Ct. 1663,158 L.Ed.2d358 (2004) (under the ADA, "eating is a major life activity").

and that Complainant's sleep disorder causes problems with his sleep. In contrast, although Complainant's medical records revealed a continuing diagnosis of depression, no evidence was presented to show which of Complainant's major life activities, if any, were specifically impacted by his depression.

ORS 659A.100(2)(d) states that " [s]ubstantially limits" means:

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

OAR 839-006-0212 provides additional guidance in determining whether a person is substantially limited. It states:

> "(1) The following factors should be considered in determining whether a person with an impairment is substantially limited in a major life activity:
>
> "(a) The nature and severity of the impairment;
>
> "(b) The length of time an impairment persists or is expected to persist; and
>
> "(c) The permanent or expected long-term effect resulting from the impairment.
>
> "(2) The determination of whether a person is substantially limited in a major life activity must be made on a case-by-case basis."

The medical evidence presented was insufficient for the forum to determine the specific nature and severity of sleep disorder Complainant suffers from,[7] the extent to which his sleeping has been affected and how consistently it has been affected, how long it is expected to persist, and the resultant permanent or expected long-term effect. Consequently, the forum cannot conclude that Complainant is "substantially limited" in his sleeping.[8] In contrast, there was substantial evidence that Complainant's anxiety, panic attacks, nausea, stomach cramps, and vomiting are chronic ongoing conditions that have chronically impaired his ability to eat for at least 10 years. This is a substantial restriction in the manner in which Complainant has been able to eat as compared to the manner under which the average person

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[7] Complainant's medical records showed that his sleep problems ranged from sleeping too much to sleeping too little.

[8] *Fraser, supra,* at 1040 (fact that an impairment causes a person to suffer "some limit" does not mean that the person suffers a "substantial limit").

in the general population eats. There is no evidence that these conditions are likely to go away. The forum concludes that Complainant is substantially limited in the major life activity of eating.

RESPONDENT'S AFFIRMATIVE DEFENSES

Respondent raised four affirmative defenses in its answer that were rejected in a similar medical marijuana case decided by the Oregon Court of Appeals after Respondent filed its answer. *See Washburn v. Columbia Forest Products, Inc.,* 197 App 104, 104 P3d 609 (2005). Those affirmative defenses include the following:

> "Oregon's Medical Marijuana Law does not require employers to accommodate the use of medical marijuana in the workplace or to accommodate off-duty use of medical marijuana in such a fashion that the employee would or could still be affected by such usage while on duty.
>
> "Respondent is not required to accommodate medical marijuana users by permitting them to work in safety-sensitive positions that would or could endanger the safety of themselves, co-workers or the public.
>
> "Respondent is free to require that employees behave in conformance with the Federal Drug-Free Workplace Act of 1988. ORS 659A.127(4). The protections of that Act do not apply to someone illegally using drugs, and marijuana is an illegal drug under Federal Law.
>
> "Oregon law prescribes that ORS 659A.112 be construed to the extent possible in a manner that is consistent with any similar provisions of the Federal Americans with Disabilities Act of 1990, as amended. ORS 659A.139. That Act does not permit the use of marijuana because marijuana is an illegal drug under Federal Law."

At hearing, Respondent conceded that *Washburn*, as it stood at the time of hearing, would result in these four affirmative defenses being denied as a matter of law and did not present any evidence in support of them.

RESPONDENT DISCHARGED COMPLAINANT BASED ON HIS USE OF MEDICAL MARIJUANA

At hearing, Respondent argued that Complainant was discharged because he "ducked" SSI's drug test, and that this constitutes a legitimate, nondiscriminatory reason ("LNDR") for Complainant's discharge. Respondent provided no evidence at hearing to show that Respondent discharged Complainant for this reason. In fact, there was no evidence to establish that Respondent was aware that Complainant had not taken a drug test at SSI at the time Mathews and White made their decision to discharge Complainant. The following two statements by Mathews in Respondent's responses to the Agency's

interrogatory #8 are the only evidence in the record in support of Respondent's argument.

> "Emerald Steel Fabricators did not discharge Mr. Scevers because he suffers from stomach problems. His temporary employment ended because, by his own admission, he could not pass a drug test and comply with our drug policy. If Mr. Scevers had undergone the initial drug screen per our agreement with Staffing Services, Inc. and had failed to pass, or if he had disclosed his marijuana use, he would not have been placed on a work assignment at Emerald Steel."
>
> "We believe that Anthony Scevers intentionally misrepresented his eligibility for a temporary work assignment at Emerald Steel Fabricators by failing to disclose his marijuana use and not completing the pre-placement drug screen at Staffing Services."

There is no evidence Complainant stated he could not pass a drug test or that he was even aware of Respondent's drug policy, as that policy was not provided to employees until a conditional job offer was made to them, and Respondent never made a conditional job offer to Complainant. Furthermore, Mathews's statements do not specify that Complainant was discharged for this perceived misrepresentation, only that Respondent believed Complainant had made a misrepresentation.

Although White told Complainant during his initial interview that Respondent required prospective permanent employees to take a pre-employment drug screen before they could be hired as permanent employees, there is no evidence that Complainant was ever asked about drug use by anyone at SSI or Respondent prior to his disclosure of his OMM card to White. Complainant credibly testified that he did not tell anyone at SSI or Respondent when he applied for work that he had an OMM card because he feared he wouldn't be hired if he disclosed this information. Although the evidence was undisputed that Respondent's agreement with SSI required SSI to drug test all employees, there was no evidence that either SSI or Respondent asked Complainant to take a drug test or that Complainant took any deliberate action to evade taking a drug test.

To sum up the relevant facts, on March 6, 2003, Complainant told White that he used medical marijuana for a medical problem and showed him Dr. Leveque's written statement that Complainant had the debilitating medical conditions of "severe nausea," "vomiting," and "chronic cramps." Complainant said he hoped to be hired as a regular employee by Respondent and needed White to be aware of his medical problem, and that he hoped this information

would not get him fired. Up to that time, Complainant's work was satisfactory, Respondent had no problems with his work, and White had no suspicions that Complainant was used marijuana or any other drug. White then told Mathews that Complainant had an OMM card, that Complainant used medical marijuana for a medical condition and said medical marijuana was the only drug he could take that alleviated his medical problem, that Complainant hoped to be hired as a permanent employee, and that Complainant was doing a reasonably good job. Mathews and White discussed whether Complainant would be hired and decided there was no need to keep Complainant on full time or hire him as a regular employee. When White next talked to Complainant about employment with Respondent, he told Complainant that his services were no longer needed.

In addition to Respondent's failed LNDR argument, Respondent argued alternatively that work had slowed down and Complainant's services were no longer needed. This argument is undercut by credible evidence that Respondent hired three more temporary employees through SSI to work in its machine shop within five weeks of Complainant's discharge to perform work that Complainant had the skills to perform and these employees continued to work until at least June 30, 2003.[9]

The foregoing evidence points overwhelmingly to one conclusion – Respondent discharged Complainant solely because he disclosed his use of medical marijuana. There is no credible evidence that Respondent relied on any other factor in its decision to discharge Complainant.

Respondent's discharge of Complainant based on his use of medical marijuana is not a *per se* violation of ORS 659A.112(1). In pertinent part, ORS 659A.112(1) provides: "It is an unlawful employment practice for any employer to * * * discharge from employment * * * because an otherwise qualified person is a disabled person." Mathews and White were both aware that Complainant used medical marijuana for his medical problems, and Complainant gave Dr. Leveque's note to White. However, there is no evidence to show either that Mathews was even aware of Complainant's specific medical problems or of any intent on White's part to discharge Complainant because of those medical problems. Rather, all the evidence points to the fact that Respondent discharged Complainant solely because he used medical marijuana, not because of his physical or mental impairments that qualify him as a "disabled person" under ORS 659A.100(1)(a). This is not a vio-

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[9] *See* Findings of Fact 10, 41 – The Merits, *supra*.

lation of the discharge prohibition in ORS 659A.112(1). Although the forum has concluded that Respondent did not violate ORS 659A.112(1) by discharging Complainant, this conclusion does not resolve the Agency's allegations that Respondent failed to reasonably accommodate Complainant's known physical or mental limitations and denied him employment opportunities based on Respondent's need to make reasonable accommodation to Complainant's physical or mental impairments.

REASONABLE ACCOMMODATION

ORS 659A.112(2) provides in part that "[a]n employer violates subsection (1) of this section if the employer does any of the following:"

> "(e) The employer does not make reasonable accommodation to the known physical or mental limitations of an otherwise qualified disabled person who is a job applicant or employee, unless the employer can demonstrate that the accommodation would impose an undue hardship on the operation of the business of the employer.
>
> "(f) The employer denies employment opportunities to a job applicant or employee who is an otherwise qualified disabled person, if the denial is based on the need of the employer to make reasonable accommodation to the physical or mental impairments of the employee or applicant."

The Agency alleged that Respondent violated subsection (2)(e) by failing "to make reasonable accommodation or to engage in interactive dialog regarding reasonable accommodations for the known physical or mental limitations of Complainant." ORS 659A.139 provides that "ORS 659A.112 to 659A.139 shall be construed to the extent possible in a manner that is consistent with any similar provisions of the federal Americans with Disabilities Act, as amended." 42 U.S.C. § 12112(b)(5)(A) of the Americans with Disabilities Act ("ADA") is similar to ORS 659A.112(2)(e) and the forum relies in part on federal case law interpreting this provision in the forum's interpretation and application of ORS 659A.112(2)(e).

The Agency further alleged that Respondent violated subsection (2)(f) by its "denial of employment to Complainant * * * based on Respondent's need to make reasonable accommodation for Complainant's known physical or mental impairments."

A. Complainant was entitled to reasonable accommodation under ORS 659A.112(2)(e).

Reasonable accommodation is required under ORS 659A.112(2)(e) & (f) when an employee is "an otherwise qualified disabled employee." The forum has already determined that Complainant is a "disabled" person. ORS 659A.115 provides that "[f]or the purposes of ORS 659A.112, a disabled person is

otherwise qualified for a position if the person, with or without reasonable accommodation, can perform the essential functions of the position." "Essential functions" are the "fundamental duties of a position a disabled person holds or desires." OAR 839-006-0205(4).

The "position" in this case was drill press operator in Respondent's machine shop, the position that Complainant was initially hired to perform and sought to continue performing. It is undisputed that Complainant performed all the duties of this position in a satisfactory manner during his employment with Respondent, making him an "otherwise qualified disabled person."

An employer's duty to reasonably accommodate an employee or job applicant is triggered when an employee or applicant requests accommodation or when the employer recognizes the need for accommodation. *Stamper v. Salem-Keizer School District,* 195 Or App 291, 97 P3d 680 (2004), *citing Barnett v. U.S. Air, Inc.,* 228 F3d 1105 (9th Cir. 2000), *vac'd on other grounds sub nom U.S. Airways, Inc. v. Barnett,* 535 U.S. 391, 122 S.Ct 1516, 152 L.Ed.2d 589 (2002).

When an employee requests accommodation, the employee must let the employer know that the employee needs an adjustment or change at work for a reason related to a medical condition. The employee need not mention the ADA, Oregon laws protecting disabled persons, or the term "reasonable accommodation."[10] In this case, Complainant told his supervisor that he used medical marijuana for a medical problem and disclosed his problem as "severe nausea and vomiting" and "chronic cramps" while inquiring if this would affect his chances at permanent employment. Under Oregon law, this constituted a request for reasonable accommodation.

B. <u>Respondent violated ORS 659A.112(2)(e) by failing to engage in a meaningful interactive process with Complainant.</u>

The Agency alleges that Respondent's failure to engage in an "interactive dialog" with Complainant regarding his need for accommodation was a *per se* violation of ORS 659A.112(2)(e). Although neither ORS chapter 659A nor BOLI's administrative rules specifically mention or require an "interactive dialog" as part of an employer's duty to reasonable accommodate a disabled person, the Oregon Court of Appeals provided guidance on this issue in *Stamper*.

In *Stamper,* a teacher alleged discrimination based on the school district's failure to reasonably accommodate his disability

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[10] *See, e.g., Schmidt v. Safeway, Inc.,* 864 F. Supp 991, 997 (D. Or. 1994) ("the [ADA] does not require the plaintiff to speak any magic words before he is subject to its protections.")

under the Americans with Disabilities Act ("ADA") and ORS 659.112. One of the issues before the court was plaintiff's allegation that the school district unreasonably refused to engage in a meaningful interactive process concerning how his disability might be accommodated. The court noted that neither Oregon law nor BOLI administrative rules specifically require an "interactive process," then stated that the Ninth Circuit Court of Appeals[11] and other federal courts have held that the ADA's reasonable accommodation provisions require employers to engage in a meaningful interactive process with employees who have a disability and seek an accommodation. *Stamper* at 297. The court did not specifically discuss whether Respondent's several offers of accommodation to Complainant constituted engagement in a "meaningful interactive process," but impliedly held that ORS 659A.112 requires an employer to engage in a meaningful interactive process with an employee who seeks accommodation for a disability. This forum adopts the same standard.

In this case, Complainant used medical marijuana as a physician recommended, as a legal palliative measure for his disability. He was in the same position as any other person with a disability who has to take prescribed medication on a regular basis to cope with their disability. He disclosed his use of medical marijuana to White, his supervisor, because he hoped to obtain permanent employment with Respondent and knew that Respondent required prospective employees to pass a drug test. At the time he disclosed his use of medical marijuana to White, he also disclosed his disability by showing White documentation that he used medical marijuana for the debilitating medical conditions of severe nausea, vomiting, and chronic cramps. At this point of disclosure, Respondent became legally obligated to engage in a meaningful interactive process with Complainant to see if reasonable accommodation was possible. This did not happen. Instead, Respondent's sole inquiry before discharging Complainant was whether Complainant had tried any medication other than marijuana for his medical conditions. Respondent's failure to engage in a meaningful interactive process to determine if Complainant's disability could be reasonably accommodated constitutes a violation of ORS 659A.112(2)(e).

In its exceptions, Respondent implies that the interactive process would have been fruitless because no reasonable accommodation was possible. As discussed below, the Agency presented evidence that reasonable accommodation was possible. In addition, Respondent misses a critical point. Engaging in a

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[11] *See Barnett v. U.S. Air, Inc.,* 228 F3d 1105 (9th Cir. 2000), *vac'd on other grounds sub nom U.S. Airways, Inc. v. Barnett,* 535 U.S. 391, 122 S.Ct 1516, 152 L.Ed.2d 589 (2002).

meaningful interactive process is the mandatory first step in the process of reasonable accommodation, and failure to engage in that process is a *per se* violation of ORS 659A.112(2)(e), regardless of whether Respondent was ultimately able to provide Complainant with a reasonable accommodation.

C. Respondent violated ORS 659A.112(2)(e) by failing to reasonably accommodate Complainant.

In the context of this case, "reasonable accommodation" is a change in working conditions made for an "otherwise qualified disabled employee" so that the employee can perform the essential functions of the job. Although the steps that an employer must take to make "reasonable accommodation" are not specifically set out in ORS chapter 659A, ORS 659A.118(1) provides some examples of actions an employer may take that constitute reasonable accommodation. Those include:

> "(a) Making existing facilities used by employees readily accessible to and usable by disabled persons.
>
> "(b) Job restructuring, part-time or modified work schedules or reassignment to a vacant position.
>
> "(c) Acquisition or modification of equipment or devices.
>
> "(d) Appropriate adjustment or modification of examinations, training materials or policies.
>
> "(e) The provision of qualified readers or interpreters."

The administrative rules promulgated by BOLI interpreting Oregon's employment disability laws further define "reasonable accommodation" to mean "modifications or adjustments:"

> "(a) To a job application process that enable a qualified disabled applicant to be considered for the position;
>
> "(b) To the work environment, or to the manner or circumstances under which a position is customarily performed, that enable a qualified, disabled person to perform the position's essential functions; or
>
> "(c) That enable a covered entity's disabled employee to enjoy equal benefits and privileges of employment as are enjoyed by similarly situated, non-disabled employees."

OAR 839-006-0205(11). OAR 839-006-0206 also provides examples of reasonable accommodation, but these are of little help, as they merely parrot the examples set out in ORS 659A.118.

Respondent argues in its exceptions that the Agency presented no evidence that there was any reasonable accommodation available for Complainant. Respondent is in error. First, the Agency established through the testimony of White and Complain-

ant that Complainant performed his job duties satisfactorily for seven weeks without any accommodation whatsoever. This establishes that the accommodation of simply allowing Complainant to continue his employment was available. Respondent's defense to this accommodation was to demonstrate that it posed an "undue hardship on the operation of [its] business[.]" ORS 659A.112(2)(e). Respondent presented no evidence in support of that defense. Second, the forum draws an inference from evidence presented by Respondent concerning its drug testing policy and the use of illegal drugs by its employees that a second accommodation was available.[12] The primary concern raised by Respondent at hearing was whether Complainant was using illegal drugs that would have been detected through Respondent's or SSI's drug tests. One way of satisfying Respondent's concern and reasonably accommodating Complainant would have been to require Complainant to take SSI's standard drug test that SSI usually conducted on employees referred to Respondent. If SSI's test showed no illegal drugs other than marijuana, which Complainant was authorized to use under Oregon law, Respondent could allow Complainant to continue his temporary employment so long as there was work for him, then engage in an interactive dialog with Complainant to address any concerns about how Complainant's off-duty use of medical marijuana related to his work. This accommodation fits within the scope of "appropriate adjustment or modification of examinations" in ORS 659A.118(1)(d) and "modifications or adjustments" to "a job application process that enable a qualified disabled applicant to be considered for the position" in OAR 839-006-0205(11)(a) and would have also applied to Respondent's potential consideration of Complainant as a permanent employee. Again, Respondent provided no evidence that this procedure would have caused an "undue hardship" to Respondent's business.

In conclusion, Respondent violated ORS 659A.112(2)(e) by failing to make reasonable accommodation to Complainant's known physical or mental limitations.

D. <u>Respondent violated ORS 659A.112(2)(f) by denying Complainant employment opportunities based on Respondent's need to make reasonable accommodation to Complainant's physical and mental impairments.</u>

Complainant disclosed his use of medical marijuana and related disability to White because he hoped to become a permanent employee and was aware he

[12] *See In the Matter of Labor Ready Northwest, Inc.,* 23 BOLI 156, 202 (2002), *appeal pending* ("[P]roof includes both facts and inferences.")

would need to pass a drug test if Respondent decided to extend a job offer to him. At that point, Respondent was put on notice that Complainant required reasonable accommodation in order to continue his employment, as a positive drug test for marijuana, an illegal drug in Oregon[13] except when used under the provisions of the OMMA, automatically disqualified applicants from employment with Respondent. It is undisputed that Complainant's work was satisfactory up to the point of his discharge, and that Respondent had actually given him a raise. White, Complainant's supervisor, testified that Complainant's use of marijuana did not affect Complainant's work in an observable manner. Instead of engaging in an interactive process with Complainant to determine if reasonable accommodation was possible, Respondent inquired only whether Complainant had tried any other medications for his disability, then discharged him because he used medical marijuana.

In this case, "employment opportunities" included both Complainant's temporary employment and the possibility of permanent employment with Respondent. Credible evidence in the record shows that a temporary employment opportunity was available for Complainant through at least June 30, 2003. There is no reliable evidence to show whether Complainant would have been hired as a permanent employee.

Respondent admits, and the forum has concluded, that Respondent discharged Complainant based on his use of medical marijuana, a drug that Complainant legally used to enable him to cope with his physical and mental impairments. Since Respondent was unwilling to employ someone who used marijuana, this created a "need" for Respondent to make reasonable accommodation for Complainant's physical or mental impairments so that Complainant could continue his "employment opportunity" as a temporary employee. Respondent, unwilling to meet this need, summarily terminated Complainant's temporary employment opportunity and violated ORS 659A.112(2)(e).

RESPONDENT DID NOT VIOLATE ORS 659A.112(2)(C) OR ORS 659A.112(2)(G)

The Agency also alleged in its Formal Charges that Respondent violated ORS 659A.112(2)(c) and ORS 659A.112(2)(g). Those two subsections provide that "[A]n employer violates subsection (1) of this section if the employer does any of the following:

> "(c) The employer utilizes standards, criteria or methods of administration that have the effect of discrimination on the

[13] ORS 475.992(4) makes persons "in unlawful possession of less than one avoirdupois ounce of the dried leaves, stems and flowers of the plant Cannabis family Moraceae" guilty of a "violation" and subject to a fine or "not less than $500 and not more than $1,000."

basis of disability, or that perpetuate the discrimination of others who are subject to common administrative control."

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

The Agency contends that Respondent violated ORS 659A.112(2)(c) by "apparently assum[ing], when the record was to the contrary, that Complainant was unable to perform the essential functions of his job, that Complainant had job safety issues, that Complainant was intoxicated or under the influence of marijuana while performing his job, or that Complainant could not pass a drug screening test." The Agency contends that Respondent violated ORS 659A.112(2)(g) in that "[a]cting on the apparent assumptions detailed [in the previous sentence] amounts to use of qualification standards that screen out or tend to screen out a disabled person, with no showing that the standard is job related and consistent with business necessity * * *."

The Agency's allegation is based on the Agency's theory that Respondent acted on certain assumptions when it took actions towards Complainant that resulted in Complainant's discharge, and that those assumptions were "standards, criteria or methods of administration" or "qualification standards, employment tests or other selection criteria." There is no credible evidence in the record to support a conclusion that Respondent assumed that Complainant was unable to perform the essential functions of his job or had job safety issues, that Complainant was intoxicated or under the influence of marijuana while performing his job, or that Complainant could not pass a drug screening test.[14] Without proof that Respondent's discharge of Complainant was based on these assumptions, the Agency cannot prevail in its allegations that Respondent violated ORS 659A.112(2)(c) and ORS 659A.112(2)(g).

DAMAGES

In its Formal Charges, the Agency sought $20,000 in lost wages and $30,000 for emotional distress. The forum awards Complainant lost wages and emotional distress damages based on Respondent's failure to reasonably

[14] In response to the Agency's interrogatory, Mathews stated that "[Complainant's] temporary employment ended because, by his own admission, he could not pass a drug test * * *." The forum has not concluded that Respondent assumed Complainant could not pass a drug test because it did not believe Complainant made that admission to Respondent.

accommodate Complainant, in violation of ORS 659A.112(2)(e), and Respondent's denial of employment opportunities to Complainant based on its need to make reasonable accommodation to Complainant, in violation of ORS 659A.112(2)(f). Damages are not predicated solely on Respondent's failure to engage in a meaningful interactive process with Complainant in violation of ORS 659A.112(2)(3).[15]

A. <u>Lost Wages.</u>

The purpose of a back pay award is to compensate a complainant for the loss of wages and benefits the complainant would have received but for the respondent's unlawful discrimination. *See, e.g., In the Matter of Southern Oregon Subway, Inc.,* 25 BOLI 218, 242 (2004). Where a respondent commits an unlawful employment practice by discharging a complainant, the forum is authorized to award the complainant back pay for the hours the employee would have worked absent the discrimination. *In the Matter of Northwest Pizza, Inc.,* 25 BOLI 79, 88 (2004). A complainant who seeks back pay is required to mitigate damages by using reasonable diligence in finding other suitable employment. *See, e.g., In the Matter of Servend International, Inc*., 21 BOLI 1, 30 (2000), *aff'd without opinion, Servend International, Inc. v. Bureau of Labor and Industries,* 183 Or App 533, 53 P3d 471 (2002).

Respondent's records established that, at the time of Complainant's discharge, he worked an average of 45 hours per week at the wage rate of $11 per hour and $16.50 per hour for overtime. He was a temporary employee who had been referred by SSI, with the hope, but no promise, of permanent employment. Up to the time of his discharge, his work had been satisfactory, and he had received one pay raise. There was no evidence that Respondent would have terminated his employment on March 13, 2003, had Complainant not disclosed his use of medical marijuana. From the date of Complainant's discharge to June 30, 2003, Respondent hired three more persons through SSI to work in Respondent's machine shop, and all three were still working as of June 30, 2003. Respondent has hired no permanent employees in its machine shop since Complainant's discharge.

Complainant credibly testified that he actively looked for work after his discharge and that he did not find comparable work until on or about November 1, 2003. There was credible evidence that Respondent experienced a slowdown in the machine shop beginning in June 2003 and no evidence presented as to how long the three temporary employees referred by SSI after

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[15] *See Barnett, supra,* at 1116 ("[E]mployers, who fail to engage in the interactive process in good faith, face liability for the remedies imposed by the statute if a reasonable accommodation would have been possible.")

Complainant's discharge continued to work after June 30, 2003, if at all. The forum declines to speculate as to how long Complainant might have continued to work after June 30, 2003, had he not been discharged, and awards him back pay from March 14 through June 30, 2003. Calculated at $522.50 per week (40 hours at $11 per hour; 5 hours at $16.50 per hour), Complainant would have earned an additional $8,013.50, had he not been discharged. Complainant earned no other income during that time period to offset that award.

B. Emotional Distress.

In determining damages for emotional distress, the commissioner considers a number of things, including the type of discriminatory conduct, and the duration, frequency, and pervasiveness of that conduct. The amount awarded depends on the facts presented by each complainant. *In the Matter of Northwest Pizza, Inc.,* 25 BOLI 79, 89 (2004). A complainant's testimony about the effects of a respondent's conduct, if believed, is sufficient to support a claim for emotional distress damages. *Id*.

The Agency relied on the testimony of Complainant, his mother, and his stepfather to establish emotional distress damages. The forum found Complainant and his mother to be credible witnesses as to the type and extent of Complainant's emotional distress and relies on their testimony to formulate a damage award.

The Agency established that Complainant experienced significantly heightened levels of anxiety, depression, and sleeplessness for three weeks after his discharge, at which time his anxiety, depression, and sleeplessness returned to their normal levels. These are all types of emotional distress for which the Commissioner has previously awarded damages. *See, e.g., In the Matter of Northwest Pizza, Inc.,* 25 BOLI 79, 90 (2004); *In the Matter of Alpine Meadows Landscape,* 19 BOLI 191, 216 (2000). The fact that Complainant suffered from the same symptoms at a reduced level prior to his discharge is not a bar to an award of damages, but the forum must consider that fact in calculating an appropriate award. *See In the Matter of Magno-Humphries,* 25 BOLI 175, 199 (2004); *In the Matter of Entrada Lodge, Inc., amended final order on remand*, 24 BOLI 126, 154 (2003). The Agency also established that Complainant experienced financial troubles as a result of his discharge. However, the Agency did not establish that those troubles caused him any more distress than the continual financial troubles he had experienced since obtaining his OMM card. Consequently, the forum does not consider Complainant's financial difficulties in calculating emotional distress damages.

The forum bases its award of emotional distress damages on Complainant's significantly heightened levels of anxiety, depression, and sleeplessness for

three weeks after his discharge. Because of Complainant's neutral demeanor, almost complete lack of eye contact, and total absence of expression during his testimony, as well as his prior and subsequent history of depression and anxiety, it was difficult to assess his level of emotional distress during those three weeks.

In its Formal Charges, the Agency asked the forum to award $25,000 in emotional distress damages to Complainant. The forum finds that figure to be excessive. Although awards of emotional distress damages are dependent on the facts presented in each case, the forum also strives for consistency with cases presenting similar issues and facts. Here, the forum finds that *Entrada*, a case heard in 2000, presented similar facts to support an emotional distress award. *Entrada* was an OFLA case in which the Complainant was not restored to her pre-OFLA leave position. Complainant was already experiencing considerable stress and acute financial distress at the time Respondent failed to restore her. For three weeks after Respondent failed to restore her, Complainant experienced a heightened stress level that manifested itself in frequent tears, worry, fright, and additional financial distress. The Commissioner awarded $15,000 in emotional distress damages. Based on the similarities between *Entrada* and this case and the fact that *Entrada* is five years old, the forum finds that $20,000 is an appropriate award of emotional distress damages.

RESPONDENT'S EXCEPTIONS

A. Exception 1.

Respondent's first exception disputes the ALJ's characterization that the *Washburn* decision cited in the Proposed Opinion has rendered four of Respondent's affirmative defenses "moot." Because that case is currently on appeal, Respondent is correct. However, until such time as the Supreme Court reverses the Court of Appeals' decision, this forum is bound by the Court of Appeals' decision. The language in the section in the Opinion discussing Respondent's affirmative defenses has been modified to correctly characterize the status of Respondent's four affirmative defenses.

B. Exception 2.

Respondent excepted to the ALJ's conclusion in the Proposed Opinion that "[t]here is no evidence Complainant stated * * * that he was even aware of Respondent's drug policy." Respondent correctly points out that the ALJ concluded in Proposed Finding of Fact 1[6] – The Merits that White told Complainant that Respondent "required prospective employees to take a pre-employment drug screen before they could be hired as permanent employees." These two statements are not mutually exclusive. Respondent's drug policy and the requirement of a pre-employment drug screen are two different things. As stated in the Proposed Opinion and also stated in Proposed Finding of Fact 18 – The

Merits, which Respondent did not contest in exceptions, Complainant was never shown a copy of Respondent's drug policy. Respondent's exception is overruled.

C. Exception 3.

Respondent excepted to the ALJ's statement in the Proposed Opinion that "Respondent violated ORS 659A.112(2)(e) by failing to make reasonable accommodation for [Complainant] [.]". Respondent argued that "[c]omplainant introduced no evidence that there was any reasonable accommodation available for him. * * * Complainant made no showing that there was any fashion in which is [sic] use of medical marijuana could have been accommodated at this job position." Respondent is mistaken. Undisputed evidence that Complainant's job performance prior to his discharge was satisfactory and inferences that can reasonably be drawn by evidence in the record establish the possibility that Respondent could reasonably accommodate Complainant. This is explained in more detail in the Opinion, which has been modified to address Respondent's exception.

D. Exception 4.

Respondent excepted to the ALJ's statements in two different sections of the Proposed Opinion that Complainant would not have failed a drug screening test. In response, the forum has deleted the first statement and modified the second.

E. Exception 5.

Respondent excepted to the proposed award of $20,000 for emotional distress damages. ORS 659A.850(4) authorizes the commissioner to issue an Order requiring a respondent to "[p]erform an act * * * reasonably calculated to carry out the purposes of this chapter, to eliminate the effects of the unlawful practice that the respondent is found to have engaged in, and to protect the rights of the complainant * * *." ORS 659A.103(1) states that "[i]t is the public policy of Oregon to guarantee disabled persons the fullest possible participation in the social and economic life of the state [and] to engage in remunerative employment * * * without discrimination." ORS 659A.103(2) states that "[t]he right to otherwise lawful employment without discrimination because of disability where the reasonable demands of the position do not require such a distinction * * * [is] hereby recognized and declared to be the rights of all the people of this state. It is hereby declared to be the policy of the State of Oregon to protect these rights[.]" The $20,000 award recommended in the Proposed Order is consistent with the purposes set out in ORS 659A.103. It is supported by substantial evidence in the form of credible testimony by Complainant, his mother, and his stepfather and is an appropriate exercise of the commissioner's discretion. Respondent's exception is overruled.

RESPONDENT'S SUPPLEMENTAL EXCEPTION

In a supplemental exception, Respondent asked that the forum consider *Gonzales v. Raich*, 125 S. Ct. 2195 (2005), a medical marijuana case decided after the Proposed Order was issued. Respondent argued that *Raich* supported Respondent's fourth and fifth affirmative defenses. In *Raich*, the U. S. Supreme Court held that Congress has the authority to prohibit the wholly local cultivation of marijuana even if it was used for wholly medicinal purposes pursuant to California law. According to the Oregon Attorney General, *Raich* does not invalidate the OMMA nor require that Oregon repeal the OMMA, and does not oblige Oregon to follow the federal Controlled Substances Act, 21 USC § 801 *et seq.*[16] Accordingly, *Gonzales* does not affect the outcome of this case.

ORDER

NOW, THEREFORE, as authorized by ORS 659A.850, and to eliminate the effects of Respondent's violations of ORS 659A.112(2)(e) and ORS 659A.112(2)(f), and in payment of the damages awarded, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **Emerald Steel Fabricators, Inc.** to:

1) Deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, a certified check payable to the Bureau of Labor and Industries in trust for Complainant Anthony L. Scevers in the amount of:

a) EIGHT THOUSAND THIRTEEN DOLLARS AND FIFTY CENTS ($8,013.50), less appropriate lawful deductions, representing wages lost by Anthony L. Scevers between March 13, 2003, and June 30, 2003, as a result of Respondent's unlawful practices found herein, plus interest at the legal rate on that sum from July 1, 2003, until paid, plus

b) TWENTY THOUSAND DOLLARS ($20,000), representing compensatory damages for emotional distress, plus interest on that sum at the legal rate from the date of the Final Order until paid.

2) Cease and desist from discriminating against any employee or prospective employee based upon the employee's disability.

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[16] Chief Counsel for Oregon Department of Justice, June 17, 2005, letter of advice to Susan M. Allan, Public Health Director, Department of Human Services.

In the Matter of

DESIGN N MIND, INC. and John M. Frost, Jr.

Case No. 09-04

Final Order of Commissioner Dan Gardner

Issued September 16, 2005

SYNOPSIS

The forum found that Respondent Design N Mind, Inc. ("DNM"), a subcontractor, failed to pay four employees the correct prevailing wage rate for the work they performed on a public work and the prime contractor, Select Contracting, Inc. ("Select"), paid the difference between the applicable prevailing wage rates and lower wage rates paid by DNM to its four employees. The forum also concluded that Respondent John M. Frost, Jr., ("Frost") was responsible for DNM's failure to pay the correct prevailing wage rate and consequently placed DNM and Frost on the commissioner's list of contractors or subcontractors ineligible to receive any contract or subcontract for public works for three years. The forum also found DNM liable for $22,000 in civil penalties for DNM's failure to pay the correct prevailing wage to four employees, DNM's having filed six inaccurate payroll records, and DNM's failure to make requested payroll documents available to the Agency for its inspection. ORS 279.350(1); ORS 279.350(2); ORS 279.354; ORS 279.355(2); ORS 279.270; OAR 839-016-0030; OAR 839-016-0035; OAR 839-016-0050((2)(a)(A); OAR 839-016-0010; OAR 839-016-0085; OAR 839-016-0520; OAR 839-016-0530((3)(e).

The above-entitled case came on regularly for hearing before Linda A. Lohr, designated as Administrative Law Judge ("ALJ") by Dan Gardner, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on May 24, 2005, in the W. W. Gregg Hearing Room of the Bureau of Labor and Industries, located at 800 NE Oregon Street, Portland, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Patrick A. Plaza, an employee of the Agency. Design N Mind, Inc. and John M. Frost, Jr., ("Respondents") failed to appear for hearing in person or through counsel.

The Agency called the following witnesses: Dylan Morgan, BOLI Wage and Hour compliance specialist and Duane Barrick, Civil Engineering Tech III for the City of Woodburn, Oregon.

The forum received as evidence:

a) Administrative exhibits X-1 through X-12;

b) Agency exhibits A-1 through A-27 (filed with the Agency's case summary).

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

FINDINGS OF FACT – PROCEDURAL

1) On August 19, 2004, the Agency issued a Notice of Intent to Place on List of Ineligibles and to Assess Civil Penalties ("Notice") alleging that Respondent Design N Mind, Inc. ("DNM") acted as a tiered subcontractor to the prime contractor, Select Contracting, Inc. ("Select"), on the Woodburn Skate Park public work ("Woodburn Project") conducted by the City of Woodburn, a public agency, between March 3 and May 17, 2003. The Agency further alleged that DNM failed to pay $12,674.28 in prevailing wages to four employees who performed manual labor on the Woodburn Project, in violation of ORS 279.350, OAR 839-016-0035, and OAR 839-016-0050(2)(a)(A), and proposed to assess $8,000 as a civil penalty in accordance with ORS 279.370, OAR 839-016-0530(3)(a), and 839-016-0540(3)(a). The Agency further alleged that Respondents DNM and John M. Frost, Jr. ("Frost") filed 11 inaccurate and/or incomplete certified payroll reports between March 2 and May 17, 2003, in violation of ORS 279.354 and OAR 839-016-0010, and proposed to assess $22,000 against DNM as a civil penalty in accordance with ORS 279.370 and OAR 839-016-0530(3)(e). The Agency further alleged that Respondents failed to provide requested records to the Agency in violation of ORS 279.355(2) and OAR 839-016-0030, and proposed to assess a $5,000 civil penalty against DNM in accordance with ORS 279.370 and OAR 839-016-0530(3)(e). The Agency further alleged that Respondents and any firm, corporation, partnership or association in which either of them has a financial interest should be placed on the list of those ineligible to receive contracts or subcontracts for public works ("List of Ineligibles") for a period of three years, pursuant to ORS 279.361 and OAR 839-016-0085, based on DNM's alleged intentional failure to pay wages to workers on the Woodburn Project and Frost's responsibility for that failure to pay. The Agency alleged several aggravating circumstances to support its proposed sanctions.

2) The Agency served the Notice on Respondents on August 19, 2004, by certified mail at 718 NE 16th Court, Gresham, Oregon 97030. The Notice instructed Respondents to make a written request for a contested case hearing within 20 days of the date on which they received the Notice if Respondents wished to exercise their right to a hearing.

3) On September 9, 2004, the Agency issued a Notice of Intent to Issue Final Order by Default that notified Respondents that the Agency planned to issue a Final Order by Default if they did not file an answer and request for hearing by September 20, 2004. The Notice was mailed to Respondents at 718 NE 16th Court, Gresham, Oregon 97030. The Agency subsequently granted Respondents an additional extension until October 1, 2004, to file their answer and request for hearing.

4) Respondents filed an answer and request for hearing by facsimile transmission on October 1, 2004. The answer stated, in pertinent part:

> "Re: John M. Frost, Jr. Case # 09-04
>
> "*Requesting Hearing*
>
> "1 - all employees were paid according to the craft they performed for the majority of their hours for that week
>
> "2 - certified payroll reports were filed by a CPA
>
> "3 - bureaus [*sic*] request for information was via Sharron @ Select Contracting, Inc. All information requested was submitted to Sharron in a timely manner.
>
> "4 – [if] any mistakes were made they were definitely not intentional
>
> "5 - I feel these violations are inaccurate. Prevailing wage information was posted for everyone to see.
>
> "Boli sent me two letters that were copies of what was sent to Select Contracting, Inc.; one stated that they were looking into this matter, the second was stating what the penalties are. Neither letter addressed design n mind, inc. or offer an opportunity for defending our position. It seems appropriate for Select Contracting, Inc. [t]o pay these people seen [*sic*] as they failed to pay their contract with us.
>
> "Your time considering this brief description of our position is much appreciated.
>
> "John M. Frost, Jr.
>
> "Representing John M. Frost, Jr."

5) The Agency filed a request for hearing with the Hearings Unit on January 28, 2005.

6) On February 1, 2005, the Hearings Unit served Respondents with a) a Notice of Hearing that set the hearing for May 17, 2005; b) a Summary of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case hearing process; d) a copy of the Notice of Intent to Place on List of Ineligibles and to Assess Civil Penalties; and e) a copy of the Servicemembers Civil Relief Act Notification.

7) On February 7, 2005, the Hearings Unit issued an interim order notifying the participants of

a change in Administrative Law Judge ("ALJ").

8) On March 31, 2005, the ALJ ordered the Agency and Respondents each to submit a case summary that included: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; and a brief statement of the elements of the claim and any civil penalty calculations (for the Agency only). The ALJ ordered the participants to submit their case summaries by May 6, 2005, and notified them of the possible sanctions for failure to comply with the case summary order.

9) On April 28, 2005, the ALJ issued an order changing the hearing date to May 24, 2005, and extending the case summary due date to May 13, 2005.

10) On April 28, 2005, the Agency moved to amend its Notice to reduce the number of certified payroll violations alleged and the amount of civil penalties sought. Respondents did not file a response and the ALJ granted the motion on May 5, 2005.

11) The Agency timely filed a case summary on May 13, 2005.

12) The U. S. Post Office returned all correspondence mailed by the Hearings Unit to DNM as either "not deliverable" or "insufficient address." The U. S. Post Office did not return the Notice of Hearing mailed by the Hearings Unit to Respondents on February 1, 2005.

13) On May 20, 2005, the Agency filed a second motion to amend its Notice. The Agency sought to "delete the word 'intentional' from page 2, line 20, the word 'intentionally' from page 3, line 20, and incorporate Exhibit A(b) which identifies four of Respondents' former employees and the amounts the Agency contends they were underpaid in prevailing wages for work performed on this Public Works." Respondents did not respond or appear at the hearing and the ALJ granted the motion after the start of hearing on May 24, 2005.

14) On May 24, 2005, at the time set for hearing, Respondents did not appear at the hearing and no one appeared on their behalf. After waiting 30 minutes, the ALJ declared Respondents to be in default and commenced the hearing, pursuant to OAR 839-050-0330(2).

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

16) The ALJ issued a proposed order on August 4, 2005, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. Neither Respondent nor the Agency filed exceptions.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, DNM was an Oregon corporation

operating as a general contractor in Oregon.

2) At all times material herein, John M. Frost, Jr., was DNM's corporate president, corporate secretary, and registered agent.

3) On or about March 28, 2003, the City of Woodburn Public Works Department, a public agency, awarded a public work contract ("Woodburn Project") to Select. When the contract was awarded, DNM was named as a first-tier subcontractor. The federal Davis-Bacon Act did not regulate the contract. The contract amount was $177,389 and the Woodburn Project was subject to regulation under Oregon's prevailing wage rate laws. The specific rates to be paid workers on the Woodburn Project were those set forth in the July 1, 2002 publication titled "Prevailing Wage Rates for Public Works Contracts in Oregon" ("PWR publication"), published by BOLI.

4) From March 3 to April 14, 2003, DNM employed Rufino May-Ek ("Ek"), Abelardo Salazar Teh ("A. Salazar"), Pociano Salazar Teh ("P. Salazar"), and Reyes de Jesus Salazar Caamal ("R. Salazar") to perform manual labor on the Woodburn Project. Most of their work consisted of building wooden forms, pouring and finishing concrete, and placing reinforced steel. Throughout their employment on the Woodburn Project, Ek, P. and R. Salazar were classified as general laborers on DNM's certified payroll records. A. Salazar was classified as a carpenter and as a general laborer on the certified payroll records. All were paid the prevailing wage commensurate with the classifications DNM reported on the certified payroll records.

5) Frost supervised DNM's work on the Woodburn Project each day, prepared and signed certified payroll records for the pay periods ending March 8, March 15, March 22, March 29, April 5, and April 12, 2003, and paid Ek, P., R. and A. Salazar with checks that he wrote and signed on DNM's corporate checking account.

6) On or about April 16, 2003, Ek, P., R. and A. Salazar filed prevailing wage complaints and wage claims with BOLI's Wage and Hour Division in which they claimed that DNM had employed them on the Woodburn Project and failed to pay them the prevailing wage rate for the work they performed as carpenters, cement masons, and ironworkers. All four wage claimants assigned to BOLI the alleged unpaid wages, *i.e.*, the difference between what they actually earned if properly classified and what they were paid.

7) After the complaints and claims were filed, the BOLI Wage and Hour Division began an investigation that included contacting Respondents and the contracting agency to collect information pertaining to the Woodburn Project and to determine whether the employees were properly paid.

8) When a worker performs tasks within multiple classifications on a public work, BOLI

requires employers to either track the actual hours worked in each classification and pay prevailing wages accordingly or pay the worker for the classification with the highest prevailing wage rate for all hours worked.

9) By letter dated April 17, 2003, BOLI compliance specialist Morgan notified the contracting agency that a complaint had been filed. Morgan requested that the contracting agency fill out a "Contracting Agency Information Form" and return it with copies of all certified payroll records submitted by the prime contractor on the Woodburn Project. The contracting agency promptly completed and returned the Contracting Agency Information Form on April 22, 2003, and included the requested certified payroll records and the City of Woodburn – First-Tier Subcontractors Disclosure Form.

10) By letter dated April 21, 2003, Morgan notified Frost that a complaint had been filed alleging that Respondents had failed to pay the correct prevailing wage rates for all employees on the Woodburn Project. Morgan requested that Respondents supply to BOLI "any and all time cards, time records and payroll records for all persons who performed work for [Respondents'] company in relation to [the Woodburn Project]. Morgan advised Respondents that the "records must include hours worked each day, rates of pay, wages paid, withholdings made, job descriptions, last known addresses, and phone numbers * * * [and] must also include copies (front and back) of all cancelled checks paid to the employees in relation to [the Woodburn Project and] specific descriptions of the work performed by each worker." Morgan also requested information pertaining to any hourly fringe rates paid to a third party trust, plan, fund, or program, including copies of cancelled checks showing those payments, if any. Respondents were instructed to provide the information to BOLI no later than May 5, 2003, and were advised that Respondents' failure to respond "will result in additional enforcement action according to the PWR laws."

11) On or about May 7, 2003, Frost contacted Morgan by telephone and requested an extension of time to May 12, 2003, to submit the requested records. Morgan allowed the extension. On May 14, 2003, Frost telephoned Morgan and left him a message indicating that he had compiled most of the records except the cancelled checks and was attempting to secure the checks from two different banks. On May 15, 2003, Morgan returned Frost's call and told him to submit the documents he had in his possession and forward the cancelled checks "by the end of the month." Frost did not submit the documents or cancelled checks to Morgan or anyone else at BOLI at any time thereafter.

12) Morgan evaluated the records provided by the contracting agency and interviewed the

contracting agency's on-site engineer, Duane Barrick, who confirmed that all four wage claimants had performed work properly classified as carpenters, cement masons, and ironworkers. From the payroll records that Frost signed and certified, Morgan determined that DNM classified and paid Ek, P. and R. Salazar as laborers between March 2 and April 12, 2003. He also determined that DNM classified and paid A. Salazar as a carpenter for the work he performed between March 2 and March 29, 2003, and classified and paid him as a laborer for the work he performed between March 30 and April 12, 2003. After computing the wages earned and owed each wage claimant using the applicable prevailing wage rate for the work they actually performed, *i.e.*, carpentry, masonry, and ironwork, Morgan determined that DNM owed $12,674.28 in unpaid prevailing wages.

13) By letter dated July 22, 2003, Morgan notified Select that DNM "has failed to adequately respond to all letters and telephone messages regarding information related to [the Woodburn Project]." The letter also stated in pertinent part:

> "The Bureau has determined DNM failed to properly classify the work performed. Each of the claimants in this matter performed significant work in the classifications of Cement Mason, Carpenter and Ironworker. While an employer may pay differing wage rates appropriate to the work performed, the employer must maintain sufficient records to show when the worker worked in each job class. If an employer fails to keep track of the number of hours worked by each employee in each classification, the employer must pay the rate of wage of the classification with the highest rate for all hours worked in that pay period.
>
> "Although DNM has failed to track and compensate the hours of work at the appropriate classification, the claimants have provided an estimate of the allocation the [*sic*] hours worked within the three classifications named above. The claimants' earnings less wages paid (from records forwarded to the Bureau by your company} constitute unpaid wages. The Bureau has found wages due in the amount of $12,674.28.
>
> "The Bureau's standard procedure at this point is to pursue an amended claim against the prime contractor's performance bond for the wages and liquidated damages. However, we also offer the prime contractor an opportunity to resolve the matter prior to our filing of the claim against the performance bond. If Select Contracting, Inc. promptly pays the wages due, the Bureau will dismiss the liquidated damages. If you decide to pay these wages, a check for the full amount of wages, $12,674.28 must be

received by the Portland office of the Bureau by no later than August 5, 2003. The bureau will then issue individual checks to the employees who performed work on [the Woodburn Project]."

14) Select responded by letter dated July 28, 2003, and enclosed a check (#8149) for $12,674.28 "to resolve the wage issue for [the Woodburn Project]." Thereafter, on BOLI's behalf, Morgan issued individual checks to the wage claimants as follows: Rufino May Ek, in the amount of $3,399.73; Reyes de Jesus Salazar Caamal, in the amount of $3,558.66; Abelardo Salazar Teh, in the amount of $2,175.30; and Ponciano Salazar Teh, in the amount of $3,540.59.

15) Morgan and Barrick were credible witnesses. Both had knowledge of key facts and gave straightforward, unbiased testimony. Barrick, an engineer and the contracting agency representative, was present on the Woodburn Project site each day that the wage claimants performed their duties and observed first hand the type of work they performed. He credibly identified each of them and confirmed their status as Respondent DNM's employees. Moreover, Barrick credibly testified that Respondent Frost regularly worked on the Woodburn Project and appeared to be supervising during that time. Morgan reasonably relied on Barrick's credible observations and knowledge of the Woodburn Project site to confirm the information he obtained from other sources. The forum has credited Morgan's and Barrick's testimony in its entirety.

ULTIMATE FINDINGS OF FACT

1) At times material, DNM was a first-tier subcontractor on the Woodburn Project for the City of Woodburn.

2) At times material, Frost was DNM's corporate president, secretary, and registered agent.

3) Between March 2 and April 12, 2003, DNM employed four workers on the Woodburn Project who performed substantial work in the classifications of Cement Mason, Carpenter, and Ironworker as defined in the July 1, 2002, PWR publication.

4) Between March 2 and April 12, 2003, Frost, on DNM's behalf, submitted payroll records to the contracting agency that he certified were accurate and complete. Each payroll record indicated that he had classified and paid the four workers as Laborers. One of the four was also classified and paid as a Carpenter for a four-week period.

5) On April 16, 2003, the four workers filed complaints and wage claims with the Agency alleging that DNM had misclassified them as laborers and had paid them less than the applicable prevailing wage rate for the work they performed.

6) As a result of the complaints and wage claims, the Agency conducted an investigation that included requesting that

DNM submit for inspection all payroll records pertaining to the four workers and the Woodburn Project. Frost, acting on DNM's behalf, negotiated time extensions for submitting the requested records but failed to provide them to the Agency.

7) The four workers were improperly classified as Laborers, performed multiple tasks as Carpenters, Cement Masons, and Ironworkers, and should have been paid the applicable prevailing wage for each classification or the highest applicable prevailing wage for all of their work. The difference between what DNM paid the four workers and the amount they earned at the applicable prevailing wage for the work they performed on the Woodburn Project is $12, 674.28.

8) Select issued a check to BOLI in the amount of $12, 674.28 in payment for the wages DNM owed to the four workers.

9) Frost supervised DNM's workers on the Woodburn Project and was responsible for the information provided in DNM's payroll records and signed DNM's payroll checks.

CONCLUSIONS OF LAW

1) DNM was a subcontractor that employed workers upon a public work in Oregon and was subject to the provisions of ORS 279.348 to 279.365.

2) The actions, inaction, statements, and motivations of Frost, DNM's president and owner, are properly imputed to DNM.

3) The Commissioner of the Bureau of Labor and Industries has jurisdiction over Respondents and the subject matter herein. ORS 279.348 to 279.380.

4) DNM failed to pay four of its workers the amounts required under ORS 279.350(1) and Select paid those amounts on DNM's behalf, which subjects DNM to the provisions of ORS 279.361(1).

5) Frost was responsible for DNM's failure to pay the applicable prevailing wage rate to four of DNM's workers on the Woodburn Project that resulted in Select paying the four workers on DNM's behalf, and is subject to the provisions of ORS 279.361(1).

6) Pursuant to ORS 279.361(1) and (2), the Commissioner is required to place Respondents on the list of contractors and subcontractors ineligible to receive any contract or subcontract for public works for a period not to exceed three years from the date of publication of their names on the list ("List of Ineligibles").

7) The Commissioner's decision to place Respondents on the List of Ineligibles for a period of three years based on their violations of ORS 279.350(1) is an appropriate exercise of his discretion. ORS 279.361(1) and (2).

8) DNM filed certified payroll reports for the Woodburn Project that did not accurately set forth the correct classification and pay rate for four of its workers for weeks between March 2 and April

12, 2003, in violation of ORS 279.354.

9) DNM failed to make available for the Agency's inspection requested payroll records that the Agency deemed necessary to determine if the correct prevailing wage rate was paid to four workers on the Woodburn Project, in violation of ORS 279.355(2).

10) Pursuant to ORS 279.370, and in addition to any other penalty provided by law, the Commissioner has the authority to assess civil penalties not to exceed $5,000 for each violation of any provision of ORS 279.348 to 279.380 or any rule adopted pursuant thereto. Under the facts and circumstances of this record, the Commissioner's imposition of civil penalties for DNM's four violations of ORS 279.350(1), six violations of ORS 279.354, and one violation of ORS 279.355(2) is an appropriate exercise of his authority. ORS 279.370.

OPINION

DEFAULT

Respondents failed to appear at hearing and the forum found them in default pursuant to OAR 839-050-0330. Thus, the Agency needed only to establish a prima facie case on the record to support the allegations in its charging document. *In the Matter of Bruce D. Huhta*, 21 BOLI 249, 257 (2001), *citing In the Matter of Sealing Technology, Inc.*, 11 BOLI 241, 249-50 (1993). Respondents' only contribution to the record was the answer filed with the request for hearing. Although the forum may consider the answer when making factual findings, unsworn and unsubstantiated assertions in the answer are overcome whenever controverted by other credible evidence. *Id.* at 257. Having considered all of the evidence in the record, the forum concludes the Agency presented a prima facie case that supports all of its allegations and is not controverted or overcome by Respondents' assertions in their answer.

DNM FAILED TO PAY FOUR WORKERS AMOUNTS REQUIRED BY ORS 279.350 AND THE PRIME PAID THOSE AMOUNTS ON DNM'S BEHALF

To establish a prima facie case, the Agency was required to present reliable evidence that (1) the project at issue was a public work, as that term is defined in ORS 279.348(3); (2) DNM was a subcontractor that employed workers on the public work whose duties were manual or physical in nature; (3) DNM failed to pay those workers the amounts required by ORS 279.350; and (4) Select, the prime contractor, paid those workers on DNM's behalf. Elements (1) and (2) are undisputed. The remaining elements are conclusively established by credible evidence in the record.

A. DNM failed to pay the correct prevailing wage rate to four workers as required by ORS 279.350.

Barrick, the contracting agency's representative, credibly testified that he was on the

Woodburn Project site almost every day and observed all four workers (Ek, A., P., and R. Salazar) regularly performing carpentry, masonry, and ironwork. The payroll records, certified by DNM president Frost, show that DNM classified and paid one worker as a laborer or carpenter and three other workers as laborers for all of the work they performed on the Woodburn Project between March 2 and April 12, 2003. Respondents did not appear at hearing to refute Barrick's testimony and their unsubstantiated assertion in their answer that "all employees were paid according to the craft they performed for the majority of their hours for that week" does not negate the credible contrary evidence.

B. Select paid the amounts DNM owed to DNM's four workers.

Respondents tacitly acknowledge in their answer that Select paid DNM's workers, stating: "It seems appropriate for Select Contracting, Inc. to pay these people seen [*sic*] as they failed to pay their contract with us." This tacit acknowledgement, coupled with Morgan's testimony and evidence showing that Select provided BOLI with a check in the amount of $12,674.28 that BOLI distributed amongst the four workers, establishes conclusively that Select paid to the four workers the amount of unpaid prevailing wages owed for work they performed on the Woodburn Project.

DNM Filed Inaccurate Or Incomplete Certified Payroll Records

ORS 279.354(1) provides that every contractor and subcontractor shall file certified payroll statements that "set out accurately and completely the payroll records for the prior week including * * * the worker's correct classification [and] rate of pay." *See also* OAR 839-016-0010(1)(providing that a contractor or subcontractor must complete and submit a payroll and certified statement form that "accurately and completely set[s] out the contractor's or subcontractor's payroll for each week during which the contractor or subcontractor employs a worker upon a public work.")

In this case the Agency alleged and evidence shows that the payroll records for the weeks of March 2-8, 2003, March 9-15, 2003, March 16-22, 2003, March 23-29, 2003, March 30 to April 5, 2003, and April 6-12, 2003, failed to include the correct classification and pay rate for Ek, P., R., and A. Salazar. Credible evidence established that the correct classifications for each worker were Cement Mason, Carpenter, and Ironworker, and that each worker should have been paid a higher rate than the amount DNM reported it paid them while misclassifying them as laborers. Thus, the forum concludes that DNM's payroll records for those periods were inaccurate and incomplete, in violation of ORS 279.354(1).

DNM FAILED TO MAKE AVAILABLE TO THE COMMISSIONER FOR INSPECTION ITS CERTIFIED PAYROLL RECORDS

ORS 279.355(2) provides that:

> "Every contractor or subcontractor performing work on public works shall make available to the commissioner for inspection * * * upon request made a reasonable time in advance any payroll or other records in possession or under the control of the contractor or subcontractor that are deemed necessary by the commissioner to determine if the prevailing rate of wage is actually being paid by the contractor or subcontractor to workers upon public works."

See also OAR 839-016-0010(4)(providing that certified payroll statements are "public records" that "must be made available upon request.")

The Agency alleged and evidence shows that DNM was asked on several occasions to provide its payroll records to the Agency for inspection. Agency compliance specialist Morgan credibly testified that he contacted Respondents through letters and by telephone asking for information related to the investigation. He also testified that, although Frost negotiated several extensions of time with which to provide the records, Frost ultimately failed to provide the requested information. For those reasons, the forum concludes that DNM failed to make its payroll records available for inspection in violation of ORS 279.355(2).

LIST OF INELIGIBLES

Based on the credible evidence in the record, the forum has found that Select paid DNM's four workers wage amounts owed by DNM to those workers and that Frost was responsible for DNM's failure to pay the correct amounts owed to those workers. Under those circumstances, the Commissioner is required to place DNM and Frost on the List of Ineligibles. ORS 279.361(1) and (2). To determine the length of time Respondents' names should remain on the List of Ineligibles, the forum may consider mitigating and aggravating circumstances. *In the Matter of Venus Vincent*, 24 BOLI 155, 167 (2003).

In this case, Respondents did not allege and the forum finds no mitigating circumstances. The Agency, however, alleges that Respondents' violations are aggravated because they knew or should have known of the violations and avoiding the violations would not have been difficult. Additionally, the Agency alleges that Respondents knew of the requirement to pay the prevailing wage rate for designated classifications, had the information necessary to pay the applicable prevailing wage rate, and failed to pay the applicable prevailing wage rate despite their knowledge. For those reasons, the Agency seeks to place Respondents on the List of Ineligibles for a three-year period.

The credible evidence showing that Frost, DNM's corporate officer, was actively and regularly engaged on the Woodburn Project site, entered and certified all of the information contained within the payroll records, and wrote out the checks payable to DNM's workers on DNM's corporate account, adequately supports the Agency's aggravation claims. Frost's actions and knowledge are properly imputed to DNM and the forum concludes that placing both Respondents on the List of Ineligibles for three years is appropriate under these circumstances.

CIVIL PENALTIES

ORS 279.370 authorizes the commissioner to impose a civil penalty not to exceed $5,000 for each violation of the prevailing wage rate laws. *See also* OAR 839-016-0540(1). When determining the civil penalty amount, the commissioner must consider the mitigating and aggravating circumstances set forth in OAR 839-016-0520(1). OAR 839-016-0520(1). DNM is responsible for providing the commissioner with evidence of any mitigating circumstances set forth in section (1) of the rule, but has not done so in this case. OAR 839-016-0520(2). Therefore, the forum has considered only the aggravating circumstances to determine the appropriate penalty.

First, the Agency seeks $2,000 for each of DNM's four alleged violations of ORS 279.350(1). For violations of ORS 279.350(1), which requires payment of the correct prevailing wage, the minimum civil penalty per violation is $1,000 or the amount of unpaid wages, whichever is less. OAR 839-016-0540(3)(a). The Agency is seeking more than the minimum civil penalty and, thus, must establish aggravating circumstances to justify the increased amount.

In this case, the Agency presented reliable evidence that establishes DNM knew or should have known of its violations. DNM's president, Frost, knew of and regularly performed work on the subcontract and supervised the workers at the job site, so he knew or should have known the type of work DNM's workers performed each day. He prepared and signed all of the payroll records and must have known the records contained information contrary to his own knowledge of the job site. Moreover, DNM had ample opportunity to avoid the violations by correctly classifying its employees based on the work they were performing. The violations are serious because they resulted in an underpayment to four DNM workers that Select ultimately paid on DNM's behalf. In fact, the violations are so serious that they require placing Respondents on the list of ineligibles.

Having considered the evidence presented, the forum concludes that $2,000 per violation, for a total of $8,000, is an appropriate civil penalty for DNM's four violations of ORS 279.350(1).

Second, the Agency seeks $2,000 for each of six violations as a civil penalty for DNM's failure

to file complete and accurate certified payroll records on the Woodburn Project, in violation of ORS 279.354. For the same reasons set forth above, the forum finds the Agency established that DNM, through its corporate president, knew or should have known the correct classification and prevailing wage rate for its four workers and despite its knowledge, misclassified and underpaid each. DNM submitted certified payroll records for the pay periods ending March 8, March 15, March 22, March 29, April 5, and April 12, 2003, that show DNM misclassified and underpaid its four workers as laborers, constituting six separate violations.

The violations are serious because the failure of subcontractors to maintain and provide required records undermines the Agency's ability to ensure that laborers on Oregon public works projects are paid the wages to which they are statutorily entitled. *In the Matter of William George Allmendinger*, 21 BOLI 151, 171-72 (2001).

Having considered the evidence presented, the forum concludes that $2,000 per violation, for a total of $12,000, is an appropriate civil penalty for DNM's six violations of ORS 279.350(1).

Third, the Agency seeks a $5,000 civil penalty for DNM's failure to make requested payroll records available to the Agency during its investigation of the complaints and wage claims filed against Respondents on the Woodburn Project, in violation of ORS 279.355(2). As aggravation, the Agency alleges that DNM's failure to cooperate by providing requested records "made it difficult to make an accurate determination." Additionally, evidence shows that it should not have been difficult for DNM to provide the records the Agency requested because it was legally obligated to make and maintain them. See OAR 839-016-0025. DNM knew or should have known of the request because the Agency's request for records was directed to DNM's president and secretary, Frost, who subsequently asked for and received several extensions of time to provide them to the Agency.

Although the violation is serious because, as previously stated, a subcontractor's failure to provide requested records undermines the Agency's ability to enforce the prevailing wage laws and ensure that workers are properly paid, the forum does not agree that $5,000 for the single violation is appropriate. The forum imposes that penalty when the violations are widespread and are of considerable magnitude, usually due to the number of workers affected by the violation. Additionally, in those cases that the forum imposed the maximum penalty, the subcontractor was found to have never filed certified payroll records as required. *See, e.g., In the Matter of Johnson Builders, Inc.*, 21 BOLI 103, 128-29 (2000). In this case, DNM filed certified payroll records each week for the duration of the

Woodburn Project and the Agency received those records from the contracting agency and eventually determined the amount of unpaid wages owed to DNM's four workers. However, that fact does not outweigh the aggravating circumstances found in this case and the forum finds that a penalty of $2,000 is commensurate with the facts in evidence that show DNM had ample opportunity to comply with ORS 279.355(2) and could have done so without undue difficulty, but failed to do so.

ORDER

NOW, THEREFORE, as authorized by ORS 279.361, the Commissioner of the Bureau of Labor and Industries hereby orders that Respondents **Design N Mind, Inc.** and **John M. Frost, Jr.** and any firm, corporation, partnership, or association in which they have a financial interest shall be ineligible to receive any contract or subcontract for public works for three years from the date of publication of their names on the list of those ineligible to receive such contracts maintained and published by the Commissioner of the Bureau of Labor and Industries.

FURTHERMORE, as authorized by ORS 279.370, and as payment of the penalties assessed as a result of its violations of ORS 279.350(1), ORS 279.354, and ORS 279.355(2), the Commissioner of the Bureau of Labor and Industries hereby orders **Design N Mind, Inc.** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, the following:

> A certified check payable to the Bureau of Labor and Industries in the amount of TWENTY TWO THOUSAND DOLLARS ($22,000), plus interest at the legal rate on that sum between a date ten days after the issuance of the final order and the date Respondent **Design N Mind, Inc.** complies with the Final Order.

In the Matter of

STORM KING CONSTRUCTION, INC.,

Case No. 99-05

Final Order of Commissioner Dan Gardner

Issued September 16, 2005

SYNOPSIS

Respondent failed to complete and return BOLI's 2001 and 2002 prevailing wage rate survey and returned BOLI's 2004 prevailing wage rate survey six months after the filing deadline. The Agency proved aggravating circumstances and there were no mitigating circumstances. The Commissioner imposed a $250 civil penalty for each of Respondent's 2001 and 2002 violations and a $500 civil penalty for Respondent's 2004 violation. ORS 279.359, ORS

279.370; OAR 839-016-0500, OAR 839-016-0520.

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Dan Gardner, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on August 4, 2005, at the Salem office of the Bureau of Labor and Industries, located at 3865 Wolverine St. N.E., Building E-1, Salem, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter Cynthia L. Domas, an employee of the Agency. Respondent was represented by Richard Werst, Respondent's president and authorized representative. Mr. Werst took part in the hearing via telephone and the ALJ and case presenter were present at BOLI's Salem's office during the hearing.

The Agency called Denise Ofarrell, an employee of the Oregon Employment Department, and Vee Souryamat, a BOLI employee, as witnesses. Respondent called Richard Werst as its only witness.

The forum received into evidence:

a) Administrative exhibits X-1 through X-7 (submitted or generated prior to hearing);

b) Agency exhibits A-1 through A-3 (submitted prior to hearing).

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

FINDINGS OF FACT – PROCEDURAL

1) On March 18, 2005, the Agency issued a Notice of Intent to Assess Civil Penalties ("Notice") in which it alleged that: (a) Respondent, an employer that performed nonresidential construction work in 2001, received and failed to complete and return the 2001 Construction Industry Occupational Wage Survey ("2001 Survey") in violation of ORS 279.359(2); (b) Respondent, an employer that performed nonresidential construction work in 2002, received and failed to complete and return the 2002 Construction Industry Occupational Wage Survey ("2002 Survey") in violation of ORS 279.359(2); and (c) Respondent, an employer that performed nonresidential construction work in 2004, received and failed to complete and return the 2004 Construction Industry Occupational Wage Survey ("2004 Survey") by September 17, 2004, in violation of ORS 279.359(2). The Agency alleged the violations were aggravated in that Respondent knew, or should have known of these violations and had more

than ample opportunity to comply with the law, Respondent's failure to take appropriate action to remedy its violation after having its violation pointed out, the Agency's expenditure of significant resources trying to obtain Respondent's compliance with the law, and the seriousness and great magnitude of the violation, as shown by its affect on the Commissioner's ability to accurately determine the prevailing wage rates and the possible skewing of the established rates. The Agency sought civil penalties of $250 for the alleged 2001 Survey violation, $250 for the alleged 2002 Survey violation, and $500 for the alleged 2004 Survey violation.

2) On March 24, 2005, Respondent's president, Richard Werst, filed an answer and request for hearing in which Respondent alleged, among other things:

> "[i]f any material was mailed to us from your agency it was not in a form to where I would be able to tell it from junk mail. * * * Our company builds pole buildings, farm buildings, garages, shops, etc. I have filled out your questioner [sic] in the past & nothing in it applies to us. * * * I can not believe that you were [sic] fine us for not filling our [sic] surveys that have nothing to do with us. If the survey was on prevailing wage, we contacted [sic] no buildings in which prevailing wages were required in 2003 or 2004, therefore the survey does not apply to us."

3) On April 22, 2005, Respondent filed a letter authorizing Richard Werst to act as its authorized representative.

4) The Agency filed a request for a telephonic hearing with the Hearings Unit on July 5, 2005.

5) On July 5, 2005, the Hearings Unit issued a Notice of Hearing to Respondent and the Agency stating the time and place of the hearing as August 4, 2005, at 9:30 a.m., at BOLI's Salem office located at 3865 Wolverine St. NE, Bldg. E-1, Salem, Oregon. Together with the Notice of Hearing, the forum sent a copy of the Order of Determination, a document entitled "Summary of Contested Case Rights and Procedures" containing the information required by ORS 183.413, a Servicemembers Civil Relief Act (SCRA) Notification, and a copy of the forum's contested case hearings rules, OAR 839-050-000 to 839-050-0440.

6) On July 7, 2005, the forum ordered the Agency and Respondent each to submit a case summary by July 26, 2005, and notified them of the possible sanctions for failure to comply with the case summary order.

7) Respondent filed its case summary on July 11, 2005.

8) The Agency filed its case summary on July 26, 2005.

9) At the start of the hearing, the ALJ verbally advised the Agency and Respondent of the is-

sues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

10) 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. Both arguments fail. 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. Respondent's motion is **DENIED**.

11) On August 29, 2005, the ALJ issues a proposed order that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. No exceptions were filed.

FINDINGS OF FACT – THE MERITS

1) In 2001, 2002, and 2004, Respondent was an Oregon employer based in Tillamook, Oregon that employed workers to perform nonresidential construction projects including pole buildings, farm buildings, garages and shops. At all times material herein, Respondent's mailing address has been 15555 Trask River Rd., Tillamook, OR 97141.

2) Richard Werst is Respondent's corporate president and is responsible for Respondent's payroll, bill paying, bidding, selling, drawing, some building, and responding to Respondent's mail.

3) The Commissioner of BOLI, consistent with ORS 279.359(1), established a survey entitled Construction Industry Occupational Wage Survey ("wage survey") in 2001, 2002, and 2004 to collect data for use in determining the prevailing rate of wage for workers in trades or occupations in the localities designated in ORS 279.348.

4) The Workforce and Economic Research Division of the Employment Department contracted with BOLI each year from 1999 to 2004 to conduct a Construction Industry Occupational Wage Survey ("wage survey"). The wage survey was to be used by the Commissioner of BOLI to aid in the determination of the prevailing wage rates in Oregon and was, in fact, used for such a purpose in those years. The Employment Department conducted its survey by mailing the wage survey forms to employers.

5) In 2001 and 2002, the Employment Department conducted its wage survey by first sending business entities a questionnaire to determine if they had contracted to do any nonresidential construction work during the pre-

ceding year. Employers who responded affirmatively or failed to respond were mailed a wage survey packet.

6) The Employment Department mailed a wage survey packet to Respondent in 2001 and 2002. In 2001, the Commissioner required employers to complete and return the wage survey by September 21, 2001. In 2002, the Commissioner required employers to complete and return the wage survey by September 20, 2002. Respondent received both wage surveys but failed to complete and return them. Both years, the Employment Department sent: (1) a reminder card to Respondent indicating that the wage survey had not been received, that Respondent was required by law to complete and return it, and that penalties could be imposed for failure to comply; and (2) a second survey packet labeled "Final Notice."

7) In the week of July 5, 2004, the Employment Department sent a notice to Respondent at 15555 Trask River Road, Tillamook, OR 97141 stating that Respondent would receive a wage survey booklet in the mail in late August 2004 that sought information about non-residential work performed by Respondent from "September 1, 2003 through August 31, 2004." The Employment Department mailed the Commissioner's 2004 wage survey to Respondent during the week of August 9, 2004 at the same address in a postage paid envelope. The words "**FILING DEADLINE: September 17, 2004**" were conspicuously printed on the cover of the survey, and the survey booklet clearly gave notice that its completion and return was required by law and violation could result in the assessment of a civil penalty of up to $5,000. Respondent did not return the wage survey.

8) In the week of September 21, 2004, the Employment Department sent a reminder card to Respondent stating that Respondent's wage survey had not been received, that Respondent was required by law to complete and return it, and that civil penalties could be imposed if Respondent failed to complete and return it.

9) In the week of October 12, 2004, the Employment Department sent another 2004 wage survey to Respondent with an additional notice on the cover that stated:

"FINAL NOTICE

Survey Past Due

Oregon law requires that you respond (ORS 279.359)"

10) Some surveys received as late as November 15, 2004, were included in survey data the Commissioner used to set prevailing wage rates. Surveys received after that date were not included in the results of the survey published by the Employment Department in January 2005 and not considered when the Commissioner reviewed the survey data for the setting of the prevailing wage rates.

11) Werst was sick with the flu during October 2004 and there was no one else at Respondent's business to handle paperwork like BOLI's wage survey.

12) On February 3, 2005, BOLI sent a letter to Respondent at 15555 Trask River Road, Tillamook, OR 97141 that included the following statements:

> "ORS 279.359 requires you to report information pertaining to wages paid in non-residential construction to the Commissioner as requested in the annual survey. Our records indicate that despite reminders, you failed to return a report for the 2004 Construction Industry Occupational Wage Survey by September 17, 2004. Our records also indicate that this may not be the first time you have failed to respond as required.
>
> "Since you have not responded to the survey, it has become necessary to begin the Administrative Process. We will soon serve upon you a Notice of Intent and ultimately a judgment in this matter. You are advised that failure to return this survey or filing fraudulent or incomplete information will result in penalties. We would prefer to resolve this matter prior to taking legal action; however, without your cooperation, this is not possible. You may stop this action by completing and returning the enclosed 2004 Occupational Wage Survey by no later than February 21, 2005.
>
> "If you did not perform any non-residential construction within Oregon during the time period covered by this survey, you can satisfy your legal obligation to respond to the survey by answering questions 1 and 2 of the survey as directed, signing it where indicated and returning it in the pre-addressed, postage paid envelope included in the survey booklet.
>
> "If we do not receive a completed survey from you by February 21, 2005, we will assess a civil penalty against you based on your continuing violations. * * *"

13) Respondent returned the 2004 wage survey and the Employment Department received it on April 5, 2005.

14) Respondent currently employs 8-9 persons.

15) Werst does not believe that Respondent is legally obligated to complete the Commissioner's wage surveys because Respondent does no prevailing wage rate work.

16) Souryamat and Werst were both credible witnesses.

ULTIMATE FINDINGS OF FACT

1) In 2001, 2002, and 2004, Respondent was an Oregon employer based in Tillamook, Oregon that employed workers to perform nonresidential construction projects.

2) The Commissioner of BOLI, consistent with ORS 279.359(1),

established and conducted a wage survey in 2001, 2002, and 2004 to collect data for use in determining the prevailing rate of wage for workers in trades or occupations in the localities designated in ORS 279.348.

3) The Oregon Employment Department, acting as BOLI's agent, mailed a wage survey packet to Respondent in 2001, 2002, and 2004. Respondent received, but did not return, the 2001 and 2002 wage survey packets. Respondent returned the 2004 wage survey packet and it was received by the Employment Department on April 5, 2005.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent was a person required to make reports and returns under ORS 279.359(2). ORS 279.359(5)

2) Respondent's failure to complete and return the Commissioner's wage surveys in 2001 and 2002 constitutes two violations of ORS 279.359(2). Respondent's failure to complete and return the Commissioner's 2004 wage survey by September 17, 2004 constitutes a single violation of ORS 279.359(2).

3) The Commissioner has the authority to assess a civil penalty for violations of ORS 279.359. The imposition of $1,000 civil penalties for Respondent's three violations of ORS 279.359(2) is an appropriate exercise of the Commissioner's discretion.

OPINION

INTRODUCTION

The Agency alleged that Respondent violated ORS 279.359(2) in 2001, 2002, and 2004. To prove a violation of ORS 279.359(2), the Agency must show that:

(1) Respondent is a "person;"

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

(3) Respondent received the Commissioner's survey; and

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

In the Matter of Cedar Landscape, Inc., 23 BOLI 287, 292 (2002).

A. Respondent was a "person" in the years 2001, 2002, and 2004.

Under ORS 279.359(5), a "person" includes an employer. The Agency alleged in its Notice that Respondent was an employer in 2001, 2002, and 2004. Respondent did not deny that allegation in its answer and presented no evidence to the contrary. OAR 839-050-0130(2) provides that "factual matters alleged in the charging document and not denied in the answer will be deemed admitted by the party." Respondent's failure to deny the Agency's allegations that it was an employer in 2001, 2002, and 2004

constitutes an admission that satisfies the first element of the Agency's case.

B. The Commissioner conducted wage surveys in 2001, 2002, and 2004.

The Agency submitted an affidavit by Denise Ofarrell, an employee of the Employment Department, that established that BOLI contracted with the Employment Department from 1999 to 2004 to conduct Construction Industry Occupational Wage Surveys and that those surveys were in fact conducted. Respondent produced no evidence to the contrary. This proves the second element of the Agency's case.

C. Respondent received the Commissioner's 2001, 2002, and 2004 wage surveys.

The Agency alleged in its Notice of Intent that Respondent received the Commissioner's wage survey in 2001, 2002, and 2004. Respondent did not deny the allegations concerning receipt of the 2001 and 2002 wage surveys in its answer and those allegations are deemed admitted. OAR 839-050-0130(2). Respondent's president, while not denying outright that he received the 2004 wage survey, intimated that it came in a form that was indistinguishable from "junk mail." The Agency provided evidence consisting of a printout from the Employment Department's computer files and a supporting affidavit from Ofarrell showing that wage surveys were sent by first class mail to Respondent in 2004 at "15555 Trask River Road, Tillamook, OR 97141, and at hearing Werst testified that this has always been Respondent's address.

To resolve this issue, the forum takes guidance from the Oregon Rules of Evidence, specifically ORE 311(1)(q). This rule creates the following presumption:

> "A letter duly directed and mailed was received in the regular course of the mail."

A presumption is a rule of law requiring that once a basic fact is established the forum must find a certain presumed fact, in the absence of evidence rebutting that presumed fact.[1] In this case, credible evidence establishes that the 2004 wage survey was sent by first class mail to Respondent's correct mailing address. Pursuant to ORE 311(1)(q), this creates a rebuttable presumption that Respondent received the wage surveys and reminder notices sent by the Employment Department to that address. Respondent did not specifically deny receiving the wage survey, and the Employment Department's electronic records show that the Employment Department in fact received Respondent's 2004 wage survey on April 5, 2005. Based on this evidence, the forum concludes that Respondent received the 2004 wage survey.

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[1] LAIRD C. KIRKPATRICK, OREGON EVIDENCE Article III-12 (4th ed. 2002).

D. Respondent failed to return the 2001, 2002, and 2004 wage surveys within the time prescribed by the Commissioner.

The Agency alleged that Respondent never completed and returned the 2001 and 2002 wage surveys. Respondent did not deny those allegations in its answer and they are deemed admitted. Testimony by Respondent and the Employment Department's electronic records established that the Employment Department received Respondent's 2004 wage survey on April 5, 2005, but the Agency provided no evidence as to whether or not it was completed. Werst testified that he filled out the 2004 wage survey and returned it, but also acknowledged he did not return it by September 17, 2004. This evidence establishes that Respondent did not timely submit the 2004 wage survey and satisfies the final element of the Agency's case.

CIVIL PENALTY

In this case, the Agency seeks a $250 civil penalty for each of Respondent's 2001 and 2002 wage survey violations and a $500 civil penalty for Respondent's 2004 wage survey violation. In determining the appropriate size of the penalty, the forum must consider the aggravating and mitigating factors set out in OAR 839-016-0520.

A. Aggravating circumstances.

The Agency alleged and proved several aggravating circumstances.

First, Respondent knew, or should have known, of its violations. The forum has concluded that Respondent received the 2001, 2002, and 2004 wage surveys, as well as information accompanying those surveys stating that Respondent was required by law to complete and return the surveys. OAR 839-016-0500 provides that "[a] person acts knowingly if the person has the means to be informed but elects not to do so." Accordingly, Werst's argument that the wage surveys were indistinguishable from "junk mail" and his implied failure to read the mail from BOLI is not a defense to the Agency's allegation that Respondent knowingly failed to return the 2001 and 2002 wage surveys and knowingly failed to return the 2004 survey in time to have it considered. The forum has previously decided that Werst's belief that ORS 279.359(2) does not apply to Respondent is not a defense to the Agency's charge that Respondent knew or should have known of the violation. *In the Matter of Elisha, Inc.,* 25 BOLI 125, 158 (2004), *appeal pending*.

Second, BOLI had to expend extra resources to try to obtain Respondent's compliance with the law. The Employment Department, which was under contract with BOLI, had to send reminder notes and a second wage survey packet to Respondent in 2001, 2002, and 2004, and BOLI itself sent a letter to Respondent on February 3, 2005, in an attempt to gain Respondent's compliance before issuing its Notice.

Third, Respondent's violations are serious, in that the Commissioner would be unable to complete his statutorily required duty of determining Oregon's prevailing wage rates if all survey recipients did not return the wage surveys or only returned them after it was too late to consider them. Respondent's data, if timely submitted, would have been included in the data used to set prevailing wage rates. However, the Agency offered insufficient evidence for the forum to determine whether or not Respondent's three violations resulted in a skewing of the established prevailing wage rates.

Fourth, Respondent had ample opportunity to comply with the law, receiving multiple reminders of its obligation to comply in 2001, 2002, and 2004.

B. Mitigating circumstances.

There are no mitigating circumstances. Although Werst credibly testified that his serious illness in October 2004 affected his ability to perform Respondent's administrative tasks, the deadline for submission of the 2004 wage survey was September 17, 2004, by which time Werst already had five weeks to complete and return the survey. Significantly, Werst did not testify that he would have submitted the 2004 wage survey in October 2004, had he not become ill. The forum views Respondent's "junk mail" defense and Werst's mistaken belief that Respondent was not required to complete and return the wage surveys as excuses to avoid compliance with the law and not as mitigating circumstances

C. Amount of civil penalty.

In prior wage survey cases, the Commissioner has assessed civil penalties ranging from $350 to $1,000 for single violations of ORS 279.359(2).[2] The Agency alleged, and the forum has concluded that Respondent committed three violations of ORS 279.359(2). There are several aggravating circumstances and no mitigating circumstances. The amount of civil penalties sought by the Agency is amply supported by the facts in this case and by prior final orders of the Commissioner. The forum assesses a $250 civil penalty for Respondent's 2001 violation, a $250 civil penalty for Respondent's 2002 violation, and a $500 civil penalty for Respondent's 2004 violation, for a total of $1,000.

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[2] *See, e.g., In the Matter of Cedar Landscape, Inc.,* 23 BOLI 287, 293-94 (2002) ($350 assessed for a single violation when aggravating and mitigating circumstances were present); *In the Matter of The Landscape Company of Portland, LLC,* 22 BOLI 69, 76-77 (2001) ($1,000 assessed when only aggravating circumstances were present, including two prior violations).

ORDER

NOW, THEREFORE, as authorized by ORS 279.370, and as payment of the civil penalties assessed as a result of its three violations of ORS 279.359(2), the Commissioner of the Bureau of Labor and Industries hereby orders **Storm King Construction, Inc.** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, a certified check payable to the Bureau of Labor and Industries in the amount of ONE THOUSAND DOLLARS ($1,000), plus any interest that accrues at the legal rate on that amount from a date ten days after issuance of the Final Order and the date Respondent complies with the Final Order.

In the Matter of

LISA SANCHEZ,

Case No. 50-04

Final Order of Commissioner Dan Gardner

Issued October 11, 2005

SYNOPSIS

The Agency paid out $253.33 in unpaid wages to a wage claimant in a Wage Security Fund payout and sought reimbursement of that amount from Respondent, plus a $200 penalty. The forum ordered Respondent to repay the amounts sought to the Wage Security Fund. ORS 652.414; OAR 839-001-0510, OAR 839-001-0515.

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Dan Gardner, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on January 19, 2005, at the Bureau's Salem office located at 3865 Wolverine NE, E-1, Salem, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Cynthia L. Domas, case presenter, an employee of the Agency. Respondent Lisa Sanchez did not appear at the hearing and was held in default.

The Agency called the following witnesses: Donna Stutzman ("Claimant")(telephonic); Jenelle Neuffer, Wage & Hour Division compliance specialist; and Michael Mortland, Wage & Hour Division compliance manager.

The forum received into evidence:

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

b) Agency exhibits A-1 through A-31 (submitted prior to hearing).

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

FINDINGS OF FACT – PROCEDURAL

1) On January 30, 2003, Claimant filed a wage claim with the Agency alleging that Respondent had employed her and failed to pay her all earned, due, and owing wages.

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

3) On August 4, 2003, the Agency issued Order of Determination No. 03-0368 in which it alleged that Claimant was employed by Respondents Lisa and David Sanchez, dba Morgan's at the Mountain, from November 1 through December 20, 2002; that Respondent unlawfully deducted $201.33 from Claimant's wages; and that Respondent owed Claimant another $52 in earned, due, and owing wages, plus $1,560 in penalty wages and $1,560 in civil penalties based on violations of ORS 653.055(1)(b).

4) On August 25, 2003, Respondent Lisa Sanchez filed an answer and request for hearing.

5) On March 19, 2004, Claimant signed a "Wage Security Fund Assignment of Wages" in which she assigned to the Commissioner of the Bureau of Labor and Industries all wages due from Respondent.

6) On June 1, 2004, the Agency issued a Final Order of Determination on Default as to David Sanchez.

7) On April 12, 2005, the Agency filed a motion to amend the Order of Determination in the following particulars:

a) Delete David Sanchez as a Respondent;

b) Delete the Agency's plea for penalty wages and civil penalties;

c) Allege that "[p]ursuant 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, hereinafter Fund, in the sum of $253.33. The Commissioner of the Bureau of Labor and Industries 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."

8) On April 13, 2005, the Hearings Unit issued a Notice of Hearing to Respondent Lisa Sanchez and the Agency stating the time and place of the hearing as June 14, 2005, at 10 a.m., at the State Office Building, 800 NE Oregon St., 10th Floor, Portland, Oregon. Together with the Notice of Hearing, the forum sent a copy of the Order of Determination, a document entitled "Summary of Contested Case Rights and Procedures" containing the information required by ORS 183.413, a Servicemembers Civil Relief Act (SCRA) Notification, and a copy of the forum's contested case hearings rules, OAR 839-050-000 to 839-050-0440.

9) On April 27, 2005, the ALJ granted the Agency's motion to amend the Order of Determination.

10) On April 27, 2005, the ALJ issued an Interim Order changing the location of the hearing to BOLI's Salem office, located at 3865 Wolverine St. NE, Bldg. E-1, Salem, Oregon.

11) When the ALJ commenced the hearing at 10 a.m. on June 14, 2005, 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.

12) On July 19, 2005, the ALJ issued a proposed order that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. On July 20, 2005, the Agency filed a request for an extension of time to file exceptions. The ALJ granted the Agency's motion. The Agency timely filed exceptions on August 9, 2005. As a result of those exceptions, the ALJ issued an amended proposed order that included a notice that the Agency and Respondent were entitled to file exceptions to the amended proposed order.

13) On August 8, 2005, the Agency filed an exception to the amended proposed order arguing that Respondent should not have been granted the opportunity to file exceptions because of Respondent's default. The forum notes that, had Respondent filed any exceptions, it would have included them in the record and hearings file but would not have considered them for the reasons stated in the Agency's exception.

FINDINGS OF FACT – THE MERITS

1) In 2002, Respondent was a person who operated a restaurant in Welches, Oregon and engaged the personal services of one or more persons.

2) Lisa and David Sanchez took over the operation of a restaurant named Morgan's at the Mountain ("Morgan's") on or about

November 1, 2002. Claimant had worked at that same restaurant for its previous owner. On November 1, 2002, Lisa and David Sanchez hired Claimant to continue work for them as a food server and at the bakery counter. Claimant was paid $6.50 per hour plus tips.

3) Claimant worked for Lisa and David Sanchez until December 20, 2002, when she voluntarily quit.

4) Claimant was paid all wages that she earned between November 1 and November 30, 2002.

5) Claimant worked 84.5 hours at Morgan's in December 2002.

6) On January 5, 2003, Respondent issued a final paycheck to Claimant to compensate Claimant for the work she performed in December 2002. Respondent calculated Claimant's wages based on 76.5 hours of work. In addition to statutory deductions, Respondent deducted the sum of $201.33 from Claimant's check "in Bakery tips Taken by Donna Stutzman as wages, without permission 11-1 – 12-18."

7) Claimant never signed an authorization for Respondent to take any deductions from her paycheck.

8) Jenelle Neuffer, an Agency compliance specialist, investigated Claimant's wage claim. Based on Claimant's contemporaneous time records, Respondent's failure to provide any time records, and Respondent's written acknowledgement of the $201.33 deduction from Claimant's final paycheck, Neuffer made a determination that Claimant had a valid wage claim in the amount of $253.33 in earned, due, and owing wages.

9) Neuffer also determined that Respondent had filed a Chapter 7 bankruptcy claim on January 29, 2003, that was dismissed on April 29, 2003; that Respondent filed a subsequent Chapter 7 bankruptcy claim on October 29, 2003; and that Respondent was no longer doing business as of January 12, 2004.

10) On or about April 8, 2004, Neuffer completed a document entitled "Wage Security Fund Report," a standard Agency form used by Agency compliance specialists when they recommend that a wage claimant be paid wages from the Wage Security Fund ("WSF"). The forum asks 12 questions, and the answers noted by Neuffer included the following:

a) Morgan's had ceased doing business and was closed, or substantially closed, as of 1/12/04;

b) Morgan's no longer employed anyone;

c) It was unknown whether there was successor in interest;

d) Lisa and David Sanchez had filed Chapter 7 bankruptcy;

e) Recovery was recommended against "Lisa & David Sanchez, et al."

Question 6 on the form asks "Are employer's assets sufficient to fully and promptly pay Claimant?" Neuffer did not answer that question. At the bottom of the form, Neuffer added the following additional comment: "Recovery is recommended because bankruptcy filing is set for dismissal pending outcome of bankruptcy fraud charges. Appears that employers have retained assets."

11) On May 3, 2004, BOLI caused the WSF to issue a check in the amount of $230.55 to Claimant, representing net wages. Claimant was actually paid gross wages of $253.33, but statutory deductions were taken from the gross wages before BOLI issued the check to Claimant.

12) Twenty-five percent of $253.33 is $63.33.

13) Claimant, Neuffer, and Mortland were credible witnesses.

ULTIMATE FINDINGS OF FACT

1) In 2002, Respondent was a person who operated a restaurant in Welches, Oregon and engaged the personal services of one or more persons, including Claimant.

2) Claimant worked for Respondent from November 1 through December 20, 2002, when she voluntarily quit. She earned $6.50 per hour plus tips.

3) Respondent has not paid Claimant for 8 hours of work she performed in December 2002 and owes Claimant $52 for this unpaid work. Respondent also deducted $201.33 from Claimant's final paycheck without Claimant's written authorization and has not reimbursed Claimant for this deduction.

4) An Agency compliance specialist investigated Claimant's wage claim and made a determination that Claimant had a valid wage claim in the amount of $253.33, that Respondent had ceased doing business, and that Respondent was without sufficient assets to fully and promptly pay the wage claim at the cessation of business.

5) On May 3, 2004, BOLI caused the WSF to issue a check in the amount of $230.55 to Claimant, representing net wages. Claimant was actually paid gross wages of $253.33, but statutory deductions were taken from the gross wages before BOLI issued the check to Claimant.

CONCLUSIONS OF LAW

1) During all times material herein, Respondent was an employer subject to the provisions of ORS 653.010 to 653.025 and 652.110 to 652.414 and Claimant was Respondent's employee.

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

3) Respondent violated ORS 652.140(2) by failing to pay Claimant all wages earned and unpaid not later than five days, excluding Saturdays, Sundays and holidays, after termination of her employment.

4) The Agency paid out $253.33 from the WSF to the Claimant and is entitled to recoup those funds, plus a penalty of $200 from Respondent. ORS 652.414(1), ORS 652.414(3).

OPINION

Pursuant to ORS 652.414(3), the Agency is entitled "to recover from the employer, or other persons or property liable for the unpaid wages, amounts paid from the Wage Security Fund ("WSF") under subsection (1) of [the statute]."[1] The Agency is also entitled to recover a penalty of 25 per cent of the wages paid from the WSF or $200, whichever is greater. *Id*. Respondent did not appear at the hearing to contest the Agency's recovery action and the forum held Respondent in default.

When a respondent defaults, the Agency is required to present a prima facie case on the record to support the allegations in its charging document. ORS 183.415(6). In this case, the Agency was required to establish that (1) Respondent was an employer at material times; (2) an amount was paid to Claimant from the WSF as unpaid wages; and (3) Respondent is liable for the amounts paid from the WSF.

In this case, the Agency established that Respondent operated a restaurant in Oregon and engaged Claimant's services as a food server between November and December 2002, and, thus, was Claimant's employer at times material. The Agency also presented evidence that Claimant was paid $253.33, less statutory deductions, from the WSF, following an investigation of Claimant's wage claim. Agency Compliance Specialist Neuffer credibly testified that she made a determination that Claimant's claim was valid and she established the means by which she made that determination. She also confirmed that the $253.33 paid to Claimant from the WSF was based on her determination that the wage claim was valid. *See In the Matter of Catalogfinder, Inc.,* 18 BOLI 242, 260 (1999) (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

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[1] 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. Respondent did not appear at the hearing to contest the recovery action and, in the absence of contrary evidence, the forum applies the presumption that an "[o]fficial duty has been regularly performed" and the requisite determinations made. ORS 40.135(1)(j). *See also In the Matter of Catalogfinder, Inc.,* 18 BOLI 242, 260 (1999).

valid for the sums actually paid out).

Based on the evidence presented, the forum concludes that Respondent was "the employer" for the purpose of ORS 652.414(3) and is liable for the amount paid to Claimant from the WSF. Additionally, under the statute, the Commissioner is entitled to recover a 25 percent penalty on the amount paid or $200, whichever is greater. In this case, $200 is greater and Respondent is liable to the Commissioner for that amount.

ORDER

NOW, THEREFORE, as authorized by ORS 652.414, and as payment of the amounts paid from the Wage Security Fund as a result of her violation of ORS 652.140, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **Lisa Sanchez** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, the following:

> A certified check payable to the Bureau of Labor and Industries in the amount of FOUR HUNDRED FIFTY-THREE DOLLARS AND THIRTY THREE CENTS ($453.33), representing $253.33 paid to Donna Stutzman from the Wage Security Fund and a $200 penalty, plus interest at the legal rate on the sum of $453.33 from June 1, 2004, until paid.

In the Matter of

HARKCOM PACIFIC, INC. and Mike E. Harkcom,

Case No. 87-03

Final Order of Commissioner Dan Gardner

Issued November 22, 2005

SYNOPSIS

Respondent Harkcom Pacific, Inc. ("HPI") was the prime contractor on a public works project and employed workers for 21 weeks to perform manual labor. HPI violated ORS 279.350 by failing to pay the prevailing wage rate to seven workers. HPI violated ORS 279.354 by filing 20 inaccurate certified payroll reports containing a false certification that its workers had been paid all wages earned. HPI, through its corporate president Mike E. Harkcom, intentionally failed to pay the prevailing wage rate to its seven workers. Respondent Mike E. Harkcom was responsible for HPI's failure to pay the prevailing wage rate. The Commissioner assessed $34,000 in civil penalties and placed Respondents on the list of contractors ineligible to receive any contract or subcontract for public works for three years. ORS 279.350, ORS 279.354, ORS 279.361; *former* OAR 839-016-0035, *former* OAR 839-050-0050, *former* OAR 839-050-0085,

former OAR 839-050-0520, *former* OAR 839-050-0530, *former* OAR 839-050-0540.

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Dan Gardner, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on September 20, 2005, in the WW Gregg Hearing Room of the Bureau of Labor and Industries, located at 800 NE Oregon Street, Portland, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter Patrick A. Plaza, an employee of the Agency. Mike E. Harkcom was present and represented himself and also acted as authorized representative for Respondent Harkcom Pacific, Inc. ("HPI").

The Agency called Tyrone Jones, former Wage & Hour Division compliance specialist, and Gayle Aheren, Respondent's former office manager, as witnesses. Respondents called Mike E. Harkcom as its only witness.

The forum received into evidence:

a) Administrative exhibits X-1 through X-17 (submitted or generated prior to hearing), and X-18 (created before hearing, but not included in the original hearings file);

b) Agency exhibits A-1 through A-19 (submitted prior to hearing), and A-20 and A-21 (submitted at hearing);

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

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

FINDINGS OF FACT – PROCEDURAL

1) On June 15, 2005, the Agency issued a Notice of Intent to Place on List of Ineligibles and to Assess Civil Penalties in the amount of $21,000 in which it made the following charges against Respondents:

> a) Respondent HPI acted as prime contractor on the Clatskanie High School, Phase 1 public works project ("Clatskanie Project"), a public works subject to regulation under Oregon's prevailing wage rate laws, between July 7 and December 10, 2001. HPI provided manual labor on the Clatskanie Project but intentionally failed to pay $15,898 in prevailing wages to seven employees, in violation of ORS 279.350 and OAR 839-016-0035. The Agency sought a $21,000 penalty for these seven alleged violations.

b) The Agency asked that Respondents, and any firm, corporation, partnership or association in which they had a financial interest be placed on the list of those ineligible to receive contracts or subcontracts for public works ("List of Ineligibles") for a period of three years.

The Agency alleged the following aggravating factors:

"Each violation set forth above is attended by one or more of the following aggravating circumstances, which have been considered pursuant to OAR 839-019-0520 in determining the amount of the penalty. Respondent knew, or should have known of the violations and avoiding the violations would not have been difficult. Respondent had the information necessary to pay the appropriate prevailing wages to its employees. * * * [BOLI] conducted an investigation into the underpayment of prevailing wages on the [Clatskanie Project] and informed Respondent in writing of the underpayment of wages. Respondent intentionally failed/refused to pay the appropriate prevailing wage to seven employees after BOLI advised it of the underpayment. Ultimately, Respondents' surety paid the wages found to be owed. Respondent also failed to pay six of its employees for all overtime hours worked in excess of 8 per day and for any hours worked on Saturdays and Sundays. These are violations of ORS 279.334 and 839-016-0050(2). Based on the facts [alleged elsewhere in the Notice of Intent], it is clear that Respondent knew or should have known of the requirement that it pay the prevailing rate of wage to its employees and consciously and intentionally chose not to pay it. These violations were serious and easily preventable, resulting in a substantial underpayment of prevailing wages and overtime wages to a number of employees on a Public Works. OAR 839-016-0520."

2) The Notice of Intent instructed Respondents that they were required to make a written request for a contested case hearing within 20 days of the date on which it received the Notice, if Respondents wished to exercise their rights to a hearing. 3) The Agency served the Notice of Intent on Respondents, together with a document providing information on how to respond to a Notice of Intent.

4) Respondents, through Mike E. Harkcom, filed an answer and request for hearing on April 19, 2005, and on April 27, 2005, Respondent HPI filed a letter authorizing Mike E. Harkcom to act as its authorized representative.

5) The Agency filed a request for hearing with the Hearings Unit on June 10, 2005.

6) On June 10, 2005, the Agency filed a motion to amend its Notice of Intent as follows:

a) Naming each of the seven employees whom the Agency alleged were underpaid in the Notice of Intent and stating the specific amount of wages each was underpaid.

b) Alleging that HPI filed 21 "inaccurate and/or incorrect Certified Payrolls" and to assess a $1,000.00 civil penalty for each of those violations, for a total of $21,000 in civil penalties. Specifically, the Agency alleged that HPI's reports "inaccurately certified that employees had been paid all wages earned for the periods listed when in fact they had not been paid all wages earned for the periods listed." The Agency listed the individual weeks in which the alleged violations occurred in its motion.

7) On June 15, 2005, the Hearings Unit served Respondents with: a) a Notice of Hearing that set the hearing for September 20, 2005; b) a Summary of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case hearing process; and d) a copy of the Notice of Intent.

8) On July 6, 2005, the ALJ ordered the participants to file case summary including: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a statement of any agreed or stipulated facts, a brief statement of the elements of the claim and any civil penalty calculations (for the Agency only). The ALJ ordered the participants to submit their case summaries by July 6, 2005, and notified them of the possible sanctions for failure to comply with the case summary order. The ALJ also sent a form to Respondents that was designed to assist respondents who are not represented by attorneys in filing a case summary.

9) On July 6, 2005, the ALJ issued an interim order that 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 of Intent by July 15, 2005, stating that the amended allegations regarding the seven employees would be deemed admitted if Respondents did not file a timely amended answer. Respondent did not file an amended answer.

10) On July 14, 2005, the Agency filed a request for reconsideration of the ALJ's Interim Order. In support of its request for reconsideration, the Agency stated that the allegations in the original Notice of Intent (failure to pay the prevailing wage rate) were directly related to and based on the Wage and Hour Division's re-

view of 21 certified payrolls submitted by Respondent on the Clatskanie Project and that these were the same 21 certified payrolls referred to in the Agency's original Motion to Amend.

11) Respondents did not object to the Agency's motion for reconsideration. On July 22, 2005, the ALJ granted the Agency's 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.

12) On August 10, 2005, Respondents filed an amended answer in which they denied the Agency's certified payroll allegations.

13) On August 9, 2005, the Agency filed a motion for partial summary judgment on two issues. First, that HPI had not paid the prevailing wage rate to the seven employees named in the Agency's amended Notice of Intent, violating *former* ORS 279.350. Second, that HPI had committed 21 violations of *former* ORS 279.354(1) through Mike Harkcom's certification on HPI's certified payroll records that each employee listed had been paid the prevailing wage rate, when in fact those employees had not been paid any fringe benefits. Respondents did not respond to the Agency's motion.

14) On August 26, 2005, the ALJ issued an interim order that granted the agency's motion for partial summary judgment in part and denied it in part. The order stated:

"**Introduction**

"On August 9, 2005, the forum received the Agency's motion for summary judgment, pursuant to OAR 839-050-0150. The Agency asked for summary judgment in its favor on two legal issues raised in the pleadings: (1) that Respondent failed to pay the prevailing rate of wage to seven workers as alleged the Agency's Notice of Intent; and (2) that Respondent filed 21 inaccurate and incorrect certified payrolls in violation of ORS 279.354. Respondent did not file a response to the Agency's motion.

"Summary Judgment Standard

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

" * * * 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 reasona-

ble 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).

"Failure To Pay the Prevailing Rate Of Wage In Violation Of ORS 279.350

"In its Notice of Intent, the Agency alleged that Respondent Harkcom Pacific, Inc. provided manual labor on the Clatskanie School District Public Works project ("Project"), a project not regulated under the federal Davis-Bacon Act that cost in excess of $25,000 and was subject to Oregon's prevailing wage rate laws, and that Respondent failed to pay $15,898 in prevailing wages. In a subsequent amendment, the Agency named the seven employees – Leonard Ballew, Jeremy Cartrette, Dusty Gallinger, Josh Hegnes, Dale Lafever, Danny Lafever, and Glen Wade -- and specified the amount each was underpaid. The Agency alleged that Respondent's failure to pay the prevailing rate of wage on the Project violated ORS 279.350 and OAR 839-016-0035.

"In support of its motion, the Agency provided a copy of a letter from Respondent to BOLI dated April 24, 2002, in which Respondent admitted that the seven employees named in the amended Notice of Intent were not paid fringe benefits for the work they performed on the Project as painters, carpenters, or laborers. In addition, Respondent did not file a required amended answer to the Agency's amended Notice of Intent. In my ruling granting the Agency's proposed amendment naming the seven employees on the Project and the specific amounts they were owed, I stated that Respondent would be deemed to have admitted the amended allegations if Respondent did not file an amended answer.

"Based on the admission contained in Respondent's April 24, 2002, letter and Respondent's failure to deny the Agency's amended allegations naming the seven employees and the specific amounts they were owed, the forum concludes that there is no genuine issue of fact as to whether Respondent failed to pay the prevailing rate of wage on the Project to those seven employees.

"The forum concludes, as a matter of law, that the Agency is entitled to summary judgment on its allegation that Respondent Harkcom Pacific, Inc. failed to pay the prevailing rate of wage to seven employees named by the Agency on the Project.

"Filing Inaccurate Or Incorrect Certified Payroll Records In Violation Of ORS 279.354.

"In its amended Notice of Intent, the Agency alleged that Respondent committed 21 violations of *former* ORS 279.354, and copies of 21 certified payroll records filed by Harkcom Pacific, Inc. covering pay periods beginning July 8 and ending the week beginning December 16, 2001. The Agency characterized the manner of violation in the following words: "[t]hese reports inaccurately certified that employees had been paid all wages earned for the periods listed when in fact they had not been paid all wages earned for the periods listed."

"Respondent timely filed an amended answer in which Respondents denied committing any certified payroll violations.

"In support of its motion, the Agency attached 21 certified payroll reports filed by Respondents on the Project. Respondents used BOLI's Form WH-38 to file their reports. Respondents did not indicate that fringe benefits had been paid to its seven employees on the Project on any of the reports. On each report, Mike Harkcom signed BOLI's "Certified Statement" in which he certified that "all persons employed on said project have been paid the full weekly wages earned."

"BOLI's argument can be summarized in a few words. Respondents did not pay fringe benefits on the Project, but Mike Harkcom certified they had been paid, and this false certification constitutes a violation of *former* ORS 279.354.

"ORS 279.354 requires a contractor or subcontractor to "file certified statements * * * certifying the hourly rate of wage paid each worker whom the contractor or the subcontractor has employed upon such public work, and further certifying that no worker employed upon such public work has been paid less than the prevailing rate of wage * * * which certificate and statement shall be verified by the oath of the contractor * * * or subcontractor."

"So far as I can determine, this is the first time the Agency has charged a contractor or subcontractor with violating *former* ORS 279.354 in this manner. The facts are undisputed. However, as I read the statute, it is not clear that Respondent has violated *former* ORS 279.354. The statute requires contractors and subcontractors to certify certain facts in certified payroll reports under oath using language that BOLI has prescribed by rule in *former* OAR 839-016-0010. Respondents made the required certification in the prescribed format and the forum is not prepared to state, at this time,

that Respondent's certification to an untrue fact, i.e., that workers were paid "the full weekly wages earned," constitutes a violation of the statute.

"The Agency's motion for summary judgment on the issue of Respondents' alleged 21 certified payroll violations is DENIED.

"The Agency is ordered to submit, prior to or at the time of hearing, a statement of Agency policy or a legal brief from legal counsel explaining how Respondents' certification of an untrue fact as alleged constitutes a violation of *former* ORS 279.354.

"**Conclusion**

"The Agency is GRANTED summary judgment with regard to its allegations that Respondents failed to pay the prevailing rate of wage to seven workers on the Project. The Agency is DENIED summary judgment with regard to its certified payroll violations. The remaining issues to be heard and decided at hearing are:

"(1) The appropriate amount of civil penalties for Harkcom Pacific's failure to pay the prevailing rate of wage on the Project;

"(2) Whether Harkcom Pacific's alleged certified payroll violations were violations of *former* ORS 279.354;

"(3) If Harkcom Pacific's alleged certified payroll violation was a violation of *former* ORS 279.354, the appropriate amount of civil penalties;

"(4) Whether Harkcom Pacific, Inc. intentionally failed/refused to pay the prevailing rate of wage to its seven workers on the Project and, if so, if Mike Harkcom was a corporate officer or corporate agent responsible for that failure and refusal.

"(5) If Harkcom Pacific, Inc. intentionally failed/refused to pay the prevailing rate of wage to its seven workers on the Project and Mike Harkcom was a corporate officer or corporate agent responsible for that failure and refusal, the length of time they should be placed on the commissioner's list of those ineligible to receive contracts or subcontracts for public works.

"**IT IS SO ORDERED**"

15) On September 2, 2005, the Agency filed a statement of Agency policy explaining how Respondents' certification of an untrue fact as alleged constitutes a violation of *former* ORS 279.354.

15) The Agency filed its case summary on September 9, 2005. (Exhibit X-15)

16) At the outset of the hearing, pursuant to ORS 183.415(7), the ALJ verbally advised the Agency and Mike E. Harkcom of the issues to be addressed, the matters to be proved,

and the procedures governing the conduct of the hearing.

17) During the hearing, the Agency moved to amend its Notice of Intent to allege that Dale Lafever was underpaid $571.60, instead of $7,306.81, and Glen Wade was underpaid $238.52, instead of $239.94. The ALJ granted the motion.

18) The ALJ issued a proposed order on October 25, 2005, that notified the participants that they were entitled to file exceptions to the proposed order within 10 days of its issuance. No exceptions were filed.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, Respondent HPI was a foreign corporation and contractor based in Kelso, Washington, and Respondent Mike Harkcom was HPI's corporate president.

2) HPI has been in business since 1993, and HPI and Mike E. Harkcom performed prevailing wage rate jobs in Oregon before 2001.

3) On May 21, 2001, the Clatskanie School District published its first advertisement for a public works project entitled Clatskanie High School, Phase I ("Clatskanie Project") in Columbia County, Oregon. The Clatskanie Project was not regulated under the Davis-Bacon Act. The contract was awarded to HPI on June 25, 2001, for amount of $148,000.

4) HPI performed work on the Clatskanie Project between July 8 and December 22, 2001, employing at least seven workers – Leonard Ballew, Jeremy Cartrette, Dusty Gallinger, Josh Hegnes, Dale Lafever, Danny Lafever, and Glen Wade -- who performed work in the classifications of laborer, carpenter, or painter. Mike Harkcom supervised HPI's work on the Clatskanie Project.

5) The Commissioner of the Bureau of Labor and Industries publishes a prevailing wage rate booklet in January and July each year that sets out the applicable prevailing wage rate for the different construction occupations in the state of Oregon. For each occupation, the prevailing wage rate includes a base hourly wage rate and an hourly fringe benefit.

6) The applicable prevailing wage rates for the Clatskanie Project were published in the Commissioner's January 1, 2001, prevailing wage rate booklet. The applicable base wage rates were $24.78 per hour for carpenters, $17.97 per hour for laborers, and $16.40 per hour for painters. The applicable fringe benefits on the Clatskanie Project were $3.13 per hour for painters, $5.80 per hour for laborers, and $8.74 per hour for carpenters. Mike E. Harkcom knew that these wages were posted in the Commissioner's booklet and gave a copy of that booklet to Gayle Aheren, his office manager, and instructed her to pay the applicable wages listed in the booklet.

7) HPI did not pay fringe benefits to Ballew, Cartrette, Gallinger, Hegnes, Dan or Dale

Lafever, or Wade for any of the work they performed for HPI on the Clatskanie Project.

8) Cartrette, Hegnes, Dan and Dale Lafever, Gallinger, and Ballew all worked overtime[1] on the Clatskanie Project but did not receive time and a half pay for any of their overtime work.

9) HPI completed and submitted 21 weekly certified payroll reports to the Clatskanie School District 6J during the performance of its contract on the Clatskanie Project. Gayle Aheren, HPI's office manager, filled out the certified payroll reports, and Mike Harkcom signed them. The certified payroll reports covered the period starting July 8, 2001, and ending December 16, 2001. Each payroll except one listed hours worked by at least one employee. The exception, a certified payroll report for the week of July 29 to August 4, 2001, lists Cartrette and Dan Lafever as employees, but states that they worked "0" hours.

10) Each of the certified payroll reports contains a column entitled "Hourly Fringe Benefit Amount Paid As Wages To Employee," with a space for the person completing the form to write the amount paid to each employee listed in the certified payroll report. In all 20 certified payroll reports that list hours worked by employees, there are no entries in the "Fringe Benefit" column.

11) Aheren was not aware that HPI was required to pay its workers fringe benefit on the Clatskanie Project.

12) Mike Harkcom instructed Aheren to fill out HPI's certified payroll reports on the Clatskanie Project, telling her to "never show overtime." Aheren attempted to comply with Harkcom's instructions by: (a) accurately entering the total number of hours worked per week by each employee, but altering the number of hours worked per day or the day on which those hours were worked; and (b) entering all straight time and overtime hours worked into the "ST" hours worked boxes on the certified payroll reports, with three exceptions.[2] HPI's employees complained to Aheren about not being paid overtime and Aheren quit in December 2001 because of her concern about

[1] Some of the overtime consisted of time worked over eight hours on weekdays and some of it consisted of time worked on weekends. ORS 279.334(1). This finding is based on hours reported on the employees' original time cards and on HPI's certified payroll reports.

[2] The certified payroll reports contain two boxes for each day of the week for each worker listed in which the contractor can list hours worked as "ST" or "OT." The certified payroll reports contain 25 entries in the "ST" box which reflect overtime hours worked that should have been written partially or completely (in the case of hours worked on Saturdays and Sundays) in the "OT" box. There are only three entries in an "OT" box, and two of those are in error and should be in the "ST" box.

HPI's practice of not paying overtime wages.

13) The back of each certified payroll report contains a "certified statement" in which Mike E. Harkcom certified, among other things:

> "I pay or supervise the payment of the persons employed by: Harkcom Pacific Inc on the Clatskanie HS * * * All persons employed on said project have been paid the full weekly wages earned * * * I have read this certified statement, know the contents thereof and it is true to my knowledge."

Although Harkcom did not read this language each time he signed a certified payroll reports, he is familiar with the language and knows it "by heart."

14) Each of HPI's employees filled out a weekly time card while working on the Clatskanie Project. On the time cards, they noted the job number, date and day of the week, and hours worked on each day.

15) HPI's weekly time cards[3] for Cartrette, Hegne, Dale and Dan Lafever, and Dusty Gallinger show that those employees performed work on the following Saturdays and Sundays on the Clatskanie Project:

Leonard Ballew: 8/25 (9 hrs.); 9/1 (5 hrs.); 11/10 (4 hrs.); 11/11 (4 hrs.)

Jeremy Cartrette: 9/2 (8 hrs.); 9/9 (12 hrs.); 9/9 (4½ hrs.); 9/15 (8 hrs.); 9/16 (9 hrs.); 9/22 (9 hrs.); 11/17 (3 ½ hrs.); 12/22 (3 hrs.)

Dusty Gallinger: 9/8 (9 hrs.)

Josh Hegne: 9/9(12 hrs.)

Dan Lafever: 9/2 (8 hrs.); 9/9 (6½ hrs.); 9/15 (8 hrs.); 9/16 (9 hrs.); 9/22 (9 hrs.); 9/23 (8 hrs); 9/29 (5½ hrs.)

Dale Lafever: 9/1 (2 hrs.)

16) HPI's certified payroll reports reflect work on the following Saturdays and Sundays on the Clatskanie Project as follows:

Leonard Ballew: 8/25 (9 hrs.); 9/1 (5 hrs.); 11/10 (4 hrs.); 11/11 (4 hrs.)

Jeremy Cartrette: 11/17 (3½ hrs.); 12/22 (3 hrs.)

Dusty Gallinger: 9/9 (5 hrs.)

Josh Hegne: 9/9 (6 hrs.); 10/6 (6 hrs.)

Dan Lafever: 9/9 (3 hrs.)

16) HPI's original time cards also show that Glen Allen Wade worked 5 hours on the Clatskanie Project on 9/4/01 and that he was paid $17.97 per hour for that work. Wade's name does not appear on HPI's certified payroll report that covers the pay period 9/2-8/01.

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[3] Unlike the certified payroll reports, which are HPI's version of all work performed on the Clatskanie Project, there are only 14 of these time cards in evidence, each representing one week of work by one employee during the period of time that HPI performed work on the Clatskanie Project.

17) At all times material herein, Harkcom was aware that HPI was required to pay an hourly base wage rate and separate hourly fringe benefit for all manual labor performed by HPI's workers on the Clatskanie Project. Aheren was not aware of the requirement to pay a separate hourly fringe benefit.

18) On January 8, 2002, John Rowand of the Fair Contracting Foundation filed a written complaint with the Prevailing Wage Rate Unit of BOLI, in which he complained about HPI's labor practices on the Clatskanie Project. He made several allegations, including that HPI's workers had not been paid fringe benefits or overtime and that carpenters had been misclassified as laborers. He enclosed a letter that described his limited investigation and the conclusions he had drawn. He also enclosed a handwritten, unsigned and undated statement by Danny Lafever.

19) Tyrone Jones, a compliance specialist employed by the Wage and Hour Division, was assigned to investigate Rowand's complaint. During his investigation, Jones obtained original time records from HPI, copies of HPI's 21 Clatskanie Project certified payroll records, and two completed questionnaires from Danny and Dale Lafever. Neither questionnaire was completed in affidavit form.

20) On January 17, 2002, Jones sent a letter to HPI, "Attn: Michael E. Harkcom," in which he stated, among other things:

> "The Bureau has received a complaint that your company has failed to pay the minimum prevailing rate of wage, failed to pay overtime for hours worked over eight (8) in a day, on holidays and Saturday and mis-classified workers for work performed on the [Clatskanie Project]."

Jones followed this paragraph by asking HPI to provide him with information and documentation relevant to the complaint.

21) On January 22, 2002, HPI's current office manager, Robin Holmes, responded to Jones's letter. Holmes provided the last known addresses and phone numbers of employees who worked on the Clatskanie Project and stated she would provide the remainder of the requested documentation and information by February 10, 2002.

22) On March 19, 2002, Jones sent a Notice of Claim for labor to HPI and Clatskanie School District 6J. The letter notified the recipients that BOLI "has a claim for labor * * *. This claim is based on [a] prima facie determination that the prevailing wage as required by ORS 279.350 in the amount of $15,896.48 has not been paid, plus $15,896.48 as liquidated damages * * *." Jones attached a summary of the wages due to Ballew, Cartrette, Gallinger, Hegnes, Dale and Danny Lafever, and Wade.

23) On April 24, 2002, Respondent's current office manager, Kim Pacsuta, sent a let-

ter to Jones acknowledging that on the Clatskanie Project, "[t]he fringe benefits that were to be added to the wages. Where [sic] accidentally left off. We know that the employees are intitled [sic] to the missing wage amount." Pacsuta listed the specific amounts owed to Ballew, Cartrette, Gallinger, Hegnes, the Lafever, and Wade. Those amounts totaled $8,835.17. Pacsuta concluded the letter by stating "[w]e hope that this will resolve matters and that this will be satisfactory to your request."

24) On May 2, 2002, Jones sent a letter to HPI in which he stated that BOLI's calculation differed significantly from Pacsuta's calculation. Jones concluded by stating "the wage settlement we are looking for would be those wages as determined by BOLI and provided in the 'Notice of Claim' dated March 19, 2002." (Testimony of Jones; Exhibit A-16)

25) On November 5, 2002, HPI's surety, Travelers Casualty & Surety Co. of America, issued a check in the amount of $15,898 to BOLI in payment of the claim made by Jones on May 19, 2002. BOLI then issued checks in the amounts listed below to the following seven employees:

Leonard Ballew:	$ 578.35
Jeremy Cartrette:	3,231.37
Dusty Gallinger:	3,623.04
Josh Hegnes:	346.89
Dale Lafever:	571.60
Dan Lafever:	7,306.81
Glen Wade	239.94

26) Jones was a credible witness. He presented a serious, professional demeanor and testified in a direct, straightforward manner, readily acknowledging when he did not recall the answer to questions asked of him. The forum has credited his testimony over Harkcom's testimony whenever their testimony conflicted.

27) Aheren, Respondent's office manager during the Clatskanie Project, quit HPI's employment in December 2001. She testified that Harkcom told her not to pay overtime on the Clatskanie Project and that she manipulated HPI's certified payroll reports in response to Harkcom's direction to avoid paying overtime. She also credibly testified that she was unaware that HPI was supposed to pay a separate hourly fringe benefit. Aheren had nothing to gain from altering the certified payroll reports except Harkcom's approval. The only impeachment or rebuttal evidence presented by Respondent was Harkcom's testimony that Aheren was not telling the truth. However, for reasons stated in Finding of Fact 28 – The Merits, the forum has concluded that Harkcom was not a credible witness. Accordingly, the forum has credited Aheren's testimony in its entirety.

28) Mike Harkcom was not a credible witness. He denied any contemporaneous knowledge of HPI's failure to pay overtime or fringe benefits on the Clatskanie Project and tried to put all the blame on Aheren, claiming he was

not responsible because he signed the certified payroll reports but wasn't aware of their contents, as he didn't look at them before signing. He claimed to have no knowledge of the specific hours HPI's employees worked on the Clatskanie Project or that they worked overtime on the Clatskanie Project, including weekends. He claimed he had no knowledge of HPI's overtime violations, stating he would have made a settlement offer including those wages in Pacsuta's April 24, 2002, letter, had he known the Agency was alleging unpaid overtime. This denial contrasts sharply with two undisputed facts -- that Jones sent a letter to HPI that was addressed to Harkcom on January 17, 2002, that alleged overtime violations, and that HPI's office manager responded to that letter on January 22, 2002. Given his position as HPI's corporate president and the person who supervised all the work performed by HPI's workers, the forum regards these claims as specious. Even if Aheren's testimony that Harkcom told her to not pay overtime was not believable, the forum would find this "ostrich defense" to be disingenuous and unbelievable. The forum has discredited all of Harkcom's testimony except where it was corroborated by other credible evidence and has believed Jones and Aheren whenever their testimony conflicted with Harkcom's testimony.

ULTIMATE FINDINGS OF FACT

1) At all times material herein, HPI was a foreign corporation and contractor based in Kelso, Washington, and Mike Harkcom was HPI's corporate president.

2) On June 25, 2001, HPI entered into a public works contract with the Clatskanie School District for amount of $148,000. The Clatskanie Project was located in Oregon and was not regulated under the Davis-Bacon Act.

3) HPI performed work on the Clatskanie Project between July 8 and December 22, 2001, employing at least seven workers on the Clatskanie Project.

4) HPI did not pay a fringe benefit to any of its workers for manual labor that they performed for HPI on the Clatskanie Project.

5) Six of HPI's workers worked overtime on the Clatskanie Project but were not paid overtime wages.

6) HPI completed and submitted 20 weekly certified payroll reports to the Clatskanie School District 6J during the performance of its contract on the Clatskanie Project that reflected manual labor performed by its employees. Mike E. Harkcom signed a certification on each report in which he certified, among other things:

> "I pay or supervise the payment of the persons employed by: Harkcom Pacific Inc on the Clatskanie HS * * * All persons employed on said project have been paid the full weekly wages earned * * * I have read this certified statement, know the contents thereof and it is true to my knowledge."

7) At all times material herein, Harkcom was aware that HPI was required to pay an hourly base wage rate and separate hourly fringe benefit for all manual labor performed by HPI's workers on the Clatskanie Project.

8) Harkcom was responsible for HPI's failure to pay the prevailing wage rate to its workers on the Clatskanie Project.

CONCLUSIONS OF LAW

1) Respondent HPI failed to pay the prevailing wage rate to seven workers who performed manual labor on the Clatskanie Project, committing seven violations of ORS 279.350(1) and *former* OAR 839-016-0035(1).

2) HPI submitted 20 certified payroll reports in which Respondent Mike E. Harkcom falsely certified that all persons employed by HPI on the Clatskanie Project had been paid the full weekly wages earned, constituting 20 violations of ORS 279.354 by HPI.

3) The Commissioner has the authority to assess civil penalties for violations of ORS 279.350 and ORS 279.354 and imposition of $34,000 in civil penalties for HPI's violations of ORS 279.350 and ORS 279.354 are an appropriate exercise of his authority. ORS 279.370, *former* OAR 839-016-0520, *former* OAR 839-016-0530(3)(a), *former* OAR 839-016-0540(1).

4) Respondent HPI intentionally failed to pay the prevailing wage rate to seven workers who performed manual labor on the Clatskanie Project and Respondent Mike E. Harkcom was responsible for that failure. As a result, the Commissioner must place Respondents on the List of Ineligibles for a period not to exceed three years. ORS 279.361. The Commissioner's decision to place both Respondents on that List for three years is an appropriate exercise of his authority.

OPINION

RESPONDENT HPI FAILED TO PAY THE PREVAILING RATE OF WAGE ON A PUBLIC WORKS PROJECT

The Agency alleged that HPI employed workers to perform manual labor on the Clatskanie Project, a project not regulated under the federal Davis-Bacon Act that cost in excess of $25,000 and was subject to Oregon's prevailing wage rate laws, and that HPI failed to pay $15,898 in prevailing wages to seven workers. HPI admitted that the seven workers were not paid fringe benefits for the work they performed on the Clatskanie Project as painters, carpenters, or laborers. Based on this admission and HPI's failure to deny the Agency's allegations as to the identity of the seven workers and the specific amounts they were underpaid, the forum granted summary judgment to the Agency as to the allegation that HPI did not pay the prevailing rate of wage to seven workers on the Clatskanie Project. That ruling is SUSTAINED. Fringe benefits are part of the prevailing rate of wage and HPI's failure to pay those

benefits to seven workers constitutes seven separate violations of ORS 279.350(1). ORS 279.348.

A. Aggravating circumstances.

HPI, through its president Mike E. Harkcom, knew that fringe benefits were part of the prevailing rate of wage in Oregon and entered into a contract with Clatskanie School District that contained a statement of the applicable prevailing wage rates for the Clatskanie Project. HPI, through its president Mike E. Harkcom, who signed the certified payroll reports, knew that fringe benefits and overtime were not paid to its workers on the Clatskanie Project. Based on Aheren's credible testimony, the forum has concluded that HPI did not pay overtime because Harkcom directed Aheren not to pay overtime on the Clatskanie Project. Had HPI wanted to pay the prevailing wage rate, it could have easily done so simply by ascertaining the applicable rates in BOLI's prevailing wage rate booklet and paying those amounts and by paying its workers for the actual dates and hours that they worked. HPI's failure to pay the prevailing wage rate resulted was serious, in that it resulted in an underpayment of wages amounting to $15,898. Finally, when the Agency brought the unpaid wages to HPI's attention, HPI did nothing to remedy the problem and the Agency had to collect the unpaid wages from HPI's surety.

B. Mitigating circumstances.

There are no mitigating circumstances.

C. Amount of civil penalty.

In its Notice of Intent, the Agency proposed to assess civil penalties of $21,000 for HPI's seven violations, calculated at $3,000 a violation. In determining an appropriate penalty, the forum considers any aggravating circumstances alleged and proved by the Agency, any mitigating circumstances, and prior final orders. *Former* OAR 839-016-0520. The minimum civil penalty is "[a]n equal amount of the unpaid wages or $1,000, whichever is less[.]" *Former* OAR 839-016-0540(3)(a). This case is factually similar to *In the Matter of Johnson Builders, Inc.,* 21 BOLI 103, 124 (2000), in which the commissioner assessed $2,000 in civil penalties for three "first" violations of ORS 279.350(1). This is also HPI's "first" violation, and the forum concludes that $2,000 per violation, for a total of $14,000, is an appropriate assessment of civil penalties.

RESPONDENT HPI FILED 20 INACCURATE CERTIFIED PAYROLL REPORTS ON A PUBLIC WORKS PROJECT

ORS 279.354(1) requires that contractors file certified statements:

> "in a form prescribed by the Commissioner of the Bureau of Labor and Industries certifying the hourly rate of wage paid each worker whom the con-

> tractor * * * has employed upon [a] public work, and further certifying that that no worker employed upon such public work has been paid less than the prevailing rate of wage * * * which certificate and statement shall be verified by the oath of the contractor * * * that the contractor has read such statement and certificate and knows the contents thereof and that the same is true to the contractor['s] * * * knowledge. The certified statements shall set out accurately and completely the payroll records for the prior week including the name and address of each worker, the worker's correct classification, rate of pay, daily and weekly number of hours worked, deductions made and actual wages paid."

This unambiguous statutory language requires that a contractor's certified payroll reports must include the following information and statements to comply with ORS 279.354(1):

> (1) Accurate complete payroll records for the prior week for each worker containing the information prescribed by statute;
>
> (2) The hourly rate paid to each worker;
>
> (3) A certification that no worker was paid less than the prevailing rate of wage;
>
> (4) A certification that the contractor has read the statement and certificate, knows the contents, and that the certification and payroll records are true.

In summary, ORS 279.354(1) requires a contractor to provide (a) truthful payroll information, and (b) a truthful certification that the payroll information is true and that no worker was paid less than the prevailing rate of wage. Truth is the key element.

The Agency alleged that HPI violated ORS 279.354 by filing 20 certified payroll reports that "inaccurately certified that employees had been paid all wages earned for the periods listed when in fact they had not been paid all wages earned for the periods listed." It is undisputed that HPI submitted 20 certified payroll reports during the performance of the Clatskanie Project showing manual labor performed on the Clatskanie Project by its employees, and that Mike E. Harkcom, as HPI's agent, signed a certified statement on each in which he certified that "[a]ll persons employed on the [Clatskanie Project] project have been paid the full weekly wages earned." If Harkcom's statement is true, then no violation occurred. If it is false, then the forum must find 20 violations.

The "full weekly wages earned" by HPI's employees on the Clatskanie Project include the hourly base wage rate and the hourly fringe benefit published in the commissioner's prevailing wage rate booklet. The forum has already concluded that HPI did not pay fringe benefits to any of its workers who worked on the Clatskanie Project and appear on

HPI's 20 certified payroll reports. By not paying fringe benefits, HPI did not pay its workers the full weekly wages they earned and the forum must conclude that Harkcom's certification on each of the 20 certified payroll reports that no worker was paid less than the prevailing rate of wage constitutes an untruthful certification. Harkcom's 20 untruthful certifications, as HPI's agent, constitute 20 violations by HPI of ORS 279.354(1).

A. Aggravating circumstances.

HPI, through its president Mike E. Harkcom, knowingly signed a false certification on all 20 certified payroll reports certifying that HPI's employees had been paid their full weekly wages. HPI could have easily avoided this problem simply by ascertaining the applicable rates in BOLI's prevailing wage rate booklet and paying those amounts and by paying its workers for the actual dates and hours worked. Had HPI done so, Harkcom's certification would have been truthful. HPI's untruthful certification was serious, in that it disguised HPI's failure to pay its workers $15,898 in earned wages.

B. Mitigating circumstances.

There are no mitigating circumstances.

C. Amount of civil penalty.

In its amended Notice of Intent, the Agency proposed to assess civil penalties of $21,000 for HPI's 21 violations,[4] calculated at $1,000 per violation. Again, in determining an appropriate penalty, the forum considers any aggravating circumstances alleged and proved by the Agency, any mitigating circumstances, and prior final orders. The commissioner considers inaccurate or falsified certified payroll reports to be a serious matter, as shown by the fact that the commissioner has assessed a minimum of $1,000 and a maximum of $4,000 for violations of ORS 279.354 involving individual inaccurate or falsified certified payroll reports over the past five years.[5] Based on these

[4] At hearing, the Agency acknowledged that there were only 20 violations, as HPI's certified payroll report for the week of July 29 to August 4, 2001, did not list any employees.

[5] *See In the Matter of Labor Ready Northwest,* 26 BOLI 1, 59 (2004), *appeal pending* ($4,000 assessed for single violation); *In the Matter of Labor Ready Northwest, Inc.,* 22 BOLI 245, 287 (2001), *rev'd in part, Labor Ready Northwest, Inc. v. Bureau of Labor and Industries,* 188 Or App 346, 71 P3d 559 (2003), *rev den* 336 Or 534, 88 P3d 280 (2004) ($2,000 assessed for each of nine violations); *In the Matter of Larson Construction Co., Inc.,* 22 BOLI 118, 158-59 (2001) ($1,000 assessed); *In the Matter of William George Allmendinger,* 21 BOLI 151, 172 (2000) ($1,000 assessed for each of two violations); *In the Matter of Johnson Builders, Inc.*, 21 BOLI 103, 126-27 (2000) ($1,250 assessed for each of 23 violations); *In the Matter of Northwest Permastore Systems, Inc.,* 20 BOLI 37, 60 (2000), *aff'd Northwest Permastore Systems v. Bureau of Labor and Industries,* 172 Or App 427 (2001) ($1,000 assessed for single violation); *In the Matter of Keith Testerman,* 20 BOLI 112, 128-

precedents and the aggravating factors present in this case, $1,000 per violation is an appropriate assessment of civil penalties for HPI's 20 violations of ORS 279.354.

RESPONDENT MIKE E. HARKCOM WAS RESPONSIBLE FOR HPI'S FAILURE TO PAY THE PREVAILING RATE OF WAGE ON A PUBLIC WORKS PROJECT

Respondent Mike E. Harkcom, HPI's president, attempted to shift all the responsibility for HPI's failure to pay the prevailing rate of wage on the Clatskanie Project to Gayle Aheren, HPI's office manager. Harkcom claimed that he was completely ignorant of the fact that HPI's workers were not paid fringe benefits or overtime during the life of the Clatskanie Project. Despite acknowledging that he supervised HPI's work on the Clatskanie Project, he even claimed ignorance of the fact that HPI's employees worked some Saturdays and Sundays. For reasons stated in Finding of Fact 28 – The Merits, the forum did not believe Harkcom's claims.

There are several key facts that show that Harkcom was integrally involved in HPI's failure to pay the prevailing rate of wage on the Clatskanie Project. First, as corporate president of HPI and supervisor on HPI's projects, the forum infers that he was aware of the extent of the work being performed by HPI's employees on the Clatskanie Project. Second, he was an experienced Oregon and Washington contractor on prevailing wage rate projects and is presumed to know the law, including the requirements of paying fringe benefits and overtime. Third, he knew that HPI was required to pay fringe benefits on the Clatskanie Project. Fourth, the forum disbelieves his testimony that he did not know that HPI's employees worked overtime, including Saturdays and Sundays, on the Clatskanie Project due to the fact that he supervised the project. Instead, the forum believes Aheren's testimony that Harkcom instructed her not to pay overtime on the Clatskanie Project. Fifth, he signed all of HPI's certified payroll reports, none of which reflected any payment for fringe benefits to any of HPI's employees. The forum regards Harkcom's claim that he never looked at any of the payroll information that Aheren wrote on the certified payroll reports as disingenuous. Finally, the forum regarded his lack of credibility under oath at the hearing as a further indication of his capacity to knowingly make a false certification. In conclusion, the overwhelming weight of credible evidence presented at hearing established that Respondent Mike E. Harkcom was responsible for HPI's failure to pay fringe benefits and overtime to its workers on the Clatskanie Project.

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29 (2000) ($1,000 assessed for each of three violations).

PLACEMENT ON THE LIST OF INELIGIBLES

The Agency seeks to debar[6] Respondents for three years based on HPI's intentional failure to pay the prevailing rate of wage on the Clatskanie Project and Mike E. Harkcom's responsibility for that failure.

A. Liability of Respondents.

ORS 279.361 provides that when a contractor intentionally fails or refuses to pay the prevailing wage rate to workers employed upon public works, the contractor and any firm in which the subcontractor has a financial interest shall be placed on the list of persons ineligible to receive contracts or subcontracts for public works for a period not to exceed three years. The forum has already concluded that HPI failed to pay applicable prevailing wage rates on the Clatskanie Project and that Mike E. Harkcom was responsible for that failure. The only question is whether that failure was "intentional." If so, the Commissioner is required to place Respondents on the List of Ineligibles.

B. Intentional Failure to Pay.

To "intentionally" fail to pay the prevailing rate of wage, "the employer must either consciously choose not to determine the prevailing wage or know the prevailing wage but consciously choose not to pay it." *In the Matter of Labor Ready Northwest, Inc.,* 22 BOLI 245, 287 (2001), *rev'd in part, Labor Ready Northwest, Inc. v. Bureau of Labor and Industries,* 188 Or App 346, 364, 71 P3d 559 (2003), *rev den* 336 Or 534, 88 P3d 280 (2004). The inclusion of the word "intentionally" in ORS 279.361(1) implies a "culpable mental state," indicating that debarment should not be "triggered by merely innocent, or even negligent, failure to pay." *Id. at* 360. Under this standard, the forum must assess Mike E. Harkcom's state of mind at the time that HPI's employees were not paid the prevailing wage in order to determine whether HPI "intentionally" failed or refused to pay the prevailing wage.

In this case, Harkcom knew the Clatskanie Project was a prevailing wage rate job and that the applicable prevailing wage rates were posted in the Commissioner's prevailing wage rate booklet. Harkcom knew that HPI's workers were entitled to fringe benefits, in addition to an hourly wage, on the Clatskanie Project. Despite this knowledge and the fact that none of HPI's certified payroll reports showed that fringe benefits had been paid, he certified that HPI's workers had been paid all wages earned. Although he knew that HPI's employees worked overtime[7] on the Clatskanie Project

[6] In this Order, "debar" and "debarment" are synonymous with placement on the List of Ineligibles.

[7] Even if the forum believed Harkcom's story that he did not know that HPI's employees worked on Saturdays and Sundays on the Clatskanie Project, it would still conclude he

and that they were entitled to be paid overtime wages for that work, he directed his office manager not to show overtime on the certified payroll reports. There was no evidence that he took any action to make sure HPI's employees were paid all the wages they earned on the Clatskanie Project. This behavior reflects a conscious and intentional choice not to pay the prevailing wage rate on the Clatskanie Project. Harkcom and HPI are both subject to debarment based on Harkcom's intentional choice not to pay the prevailing wage rate.

C. <u>Length of debarment.</u>

ORS 279.361 provides that debarment shall be for "a period not to exceed three years." Although that statute and the Agency's administrative rules interpreting it do not explicitly authorize the forum to consider mitigating factors in determining the length of a debarment, the commissioner has held that mitigating factors may be considered in determining whether the debarment of a contractor or subcontractor should last less than the maximum three-year period allowed by law. *See In the Matter of Larson Construction Co., Inc.*, 22 BOLI 118, 165 (2001); *In the Matter of Keith Testerman*, 20 BOLI 112, 129 (2000); *In the Matter of Southern Oregon Flagging, Inc.*, 18 BOLI 138, 169 (1999); *In the Matter of Intermountain Plastics*, 7 BOLI 142, 160 (1988). Aggravating factors may also be considered. *See, e.g., Testerman* at 129. The aggravating circumstances considered may include those set out in OAR 839-016-0520(1).

There are multiple aggravating circumstances in this case and no mitigating circumstances. The aggravating circumstances include: Harkcom's knowledge that the Clatskanie Project was a prevailing wage rate job and that fringe benefits and overtime must be paid; Harkcom's falsification of 20 certified payroll reports in an apparent attempt to deceive the contracting agency and to avoid paying almost $16,000 in earned wages to HPI's workers; Harkcom's directive to HPI's office manager to falsify HPI's certified payroll reports so they did not show overtime; the seriousness of the HPI's violations, in that they resulted in an underpayment of wages of $15,898 to HPI's workers; and HPI's failure to correct the problem when the Agency brought it to HPI's attention.[8] There are no mitigating circumstances.

Under the circumstances, the forum finds that three years is an appropriate period of debarment based on HPI's intentional failure to pay the prevailing rate of wage

knew HPI's employees had worked overtime based on his specific instruction to Aheren to not show any overtime wages on the Clatskanie Project.

[8] All of Harkcom's listed actions were taken in his capacity as president of HPI, and these actions are therefore imputed to HPI.

to workers employed on the Clatskanie Project and Mike E. Harkcom's responsibility for that failure.

ORDER

NOW, THEREFORE, as authorized by ORS 279.361, the Commissioner of the Bureau of Labor and Industries hereby orders that Respondents **Harkcom Pacific, Inc.** and **Mike E. Harkcom** or any firm, corporation, partnership, or association in which either **Harkcom Pacific, Inc.** or **Mike E. Harkcom** has a financial interest shall be ineligible to receive any contract or subcontract for public works for three years from the date of publication of their names on the list of those ineligible to receive such contracts maintained and published by the Commissioner of the Bureau of Labor and Industries.

FURTHERMORE, as authorized by ORS 279.370, and as payment of the penalties assessed as a result of its violations of ORS 279.350(1), ORS 279.354, *former* OAR 839-016-0035(1), and *former* OAR 839-016-0050(2), the Commissioner of the Bureau of Labor and Industries hereby orders **Harkcom Pacific, Inc.**, to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, the following:

> A certified check payable to the Bureau of Labor and Industries in the amount of THIRTY FOUR THOUSAND DOLLARS ($34,000), plus interest at the legal rate on that sum between a date ten days after the issuance of the final order and the date Respondent **Harkcom Pacific, Inc.** complies with the Final Order.

In the Matter of

LABOR READY NORTHWEST, INC.

Case Nos. 122-01 & 149-01

Amended Final Order on Reconsideration of Commissioner Dan Gardner

Issued November 28, 2005

SYNOPSIS

Respondent was a subcontractor on three public works projects by providing workers to perform manual labor for other contractors on the three projects. On two of the projects, Respondent paid six workers less than the applicable prevailing wage rate, committing six violations of ORS 279.350(1). Respondent failed to post the prevailing wage rate on two of the projects, in violation of ORS 279.350(4). Respondent filed payroll reports on all three projects that either lacked certified statements, misclassified workers, misstated hours worked, or were untimely, committing eight violations of ORS 279.354 and OAR

839-016-0010. Respondent also failed to timely provide documents requested by the Wage and Hour Division that were necessary to determine if the prevailing wage rate was paid on one of the projects, committing one violation of ORS 279.355 and OAR 839-016-0030. The Commissioner concluded that Respondent intentionally failed to pay the prevailing rate of wage to one worker and intentionally failed to post the prevailing wage rates as required by ORS 279.350(4) on one of the projects and placed Respondent on the list of contractors or subcontractors ineligible to receive any contract or subcontract for public works for one year. The Commissioner also assessed $58,500 in civil penalties. ORS 279.334(1)(a), ORS 279.348(3) and (5), ORS 279.350(1), ORS 279.350(4), *former* ORS 279.354, ORS 279.355(2), ORS 279.361(1), ORS 279.370(1); OAR 839-016-0004(16) and (17), *former* OAR 839-016-0010, OAR 839-016-0030(1) and (2), OAR 839-016-0033(1), OAR 839-016-0035(1), OAR 839-016-0050(2), OAR 839-016-0085(1) and (4), OAR 839-016-0090, OAR 839-016-0500, OAR 839-016-0520, OAR 839-016-0530, OAR 839-016-0540.

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on January 15 and 16, 2002, in Room 1004, Portland State Office Building, Portland, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by David K. Gerstenfeld, an employee of the Agency. Respondent was represented by David J. Sweeney, attorney at law. Aaron Roblan, an attorney employed by Labor Ready, Inc., and Respondent, was present during the hearing as the person designated by Respondent to assist in Respondent's case.

The Agency called the following witnesses: Michael Wells, Susan Wooley, and Leslie Laing, BOLI Wage and Hour Division Compliance Specialists.

Respondent called the following witnesses: Shannon Shields, Respondent's branch manager in Hillsboro, Oregon; Siobhan Rischman, manager of the prevailing wage department for Labor Ready, Inc.

The forum received into evidence:

a) Administrative exhibits XA-1 through XA-8[1] (generated in case no. 122-01 prior to case consolidation); XB-1 through XB-4[2] (generated in

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[1] These exhibits were originally numbered X-1, X-2, etc. The forum has renumbered them to avoid confusion due to the later consolidation of cases 122-01 and 149-01.

[2] *Id*.

case no. 149-01 prior to case consolidation); and X-1 through X-6 (generated subsequent to the consolidation of cases 122-01 and 149-01 and prior to hearing);

b) Agency exhibits A-1 through A-53 and A-62 through A-64 (submitted prior to hearing); and A-66 through A-69 (submitted at hearing);

c) Respondent exhibits R-1, R-10, R-12 through R-14, and R-17 (submitted prior to hearing).

On June 17, 2002, after fully considering the entire record in this matter, Jack Roberts, then-Commissioner of the Bureau of Labor and Industries, issued the Findings of Fact (Procedural and On the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order in this case. After Respondent timely sought judicial review in the Oregon Court of Appeals on June 19, 2002, I, Dan Gardner, Commissioner of the Bureau of Labor and Industries, filed a Notice of Withdrawal of Order for Purposes of Reconsideration in the Court of Appeals, then issued a Final Order on Reconsideration on August 19, 2004,

On September 21, 2004, Respondent timely sought judicial review of the Final Order on Reconsideration with the Oregon Court of Appeals. On October 4, 2005, I, the Commissioner, filed a Notice of Withdrawal of Order for Purposes of Reconsideration in the Court of Appeals. Having reconsidered the Final Order on Reconsideration, I hereby issue this Amended Final Order on Reconsideration.

FINDINGS OF FACT – PROCEDURAL

1) On January 30, 2001, the Agency issued a Notice of Intent to Place on List of Ineligibles and to Assess Civil Penalties in the amount of $46,000 in which it made the following charges against Respondent:

a) Between approximately May 8 and June 9, 2000, Respondent provided manual labor as a subcontractor on the Cornelius Public Works Facility – Phase I Project (the "Cornelius Project"), a public works project subject to regulation under Oregon's prevailing wage rate laws and intentionally failed to pay $971.90 in prevailing wages to eight employees – Joseph Baker, Catherine Clayton, Chris Francis, Jason Henry, Renaldo Ramirez, Alfredo Rodriguez, Miguel Silva, and David Snyder, in violation of ORS 279.350 and OAR 839-016-0035. The Agency sought a $24,000 penalty for these eight alleged violations.

b) Respondent filed six certified payroll reports covering the weeks ending June 16, June 30, July 7, July 21, August 11, and August 18, 2000, reflecting work performed on the Cornelius Project "that were inaccurate and/or incomplete by, among other

deficiencies, falsely certifying that all wages earned had been paid, in listing improper pay rates and in failing to show overtime wages earned," in violation of ORS 279.354 and OAR 839-016-0010. The Agency sought an $18,000.00 penalty for these six alleged violations.

c) Respondent intentionally failed to post the prevailing wage rates in a conspicuous and easily accessible place at the work site on the Cornelius Project, in violation of ORS 279.350(4) and OAR 839-016-0033(1). The Agency sought a $4,000 penalty for this alleged violation.

d) The Agency asked that Respondent, and any firm, corporation, partnership or association in which it had a financial interest be placed on the list of those ineligible to receive contracts or subcontracts for public works ('List of Ineligibles') for a period of three years based on Respondent's alleged intentional failure to pay and post the prevailing wage rate on the Cornelius Project.

e) The Agency alleged the following aggravating factors: "Respondent knew, or should have known, of the violations and avoiding the violations would not have been difficult. Respondent has a lengthy history of prior violations regarding some of the same types of violations alleged herein and has failed to take appropriate remedial actions to stop their recurrence. The violations are serious and of great magnitude. Respondent has been issued a formal warning letter and been the subject of a Final order regarding violations of Oregon's prevailing wage rate laws."

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

3) The Agency served the Notice of Intent on Respondent's registered agent on February 5, 2001.

4) Respondent, through counsel, filed an answer and request for hearing on February 23, 2001.

5) On February 28, 2001, the Agency filed a motion to consolidate the hearings in case number 31-01 and the Agency's case against Respondent involving the Cornelius Project. On April 2, 2001, the ALJ heard oral arguments from Respondent and the Agency regarding the Agency's motion to consolidate. That same day, the ALJ issued an interim order denying the Agency's motion. In pertinent part, the order stated:

> "There is no dispute that these cases involve common issues of law. The same types of violations are alleged to have occurred in each case, and the same types of sanctions are sought. In addition, the evi-

dence showing Respondent's past history regarding its actions in responding to previous violations of PWR statutes and rules; prior violations, if any, of statutes and rules; and whether Respondent knew or should have known of the violations is likely to be similar in both cases. In contrast, the facts regarding the actual violations will be very dissimilar. The allegations involve two different projects, two different types of work performed by workers, two different sets of witnesses, and two different sets of exhibits. OAR 839-050-0190 gives the ALJ the discretion to order consolidation where the cases involve 'common questions of law or fact.' Here, although there are common questions of law and may be some common questions of fact in the two cases, there are also significant dissimilarities. These dissimilarities lead the forum to conclude that consolidation of the cases would not necessarily result in any substantial gain of efficiencies or savings of time for the participants or the forum."

6) The Agency filed a request for hearing with the Hearings Unit on April 4, 2001.

7) On April 12, 2001, the Hearings Unit served Respondent with: a) a Notice of Hearing in case number 122-01 involving the Cornelius Project that set the hearing for September 17, 2001; b) a Summary of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case hearing process; and d) a copy of the Notice of Intent.

8) On April 20, 2001, the Agency issued another Notice of Intent to Place on List of Ineligibles and to Assess Civil Penalties in the amount of $24,000 in which it made the following charges against Respondent:

a) On or about September 2, 2000, Respondent provided manual labor as a subcontractor on the Addition & Remodel at Central High School project (the "Central Project"), a public works project subject to regulation under Oregon's prevailing wage rate laws and intentionally failed to pay $315.58 in prevailing wages to its employee, Aaron Wadsworth, in violation of ORS 279.350 and OAR 839-016-0035. The Agency sought a $5,000 penalty for this alleged violation.

b) Respondent did not file certified payroll reports regarding the work performed by its employee on the Central Project until January 18, 2001, in violation of ORS 279.354 and OAR 839-016-0010. The Agency sought a $4,000 penalty for this alleged violation.

c) Respondent intentionally failed to post the prevailing wage rates in a conspicuous and easily accessible place at the work site on the Central Project, in violation of ORS

279.350(4) and OAR 839-016-0033. The Agency sought a $5,000 penalty for this alleged violation.

d) Respondent was a contractor or subcontractor on the Beaver Acres Elementary School Fire Rebuild project ("Beaver Acres Project"), a public works project subject to regulation under Oregon's prevailing wage rate laws. Respondent filed certified payroll reports reflecting work performed by its employees on the Beaver Acres Project, "but these reports were inaccurate and/or incomplete by, among other deficiencies, not being properly certified; inaccurately listing pay rates and amounts; not including the group, where appropriate, for the classification of work its employees performed and omitting required general information about the project. Respondent filed such inaccurate/incomplete certified payroll reports covering the period of approximately April 22 through May 19, 2000 * * * in violation of ORS 279.354 and OAR 839-016-0010." The Agency sought a $5,000 penalty for this alleged violation.

e) The Agency requested that Respondent provide documents necessary to determine if the prevailing wage rate was paid on the Beaver Acres Project and Respondent failed to provide the Wage and Hour Division with records necessary to determine if the prevailing rate of wage was paid to employees of the Beaver Acres Project within the timeline proscribed by OAR 839-016-0030(2), in violation of ORS 279.355 and OAR 839-016-0030. The Agency sought a $5,000 penalty for this alleged violation.

f) The Agency asked that Respondent, and any firm, corporation, partnership or association in which it had a financial interest be placed on the list of those ineligible to receive contracts or subcontracts for public works ('List of Ineligibles') for a period of three years based on Respondent's alleged intentional failure to pay and post the prevailing wage rate on the Central Project.

g) The Agency alleged the same aggravating factors as alleged in its Notice regarding the Cornelius Project.

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

10) The Agency served the Notice of Intent on Respondent's registered agent on April 30, 2001.

11) Respondent, through counsel, filed an answer and request for hearing on May 18, 2001.

12) The Agency filed a request for hearing with the Hearings Unit on May 22, 2001.

13) On June 4, 2001, the ALJ ordered the Agency and Respondent each to submit a case summary regarding case number 122-01 that included: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a statement of any agreed or stipulated facts; a brief statement of the elements of the claim and any civil penalty calculations (for the Agency only); and a brief statement of any defenses to the claim (for Respondent only). The ALJ ordered the participants to submit their case summaries by September 7, 2001, and notified them of the possible sanctions for failure to comply with the case summary order.

14) On June 29, 2001, the Hearings Unit served Respondent with: a) a Notice of Hearing in case number 150-01 involving the Central and Beaver Projects that set the hearing for January 15, 2002; b) a Summary of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case hearing process; and d) a copy of the Notice of Intent.

15) On July 31, 2001, the Agency filed a motion to amend its Notice in case number 122-01[3] to allege fifteen specific violations that were only alluded to in the paragraphs in both Notices listing "Aggravating Factors." Four of the allegations were already litigated in case number 31-01.[4] Five of the allegations were identical to the five violations alleged contained in the Agency's Notice in case number 149-01.[5] The remaining six were as follows:[6]

> "8. At times material, Respondent often required its employees to report to work at Respondent's office, then drive to a particular location to perform work for one of Respondent's clients. At times material, Respondent often required its employees to travel from the place where its employees performed work for Respondent's clients to Respondent's office at the conclusion of the workday. Respondent failed to pay its employees at least the statutory minimum wage of $6.50 per hour for time spent travelling

[3] At hearing, in response to the ALJ's inquiry, the Agency and Respondent agreed that the alleged violations listed in the Agency's motion to amend applied to case number 149-01 as well as case number 122-01.

[4] These allegations were spelled out in paragraphs 11-13 of the Agency's motion to amend. Case number 31-01 was heard on June 19-20 and August 8, 2001, and the Commissioner issued a Final Order on December 13, 2001. That Final Order was offered and received as Exhibit A-64.

[5] *See* Finding of Fact 8 – Procedural, *supra*.

[6] The allegations are referred to by the same numbers in the Agency's motion to amend.

between Respondent's office and the work location where the employees worked for Respondent's clients (and back again). This is in violation of ORS 653.025 and OAR 839-020-0045(3).

"9. Respondent failed to timely pay an employee, Norm Nicholas, overtime wages he earned working on a prevailing wage rate project in Oregon between approximately June 1 and October 28, 1998 in the amount of $1,767.37. This is in violation of ORS 279.350, 279.334 and OAR 839-016-0050.

"10. Respondent filed certified payroll records for employees' work on an Oregon prevailing wage rate project (Southern Oregon University Center for the Visual Arts) in or about late 1999. The certified statements did not meet all the requirements of ORS 297.354(1).[7]

"19. Respondent has previously been adjudicated to have violated ORS 279.354, 279.355 and OAR 839-016-0025 on the Mt. Tabor and CRCI projects in Agency Case No. 70-99 issued June 1, 2000.

"21. Respondent failed to timely pay an employee, Anthony E. Alder, for two hours of work performed on May 1, 2001, resulting in $13.90 in unpaid wages. This is in violation of ORS 652.120.

"22. Respondent withheld $282 from the paycheck of its employee (Roger L. Shutz) for the pay period November 19 – December 3, 1998, in violation of ORS 652.610(3)."

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.

16) On August 9, 2001, Respondent filed objections to the Agency's motion to amend. Among other things, Respondent objected on the grounds that "[f]or a 'violation' to be considered by the forum, a previous adjudication must have occurred."

17) On August 15, 2001, the ALJ conducted a prehearing conference to discuss the Agency's motion to amend and Respondent's objections. On August 17, 2001, the ALJ held another prehearing conference to discuss possible consolidation of case numbers 122-01 and 149-01.

18) On August 16, 2001, the ALJ issued an interim order renumbering case number 150-01 to 149-01.

19) On August 17, 2001, the ALJ issued an interim order in which he granted the Agency's motion to amend, consolidated case numbers 122-01 and 149-01 for hearing and rescheduled the

[7] At hearing, the Agency moved to correct the statutory citation to 279.354(1). Respondent did not object and the ALJ granted the motion.

hearing to begin on January 15, 2002, and set a case summary due date of December 21, 2001. In addition, the order stated that the allegations previously litigated in case number 31-01 would not be relitigated, but the ALJ would take official notice of the Commissioner's Final Order in that case. The order also repeated the Agency's stipulation that, should the Commissioner's Final Order resulting from case numbers 122-01 and 149-01 order debarment of Respondent pursuant to ORS 279.361, any debarment periods imposed on Respondent would run concurrently.

20) The Agency and Respondent filed timely case summaries on December 21, 2001.

21) On January 9, 2002, Respondent's counsel filed a letter stating that Tim Adams, Labor Ready'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. Respondent faxed this letter to case presenter Gerstenfeld on the afternoon of January 9, 2002.

22) 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.

23) 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 Lesley Laing, author of the investigative report, about the documents, Respondent was responsible for providing her with copies of those documents.

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

25) The Agency case presenter waived the ALJ's recitation of the manner in which objections may be made and matters preserved for appeal.

26) At the outset of the hearing, the Agency moved to correct paragraph 10 of its Motion to Amend to read "ORS 279.354(1)" instead of "ORS 297.354(1)." Re-

spondent did not object and the ALJ granted the Agency's motion.

27) At the outset of the hearing, the Agency moved to correct the last sentence of paragraph 7 of its Notice of Intent in Case No. 122-01 to substitute "Beaver Acres" for "Central." Respondent did not object and the ALJ granted the Agency's motion.

28) At the outset of hearing, the Agency case presenter sought clarification that the aggravating factors listed in its July 31, 2001, motion to amend would be considered as aggravating factors for both case numbers 122-01 and 149-01. Respondent's counsel stated he understood this was the case.

29) During the hearing, the Agency offered exhibits A-54 through A-61 and A-72 and A-73. Respondent objected to A-54, A-55, and A-56 on the basis of relevancy, lack of foundation, and hearsay, to A-57 through A-61 on the basis of relevancy, and to A-72 and A-73 on the basis of relevancy. When the Agency offered A-72 and A-73 in rebuttal, Respondent objected on the basis that they did not rebut any evidence in Respondent's case. The ALJ reserved ruling on Respondent's objections until the proposed order. Respondent's objections are sustained, for reasons set out in the opinion. Those rulings are confirmed.

30) After the Agency had completed its case-in-chief, Respondent moved to dismiss the charges that it failed to post the applicable prevailing wage rates on the Cornelius and Central Projects. The ALJ denied Respondent's motion. In the proposed order, the ALJ reversed his ruling and retrospectively granted Respondent's motion to dismiss the charges that Respondent failed to post the applicable prevailing wage rates on the Cornelius and Central Projects. The Agency excepted to the ALJ's reversal of his ruling at hearing. For reasons stated in the Opinion, the forum reverses the ALJ's ruling in the proposed order and considers the merits of whether Respondent failed to post as alleged.

31) On April 22, 2002, the ALJ issued a proposed order that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. On April 26, 2002, Respondent filed an unopposed motion for an extension of time until May 8 in which to file exceptions. That same day, the ALJ granted Respondent's motion.

32) On May 8, 2002, Respondent filed exceptions to the proposed order. Those exceptions are discussed in the Opinion.

33) On May 8, 2002, the Agency filed a motion for an extension to file exceptions to the proposed order until May 15, 2002. 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.

34) On May 15, 2002, the Agency filed exceptions to the proposed order. Those exceptions are discussed in the Opinion.

FINDINGS OF FACT – THE MERITS

1) On December 18, 1998, Respondent Labor Ready Northwest, Inc. ("LRNWI") registered as a corporation with the Oregon Secretary of State, Corporation Division. Its principal place of business was listed as "1015 A St., Tacoma, WA 98402, with a mailing address of "PO Box 2910, Tacoma, WA 98401." At all times material herein, LRNWI was registered as a corporation with the Oregon Secretary of State, Corporation Division. As of January 16, 2002, LRNWI's president was listed as "Timothy J. Adams." Beginning on September 3, 1999, and at all times material since, Respondent was registered with the Oregon Secretary of State, Corporation Division as the registrant for the assumed business name "Labor Ready." The principal place of business for "Labor Ready" ("LR") was listed as "1016 S. 28th St., Tacoma, WA 98409" and the authorized representative was listed at the same address.

2) From February 23, 1995, until January 7, 1999, Labor Ready, Inc. ("LRI") was registered with the Oregon Secretary of State, Corporation Division, with its principal place of business and mailing address listed as "1016 S. 28th St., Tacoma, WA 98409."

3) On July 22, 1999, the Agency issued a Notice of Intent to Assess Civil Penalties against LRI and LRNWI alleging that Respondents had violated Oregon's prevailing wage rate laws in October and November 1998 and in February 1999 and proposing to assess $20,000 in civil penalties. The case was set for hearing and assigned case number 70-99. On June 1, 2000, after hearing, the Commissioner issued a final order concluding that LRI had: (a) violated ORS 279.355 and OAR 839-016-0025 by failing to make and maintain records of the daily hours worked by its employees on a public works project; (b) violated ORS 279.355 and OAR 839-016-0025 by failing to make and maintain records of the daily compensation paid to each of its employees on the project; and (c) violated ORS 279.354 by filing certified payroll reports that inaccurately stated the projects on which two employees had worked. The commissioner imposed civil penalties totaling $13,000 for these violations.

4) On November 1, 2000, the Agency issued a Notice of Intent to Assess Civil Penalties alleging that Respondent had violated Oregon's prevailing wage rate laws on the New Bend Middle School Project in May and June 2000. The Notice proposed to assess $44,000 in civil penalties and to place Respondent on the Com-

missioner's List of Ineligibles for a period of three years. The case was set for hearing and assigned case number 31-01. On December 13, 2001, after hearing, the Commissioner issued a final order concluding that Respondent had: (a) violated ORS 279.350 by misclassifying eight workers and, as a result, paid them less than the applicable prevailing wage rate, in violation of ORS 279.350(1); (b) failed to post the prevailing wage rate on the public works project on which its workers were employed, in violation of ORS 279.350(4), (c) filed nine payroll statements that contained incorrect information and were not accompanied by appropriate statements of certification, in violation of ORS 279.354 and OAR 839-016-0010; and (d) provided four itemized statements of earnings that contained incorrect information in violation of OAR 839-020-0012. The Commissioner concluded that Respondent's violations of ORS 279.350(1) and (4) were intentional and placed Respondent on the list of contractors or subcontractors ineligible to receive any contract or subcontract for public works for one year and assessed $34,000 in civil penalties. Respondent appealed the Final Order to the Oregon Court of Appeals, raising the following assignments of error:

> (1) "BOLI erred in imposing the one-year debarment and, specifically, BOLI misconstrued ORS 279.361(1) in determining that [LRNW] had 'intentionally failed to pay and post the prevailing wage. (2) BOLI's imposition of $2,000 in civil penalties for petitioner's alleged failure to 'keep' the prevailing wage posted was based on an erroneous construction of ORS 279.350(4). (3) BOLI erred in rejecting petitioner's estoppel defense to the imposition of any sanctions."

Respondent did not assign error to BOLI's determinations with respect to the payroll reports and itemized statements or to the imposition of civil penalties for those violations. *In the Matter of Labor Ready Northwest,* 22 BOLI 245 (2001), *reversed in part, Labor Ready Northwest, Inc. v. Bureau of Labor and Industries,* 188 Or App 346, 354 (2003), *rev den* 336 Or 534 (2004). The Court of Appeals held that BOLI erred in debarring Respondent, but rejected Respondent's estoppel defense and upheld the $2,000 civil penalty for Respondent's alleged failure to keep the prevailing wage posted. *Id.* at 355, 369.

THE CORNELIUS PROJECT

5) Between June 12 and August 12, 2000, Respondent provided manual labor as a subcontractor on the Cornelius Project, a public works project performed in Hillsboro, Oregon, that was subject to regulation under Oregon's prevailing wage rate laws and was not regulated under the Davis-Bacon Act. The Cornelius Project was first advertised for bid on November 8, 1999, and BOLI's July 1999 prevailing wage rate booklet applied to the Cornelius Project. I-5 Excavating,

Inc. ("I-5") was the prime contractor on the Cornelius Project. The contract was for the amount of $1,666,600.

6) On October 10, 2000, John Rowand, a compliance investigator with the Fair Contracting Foundation, filed a complaint with BOLI stating that he had reviewed the certified payroll records submitted by Respondent on the Cornelius Project and found that Respondent "was not paying overtime after 8 hours in a day or on Saturdays." Rowand asked that BOLI "address the overtime issues identified." Based on Rowand's complaint, Michael Wells, a compliance specialist employed with the Wage & Hour Division of BOLI, began an investigation.

7) The applicable prevailing wage rate for laborers on the Cornelius Project was a basic hourly rate of $20.09 plus $7.50 in fringe benefits, for a total of $27.59. The applicable prevailing wage rate for carpenters was a basic hourly rate of $23.94 plus $7.92 in fringe benefits, for a total of $31.86.

8) Respondent's employees were sent to the Cornelius Project by Respondent's Hillsboro, Oregon office and performed manual work as laborers and carpenters.

9) At the time of hearing, Shannon Shields had been Respondent's Hillsboro branch manager for three years. She dispatched Respondent's employees to work at the Cornelius Project in response to a job order from I-5 for workers to do landscaping at a construction site. The person who placed I-5's job order did not inform Respondent that the Cornelius Project was a public works, and there was no evidence that Shields or anyone else from Respondent's Hillsboro office inquired if the job was a public works. Shields did not believe that the Cornelius Project was a public works and did not discover it was a public works until July 6, 2000, when one of Respondent's employees told her he thought the Cornelius Project was a prevailing wage rate job. Shields then called I-5 and was informed that Respondent's workers were performing work subject to the prevailing wage. At that point, she took a copy of the applicable prevailing wage rates to the job site of the Cornelius Project and gave them to I-5's foreman, telling him the rates needed to be posted. Shields was not aware of anyone from Respondent going to the job site before July 6 to post the prevailing wage rates. Shields did not know if the I-5 foreman posted the prevailing wage rates, and if so, where they were posted, or if they were kept posted.

10) Prior to the Cornelius Project, Shields had received no training regarding how to comply with Oregon's prevailing wage rate laws. Since then, she has received some training from "corporate."

11) During his investigation, Wells received twelve payroll re-

ports[8] from Respondent reflecting work performed by Respondent's employees on the Cornelius Project. Six of these were Respondent's original reports. The other six were corrected versions of the six original reports. All twelve lacked the statement of certification required by *former* ORS 279.354.[9]

12) On August 18, 2000, Respondent completed a payroll report for work done by its employees on the Cornelius Project for the week ending June 16, 2000. The report states that Catherine Clayton, Renaldo Ramirez, and Alfredo Rodriguez each worked 5.25 hours of straight time on June 12, 2000, as "laborers" at the wage rate of $6.50 per hour, earning gross wages of $34.13 each.

13) Respondent's computer data base shows that Respondent initially paid Clayton, Ramirez, and Rodriguez a total of $34.13 gross wages, computed at the wage rate of $6.50 per hour, for work performed on June 12, 2000.

14) On November 21, 2000, Respondent completed a second payroll report for the week ending June 16, 2000, reflecting work performed by Clayton, Ramirez, and Rodriguez on June 12, 2000, on the Cornelius Project. The word "CORRECTION" is stamped on the report. This report states that the three workers each worked 5.25 hours and were paid gross wages of $144.85, computed at the wage rate of $27.59 per hour.

15) Respondent's computer data base shows that Clayton, Ramirez, and Rodriguez were each paid an additional $110.72 in gross wages on November 21, 2000, as "back pay" for their June 12, 2000, work on the Cornelius Project.

16) On November 21, 2000, Respondent created a work ticket seeking "back pay on ticket 54272" from I-5 for 5.25 hours of work that Rodriguez, Clayton, and Ramirez each performed on June 12, 2000. Handwritten on the work ticket are the words "Back pay on ticket 54272-1128 Date 6/12/00 got paid $6.50 & was prevailing wage." On November 24, 2000, Respondent created a billing detail for an invoice to I-5 regarding "BACK PAY" that sought $111.67 additional pay each for Clayton, Ramirez, and Rodriguez based on 5.25 hours work performed by each of them at the "bill rate" of $21.27 per hour.

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[8] Throughout this Final Order, the forum uses the term "payroll report" to refer to documents submitted by Respondent to meet the requirements of ORS 279.354(1), but which lack the certification required by following language in that statute: "* * * which certificate and statement shall be verified by the oath of the contractor or the contractor's surety or subcontractor that the contractor or subcontractor has read such statement and certificate and knows the contents thereof and that the same is true to the contractor or subcontractor's knowledge."

[9] *See id.*

17) On July 6, 2000, Respondent created work tickets seeking "back pay" for "work ticket #54753" from I-5 for 6 hours of work performed by Chris Francis on June 28, 2000; "back pay" for "work tickets 54886, 54840" from I-5 for 8 hours of work performed by Joseph Baker on June 30, 2000, and 7 hours performed by Baker on July 3, 2000; and "back pay" for "work ticket 54816-1128" from I-5 for 6 hours of work performed by Faried Harwash on June 29, 2000. Respondent billed I-5 at the rate of $20.90 per hour on July 7, 2000, for these hours.

18) On August 18, 2000, Respondent completed a payroll report for work done by its employees on the Cornelius Project for the week ending June 30, 2000. The report states that Faried Hawash and Chris Francis both worked 6 hours of straight time on June 28, 2000, as "laborers" at the wage rate of $31.26 per hour.

19) On November 21, 2000, Respondent completed a second payroll report for the week ending June 30, 2000, that stated the same information as Respondent's original payroll report regarding Hawash's and Francis's work on the Cornelius Project on June 28, 2000. Added to the report was Joseph Baker, who was listed as having worked 8 hours of straight time on June 30 as a "laborer" at the wage rate of $31.26 per hour. The word "CORRECTION" is stamped on the report.

20) An itemized statement of deductions created by Respondent for Chris Francis shows that Respondent issued a check to Francis on June 28, 2000, for 6 hours worked on June 28, 2000, doing "CARPENTRY – INSTALLATION - CABINETWORK" for I-5. Francis was paid gross wages of $60, computed at $10 per hour. A second itemized statement of deductions created by Respondent for Francis shows that he received a check on July 6, 2000, for 6 hours worked on July 6, 2000, doing "CARPENTRY - NOC" for I-5. Again, he was paid gross wages of $60, computed at $10 per hour.

21) An itemized statement of deductions created by Respondent for Faried Hawash shows that Respondent issued a check on June 29, 2000, to Hawash for 6 hours work doing "CARPENTRY – INSTALLATION - CABINETWORK" for I-5. He was paid gross wages of $54, computed at $9 per hour.

22) On August 18, 2000, Respondent completed a payroll report for work done by its employees on the Cornelius Project for the week ending July 7, 2000. The report states that Joseph Baker worked as a "laborer" for 7 hours of straight time on July 3 and 15 hours of straight time on July 6 at the wage rate of $31.26 per hour, earning gross wages of $700.92.

23) On November 21, 2000, Respondent completed a second payroll report for the week ending July 7, 2000, stating that Baker worked as a "laborer" for 7 hours of straight time on the Cornelius

Project on July 3, 2000, at the wage rate of $31.26 per hour and did not work at all on July 6, earning gross wages of $218.82. The word "CORRECTION" is stamped on the report.

24) Respondent's computer data base and statements of itemized deductions created by Respondent show that Respondent initially paid Baker $10 per hour for his work on June 30 and July 3, 2000, and on July 6, 2000, paid him $21.86 per hour for 15 hours of work as "back pay." These same records show that Respondent initially paid Francis $10 per hour for his work on June 28, 2000, and paid him $21.86 per hour for 6 hours of work as "back pay" on July 6, 2000.

25) On July 19, 2000, Respondent created a work ticket showing Chris Francis had worked 9 hours that day as a "carpenter" for I-5 in Cornelius.

26) On August 18, 2000, Respondent completed a payroll report for work done by its employees on the Cornelius Project for the week ending July 21, 2000. The report states that Chris Francis worked as a "laborer" for 4 hours of straight time on Saturday, July 15, 8 hours of straight time on July 17 and 18, and 9 hours of straight time on July 19, earning gross wages of $906.54 computed at $31.26 per hour. Respondent's computer data base also shows that Francis was paid $31.26 per hour for his work on these days.

27) On November 21, 2000, Respondent completed a second payroll report for work done by its employees on the Cornelius Project for the week ending July 21, 2000. It was identical to the first report except that it was denoted "Payroll No. 6"[10] and was completed by Ivy Finnegan, an "Administrative Assistant."[11]

28) On August 25, 2000, Respondent completed a payroll report for work done by its employees on the Cornelius Project for the week ending August 11, 2000. The report states that Chris Francis worked as a "laborer" for 4 hours of straight time on August 7, 8.5 hours of straight time on August 8, and 8 hours of straight time on August 11, earning gross wages of $640.83, computed at $31.26 per hour.

29) On November 21, 2000, Respondent completed a second payroll report for work done by its employees on the Cornelius Project for the week ending August 11, 2000. The word "CORRECTION" is stamped on the report. The report states that Chris Francis worked as a "laborer" for 4 hours of straight time on August 9, 8.5 hours of straight time on August 10, and 8 hours of straight time on August 11, earning gross wages of $640.83 computed at $31.26 per hour.

30) Respondent's computer data base shows that Francis

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[10] The original payroll report was denoted "Payroll No. 5."

[11] Sherry Johnson, another "Administrative Assistant," completed the first report.

worked 4 hours on August 9, 8.5 hours on August 10, and 8 hours on August 11, 2000 and was paid $31.26 per hour for this work.

31) On August 25, 2000, Respondent completed a payroll report for work done by its employees on the Cornelius Project for the week ending August 18, 2000. The report states that Chris Francis worked as a "laborer" for 8 hours of straight time on August 14, earning gross wages of $250.08, computed at $31.26 per hour.

32) On November 21, 2000, Respondent completed a second payroll report for work done by its employees on the Cornelius Project for the week ending August 18, 2000. The word "CORRECTION" is stamped on the report. The report shows that Chris Francis worked as a "laborer" for 8 hours of straight time on Saturday, August 12, earning gross wages of $250.08 computed at $31.26 per hour.

33) Respondent's computer data base shows that Francis worked 8 hours on August 12, 2000, and was paid $31.26 per hour for this work.

34) Prior to July 6, 2000, none of Respondent's employees on the Cornelius Project were paid the applicable prevailing wage rate.

35) Francis, Baker, and Hawash worked as carpenters on the Cornelius Project. Clayton, Ramirez, and Rodriguez worked as laborers.

36) Each payroll report submitted by Respondent on the Cornelius Project was accompanied by a "Statement of Compliance" that was signed by one of Respondent's administrative assistants and contained the following language:[12]

"1. Payroll Number

"2. Payroll Statement Date

"3. Contract Number

"4. Date

"I, (*name of signatory party*), (*title of signatory party)*[13] do hereby state (1) That I pay or supervise the payment of the persons employed by (*Vendor)*[14] on the (*Building or work)*[15]: that during the payroll period commencing on the ___ day of _____, _____, and ending the day of _____, _____, on said project have been paid the full weekly wages earned, that no rebates have been or will be made either directly or indirectly to or on behalf of said (*Vendor*)[16] from the full weekly wages earned by any person and that

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[12] The cited text reproduces the language, but not the specific format of the Statement of Compliance.

[13] Each was filled in with the words "Administrative Assistant."

[14] Each was filled in with the words "Labor Ready Northwest, Inc."

[15] Each was filled in with the words "Public Works Bldg"

[16] Each was filled in with the words "Labor Ready Northwest, Inc."

no deductions have been made either directly or indirectly from the full wages earned by any person, other than permissible deductions as defined in Regulations, Part 3 (29 CFR Subtitle A), issued by the Secretary of Labor under the Copeland Act, as amended * * * and described below:

"(2) That any payrolls otherwise under this contract required to be submitted for the above period are correct and complete; that the wage rates for laborers or mechanics contained therein are not less than the applicable wage rates contained in any wage determination incorporated into the contract; that the classifications set forth therein for each laborer or mechanic conform with the work performed.

"(3) That any apprentices employed in the above period are duly registered in a bona fide apprenticeship program registered with a State apprenticeship agency recognized by the Bureau of Apprenticeship and Training, United States Department of Labor, or if no such recognized agency exists in a State, are registered with the Bureau of Apprenticeship and Training, United States Department of Labor.

"(4) That:

"(a) Where fringe benefits are paid to approved plans, funds, or programs, [i]n addition to the basic hourly wage rates paid to each laborer or mechanic listed in the above referenced payroll, payments of fringe benefits as listed in the contract have been or will be made to appropriate programs for the benefit of such employees, except as noted in Section 4(c) below.

"(b) Where fringe benefits are paid in cash, [e]ach laborer or mechanic listed in the above referenced payroll has been paid as indicated on the payroll, an amount not less than the sum of the applicable basic hourly wage rate plus the amount of the required fringe benefits as listed in the contract, except as noted in Section 4(c) below.

"(c) Exceptions

"Exception (*Craft*) Explanation

"5. Remarks

"6. Name Title Signature

"The willful falsification of any of the above statements may subject the contractor or subcontractor to civil or criminal prosecution. See Section 1001 of Title 18 and Section 3729 of Title 31 of the United States Code.

"DD FORM 879, APR 1998 (EG) * * *"

37) BOLI has created a form called a "WH-38" that contractors and subcontractors may use to comply with the wage certification statement required by ORS 279.354. The certified statement

accompanying the sample of Form WH-38 disseminated by BOLI with its prevailing wage rate booklet containing prevailing wage rates effective July 1, 1999, contains the following language:

"CERTIFIED STATEMENT

"I, (*Name of signatory party*)(*title*) do hereby state:

"(1) That I pay or supervise the payment of the persons employed by; (*contractor, subcontractor or surety*) on the (*building or work*)[;] that during the payroll period commencing on the ____ day of _____, 19__, and ending the ____ day of _____, 19__ all persons employed on said project have been paid the full weekly wages earned, that no rebates have been or will be made either directly or indirectly to or on behalf of said _____ from the full weekly wages earned by any persons, and that no deductions have been made either directly or indirectly from the full wages earned by any person, other than permissible deductions as specified in ORS 652.610, and described as follows: _____.

"(2) That any payrolls otherwise under this contract required to be submitted for the above period are correct and complete; that the wage rates for workers contained therein are not less than the applicable wage rates contained in any wage determination incorporated in the contract; that the classification set forth therein for each worker conforms with work performed.

"(3) That any apprentices employed in the above period are duly registered in a bona fide apprenticeship program registered with a state apprenticeship agency recognized by the Bureau of Apprenticeship and Training, United States Department of Labor, or if no such recognized agency exists in a state, are registered with the Bureau of Apprenticeship and Training, United States Department of Labor.

"I have read this certified statement, know the contents thereof and it is true to my knowledge.

"(*name and title*) (*signature*)"

38) On December 4, 2000, Wells sent a letter to Ivy Finnegan, an Administrative Assistant employed in Labor Ready, Inc.'s prevailing wage unit who had signed a number of Respondent's payroll reports for the Cornelius Project. Wells stated that his investigation was complete and that eight of Respondent's employees on the Cornelius Project were owed back wages in the following amounts: David Snyder, carpenter ($34.16), Cathrine [*sic*] Clayton, laborer ($110.72), Renaldo Ramirez, laborer, ($110.44), Alfredo Rodriguez, laborer ($110.72), Joseph Baker, carpenter ($9.00), Chris Francis, carpenter ($196.10), Jason Henry,

carpenter ($34.16), and Miguel Silva, carpenter ($34.16).

39) On December 13, 2000, Finnegan wrote back to Wells. She stated that the only person still owed back pay was Chris Francis "as he was paid at 31.26 instead of 31.86 for a total of 57.50 hours which would equal 34.50 not 196.10." She also stated that "the only temp carpenters dispatched from our office where [*sic*] Chris Francis and Joseph Baker."

40) In the same letter, Finnegan provided computer printouts containing the following information concerning Respondent's Cornelius Project employees:

Catherine Clayton: worked 5.25 hours on 6/12/00. Paid $34.13[17] on 6/12/00 (@ $6.50 per hour) and $110.72 (@ $21.09 per hour) on 11/21/00.

David Snyder: worked 8 hours on 7/28/00. Paid $220.72 (@ $27.59 per hour) on 7/28/00.

Renaldo Ramirez: worked 5.25 hours on 6/12/00. Paid $34.13 (@ $6.50 per hour) on 6/12/00. Paid $110.72 (@ $21.09 per hour) "back pay" on 11/21/00 based on 5.25 hours worked for I-5 Excavating).

Alfredo Rodriguez: worked 5.25 hours on 6/12/00. Paid $34.13 (@ $6.50 per hour) on 6/12/00. Paid $110.72 (@ $21.09 per hour) "back pay" on 11/21/00 based on 5.25 hours worked for I-5 Excavating).

Joseph Baker: worked 8 hours on 6/30/00. Paid $80 (@ $10 per hour) on 6/30/00. Worked 7 hours on 7/3/00. Paid $70 (@ $10 per hour) on 7/3/00. Paid $212.16 (@ $21.86 per hour) "back pay" on 7/6/00.

Chris Francis: worked 6 hours on 6/28/00. Paid $60 (@ $10 per hour). Paid $131.16 (@ $21.86 per hour) "back wages" on 7/6/00. Worked 4 hours on 7/15/00, 8 hours on 7/17/00, 8 hours on 7/18/00, 9 hours on 7/19/00, 4 hours on 8/9/00, 8.5 hours on 8/10/00, 8 hours on 8/11/00, and 8 hours on 8/12/00 (all @ $31.26 per hour).

41) At the time of hearing, Respondent still owed Chris Francis $34.50.

42) None of Respondent's payroll reports submitted on the Cornelius Project listed fringe benefits independently from wages.

THE CENTRAL PROJECT

43) The Central Project was a public works project performed at Central High School in Independence, Oregon, that was subject to regulation under Oregon's prevailing wage rate laws and was not regulated under the Davis-Bacon Act. It was first advertised for bid on March 1, 2000, and BOLI's January 2000 prevailing wage rate booklet applied to

[17] All payments represent gross wages.

the Central Project. M. L. Holmes Construction was the prime contractor on the Central Project and was awarded a contract in the amount of $481,435 on April 26, 2000. On October 25, 2000, the contracting agency anticipated that work on the Central Project would be completed on November 30, 2000.

44) On Saturday, September 2, 2000, Respondent dispatched Aaron Wadsworth to perform work for Andersen Woodworks at Central High School.[18] Wadsworth worked 8.5 hours for Andersen on the Central Project on September 2 and was paid $57.38 in gross wages, computed at $6.75 per hour.

45) Wadsworth performed work on the Central Project that fit in the classification of Carpenter, Group 1, and Laborer. The applicable prevailing wage rate for Carpenter 1 was $23.94 per hour plus $7.92 in fringe benefits.

46) Leslie Laing, a BOLI Wage & Hour Division compliance specialist investigated Andersen Woodworks regarding payment of prevailing wage rates on the Central Project. During her investigation, Laing telephoned Margie Salazar, Respondent's employee in Respondent's Salem office, to discuss Wadsworth's employment. Laing told Salazar that she was conducting an investigation of prevailing wage rates on the Central Project. Salazar told Laing that the Andersen employee who placed the job order had told her that the work was unloading a truck at Central High School and did not disclose that the project was a prevailing wage rate project. Laing told Salazar that Wadsworth needed to be paid the prevailing wage rate and that Laing would determine Wadsworth's correct classification and wage rate and get back to Salazar.

47) Laing interviewed Wadsworth and one of his co-workers and determined that Wadsworth had performed work as a carpenter and laborer for Andersen on September 2, 2000. Because there was no record of hours that Wadsworth had worked in each job, Laing determined that Wadsworth should be paid at the Carpenter, Group 1 rate for all hours that he worked.

48) On January 4, 2001, Laing telephoned Salazar and told her that Wadsworth's correct classification was Carpenter, Group 1, and that Respondent must pay Wadsworth overtime for all 8.5 hours that he worked because September 2 was a Saturday. Laing told Salazar that the correct rate was $43.83 per hour. That same day, Salazar caused a check to be issued to Wadsworth in the amount of $194.50 ($315.58 gross pay less deductions). This was the total amount due to Wadsworth.

49) On January 18, 2001, Respondent completed a payroll report that showed Wadsworth

[18] The words "High School" appear in the "Other" box of Respondent's September 2, 2000, work ticket reflecting Wadsworth's work.

had worked as a laborer for 8.5 hours of straight time on September 2, 2000, at the pay rate of $43.83 per hour. Respondent's accompanying "Statement of Compliance" contained the same form language as the payroll reports submitted by Respondent for the Cornelius Project and lacked a statement of certification. Laing received this on January 26, 2001.

THE BEAVER ACRES PROJECT

50) Between April 29 and May 12, 2000, Respondent provided manual labor as a subcontractor on the Beaver Acres Project, a public works project performed in Beaverton, Oregon, that was subject to regulation under Oregon's prevailing wage rate laws and was not regulated under the Davis-Bacon Act.

51) Susan Wooley, a compliance specialist employed by BOLI's Wage & Hour Division, was assigned to investigate a complaint against Horizon Restoration Systems, a contractor on the Beaver Acres Project. On August 4, 2000, Wooley sent a letter addressed to "Labor Ready Northwest, Inc., 1016 S 28th St., Tacoma, WA 98409-8020" in which she wrote, in pertinent part:

> "We recently received a complaint that shows that your employees may not have received the correct rate of pay on the [Beaver Acres Elementary School Fire Rebuild Project]. To resolve this matter quickly, please supply **any and all** time records, payroll records, and certified payroll records for **all** employees who performed work on the project. If you had apprentices on the project, please provide a list of names of these employees, proof of registration and standing in a bona fide apprenticeship program and ratio standards for the workers.
>
> "In addition, if you paid fringes to a third party trust, plan, fund, or program (such as vacation, holiday, medical, pension, etc.), please provide the hourly fringe rate paid to each program and copies of the monthly statements and copies (front and back) of canceled checks showing payments to the fund.
>
> "I need to have this information in my office no later than **August 21, 2000**.
>
> "* * * * *
>
> "Please call me at the number below if you have any questions." (Emphasis in original)

52) On August 18, 2000, Wooley received several payroll reports and certified payroll reports from Respondent covering the time periods April 22 through April 28, April 29 through May 5, and May 6 through May 12, 2000, reflecting work done on the Beaver Acres Project. Wooley reviewed the reports but was unable to determine the amount Respondent's employees were paid on the project because Respondent did not send documentation of the pay the employees received.

53) A number of workers are listed on the reports, all classified as laborers. Statements contained on the reports are summarized below:

a) A report for April 22-28 2000, for laborers from Respondent's Tigard location lists the wage rate of all 24 workers as $6.50 per hour of straight time work. "HORIZON RESTORATION SYSTEMS" is typed on the first line of the report. A handwritten notation on top of the report reads "ST rate 27.59 OT 37.64." After each worker's name is a typed figure in a box showing gross wages calculated at $6.50 per hour,[19] which has been crossed out. In the same box, a handwritten figure appears that is much higher and appears to be the result of multiplying the hours worked by $27.59 per hour.[20] Respondent's typed entries show that Cheri Lagasse worked 10.5 hours of straight time on April 28, 2000, and was paid $172.25 for 26.5 hours of straight time work. Handwritten figures in the same boxes show that she was paid for 24 straight time hours and 2.5 overtime hours, with gross wages of $756.16. Six workers have $2.00 deducted from their pay with the notation "equip." This report is not accompanied by a statement of certification. (Exhibit A-33, pp. 10-13)

b) A second report for April 22-28, 2000 for laborers from Respondent's Tigard location that has "CORRECTION" marked on it. With one exception, all workers listed are the same. The added worker is Kerry Lee, who is shown as working 8 hours straight time and 5 hours overtime on April 28, 2000, earning gross wages of $400.92. Lee and all others on the list are described as "laborers" at the rate of pay of $27.59 per hour straight time and $34.64 overtime. The handwritten gross wages on the original report are typed in this report. Cheri Lagasse is shown as having worked 8.0 hours of straight time and 2.5 hours of overtime on April 28. A Statement of Compliance dated "2000/8/9" accompanied this report. It contains a statement above the certificate preparer's signature that reads: "I have read this Certified Statement, know the contents thereof, and it is true to my knowledge." (Exhibit A-33, pp. 5-9)

c) A report for April 29-May 5, 2000, for workers from Respondent's Tigard location that lists David Batson as a "laborer" and lists his wage rate as $6.50 per hour for 8.5 hours of straight time worked on Saturday, April 29, 2000, with gross wages of $55.25. This report is not accompanied by a

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[19] For example, Arturo Perez's gross wages for 8 hours equal $52.00.

[20] For example, Arturo Perez's handwritten gross wages are $220.72 (8.0 x $27.59).

statement of certification. (Exhibit A-33, pp. 3-4)

d) A second report for April 29-May 5, 2000, for workers from Respondent's Tigard location dated 8/9/2000 with "CORRECTION" marked on it that lists David Batson as a "laborer with a wage rate of $37.64 per hour for 8.5 hours of overtime worked on Saturday, April 29, 2000, with gross wages of $319.94. A Statement of Compliance dated "2000/8/9" accompanied this report. It contains a statement above the certificate preparer's signature that reads: "I have read this Certified Statement, know the contents thereof, and it is true to my knowledge." (Exhibit A-33, pp. 1-2)

e) A report for May 6-12, 2000, for laborers from Respondent's Tigard location that lists 25 workers, all classed as "laborers" whose wage rate was $21.09 per hour straight time and $31.64 per hour overtime. The report states all 25 performed work only on May 11. The report shows the following number of straight time hours worked by workers: Henry Nono – 16.0, James Wagner – 24.0, Donald Buck – 27.5, David Lagasse – 30.0, Cheri Lagasse – 24.0, Ryan Bruno – 14.0, Vernon Ahlgren -- 30.0, Charles Penn -- 22.0, Dale Saffel -- 16.0. The report also shows that all 25 workers were paid $21.09 per hour for their work.[21] "HORIZON RESTORATION SYSTEMS" is printed across the top of the first page of the report. "CORRECTION FOR ELEM. PW" is typewritten under the box entitled "PROJECT AND LOCATION," and "Back paid for W/E 4/28 is handwritten in that same box." "NOT A PAYROLL" is typed in the box entitled "PROJECT OR CONTRACT NO." This report is not accompanied by a statement of certification. (Exhibit A-33, pp. 14-17)

54) On September 11, 2000, Wooley sent a second letter to Respondent that set a new deadline for providing requested documentation. This letter stated:

> "Thank you for providing copies of certified payroll reports on the above prevailing wage project as requested. However, also requested were any and all time records and payroll records for all employees who performed work on this project. These are still needed. Please ensure you provide this information from <u>all</u> Labor Ready branches that provided workers for this project. The time records should include copies of work tickets for each person who worked on this project, for each day worked. If you have any questions about the type of records being requested, please contact me at the telephone number

[21] For example, Dale Saffel's gross wages were $337.44 (16.0 x $21.09).

shown at the bottom of this letter.

"While it appears most workers listed on the certified payroll reports were paid correctly, I have some concerns about the records, and it does appear one person may be due overtime wages. First, Kerry Lee does not appear on the first two version[s] of the certified payroll report, i.e., on the one showing workers earning $6.50 per hour, nor on the one showing the remaining wages due at $21.09 per hour. The only time s/he appears is on the version labeled 'Correction.' Kerry is also the worker who appears to be due overtime wages. While the base rate shown for Kerry is correct at $27.59, the overtime rate shown is incorrect. The rate should be $37.64, but is shown at $34.64. The gross amount shown on the certified payroll does not match up with either overtime rate, so it is not clear how this gross amount was figured. However, s/he was due $408.90 for the 13 hours worked on April 27, and was only paid $400.92. This leaves $7.97 still owing for these hours. Please review your records, make up the difference in pay to this employee and provide proof of payment to the Bureau.

"Kerry Lee is only one of many workers whose overtime rate is incorrect on the certified payroll. Please explain why, even though the gross amount due is correct in most cases, the overtime rate for the majority of workers is listed on the certified payroll as $34.64 per hour rather than $37.64.

"Beaverton School District provided the Bureau with copies of certified payroll, and actually provided more reports than Labor Ready did. Labor Ready provided reports from the Tigard branch only, from April 22 to May 5. However, the School District provided reports from the Tigard branch through May 19, and from the Parkrose branch for work from April 29 to May 19.

"Please explain why Labor Ready did not provide the Bureau all certified payroll reports for this project, as originally requested. Also, at this time, please provide any additional certified payroll reports not yet submitted, from all branches that provided labor for this project.

"Another problem with the certified payroll is that the group number for the Laborer classification is missing. One certified payroll report has "Group 5" hand-written next to the project name, but there is no indication for any of the other workers' group numbers. Please ensure that future certified payroll reports have this information listed in column 2, as required.

"For several employees, there is a $2.00 deduction shown on the certified payroll report, with

the hand-written notation of "equip." Please explain what this deduction is for. ORS 652.610 requires that any deductions from an employee's pay must be for the employee's benefit, and must be authorized in writing by the employee. Please provide copies of the written authorizations for the seven employees with the equipment deductions. If this is an unauthorized deduction, it is possible the amount deducted will need to be refunded to the employees.

"Finally, there may be two employees who worked on this project that did not appear on the certified payroll reports. I have information indicating Daniel Mark and Daryl Single performed work on this project. Please provide any and all information regarding these employees as it relates to this project.

"Please provide all requested documentation by no later than September 22, 2000. Also, please provide a contact name and telephone number for someone at Labor Ready with whom I can speak regarding this investigation. Again, if you have any questions, you may call me at the number shown below."

55) At 11 a.m. on September 29, 2000, Wooley called Respondent's Tacoma office to find out why she had not yet received a response to her September 11 letter. Wooley spoke with Charlene Baldwin, who stated that it was her responsibility to reply to Wooley's request. Baldwin said she had not yet responded because Wooley had stated in her letter that there was "a great deal of wages due." Baldwin said she would find out the status of Respondent's response and call Wooley back at 1 p.m. that day. Baldwin did not call back.

56) On October 2, 2000, Wooley called Baldwin. Baldwin said she hadn't called back because she hadn't finished her calculations until 5:30 p.m. on September 29 and still needed to get the written authorization for the $2.00 equipment deductions. Wooley explained the seriousness of the matter and explained she must respond timely to Wooley's requests. Baldwin said she would mail out the requested information that day.

57) On October 3, 2000, Wooley received a new set of documents from Baldwin. They consisted of the following:

a) Payroll report for April 22-28, 2000 for "Group 1" laborers from Respondent's Tigard location on the Beaver Acres Project. "CORRECTION" is stamped on this document. This was accompanied by a statement of compliance with form language identical to that on statements of compliance submitted with payroll reports by Respondent for the Cornelius Project. This report shows that Kerry Lee worked 12.0 hours of straight time and 1.0 hour of overtime on April

28 and was paid gross wages of $368.72. (Exhibit A36, pp.8-13)

b) Payroll report for April 29-May 5, 2000, for "Group 1" laborers from Respondent's Parkrose location. "CORRECTION" is stamped on this document. This was accompanied by a statement of compliance with form language identical to that on statements of compliance submitted with payroll reports by Respondent for the Cornelius Project. (Exhibit A-36, pp. 1, 3)

c) Payroll report for April 29-May 5, 2000, for "Group 1" laborers from Respondent's Tigard location. "CORRECTION" is stamped on this document. This was accompanied by a statement of compliance with form language identical to those submitted by Respondent for the Cornelius Project. (Exhibit A-36, pp. 6-7)

d) Statement of Eligibility Requirements for Earned Income Credit 2000. (Exhibit A-36, p. 2)

e) Statement by Baldwin certifying that no Respondent employees worked for "Horizon Restoration System" on the Beaver Acres Project from May 6 through May 12, 2000. "CORRECTION" is stamped on this document. (Exhibit A-36, p. 4)

f) Statement by Baldwin re: "CASH ADVANCES/EQUIPMENT." This statement reads:

> "Labor Ready's policy is to give a worker, when needed, a few dollars in cash to go to the job site. We will advance him/her $1.00 to $5.00 in cash and deduct the amount from their paycheck at the end of the pay period. Occasionally at the worker's request, we will advance them larger amounts (i.e., workers on prevailing wage jobs).
>
> "All cash advances and equipment, borrowed or purchased, are signed for the by [sic] worker involved in the transaction."

58) Based on the information contained in the documents she received from Respondent on August 18 and October 3, Wooley had concerns that there might be prevailing wage rate violations. Wooley also concluded that Respondent's payroll reports did not conform to Oregon law requiring submission of certified payroll reports in several respects.

59) On October 13, 2000, Wooley sent a third letter to Respondent, addressed to Baldwin. In pertinent part, it read as follows:

> "I received the amended certified payroll you submitted for the [Beaver Acres Elementary School Fire Rebuild Project]. The amended certified payroll reports are necessary, but simply correcting numbers on a computerized spreadsheet does not provide any proof that the workers were actually paid

the amount of wages due them.

"You must still provide documentation that has been requested twice before. This is the third and final request for this documentation. Please provide any and all daily time records (or 'wage tickets,' if this is the Labor Ready term for time records) and payroll records for all employees who performed work on this project. The payroll records I am requesting are not the same as certified payroll reports. If the payroll records do not clearly delineate the number of hours worked and amount of wages paid for the work on the project in question, you must provide all time cards for the duration of each pay period, including those for other projects. The information provided must be for the duration of Labor Ready Inc.'s work on this project; at least from April 22, 2000 through May 19, 2000. If you are unclear as to what is being requested, please contact me so I can explain. Should you fail to provide these requested records, I will be forced to subpoena the records. I will also consider recommending the assessment of civil penalties against Labor Ready Northwest, Inc. and/or Labor Ready, Inc. for violation of ORS 279.355 and OAR 839-016-0030, for failure to provide records showing whether or not the prevailing wage rate has been paid.

"At this time, I am also requesting copies of all canceled checks paid to each and every worker in relation to this project, whether or not those checks include wages earned on different projects. I am also requesting current addresses and phone numbers for each worker on this project.

"In your letter to me, you stated, 'The overtime was calculated correctly for all in question only.' I assume you mean the overtime wages were calculated correctly for all employees on this project, but this is not true. Kerry Lee is still due at least $8.00 in overtime wages, and perhaps more. * * * Once I review the time cards, payroll records and canceled checks, I will be able to determine what was truly paid to this worker, and the amount of wages actually due.

"Please explain why Kerry Lee was 'omitted from the invoices in question,' and therefore did not appear on the original certified payroll. The explanation you provided in your letter simply said it was 'for some reason,' but I need a more thorough explanation. Were any other workers on this project 'omitted from the invoices in question?' if so, please provide all information on these workers, including names, time cards, payroll records and canceled checks.

"Please explain why the rates of pay on the first corrected version of certified payroll were

incorrect, yet in most cases, the gross amount of pay was equal to the number of hours shown as worked multiplied by the correct wage rate in the BOLI rate book.

"Please explain why Labor Ready did not provide the Bureau all certified payroll reports for this project, as originally requested. Even with the amended certified payroll you provided with your letter, there are at least two certified payroll reports missing. * * *

"Please explain why Labor Ready has still not provided any certified payroll to the Bureau for the week of 5/13/00 to 5/19/00, from either the Parkrose or the Tigard branch.

"You are using the federal PWR payroll form for this project, but this form is missing some of the information required on Oregon's certified payroll form, or WH-38. The federal form is missing much of the information required at the top of the State's form, and is also missing the fringe benefit information found in columns 10 and 11. In this case, it appears Labor Ready is paying the fringe benefit portion of the prevailing wage rate to the worker as wages. At a minimum, this amount must be shown separately from the base amount paid, as directed in column 6 of the State's form.

"Most importantly, the certifying statement on the State's form is missing from Labor Ready's form. You <u>must</u> include the sentence, 'I have read this certified statement, know the contents thereof and it is true to my knowledge.' Without this statement, this report is incomplete and is not 'certified.' I am enclosing a copy of Oregon's WH-38 form, along with instructions for completing the form. While you do not have to use this exact form, OAR 839-016-0010 requires that when using a different form, it must contain all of the information required on the WH-38.

"My final comment on the certified payroll report is that you should show a worker's group number in column 2 of the report, along with the classification. * * * Please ensure future certified payroll forms used by Labor Ready Northwest, Inc. and Labor Ready, Inc. contain all the information required on the State or [*sic*] Oregon certified payroll form. Failure to do so may result in the assessment of civil penalties by the Bureau.

"* * * * *

"You must still provide the written authorizations for the $2.00 'equip' deductions. Without the written authorizations, this deduction is not lawful. Even if you are able to provide those authorizations, however, it is still not clear if this is a lawful deduction. Explain <u>fully</u> what this deduction is for. * * * Without a full explanation as to what this deduction is for, and

without signed and dated authorizations from each employee, I will require that Labor Ready refund this money to the workers.

"The final issue deals with Daniel Mark and Daryl Single. The information I have indicates these employees worked on this project. Your response to me stated only, 'According to our records the two employees, Daniel Mark and Daryl Single, did not work on this project.' I hope you can understand that I cannot simply accept your assurance that these employees did not work on this project. Labor Ready's records have not proved to be extremely accurate, either in the past or in this particular case. You must provide documentation showing on which projects these employees did work, the hours and days they worked, payroll records for these employees, from April 22, 2000 through May 19, 2000.

"Please provide all requested documentation and answers to the above questions by no later than October 25, 2000. If you do not provide the requested information by this date, I will subpoena these records, and will take further action as allowed by the prevailing wage rate laws. Please be aware that the Bureau of Labor and Industries has the ability to assess civil penalties and/or liquidated damages against your company for violations of the prevailing wage laws, and will consider taking such action should you fail to provide all requested information. If you have any questions, you may call me at the number shown below."

(Emphasis in original)

With her letter, Wooley enclosed a copy of BOLI's form WH-38 and a two-page instruction sheet describing how to complete the WH-38.

60) Wooley did not receive any documents from Respondent through October 25, 2000.

61) On October 26, 2000, Wooley called Respondent. She spoke with Siobhan Rischman, an employee of Labor Ready, Inc.'s prevailing wage unit who managed the unit that issued certified payroll reports. Rischman had assumed the job of responding to Wooley because of her perception that Baldwin had not responded adequately to Wooley's requests. Rischman stated that most of the documents were ready, but she had just requested copies of the cancelled checks and those would take 10 days to receive. Rischman asked Wooley if Wooley wanted her to mail the documents currently in Respondent's possession and then send copies of cancelled checks as they were received. Wooley asked Rischman to hold what she had so far and "then mail the entire package of documents when all [were] complete."

62) Some time later, [22] Wooley received two more certified payroll reports from Respondent. The reports were dated "2000-11-3" are summarized as follows:

a) A report for April 29 through May 5, 2000, for laborers from Respondent's Parkrose location that lists two workers classified as "laborers" whose wage rate was $27.59 per hour straight time and $41.39 per hour overtime. "HORIZON RESTORATION SYSTEM" is printed across the top of the first page of the report. "DEMO – BEAVER ACRES" is typewritten under the box entitled "PROJECT AND LOCATION," and "(Group 1)" is handwritten in that same box.

b) A report for May 13 through May 19, 2000, for laborers from Respondent's Tigard location that lists three workers classified as "laborers" whose wage rate was $25.50 per hour straight time and $37.80 per hour overtime. "HORIZON RESTORATION SYSTEMS" is printed across the top of the first page of the report. "BEAVER ACRES ELEM." is typewritten under the box entitled "PROJECT AND LOCATION," and "(Group 5)" is handwritten in that same box.

The certified statements accompanying these payroll reports are identical to the statements submitted accompanying Respondent's Cornelius Project payroll reports with one significant exception. Above the signature of the individual preparing it appears the typed statement "I have read this Certified Statement, know the contents thereof, and it is true to my knowledge."

63) On November 17, 2000, Wooley received a certified payroll report from Respondent that showed Kerry Lee had worked 8.0 hours of straight time and 5.0 hours of overtime on April 28, 2000, earning gross wages of $351.24.

64) None of Respondent's payroll reports submitted on the Beaver Acres Project listed fringe benefits independently from wages.

65) On January 29, 2001, Wooley sent a letter to Rischman. Among other things, she stated:

> "Pending receipt of the proof of voucher payments * * * it appears all employees were paid correctly on this project."
>
> "* * * * *
>
> "When we spoke on Thursday, I mentioned that while I had received some of the requested documentation, Labor Ready had not responded to any of the questions I asked in my letter of October 13, 2000. At this point, rather than pro-

[22] Wooley did not testify as to the date these certified payroll reports were received, and they do not have a BOLI date stamp on them showing the date they were received.

vide individual answers to all those questions, I think it would be more beneficial to simply ask for an answer to one question, which is why there continue to be errors on the certified payroll reports.

"* * * * *

"Please provide the requested documentation (proof of payments to workers) and an answer to the question of certified payroll report errors by no later than February 7, 2001. Failure to respond may negatively impact the administrative action currently underway."

66) On February 5, 2001, Rischman sent a letter to Wooley explaining the reason for the Kerry Lee discrepancies. Rischman indicated that, as a result of Wooley's audit, she was "recommending that all pay issued to workers on prevailing wage rate jobs be via check so that if need be, we can provide the best documentation of payment possible." Previously, Respondent had paid some workers by voucher for work on the Beaver Acres Project. The voucher could be exchanged for cash in Respondent's cash dispensing machine located in Respondent's local offices.

67) Wooley did not request that Respondent change from vouchers to paychecks, as this change makes no difference in the difficulty of performing an audit to determine if the prevailing wage rate has been paid.

68) At the end of her investigation, Wooley concluded that Respondent had paid all wages due to workers on the Beaver Acres Project. Wooley was unable to make this determination until Rischman had responded to her January 29, 2001, request for records.

69) During her investigation, Wooley never made any verbal statements to any representative of Respondent that she would recommend the assessment of civil penalties if Respondent did not timely submit requested records.

RESPONDENT'S GENERAL BUSINESS PRACTICES

70) Respondent's sole business is providing temporary workers to client businesses.

71) At the time Respondent employed workers on the Cornelius, Central, and Beaver Acres Projects, it was Respondent's typical practice to pay workers on a daily basis if the workers so chose that method of payment.

72) At times material, all the certified payroll reports submitted by Respondent were prepared by staff employed by Labor Ready, Inc. at Respondent's corporate headquarters in Tacoma, Washington. Preparation of certified payroll reports is triggered when one of Respondent's branch office employees makes an entry into Respondent's computer noting that an employee has worked on a prevailing wage rate job.

73) A document used by Respondent in training its employees on prevailing wage rate

job requirements includes the following statements:

> "II. Prevailing wage laws require three basis [*sic*] things of Labor Ready:
>
> "(A) *Payment of prevailing wages to workers.* Prevailing wages are usually (but not always) much higher than competitive wages, and they vary from region to region. Prevailing wages may also include daily or weekend overtime obligations which are different from general state law. A statement of the prevailing wage for each job category in a particular region may be obtained from the federal or state (as applicable) Department of Labor.
>
> "* * * * *
>
> "It is critically important that we don't fail to identify a prevailing wage job. Become adept at spotting prevailing wage-sounding projects. Do not rely on the customer to advise you as to whether a job is prevailing wage. Call the state or federal Department of Labor and see if the project is listed (although even this is not foolproof). Do a site visit, look for postings regarding prevailing wage, and inquire of other contractors."

MITIGATION

74) Since the Beaver Acres Project, Respondent no longer issues vouchers to workers on prevailing wage rate jobs. Respondent's intent is to provide a clearer record to auditors such as BOLI.

75) Since the Beaver Acres Project, Rischman has created an audit team in her department that conducts daily reviews of two reports. The first is a prevailing wage rate "possibilities" account for Respondent's jobs that were new the prior day that and not marked as prevailing wage rate jobs, but which contain one of 25 keywords, such as "high," "school," and "airport" that indicate a possible prevailing wage rate job. The second is when a branch office flags a job as a prevailing wage rate job, Respondent's computer system prompts the branch employee to send a prevailing wage rate sheet to corporate headquarters in Tacoma. Upon receipt of the rate sheet, one of Rischman's subordinates will review it and ascertain that all rates have been correctly paid. Rischman receives an automatic e-mail if this isn't done.

76) Since the Beaver Acres Project, Respondent now limits reporting of prevailing wage rate work to a daily work ticket instead of a weekly work ticket so that Respondent can have an accurate accounting of prevailing wage rate work on a daily basis.

77) Since the Beaver Acres Project, Respondent has reformatted its payroll reports to include a separate classification for fringe benefits.

78) Since the Beaver Acres Project, Respondent no longer allows any equipment or

transportation deductions from workers' checks on prevailing wage rate jobs.

AGGRAVATION

79) On January 26, 2000, Tyrone B. Jones, a BOLI Wage & Hour Division compliance specialist, sent a letter to Timothy J. Adams at Labor Ready's corporate office, 1016 S. 28th Street, Tacoma, WA 98409. The letter informed Adams that payroll records provided by LRI for the Southern Oregon University Center For The Visual Arts project contained incorrect trade classifications for LRI's workers and that LRI had not provided a certified statement that met the requirements of ORS 279.354. On February 1, 2000, LRI provided payroll records for the Southern Oregon project that listed the classification of LRI's sole employee on the job as "laborer" and included a statement of certification containing the following language:

> "I have read this certified statement, know the contents thereof and it is true to my knowledge."

The original payroll reports were not offered as evidence.

80) The Agency offered no evidence in support of its allegation contained in its motion to amend the Notice of Intent that Respondent failed to pay its employees at least the statutory minimum wage of $6.50 per hour for time spent travelling between Respondent's office and the work location where the employees worked for Respondent's clients and back again.[23]

CREDIBILITY FINDINGS

81) Wells, Wooley, Laing, and Shields were credible witnesses and the forum has credited their testimony in its entirety.

82) Rischman's testimony was credible in all respects except one. The forum disbelieved her testimony that Wells instructed Ivy Finnegan, Rischman's subordinate, not to pay Chris Francis the $34.50 in wages that Respondent admitted were due and owing to Francis. Wells testified credibly that it was not the Agency's practice to instruct employers not to pay wages admittedly due and that he would not have told Finnegan to withhold payment.

ULTIMATE FINDINGS OF FACT

CORNELIUS PROJECT

1) On December 20, 1999, a contract for the Cornelius Project, a public works project in Hillsboro, Oregon, was awarded to I-5 Excavating, Inc. ("I-5"). The Project was first advertised for bid on November 8, 1999, and its contract was for the amount of $1,666,600.

2) The Cornelius Project was regulated under Oregon's prevailing wage rate laws and the prevailing wage rates that applied to the project were those published in BOLI's July 1999 prevailing wage rate booklet. It

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[23] *See* Finding of Fact 15 – Procedural, *supra*.

was not regulated under the Davis-Bacon Act.

3) The applicable prevailing wage rate for laborers on the Cornelius Project was a basic hourly rate of $20.09 plus $7.50 in fringe benefits, for a total of $27.59. The applicable prevailing wage rate for carpenters was a basic hourly rate of $23.94 plus $7.92 in fringe benefits, for a total of $31.86.

4) Respondent provided seven workers – Joseph Baker, Catherine Clayton, Chris Francis, Faried Hawash, Renaldo Ramirez, Alfredo Rodriguez, and David Snyder -- to I-5 between June 12 and August 12, 2000. These workers all performed manual labor on the Cornelius Project. Baker, Francis, and Hawash worked as carpenters, and the remaining four worked as laborers.

5) Clayton, Ramirez, and Rodriguez were initially paid $6.50 per hour for their June 28, 2000, work on the Cornelius Project.

6) Hawash was initially paid $9 per hour for his June 28, 2000, work on the Cornelius Project.

7) Baker was initially paid $10 per hour for his June 30 and July 3, 2000, work on the Cornelius Project.

8) Francis was initially paid $10 per hour for his June 28, 2000, work on the Cornelius Project. Francis worked as a carpenter for Respondent on the Cornelius Project on eight different days between July 15 and August 12, 2000, and was issued eight separate checks. On each check, he was paid $31.26 per hour.

9) Respondent first learned that the Cornelius Project was a prevailing wage rate job on July 6, 2000.

10) On July 6, 2000, after Respondent's manager learned the Cornelius Project was a prevailing wage rate job, she had checks issued to Baker, Hawash, and Francis for the difference between the amount Respondent paid them for their work before July 6 and the prevailing wage. That same day, she took a copy of the prevailing wage rates to the Cornelius Project and asked I-5's foreman to post them.

11) Snyder was initially paid $27.59 per hour for his July 28, 2000, work on the Cornelius Project.

12) On August 18, 2000, Respondent filed a payroll report for the week ending June 16, 2000, for work on the Cornelius Project. This report lacked the statement of certification required by ORS 279.354 and OAR 839-016-0010. Respondent's corrected report, filed on November 21, 2000, also lacked a statement of certification.

13) On August 18, 2000, Respondent filed a payroll report for the week ending June 30, 2000, for work on the Cornelius Project. This report lacked the statement of certification required by ORS 279.354 and OAR 839-016-0010 and stated that Hawash's and Francis's work

classification was "laborer." Respondent's corrected report, filed on November 21, 2000, also lacked a statement of certification. In addition, it listed an additional worker, Baker, who was not listed on the first report, and stated that Hawash's, Francis's, and Baker's work classification was "laborer."

14) On August 18, 2000, Respondent filed a payroll report for the week ending July 7, 2000, for work on the Cornelius Project. This report lacked the statement of certification required by ORS 279.354 and OAR 839-016-0010 and stated that Baker worked 15 hours of straight time as a "laborer" on July 6. Respondent's corrected report, filed on November 21, 2000, also lacked a statement of certification and stated that Baker had not worked at all on July 6.

15) On August 18, 2000, Respondent filed a payroll report for the week ending July 21, 2000, for work on the Cornelius Project. This report lacked the statement of certification required by ORS 279.354 and OAR 839-016-0010 and stated that Francis worked as a "laborer" for 4 hours of straight time on Saturday, July 15, and 9 hours of straight time on July 19. Respondent's corrected report, filed on November 21, 2000, was identical, except for the payroll number, to the first report, and also lacked a statement of certification.

16) On August 25, 2000, Respondent filed a payroll report for the week ending August 11, 2000, for work on the Cornelius Project. This report lacked the statement of certification required by ORS 279.354 and OAR 839-016-0010 and stated that Francis worked as a "laborer" for 4 hours on August 7, 8.5 hours straight time August 8, and 8 hours on August 11. Respondent's corrected report, filed on November 21, 2000, stated that Francis worked as a "laborer" for 4 hours on August 9, 8.5 hours of straight time on August 10, and 8 hours on August 11. It also lacked a statement of certification.

17) On August 25, 2000, Respondent filed a payroll report for the week ending August 18, 2000, for work on the Cornelius Project. This report lacked the statement of certification required by ORS 279.354 and OAR 839-016-0010 and stated that Francis worked as a "laborer" for 8 hours on August 14. Respondent's corrected report, filed on November 21, 2000, stated Francis worked as a "laborer" for 8 hours of straight time on Saturday, August 12. It also lacked a statement of certification.

18) Respondent did not post or keep posted the applicable prevailing wage rates at the Cornelius Project at any time while its workers performed work on that project.

19) On November 21, 2000, Respondent issued checks to Clayton, Ramirez, and Rodriguez as "back pay" for the difference between what Respondent had paid them for their work on June 12, 2000, at the Cornelius Project and the prevailing wage.

20) At the time of hearing, Respondent still owed Francis $34.50 in unpaid prevailing wages, all of which was earned after July 6, 2000. At the latest, Respondent's corporate headquarters was aware that Francis was owed this back pay on December 13, 2000.

CENTRAL PROJECT

20) On April 26, 2000, the contract for the Addition and Remodel Project at Central High School in Independence, Oregon was awarded to M. L. Holmes Construction. The Central Project was first advertised for bid on March 1, 2000. The contract was for the amount of $481,435.

21) The Central Project was a public works project regulated under Oregon's prevailing wage rate laws, and the prevailing wage rates that applied to the project were those published in BOLI's January 2000 prevailing wage rate booklet. It was not regulated under the Davis-Bacon Act.

22) On Saturday, September 2, 2000, Respondent's Salem office dispatched Aaron Wadsworth to perform manual labor for Andersen Woodworks at the Central Project. Wadsworth worked 8.5 hours for Andersen on the Central Project that day. Respondent paid him $57.38 in gross wages, calculated at the rate of $6.75 per hour. Wadsworth only worked one day on the Central Project.

23) Wadsworth performed work on the Central Project that fit in the classification of Carpenter, Group 1, and Laborer. The applicable prevailing wage rate for Carpenter 1 was $23.94 per hour plus $7.92 in fringe benefits, and $43.83 per hour for wages and fringe benefits for overtime work.

24) Respondent did not complete the certified payroll report required by ORS 279.354 until January 18, 2001.

25) Respondent did not post or keep posted the applicable prevailing wage rates while Wadsworth performed work on the Central Project.

26) Respondent did not know that the Central Project was a prevailing wage rate job until notified of that fact by BOLI in January 2001.

BEAVER ACRES PROJECT

27) Between April 29 and May 12, 2000, Respondent provided manual labor as a subcontractor on the Beaver Acres Project, a public works project performed in Beaverton, Oregon, that was subject to regulation under Oregon's prevailing wage rate laws and not regulated under the Davis-Bacon Act.

28) Respondent filed several payroll reports required by ORS 279.354, including two sets of corrected reports, for the Beaver Acres Project. Respondent's three original reports all lack the statement of certification required by ORS 279.354 and OAR 839-016-0010. The three original reports all show that one or more workers worked more than eight hours as straight time on various

days. The first set of corrected reports includes a statement above the preparer's signature that reads: "I have read this Certified Statement, know the contents thereof, and it is true to my knowledge."

29) On August 4, 2000, Susan Wooley, a compliance specialist employed by the Wage & Hour Division of BOLI, sent a letter to Respondent in which she requested, among other items, "any and all time records, payroll records, and certified payroll records for all employees who performed work on the project." Wooley requested these records because she was unable to determine if Respondent had paid the prevailing rate of wage to its employees on the Beaver Acres Project without them. Wooley requested that these records be provided to her no later than August 21, 2000.

30) On August 18, 2000, Wooley received several payroll reports from Respondent reflecting work done by Respondent's employees on the Beaver Acres Project. Wooley reviewed the reports but was unable to determine the amount Respondent's employees were paid on the project because of confusing information on the payroll reports and because Respondent did not send any time records or payroll records.

31) On September 11, 2000, Wooley sent a second letter to Respondent that renewed her request for "all time records and payroll records for all employees who performed work on this project." In the letter, Wooley pointed out some of the discrepancies she found on the payroll reports. Wooley asked that this documentation be provided no later than September 22, 2000.

32) On October 3, 2000, Wooley received a new set of documents from Baldwin that consisted of corrected payroll reports for the Beaver Acres job. This set of reports lacked the statement of certification quoted in Ultimate Finding of Fact 23. One of the reports showed that a worker had worked 12 hours of straight time and one hour of overtime on a single weekday.

33) After reviewing Respondent's October 3 submissions, Wooley was still unable to determine if Respondent's workers had been paid the prevailing wage rate. On October 13, 2000, she sent a third letter to Respondent that again requested time records showing the hours Respondent's workers had worked and payroll records documenting the pay that Respondent's workers had actually received. Wooley also requested copies of all canceled checks issued to Respondent's workers on the Beaver Acres Project and other information concerning the workers. Wooley requested that this documentation be provided no later than October 25, 2000, and stated that she would subpoena the records if they were not provided by that date and "take further action as al-

lowed by the prevailing wage rate laws."

34) On October 26, 2000, Wooley telephoned Respondent and spoke with Rischman, who told Wooley she had just requested copies of the canceled checks and they would take 10 days to receive, and that she had most of the other documents requested. Wooley told Rischman to send all the documents at once when Rischman had received them all.

35) Between October 26, 2000, and January 29, 2001, Wooley received several more certified payroll reports from Respondent. On January 29, 2001, Wooley sent a final letter to Rischman requesting, among other things, proof of payments to workers and an explanation for the continued errors on Respondent's certified payroll reports.

36) On February 5, 2001, Rischman sent a letter to Wooley explaining the reason for inconsistencies in Respondent's certified payroll reports. After receiving that letter, Wooley was finally able to determine that Respondent had paid all wages due to its workers on the Beaver Acres Project.

CONCLUSIONS OF LAW

1) ORS 279.348(3) provides:

> "'Public works' includes, but is not limited to, roads, highways, buildings, structures and improvements of all types, the construction, reconstruction, major renovation or painting of which is carried on or contracted for by any public agency to serve the public interest but does not include the reconstruction or renovation of privately owned property which is leased by a public agency."

OAR 839-016-0004(17) provides:

> "'Public work', 'public works' or public works project' includes but is not limited to roads, highways, buildings, structures and improvements of all types, the construction, reconstruction, major renovation or painting of which is carried on or contracted for by any public agency the primary purpose of which is to serve the public interest regardless of whether title thereof is in a public agency but does not include the reconstruction or renovation of privately owned property which is leased by a public agency."

ORS 279.348(5) provides:

> "'Public agency' means the State of Oregon or any political subdivision thereof or any county, city, district, authority, public corporation or entity and any of their instrumentalities organized and existing under law or charter."

See also OAR 839-016-0004(16) (same). The Cornelius, Central, and Beaver Acres Projects were public works projects. Respondent was a subcontractor who employed workers on all three Projects.

2) ORS 279.350(1) provides, in pertinent part:

> "The hourly rate of wage to be paid by any contractor or subcontractor to workers upon all public works shall be not less than the prevailing rate of wage for an hour's work in the same trade or occupation in the locality where such labor is performed. The obligation of a contractor or subcontractor to pay the prevailing rate of wage may be discharged by making the payments in cash * * *."

OAR 839-016-0035(1) provides:

> "Every contractor or subcontractor employing workers on a public works project shall pay to such workers no less than the prevailing rate of wage for each trade or occupation, as determined by the Commissioner, in which the workers are employed."

ORS 279.334(1)(a) provides, in pertinent part:

> "In all cases where labor is employed by the state, county, school district, municipality, municipal corporation, or subdivision, through a contractor, no person shall be required or permitted to labor more than 10 hours in any one day, or 40 hours in any one week, except in cases of necessity, emergency, or where the public policy absolutely requires it, in which event, the person or persons who employed for excessive hours shall receive at least time and a half pay:
>
> "(A) For all overtime in excess of eight hours a day or 40 hours in any one week when the work week is five consecutive days, Monday through Friday; or
>
> "* * * * *
>
> "(C) For all work performed on Saturday * * *."

OAR 839-016-0050(2) provides, in pertinent part:

> "Contractors and subcontractors required by ORS 279.334 to pay overtime wages shall pay such wages as follows:
>
> "(a) Workers must be paid at least time and one-half the hourly rate of pay, excluding fringe benefits, for all hours worked:
>
> "(A) On Saturdays;
>
> "* * * * *
>
> "(D) Over eight (8) hours in a day[.]"

Respondent committed five violations of ORS 279.350(1) and OAR 839-016-0035(1) on the Cornelius Project by initially paying Catherine Clayton, Renaldo Ramirez, and Alfredo Rodriguez $6.50 per hour for their work on June 12, 2000; by initially paying Joseph Baker $10 per hour for his work on June 30 and July 3, 2000; and by initially paying Chris Francis $10 per hour for his work on June 28, 2000, then paying him $31.26 per hour for his work after July 6, 2000.

Respondent committed one violation of ORS 279.350(1) and OAR 839-016-0035(1) on the Central Project by initially paying Aaron Wadsworth $6.75 per hour

for his work on September 2, 2000.

3) *Former* ORS 279.354 provided, in pertinent part:

> "(1) The contractor or the contractor's surety and every subcontractor or the subcontractor's surety shall file certified statements with the public contracting agency in writing in form prescribed by the Commissioner of the Bureau of Labor and Industries, certifying the hourly rate of wage paid each worker which the contractor or the subcontractor has employed upon such public work, and further certifying that no worker employed upon such public work has been paid less than the prevailing rate of wage or less than the minimum hourly rate of wage specified in the contract, which certificate and statement shall be verified by the oath of the contractor or the contractor's surety or subcontractor or the subcontractor's surety that the contractor or subcontractor has read such statement and certificate and knows the contents thereof and that the same is true to the contractor or subcontractor's knowledge. The certified statements shall set out accurately and completely the payroll records for the prior week including the name and address of each worker, the worker's correct classification, rate of pay, daily and weekly number of hours worked, deductions made and actual wages paid.
>
> "(2) Each certified statement required by subsection (1) of this section shall be delivered or mailed by the contractor or subcontractor to the public contracting agency. Certified statements shall be submitted as follows:
>
> "(a) For any project 90 days or less from the date of award of the contract to the date of completion of work under the contract, the statements shall be submitted once before the first payment and once before final payment is made of any sum due on account of a contract for a public work.
>
> "(b) For any project exceeding 90 days from the date of award of the contract to the date of completion of work under the contract, the statements shall be submitted once before the first payment is made, at 90-days intervals thereafter, and once before final payment is made of any sum due on account of a contract for a public work."

Former OAR 839-016-0010 provided, in pertinent part:

> "(1) The form required by ORS 279.354 shall be known as the Payroll and Certified Statement, Form WH-38. The Form WH-38 shall accurately and completely set out the contractors or subcontractor's payroll for the work week immediately preceding the submission of the form to the

public contracting agency by the contractor or subcontractor.

"(2) A contractor or subcontractor must complete and submit the certified statement contained on Form WH-38. The contractor or subcontractor may submit the weekly payroll on the Form WH-38 or may use a similar form providing such form contains all the elements of Form WH-38.

"(3) When submitting the weekly payroll on a form other than Form WH-38, the contractor or subcontractor shall attach the certified statement contained on Form WH-38 to the payroll forms submitted.

"(4) Each Payroll and Certified Statement form shall be delivered or mailed by the contractor or subcontractor to the public contracting agency. Payroll and certified statement forms shall be submitted as follows:

"(a) For any public works project of 90 days or less from the date of award of the contract to the date of completion of work under the contract, the form shall be submitted once within 15 days of the date the work first began on the project and once before the agency makes its final inspection of the project;

"(b) For any public works project exceeding 90 days from the date of award of the contract to the date of completion of work under the contract, the form shall be submitted within 15 days of the date work first began on the project, at 90-day intervals thereafter, and before the agency makes its final inspection of the project.

"(5) Subcontractors beginning work on a project later than 15 days after the start of work on the project or finishing work 90 days prior to the final inspection of the work by the agency shall submit the payroll and certified statement as follows:

"(a) For any public works project of 90 days or less from the date of award of the contract to the data of completion of work under the contract, the form shall be submitted once within 15 days of the date the subcontractor first began work on the project and once before the contractor makes its final inspection of the work performed by the subcontractor;

"(b) For any public works project exceeding 90 days from the date of award of the contract to the date of completion of work under the contract, the form shall be submitted within 15 days of the date the subcontractor first began work on the project, at 90-day intervals thereafter, and before the contractor makes its final inspection of the work performed by the subcontractor[.]"

Respondent filed six payroll reports for work performed by its employees on the Cornelius Project that did not meet the

requirements of ORS 279.354 and OAR 839-016-0010, constituting six violations of ORS 279.354 and *former* OAR 839-016-0010.

Respondent filed one payroll report for work performed by its employee on the Central Project that did not meet the requirements of ORS 279.354 and OAR 839-016-0010, constituting one violation of ORS 279.354 and *former* OAR 839-016-0010(5).

Respondent filed several payroll reports for work performed by its employee on the Beaver Acres Project that did not meet the requirements of ORS 279.354 and OAR 839-016-0010, constituting one violation of ORS 279.354 and OAR 839-016-0010.[24]

4) ORS 279.350(4) provides:

> "Every contractor or subcontractor engaged on a project for which there is a contract for a public work shall keep the prevailing wage rates for that project posted in a conspicuous and accessible place in or about the project. Contractors and subcontractors shall be furnished copies of these wage rates by the commissioner without charge."

OAR 839-016-0033(1) provides:

> "Contractors shall post the prevailing wage rates applicable to the project in a conspicuous place at the site of work. The posting shall be easily accessible to employees working on the project."

Respondent did not post or keep posted the prevailing wage rates for the Cornelius or Central Projects, committing two violations of ORS 279.350(4) and OAR 839-016-0033(1).

5) ORS 279.355(2) provides:

> "Every contractor or subcontractor performing work on public works shall make available to the commissioner for inspection during normal business hours and, upon request made a reasonable time in advance, any payroll or other records in the possession or under the control of the contractor or subcontractor that are deemed necessary by the commissioner to determine if the prevailing rate of wage is actually being paid by such contractor or subcontractor to workers upon public works."

OAR 839-016-0030 provides, in pertinent part:

> "(1) Every contractor and subcontractor performing work on a public works contract shall make available to representatives of the Wage and Hour Division records necessary to determine if the prevailing wage rate has been or is being paid to workers upon such public work and records showing contract prices and fees paid to the bureau. Such records shall be made available to representatives of the Wage and Hour Division

[24] The forum finds one violation because the Agency only alleged one violation.

for inspection and transcription during normal business hours.

"(2) The contractor or subcontractor shall make the records referred to in section (1) of this rule available within 24 hours of a request from a representative of the Wage and Hour Division or at such later date as may be specified by the division."

Respondent committed one violation of ORS 279.355 and OAR 839-016-0030(2) by failing to make available records necessary to determine if the prevailing wage rate was paid to its employees on the Beaver Acres Project at the time requested by a representative of the Wage and Hour Division.

6) ORS 279.370 provides, in pertinent part:

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

OAR 839-016-0500 provides:

"As used in OAR 839-016-0500 to 839-016-0540, a person acts knowingly when the person has actual knowledge of a thing to be done or omitted or should have known the thing to be done or omitted. A person should have known the thing to be done or omitted if the person has knowledge of facts or circumstances that would place the person on reasonably diligent inquiry. A person acts knowingly if the person has the means to be informed but elects not to do so. For purposes of the rule, the contractor, subcontractor and contracting agency are presumed to know the circumstances of the public works construction project."

OAR 839-016-0520 provides:

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

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

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

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

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

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

"(2) It shall be the responsibility of the contractor, subcontractor or contracting

agency to provide the commissioner with evidence of any mitigating circumstances set out in subsection (1) of this rule.

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

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

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

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

"(2) Civil penalties may be assessed against any contractor, subcontractor or contracting agency regulated under the Prevailing Wage Rate Law and are in addition to, not in lieu of, any other penalty prescribed by law.

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

"(a) Failure to pay the prevailing rate of wage in violation of ORS 279.350;

"(b) Failure to post the applicable prevailing wage rates in violation of ORS 279.350(4);

"* * * * *

"(e) Filing inaccurate or incomplete certified statements in violation of ORS 279.354."

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

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

"(2) For purposes of this rule "repeated violations" means violations of a provision of law or rule which has been violated on more than one project within two years of the date of the most recent violation.

"(3) Notwithstanding any other section of this rule, when the commissioner determines to assess a civil penalty for a violation of ORS 279.350 regarding the payment of the prevailing rate of wage, the minimum civil penalty shall be calculated as follows:

"(a) An equal amount of the unpaid wages or $1,000, whichever is less, for the first violation;

"(b) Two times the amount of the unpaid wages or $3,000,

whichever is less, for the first repeated violation;

"(c) Three times the amount of the unpaid wages or $5,000, whichever is less, for the second and subsequent repeated violations.

"* * * * *

"(5) The civil penalty for all other violations shall be set in accordance with the determinations and considerations referred to in OAR 839-016-0530.

"(6) The civil penalties set out in this rule shall be in addition to any other penalty assessed or imposed by law or rule."

The Commissioner's imposition of the penalties for Respondent's violations of ORS 279.350(1) and OAR 839-016-0035(1), ORS 279.350(4) and OAR 839-016-0033(1), ORS 279.354 and OAR 839-016-0010, and ORS 279.355 and OAR 839-016-0030 is an appropriate exercise of his discretion.

7) ORS 279.361(1) provides:

"(1) When the Commissioner of the Bureau of Labor and Industries, in accordance with the provisions of ORS 183.310 to 183.550, determines that a contractor or subcontractor has intentionally failed or refused to pay the prevailing rate of wage to workers employed upon public works * * * or a contractor or subcontractor has intentionally failed or refused to post the prevailing wage rates as required by ORS 279.350(4), the contractor or subcontractor or any firm, corporation, partnership or association in which the contractor or subcontractor has a financial interest shall be ineligible for a period not to exceed three years from the date of publication of the name of the contractor or subcontractor on the ineligible list as provided in this section to receive any contract or subcontract for public works. The commissioner shall maintain a written list of the names of those contractors and subcontractors determined to be ineligible under this section and the period of time for which they are ineligible. A copy of the list shall be published, furnished upon request and made available to contracting agencies."

OAR 839-016-0085 provides, in pertinent part:

"(1) Under the following circumstances, the commissioner, in accordance with the Administrative Procedures Act, may determine that for a period not to exceed three years, a contractor, subcontractor or any firm, limited liability company, corporation, partnership or association in which the contractor or subcontractor has a financial interest is ineligible to receive any contract or subcontract for a public work:

"(a) The contractor or subcontractor has intentionally failed or refused to pay the

prevailing rate of wage to workers employed on public works as required by ORS 279.350;

"* * * * *

"(c) The contractor * * * has intentionally failed or refused to post the prevailing wage rates as required by ORS 279.350(4) and these rules."

"* * * * *

"(4) The Wage and Hour Division shall maintain a written list of the names of those contractors, subcontractors and other persons who are ineligible to receive public works contracts and subcontracts. The list shall contain the name of contractors, subcontractors and other persons, and the name of any firms, corporations, partnerships or associations in which the contractor, subcontractor or other persons have a financial interest. Except as provided in OAR 839-016-0095, such names will remain on the list for a period of three (3) years from the date such names were first published on the list."

Respondent intentionally failed to pay the prevailing wage rate to one employee –Francis -- for his work on the Cornelius Project. Respondent intentionally failed to post the prevailing wage rates on the Cornelius Project. As a result, the Commissioner must place Respondent on the List of Ineligibles for a period not to exceed three years. The Commissioner's decision to place Respondent on that list for one year based on Respondent's intentional violation of ORS 279.350(1) and intentional violation of ORS 279.350(4) related to the Cornelius Project is an appropriate exercise of his discretion.

OPINION

RULINGS RESERVED FOR PROPOSED ORDER

A. <u>Exhibits A-54 through A-56.</u>

These exhibits documented a wage claim filed by Anthony Alder on May 4, 2001, alleging he was employed by "Labor Ready" and not paid for 2.5 hours work moving furniture at the Marriott Motel on May 1, 2001, that BOLI sent a demand letter, and that BOLI received a check from Labor Ready in the amount of $15.64 made out to Anthony Alder. These exhibits were offered as evidence that Respondent had previously violated statutes and rules, constituting an aggravating circumstance under OAR 839-016-0520(1)(b). The violations alleged in the Agency's Notices of Intent regarding the Cornelius, Central, and Beaver Acres Projects all took place in the year 2000. Alder's wage claim cannot constitute a "prior violation" for the reason his alleged unpaid wages became due in the year 2001, making it an alleged *subsequent* violation. Respondent's objection to these exhibits on the basis of relevance is sustained.

In its exceptions, the Agency acknowledged that Exhibits A-54 to A-56 did not establish a "prior violation" within the meaning of OAR 839-016-0520(1)(b), but ar-

gued that they were relevant to show "[t]he actions of the * * * subcontractor * * * in responding to previous violations of statutes and rules" under OAR 839-016-0520(1)(a). The forum disagrees. This rule is intended to penalize contractors and subcontractors for actions taken after an actual determination that a previous violation occurred.[25] It does not apply to actions taken before such a determination has been made. This rule is in contrast to the "prior violation" rule, which turns on the date the action constituting the violation occurred, not the date the action was determined to be a violation. In this case, December 13, 2001, the date the Final Order in Case No. 31-01 issued, was the first date on which Respondent was determined to have committed a violation. Respondent's "actions" with regard to Alder took place in May 2001, and cannot be evaluated as responding to a subsequent determination. The Agency's exception is DENIED.

B. <u>Exhibits A-57 through A-61.</u>

These exhibits documented a wage claim filed by Roger Shurtz on February 9, 1999, alleging he had been employed by "Labor Ready" and was still owed $282 for work performed between August 21 and December 3, 1998, that BOLI sent a demand letter to "Labor Ready, Inc.," and that BOLI received a check from "Labor Ready" in the amount of $282 made out to Roger Shurtz. These exhibits were also offered as evidence that Respondent had previously violated statutes and rules, constituting an aggravating circumstance under OAR 839-016-0520(1)(b). Evidence produced by the Agency shows that Respondent was not registered to do business in Oregon until December 18, 1998, and there is no evidence that Shurtz was employed by Respondent LRNWI, as opposed to LRI, which was registered to do business in Oregon at that time. Respondent's objection to these exhibits on the basis of relevance is sustained because the Agency did not establish that Shurtz's claim was against Respondent.

C. <u>Exhibits 72 and 73.</u>

These exhibits consist of documents that the Agency downloaded from the Internet between the first and second day of hearing. They were offered in rebuttal to show that the operations of LRNWI and LRI were sufficiently intertwined so that LRI's prior violations should be imputed to LRNWI for the purpose of assessing civil penalties. However, although these documents supported the allegations in the Agency's amended Notice of Intent, they did not rebut any evidence presented by Respondent and were irrelevant for that purpose. Respondent's relevancy objection to Exhibits A-72 and A-73 is sustained.

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[25] Examples of a "determination" that would establish the existence of a "prior violation" include a Commissioner's Final Order, an admission of liability by a respondent, or a previous adjudication in another forum of the alleged "prior violation."

RESPONDENT'S MOTION TO DISMISS THE AGENCY'S CHARGE THAT RESPONDENT FAILED TO POST THE APPLICABLE PREVAILING WAGE RATES ON THE CORNELIUS AND CENTRAL PROJECTS

At the conclusion of the Agency's case-in-chief, Respondent moved to dismiss the Agency's charges that Respondent failed to post the applicable prevailing wage rates on the Cornelius and Central Projects, arguing that the Agency elicited no testimony and presented no other evidence in support of these charges. In response, the Agency argued that it had presented a prima facie case through three pieces of evidence: (1) evidence that Respondent did not pay the prevailing wage rate on the Cornelius Project until July 6, 2000; (2) evidence that Respondent did not pay the prevailing wage rate on the Central Project until the Agency told Respondent's representative that the Central Project was a prevailing wage rate job; and (3) evidence cited in the final order issued in case number 31-01 that Respondent did not post on prevailing wage rate jobs in the year 2000. The ALJ denied Respondent's motion. In the proposed order, the ALJ reconsidered this ruling and reversed it, granting Respondent's motion with respect to both the Cornelius and Central Projects on the grounds that the Agency had not presented a prima facie case in its case in chief. In this reconsideration, the ALJ declined to consider evidence relevant to the Agency's posting allegations that came in after the Agency had rested its case. The Agency filed exceptions to the ALJ's conclusions, arguing that it had presented a prima facie case in its case in chief and that evidence presented after the Agency had rested its case must be considered in a review of Respondent's motion to dismiss. The Agency cited Oregon appellate court decisions in support of both points.

After reviewing the Agency's exceptions, the forum concludes that the ALJ's ruling at hearing was correct and the ALJ should not have reconsidered that ruling in the proposed order, and that even if the ALJ was justified in reconsidering his original ruling, he was required to consider *all* the evidence presented during the hearing.

As the Agency points out, on judicial review of denial of a motion to dismiss for failure to establish a prima facie case, the reviewing court will view the evidence "in the light most favorable to the plaintiff and * * * plaintiff is entitled to the benefit of every reasonable inference which may be drawn from the evidence." *Scott v. Mercer Steel Co., Inc*., 263 Or 464, 466-67 (1972). The same standard is applicable to contested case hearings.

The Agency established the following relevant facts in its case in chief. First, Respondent did not begin paying the prevailing wage rate until July 6, 2000, well after its employees began working on

the Cornelius Project. Second, Respondent underpaid its worker on the Central Project until the Agency notified Respondent that the Central Project was a prevailing wage rate job. Third, Timothy Adams, Respondent's general counsel and executive vice president, previously testified on June 19, 2001, a year after Respondent employed workers on the Cornelius and Central Projects, that the posting of prevailing wage rates on job sites by Respondent where Respondent has workers "is not part of our compliance process."[26] As the Agency correctly points out, proof includes both facts and inferences. *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 (1991); *Arkad Enterprises v. Bureau of Labor and Industries,* 107 Or App 384, 386-87 (1991), (quoting *City of Portland v. Bureau of Labor and Industries,* 298 Or 104, 118 (1984). A reasonable inference can be drawn from these facts that Respondent did not post the applicable prevailing wage rates on the Cornelius or Central Projects. Consequently, the forum confirms the ALJ's original ruling at hearing to deny Respondent's motion to dismiss the Agency's posting allegations and reverses the ALJ's contrary ruling in the proposed order.

The forum also reverses the ALJ's ruling in the proposed order that evidence presented after the Agency rested its case and Respondent's motion to dismiss was denied would not be considered in a reconsideration of that ruling. As pointed out in the Agency's exceptions, Oregon appellate courts have long held that, when reviewing a denial of a motion to dismiss or for a nonsuit or directed verdict, the reviewing court must consider all the evidence in the record, not only that presented prior to the time of the motion. *See Scholes v. Sipco Services and Marine, Inc*., 103 Or App 503-, 506 (1990); *Reagan v. Certified Realty Co.,* 47 Or App 35, 37 (1980)*; Ballard v. Rickbaugh Orchards, Inc.,* 259 Or 200, 203 (1971); *Hinton v. Roethler*, 90 Or 440, 446-67 (1918); *Roundtree v. Mount Hood R.R. Co.,* 86 Or 147, 151 (1917). That same standard is applicable to the ALJ's reconsideration of a denial of Respondent's motion to dismiss at hearing or to reconsideration of the same issue in a final order.

RESPONDENT FAILED TO POST THE PREVAILING WAGE RATES FOR THE CORNELIUS AND CENTRAL PROJECTS

ORS 279.350(4) requires all subcontractors who employ workers on a public works project to "keep the prevailing wage rates for that project posted in a conspicuous and accessible place in or about the project." The Oregon Court of Appeals has interpreted this language to require that "every contractor and subcontractor engaged in a public project to per-

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[26] *See In the Matter of Labor Ready Northwest, Inc*., 22 BOLI 245, 283, fn. 18 (2001), *reversed in part, Labor Ready Northwest, Inc. v. Bureau of Labor and Industries,* 188 Or App 346 (2003), *rev den* 336 Or 534 (2004).

sonally initially post the prevailing wage and to maintain that posting throughout the course of its employees' work on the project. *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries,* 188 Or App 346, 369, 71 P3d 559, 572 (2003), *rev den* 336 Or 534 (2004).

A. <u>The Cornelius Project.</u>

Respondent was unaware that the Cornelius Project was a public works until July 6, 2000, when one of Respondent's employees told Shannon Shields, manager of Respondent's Hillsboro office who had dispatched Respondent's employees to the Project, that he thought the Cornelius Project was a prevailing wage rate job. Shields then called I-5, the prime contractor, and was informed that Respondent's workers were performing work subject to the prevailing wage. That same day, Shields took a copy of the applicable prevailing wage rates to the Cornelius Project job site, gave them to I-5's foreman, and asked him to post them. It is undisputed that Respondent did not pay its workers on the Cornelius Project the prevailing wage rate before July 6, 2000. Based on Shields' testimony that she did not believe the Cornelius Project was a public works project before July 6, 2000, and her attempted posting that date, the forum infers that Respondent had not posted or made an attempt to post the prevailing wage rates for the Cornelius Project before July 6, 2000. There is no evidence that Shields or any other representative of Respondent took any other action after July 6, 2000, to post the rates on the Cornelius Project or to verify that they had been posted or were kept posted. Respondent's failure to personally initially post the prevailing wage and to maintain that posting throughout the course of its employees' work on the Cornelius Project constitutes a violation of ORS 279.350(4).

1. <u>Aggravating circumstances.</u>

The violation is a serious one that requires placement on the Commissioner's List of Ineligibles if the Commissioner finds that the violation was intentional. The magnitude is substantial because Respondent did not provide its workers with any way of finding out they were being underpaid and six workers were initially paid less than the prevailing wage rate. There was no evidence that Respondent made any inquiry as to whether the job was a public works when taking the job order. Respondent also failed to take adequate steps to post once it learned the Cornelius Project was a public works. In addition, Respondent previously violated the same statute on the New Bend Middle School Project.

2. <u>Mitigating circumstances.</u>

There are no mitigating circumstances. The forum does not consider Shields' visit to the job site with a copy of the prevailing wage rates as mitigation because there is no evidence that either she or anyone else employed by Respondent took any steps to as-

certain that the rates were in fact posted and kept posted.

3. Amount of civil penalty.

The Agency sought a $4,000 civil penalty for Respondent's violation. In the New Bend Middle School case, the Agency sought and the Commissioner assessed a $2,000 civil penalty for the same violation. This is Respondent's second violation, and the forum finds that a $4,000 civil penalty is appropriate.

B. The Central Project.

In contrast to the Cornelius Project, where Respondent employed workers for several months, Respondent only employed one worker for one day on the Central Project. The Agency presented evidence that Respondent initially paid its worker $6.75 per hour, as opposed to the prevailing wage rate of $43.83 per hour, and that Respondent sent a check for the difference to BOLI four months later when BOLI informed Respondent's Salem branch office that the Central Project was a public works. Based on Rischman's testimony, Respondent's statements in its training manual, and Respondent's prompt payment of wages owed in the Cornelius and Central Projects when Respondent learned those projects were public works, the forum concludes that Respondent has a corporate policy of paying its workers the prevailing wage rate on public works where Respondent is aware that the job is a public works. Since Respondent did not initially pay its worker the prevailing wage rate in this case, the forum infers that Respondent did not know the Central Project was a public works until so notified by BOLI. Lacking knowledge that the Central Project was a public works, Respondent would have had no reason to post, and there was no evidence presented that Respondent did post. From this evidence, the forum concludes that Respondent did not post the Central Project and violated ORS 279.350(4).

1. Aggravating circumstances.

Respondent's violation is a serious one that requires placement on the Commissioner's List of Ineligibles if the Commissioner finds that the violation was intentional. The magnitude is substantial because Respondent did not provide its worker with any way of finding out he was being underpaid and Respondent initially paid him less than the prevailing wage rate. There was no evidence that Respondent made any inquiry as to whether the job was a public works when taking the job order, even though the evidence indicates Respondent knew the job was at a high school. In addition, Respondent previously violated the same statute twice on the New Bend Middle School and Cornelius Projects.

2. Mitigating circumstances.

There are no mitigating circumstances.

3. Amount of civil penalty.

ORS 279.370(1) gives the Commissioner the authority to as-

sess civil penalties for violations of ORS 279.350(4) based merely on Respondent's failure to perform its statutorily prescribed obligation, which was to post and keep the prevailing wage rates posted on the Central Project as long as its worker was employed on that project. *Labor Ready at* 360. Respondent's intent is immaterial. *Id.* The Agency sought a $5,000 civil penalty for Respondent's violation. This is Respondent's third violation, and the forum finds that a $5,000 civil penalty is appropriate.

RESPONDENT FAILED TO PAY THE PREVAILING RATE OF WAGE ON THE CORNELIUS AND CENTRAL PROJECTS

ORS 279.350(1) requires payment of the prevailing rate of wage on public works contracts. To establish a violation of that statute, the Agency must prove: (1) The project at issue was a public work, as that term is defined in ORS 279.348(3); (2) Respondent was a contractor or subcontractor that employed workers on the public works project whose duties were manual or physical in nature; and (3) Respondent failed to pay those workers at least the prevailing rate of wage for each hour worked on the project. *In the Matter of William George Allmendinger*, 21 BOLI 151, 169-70 (2000). In this case, elements (1) and (2) are undisputed on both the Cornelius and Central Projects.

A. The Cornelius Project.

The Agency alleged that Respondent failed to pay the prevailing wage rate to eight workers – Joseph Baker, Catherine Clayton, Chris Francis, Jason Henry, Renaldo Ramirez, Alfredo Rodriguez, Miguel Silva, and David Snyder -- on the Cornelius Project. The evidence shows that Respondent employed both laborers and carpenters on the Cornelius Project, and that the applicable prevailing wage rate, including fringe benefits, was $27.59 per hour for laborers and $31.86 per hour for carpenters. Respondent's records show that six workers – Clayton, Ramirez, Rodriguez, Baker, Francis, and Faried Hawash -- were initially paid less than the prevailing wage rate. There is no evidence that Henry or Silva worked on the Cornelius Project or that Snyder was underpaid. With one exception, Respondent subsequently issued back pay checks to all six workers, bringing their wages up to the prevailing wage rate. That exception is Francis, who received a check for back pay, but was still owed $34.50 in unpaid wages at the time of hearing. Although Respondent's subsequent payment of back wages may be considered as a mitigating factor,[27] it is not a defense to the alleged violation. *See In the Matter of Loren Malcolm*, 6 BOLI 1, 11 (1986). The forum does not consider Respondent's failure to pay Hawash the prevailing wage rate a violation for the reason that Hawash's

[27] *Id., 22 BOLI at* 286.

name was not included in the Agency's list of eight underpaid workers in its Notice of Intent, and the Notice was not amended to include it. The forum finds that Respondent committed five violations of ORS 279.350(1) by failing to pay Clayton, Ramirez, Rodriguez, Baker, and Francis the prevailing wage rate when their wages were initially paid.

1. Aggravating circumstances.

First, Respondent knew or should have known of its violation. OAR 839-016-0500 provides:

> "As used in OAR 839-016-0500 to 839-016-0540, a person acts knowingly when the person has actual knowledge of a thing to be done or omitted or should have known the thing to be done or omitted. A person should have known the thing to be done or omitted if the person has knowledge of facts or circumstances that would place the person on reasonably diligent inquiry. A person acts knowingly if the person has the means to be informed but elects not to do so. For purposes of the rule, the contractor, subcontractor and contracting agency are presumed to know the circumstances of the public works construction project."

Giving Respondent the benefit of the doubt, Respondent's violation stemmed from its initial lack of knowledge that the Cornelius Project was a public works project. Although Respondent's branch manager testified that no one from I-5 informed Respondent that the Cornelius Project was a public works project, there was no evidence presented that anyone from Respondent inquired if the job was a public works project prior to July 6, 2000, over three weeks after Respondent first sent workers to that project. This violation might have been avoided altogether if Respondent had simply made that inquiry when taking I-5's job order or had sent someone to visit the job site. However, Shields testified that she had received no training about prevailing wage rate jobs prior to the Cornelius Project. If she had received this training, she might have been aware of Respondent's corporate advice to "not rely on the customer to advise you as to whether a job is prevailing wage."[28]

This violation is a serious one that requires debarment if the Commissioner finds that the violation was intentional. The magnitude is substantial because it resulted in the underpayment of six workers, three of whom -- Rodriguez, Clayton, and Ramirez -- did not receive their full pay until November 21, 2000, five months after their pay was due, and a fourth – Francis – who was still owed wages at the time of the hearing. This occurred even though Respondent acquired actual knowledge on July 6, 2000, that the Cornelius Project was a prevailing wage rate job.

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[28] *See* Finding of Fact 73 – The Merits, *supra*.

Finally, Respondent previously violated the same law on the New Bend Middle School Project by failing to pay eight workers the applicable prevailing wage rate on a public works project between April 4 and June 2, 2000.

2. Mitigating circumstances.

There are two circumstances that mitigate Respondent's five violations to a limited degree. First, Respondent eventually paid full back pay to five workers and all but $34.50 in back pay to a sixth. Second, Respondent's prevailing wage unit manager has created an audit team in her department that conducts daily reviews of two reports in an attempt to minimize the possibility that Respondent has unknowingly sent workers to prevailing wage rate jobs.[29]

3. Amount of civil penalty.

ORS 279.370(1) gives the Commissioner the authority to assess civil penalties for violations of ORS 279.350(1) based solely on Respondent's failure to perform its statutorily prescribed obligation, which was to pay the prevailing wage rate to workers it employed on the Cornelius Project. *Labor Ready at* 360. Respondent's intent is immaterial. *Id.* The Agency alleged that Respondent's violations were "second repeated" violations and sought $3,000 in civil penalties for each alleged violation, for a total of $24,000. The forum has found five violations. OAR 839-016-0540(2) defines "repeated violations" as "violations of a provision of law or rule which has been violated on more than one project within two years of the date of the most recent violation." Here, Respondent's only prior violation occurred at the New Bend Middle School project and is reflected in the Commissioner's final order in case number 31-01. Consequently, Respondent's five Cornelius Project violations are properly classified as "first repeated" violations. OAR 839-016-0540 provides that the *minimum* civil penalty for a first repeated violation is "[t]wo times the amount of the unpaid wages or $3,000, whichever is less[.]"

Although the Agency mischaracterized the repetitive nature of Respondent's violations, when the forum considers all the aggravating and mitigating circumstances, $3,000 per violation, for a total of $15,000, is still an appropriate civil penalty for Respondent's five violations of ORS 279.350(1).

B. The Central Project.

The Agency alleged that Respondent failed to pay the prevailing wage rate to one worker, Aaron Wadsworth, who was employed by Respondent as a carpenter and laborer on the Central Project. The evidence shows that Respondent employed Wadsworth on that project for 8.5 hours on one day. That day was September 2, 2000, a Saturday. Credible evidence established that Wadsworth performed work fitting into the classifications of both carpenter and laborer. The Agency

[29] *See* Finding of Fact 75 – The Merits, *supra*.

established that Wadsworth was entitled to be paid a carpenter's wage, the higher rate, because there was no way to determine how many hours he worked in each classification. The applicable prevailing wage rate on the Central project for carpenters was $23.94 per hour plus $7.92 per hour in fringe benefits, with an overtime rate totaling $43.83 per hour. Instead, Respondent paid Wadsworth $6.75 per hour. Four months later, Respondent issued a back pay check to Wadsworth, bringing his wages up to the prevailing wage rate. Again, although Respondent's subsequent payment of back wages may be considered as a mitigating factor, it is not a defense to the alleged violation. *Loren Malcolm*, 6 BOLI at 11. The forum finds that Respondent committed one violation of ORS 279.350(1) by failing to pay Wadsworth the prevailing wage rate at the time his wages were initially paid.

1. Aggravating circumstances.

Respondent's work ticket for the Central Project indicates that Wadsworth was referred to work at a "high school." This should have alerted Respondent's branch manager to inquire if its worker would be working on public works project, and the forum imputes this knowledge to Respondent pursuant to OAR 839-016-0500.

The evidence indicates that Respondent's problem was caused by its apparent ignorance that the Central Project was a public works project. Again, there was no evidence presented that Respondent's branch manager inquired of Andersen Woodworks, the employer to whom it dispatched Wadsworth, if the job was a prevailing wage rate job. Respondent's violation might have been avoided altogether if its representative had simply made that inquiry when taking the job order or had sent someone to visit the job site.

This violation is a serious one that requires debarment if the Commissioner finds that the violation was intentional. Although only one worker was underpaid, the magnitude is substantial because of the extreme contrast between the wage Wadsworth was initially paid -- $6.75 per hour, and the wage he was entitled to -- $43.83 per hour, and the fact that he did not receive his full back pay until it was four months overdue.

Finally, Respondent violated the same law on two prior occasions. First, on the New Bend Middle School Project when it failed to pay eight workers the applicable prevailing wage rate on a public works project between April 4 and June 2, 2000. Second, on the Cornelius Project, by failing to pay the applicable prevailing wage rate to six workers.

2. Mitigating circumstances.

There are two circumstances that mitigate Respondent's single violation to a limited degree. First, Respondent sent the Agency a check for the full amount of back pay owed to its worker, Wadsworth, shortly after the Agency notified Respondent of the

underpayment. Second, Respondent's prevailing wage unit manager has created an audit team in her department that conducts daily reviews of two reports in an attempt to minimize the possibility that Respondent has unknowingly sent workers to prevailing wage rate jobs.

3. Amount of civil penalty.

The Agency alleged that Respondent's violation was a "second and subsequent repeated" violation and sought $5,000 in civil penalties for the alleged violation. OAR 839-016-0540(2) defines "repeated violations" as "violations of a provision of law or rule which has been violated on more than one project within two years of the date of the most recent violation." Here, Respondent had two violations within two years of September 2, 2000. First, the New Bend Middle School Project violation that is reflected in the final order in case number 31-01. Second, Respondent's violations at the Cornelius Project. Consequently, Respondent's Central project violation is properly classified as a "second and subsequent repeated" violation. OAR 839-016-0540 provides that the *minimum* civil penalty for a second and subsequent repeated violation is "[t]hree times the amount of the unpaid wages or $5,000, whichever is less[.]"

Considering all the aggravating and mitigating circumstances, the forum finds that $5,000 is an appropriate civil penalty for Respondent's violation of ORS 279.350(1) on the Central Project.

RESPONDENT FILED PAYROLL STATEMENTS THAT LACKED A STATEMENT OF CERTIFICATION AND CONTAINED INACCURATE INFORMATION.

Former ORS 279.354 required contractors and subcontractors on public works projects to file certified statements, in writing, "in form prescribed by the Commissioner of the Bureau of Labor and Industries." The certification was to be "verified by the oath of the * * * subcontractor * * * that the * * * subcontractor has read such statement and certificate and knows the contents thereof and that the same is true to the * * * subcontractor's knowledge." It also contained the requirement that the certified statements "set out accurately and completely the payroll records for the prior week including the name and address of each worker, the worker's correct classification, rate of pay, daily and weekly number of hours worked, deductions made and actual wages paid." *Former* OAR 839-016-0010 implemented this statute by creating a form, the "WH-38," for contractors and subcontractors to use in complying with *former* ORS 279.354. The rule allowed contractors and subcontractors to use their own form, so long as it contained "all the elements of Form WH-38." The rule further required that "the certified statement contained on Form WH-38" must be attached to "payroll forms submitted" if the contractor or subcontractor used their own

payroll form. In addition, both the statute and rule established deadlines for submitting the forms.

A. <u>The Cornelius Project.</u>

The Agency alleged that Respondent filed six payroll reports "that were inaccurate and/or incomplete by, among other deficiencies, falsely certifying that all wages earned had been paid, in listing improper pay rates and in failing to show overtime wages earned." An inspection of Respondent's original payroll reports and comparison with subsequent corrected payroll reports and payroll records reveals a number of deficiencies. First, all six payroll reports lacked the certification language required by ORS 279.354 and contained on the Agency's WH-38. That language reads "I have read this certified statement, know the contents thereof and it is true to my knowledge." Respondent argues that the language printed under the signatory's name on its "Statement of Compliance" accompanying its payroll reports – "The willful falsification of any of the above statements may subject the contractor or subcontractor to civil or criminal prosecution" – is the "functional equivalent" of the language contained on the Agency's WH-38. Respondent misses the mark. The language on the WH-38 is an affirmative oath that mirrors the statute; the language on Respondent's form merely states the consequences of willfully providing false information. Second, none of the payroll reports list the location of the project – they merely state "PUBLIC WORKS BUILDING." Third, five of Respondent's payroll reports incorrectly classify Joseph Baker, Faried Hawash, or Joseph Baker as "laborers" instead of "carpenters." Fourth, Respondent's payroll report for the week ending July 7, 2000, incorrectly reported that Baker had worked 15 hours straight time[30] on July 6. Sixth, Respondent's payroll report for the week ending July 21, 2000, reported that Francis had worked 4 hours straight time on Saturday, July 15, and 9 hours of straight time on July 19.[31] Seventh, based on Respondent's corrected report, Respondent's payroll report for the week ending August 11, 2000, reported Francis had worked days that he had not worked and did not report days that he did work.

<u>1. Aggravating circumstances.</u>

First, it should have been simple for Respondent to comply with *former* ORS 279.354 and *former* OAR 839-016-0010. The statute and rule are very specific about the information required, and the BOLI provides a specific form that contractors or subcontractors may use to comply with the law. Instead, Respondent opted to use its own form, which was allowed by *former* OAR 839-016-0010 so long as it contained all the elements of the Agency's form,

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[30] ORS 279.334(1)(a) provides that all time worked on Saturdays and in excess of eight hours from Monday through Friday must be paid at the overtime rate.

[31] *Id*.

including a certified statement. Respondent's form did not contain all the required elements, and even Respondent's corrected submissions lacked the required certified statement. Respondent's original submissions also incorrectly reported the classification of workers and hours worked. If Respondent had original time records that were correct and had taken care to determine the type of work its workers were performing, these inaccuracies would not have occurred.

Second, Respondent's violation was serious, as the inaccurate information provided affected the Agency's ability to determine if Respondent's workers had been paid properly. The magnitude was also substantial, in that Respondent's submissions contained inaccurate information about at least six workers.

Third, Respondent was on notice and had knowledge that its practices regarding certified payroll reports required by *former* ORS 279.354 were defective. All of Respondent's reports are prepared by staff employed by Respondent's corporate parent in Tacoma, Washington. That corporate parent was notified by the Agency on January 26, 2000, that its certified payroll reports must contain the following language: "I have read this certified statement, know the contents thereof and it is true to my knowledge." There was no evidence that Respondent has modified its forms to meet that requirement.

Fourth, Respondent violated the same statute and rules on two prior occasions, on the New Bend Middle School case, where it committed nine violations, and on the Beaver Acres Project, where it committed one violation.

2. Mitigating circumstances.

Respondent eventually submitted payroll reports that showed the correct hours and wages earned by its workers; however, its corrected reports still lacked the required statement of certification. Respondent has reformatted its reports to include a separate box for fringe benefits. Respondent now requires prevailing wage rate work to be reported on a daily, instead of a weekly basis, in order to ensure that its reporting of hours and days worked by workers is accurate.

3. Amount of civil penalty.

In its charging document, the Agency sought an $18,000 civil penalty for Respondent's six violations. In case number 31-01 involving the New Bend Middle School project, the Commissioner assessed $18,000 in civil penalties for Respondent's nine violations of ORS 279.354, or $2,000 per violation. Considering all the aggravating and mitigating circumstances, a civil penalty of $18,000, or $3,000 per violation, is appropriate.

B. The Central Project.

The Agency's sole allegation concerning Respondent's payroll report submitted for the Central Project is that it was untimely filed.

The evidence does not clearly establish the starting and completion date of the project, or whether the project took more or less than 90 days to complete. Either way, under OAR 839-016-0010(5), Respondent was required to submit its payroll and certified statement "within 15 days of the date [Respondent] first began work on the project[.]" Respondent's employee, Wadsworth, worked on September 2, 2000. This made Respondent's reports due on September 17, 2000. Respondent did not complete its report to the Agency until January 18, 2001. This constitutes one violation of ORS 279.354 and *former* OAR 839-016-0010(5).

1. Aggravating circumstances.

First, it should have been simple for Respondent to comply with *former* ORS 279.354 and *former* OAR 839-016-0010. The rule is specific about the time limits for filing certified payroll statements, and the BOLI provides a specific form that contractors or subcontractors may use to comply with the law. In this situation, Respondent's problem stemmed from its apparent failure to ascertain that it had sent its worker to a public works project. This problem might have been entirely avoided if Respondent had exercised reasonable care in taking the job order from Andersen Woodworks.

Second, Respondent's failure to file a report at all until prompted by the Agency was serious. However, the magnitude was limited, in that it only affected one worker.

Third, based on OAR 839-016-0600, the forum imputes knowledge that the Central Project was a prevailing wage rate job to Respondent and concludes that Respondent knowingly failed to file a certified payroll report.

Fourth, Respondent violated the same statute and rules on three prior occasions: on the New Bend Middle School case, when it committed nine violations; on the Beaver Acres Project, when it committed one violation; and on the Cornelius Project, when it committed six violations.

2. Mitigating circumstances.

Respondent's prevailing wage unit manager has created an audit team in her department that conducts daily reviews of two reports in an attempt to minimize the possibility that Respondent has unknowingly sent workers to prevailing wage rate jobs.

3. Amount of civil penalty.

In its charging document, the Agency sought a $4,000 civil penalty for Respondent's single violation of *former* ORS 279.354 and *former* OAR 839-016-0010. Considering all the aggravating and mitigating circumstances, $4,000 is an appropriate civil penalty.

C. The Beaver Acres Project.

Respondent's payroll reports for the Beaver Acres Project provide a textbook example of why accurate reports are important and how inaccurate payroll reports make it nearly impossible for the

Agency to determine if the prevailing wage rate has been paid.

The Agency alleged that Respondent filed payroll reports "that were inaccurate and/or incomplete by, among other deficiencies: not being properly certified; inaccurately listing pay rates and amounts; not including the group, where appropriate, for the classification of work its employees performed and omitting required general information about the project." Respondent filed several original payroll reports and two versions of corrected payroll reports for the Beaver Acres Project. The original and second corrected payroll reports all lack an appropriate statement of certification. The originals do not specify the "group" classification for Respondent's workers[32] and state the name, but not the location of the project. Among other things, the payroll reports also report some overtime hours as straight time hours and contain multiple entries for the same category, *e.g.* gross wages, for a large number of workers. They also fail to break out fringe benefits from hourly wages.

1. Aggravating circumstances.

With one exception, the same aggravating circumstances apply to the Beaver Acres Project as the Cornelius Project. That exception is that Respondent had only one prior violation -- the New Bend Middle School Project – prior to its violation on the Beaver Acres Project. In addition, the magnitude of the violation was higher than on the Cornelius Project because of the number of workers involved and because the inaccuracies and inconsistencies in Respondent's reports caused the Agency to expend considerable time in determining that Respondent had in fact paid its workers the prevailing wage rate. Also, there are several reports, each of which would comprise a separate violation had the Agency chosen to plead multiple violations, that were consolidated by the charging document into one violation.

2. Mitigating circumstances.

No workers were underpaid as a result of Respondent's defective payroll reports. Respondent has reformatted its certified payroll reports to reflect fringe benefits and has eliminated deductions for equipment and transportation on prevailing wage rate jobs. Respondent now requires prevailing wage rate work to be reported on a daily, instead of a weekly basis, in order to ensure that its reporting of hours and days worked by workers is accurate.

3. Amount of civil penalty.

In its charging document, the Agency alleged a single violation of *former* ORS 279.354 and *former* OAR 839-016-0010 by Respondent on the Beaver Acres

[32] The payroll reports state that each worker was a "laborer." BOLI's "Prevailing Wage Rate" book effective July 1, 1999, describes five different groups of laborers, differentiated by type of work performed, with each group entitled to a different rate of pay.

Project and sought a $5,000 civil penalty. Considering all of the aggravating and mitigating circumstances, $5,000 is an appropriate civil penalty.

RESPONDENT FAILED TO TIMELY PROVIDE RECORDS DEEMED NECESSARY BY THE COMMISSIONER TO DETERMINE IF THE PREVAILING RATE OF WAGE WAS ACTUALLY BEING PAID BY RESPONDENT TO ITS WORKERS ON THE BEAVER ACRES PROJECT

This issue arose pursuant to a complaint that employees of Horizon Restoration Systems had not received the correct rate of pay on the Beaver Acres Project. During her investigation of Horizon, Susan Wooley, an Agency compliance specialist, determined that Respondent had provided workers to Horizon. On August 4, 2000, Wooley sent a letter to Respondent requesting "**any and all** time records, payroll records, and certified payroll records for **all** employees who performed work on the project." (Emphasis in original) Wooley requested these records no later than August 21, 2000. On August 18, 2000, Wooley received some certified and uncertified payroll reports reflecting work done on the project, but not the original time and payroll records she had requested. On the payroll reports she received, Respondent listed workers as having worked days they did not work, listed workers as having worked more hours in a single day than were actually worked, listed some overtime hours worked as straight time hours, listed some incorrect hourly wages, and had multiple entries in the gross wages and deductions column.

Because of the inaccuracies and inconsistencies in the reports submitted by Respondent, Wooley was unable to determine whether Respondent's workers had been paid the correct prevailing wage rate. On September 11, 2000, she made a second request for "any and all time and payroll records" for employees who had performed work on the Beaver Acres Project. She asked that the documents be provided no later than September 22, 2000. On October 3, Respondent provided corrected copies of the earlier payroll reports that lacked the statement of certification required by ORS 279.354.

On October 13, 2000, Wooley sent Respondent a third letter explaining that "simply correcting numbers on a computerized spreadsheet does not provide any proof that the workers were actually paid the amount of wages due them." Wooley again asked Respondent to provide "any and all daily time records (or 'wage tickets,' if this is the Labor Ready term for time records) and payroll records for all employees who performed work on this project." Wooley asked that Respondent submit these records by October 25, 2000.

Sometime between October 13 and October 26, 2000, Respondent's prevailing wage unit manager became involved and requested copies of canceled

checks issued to Respondent's workers on the Beaver Acres Project. After several more exchanges with Rischman, Wooley finally obtained the records she needed to determine that Respondent's employees all been paid the prevailing wage rate. This was sometime between January 29 and February 7, 2001.

An objective determination of whether workers have been paid the prevailing rate of wage requires documentation in the form of time and payroll records, and a comparison of those records. This is precisely what Wooley requested in her letter dated August 4, 2000. OAR 839-016-0030 provides that such records must be made available "within 24 hours of a request from a representative of the Wage and Hour Division or at such later date as may be specified by the Division." The "later date" specified by Wooley was August 21, 2000.

On August 18, 2000, Wooley received some certified and uncertified payroll reports that contained significant inaccuracies and omissions and raised serious questions about whether Respondent's workers had been paid the prevailing wage rate. Copies of original time and payroll records were not provided. If there was any question about the reasonableness of Wooley's original request in demanding "any and all" time and payroll records, the problems in Respondent's payroll reports dispelled all doubts.

Some months later, after several more letters and phone calls, Wooley eventually received sufficient records to be able to determine that Respondent had in fact paid the prevailing wage rate to its employees on the Beaver Acres Project.

Respondent argues that Wooley kept extending the due date for the time and payroll records in her subsequent letters, and that Respondent complied with the final deadline. Respondent's argument lacks merit. Wooley's original deadline of August 21, 2000, is the submission deadline that matters. Wooley's credible testimony established that she needed those records to determine if Respondent had paid the prevailing wage rate, and Respondent did not comply with Wooley's request until months after August 21. In fact, Respondent did not even try to obtain the canceled checks until late October 2000.

Respondent's failure to provide Wooley with "any and all time records, payroll records, and certified payroll records for all employees who performed work on the project" by August 21, 2000, was in violation of ORS 279.355 and OAR 839-016-0030.

A. <u>Aggravating circumstances.</u>

There are several aggravating circumstances present. First and most important, Respondent's lack of cooperation. It took Respondent five months to comply with Wooley's initial request for payroll and time records, whereas it should have been relatively simple to comply with Wooley's

straightforward request to provide those records within two weeks. Instead, Wooley had to make multiple requests. There was no evidence that Respondent even attempted to provide any records other than payroll reports prior to late October 2000 when Rischman became involved. The seriousness of the violation was considerable because the Agency was unable to perform its statutorily mandated duty of determining that workers have been paid the prevailing wage rate without obtaining these records. The magnitude was high because of the number of workers involved in the audit.

B. Mitigating circumstances.

There are two mitigating circumstances. First, when Respondent eventually provided the requested records, Wooley was able to determine that all workers had been paid the correct prevailing wage rate. Second, Respondent has eliminated deductions for equipment and transportation on prevailing wage rate jobs, making it marginally easier for an auditor to determine if Respondent has correctly paid its workers.

C. Amount of civil penalty.

The Agency sought a civil penalty of $5,000 in its charging document. Based on all the aggravating and mitigating circumstances, a civil penalty of $2,500 is appropriate.[33]

PLACEMENT ON THE LIST OF INELIGIBLES

The Agency seeks to debar[34] Respondent for two concurrent three year periods on the basis that Respondent's failures to pay and post the applicable prevailing wage rate on the Cornelius and Central Projects were intentional.

A. Liability of Respondent.

ORS 279.361 provides that when a subcontractor "intentionally" fails or refuses to pay the prevailing wage rate to workers employed upon public works or when a subcontractor "intentionally" fails or refuses to post the prevailing wage rates as required by ORS 279.350(4), the subcontractor and any firm in which the subcontractor has a financial interest shall be placed on the list of persons ineligible to receive contracts or subcontracts for public works for a period not to exceed three years. The forum has already concluded that Respondent failed to pay and post the applicable prevailing wage rates on the Cornelius and Central Projects.

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[33] *Compare In the Matter of William George Allmendinger*, 21 BOLI 151, 171-72 (2000) ($3,500 civil penalty assessed for violation of ORS 279.355 where respondent failed to provide records and also failed to pay prevailing wage rate to two workers); and *In the Matter of Johnson Builders, Inc*., 21 BOLI 103, 129 (2000) ($5,000 civil penalty assessed where respondent failed to provide records and also failed to pay prevailing wage rate to eight workers).

[34] In this Order, "debar" and "debarment" are synonymous with placement on the List of Ineligibles.

The only question is whether those failures were "intentional." If so, the Commissioner is required to place Respondent on the List of Ineligibles.

B. Intentional Failure to Pay.

To "intentionally" fail to pay the prevailing wage, "the employer must either consciously choose not to determine the prevailing wage or know the prevailing wage but consciously choose not to pay it." *Labor Ready at* 364. The inclusion of the word "intentionally" in ORS 279.361(1) implies a "culpable mental state," indicating that debarment should not be "triggered by merely innocent, or even negligent, failure to pay." *Id. at* 360. Under this standard, the forum must assess Respondent's state of mind at the time that its employees were not paid the prevailing wage in order to determine whether Respondent "intentionally" failed or refused to pay the prevailing wage.

1. The Cornelius Project.

On the Cornelius Project, the evidence was undisputed that Respondent was unaware that it was sending its employees to a public work until July 6, 2000, three weeks after it sent its first employee to the Cornelius Project. Between June 12 and July 6, 2000, Respondent employed six workers on the Project – Clayton, Ramirez, Rodriguez as laborers, and Francis, Baker, and Hawash as carpenters. Respondent paid all six substantially less than the prevailing wage during that time period. Prior to July 6, there is no evidence that Respondent was aware that it was sending its workers to a public work subject to the prevailing wage rate, or that Respondent consciously chose not to determine the prevailing wage or knew the prevailing wage but consciously chose not to pay it. Rather, Respondent's underpayment can be characterized at best as an "innocent" mistake and at worst as "negligent." Based on the Court of Appeals' earlier decision, the forum concludes that Respondent's failure to pay its workers the prevailing wage prior to July 6, 2000, was not intentional under ORS 279.261(1).

On July 6, 2000, Shields, Respondent's Hillsboro branch manager, learned that the Project was subject to the prevailing wage rate. Shields immediately began paying the applicable prevailing wage rate for laborers or carpenters to the workers Respondent employed on the Project. Shields also immediately issued "back pay" checks to Francis, Baker, and Hawash for the difference between their initial pay prior to July 6 and the prevailing wage.[35] This evidence establishes that, as of July 6, 2000, Respondent, through its manager Shields, knew that its workers were employed on a public work, knew the correct prevailing wage for laborers and carpenters on the Cornelius Project, and knew that it had not paid its workers the prevailing wage. Despite this knowledge, Respondent did not issue "back pay"

[35] *See* Finding of Fact 17 – The Merits, *supra*.

checks to three other workers – Clayton, Ramirez, and Rodriguez -- until November 21, 2000, and provided no explanation for this failure. There was no evidence presented at hearing to explain this failure.[36]

The question is whether Respondent's delay in paying "back pay" to Clayton, Ramirez, and Rodriguez and failure to pay "back pay" to Francis rises to the level of "intentional." This requires proof that Respondent knew "the prevailing wage but consciously choose not to pay it." *Labor Ready at* 364.

The inclusion of the word "intentionally" in ORS 279.361(1) implies a "culpable mental state," indicating that debarment should not be "triggered by merely innocent, or even negligent, failure to pay." *Id. at* 360. As stated earlier, this requires an assessment of Respondent's state of mind after Shields learned on July 6 that "back pay" was due. The statutory requirement to pay the prevailing wage includes an obligation to pay all earned, due, and unpaid prevailing wages, which Respondent acknowledged by immediately paying three of its workers for the difference between their pay earned and received before July 6 and the prevailing wage.[37] However, there is no evidence as to why Clayton, Ramirez, and Rodriguez were not issued "back pay" checks until November 21, 2000. Respondent's failure to fulfill its statutory duty to issue "back pay" checks to these three workers no later than 35 days after they performed the work, without any evidence that Respondent made a conscious choice not to issue the checks, does not establish that Respondent "intentionally" failed to pay these three workers the prevailing wage rate. Consequently, Respondent may not be debarred for its untimely issuance of "back pay" checks to these three workers.

Respondent's failure to pay Chris Francis $34.50 in prevailing wage rate "back pay" is a different matter. This "back pay" amount was earned *after* July 6, 2000, when Respondent knew it was required to pay its workers the prevailing wage on the Cornelius Project. Francis worked as a carpenter and was entitled to be paid $31.86 per hour, as Respondent

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[36] The only evidence even tangentially related to Respondent's delay in paying Clayton, Ramirez, and Rodriguez was the following testimony of Shields:

"Q: From that point forward, from the time you became aware that it was a prevailing wage rate job, were all the workers dispatched by Labor Ready on that job, paid prevailing wages?

"A: Yes.

"Q: And did you, at that time, to the best of your ability, go back and attempt to pay all the workers that had been on the job up to that point, prevailing wage?

"A: Yes."

[37] *Cf.* ORS 652.120, which requires employers to pay employees "the wages due and owing to them" no more than 35 days after the employees performed their work.

tacitly acknowledged on July 6, 2000, when it paid Francis $21.86 per hour for six hours of "back pay" earned on June 28, 2000.[38] Respondent admitted owing this amount to Francis on December 13, 2000, but still had not paid Francis at the time of the hearing. Respondent's defense was that BOLI had instructed Respondent not to pay these wages to Francis, but the Administrative Law Judge found that the testimony supporting this defense was not credible.[39]

In summary, it is undisputed that (1) Respondent knew the prevailing wage after July 6, but underpaid Francis by $.60 per hour for a total of 57.5 hours worked as a carpenter after that date; (2) on December 13, 2000, Respondent's corporate headquarters knew it had underpaid Francis by that amount; and (3) that Respondent still had not paid Francis at the time of hearing. Respondent's decision not to pay Francis the $34.50 it owed him was a conscious choice. Based on undisputed evidence that Respondent knew "the prevailing wage but consciously choose not to pay it, the forum finds that Respondent "intentionally" failed to pay the prevailing wage rate to Francis on the Cornelius Project, subjecting Respondent to debarment. *Id.* at 364.

2. The Central Project.

Respondent sent one worker to the Central Project for one day and did not pay that worker the prevailing wage until later notified by BOLI that the Central Project was a public work. When BOLI notified Respondent of that fact, Respondent immediately sent a check for the total amount of unpaid prevailing wages due to its worker. Although Respondent's job order indicated that its worker would be working at a high school, there was no evidence that Respondent knew the Central Project was a public work until notified by BOLI or that Respondent made a conscious choice not to determine that the Central Project was a public work.[40] As a result, the fo-

[38] Francis had only been paid $10 per hour, and the additional $21.86 per hour brought his total wage to $31.86 per hour, the correct prevailing wage for carpenters. *See* Finding of Fact 24 – The Merits, *supra.*

[39] *See* Finding of Fact 82 – The Merits, *supra*.

[40] If Respondent had knowledge of, but recklessly disregarded, facts or circumstances that would lead a reasonable employer to inquire if its worker was employed upon public work, the worker was in fact employed upon a public work, and Respondent did not pay its worker the prevailing wage, the forum would conclude that Respondent made a conscious choice not to determine the prevailing wage and thereby intentionally failed to pay the prevailing wage. The mere fact that the job order from Andersen Woodworks stated that it needed a worker at a high school does not constitute such facts or circumstances. In contrast, a job order stating that a worker was needed to perform labor on a substantial construction project at a high school, or evidence that Respondent's employee taking the job order was aware that a substantial construction project was taking place

rum concludes that Respondent's failure to pay its worker the prevailing wage was not an "intentional" failure.

C. Intentional Failure to Post.

ORS 279.350(4) "requires every * * * subcontractor engaged in a public project to personally initially post the prevailing wage and to maintain that posting throughout the course of its employees' work on the project." *Labor Ready at* 369. A "negligent or otherwise inadvertent failure" to post the prevailing wage rate is insufficient to require debarment. *Id.* A "heightened level of culpability [must] be proven before an employer [can] be debarred" based on an intentional failure to post. *Id. at* 366.

1. The Cornelius Project.

Prior to July 6, 2000, Respondent's failure to post the prevailing wage rates on the Cornelius Project cannot be considered "intentional," as Respondent was not aware that the Cornelius Project was a public work before that time and could not have consciously chosen not to post. On July 6, 2000, Respondent became aware that the Cornelius Project was a public work. Respondent's manager, Ms. Shields, took a copy of the prevailing wage rates to the job site and asked the general contractor's foreman to post them.[41] It is undisputed that Respondent's manager knew the correct prevailing wage rate for carpenters and laborers, the two classifications in which its workers were employed, and that she took no action to post the rates herself at that time or any subsequent time and made no effort to determine whether the rates had been posted or were kept posted. There was no evidence that anyone else employed by Respondent took any action to post the rates or determine whether the rates had been posted or were kept posted.

The fact that Shields delivered the prevailing wage rates to the Cornelius Project's prime contractor on the same day she learned the project was a public works is compelling evidence that she knew she had a duty to post those rates. Instead of posting them herself as the statute requires, she handed them to I-5's foreman, asked him to do it, and did no follow-up to ascertain that they had been posted and were kept posted. The forum finds from those circumstances that Respondent's failure to post the prevailing wage rates was intentional.

In the prior *Labor Ready* case, Respondent made no attempt to post the prevailing wage on a public work where its workers were

at that high school, would likely constitute facts or circumstances that would have put Respondent on notice that its worker was likely employed upon a public work.

[41] The forum infers that Respondent's manager would not have taken the prevailing wage rates to the job site and asked the general contractor's foreman to post the rates unless Respondent's manager believed that posting was required.

employed. The Court of Appeals held that Respondent's failure to post the applicable prevailing wage rate was not "intentional" within the meaning of ORS 279.361(1) "for either of two reasons":

> "First, [Labor Ready] acted from a good-faith, albeit legally mistaken, belief that the posting in the general contractor's shack obviated any need for petitioner itself to post. * * * Thus, there was no conscious choice on petitioner's behalf not to perform a known duty. Second, as noted, [Labor Ready] was mistaken as to the correct prevailing wage for its employees' work; thus, it did not know the correct rate and, consequently, did not elect not to post *that* rate." *Labor Ready at* 366.

Neither of those circumstances is present in this case. First, the facts reveal that Respondent's manager did not, in good-faith, believe she was not required to post the prevailing wage rates. Rather, knowing that posting was required, she made the conscious choice to rely upon I-5's foreman to carry out Respondent's duty to post. Here, unlike in previous case, the prevailing wage rates were not posted at all. Second, there is no evidence that Respondent was mistaken as to the correct prevailing wage. Accordingly, the reasons the court found the violation to be not intentional in the earlier case do not apply in this case.

As noted earlier, ORS 279.350(4) requires every subcontractor "to personally initially post the prevailing wage and to maintain that posting throughout the course of its employees' work on the project. *Id. at* 369. Once Respondent's manager knew that posting was required, Respondent's failure to personally post and maintain that posting was a conscious choice and an "intentional" failure within the meaning of ORS 279.261(1), subjecting Respondent to debarment.

2. The Central Project.

Respondent employed one worker for one day on the Central Project and was unaware that the Central Project was a public work until contacted by BOLI several months after its worker worked on the Central Project. Although Respondent's job order indicated that its worker would be working at a high school, there was no evidence that Respondent knew the Central Project was a public work until notified by BOLI or that Respondent made a conscious choice not to determine that the Central Project was a public work.[42] As a result, the forum

[42] If Respondent had knowledge of, but recklessly disregarded, facts or circumstances that would lead a reasonable employer to inquire if its worker was employed upon a public work, that worker was in fact employed upon a public work, and Respondent did not post the prevailing wage, the forum would conclude that Respondent made a conscious choice not to post the prevailing wage and thereby intentionally failed to post

concludes that Respondent's failure to post the prevailing wage rate was not "intentional."

D. Length of debarment.

ORS 279.361 provides that debarment shall be for "a period not to exceed three years." Although that statute and the Agency's administrative rules interpreting it do not explicitly authorize the forum to consider mitigating factors in determining the length of a debarment, the commissioner has held that mitigating factors may be considered in determining whether the debarment of a contractor or subcontractor should last less than the maximum three-year period allowed by law. *See In the Matter of Larson Construction Co., Inc.*, 22 BOLI 118, 165 (2001); *In the Matter of Keith Testerman*, 20 BOLI 112, 129 (2000); *In the Matter of Southern Oregon Flagging, Inc*., 18 BOLI 138, 169 (1999); *In the Matter of Intermountain Plastics*, 7 BOLI 142, 160 (1988).[43] Aggravating factors may also be considered. *See, e.g., Testerman* at 129. The aggravating circumstances considered may include those set out in OAR 839-016-0520(1).

Aggravating circumstances in this case include: (1) Respondent's failure to pay three workers the prevailing wage for five months *after* it learned its workers were entitled to the prevailing wage rate; (2) Respondent's initial failure to pay the prevailing wage to eight workers employed on the New Bend Middle School public works project; (3) Respondent's six violations of ORS 279.354 on the Cornelius Project; (4) Respondent's single violations of ORS 279.354 and ORS 279.355 on the Beaver Acres Project; (5) Respondent's initial failure to pay the prevailing wage on the Central Project; (6) Respondent's failure to post on the Central Project; and (7) Respondent's failure, despite a prior warning, to correct the certification statement attached to its payroll report.

In mitigation, the forum considers that Respondent: (1) has paid back wages in full to all but one worker on the Cornelius and Central Projects; (2) has made changes to its payroll records and reports that make them easier to audit and less likely to contain errors concerning hours and dates worked; (3) promptly paid back wages owed to its worker on the Central Project when the Agency made a demand for payment; (4) through Rischman, has created a corporate "audit team" that conducts daily reviews designed to identify prevailing wage rate projects; and (5) has given Shields, its Hillsboro branch manager, some training on prevailing wage rate jobs.

The forum finds that one year is an appropriate period of debar-

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the prevailing wage. See fn. 38, supra.

[43] *Compare In the Matter of Larson Construction Co., Inc.,* 17 BOLI 54, 76 (1998), where the commissioner held that mitigating factors may not be considered in the "initial determination of whether to debar a subcontractor."

ment based on Respondent's intentional failure to pay the prevailing rate of wage to one worker employed on the Cornelius Project. One year is also an appropriate period of debarment based on Respondent's intentional failure to post the prevailing wage rates as required by ORS 279.350(4) on the Cornelius Project. The forum would impose the same one-year debarment for either violation independently but chooses, in its discretion, to run the two one-year debarment periods concurrently rather than consecutively.

RESPONDENT'S REMAINING EXCEPTIONS

A. Exception 1.

Respondent excepted to the finding that Timothy Adams agreed that Respondent had violated Oregon's prevailing wage rate law with respect to wage claimant Norm Nicholas, on the basis that the Agency failed to prove that Nicholas's wage claim was against Respondent. The forum has reviewed Michael Wells's testimony and Exhibits A-47 to A-53 and concurs with Respondent that the Agency did not meet its burden of proof in establishing that Respondent, not Labor Ready, Inc., was Nicholas's employer. Respondent's exception is GRANTED and Proposed Finding of Fact 79 – The Merits has been deleted.

B. Exception 2.

Respondent excepted to the language contained in Proposed Finding of Fact 82 – The Merits that concluded that Rischman's testimony relating to the withholding of $34.50 in wages to Chris Francis was not credible. A preponderance of the evidence shows that Rischman's testimony on this issue was not credible. Respondent's exception is DENIED.

C. Exception 3.

Respondent excepted to Proposed Finding of Fact 41 – The Merits and proposed to add language to the effect that Francis had not been paid $34.50 based on BOLI Compliance Specialist Wells's lack of response to Respondent's inquiry about whether it should pay the amount. This exception lacks merit and is DENIED.

D. Exceptions 4A and 4B.

Respondent excepted to the conclusion that Respondent intentionally failed to pay the prevailing wage rate on the Cornelius and Central projects. Respondent's exception is based on its contention that the forum wrongfully applied the *Sabin* "willful" standard in determining that Respondent's violations were "intentional" in the original Final Order. Respondent's exception is DENIED with regard to the Cornelius Project for reasons stated in the Opinion of this Amended Final Order on Reconsideration. Respondent's exception is GRANTED with regard to the Central Project for reasons also stated in the Opinion of this Amended Final Order on Reconsideration.

E. Exceptions 5 and 11.

Respondent excepted to the ALJ's use of prior violations found in the Final Order of the Commissioner on the New Bend Middle School project, Case No. 31-01, issued December 13, 2001, as an aggravating factor in determining Respondent's period of debarments. Respondent's argument was based on the fact that the final order in Case No. 31-01 was on appeal to the Oregon Court of Appeals at the time Respondent filed its exceptions. That final order has been reversed in Respondent's favor on the issue of debarment. However, in that case Respondent did not appeal the Commissioner's conclusion in that final order that Respondent violated ORS 279.350(1) by failing to pay its workers the prevailing wage on the New Bend Middle School project. Consequently, those violations stand and are properly considered as an aggravating factor in determining Respondent's period of debarment. Respondent's exception is DENIED.

F. Exceptions 6 and 12.

Respondent excepted to the ALJ's use of Respondent's violations of ORS 279.354 on the Cornelius and Central Projects as aggravating factors in determining Respondent's period of debarment. Respondent's argument is that violations of ORS 279.354 are not aggravating factors "because it is impossible to have a correct certified payroll statement where there is an underlying failure to pay the prevailing wage rate * * * A failure to correctly certify a payroll statement automatically occurs in every instance of a failure to pay the applicable prevailing wage. Thus, this is not an aggravating factor; it is the same factor." Respondent's argument is misplaced. Failure to pay the applicable prevailing wage rate and failure to properly certify, though one may flow from the other, constitute two distinct, separate actions, as well as violations of two different statutes.[44] For that reason, Respondent's ORS 279.354 violations are properly considered aggravating factors.

G. Exceptions 7 and 13.

Respondent excepted to the ALJ's use of Respondent's violations of ORS 279.354 and ORS 279.355 on the Beaver Acres project as aggravating factors in determining Respondent's periods of debarment because "it involve[d] a different physical location and different conduct." For the purpose of debarment, the

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[44] The forum notes that on the Beaver Acres project, Respondent apparently paid the prevailing wage rate to all its workers, yet still violated ORS 279.354 by inaccurately completing the reports and not completing an appropriate statement of certification. Respondent's problem on the Central Project was that it did not initially pay the prevailing wage rate and untimely filed its payroll statement. On the Cornelius Project, all six of Respondent's payroll reports lacked an appropriate certification statement, constituting a violation of the statute and administrative rule that would have existed even if Respondent had paid the prevailing wage rate.

Commissioner is not limited to consideration of violations of ORS 279.350(1) and (4) the same project on which the debarment is founded. Respondent's argument lacks merit and is DENIED.

H. Exceptions 8 and 14.

Respondent excepted to the ALJ's use of Respondent's failure to correct the certification statement attached to its payroll report as an aggravating factor in determining Respondent's periods of debarment, arguing that "[a]n aggravating factor must deal with the type of conduct for which the penalty of debarment is sought." Respondent's exception is DENIED for the same reason that Exceptions 7 and 13 were denied.

I. Exceptions 9 and 15.

Respondent excepted to the ALJ's use of the conclusory statement that it had "committed serious violations of considerable magnitude" to support the proposed length of debarment based on Respondent's violations on the Cornelius and Central projects. The forum agrees with Respondent that this conclusion, which was intended to refer to other aggravating factors previously listed, is simply cumulative and has deleted it in the Opinion.

J. Exception 10.

Respondent excepted to the ALJ's use of the conclusion that Respondent "underpaid one worker and took five months to issue a back pay check to that worker" as an aggravating factor used to support the length of Respondent's debarment on the Central project. The forum has modified this statement in the Opinion in response to Respondent's exception.

K. Exception 16.

The forum has added an additional mitigating factor regarding the length of Respondent's debarment in response to Respondent's exception.

L. Exceptions 17 and 18.

Respondent excepts to the length of debarments imposed in the Proposed Order on both the Cornelius and Central Projects on the grounds that they are "grossly excessive, not supported by the evidence, and an abuse of discretion by the forum/Commissioner."

In this Amended Final Order on Reconsideration, the length of debarment has been reduced to one year and is based solely on violations on the Cornelius Project. To that limited extent, Respondent's exception is GRANTED.

ORDER

NOW, THEREFORE, as authorized by ORS 279.361, the Commissioner of the Bureau of Labor and Industries hereby orders that Respondent **Labor Ready Northwest, Inc.** or any firm, corporation, partnership, or association in which it has a financial interest shall be ineligible to receive any contract or subcontract for public works for one year based on its intentional violations of ORS 279.350(1) and ORS 279.350(4) on the Cornelius Project from the date of publication of

their names on the list of those ineligible to receive such contracts maintained and published by the Commissioner of the Bureau of Labor and Industries.

FURTHERMORE, as authorized by ORS 279.370, and as payment of the penalties assessed as a result of its violations of ORS 279.350(1), ORS 279.350(4) ORS 279.354, ORS 279.355, OAR 839-016-0010, OAR 839-016-0030, OAR 839-016-0033(1), and OAR 839-016-0035, the Commissioner of the Bureau of Labor and Industries hereby orders **Labor Ready Northwest, Inc.**, to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, the following:

> A certified check payable to the Bureau of Labor and Industries in the amount of FIFTY EIGHT THOUSAND FIVE HUNDRED DOLLARS ($58,500), plus interest at the legal rate on that sum between a date ten days after the issuance of the original final order on June 17, 2002, and the date Respondent **Labor Ready Northwest, Inc.** complies with the Final Order.

In the Matter of

OKECHI VILLAGE & HEALTH CENTER, INC.,

Case Nos. 19-05 & 54-05

Final Order of Commissioner Dan Gardner

Issued February 14, 2006

SYNOPSIS

Respondent employed two wage claimants and willfully failed to pay them all of their earned, due and owing overtime wages. The forum ordered Respondent to pay the wages owed plus penalty wages and interest. The forum also ordered Respondent to pay civil penalties of $2,000 for record-keeping violations. ORS 652.140; ORS 652.150; OAR 839-020-0030

The above-entitled case came on regularly for hearing before Linda A. Lohr, designated as Administrative Law Judge ("ALJ") by Dan Gardner, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on August 2, 2005, in the W.W. Gregg Hearing Room of the Bureau of Labor and Industries, located at 800 NE Oregon Street, Portland, Oregon.

Cynthia L. Domas, an Agency employee, represented the Bureau of Labor and Industries ("BOLI" or "the Agency"). Mohammad Longanga Onakoy and Jair Watenda Simmons ("Claimants") were present throughout the hearing and were not represented by counsel. Okechi Village and Health Center LLC ("Respondent") failed to appear for hearing in person or through counsel.

In addition to Claimants Onakoy and Simmons, the Agency called Margaret Trotman, Wage and Hour Division compliance specialist, and Betty Gambone, Department of Human Resources representative, as witnesses.

The forum received as evidence:

a) Administrative exhibits X-1 through X-18;

b) Agency exhibits A-1 through A-22 (filed with the Agency's case summary).

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

FINDINGS OF FACT – PROCEDURAL

1) On July 17, 2003, Claimant Simmons filed a wage claim form in which he stated that Respondent had employed him from August 25, 2001, to October 2003, and failed to pay him for overtime hours he worked from January 1, 2002, to October 1, 2003.

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

3) On February 18, 2004, Claimant Onakoy filed a wage claim form in which he stated that Respondent had employed him from August 25, 2001, to October 2003, and failed to pay him for overtime hours he worked from January 1, 2002, to October 1, 2003.

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

5) On April 26, 2004, the Agency issued Order of Determination No. 03-2430. The Agency alleged Respondent employed Claimant Simmons during the periods October 2 through October 31, 2002, at the rate of $8.00 per hour, and December 1, 2002, through June 19, 2003, at the rate of $9 per hour. The Agency also alleged Respondent had employed Claimant Onakoy during the period June 1, 2002, through August 30, 2003, at the rate of $9.15 per hour. Additionally, the Agency alleged Respondent willfully failed to pay Claimants at one and one half their regular pay rates for each hour worked over 40 hours in a given work week, in violation of OAR 839-020-0030 and ORS 652.140, and owed Claimants the unpaid overtime wages, along with penalty wages of $2,330.40 (Simmons) and $2,630.40 (Onakoy), plus interest on the unpaid wage and penalty amounts. The Agency further alleged that Respondent paid Claimants less than the wages to which they were entitled under ORS 653.010 to 653.261, and therefore was liable to Claimants

for the full amount of the unpaid wages, less any amount actually paid, and for civil penalties in the amount of $2,330.40 (Simmons) and $2,630.40 (Onakoy), as provided in ORS 652.150. The Order of Determination gave Respondent 20 days to pay the sums, request an administrative hearing and submit an answer to the charges, or demand a trial in a court of law.

4) On June 1, 2004, the Agency issued a Notice of Intent to Issue Final Order by Default to Respondent's registered agent, Okechi Mary Nwaogu-Dupain. The Agency advised Respondent that if it did not file an "Answer or Request for Hearing or Court Trial" by June 11, 2004, the Agency would issue a final order by default. On June 11, 2004, Respondent, through counsel, filed an answer and request for hearing and alleged certain affirmative defenses and asserted two counter claims against Claimants.

5) On June 21, 2005, the Agency requested a hearing. On June 23, 2005, the Hearings Unit issued a Notice of Hearing stating the hearing would commence at 9:30 a.m. on July 26, 2005. With the Notice of Hearing, the forum included a copy of the Order of Determination, a language notice, a Servicemembers Civil Relief Act notification, and copies of the Summary of Contested Case Rights and Procedures and the Contested Case Hearing Rules, OAR 839-050-0000 to 839-050-0440.

6) By letter dated June 28, 2005, 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.

7) On July 5, 2005, Respondent, through counsel, requested that the hearing date be moved to August 2, 2005, due to a trial previously set to begin on the scheduled hearing date. The Agency agreed to the new date and on July 6, 2005, the ALJ issued an order granting Respondent's request and rescheduling the hearing for Tuesday, August 2, 2005.

8) On July 12, 2005, the ALJ ordered the Agency and Respondent each to submit a case summary that included: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a statement of any agreed or stipulated facts; a brief statement of the elements of the claim; and any wage and penalty calculations (for the Agency only). The ALJ ordered the participants to submit their case summaries by July 22, 2005, and notified them of the possible sanctions for failure to comply with the case summary order.

9) On July 13, 2005, the Agency requested a hearing based on a Notice of Intent to Assess Civil Penalties, Case No. 54-05, that was served on Respondent on May 23, 2005, and to which

Respondent, through counsel, filed an appearance on June 10, 2005, and an answer on July 11, 2005. In the Notice of Intent, the Agency alleged recordkeeping violations and sought civil penalties of $3,000 against Respondent. In its request for hearing, the Agency included a copy of the Notice of Intent, Respondent's responses, and service documents. On the same date it requested a hearing, the Agency moved to consolidate the civil penalty case (54-05) with the wage claim case (19-05) because they involved the same events, time periods, and participants. Respondent agreed to consolidation and the ALJ granted the Agency's motion on July 18, 2005.

10) On July 22, 2005, 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.

11) On July 25, 2005, the Agency timely filed its case summary. Respondent did not file a case summary.

12) By letter dated July 25, 2005, the Agency advised the ALJ that Respondent's counsel had sent the Agency case presenter a letter by facsimile transmission stating that counsel was "forced to withdraw from legal representation in this consolidated matter * * * due to [Respondent's] inability to continue paying for legal representation and inability to maintain sufficient contact with this office."

13) On July 26, 2005, 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. Based on counsel's letter, 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.

14) On July 27, 2005, the Agency advised the ALJ that it planned to call an additional witness at the scheduled hearing.

15) On July 28, 2005, the Agency submitted an addendum to its case summary listing additional exhibits.

16) On August 1, 2005, the Hearings Unit received a hand delivered document entitled "Interim Order Postponing Trial to September 15, 2005," stating:

> "I am relying to [sic] a copy of an order received from my prior attorney, Dolan Griggs LLP. It states that OKECHI Village & Health Center, Inc. must be represented by an attorney or an authorized representative in order to contest this case.
>
> "A. Please bear in mind the following circumstances:
>
> "1. OKECHI Village & Health Center closed for business on January 12th 2005, the offices

are closed and the premises vacated.

"2. OKECHI Village & Health Center has no funds nor income nor any assets and cannot pay for an attorney or an authorized representative at this time.

"3. OKECHI Village & Health Center is trying to obtain the services of an unpaid competent authorized representative at this time but this is proving to be a difficult task at this short notice.

"4. OKECHI Village & Health Center instructed Dolan Griggs LLP to request a postponement until September 15th 2005 to enable time to find funds for an attorney or find an authorized representative and give enough time for the new appointment to review all the facts concerning this matter. Either this instruction was not carried out or the Bureau of Labor and Industries refused the request.

"5. The principal witness for OKECHI Village & Health Center Inc. spends most of his time out of town but has given an assurance to be present from September 15th through September 30th 2005.

"B. In view of the above please consent to the following:

"1. Postpone the hearing until September 15th 2005 or a date thereafter convenient to the court.

"2. Allow time for the submission of either the appointment of a new attorney or the appointment of an authorized representative.

"IT IS SO ORDERED

"Entered at Portland, Oregon with copies mailed to:

" * * * * *

"Linda A. Lohr, Administrative Law Judge"

The document was not signed and the identity of the courier is unknown. The ALJ left messages at Respondent's two known telephone numbers, advising that Respondent must appear at the hearing on August 2, 2005, with counsel or an authorized representative, or be found in default.

17) 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.

18) At the start of hearing, the ALJ granted the Agency's July 22, 2005, motion to amend the Order of Determination to include the additional citations: 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.

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

20) The ALJ issued a proposed order on December 5, 2005, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. Neither Respondent nor the Agency filed exceptions.

FINDINGS OF FACT – THE MERITS

1) At times material, Respondent was a domestic business corporation that provided short term residential care for "at risk" teenage boys in Portland, Oregon, and employed one or more persons in Oregon.

2) At times material, Mary N. Dupain was Respondent's president and registered agent and Marc Willard-Dupain was Respondent's secretary.

3) At times material, Respondent was licensed to provide short-term care for troubled youths ("clients") placed by the Oregon Department of Human Resources ("DHS"). DHS has placed with Respondent "high risk" youth who required "one on one" attention. Respondent's contract with DHS was "per child" for up to 30 days per child and could be renewed for an additional period up to 30 days. DHS paid Respondent for services billed per child. DHS paid Respondent over $500,000 in 2004.

4) Respondent employed Claimant Onakoy as a caregiver in August 2001. Sometime in 2002, Respondent's business closed down for a period following a DHS investigation and Claimant Onakoy did not work at the care facility for two or three months. He resumed working for Respondent in or around June 2002 until in or around August 2003. His duties included transporting Respondent's clients to and from school, counseling and medical appointments, and other outside activities; cooking meals for the clients and occasionally washing their clothes; and performing minor maintenance at Respondent's facility. The number of clients varied at the facility, but during the last few months of his employment Claimant Onakoy cared for as many as 12 clients, including "high risk" youth who needed personal attention.

5) When Claimant Onakoy was hired, Respondent agreed to pay him $8.00 per hour. Later, Respondent increased his pay to $9.15 per hour, which he was earning at the time he left his employment. When he inquired about overtime, Mary Dupain told him that the "government did not allow [the payment of] overtime."

6) Claimant Onakoy's work shifts varied according to the schedule Marc or Mary Dupain posted each week. Often his assigned shift overlapped with other shifts because other caregivers needed help, arrived late, or failed to show up for a shift. Whenever someone failed to appear for a

shift, Claimant Onakoy remained at work because he was aware of his responsibility to the clients. On those occasions, he contacted the Dupains but they would not relieve him or send anyone else to take over the shift.

7) On or about August 30, 2003, Claimant Onakoy quit his employment. Before he filed his wage claim with the Agency, he twice asked the Dupains for his unpaid overtime wages and copies of his time cards. The Dupains did not pay him the wages owed and Mary Dupain told him that she did not have his time cards. When he filed his wage claim, the Agency asked him to estimate the hours he worked each week.

8) After investigation, the Agency determined that between June 1, 2002, and August 30, 2003, Claimant Onakoy worked an estimated 3,964 hours, including 1,395 overtime hours, earning an estimated total of $42,659.70. The Agency also determined that during that period Respondent paid Claimant Onakoy estimated wages totaling $36,270.60 (3,964 hours paid at the $9.15 straight time rate), leaving an estimated $6,389.10 in unpaid wages.

9) Respondent employed Claimant Simmons as a caregiver from in or around August 2002 until in or around July 2003. His duties included client medication supervision, refilling prescriptions, cooking meals, teaching "life skills," and generally functioning as a "babysitter to teen boys." Respondent had 3 to 4 clients when Claimant Simmons began his employment in August 2002 and 10 to 12 when he left in July 2003. The clients ranged in age from 9 to 17 years old.

10) Respondent agreed to pay Claimant Simmons $8.00 per hour.

11) Claimant Simmons was scheduled to work from 11 p.m. to 7 a.m., six or seven days per week, but also was often scheduled to work from 11 a.m. the following day until 11 p.m. As a result, he worked numerous overtime hours that Respondent paid at the straight time rate of $8.00 per hour.

12) Throughout his employment, Claimant Simmons recorded the dates and time that he clocked in and out on his time cards on his home computer. He recorded the time because the Dupains often made computation errors and sometimes his paychecks were for fewer hours than those recorded on his time cards. Before he left his employment, he copied all of his time cards.

13) Based on Claimant Simmons's documentation and records that Respondent provided, the Agency determined that Claimant Simmons worked an estimated 2,219 hours, including 951.25 overtime hours, earning approximately $21,557 between October 2 and October 31, 2002, and December 1, 2002, through June 19, 2003. The Agency also determined that Respondent paid Claimant Simmons wages totaling

$11,818 during that period, leaving an estimated $9,739 in unpaid wages.

14) During the investigation, the Agency conferred with DHS and determined that the contracts between Respondent and DHS were "personal service" contracts subject to ORS 279.334(6).[1] Consequently, when computing Claimants' wages, the Agency included overtime pay for legal holidays and for overtime after 40 hours in a workweek.

15) As of the date of hearing, Respondent still owed Claimants $16,128.10 in unpaid wages.

16) During the wage claim investigation, Agency compliance specialist Trotman made numerous attempts to obtain all payroll records pertaining to Claimants Onakoy and Simmons from Respondent. Beginning in early November 2003, via numerous letters and telephone calls to Marc and Mary Dupain, Trotman requested time and payroll records and other documents that established Claimants' employment status, hours worked, and the amount of wages Respondent paid to each. Trotman granted the Dupains several extensions of time to provide the requested documents. On December 14, 2003, Marc Dupain sent to Trotman Claimant Simmons's original time cards and a copy of one check dated December 6, 2002, payable to "Jaire Simmons." In the letter, Dupain stated that he had ordered "all cancelled checks and copies of bank statements * * * [that] will completely negate this whole issue." On January 13, 2004, Trotman wrote to the Dupains, acknowledging receipt of the records, and notified them that the records were incomplete. She reiterated her previous requests and requested additional information to be provided by January 28, 2004. Between January and August 2004, Trotman spoke by telephone to Mary Dupain, who claimed that she had not received Trotman's January 13 letter and was forced into bankruptcy because of the wage claims. Trotman confirmed with the bankruptcy trustee that Respondent was not part of Mary Dupain's Chapter 13 bankruptcy that was filed on June 28, 2002. In later telephone calls, Mary Dupain's attorney, Eric Wilborn, advised Trotman that Respondent had filed a Chapter 11 bankruptcy petition and that Respondent was an "S" corporation, therefore, Mary Dupain was liable for the corporate debt as an individual and her business debt was covered under her bankruptcy. Trotman subsequently confirmed that

[1] ORS 279.334(6) provides in pertinent part: "This section shall not apply to contracts for personal services * * * provided that persons employed under such contracts shall receive at least time and a half pay for work performed on the legal holidays specified in * * * this section and for all overtime worked in excess of 40 hours in any one week, except for individuals under those contracts who are excluded under ORS 653.010 to 653.261 or under 29 U.S.C. sections 201 to 209 from receiving overtime."

Respondent had not filed a Chapter 11 bankruptcy. Despite Trotman's requests, Wilborn failed to provide documentation that supported his claim that Respondent was an "S" corporation. As of the hearing date, Trotman had not received all of the requested documents or information from Respondent or its counsel. Trotman never received any records that showed the actual number of hours Claimant Onakoy worked during his employment with Respondent.

17) Respondent has a history of prior wage claims and complaints that includes a wage claim in 1999, a wage claim and one complaint in 2000, a wage claim in 2001 and a complaint in 2003.

18) All of the witnesses gave credible testimony.

ULTIMATE FINDINGS OF FACT

1) Respondent at all times material herein conducted a business in Oregon and engaged the personal services of one or more employees in the operation of that business.

2) Respondent employed Claimant Onakoy between June 1, 2002, and August 30, 2003, and agreed to pay him $9.15 per hour.

3) Respondent employed Claimant Simmons between October 2 and October 31, 2002, and between December 1, 2002, and June 19, 2003, and agreed to pay him $8.00 per hour.

4) During their employment, Claimant Onakoy worked 951.25 hours and Claimant Simmons worked 1,395 hours in excess of 40 hours per week. Respondent did not pay Claimants one and one half times their pay rate for any of the hours they worked in excess of 40 per week.

5) When Claimants voluntarily quit their employment, Respondent owed and still owes Claimant Onakoy unpaid overtime wages of $6,389.10 and Claimant Simmons unpaid overtime wages of $9,739.

6) Respondent willfully failed to pay the wages due and owing Claimants and more than 30 days have elapsed since the wages were due.

7) Penalty wages, computed in accordance with ORS 652.150, equal $2,196 (Onakoy: $9.15 per hour x 8 hours per day x 30 days) and $1,920 (Simmons: $8.00 per hour x 8 hours per day x 30 days).

8) Civil penalties under ORS 653.055, computed in accordance with ORS 652.150, equal $2,196 (Onakoy: $9.15 per hour x 8 hours per day x 30 days) and $1,920 (Simmons: $8.00 per hour x 8 hours per day x 30 days).

9) Respondent failed to make a record of the actual hours Claimant Onakoy worked each week and each pay period, and also failed to make any records showing the actual hours Claimants worked each week available to the Agency for inspection. Respondent's failure to make and keep required records was willful.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent was an employer and Claimants were employees subject to the provisions of ORS 652.110 to 652.200 and 652.310 to 652.405.

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

3) Respondent violated ORS 652.140(2) by failing to pay Claimants Onakoy and Simmons all wages earned and unpaid after they quit their employment without notice.

4) Respondent is liable for penalty wages under ORS 652.150 for willfully failing to pay all wages or compensation earned and due to Claimants Onakoy and Simmons when their employment terminated as provided in ORS 652.140(2).

5) Respondent is liable for civil penalties under ORS 652.055 for failing to pay Claimants Onakoy and Simmons one and one half their regular rate of pay for the work they performed in excess of 40 hours per week in violation of ORS 653.261 and OAR 839-020-0030(1).

6) Respondent violated ORS 653.045(1)(b) by failing to maintain a record of the actual hours Claimant Onakoy worked each week and each pay period and is liable for $1,000 in civil penalties under ORS 653.256.

7) Respondent violated ORS 653.045(2) by failing to keep required records available for the Agency's inspection and is liable for $1,000 in civil penalties under ORS 653.256.

8) Under the facts and circumstances of this record, and according to the applicable law, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondent to pay Claimants their earned, unpaid, due and payable wages, penalty wages, and civil penalties, plus interest on all sums until paid. ORS 652.332.

9) Under the facts and circumstances of this record, and according to the applicable law, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondent to pay $2,000 in civil penalties, plus interest on those sums until paid. ORS 653.256.

OPINION

Respondent failed to appear at hearing and the forum found Respondent in default pursuant to OAR 839-050-0330. The Agency, therefore, was required to establish a prima facie case on the record to support the allegations in its charging documents. *In the Matter of Barbara Blair*, 24 BOLI 89, 96 (2002). 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. *Id*.

WAGE CLAIMS

The Agency's prima facie case supporting its allegations in the Order of Determination includes credible evidence showing: 1) Respondent employed Claimants; 2) Respondent agreed to pay Claimant Onakoy $9.15 per hour and Claimant Simmons $8.00 per hour; 3) Claimants performed work for which they were not properly compensated; and 4) the amount and extent of work Claimants performed for Respondent. *In the Matter of Barbara Coleman*, 19 BOLI 230, 262-63 (2000). In its answer, Respondent admits it employed Claimants as "direct care workers" during the wage claim periods and that it agreed to pay the hourly rates claimed. The only issues in dispute are whether Claimants performed work for which they were not properly compensated and, if so, the amount and extent of the work they performed.

Claimants contend they were not paid for any hours they worked that exceeded 40 hours per week. In its answer, Respondent alleged that "[t]his is because all hours worked by claimants in excess of forty hours per week were covered by the independent contractor agreement between claimants and [Respondent]." Additionally, Respondent denied it owes wages for the excess hours and contended that "Claimants have already been paid at least $64,981.67, which is $764.97 more than the amount which BOLI claims is due to claimants." Respondent's unsubstantiated assertions are overcome by Claimants' credible testimony that there was no such agreement and that their overtime hours were an extension of their caregiver duties for Respondent and remain unpaid to date. Additionally, the forum infers from Respondent's statements that it knew Claimants worked hours that exceeded 40 per week and, based on Claimants' credible testimony, concludes that Claimants performed work for which they were not properly compensated.

When a respondent produces no records or, as in this case, incomplete records of dates and hours a wage claimant worked, the forum may rely on the wage claimant's credible testimony to show the amount and extent of the hours worked. *See e.g.*, *In the Matter of John M. Sanford*, 26 BOLI 73, 81, *as amended* 26 BOLI 111 (2004). Here, the forum found that both Claimants credibly testified about the number of hours they worked during the wage claim periods. Their testimony was bolstered, in part, by the few records Respondent produced during the wage claim investigation. Additionally, Claimant Simmons credibly testified that he maintained a contemporaneous computer record of his hours and also produced at hearing the copies he made of all his time cards before he left his employment. Although Claimant Onakoy did not keep a contemporaneous record of his work hours, he provided credible information to the Agency during the wage claim in-

vestigation that enabled the Agency to make a reasonable estimate of the number of hours he worked. Claimants' evidence is all the more believable because, 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.[2] Consequently, the forum concludes that between June 1, 2002, and August 30, 2003, Claimant Onakoy worked 1,395 overtime hours, earning $6,389.10 in unpaid overtime wages, and that between October 2 through October 31, 2002, and December 1, 2002, through June 19, 2003, Claimant Simmons worked 951.25 overtime hours, earning $9,739 in unpaid overtime wages.

PENALTY WAGES UNDER ORS 652.150

The forum may award penalty wages when it determines that a respondent's failure to pay wages was willful. Willfulness does not imply or require blame, malice, or moral delinquency. A respondent commits an act or omission "willfully" if the respondent acts or fails to act intentionally, as a free agent, and with knowledge of what is being done or not done. *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976).

In its answer, Respondent admitted Claimants worked hours exceeding 40 per week, but denied owing overtime wages because Claimants were performing "cleaning and maintenance" duties during those hours under an independent contractor agreement. Respondent's unsworn and unsubstantiated statement is overcome by credible evidence to the contrary. There is no evidence that Respondent acted other than voluntarily and as a free agent when it failed to pay Claimants all of the wages earned and due when they voluntarily ended their employment. The forum concludes that Respondent's failure to pay was willful and Respondent is liable to each Claimant for penalty wages under ORS 652.150(1) (providing that "as a penalty for such [willful] nonpayment, the wages or compensation of such employee shall continue from the due date thereof at the same hourly rate for eight hours per day until paid or until action therefor is commenced. However, in no case shall such wages or compensation continue for more than 30 days from the due date"). In accordance with ORS 652.150(1), the forum has determined that Claimant Onakoy's penalty wages total $2,196 (computed by multiplying his hourly rate of $9.15 per hour by 8 hours per day multiplied by 30

[2] In addition to unsworn assertions in its answer, Respondent alleged certain defenses that are not substantiated by any evidence in the record. Instead, credible evidence controverts those defenses and the forum has not considered them in this Order.

days) and Claimant Simmons' penalty wages total $1,920 (computed by multiplying his hourly rate of $8.00 per hour by 8 hours per day multiplied by 30 days.)[3]

CIVIL PENALTIES UNDER ORS 653.055

The Agency also alleged in its Order of Determination that Respondent paid both Claimants less than the wages to which they were entitled under ORS 653.010 to 653.261, and was subject to civil penalties under ORS 653.055(1)(b). Having found that Claimants were entitled to receive overtime wages pursuant to ORS 653.261 and that Respondent failed to pay the overtime wages Claimants earned during the applicable wage claim periods, the forum concludes that under ORS 653.055(1)(b), Respondent is liable to each Claimant for civil penalties as provided in ORS 652.150. The forum concludes that Claimants Onakoy and Simmons are entitled to recover civil penalties of $2,196 and $1,920, respectively, from Respondent, calculated pursuant to ORS 652.150.

RECORDKEEPING VIOLATIONS

In its Notice of Intent to Assess Civil Penalties, the Agency seeks to impose a $2,000 civil penalty against Respondent for willfully failing to make required records showing the hours that Claimants Onakoy and Simmons worked each week and pay period, in violation of ORS 653.045(1). The Agency also seeks a $1,000 civil penalty against Respondent for its willful failure to make required records available for the Agency's inspection, in violation of ORS 653.045(2).

The hearing record includes evidence that Respondent maintained and provided the Agency with a record of Claimant Simmons's actual work hours, including his original time cards. However, despite the Agency's repeated requests and ample opportunity to do so, Respondent failed to make Claimant Onakoy's payroll records available for the Agency's inspection. The forum infers that Respondent did not make records pertaining to Claimant Onakoy or it would have provided them when it provided Claimant Simmons's payroll records.

ORS 653.256 authorizes the Commissioner to assess civil penalties for each willful violation of ORS 653.045. OAR 839-020-0004(33) states:

> "'Willfully' means knowingly. An action is done knowingly when it is undertaken with actual knowledge of a thing to be done or omitted or action un-

[3] In its Order of Determination, the Agency alleged a higher amount of penalty wages that had been calculated pursuant to an Agency policy or interpretation that this forum deemed contrary to wage and hour statutes and rules. *See In the Matter of John M. Sanford*, 26 BOLI 72, 82-85 (2004). Consequently, the forum recomputed the penalty wages to conform to the formula set forth in ORS 652.150(1).

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

In this case, Respondent knew or should have known it was required to make and keep records of Claimant Onakoy's work hours. The fact that Respondent kept records of the hours Claimant Simmons worked and provided those records to the Agency is evidence that Respondent knew of the requirement. Respondent, as an employer, has a duty to know the laws that regulate employment in this state.

The actual amount of the civil penalty the Commissioner assesses depends on the mitigating and aggravating circumstances set forth in OAR 839-020-1020. *See* OAR 839-020-1010. In this case, Respondent offered no mitigating evidence in its answer for the forum to consider when determining the amount of the civil penalty. On the other hand, the Agency alleged, and the forum finds, that Respondent knew or should have known of the violation and that the Agency gave Respondent ample opportunity to correct the violation but it failed to do so. Additionally, the forum finds that Respondent's failure to make and keep a record of Claimant Onakoy's actual work hours hampered the Agency's investigation and its ability to determine whether Claimant Onakoy was paid correctly or to determine the amount of any additional wages owed. As such, the violations are serious and the forum finds $1,000 for each of two violations, (1) ORS 653.045(1) – failure to make a record of Claimant Onakoy's actual work hours each week and each pay period, and (2) ORS 653.045(2) – failure to make records available for the Agency's inspection, is an appropriate civil penalty in this case.

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, and as payment of the unpaid wages, Respondent **Okechi Village & Health Center LLC** is hereby ordered to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2180, the following:

> A certified check payable to the Bureau of Labor and Industries, in trust for Claimant Mohammad Longanga Onakoy, in the amount of TEN THOUSAND SEVEN HUNDRED EIGHTY ONE DOLLARS AND TEN CENTS ($10,781.10), less lawful deductions, representing

$6,389.10 in gross earned, unpaid, due and payable wages, $2,196 in penalty wages, and $2,196 in civil penalties; plus interest at the legal rate on the sum of $6,389.10 from October 1, 2003, until paid, and interest at the legal rate on the sum of $2,196 (penalty wages) from November 1, 2003, until paid; and interest at the legal rate on the sum of $2,196 (civil penalties) from October 1, 2003, until paid.

A certified check payable to the Bureau of Labor and Industries, in trust for Claimant Jair Watenda Simmons, in the amount of ELEVEN THOUSAND SIX HUNDRED AND FIFTY NINE DOLLARS ($11,659), less appropriate lawful deductions, representing $9,739 in gross earned, unpaid, due and payable wages, $1,920 in penalty wages, and $1,920 in civil penalties; plus interest at the legal rate on the sum of $9,739 from July 1, 2003, until paid, interest at the legal rate on the sum of $1,920 (penalty wages) from August 1, 2003, until paid, and interest at the legal rate on the sum of $1,920 (civil penalties) from July 1, 2003, until paid.

NOW, THEREFORE, as authorized by ORS 652.256, and as payment of the civil penalties assessed as a result of its violations of ORS 653.045, Respondent **Okechi Village & Health Center LLC** is hereby ordered to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2180, the following:

A certified check payable to the Bureau of Labor and Industries in the amount of TWO THOUSAND DOLLARS ($2,000), plus accrued interest at the legal rate on that amount from a date ten days after issuance of the Final Order and the date Respondent Okechi Village & Health Center complies with the Final Order.

In the Matter of

TROY MELQUIST dba RedCellX, Inc.,

Case No. 68-05

Final Order of Commissioner Dan Gardner

Issued February 14, 2006

SYNOPSIS

Respondent failed to pay four wage claimants all wages earned and unpaid at the time they quit

their employment with Respondent, in violation of ORS 652.140(1) and 652.140(2). The forum ordered Respondent to pay the wages owed plus penalty wages, pursuant to ORS 652.150, plus interest on the wages owed and penalty amounts. ORS 652.140(1); ORS 652.140(2); ORS 652.150.

The above-entitled case came on regularly for hearing before Linda A. Lohr, designated as Administrative Law Judge ("ALJ") by Dan Gardner, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on June 7, 2005, in the W.W. Gregg Hearing Room of the Bureau of Labor and Industries, located at 800 NE Oregon Street, Portland, Oregon.

Cynthia L. Domas, an Agency employee, represented the Bureau of Labor and Industries ("BOLI" or "the Agency"). Mary Ann Burke, Michael Polehn, Scott L. Hickey, and Nilanthren Vadival Naidoo ("Claimants") were present throughout the hearing and were not represented by counsel. Troy Melquist ("Respondent") failed to appear for hearing in person or through counsel.

The Agency called the following witnesses: Mary Burke, Scott Hickey (telephonic), Nilanthren Naidoo (telephonic), and Michael Polehn, wage claimants; and Stan Wojtyla, Wage and Hour Division compliance specialist.

The forum received as evidence:

a) Administrative exhibits X-1 through X-6;

b) Agency exhibits A-1 through A-38 (filed with the Agency's case summary).

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

FINDINGS OF FACT – PROCEDURAL

1) On November 21, 2003, Claimant Burke filed a wage claim form on which she stated that Respondent had employed her from September 8 to October 21, 2003, and failed to pay her any wages for the hours she worked for that time period.

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

3) On October 28, 2003, Claimant Hickey filed a wage claim form on which he stated that Respondent had employed him from September 19 to October 14, 2003, and failed to pay him any wages for the hours he worked for that time period.

4) At the time he filed his wage claim, Claimant Hickey assigned to the Commissioner of the Bureau of Labor and Industries, in

trust for Claimant, all wages due from Respondent.

5) On September 24, 2003, Claimant Naidoo filed a wage claim form on which he stated that Respondent had employed him from March 25 to August 22, 2003, and failed to pay him any wages for the hours he worked for that time period.

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

7) On November 13, 2003, Claimant Polehn filed a wage claim form on which he stated that Respondent had employed him from April 14 to September 22, 2003, and failed to pay him any wages for the hours he worked from September 1 to September 19, 2003.

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

9) On January 1, 2004, the Agency issued Order of Determination No. 03-3183. The Agency alleged Respondent had employed Claimant Burke during the period September 8 to October 21, 2003, at the rate of $36.92 per hour; Claimant Hickey during the period September 19 to October 14, 2003, at the rate of $10.42 per hour; Claimant Naidoo during the period August 1 to August 22, 2003, at the rate of $36.05 per hour; and Claimant Polehn during the period September 1 to September 29, 2003, at the rate of $21.62 per hour. Additionally, the Agency alleged Respondent willfully failed to pay Claimants any of the wages they were owed for the hours they worked during those periods and more than thirty days have elapsed since the wages became due and owing pursuant to ORS 652.140, therefore Respondent owed Claimants the earned and unpaid wages, along with penalty wages of $8,860.80 (Burke); $2,500.80 (Hickey); $8,652 (Naidoo); and $5,191.20 (Polehn), plus interest on the unpaid wage and penalty amounts. The Order of Determination gave Respondent 20 days to pay the sums, request an administrative hearing and submit an answer to the charges, or demand a trial in a court of law.

10) On February 17, 2004, the Agency issued a Notice of Intent to Issue Final Order by Default to Respondent. The Agency advised Respondent that if it did not file an “Answer or Request for Hearing or Court Trial” by February 27, 2004, the Agency would issue a final order by default. Respondent timely filed an answer and request for hearing and contested the wage claims filed by Claimants Hickey and Naidoo.

11) On April 25, 2005, the Agency requested a hearing. On April 26, 2005, the Hearings Unit issued a Notice of Hearing stating the hearing would commence at 10 a.m. on June 7, 2005. With the

Notice of Hearing, the forum included a copy of the Order of Determination, a language notice, a Servicemembers Civil Relief Act notification, and copies of the Summary of Contested Case Rights and Procedures and the Contested Case Hearing Rules, OAR 839-050-0000 to 839-050-0440.

12) On April 29, 2005, Respondent was personally served with the Notice of Hearing and attachments at 15823 SW Village Circle, Beaverton, Oregon. The service report states that attempts to serve Respondent were made on April 27 and 28, but there was "no answer, no car in garage, appears occupied."

13) On May 23, 2005, the ALJ ordered the Agency and Respondent each to submit a case summary that included: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a statement of any agreed or stipulated facts; and a brief statement of the elements of the claim and any wage and penalty calculations (for the Agency only). The ALJ ordered the participants to submit their case summaries by June 1, 2005, and notified them of the possible sanctions for failure to comply with the case summary order.

14) On May 26, 2005, the Agency timely filed its case summary. Respondent did not file a case summary.

15) Respondent did not appear at the time and place set for hearing and no one appeared on his behalf or advised the ALJ of any reason for his failure to appear. The ALJ ruled that Respondent was in default, having been properly served with the Notice of Hearing and having failed to appear at the hearing.

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

17) The ALJ issued a proposed order on December 5, 2005, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. Neither Respondent nor the Agency filed exceptions.

FINDINGS OF FACT – THE MERITS

1) At times material, Respondent was an individual conducting business in Oregon as a hardware and software systems developer using the name of "RedCellX, Inc." and employed one or more persons in Oregon.

2) Respondent's business was developing hardware and software for embedded products contained within hand held devices such as personal data systems, cell phones, e-books, and electronic books. Respondent's workforce was involved with software and hardware programming associated with creating those devices.

3) Previously, Respondent was the president of RedCellX, Inc., a corporation that owned the business until it was administratively dissolved on September 5, 2003. Respondent continued to use the name RedCellX, Inc. while conducting his business.

4) On or about September 8, 2003, Respondent hired Claimant Burke as a software programmer to analyze code and algorithms for compressing music and data for embedded products. Claimant Burke held a Bachelor's and an advanced degree in Math. Respondent hired her because of her background in the aerospace industry with satellite data compression. Respondent assigned her to investigate, design and develop algorithms needed to perform specific tasks. He asked her to look at existing music compression algorithms from another person's project and do "a proof concept coding and compression of test data to do standard algorithm programming."

5) Respondent agreed to pay Claimant Burke $6400 per month for a minimum 40 hour work week. She usually worked between 8 a.m. and 6 p.m., five days per week, Monday through Friday. She worked with Jerry Wheeler, Stan Nichols, Scott Hickey, and Mike Polehn.

6) Respondent managed the daily business affairs and handled the clients and financial matters. Respondent usually came in to work at 11 a.m. and stayed well beyond Claimant Burke's workday.

7) Beginning around October 7, 2003, Claimant Burke sent Respondent numerous e-mails requesting her September paycheck. Each time Respondent replied to one of her e-mails, he acknowledged that the payroll was due, but repeatedly stated that "funds are not yet available from the deposits. I have a check ready for you awaiting clearing deposits." Finally, on October 22, 2003, Claimant Burke sent Respondent an e-mail that stated in pertinent part:

> "I haven't heard from you regarding back wages owed for September, 2003. This has left me no alternative but to follow what Nilan has done. I am filing a wage claim form with BOLI for the September wages. In addition, you have not provided any indication of work assignments, nor plans for further work. In addition, I am filing an unemployment claim with the State of Oregon. I formally request that you do not contest the claim, as you have left me no other option. I was recruited from Novellus to RedCellX, giving up a solid job with benefits, to be left in the dark."

Respondent immediately replied by e-mail and stated in pertinent part:

> "I had asked to have a meeting with you today via the e-mail I forwarded. I am still waiting to have checks clear to pay for your wages. I did not want to ask you to work if you were not yet paid for last month. That

seems fair right? I told you I would not contest any unemployment. You are left in the dark, I am sorry for that, I am trying to bring light to your situation ASAP. I have much regrets concerning the situation right now."

8) Claimant Burke performed work for Respondent from September 8 through October 3, 2003, and earned gross wages of $6,400. She quit her employment because she was not receiving any pay for the work she performed.

9) At the time of hearing, Respondent owed Claimant Burke $6,400 in unpaid wages.

10) Claimant Burke's penalty wages, computed in accordance with ORS 652.150, total $8,861 ($36.92 per hour x 8 hours per day x 30 days).[1]

11) On or about September 19, 2003, Respondent hired Claimant Hickey as a project manager through the "SBA Career Services Business Internship Program" at Portland State University's School of Business Administration ("PSU"). Claimant Hickey had recently graduated from PSU with double degrees in general management and information systems. Respondent had announced the 12-month internship opportunity through SBA Career Services on September 3, 2003, and stated that "the intern, who will report directly to the CEO, will take projects from their conception and work through the product's life cycle. Products can be hardware, software, or a combination of both. Project managers work directly with RedcellX clients." The announcement also stated that the internship included compensation of $20,000 for 30 to 40 hour workweeks for the 12-month duration.

12) During his internship, Claimant Hickey worked with Respondent, clients, and hardware and software engineers. He was responsible for coordinating the work and making sure staff met the timelines. Additionally, he did the "dirty work" as Respondent's administrative assistant. He answered the phone and handled creditors, people complaining about projects that were not being delivered, and people complaining that they were not paid. Claimant Hickey observed checks ranging from $14,000 to $20,000 coming in to the business. Respondent deposited the checks and told his staff that he would issue paychecks when the checks cleared at the bank.

13) Respondent agreed to pay Claimant Hickey $20,000 for the 12-month internship for a 30 to 40 hour work week. Claimant Hickey worked between 8 a.m. and 5 p.m., Monday through Friday. He was told that payday was monthly at the end of each month. He never received any wages for the work he performed for Respondent.

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[1] Burke's hourly rate equals her monthly salary multiplied by 12 months, divided by 52 weeks, and divided by 40 hours per week.

14) Claimant Hickey performed work for Respondent from September 9 through October 14, 2003, and earned gross wages of $1,479.64. He quit his employment because he was not receiving any pay for the work he performed.

15) At the time of hearing, Respondent owed Claimant Hickey $1,479.64 in unpaid wages.

16) Claimant Hickey's penalty wages, computed in accordance with ORS 652.150, are $2,309 ($9.62 per hour x 8 hours per day x 30 days).[2]

17) On or about March 3, 2003, Respondent hired Claimant Naidoo as a software engineer to write software for embedded devices. Claimant Naidoo has electrical engineering and computer science degrees and was earning $100,000 annually before he came to Oregon.

18) Respondent agreed to pay Claimant Naidoo $75,000 annually for a minimum of 40 hours per week after a three-month trial period. By July 1, 2003, Claimant Naidoo was earning the agreed upon salary.

19) Claimant Naidoo worked from 8:30 a.m. to 6 p.m., Monday through Friday. During his employment, two or three of his paychecks bounced, but Respondent eventually covered the checks and Claimant Naidoo was paid for his work through July 31, 2003.

20) In or around early August 2003, Claimant Naidoo gave Respondent notice that he had accepted a job at Intel. He worked until August 17, 2003, and used paid time off to take a vacation between August 18 and August 22, 2003.

21) Respondent's employee handbook states that salaried employees regularly scheduled to work 30 or more hours per week are entitled to participate in the "company's PTO [paid time off] program." Hours are accrued as each year progresses and are based on years of service. The hours are available in the year they accrue, but are subtracted from the paid time off hours available for the next year. Paid time off does not start to accrue until after the first 90 days of employment. The employee handbook does not state that "vacation time is not paid upon quitting and or termination." Claimant Naidoo was eligible for 4.5 paid days off in August 2003.

22) Claimant Naidoo performed work for Respondent and used 4.5 days of paid vacation time from August 1 through August 22, 2003, and earned gross wages of $4,326.90. Respondent did not pay the wages when due and on August 30, 2003, Claimant Naidoo asked for his August paycheck. After numerous e-mail exchanges, Respondent sent Claimant Naidoo an e-mail on September 15, 2003, stating:

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[2] Pursuant to Agency policy, penalty wages are rounded off to the nearest dollar.

"The major issue we have at this time is as follows"

"1. SEI has not paid;

"2. Yaacov has not paid;

"a. I had to cover all outstanding Payroll checks and your amount. I am waiting for clearance of check since wires can only be for cash. I have deposits in the bank and you [are] next on the wire transfer amount. Last Friday the checks did not post yet.

"b. The payoff balance goes:

"i. Nilan

"ii. Alex

"iii. Aaron

"That is the order."

Finally, on September 18, 2003, Respondent informed Claimant Naidoo by e-mail that when he received funds promised to him by another company: "I will send them over to you ASAP." Claimant Naidoo never received any wages for August 2003.

23) At the time of hearing, Respondent owed Claimant Naidoo $4,326.90 in unpaid wages.

24) Claimant Naidoo's penalty wages, computed in accordance with ORS 652.150, are $8,652 ($36.05 per hour x 8 hours per day x 30 days).

25) On or about April 14, 2003, Respondent hired Claimant Polehn as a computer hardware development engineer. He primarily worked on one project that involved designing hardware for a customer's media center with MP3 player. He also did circuit design and drafted proposals.

26) Respondent agreed to pay Claimant Polehn $45,000 annually to work 40 hours per week. At first, Respondent paid Claimant Polehn by check, but when the checks began to bounce, they mutually agreed upon electronic deposit for future wage payments.

27) On or about September 22, 2003, Respondent told Claimant Polehn that the company was moving to Hillsboro and that Polehn was temporarily laid off. Respondent did not pay Polehn for the work he performed from September 2 through September 22, and on October 21, 2003, Polehn e-mailed Respondent a demand for his wages. Polehn advised Respondent that if the wages were not deposited in his account, he planned to file a wage claim with BOLI. Thereafter, they exchanged several e-mails and Respondent acknowledged the unpaid wages, but made excuses for the delay paying the amount owed. Despite his repeated requests, Polehn never received his wages for September 2003.

28) At the time of hearing, Respondent owed Claimant Polehn $2,596.14 in unpaid wages.

29) Claimant Polehn's penalty wages, computed in accordance with ORS 652.150, are $5,191 ($21.63 per hour x 8 hours per day x 30 days).

30) While employed by Respondent, each claimant kept a

spreadsheet or other contemporaneous record of their work hours.

ULTIMATE FINDINGS OF FACT

1) At times material herein, Respondent conducted business in Oregon under the name of a defunct corporation, RedcellX, Inc., and employed one or more persons in the operation of that business.

2) Respondent employed Claimant Burke from September 8 through October 21, 2003.

3) Respondent agreed to pay Claimant Burke $6,400 per month.

4) Claimant Burke quit her employment with Respondent on October 21, 2003.

5) From September 8 through October 21, 2003, Claimant Burke earned $6,400 and was not paid any wages for her services.

7) Respondent owes Claimant Burke $6,400 in due and unpaid wages.

8) Respondent willfully failed to pay Claimant Burke the $6,400 in earned, due and payable wages. Respondent has not paid the wages owed and more than 30 days have elapsed from the date the wages were due.

9) Penalty wages for Burke, computed pursuant to ORS 652.150, equal $8,861.

10) Respondent employed Claimant Hickey from September 19 through October 14, 2003.

11) Respondent agreed to pay Claimant Hickey $20,000 for a 12-month internship.

12) Claimant Hickey quit his employment with Respondent on October 14, 2003.

13) From September 19 through October 14, 2003, Claimant Hickey earned $1,479.64 and was not paid any wages for his services.

14) Respondent owes Claimant Hickey $1,479.64 in due and unpaid wages.

15) Respondent willfully failed to pay Claimant Hickey $1,479.64 in earned, due and payable wages. Respondent has not paid the wages owed and more than 30 days have elapsed from the date the wages were due.

16) Penalty wages for Hickey, computed pursuant to ORS 652.150, equal $2,309.

17) Respondent employed Claimant Naidoo from March 3 through August 22, 2003.

18) Respondent agreed to pay Claimant Naidoo $75,000 annually.

19) Claimant Naidoo quit his employment with Respondent effective August 22, 2003.[3]

20) From August 1 through August 22, 2003, Claimant Naidoo earned $4,326.90 and was not paid any wages for his services.

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[3] See Finding of Fact – The Merits 20.

21) Respondent owes Claimant Naidoo $4,326.90 in due and unpaid wages.

22) Respondent willfully failed to pay Claimant Naidoo $4,326.90 in earned, due and payable wages. Respondent has not paid the wages owed and more than 30 days have elapsed from the date the wages were due.

23) Penalty wages for Naidoo, computed pursuant to ORS 652.150, equal $8,652.

24) Respondent employed Claimant Polehn from September 1 through September 19, 2003.

25) Respondent agreed to pay Claimant Polehn $45,000 annually.

26) Claimant Polehn was laid off on September 19, 2003.

27) From September 1 through September 19, 2003, Claimant Polehn performed work for Respondent and earned $2,596.14 and was not paid anything for those services.

28) Respondent owes Claimant Polehn $2,596.14 in due and unpaid wages.

29) Respondent willfully failed to pay Claimant Polehn $2,596.14 in earned, due and payable wages. Respondent has not paid the wages owed and more than 30 days have elapsed from the date the wages were due.

30) Penalty wages for Polehn, computed pursuant to ORS 652.150, equal $5,191.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent was an employer and Claimants were employees subject to the provisions of ORS 652.110 to 652.200 and 652.310 to 652.405.

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

3) Respondent violated ORS 652.140(1) by failing to pay Claimant Polehn all wages earned and unpaid at the time Respondent terminated Polehn's employment. Respondent violated ORS 652.140(2) by failing to pay Claimants Burke, Hickey, and Naidoo all wages earned and unpaid after they quit Respondent's employment.

4) Respondent is liable for penalty wages under ORS 652.150 for willfully failing to pay all wages or compensation earned and due to Claimants Burke, Hickey, Naidoo, and Polehn when their employment terminated, as provided in ORS 652.140(1) and 652.140(2).

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

OPINION

Respondent failed to appear at hearing and the forum found him in default pursuant to OAR 839-050-0330. The Agency, therefore, was required to establish a prima facie case on the record to support the allegations in its charging document. *In the Matter of Barbara Blair*, 24 BOLI 89, 96 (2002). The forum may consider unsworn assertions contained in a defaulting respondent's answer when making factual findings, but those assertions are overcome whenever controverted by other credible evidence. *Id*.

Additionally, pursuant to OAR 839-050-130(2), "factual matters alleged in the charging document and not denied in the answer will be deemed admitted by the party." In his answer, Respondent did not deny employing Claimants Burke, Naidoo, and Polehn during the time alleged or deny that he owed Claimants Burke and Polehn the amounts they claim he owed when they quit their employment and the forum deems those matters admitted. However, Respondent contended in his answer that Claimant Hickey was engaged as an unpaid intern for 30 days and "requested halfway through his internship to be paid $2,000 for his time." He further contended that Claimant Naidoo's wage claim includes "vacation time which he had not accumulated and attempted to take after leaving the company" and fails to "reflect any deductions for health care" that Claimant Naidoo allegedly owed when he quit his employment. Those contentions are overcome by credible evidence in the record.

WAGE CLAIMS

The Agency's prima facie case consists of credible evidence showing: 1) Respondent employed Claimants; 2) Respondent paid or agreed to pay Claimants a fixed rate; 3) Claimants performed work for which they were not properly compensated; and 4) the amount and extent of work Claimants performed for Respondent. *In the Matter of Barbara Coleman*, 19 BOLI 230, 262-63 (2000). Based on Respondent's answer and credible evidence in the record, there is no dispute that Respondent employed Claimants Burke, Naidoo, and Polehn and that he paid or agreed to pay the fixed amount they claim they were either promised or paid. Moreover, evidence shows and Respondent does not dispute that all of the Claimants, including Hickey,[4] performed work for which

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[4] On the one hand, Respondent claimed in his answer that Hickey was an unpaid intern, but then apparently abandoned that argument by stating that Hickey "failed to turn in proper legal documents to establish his internship." Respondent then admitted that Hickey was not paid for "[three] weeks of internship work" because he "failed to supply the proper required information for hours worked" and "failed to fill out proper tax forms for any payment or 1099 payment." The forum has deemed the latter statement an admission that Hickey performed work for which he was not properly compensated.

they were not properly compensated. Respondent did not contest and the forum therefore deems admitted the amount and extent of work Claimants Burke, Polehn, and Hickey performed for Respondent. The only issues, therefore, are whether Respondent agreed to pay Claimant Hickey a fixed wage rate and whether Claimant Naidoo's vacation time was properly included as compensation that he was entitled to receive when he quit his employment.

A. Respondent agreed to pay Claimant Hickey $20,000 for a one year internship.

Credible evidence controverts Respondent's claim that Claimant Hickey was an unpaid intern who "failed to turn in proper legal documents to establish his internship." Hickey's credible testimony that Respondent hired him as a project manager for 12 months and agreed to pay him $20,000 for 30 to 40 hour workweeks is corroborated by Respondent's announcement, placed through SBA's Career Services Business Internship Program, recruiting business students for an "internship opportunity [for] Fall 2003." The announcement clearly states the conditions and terms of the internship opportunity and is consistent with Hickey's account of how and under what circumstances he was hired by Respondent. Respondent's admission that Hickey performed three weeks of "internship work," Hickey's testimony, and the recruitment announcement establish that Hickey's agreed upon rate of pay was $20,000 for 12 months of service, which the Agency, by amendment, pro-rated at $9.62 hourly.

B. Claimant Naidoo earned paid vacation hours for which he was not properly compensated.

Claimant Naidoo's claim includes paid vacation days that he used during the last week that he was employed. Credible evidence, including an excerpt from Respondent's company policy, shows Naidoo was eligible for paid time off and was not restricted from using it during the time period he claimed. In fact, the company policy states: "You are allowed to manage your paid time off to best accommodate your personal needs." When he left Respondent's employment, Claimant Naidoo had earned four and one half paid vacation days and had the discretion to use those days to suit his personal needs.

ORS 652.210(3) defines "wages" as "all compensation for performance of service by an employee for an employer whether paid by the employer or another person, including cash value of all compensation paid in any medium other than cash." The forum finds that paid time off, when used in accordance with company policy, is compensation for services performed by an employee for an employer and constitutes "wages" as defined by statute. In this case, Claimant Naidoo's compen-

sation package included paid time off which he used in accordance with company policy. The Agency determined that he was entitled to use those vacation days and appropriately included that amount when computing Claimant Naidoo's unpaid wages.

Based on the credible evidence herein, the forum finds that the Agency established a prima facie case and Respondent owes Claimants unpaid wages for the time period alleged and in the amounts established in the record.

PENALTY WAGES

The forum may award penalty wages when it determines that a respondent's failure to pay wages was willful. Willfulness does not imply or require blame, malice, or moral delinquency. A respondent commits an act or omission "willfully" if the respondent acts or fails to act intentionally, as a free agent, and with knowledge of what is being done or not done. *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976).

The record is replete with evidence that shows Respondent knew he owed Claimants wages and engaged in a pattern of conduct designed to avoid paying the wages. Respondent acted voluntarily and as a free agent when he failed to pay all of the wages they were owed when they quit their employment. Respondent's failure to pay was willful and Respondent is liable to each Claimant for penalty wages under ORS 652.150(1) (providing that "as a penalty for such [willful] nonpayment, the wages or compensation of such employee shall continue from the due date thereof at the same hourly rate for eight hours per day until paid or until action therefor is commenced. However, in no case shall such wages or compensation continue for more than 30 days from the due date"). In accordance with ORS 652.150(1), the forum has determined that Claimant Burke's penalty wages total $8,861 (computed by multiplying her hourly rate of $36.92 per hour by 8 hours per day multiplied by 30 days); Claimant Hickey's penalty wages total $2,309 (computed by multiplying his hourly rate of $9.62 per hour by 8 hours per day multiplied by 30 days); Claimant Naidoo's penalty wages total $8,652 (computed by multiplying his hourly rate of $36.05 per hour by 8 hours per day multiplied by 30 days); and Claimant Polehn's penalty wages total $5,191 (computed by multiplying his hourly rate of $21.63 per hour by 8 hours per day multiplied by 30 days).

ORDER

NOW, THEREFORE, as authorized by ORS 652.332, and as payment of the unpaid wages, Respondent **Troy Melquist** is hereby ordered to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2180, the following:

> A certified check payable to the Bureau of Labor and Industries, in trust for Claimant Mary Ann Burke, in the amount of

FIFTEEN THOUSAND TWO HUNDRED SIXTY ONE DOLLARS ($15,261), less appropriate lawful deductions, representing $6,400 in gross earned, unpaid, due and payable wages and $8,861 in penalty wages, plus interest at the legal rate on the sum of $6,400 from December 1, 2003, until paid and interest at the legal rate on the sum of $8,861 from January 1, 2004, until paid.

A certified check payable to the Bureau of Labor and Industries, in trust for Claimant Scott L. Hickey, in the amount of THREE THOUSAND SEVEN HUNDRED EIGHTY EIGHT DOLLARS AND SIXTY FOUR CENTS ($3,788.64), less appropriate lawful deductions, representing $1,479.64 in gross earned, unpaid, due and payable wages and $2,309 in penalty wages, plus interest at the legal rate on the sum of $1,479.64 from November 1, 2003, until paid and interest at the legal rate on the sum of $2,309 from December 1, 2003, until paid.

A certified check payable to the Bureau of Labor and Industries, in trust for Claimant Nilanthren V. Naidoo, in the amount of TWELVE THOUSAND NINE HUNDRED SEVENTY EIGHT DOLLARS AND NINETY CENTS ($12,978.90), less appropriate lawful deductions, representing $4,326.90 in gross earned, unpaid, due and payable wages and $8,652 in penalty wages, plus interest at the legal rate on the sum of $4,326.90 from October 1, 2003, until paid and interest at the legal rate on the sum of $8,652 from November 1, 2003, until paid.

A certified check payable to the Bureau of Labor and Industries, in trust for Claimant Michael A. Polehn, in the amount of SEVEN THOUSAND SEVEN HUNDRED EIGHTY SEVEN DOLLARS AND THIRTY FOUR CENTS ($7,787.14), less appropriate lawful deductions, representing $2,596.14 in gross earned, unpaid, due and payable wages and $5,191 in penalty wages, plus interest at the legal rate on the sum of $2,596.14 from November 1, 2003, until paid and interest at the legal rate on the sum of $5,191 from December 1, 2003, until paid.

In the Matter of

OKECHI VILLAGE & HEALTH CENTER, INC.,

Case Nos. 19-05 & 54-05

Amended Final Order of Commissioner Dan Gardner

Issued February 24, 2006

ED: The Final Order in this case was initially issued on February 14, 2006, and published at 27 BOLI 156 (2006). The commissioner later discovered that, in the Order section of the Final Order, Respondent was ordered to pay an incorrect amount to Claimant Jair Watenda Simmons because of an addition error and issued an Amended Final Order that corrected the math error. In the Final Order, Respondent was ordered to pay "ELEVEN THOUSAND SIX HUNDRED AND FIFTY NINE DOLLARS ($11,659), less appropriate lawful deductions." In the Amended Final Order, Respondent is ordered to pay Simmons the amount of THIRTEEN THOUSAND FIVE HUNDRED AND SEVENTY NINE DOLLARS ($13,579) 9), less appropriate lawful deductions."

In the Matter of

BUKOVINA EXPRESS, INC. and Bukovina Express LLC

Case Nos. 17-05 & 21-05

Final Order of Commissioner Dan Gardner

Issued March 20, 2006

SYNOPSIS

Respondent Bukovina Express, Inc. ("Bukovina Inc.") owed Claimant $592.20 in unpaid wages when it ceased doing business and subsequently reorganized as Respondent Bukovina Express LLC ("Bukovina LLC"). BOLI determined that Claimant was entitled to receive payment from the Wage Security Fund and paid Claimant in full. The forum concluded the Commissioner was entitled to recover the amount paid to Claimant from the Wage Security Fund and that Bukovina Inc. and Bukovina LLC, as a bona fide successor to Bukovina Inc., were jointly and severally liable to the Wage Security Fund for the unpaid wages paid to Claimant. The forum ordered both Respondents to repay the Wage Security Fund $592.20, plus a $200 penalty in accordance with ORS 652.414(3). The forum further concluded that Bukovina Inc. was liable to Claimant for its willful failure to pay Claimant's wages when due and ordered that it pay Claimant $1,692 in penalty wages, pursuant to ORS 652.150. The forum also concluded that Bukovina Inc. was liable to Claimant for paying him less than the applicable minimum wage and ordered Bukovina Inc. to pay $1,692 as civil penalties, pursuant to ORS 653.055. Additionally, the forum concluded that Bukovina Inc. willfully failed to keep and maintain records in accordance with ORS 653.045(1) and ordered Bukovina Inc. to pay $1,000 as a civil penalty, pursuant to ORS 653.256. ORS 652.140; ORS 652.150; ORS 652.332; ORS 652.414; ORS 653.055; ORS 653.045; ORS 653.256.

The above-entitled case came on regularly for hearing before Linda A. Lohr, designated as Administrative Law Judge ("ALJ") by Dan Gardner, Commissioner of the Bureau of Labor and Industries for the State of Oregon ("Commissioner"). The hearing was held on May 10, 2005, in the W. W. Gregg Hearing Room of the Bureau of Labor and Industries, located at 800 NE Oregon Street, Portland, Oregon.

Cynthia L. Domas, an employee of the Agency, represented the Bureau of Labor and Industries ("BOLI" or "the Agency"). Alexander Sheifer ("Claimant") was present throughout the hearing and was not represented by counsel. Respondent Bukovina Express LLC's ("Bukovina LLC") registered agent, Valentina Zhiryada, appeared as Bukovina LLC's authorized representative. Respondent Bukovina Express, Inc. ("Bukovina Inc.") did not appear at the hearing through counsel or an authorized representative and was held in default.

The Agency called Claimant and BOLI Wage and Hour compliance specialist Margaret Trotman as witnesses.

Bukovina LLC called its authorized representative Valentina Zhiryada as its only witness.

The forum received as evidence:

a) Administrative exhibits X-1 through X-30 (submitted or generated prior to hearing), and

b) Agency exhibits A-1 through A-30 (filed with the Agency's case summary) and A-31 (filed prior to hearing).

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

FINDINGS OF FACT – PROCEDURAL

1) On April 27, 2004, Claimant filed a wage claim form on which he stated that Bukovina Inc. had employed him during the wage claim period of March 23 to March 29, 2004, and failed to pay him all wages that were due when he quit his employment.

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

3) On September 7, 2004, the Agency issued Order of Determination No. 04-1682 ("Order"). In the Order, the Agency alleged Bukovina Inc. had employed Claimant during the period March 23 through March 29, 2004, failed to pay him for all hours worked in that period, and was liable to him for $592.20 in unpaid wages, plus interest. The Agency also alleged that Bukovina Inc.'s failure to pay all of Claimant's wages when due was willful and Bukovina Inc. was liable to Claimant for $1,692 as

penalty wages, plus interest. In addition to the penalty wages, the Agency alleged that Bukovina Inc. paid Claimant less than the wages to which he was entitled under ORS 653.010 to 653.261 and was therefore liable to Claimant for $1,692 as civil penalties pursuant to ORS 653.055(1)(b), plus interest. The Order gave Bukovina Inc. 20 days to pay the sums, request an administrative hearing and submit an answer to the charges, or demand a trial in a court of law.

4) On September 21, 2004, Bukovina Inc., through its registered agent and authorized representative, Valentina Zhiryada, filed an answer and request for hearing by facsimile transmission. In its answer, Bukovina Inc. denied owing Claimant any wages, contending that it had not hired him or "asked him about any service." The Agency received the original answer and request for hearing on September 22, 2004.

5) On October 11, 2004, the Agency issued a Notice of Intent to Assess Civil Penalties against Bukovina Inc. alleging (1) that Bukovina Inc. failed to maintain and preserve payroll records pertaining to Claimant's employment from on or about March 22 through March 31, 2004, and (2) that Bukovina Inc. failed to make records it was required to maintain and preserve available for inspection by the Commissioner. The Agency alleged several aggravating circumstances and proposed that a $1,000 civil penalty per violation be assessed against Bukovina Inc. Bukovina Inc., through its authorized representative, Zhiryada, filed an answer and request for hearing contending that it did not hire Claimant, did not owe him wages, and kept no records pertaining to Claimant.

6) On October 21, 2004, the Agency requested a hearing and filed a motion to consolidate the matters in the Order and Notice of Intent because they involved the "same events, time period, and participant." On October 26, 2004, the ALJ ordered that the matters be consolidated because she found that both cases had common questions of fact and related questions of law. On the same date, the Hearings Unit issued a Notice of Hearing stating the hearing would commence at 9:30 a.m. on March 9, 2005. The Notice of Hearing included copies of the Order, a Summary of Contested Case Rights and Procedures and a copy of the contested case hearing rules, OAR 839-050-0000 to 839-050-0440.

7) On November 1, 2004, the Agency advised the ALJ that Bukovina Inc.'s counsel notified the case presenter that she no longer represented Bukovina Inc. and that all correspondence should be directed to Bukovina Inc.

8) On November 17, 2004, the Hearings Unit mailed Bukovina Inc. a copy of the amended contested case hearing rules along with a revised Summary of Contested Case Rights and Procedures.

9) On February 14, 2005, the Agency filed a motion for a discovery order to compel Bukovina Inc. to provide certain described documents and to respond to three interrogatories. With its motion, the Agency included copies of its informal request, the "Agency's First Set of Interrogatories,"[1] and Bukovina Inc.'s response to the informal discovery request. In its response, Bukovina Inc., through Zhiryada, claimed that it had no information related to Claimant to provide the Agency. Zhiryada further stated that Bukovina Inc. was "not longer [*sic*] in the business since December 31, 2004," and that she was no longer its authorized representative.

10) On February 22, 2005, the ALJ granted the Agency's motion for a discovery order. On the same date, in a separate interim order, the ALJ ordered Bukovina Inc. to retain counsel or file a second letter authorizing a representative to appear on its behalf. In the order, the ALJ stated: "If Respondent fails to appear through counsel or to file a letter authorizing a representative within the time allowed, the forum may find Respondent in default. *See* OAR 839-050-0330."

11) On February 24, 2005, the Agency filed a motion to amend the Order of Determination to add Bukovina Express, LLC, as a successor to Bukovina Inc. On March 3, 2005, the hearing was postponed due to the temporary unavailability of the ALJ. On March 17, 2005, the ALJ issued an order granting the Agency's motion to amend, stating, in pertinent part:

> "In an affidavit accompanying the motion, Agency case presenter Cynthia Domas states that she became aware on February 22, 2005, that Respondent Bukovina Express, Inc. 'may have moved to Washington State and was registered to do business in that state as Bukovina Express LLC.' Domas included a copy of a Washington Corporations Division's Registration Data Search that shows Bukovina Express LLC was 'incorporated' in Washington on January 1, 2005. (Agency Exhibit A-B) The data search also shows Valentina Zhiryada is listed as the LLC's registered agent. In a letter to Domas dated February 11, 2005, Respondent's president and authorized representative, Valentina Zhiryada, stated that Respondent ceased doing business on December 31, 2004. (Agency Exhibit A-A) Additionally, the Agency provided evidence that Respondent was administratively dissolved on February 11, 2005. (Agency Exhibit A-C) Based on its good faith belief that Respondent has continued to conduct business as Bukovina Express, LLC, fol-

[1] The interrogatories included the question: "Provide the name, address, and telephone number of the driver that the Wage Claimant, Alexander Sheifer, drove with during the wage claim period of March 23 through March 29. 2004."

lowing its administrative dissolution, and changed only the company name and 'possibly the address of the company headquarters,' the Agency seeks to add Bukovina Express, LLC, as a successor in interest to Bukovina Express, Inc., pursuant to ORS 653.310. Respondent had until March 3, 2005, to respond to the motion. To date, the Hearings Unit has received no response from Respondent.

"OAR 839-050-0140, which governs amendments, states in pertinent part:

'(1) Prior to the hearing a participant may amend its pleading once as a matter of course at any time before a responsive pleading is served. Otherwise, a participant may amend its pleading only by permission of the administrative law judge or by written consent of the other participants. * * * Permission shall be freely given when justice so requires.'

"In this case, the Agency submitted documentation showing that Bukovina Express, LLC, may be a successor to Respondent and possibly liable for wages under ORS 653.310. For that reason, the forum finds that justice is best served in this case by adding Bukovina Express, LLC, as a respondent."

The ALJ ordered the Agency to serve an amended Order of Determination on Bukovina LLC and the Hearings Unit by March 25, 2005, and instructed Bukovina LLC to file an answer to the amended Order of Determination through counsel or an authorized representative no later than April 4, 2005. In the same interim order, the ALJ rescheduled the hearing to begin at 9:30 a.m. on May 10, 2005.

12) On March 18, 2005, the ALJ ordered the Agency and Respondents each to submit a case summary that included: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a statement of any agreed or stipulated facts; and a brief statement of the elements of the claim and any wage and penalty calculations (for the Agency only). The ALJ ordered the participants to submit their case summaries by April 29, 2005, and notified them of the possible sanctions for failure to comply with the case summary order.

13) On March 22, 2005, the Agency filed a second motion to amend the 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. The Agency included an affidavit and documents that showed the Agency had determined Bukovina Inc. was no longer in business as of December 31, 2004, and had administratively dissolved on February 11, 2005. The documents also showed that the Agency paid Claimant $592.20, less statutory

deductions, from the Wage Security Fund.

14) On March 24, 2005, the Hearings Unit received the Amended Order of Determination No. 04-1682 from the Agency.

15) On March 29, 2005, the Hearings Unit received a letter dated March 21, 2005, from Valentina Zhiryada that stated in pertinent part:

> "This letter is the answer to your letter regarding Case Number 17-05 & 21-05 INTERIM ORDER – GRANTING AGENCY'S MOTION TO AMEND TO ADD RESPONDENT AND RESCHEDULING HEARING.
>
> "As a former authorized representative of Bukovina Express, Inc., I have to notify You [*sic*] that I am not agreed with your decision about adding Bukovina Express LLC as a Respondent in this matter because A. Sheifer made his claim against the other company – Bukovina Express Inc. And the other thing that I am not agreed with, you are writing: 'Respondent had until March 3, 2005, to Respond [*sic*] to the motion. To date, the Hearings Unit has received No [*sic*] response from Respondent.' But this is not a truth, I did send Letter [*sic*] with certified mail receipt to Cynthia L. Domas, 3865 Wolverine Street N.E. No. E-1, Salem, OR 97305 on February 23, 2005 and I have Domestic Return Receipt, that shi [*sic*] received it on February 24, 2005. (Copies is [*sic*] added)."

Zhiryada included a copy of a letter dated February 22, 2005, addressed to Cynthia L. Domas, Case Presenter, and a copy of a "Domestic Return Receipt" signed by Cynthia L. Domas on February 24, 2005. The letter states in pertinent part:

> "This letter is the answer to your letter regarding Case Number 17-05 & 21-04 AGENCY'S MOTION FOR A DISCOVERY ORDER. As a former authorized representative of Bukovina Express Inc., I have to notify You [*sic*] that I am not able to provide You [*sic*] with information requested by You [*sic*] regarding Alexander Sheifer because [he] was never employed by company [*sic*]. So, I never have [*sic*] any Information regarding him and will never have in the future. Alexander Sheifer made claim against Bukovina Express Inc. and all the information in that matter You [*sic*] can requested from him [*sic*]. Finally, all the proves [*sic*] for unreasonable claim against Bukovina Express Inc. I will provide on the Hearing, which is set up for me on March 9, 2005."

16) On April 12, 2005, the ALJ issued a second order requiring Respondents to retain counsel or file a letter authorizing a representative to appear on their behalf. Respondents were informed that failure to do as required might result in the issuance of a default order.

17) On April 12, 2005, the ALJ issued an order that provisionally denied the Agency's second motion to amend, 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, where, and on whom the [first] Amended Order of Determination was served."

18) On April 20, 2005, the Agency submitted information that established that Respondents were served with the Agency's first Amended Order of Determination on March 23, 2005.

19) On April 20, 2005, the Hearings Unit received a letter from the Agency case presenter that stated in pertinent part:

> "Enclosed is a copy of a letter that was sent to me by Valentina Zhiryada the former authorized representative for Bukovina Express, Inc. It apparently was intended for you. As pointed out in the ALJ's order dated April 12th, Ms. Zhiryada currently has no standing in this matter and neither respondent is currently represented by an authorized representative or an attorney as required by law. Be that as it may, the Case Presenter is forwarding the letter to the forum."

The enclosure was a letter from Valentina Zhiryada, addressed to the ALJ and dated April 16, 2005, that stated in pertinent part:

> "This letter is the answer to your letter regarding Case Number 17-05 & 21-05 INTERIM ORDER - DIRECTING AGENCY TO SUBMIT CERTIFICATE OF SERVICE . . .
>
> "As a former authorized representative of Bukovina Express Inc., I have to notify You [*sic*] that I am not agreed [*sic*] with your decision about adding Bukovina Express LLC as a Respondent in this matter because A. Sheifer made his claim against the other company – Bukovina Express Inc. As only member and representative for Bukovina Express LLC I will be present on Hearing rescheduled for me on MAY 10, 2005, at 9:30 a.m. But I am not agreed with all The [*sic*] penalties at all, because I do not own nothing [*sic*] to A. Sheifer and Never [*sic*] will."

The ALJ treated Zhiryada's letter as written authorization to appear as Bukovina LLC's authorized representative.

20) On April 29, 2005, the Agency timely filed a case summary. Respondents did not file a case summary.

21) On April 29, 2005, the Agency filed a third motion to amend the Amended Order of Determination by interlineation to recover from Bukovina LLC, under a successorship theory, $592.20 in wages paid out of the Wage Security Fund, plus a $200 penalty, together with interest from May 1, 2004, until paid. Additionally, the Agency moved to recover penalty wages of $1,692 and civil penalties of $1,692, including interest, from Bukovina LLC based on the inequity of allowing "an employer to change its name and move in order to avoid paying wages and hence penalty wages and civil penalties." The Agency attached to the motion and incorporated by reference its "Second Motion to Amend" and "Affidavit of Cynthia L. Domas."[2]

22) On May 10, 2005, the Agency submitted a three-page document, marked Exhibit A-31, which "was inexplicably omitted from the Case Summary." The Agency case presenter stated that the document was part of the "Employer Response that has already been submitted as Agency Exhibit 8 in the Agency's Case Summary. * * * There is an actual reference to the document on page 2 line 19 of Agency Exhibit A-8."

23) At the start of hearing, Zhiryada stated that Bukovina Inc. no longer exists and that Bukovina LLC is a "different entity" of which she is the sole member and representative.

24) At the start of hearing, the ALJ verbally advised the participants of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

25) On February 2, 2006, the ALJ issued a proposed order and notified the participants they were entitled to file exceptions to the proposed order. The Agency did not file exceptions. Respondent timely filed exceptions to the proposed order that are addressed in the Opinion section of this Final Order.

RULING ON AGENCY'S THIRD MOTION TO AMEND

Neither Respondent filed a response to the Agency's April 29, 2005, motion to amend the Amended Order of Determination. The Agency's motion sought to recover $592.20 in wages paid out of the Wage Security Fund, plus a $200 penalty and interest from Bukovina LLC under a successorship theory. Additionally, the Agency moved to recover penalty wages of $1,692 and civil penalties of $1,692, including interest, from Bukovina LLC based on equitable principles. Absent objection, and in the interest of justice, the Agency's motion was granted, subject to the Agency's burden of proving the allegations and establishing joint and several

[2] The attachments inadvertently were marked as separate exhibits in the official record. The documents marked as Exhibits X-28 and X-29 are actually incorporated by reference in Exhibit X-27.

liability for any violations found at hearing.

FINDINGS OF FACT – THE MERITS

1) At times material until February 11, 2005, Respondent Bukovina Express, Inc. ("Bukovina Inc.") was an Oregon corporation engaged in interstate trucking. Its principal place of business was located at 3540 SE 157th Avenue, Apartment A, in Portland, Oregon.

2) At times material, Valentina Zhiryada was Bukovina Inc.'s president, secretary, and registered agent, and resided at 3540 SE 157th Avenue, Apartment A, in Portland, Oregon.

3) Zhiryada's husband, Valery Zhiryada, and two other family members were long haul truck drivers for the company. Valery Zhiryada holds a current Oregon Class C commercial driver's license that includes the following endorsements: "Passenger vehicle designed to carry more than 15 people; Double or Triple Trailers; [and] Combined Hazardous Material (H) and Tank Vehicle (N)." The Zhiryadas owned four trucks that they used to transport goods to and from the East Coast. They hired "outside" drivers and "rented" the trucks to the drivers for $1.00 in order to establish the drivers as "independent contractors." The Zhiryadas conducted their trucking business from their apartment in Portland, Oregon.

4) Sometime in March 2004, Claimant heard from an acquaintance that Bukovina Inc. needed truck drivers. The acquaintance, who worked as a trucker for Valentina Zhiryada's brother, told Claimant enough about the job to pique his interest and, with Claimant's permission, gave Claimant's telephone number to the Zhiryadas. A few days later, Valery Zhiryada called Claimant and asked him if he wanted a job. When Claimant said yes, Zhiryada scheduled Claimant for an interview.

5) When Claimant arrived for the interview, Valery Zhiryada asked him about his truck driving experience and told him that Bukovina Inc. paid their truckers on a percentage basis. Claimant told him that his experience included seven years as a truck driver in Russia, four years driving locally in Portland, and six months as a long haul driver.

6) At the interview, Valentina Zhiryada asked Claimant to fill out some paperwork and provide copies of his driver's license, social security number, U.S. Passport, and his DMV driving record. She gave Claimant a Federal Drug Testing Custody and Control Form and sent him to a laboratory for a drug and alcohol test that took place on March 17, 2004. On the U.S. Department of Transportation Alcohol Testing Form Claimant received after he took the drug test, the "Alcohol Technician" designated "Bukovina Express" as the "Employer Name" located at "3450 SE 157th Ave, Portland, OR 97236." "Valentina" was listed as the "DER Name" and the "Pre-employment" box was checked as the "Reason for the Test."

7) A few days after the drug test, Valentina Zhiryada called Claimant and told him that his tests were "all good" and that he was ready for his first trip. She assigned him to ride with another driver named "Slavic" and pick up a load of pears from Hood River and transport the load to New Jersey. When he agreed to make the trip, Claimant understood that he would receive 12 percent and Slavic 14 percent of the gross amount paid for the delivery.

8) On March 23, 2004, Slavic arrived at Claimant's home early in the morning and drove him to Columbia Boulevard in Portland where they attached a refrigerated trailer ("reefer") to the truck and drove to Hood River. While in Hood River, Claimant assisted Slavic with obtaining the paperwork at the "main office" because Slavic spoke little English. They used a forklift to load the pears and proceeded to drive, non-stop, to New Jersey. During the trip, they drove alternating five-hour shifts and ate and rested in the truck.

9) Before entering New Jersey, Claimant and Slavic stopped at a truck stop with two other Bukovina Inc. trucks. Six drivers made the trip, two drivers per truck, including Valery Zhiryada and Valentina's brother. At the truck stop, the drivers rested and had a shower. Valery did not eat with the drivers, but he paid for their meal. After they ate, Slavic and Claimant drove to a warehouse in New Jersey where they were charged a $20 fee to enter the warehouse. They waited several hours for someone to bring a forklift and unload the pears. Several pallets contained two different types of pears and Claimant and Slavic had to separate the pears by hand before the pears were unloaded. During this time, Slavic and Claimant had at least one telephone contact with Valery Zhiryada who was unloading his truck elsewhere. After the pear delivery, Claimant and Slavic drove to New York to pick up a load of European foods to haul back to Portland. They had to wait until 7:30 p.m. to load. They used a forklift to load the pallets. The other Bukovina Inc. drivers, including Valery, were loading their trucks at the same warehouse. After loading, they drove straight back to Oregon. They drove 3,000 miles one way from Portland to New York and the entire round trip took one week. During the trip, Slavic maintained and Claimant signed logbooks that were left in the truck at the end of the trip.

10) When they returned to Portland, Slavic parked the trailer on Foster Road, dropped Claimant off at his home, and told Claimant to meet him at the trailer in the morning. The next day, March 29, 2004, Claimant and Slavic delivered goods to eight different locations in Oregon and Washington. Most of the deliveries were to Russian and German markets. That day, Claimant used Slavic's cell phone to call Valery Zhiryada and tell him that he could not continue working for the company. He explained that his wife

had medical problems while he was gone and she did not want him to be away from home for that length of time again. Valery was unloading his truck when Claimant called and did not indicate when or if Claimant would be paid. From March 23 through March 29, 2004, Claimant worked approximately 12 hours per day.

11) March 29, 2004, was Claimant's last day of work. Thereafter, Claimant called the Zhiryadas several times to ask about his wages but could not reach them. Although he left a message each time, his calls were not returned. He finally went to the Zhiryada's apartment to ask for his wages and spoke to both of them. He apologized for not being able to work for them anymore. Valentina would not speak to him. Valery was "very mad" at him and told him that he would not pay for only one week of work. Valery then "kicked [Claimant] out."

12) Claimant filed a wage claim on April 27, 2004. Sometime thereafter, Valery Zhiryada called Claimant and asked him about a letter Valentina had received from the BOLI Wage and Hour Division and asked Claimant what he was doing. Claimant said to him, "you owe me money and you need to pay me."

13) Wage and Hour compliance specialist Margaret Trotman was assigned to investigate Claimant's wage claim. She reviewed Claimant's documentation, which included his wage claim, calendar of hours worked, and Federal Drug Testing documents. Trotman sent Bukovina Inc. a Notice of Wage Claim, along with a request for records pertaining to Claimant's employment. In May 2004, Bukovina Inc. returned the Employer Response form to Trotman on which Valentina Zhiryada claimed that Bukovina Inc. had not hired Claimant. Later, Bukovina Inc.'s counsel at the time told the Agency that Claimant was on a "ride along" and was not entitled to any pay because he did not provide any "services." Counsel further stated that "[a]fter that trip, [Claimant] indicated he did not want to drive a truck for [Bukovina Inc.] for family reasons and because he did not want to be on the road for long periods." In a subsequent telephone call with Trotman, Valentina Zhiryada acknowledged that she had sent Claimant for a drug test and that Claimant rode in a Bukovina Inc. truck with another driver during the March 2004 trip to New Jersey and New York.

14) In February 2005, Claimant observed Valery Zhiryada's truck in a Goodyear Tire shop with "Bukovina Express LLC" inscribed on the door. During the same period, he observed Valentina Zhiryada's brother unloading a truck at the Roman Russian Food Store on SE Division in Portland. He noticed that truck also had "Bukovina Express LLC" inscribed on the doors. When he worked for Bukovina Inc., the inscription on the same trucks was "Bukovina Express, Inc." He took photographs of the truck he observed at the Russian food store and provided them to the Agency

during the wage claim investigation.

15) Zhiryada told Trotman that she closed her business on December 31, 2004, and had started a new business in February 2005. Trotman thereafter determined that Bukovina Inc. had ceased doing business as of December 31, 2004, and that the corporation was administratively dissolved on February 11, 2005.

16) The Zhiryadas moved to Ridgefield, Washington, and Valentina Zhiryada formed a limited liability company named Bukovina Express LLC ("Bukovina LLC") on January 1, 2005. Bukovina LLC is registered with the Washington State Corporations Division and Valentina Zhiryada is the LLC's registered agent and sole member. The principal place of business for Bukovina LLC is 20913 NW 6th Ct., Ridgefield, Washington.

17) The Zhiryadas continue to deliver goods to their long-term Oregon customers, including the Good Neighbor European Deli and Market at SE 82nd Avenue in Portland, through Bukovina LLC.

18) During the wage claim investigation, Trotman sent Valentina Zhiryada letters dated July 13 and August 13, 2004, requesting "readable copies of [Slavic's and Claimant's] Daily Driver's Log Sheets and a complete list of the pick-up and drop-off points" for the "entire trip between Portland and New Jersey." Trotman also requested that Zhiryada provide the Agency with the "[f]ull name, address, and telephone number of the other driver of the truck known as 'Slevic.'" Trotman received no response from Zhiryada or any other Bukovina Inc. representative. Bukovina Inc. provided no records of any kind to the Agency and Trotman relied on Claimant's estimated work hours to calculate his wages based on the minimum wage rate of $7.05 per hour.

19) The Oregon Department of Transportation Motor Carrier Transportation Division has promulgated rules that govern the maintenance and preservation of motor carrier records. OAR 740-055-0120 provides as follows:

> "(1) All carriers must maintain records of their motor vehicle operations and make reports on forms approved by the Department. Such records must be:
>
> "(a) Stored at the carrier's principal office or place of business;
>
> "(b) Made available for inspection by the Department or its representatives upon request; and
>
> "(c) Retained for a period of three (3) years unless otherwise authorized by the Department.
>
> "(2) All carriers must maintain records containing the following information for each vehicle:
>
> "(a) Origin and destination points;

"(b) Oregon entry and exit points;

"(c) Actual Oregon miles for each trip;

"(d) Pickup and delivery points in Oregon for each trip;

"(e) Routes for travel for each trip;

"(f) Dates of each trip;

"(g) Daily beginning and ending odometer or other mileage recording device readings for each vehicle;

"(h) Load tickets and/or bills of lading for each shipment transported;

"(i) Identification of any exempt miles claimed, which shall include beginning and ending odometer or other mileage recording device readings for the exempt portion of each trip. If repeated trips are made to and from the same locations, a one-time recording of odometer or other mileage recording device readings for the exempt portion of those trips may be applied to the total number of trips. * * * "

20) Claimant estimated he worked 84 hours from March 23 through March 29, 2004. Trotman determined that Claimant's wage claim was valid and that he was owed at least $592.20 for those hours worked ($7.05 per hour multiplied by 84 hours).

21) Based on Trotman's determination that Bukovina Inc. had ceased doing business, the Agency caused the WSF to pay Claimant's unpaid wages of $592.20, less statutory deductions, on March 17, 2005.

22) Claimant and Trotman were credible witnesses.

23) Valentina Zhiryada's brief testimony tended to bolster Claimant and Trotman's testimony. However, her statements that Claimant did not have permission to drive and that "we did not ask for his services, so we owe him nothing" were not credible and not given any weight.

ULTIMATE FINDINGS OF FACT

1) In 2004, Bukovina Inc. directly engaged the personal services of one or more employees in Oregon. During that time, Claimant rendered personal services to Bukovina Inc. in Oregon.

2) From January 1, 2005, to the present, Bukovina LLC has continued to conduct the same business in Oregon as its predecessor, Bukovina Inc., utilizing the same trucks and servicing the same customers.

3) At times material, Valentina Zhiryada was Bukovina Inc.'s registered agent and sole principal and Bukovina LLC's registered agent and sole member.

4) Between March 23 and March 29, 2004, Bukovina Inc. suffered or permitted Claimant to render personal services to Bukovina Inc. and Claimant worked approximately 84 hours during that period.

5) The state minimum wage in 2004 was $7.05 per hour.

6) Claimant's last day of work was March 29, 2004, the same day he quit his employment without notice.

7) When Claimant's employment ended, Bukovina Inc. owed Claimant $592.20 in wages for the hours he worked between March 23 and March 29, 2004.

8) Claimant filed a wage claim and after investigation the Agency determined that the wage claim was valid.

9) The Agency determined that Bukovina Inc. had ceased doing business on December 31, 2004, and based on that determination, the Agency paid Claimant $592.20, less statutory deductions, from the Wage Security Fund.

10) Bukovina Inc. willfully failed to pay Claimant wages owed to him and is liable for penalty wages.

11) Penalty wages, computed in accordance with ORS 652.150 and OAR 839-001-0470(1)(c), equal $1,692 ($7.05 per hour X 8 hours per day X 30 days).

12) Bukovina Inc. paid Claimant less than the minimum wage to which he was entitled and is liable for civil penalties.

13) Civil penalties, computed in accordance with ORS 652.150 and OAR 839-001-0470(1)(c), equal $1,692 ($7.05 per hour X 8 hours per day X 30 days).

14) Bukovina Inc. did not make or maintain records required pursuant to ORS 653.045(1) and is liable for a $1,000 civil penalty.

15) Twenty five percent of $592.20 is $148.50.

CONCLUSIONS OF LAW

1) At times material herein, Bukovina Inc. was an Oregon employer subject to the provisions of ORS 652.110 to 652.414 and ORS 653.010 to 653.261 and Claimant was Bukovina Inc.'s employee.

2) Bukovina LLC is a successor to Bukovina Inc. and therefore an employer under ORS 652.310(1) and subject to the provisions of ORS 652.310 to 652.405, 652.409 to 652.414.

3) The actions, inaction, statements, and motivations of Valentina Zhiryada, Respondent Bukovina Inc.'s president and Respondent Bukovina LLC's sole member, are properly imputed to Bukovina Inc. and Bukovina LLC.

4) The Commissioner has jurisdiction over the subject matter and the Respondents herein. ORS 652.310 to ORS 652.332; ORS 652.409 to ORS 652.414.

5) Bukovina Inc. violated ORS 652.140(2) by willfully failing to pay Claimant $592.20 in earned and unpaid wages after he left Respondent's employment.

6) As a successor employer, Bukovina LLC is jointly and severally liable for Bukovina Inc.'s failure to pay Claimant all wages

earned and unpaid after Claimant's employment terminated.

7) Under the facts and circumstances of this record, and according to applicable law, the Commissioner has the authority to order Bukovina Inc. and Bukovina LLC to jointly and severally reimburse the Wage Security Fund in the amount of $592.20, the amount paid to Claimant from the Wage Security Fund, plus a $200 penalty on that sum, plus interest at the legal rate on both sums until paid. ORS 652.414.

8) Bukovina Inc. is liable for $1,692 in penalty wages under ORS 652.150 for willfully failing to pay all wages or compensation due Claimant when his employment terminated, as provided in ORS 652.140(2).

9) Under the facts and circumstances of this record, and according to the applicable law, the Commissioner has the authority to order Bukovina Inc. to pay Claimant penalty wages, plus interest until paid, pursuant to ORS 652.332.

10) Bukovina Inc. violated ORS 653.025 by failing to pay Claimant at least the applicable minimum wage rate required for each hour of work time.

11) Under the facts and circumstances of this record, and according to the applicable law, the Commissioner has the authority to order Bukovina Inc. to pay Claimant civil penalties as set forth in ORS 652.150, plus interest until paid, pursuant to ORS 652.332.

12) Bukovina Inc.'s failure to make and keep required records pertaining to Claimant's employment in violation of ORS 653.045(1) was willful and Bukovina Inc. is liable for $1,000 as a civil penalty under ORS 653.256.

13) Under the facts and circumstances of this record, and according to the applicable law, the Commissioner has the authority to order Bukovina Inc. to pay a $1,000 civil penalty for its willful violation of ORS 653.045(1). ORS 653.256.

OPINION

Procedurally, this case evolved from a claim for wages, penalty wages, and civil penalties against Respondent Bukovina Express, Inc. ("Bukovina Inc.") to a Wage Security Fund ("WSF") recovery action against Bukovina Inc. and alleged successor in interest, Respondent Bukovina Express, LLC ("Bukovina LLC"). In its amended charges, the Agency alleges that Respondents are jointly and severally liable to the Commissioner for $592.20, the amount paid to Claimant from the WSF, a $200 penalty, and interest on both amounts, pursuant to ORS 652.414(3). The Agency also seeks penalty wages of $1,692, pursuant to ORS 652.150, and civil penalties of $1,692, pursuant to ORS 653.055(1)(b), from both Respondents. Finally, the Agency seeks a $2,000 civil penalty, pursuant to ORS 653.256, from Bukovina Inc. for recordkeeping violations. Bukovina Inc. did not appear at the hearing with counsel or an authorized representative

and was found in default. In its unsworn answer to the charges, Bukovina Inc. admitted that it did not make or maintain records pertaining to Claimant, but claimed it did not hire him and therefore was not required to keep any records and did not owe him wages. Bukovina LLC, through its authorized representative, Valentina Zhiryada, appeared at the hearing and denied that it was liable for unpaid wages or "penalties" because Claimant "made his claim against the other company – Bukovina Express Inc.," and denied that it owed Claimant wages.

WAGE SECURITY FUND RECOVERY

Pursuant to ORS 652.414(3), the Agency is entitled "to recover from the employer, or other persons or property liable for the unpaid wages, amounts paid from the Fund under subsection (1) of [the statute]." The Agency is also entitled to recover a penalty of 25 per cent of the wages paid from the WSF or $200, whichever is greater. *Id*. The Agency must show that (1) Bukovina Inc. was Claimant's employer; (2) an amount was paid to Claimant from the WSF as unpaid wages; and (3) Bukovina Inc., its successor, or both are liable for the amounts paid from the WSF.[3] The Agency established and Respondents did not dispute that Claimant was paid $592.20, less statutory deductions, from the WSF on March 17, 2005.[4]

The only issues are whether Bukovina Inc. employed Claimant and, if so, whether Bukovina LLC is a successor to Bukovina Inc. and jointly and severally liable for Claimant's unpaid wages under ORS 652.414(3).

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[3] 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. Here, Bukovina Inc. did not appear at the hearing to contest the recovery action and, in the absence of contrary evidence, the forum applies the presumption that an "[o]fficial duty has been regularly performed." ORS 40.135(1)(j). *See also In the Matter of Catalogfinder, Inc.,* 18 BOLI 242, 260 (1999).

[4] Agency Compliance Specialist Trotman credibly testified that she made a determination that Claimant's claim was valid and she established the means by which she made that determination. She also confirmed that the $592.20 paid to Claimant from the WSF was based on her determination that the wage claim was valid. *See In the Matter of Lisa Sanchez*, 27 BOLI _ (2005) (in cases involving payouts from the WSF, 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 WSF and seeks to recover that money, a rebuttable presumption exists that the Agency's determination is valid for the sums actually paid out).

A. Bukovina Inc. employed Claimant

When a respondent defaults, as Bukovina Inc. did in this case, the Agency is required to present a prima facie case on the record to support the allegations in its charging document. ORS 183.415(6). 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 Barbara Blair*, 24 BOLI 89, 96 (2002).

The Agency alleged and established through credible witness testimony that Bukovina Inc. employed Claimant during March 2004. Claimant credibly testified that Bukovina Inc., through Valery Zhiryada, interviewed him for a truck driving job, and that its corporate president, Valentina Zhiryada, sent him for a drug test and subsequently assigned him to ride with another driver to deliver Hood River pears to New Jersey, pick up a load in New York, and make deliveries in Oregon and Washington upon his return. Claimant's testimony was bolstered by Valentina Zhiryada's admissions to the Agency investigator that she sent him for a drug test and that he rode along with another driver in a Bukovina truck on a cross country trip. Additionally, Zhiryada's testimony at hearing that the truckers worked for a percentage of the profits was consistent with Claimant's testimony that he understood he would receive a percentage of the gross amount earned for the deliveries. From those facts, the forum concludes that Claimant rendered personal services to Bukovina Inc. for an agreed amount and therefore was Bukovina Inc.'s employee as defined in ORS 652.310(2), during the wage claim period. Nothing in the record contradicts or overcomes the Agency's prima facie case and the forum concludes that Bukovina Inc. employed Claimant during the wage claim period.

B. Bukovina LLC is a successor to Bukovina Inc. and is liable for Claimant's unpaid wages.

The test to determine whether an employer is a "successor" under ORS 652.310(1) is whether it conducts essentially the same business as conducted by the predecessor. The elements to consider include: the name or identity of the business; its location; the lapse of time between the previous operation and the new operation; whether the same or substantially the same work force is employed; whether the same product is manufactured or the same service is offered; and, whether the same machinery, equipment, or methods of production are used. Not every element needs to be present to find a successor employer. All of the facts must be considered together to make a determination. *In the Matter of Mermac, Inc.*, 26 BOLI 218, 225 (2005), *citing In the Matter of Fjord, Inc.*, 21 BOLI 260, 286

(2001). *See also In the Matter of Catalogfinder, Inc.*, 18 BOLI 242, 256 (1999).

Undisputed evidence shows that 1) Bukovina Inc. ceased doing business in December 2004 and administratively dissolved in February 2005; 2) Valentina Zhiryada, the same principal who owned and operated the corporation, immediately reorganized as an LLC retaining the name of Bukovina Express after dissolving the corporation; and 3) although Zhiryada relocated the business to Ridgefield, Washington, the LLC continues as a trucking operation, using the same trucks, and servicing the same clientele in Oregon as its predecessor. Based on those facts, the forum finds that Bukovina LLC continues to conduct essentially the same business as its predecessor, Bukovina Inc., and that, as a matter of law, Bukovina LLC is a successor within the meaning of ORS 652.310(1).

As the successor to Bukovina Inc., Bukovina LLC is liable for the wages Claimant earned in March 2004 before the corporation was dissolved and, therefore, is subject to the Agency's recovery action under ORS 652.414(3). *See In the Matter of Fjord, Inc.*, 21 BOLI 260, 293 (2001) (concluding that the respondent conducted essentially the same business as the actual employer and as a successor respondent was liable for the unpaid wage amounts paid out by the WSF).

C. Bukovina Inc. and Bukovina LLC are jointly liable for Claimant's unpaid wages and both are subject to the Agency's recovery action under ORS 652.414(3).

The Agency asks the forum to impose joint and several liability upon Respondents Bukovina Inc. and Bukovina LLC, contending that both entities have a common sole principal and that, despite Bukovina Inc.'s status as a dissolved corporation, one or both entities may be available to repay the WSF. Ordinarily, when the actual employer is available and has the apparent ability to pay a wage obligation, primary responsibility for the payment of wages rests with that employer. When existing circumstances give rise to uncertainty about the actual employer's ultimate ability to fully recompense a wage claimant, then "furtherance of the legislative emphasis on protection of the employee (in relation to the payment of wages) requires that liability for wages owed be placed also on the successor." *See In the Matter of Gerald Brown*, 14 BOLI 154, 168-69 (1995) (when the uncertainty about the eventual property or asset distribution was brought on by the "extraordinary entanglement of assets" between the actual employer and its successor, the forum found it appropriate to impose joint and several liability upon both respondents for wages owed to the wage claimants). The same principles apply to WSF recovery actions.

In this case, the Agency made a determination that Bukovina Inc.

had ceased doing business and was without sufficient assets to pay the wages owed to Claimant and that his wage claim could not otherwise be "fully and promptly paid." Based on the Agency's determination, Claimant's unpaid wages were paid out of the WSF. Therefore, as a practical matter, Bukovina Inc. must be considered a defunct corporation that is unable to recompense the WSF for the amount paid in unpaid wages. Under those circumstances, responsibility for full recompense usually falls upon the bona fide successor. *See In the Matter of Fjord, Inc.*, 21 BOLI 260, 293 (2001). However, the forum takes official notice that in Oregon an administratively dissolved corporation has five years from the date of dissolution to apply to the Secretary of State for reinstatement. ORS 60.654. In the meantime, an administratively "dissolved" corporation continues its corporate existence and can conduct activities necessary "to wind up and liquidate its business and affairs." ORS 60.651(3). Thus, Bukovina Inc. has the potential for reinstatement at any time within the next five years. Given the common principal, Valentina Zhiryada, and the close timing of the asset transfer, the forum finds there is uncertainty about the eventual property or asset distribution between the two Respondents. To ensure that the WSF is not left without a remedy, the forum concludes that this is an appropriate case to impose joint and several liability upon both Respondents for repayment to the WSF for Claimant's unpaid wages.

Based on the evidence presented, the forum concludes that Bukovina Inc. was "the employer" for the purpose of ORS 652.414(3), Bukovina LLC is a bona fide successor to Bukovina Inc., and both are liable for the amount paid to Claimant from the WSF. Additionally, under the statute, the Commissioner is entitled to recover a 25 percent penalty on the amount paid or $200, whichever is greater, from "the employer, or other persons or property liable for the unpaid wages." In this case, $200 is greater and Respondents are jointly and severally liable to the Commissioner for that amount.

PENALTY WAGES UNDER ORS 652.150

In its amended Order of Determination, the Agency alleged that Bukovina Inc. willfully failed to pay Claimant the wages due after he quit his employment and that 30 days had elapsed since the wages became due and owing, pursuant to ORS 652.140. Willfulness does not imply or require blame, malice, or moral delinquency. Rather, a respondent commits an act or omission willfully if he or she acts, or fails to act, intentionally, as a free agent, and with knowledge of what is being done or not done. *In the Matter of Kilmore Enterprises, Inc.*, 26 BOLI 111, 124 (2004).

Here, Bukovina Inc., through its principal Valentina Zhiryada, admitted that it did not pay Claim-

ant any wages for the work he performed in March 2004. The evidence established that Zhiryada, acting on Bukovina Inc.'s behalf, assigned Claimant to make a delivery to the East coast and that she knew he had made the trip and additional deliveries upon his return one week later. Evidence also shows that she refused to pay Claimant the wages he earned during that period despite his repeated requests. The forum infers from those facts that Bukovina Inc., through its principal, Zhiryada, voluntarily and as a free agent failed to pay Claimant all of the wages he earned between March 23 and March 29, 2004, when his employment with Bukovina Inc. ended. Zhiryada's claim at hearing that Claimant "did not have permission to drive" and therefore was not entitled to wages is not a defense. Any work that is "suffered" or "permitted" is work time. *In the Matter of Elisha, Inc.*, 25 BOLI 125, 153 (2003), *affirmed without opinion, Elisha, Inc. v. Bureau of Labor and Industries*, 198 Or App 285 (2005), *appeal pending*. Evidence shows that Claimant performed duties as a long haul truck driver for one week with Bukovina Inc.'s knowledge and from which Bukovina Inc. received a benefit. A respondent's ignorance or misunderstanding of the law does not exempt that respondent from a determination that it willfully failed to pay wages earned and owed. *In the Matter of Danny Vong Phuoc Trong*, 21 BOLI 217, 231 (2001). Having considered all of the facts found herein, the forum concludes that Bukovina Inc. acted willfully and is liable for penalty wages under ORS 652.150.

At hearing, the Agency urged the forum to hold Bukovina LLC jointly liable for penalty wages as Bukovina Inc.'s successor. The Agency acknowledged that its argument was contrary to Agency precedent, but contended that the particular circumstances in this case and equity require that both entities be held responsible for penalty wages. Essentially, the Agency argues that this case is an exception to current precedent which is based on the Agency's longstanding policy of not holding successor employers liable for penalty wages. *See In the Matter of Stephanie Nichols*, 24 BOLI 107, 122 (2002), *citing In the Matter of Anita's Flowers*, 6 BOLI 258, 267 (1987). Generally, the policy makes sense because ORS 652.150 compels penalty wages "if an employer willfully fails to pay any wages or compensation of any employee whose employment ceases." Such language requires an intention that in most cases cannot be reasonably imputed to a successor employer.[5] *But see*

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[5] Also, there are statutory provisions that reduce or provide a defense to the penalty under certain circumstances that are not otherwise available to a successor employer. *See* ORS 652.150(2); ORS 652.150(3); ORS 652.150(5). Contrast with ORS 652.414(3) that allows the Commissioner to recover amounts paid from the WSF *and* a penalty of 25 percent of the amount of wages paid from the WSF or $200, whichever is greater, from "the employer or

In the Matter of Waylon & Willies, Inc., 7 BOLI 68, 76-77 (1988) (determining that the policy of not holding successor employers liable for penalty wages is not applicable in cases involving an individual successor who is personally responsible for unpaid wages that accrued due to that individual's willful failure to pay the wages earned). In this case, the successor is an LLC, albeit a closely held entity owned and operated by the same principal that owned and operated its predecessor. That same principal was directly responsible for the unpaid wages that accrued during Claimant's employment. The Agency, however, has not asked the forum to disregard a legally established corporate entity and hold the principal personally liable for penalty wages. Instead, the Agency argues that Bukovina LLC, through its sole principal, had actual knowledge of Bukovina Inc.'s penalty wage liability when the LLC was created and that the principal's choice to dissolve the corporate entity and establish a new entity that merely continued its predecessor's business is an apparent attempt to evade the wage and hour laws. Thus, the Agency argues, the only equitable remedy is to hold the LLC jointly liable for penalty wages. The Agency does not seek to change its policy of not holding successor employers liable for penalty wages, but rather only asks that an exception be made in this particular case based on equitable principles. This forum, however, does not have the authority to fashion an equitable remedy. *Oregon Occupational Safety and Health Division v. Don Whitaker Logging, Inc.*, 123 Or App 498, 501 (1993) ("Administrative agencies * * * are creatures of statute and do not have the powers of a court of equity. Rather, they are limited to the authority conferred on them by statute"). Consequently, the forum declines to reverse or modify longstanding precedent.

The Agency sought penalty wages in the amount of $1,692, computed by multiplying the applicable minimum wage rate of $7.05 by 8 hours per day and multiplied by 30 days, in accordance with ORS 652.150 and OAR 839-001-0470(1). Based on the evidence and the Agency's calculations, the forum concludes that Bukovina Inc. is solely liable for $1,692 in penalty wages.

CIVIL PENALTY UNDER ORS 653.055

The forum may also award "civil penalties [as] provided in ORS 652.150" to an employee when an employer "pays an employee less than the wages to which the employee is entitled under ORS 653.010 to 653.261." ORS 653.055. Oregon's minimum wage requirements fall within the range of wage entitlements encompassed by ORS 653.055. *In the Matter of Adesina Adeniji*, 25 BOLI 162, 174 (2004), *citing Cornier v. Paul Tulacz, DVM PC*, `176 Or App 245 (2001). In its amended charges, the Agency seeks an

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other persons or property liable for the unpaid wages."

additional $1,692 penalty based on its determination that "the employer paid the wage claimant less than the wages to which the wage claimant was entitled under ORS 653.010 to 653.261 and is therefore also liable to the wage claimant for civil penalties pursuant to the provisions of ORS 653.055(1)(b)."

Pursuant to ORS 653.025, Bukovina Inc. was required to pay Claimant at least $7.05, the applicable minimum wage in March 2004, for each hour he worked for Bukovina Inc. The Agency's prima facie case included sufficient evidence to show that Bukovina Inc. employed Claimant between March 23 and March 29, 2005, that Claimant worked an estimated 84 hours during that period, and that Claimant was paid nothing for those hours. Bukovina Inc. was required to pay him at least the applicable minimum hourly wage rate in accordance with ORS 653.025 and failed to do so. Consequently, the forum concludes that Bukovina Inc. is liable for $1,692 as civil penalties for Bukovina Inc.'s failure to pay the minimum amount of wages owed Claimant for the work he performed while in its employ. This figure is computed by multiplying $7.05 per hour by 8 hours per day multiplied by 30 days pursuant to ORS 652.150.

The Agency also asks the forum to hold Bukovina Inc.'s successor Bukovina LLC jointly liable for the civil penalties. There is no policy or precedent in place that limits the forum's ability to impose joint liability for civil penalties under ORS 653.055. Moreover, the statute does not require the same element of intent required under ORS 652.150. The language merely states that "any employer who pays an employee less than the wages to which the employee is entitled" is liable for the same penalties that may be assessed under ORS 652.150. However, the forum *is* limited by ORS 653.010 which states in pertinent part:

> "As used in ORS 653.010 to 653.261, unless the context requires otherwise,
>
> "(2) 'Employ' includes to suffer or permit to work * * *
>
> "(3) 'Employer' means any person who employs another person * * *."

There is no provision in ORS chapter 653 that includes a successor employer within the definition of "employer" for purposes of ORS 653.010 to 653.261. Thus, in order to hold Bukovina LLC liable for civil penalties under ORS 653.055, the Agency was required to establish independently that 1) Bukovina LLC was an employer as defined in ORS 653.010(3) and that 2) Bukovina LLC paid its employee, in this case, Claimant, less than the wages to which the employee is entitled under ORS 653.010 to 653.261. The evidence clearly established those elements as they pertain to Bukovina Inc., but the Agency never alleged and the evidence does not show that Bukovina LLC suffered or permit-

ted Claimant or anyone else to work after Bukovina Inc. ceased to conduct business. Consequently, the forum concludes that Bukovina LLC is not liable, as a successor or otherwise, for any violation of ORS 653.055.

RECORDKEEPING VIOLATIONS UNDER ORS 653.045

In its Notice of Intent to Assess Civil Penalties, the Agency asks the forum to impose a $1,000 civil penalty against Bukovina Inc. based on its alleged failure to maintain and preserve required records regarding Claimant's employment from March 22 through March 31, 2004, in violation of ORS 653.045(1). The Agency also asks the forum to impose a $1,000 civil penalty based on Bukovina Inc.'s alleged failure to make records required to be preserved and maintained for the Commissioner's inspection available to the Agency, in violation of ORS 653.045(2).

ORS 653.045 provides in pertinent part:

> "(1) Every employer required by ORS 653.025 or by any rule, order or permit issued under ORS 653.030 to pay a minimum wage to any of the employer's employees shall make and keep available to the Commissioner of the Bureau of Labor and Industries for not less than two years, a record or records containing:
>
> "(a) The name, address and occupation of each of the employer's employees.
>
> "(b) The actual hours worked each week and each pay period by each employee.
>
> "(c) Such other information as the commissioner prescribes by the commissioner's rules if necessary or appropriate for the enforcement of ORS 653.010 to 653.261 or of the rules and orders issued thereunder.
>
> "(2) Each employer shall keep the records required by subsection (1) of this section open for inspection or transcription by the commissioner or the commissioner's designee at any reasonable time."

Bukovina Inc. defaulted by not appearing at the hearing; consequently, no evidence was presented to support the claim in its answer to the Notice of Intent that it "never hired" Claimant and, by implication, was therefore not required to make and keep records under ORS 653.045. In contrast, the Agency presented credible evidence that established Bukovina Inc. employed Claimant in March 2004 and was required to pay him the minimum wage in accordance with ORS 653.025. Additionally, Bukovina Inc., through its principal Zhiryada, steadfastly maintained throughout the Agency's wage claim investigation and in its answer that it kept no records whatsoever for Claimant. Based on those facts, the forum concludes that Bukovina Inc. was required to "make and keep available to the Commissioner" records pertaining to Claimant's employment, including

the number of hours he worked each week and each pay period, and failed to do so. Pursuant to ORS 653.256, the forum may assess civil penalties not to exceed $1,000 for each willful violation of ORS 653.045.

For the purposes of ORS 653.010 to 653.261, "willfully" is defined in OAR 839-020-0004(33) which states:

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

The Agency made a prima facie case that Bukovina Inc. had knowledge of facts and circumstances that put it on notice of its duty to keep and maintain records pertaining to Claimant. There is no credible evidence that suggests otherwise and the forum concludes that Bukovina Inc. willfully failed to make and maintain required records in accordance with ORS 653.045(1).

The Agency's second claim for civil penalties against Bukovina Inc., essentially, is a request for double penalties based on the same employer misconduct - failure to make and keep records. There is no question that a separate cause of action under ORS 653.045(2) may be maintained when the Agency establishes that a respondent kept records in accordance with ORS 653.045(1) and then willfully refused or failed to make those records available to the Agency, *i.e.*, keep them "open for inspection or transcription by the commissioner or the commissioner's designee at a reasonable time." In this case, however, the forum concludes there is no basis for the second claim because the Agency has already established that Bukovina Inc. kept no records pertaining to Claimant. Therefore, the Agency's claim for a penalty under ORS 653.045(2) is merely an attempt to penalize Bukovina Inc. twice for the identical misconduct that warranted a penalty under ORS 653.045(1). The Agency's claim for a civil penalty under ORS 653.045(2) fails.

CIVIL PENALTY UNDER ORS 653.256

The actual amount of the civil penalty the Commissioner assesses depends on the mitigating and aggravating circumstances set forth in OAR 839-020-1020. *See* OAR 839-020-1010. In this default case, Bukovina Inc. presented no mitigating evidence for the forum to consider when de-

termining the amount of the civil penalty. On the other hand, the Agency established several aggravating factors that warrant the maximum penalty allowed. The Agency alleged and the forum finds that Bukovina Inc., as an employer, knew or should have known of the violations and despite numerous opportunities to comply with the law prior to the Order of Determination, Bukovina Inc. failed to avail itself of those opportunities. Moreover, credible evidence showed that the Agency Compliance Specialist gave Bukovina Inc. numerous opportunities to correct the violations and that its failure to make and keep records hampered the Agency's ability to determine Claimant's actual wages owed. As such, the violation is serious and the forum concludes that Bukovina Inc. is liable for a civil penalty and $1,000 is an appropriate penalty in this case.

RESPONDENTS' EXCEPTIONS

Respondents, through counsel, filed "primary" and "secondary" exceptions to the ALJ's proposed order. The primary exceptions dispute the ALJ's conclusions that 1) Respondent Bukovina Inc. defaulted by failing to appear at hearing with counsel or an authorized representative and 2) Bukovina Inc. employed Claimant.

OAR 839-050-0330(3) provides, in pertinent part:

> "When a party is in default and the administrative law judge has not granted relief from default, the administrative law judge will not permit the party to participate in any manner in the subsequent hearing, including, but not limited to, * * * filing exceptions to the Proposed Order." (emphasis added)

At the start of hearing, Bukovina Inc.'s former authorized representative, Valentina Zhiryada, dispelled any doubt about her intention and unequivocally maintained that she was not appearing as Bukovina Inc.'s authorized representative and was only appearing for Bukovina LLC. Based on Zhiryada's representations and Bukovina Inc.'s failure to comply with the ALJ's prior orders to either retain counsel or submit a letter authorizing a representative, the forum held Respondent Bukovina Inc. in default for its failure to appear at hearing with counsel or an authorized representative in accordance with OAR 839-050-0110(1)&(3). Consequently, although Respondents' primary exceptions are included in the record, the forum is barred from giving them consideration in this Final Order.

However, the forum will consider the secondary exception which disputes the ALJ's conclusion that Respondent Bukovina LLC was jointly and severally liable for Bukovina Inc.'s failure to pay wages. Respondents first suggest the ALJ exhibited bias by making a "gratuitous comment regarding Valentina's 'apparent readiness to create a new entity to avoid liability.'" Although the comment was an inference drawn

from the underlying facts and not intended to inflame, in retrospect, the forum agrees the comment was not necessary to support the rationale behind the ultimate conclusion that both Respondents are liable for repayment to the WSF for Claimant's unpaid wages. Consequently, the language in that section of the Opinion has been modified to more accurately reflect the forum's rationale for its conclusion.

Respondents next contend that as a "separate legal entity" under Washington law, Bukovina LLC is not "answerable to the Oregon Bureau of Labor and Industries for the wage obligations of [Bukovina Inc.], an Oregon corporation." However, Bukovina LLC's status as a foreign entity is not necessarily a factor when determining whether it conducts essentially the same business as its predecessor. Just as a foreign entity that conducts business in Oregon is subject to Oregon's wage and hour laws as to its Oregon employees, a foreign entity that succeeds to an Oregon entity and continues to conduct the identical business in Oregon may be held liable for its predecessor's failure to pay wages.

ORS 652.310(1) provides that for the purposes of wage claim enforcement, "employer" includes "*any* successor to the business of *any* employer * * * for the continuance of the same business, so far as such employer has not paid employees in full." (emphasis added) In this case, Bukovina LLC succeeded to Bukovina Inc. for the continuance of Bukovina Inc.'s trucking business in Oregon and Washington, retaining the same name (albeit a different business structure), equipment, and Oregon customers. Bukovina LLC continued to conduct the same business as its predecessor in Oregon and meets the criteria for a bona fide successor. Bukovina LLC's status as a "separate legal entity" under Washington law has no relevance.

Respondents' exceptions are **DENIED**.

ORDER

NOW, THEREFORE, as authorized by ORS 652.414, and as payment of the amounts paid from the Wage Security Fund under ORS 652.414(1), the Commissioner of the Bureau of Labor and Industries hereby orders **Bukovina Express, Inc.** and **Bukovina Express, LLC** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, the following:

> A certified check payable to the Bureau of Labor and Industries in the amount of SEVEN HUNDRED AND NINETY TWO DOLLARS AND TWENTY CENTS ($792.20), representing $592.20 of the $792.20 paid to Alexander Sheifer from the Wage Security Fund and a $200 penalty on that sum, plus interest at the legal rate on the sum of

$792.20 from May 1, 2004, until paid.

FURTHERMORE, as authorized by ORS 652.332 and ORS 652.150, and as payment of the penalty wages assessed as a result of its violation of ORS 652.140, the Commissioner of the Bureau of Labor and Industries hereby orders **Bukovina Express, Inc.** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, the following:

A certified check payable to the Bureau of Labor and Industries, in trust for Claimant Alexander Sheifer, in the amount of ONE THOUSAND SIX HUNDRED AND NINETY TWO DOLLARS ($1,692), representing $1,692 in penalty wages, plus interest at the legal rate on the sum of $1,692 from June 1, 2004, until paid.

FURTHERMORE, as authorized by ORS 653.256, and as payment of the civil penalties assessed as a result of Bukovina Express Inc.'s violation of ORS 653.055, the Commissioner of the Bureau of Labor and Industries hereby orders **Bukovina Express, Inc.** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, the following:

A certified check payable to the Bureau of Labor and Industries in the amount of ONE THOUSAND DOLLARS ($1,000), plus any interest that accrues at the legal rate on that amount from a date ten days after the issuance of the Final Order and the date **Bukovina Express, Inc.** complies with the Final Order.

A certified check payable to the Bureau of Labor and Industries, in trust for Claimant Alexander Sheifer, in the amount of ONE THOUSAND SIX HUNDRED AND NINETY TWO DOLLARS ($1,692), representing $1,692 in civil penalties, plus interest at the legal rate on the sum of $1,692 from June 1, 2004, until paid.

FINALLY, as authorized by ORS 653.256, and as payment of the civil penalty assessed as a result of Bukovina Express Inc.'s willful violation of ORS 653.045, the Commissioner of the Bureau of Labor and Industries hereby orders **Bukovina Express, Inc.** to deliver to the Fiscal Services Of

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In the Matter of

Gary Rivers, Charles Casteel, and Captain Hooks Salvage & Auto Wrecking, LLP

Case No. 43-05

Final Order of Commissioner Dan Gardner

Issued March 31, 2006

SYNOPSIS

Respondents employed Claimant to work 135 hours between October 13 and November 1, 2003 at the agreed rate of $15 per hour. Claimant worked 120 straight time and 15 overtime hours. At $15 per hour, Claimant earned $2,137.50 and was paid nothing. Respondents were ordered to pay Claimant $2,137.50 in unpaid, due and owing wages. Respondents' failure to pay the wages was willful and Respondents were ordered to pay $3,600 in penalty wages. Respondents were also ordered to pay a $3,600 civil penalty based on their failure to pay overtime wages to Claimant. ORS 652.140(2), ORS 652.150; ORS 653.055; ORS 653.256; ORS 653.261; OAR 839-001-0470; OAR 839-020-0030.

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Dan Gardner, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on January 24, 2006, in the WW Gregg Hearing Room of the Bureau of Labor and Industries, located at 800 NE Oregon Street, Portland, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter Jeffrey C. Burgess, an employee of the Agency. Jesus H. Ramos, the wage claimant ("Claimant") was present. Respondent Charles Casteel was present. He was not represented by counsel. Respondent Casteel also acted as authorized representative for Respondent Captain Hooks Salvage & Auto Wrecking LLP. Respondent Gary Rivers was represented at hearing by R. Bruce Dusterhoff, attorney at law.

The Agency called the following witnesses: Claimant; Katy Bayless, Wage & Hour Division compliance specialist; Mischelle Watkins, Captain Hooks's former bookkeeper; and Respondent Gary Rivers.

Respondent Casteel called himself as a witness. Respondent Rivers called himself as a witness.

The forum received into evidence:

a) Administrative exhibits X-1 through X-12 (submitted or generated prior to hearing) and X-13 through X-16 (submitted or generated after hearing); and

b) Agency exhibits A-1 through A-7, and A-9 through A-16 (submitted prior to hearing).

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

Fact, Conclusions of Law, Opinion, and Order.

FINDINGS OF FACT – PROCEDURAL

1) On February 17, 2004, Claimant filed a wage claim with the Agency alleging that "Gary Rivers, partner" and "Captain Hooks Wrecking and Auto Salvage, LLP" had employed him and failed to pay wages earned and due to him.

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

3) On January 16, 2003, the Agency issued Order of Determination No. 03-3797 based upon the wage claim filed by Claimant. The Order of Determination alleged that Respondents Gary Rivers ("Rivers"), Charles Casteel ("Casteel"), and Captain Hooks Salvage & Auto Wrecking LLP ("Captain Hooks") employed Claimant from October 13 to November 1, 2003, at the rate of $15 per hour; that he earned $2,137.50 in straight time and overtime wages and was not paid anything; and that Respondents owed him $2,137.50 in unpaid wages, $3,600 in penalty wages, and $3,600 in civil penalties, plus interest; and required that, within 20 days, Respondents either pay these sums in trust to the Agency, request an administrative hearing and submit an answer to the charges, or demand a trial in a court of law.

4) Subsequently, Casteel filed an answer and request for hearing on his own behalf and on behalf of Captain Hooks as its authorized representative. R. Bruce Dusterhoff filed an answer and request for hearing on behalf of Rivers.

5) On June 27, 2005, the Hearings Unit issued a Notice of Hearing to Respondents, the Agency, and Claimant stating the time and place of the hearing as 9:00 a.m. on September 7, 2005, in the WW Gregg Hearings Room, Room 1004, State Office Building, 800 N. E. Oregon St., Portland, Oregon.

6) On July 13, 2005, the forum ordered the Agency and Respondents each to submit a case summary including: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; and a brief statement of the elements of the claim, a statement of any agreed or stipulated facts, and any wage and penalty calculations (for the Agency only). The forum ordered the participants to submit case summaries by August 26, 2005, and notified them of the possible sanctions for failure to comply with the case summary order.

7) On August 27, 2005, Mischelle Watkins, Captain Hooks's former bookkeeper, requested a postponement on Casteel's behalf because of Casteel's emergency medical condition. Watkins enclosed documentation of Casteel's medical condition.

8) On August 24, 2005, the ALJ issued an interim order granting Casteel's request for postponement on the condition that Casteel, or someone he authorized, file a signed declaration with the Hearings Unit no later than August 31, 2005.

9) On August 26, 2005, the Agency filed its case summary.

10) On August 29, 2005, Casteel filed a signed declaration requesting that Watkins be allowed to act on his behalf regard information concerning his health.

11) On September 1, 2005, the ALJ issued an order rescheduling the hearing to January 24, 2006, and setting a new deadline for filing case summaries.

12) On December 20, 2005, the ALJ was changed from ALJ Linda Lohr to ALJ Alan McCullough.

13) At the start of the hearing, the ALJ explained the issues involved in the hearing, the matters to be proved, and the procedures governing the conduct of the hearing.

14) During the hearing, Rivers's attorney moved three times to dismiss the Order of Determination on the basis that Rivers 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.

15) During the hearing, Rivers's attorney twice moved for summary judgment or dismissal on the issue of Rivers's liability for penalty wages and civil penalties on the basis that the Agency had not shown a willful failure to pay and that Rivers had established his financial inability to pay the wages at the time they accrued. The ALJ denied the motions.

16) During the hearing, the Agency attempted to elicit evidence regarding Rivers's receipt of a substantial amount of funds from an auto accident settlement. Rivers objected because he received the funds two years after Claimant left his employment with Captain Hooks. The Agency argued that the evidence was relevant to disprove Rivers's affirmative defense of financial inability to pay at the time the wages accrued because Rivers could have sold his claim, 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 Rivers's attorney to respond.

17) 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, le-

gitimate 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.

18) At the request of Rivers's attorney, the ALJ left the record open until 5 p.m. on January 31, 2006, for him to ask permission to submit a brief on the issue of Rivers's liability as a member of a limited liability partnership.

19) On January 31, 2006, Rivers's attorney made a request to file a post-hearing memorandum. On February 3, 2006, the ALJ issued an Interim Order directing the Agency, Rivers, and Casteel, if he so desired, to file a post-hearing memorandum by February 17, 2006, on the following issues:

a) Rivers is not personally liable in this matter because he was a partner in Captain Hooks, a limited liability partnership, or in the alternative, a de facto limited liability corporation.

b) If Rivers is personally liable for Claimant's unpaid wages, he is not liable for the penalty wages or civil penalties sought by the Agency in its Order of Determination based on the facts of the case.

20) On February 17, 2006, Rivers's attorney and the Agency, through the Attorney General's office, filed post-hearing memoranda.

21) The ALJ issued a proposed order on March 9, 2006, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. No exceptions were filed.

FINDINGS OF FACT – THE MERITS

1) On October 8, 2003, Respondents Casteel and Rivers filed a document entitled "Application for Registration – Limited Liability Partnership" with the Oregon Secretary of State, Corporation Division. Among other entries, the application contained the following handwritten information:

Name: "Captain Hooks Salvage and Auto Wrecking, LLP"

Principal Office Address: "32450 S. Molalla Ave., Molalla, OR 97038"

Address Where the Division May Mail Notices: "17380 SW 63rd, Lake Oswego, OR 97035"

Name and Address of at Least Two Partners: "Charles Casteel, 37911 SW Laurelwood Dr., Gaston, OR 97119; Gary Rivers, 8275 SW Elligson Rd., Wilsonville, OR 97070"

Brief Statement of Primary Business Activity: "Salvage, Auto Repair, Towing"

Execution: signatures and printed names of "Charles Casteel" and "Gary Rivers" and "Partner" written after each un-

der the heading of "**Title or Capacity**"

Contact Name: "Gary Rivers"

2) On October 8, 2003, "Captain Hooks Salvage and Auto Wrecking LLP" registered with the Oregon Secretary of State, Corporation Division, under the assumed business name "Captain Hooks Salvage and Auto Wrecking." The registration listed the "principal place of business" as "34250 S Molalla Ave., Molalla, OR 97038" and the authorized representative as "Gary Rivers, 17380 SW 63rd, Lake Oswego, OR 97035."

3) As of October 8, 2003, Casteel and Rivers intended to enter into a partnership that was a business venture for profit and would conduct auto salvage, wrecking, and towing. They planned to split any profit from the business on a "40, 40, and 20" basis, with Casteel and Rivers each taking 40% and 20% to go back into the business "to keep it going."

4) Casteel's and Rivers's oral agreement to enter into partnership included conditions that they would each contribute specified assets to Captain Hooks. Casteel agreed to contribute $20,000 in cash, three used tow trucks that could be made "operational," and the use of his existing wrecking yard and associated "wrecking license" in Molalla. Rivers agreed to contribute three "operational" tow trucks, his existing lease on the property, and the utility and phone bills. Casteel and Rivers made these contributions. The title to the six tow trucks remained in Casteel's and Rivers's individual names. The lease remained in Rivers's name and the wrecking yard and wrecking license remained in Casteel's name.

5) Throughout the life of the partnership, Casteel and Rivers conducted business as Captain Hooks at a shop located at 17380 SW 63rd, Lake Oswego, OR 97035 (the "shop").

6) During the week of October 6-12, 2003, Claimant asked Rivers for a job as an auto body technician. Rivers agreed to hire him. Rivers and Claimant agreed that Claimant would be paid $15 per hour, to be paid "monthly."

7) When Rivers hired Claimant, he gave him a business card that had the words "Captain Hooks Wrecking and Auto Salvage, LLP" printed on it.

8) Claimant began work in the shop on October 13, 2003. He worked at the shop through November 1, 2003, performing bodywork to restore a Suburban owned by Rivers. The purpose of the work was so that the Suburban could be painted and sold and the proceeds invested in Captain Hooks. Rivers told Claimant what he wanted done on the Suburban. As Claimant worked, Rivers looked at his work and gave him some suggestions and specific instructions regarding how to do the work. Casteel never directed Claimant's work.

9) The shop had two "sides" to it. Claimant started work on the

Suburban on the "towing" side. At some point, the Suburban was moved to the other "side," where Claimant continued working. Claimant worked in the shop and used Rivers's welding equipment and grinders to do his work.

10) Claimant did not work for anyone else between October 13 and November 1, 2003.

11) Claimant maintained an accurate, contemporaneous written record of his work hours while he worked for Respondents.

12) During the workweek of October 13 through October 19, 2003, Claimant worked the following dates and hours for Respondents: 10/13 (8); 10/14 (8), 10/15 (8), 10/16 (8), 10/17 (8), 10/18 (6), for a total of 40 straight time and six overtime hours.

13) During the workweek of October 20 through October 26, 2003, Claimant worked the following dates and hours for Respondents: 10/20 (8.5); 10/21 (7), 10/22 (8), 10/23 (8), 10/24 (8.5), 10/25 (8.5), for a total of 40 straight time and eight overtime hours.

14) During the workweek of October 27 through November 2, 2003, Claimant worked the following dates and hours for Respondents: 10/27 (8.5); 10/28 (8), 10/29 (8), 10/31 (8), 11/1(8) for a total of 40 straight time and .5 overtime hours.

15) Claimant's overtime wage rate was $22.50 per hour ($15 x 1.5 = $22.50).

16) In total, Claimant earned $2,137.50 while employed by Respondents (120 straight time hours X $15 = $1,800; 15 overtime hours X $22.50 = $337.50; $1,800 + $337.50 = $2,137.50).

17) During Claimant's employment, Casteel told Claimant that he and Rivers were partners. During his employment, Claimant understood that Rivers and Casteel were partners and that he was working for a business named Captain Hooks Salvage and Auto Wrecking, LLP.

18) During his employment, Claimant asked both Rivers and Casteel for his wages. Rivers told Claimant to talk with Casteel, and Casteel told Claimant to talk with Rivers. Neither Rivers nor Casteel paid Claimant anything for his work.

19) As of the date of hearing, Claimant had still not been paid anything for his work.

20) Claimant's last day of work was Saturday, November 1, 2003. That day, Claimant again asked Respondent Rivers for his paycheck. Rivers told him to come back on Monday. Claimant returned to the shop on November 3, 2003, to get his paycheck, but Rivers was not there. Claimant asked Casteel for his pay. Casteel gave Claimant $10 for gas and told him to ask Rivers for his pay. After that, Claimant did not return to the shop to get his paycheck because he did not have the money for gas to commute between his home in Forest Grove and Lake Oswego.

21) Claimant did not perform any work for Respondents after November 1, 2003.

22) No lease payments were paid on the property used by Captain Hooks during the life of the partnership. About two years later, Rivers paid $100,000 in back lease payments to the lessor of the property.

23) On December 5, 2003, BOLI's Wage & Hour Division sent a letter to "Captain Hooks Salvage and Auto Wrecking LLP, 17380 SW 63rd, Lake Oswego, OR 97035." The letter contained a notification that Claimant "Jesus H. Ramos" had filed a wage claim with BOLI claiming "[u]npaid wages of 2,025.00 at the rate of $15.00 per hour from October 13, 2003 to November 11, 2003, and also * * * expenses in the amount of $26.89."

24) On February 26, 2004, Wage & Hour Division compliance specialist Katy Bayless sent a letter to "Captain Hooks Salvage and Auto Wrecking LLP, 17380 SW 63rd, Lake Oswego, OR 97035" that included the following language:

> "Since you have not responded to our letter dated December 5, 2003, it has become necessary to begin the Administrative Process. * * *
>
> "You are advised that as of this date, in addition to the $2,137.00 in wages owed, penalty wages have accrued to the amount of $7,200.00. * * *"

Bayless "cc'd" a copy of the letter to Casteel and Rivers. No evidence was presented to show that Casteel and Rivers did not receive the letters.

25) On November 20, 2003, Casteel filed a "Cancellation" of "Limited Liability Partnership" with the Oregon Secretary of State, Corporation Division. The cancellation applied to "Captain Hooks Wrecking and Auto Salvage, LLP." It was signed by "Charles Casteel" in the capacity of "partner/owner." On the same day, the Oregon Secretary of State processed the cancellation of "Captain Hooks Wrecking and Auto Salvage, LLP" and involuntarily cancelled Captain Hooks's assumed business name.

26) Shortly after November 20, 2003, Casteel came to the shop and removed the three tow trucks he had purchased for use by the partnership. Rivers kept his three tow trucks at the shop.

27) At some point prior to November 20, 2003, Casteel wrote a check on Captain Hooks's checking account to Mischelle Watkins, Respondents' bookkeeper, which was signed by Watkins. The purpose of the check was to pay Watkins's mortgage. There was no evidence showing the amount of the check or the amount of any unpaid wages owed to Watkins at the time of the payment.

28) Casteel and Watkins were the only persons who had signing authority on the Captain Hooks checking account. When

Casteel cancelled the partnership, he went to the bank with Rivers, withdrew the remaining $10 in Captain Hooks's checking account, and gave it to Rivers. Casteel also signed over the authority for the checking account to Rivers.

29) At the time Claimant was employed by Captain Hooks, Rivers lived in a "5th wheeler" with his wife in a trailer park and "was having trouble putting food on [his] table." He was barely making enough money to pay the trailer park rent and utilities.

30) In 1999, Rivers was involved in a "near-fatal car wreck." He has not worked for pay since August 19, 1999, and has had numerous surgeries on his foot as a result of the wreck.

31) During Claimant's employment with Captain Hooks, Rivers lacked the personal financial resources to pay the lease or utilities on the property used by Captain Hooks. Some time after the Secretary of State canceled the partnership, Rivers received notice that he would be evicted if he did not pay the rent.[1] Rivers did not pay, was evicted, and was no longer able to access the property. At the time, Rivers had 60 "junk" cars on the premises, along with personal property, including tools and car parts. Later, the landlord disposed of all Rivers's property.

32) On June 3, 2004, in response to the Order of Determination, Rivers wrote a letter to the Wage and Hour Division related to "Captain Hooks Salvage and Auto Wrecking LLP." He signed it as "Gary Rivers – former partner."

33) On June 11, 2004, Casteel sent a letter to the Wage and Hour Division, in response to the Order of Determination, in which he stated, among other things, that "Gary Rivers and I formed an informal partnership that was never carried forth over 60 days."

34) Claimant maintained a calm demeanor throughout his testimony. His testimony was internally consistent and he answered questions directly. He was not impeached on cross examination. The forum has credited his testimony in its entirety with regard to the dates and hours he worked for Respondents, his working conditions, and his agreed rate of pay.

35) Mischelle Watkins, the bookkeeper for Captain Hooks, drove Casteel to the hearing, and was very solicitous towards Casteel at the start of the hearing and during her testimony. She was instrumental in getting Casteel to file the LLP cancellation with the Secretary of State. At one point during her testimony, she even had a brief discussion with Casteel about his daily water requirement. In contrast, she was openly hostile in her facial expressions towards Rivers and exhibited a negative attitude to-

[1] There was no evidence presented as to the date of Rivers's eviction.

wards Rivers before the hearing and during her testimony. For example, in her August 24, 2005, letter requesting a postponement on Casteel's behalf, she wrote "it seems that Mr. Rivers has once again escaped any kind of consequences for his lying and cheating behavior." At hearing, when asked if Rivers and Casteel ever formalized their partnership agreement, she testified that nothing was ever "formally drawn up," then volunteered that the reason was because "Mr. Rivers wouldn't take responsibility or sit down to create that so it never happened." When asked "Captain Hooks Salvage, do you know if it was able to generate some revenue to help pay bills?" she answered "If there was revenue from this organization it went in Gary's pocket; it was cash." She also testified that "Mr. Casteel was taken in by Gary Rivers, who created a sham." As a result of this obvious and open bias, the forum has only credited her testimony where it was either uncontroverted or corroborated by other credible evidence.

36) Casteel was a sympathetic witness due to his physical condition. He appeared in a wheelchair and the ALJ observed that he appeared to be in physical discomfort throughout the hearing. Casteel expressed extremely hostile feelings towards Rivers before and during the hearing, revealing a bias that detracted substantially from his credibility. For example, in a letter dated June 11, 2004, he stated that "Gary Rivers stole money from me, made decisions without my input and told ludicrous and ridiculous lies. * * * Mr. Rivers has no conscience." In the same letter, Casteel provided a letter to BOLI in which he stated that Rivers had "leased two shops side by side in the same building * * * [o]ne under Midway Towing and one under Captain Hooks. Jesus was working in the Midway Towing Shop at all times while he was there." Claimant, whom the forum has found to be a credible witness, directly contradicted this statement, testifying that he worked first in one shop, then the other. At hearing, Casteel exhibited a negative attitude towards Rivers in his tone of voice and caustic comments. For example, after Casteel and Rivers had angrily addressed one another during Casteel's cross examination of Rivers, Casteel's final comment was -- "All I know, everything was a shady deal." As a result of this obvious and open bias, the forum has only credited Casteel's testimony where it was either uncontroverted or corroborated by other credible evidence.

37) Rivers also presented himself as a sympathetic witness due to his physical condition related to his 1999 auto accident. However, the forum disbelieved his testimony that he had nothing to do with the preparation of a purported employment "contract" prepared for Claimant's signature by Watkins. That four page document refers specifically to Claimant and Gary Rivers, refers to Claimant as an "employee," and states that "Captain Hooks" agrees to "an hourly rate of pay = $15.00 p/hour." Because these

facts correspond to undisputed testimony, the forum has believed Watkins's testimony that she prepared it at Rivers's instruction for Claimant's signatures.[2] On direct examination, as a hostile witness, Rivers repeatedly failed to directly respond to questions by interrupting the Agency case presenter in the midst of a question to state his views. This also detracted from his credibility. At hearing, Rivers exhibited a bias against Casteel in his negative tone of voice and caustic comments. He blamed Casteel for Captain Hooks's failure to pay Claimant, claiming he had no control over the situation. This lack of objectivity detracted from his credibility. As a result, the forum has only credited Rivers's testimony where it was undisputed or corroborated by other credible evidence.

38) Bayless's testimony primarily involved authenticating documents she generated or obtained during the course of her investigation and explaining the contents of those documents. Her testimony was undisputed and the forum has credited her testimony in its entirety.

39) Penalty wages are computed as follows for Claimant, in accordance with ORS 652.150 and OAR 839-001-0470(1): $15.00 per hour x 8 hours x 30 days = $3,600.

40) ORS 653.055 civil penalties wages are computed as follows for Claimant, in accordance with ORS 652.150 and OAR 839-001-0470(1): $15.00 per hour x 8 hours x 30 days = $3,600.

[2] The document contains numerous places for Claimant to sign and date.

ULTIMATE FINDINGS OF FACT

1) On October 8, 2003, Respondents Casteel and Rivers became partners in a business with the assumed business name of Captain Hooks Salvage and Auto Wrecking.

2) Rivers, on behalf of Captain Hooks, hired Claimant as an auto body technician at the agreed rate of $15 per hour.

3) Claimant worked for Captain Hooks under Rivers's supervision in the shop from October 13 through November 1, 2003, using tools and equipment owned by Rivers. Claimant voluntarily left Captain Hooks's employment.

4) Claimant worked a total of 120 straight time hours and 15 overtime hours for Captain Hooks, earning $1800 in straight time wages and $337.50 in overtime wages.

5) At the time of the hearing, Respondents had not paid Claimant any wages.

6) Respondents willfully failed to pay Claimant his wages.

7) On February 26, 2004, Wage & Hour Division compliance specialist Katy Bayless sent a letter to Respondents advising that Respondents owed Claimant $2,137.00 in unpaid wages and the penalty wages had accrued in the amount of $7,200.

8) Penalty wages are computed as follows for Claimant, in accordance with ORS 652.150 and OAR 839-001-0470(1): $15.00 per hour x 8 hours x 30 days = $3,600.

9) ORS 653.055 civil penalties are computed as follows, in accordance with ORS 652.150 and OAR 839-001-0470(1): $15.00 per hour x 8 hours x 30 days = $3,600.

CONCLUSIONS OF LAW

1) During all times material herein, Respondents Captain Hooks, Gary Rivers, and Charles Casteel were employers and Claimant Jesus Ramos was an employee subject to the provisions of ORS 652.110 to 652.200, 652.310 to 652.405, and ORS 653.010 to 653.261. During all times material, Respondents employed Claimant.

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

3) Respondents violated ORS 652.140(2) by failing to pay Claimant all wages earned and unpaid not later than November 7, 2003, five business days, excluding Saturdays, Sundays and holidays, after November 1, 2003, the day that Claimant quit without notice. Respondents owe Claimant $2,137.50 in unpaid, due and owing wages.

4) Respondents' failure to pay Claimant all wages due and owing was willful and Respondents owe Claimant $3,600 in penalty wages pursuant to ORS 652.150.

5) Respondents failed to pay Claimant for 15 overtime hours and are liable for $3,600 in civil penalties under ORS 653.055.

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

OPINION

In order to prevail in this matter, the Agency is required to prove the following four elements by a preponderance of the evidence: 1) Respondents employed Claimant; 2) The pay rate upon which Respondents and Claimant agreed, if it exceeded the minimum wage; 3) Claimant performed work for which he was not properly compensated; and 4) The amount and extent of work Claimant performed for Respondents. *In the Matter of Gary Lee Lucas,* 26 BOLI 198, 210 (2005)

RESPONDENTS EMPLOYED CLAIMANT

The following facts were undisputed: (1) Claimant was employed by the partnership that registered with the Secretary of State under the name Captain

Hooks Salvage and Auto Wrecking LLP; (2) Rivers and Casteel were the only partners in the business; and (3) Rivers interviewed and hired Claimant, directed his work, and provided the tools and equipment that he used to perform his work. This undisputed evidence establishes that a partnership formed by Rivers and Casteel and registered under the name of Captain Hooks Salvage and Auto Wrecking LLP employed Claimant. The issue of liability, which Rivers raised at hearing, is a separate issue that will be discussed later.

RESPONDENTS AGREED TO PAY CLAIMANT $15 PER HOUR

Claimant and Rivers both testified that Rivers, on behalf of the partnership, agreed to pay Claimant $15 per hour for his work. The forum accepts this credible testimony as fact and concludes that Claimant's agreed rate of pay was $15 per hour.

CLAIMANT PERFORMED WORK FOR WHICH HE WAS NOT PROPERLY COMPENSATED

Undisputed evidence established that Claimant performed work for Respondents and that he has been paid nothing for his work.

THE AMOUNT AND EXTENT OF WORK CLAIMANT PERFORMED FOR RESPONDENTS

The final element of the Agency's case requires proof of the amount and extent of work performed by the claimants. The Agency's burden of proof can be met by producing sufficient evidence from which a just and reasonable inference may be drawn. *Gary Lee Lucas, at 211.* In this case, the Agency provided a credible, contemporaneous record of Claimant's work hours that showed Claimant worked 120 straight time hours and 15 hours of overtime for Respondents, and Respondents did not dispute that record. Consequently, the forum concludes that Claimant worked 120 straight time hours and 15 hours of overtime for Respondents. It was undisputed that Respondents have paid Claimant nothing for this work. As a result, Claimant is owed $1,800 in straight time wages (120 hours x $15 per hour = $1,800) and $337.50 in overtime wages (15 x $22.50 per hour = $337.50), for a total of $2,137.50.

CLAIMANT IS OWED $3,600 IN PENALTY WAGES

The forum may award penalty wages where a respondent's failure to pay wages was willful. Willfulness does not imply or require blame, malice, or moral delinquency. Rather, a respondent commits an act or omission "willfully" if he or she acts (or fails to act) intentionally, as a free agent, and with knowledge of what is being done or not done. *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976). Respondent Rivers raised the affirmative defense of financial inability to pay in his an-

swer.[3] However, neither Casteel nor Captain Hooks raised this defense in their answer and the forum may not consider the financial inability of either Casteel or the partnership to pay Claimant's wages in deciding whether to award penalty wages.[4]

Respondents did not dispute Claimant's hourly wage, the amount Claimant was owed, or that he performed all his work on Captain Hooks's property, using tools and equipment provided by Rivers, under Rivers's general direction. Although there was no testimony about the extent to which Casteel observed Claimant's work, Casteel did not contest the Agency's allegation that Claimant worked 135 hours for Captain Hooks. Casteel also did not produce any evidence to show that he was absent from Captain Hooks's premises during Claimant's work hours or that he was not contemporaneously aware of the amount and extent of Claimant's work. From these facts, the forum infers that both Rivers and Casteel were aware of the amount and extent of the work performed by Claimant.

Although Respondents maintained at hearing that Captain Hooks was "undercapitalized," they agreed that Casteel contributed $20,000 to the business when it started up, that no partnership assets were used to make lease payments on the property used by Captain Hooks, that an unspecified amount was paid out to cover Watkins's mortgage payment, and that there was only $10 left in Captain Hooks's checking account when Casteel bailed out of the partnership on November 20, 2003. However, Claimant's last day of work was November 1, 2003, and his wages were due no later than November 7, 2003. Respondents presented no specific evidence to show the partnership's financial status at that time or how the remainder of Respondents' start-up money was spent.

The facts show that Respondents knew the amount of wages earned by Claimant, that they chose to spend the partnership funds on expenses other than Claimant's wages, and they acted as free agents in making this choice. The Agency provided documentary and testimonial evidence that it made the written demand for Claimant's wages required by ORS 652.150. Consequently, the forum assesses the penalty wages in the manner provided for in ORS 652.150 (hourly rate - $15 x eight hours per day x 30 days = $3,600).

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[3] *See In the Matter of Graciela Vargas,* 16 BOLI 246, 256 (1998) (the defense of financial inability to pay wages at the time they accrue is an affirmative defense).

[4] *See* OAR 839-050-0130(2) ("The failure of the party to raise an affirmative defense in the answer is a waiver of such defense); *Vargas at* 256 (the affirmative defense of financial ability to pay wages at the time they accrue is waived if not raised in the employer's answer).

In a post-hearing memorandum, Rivers asserted that penalty wages cannot exceed Claimant's total unpaid wages because the Agency presented no proof that either Casteel or Rivers "received written notice of demand to pay wages directed to them personally." ORS 652.150(2) provides that:

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

The Agency presented proof that it had sent notice to Respondents at Captain Hooks's business address on December 5, 2003, and on February 26, 2004,[5] but no proof that either Casteel or Rivers actually received those letters. However, the Agency's Order of Determination ("Order") also constitutes a written notice of nonpayment. The Order states that Claimant is owed $2,137.50 in unpaid wages and includes the following language: "[p]ursuant to ORS 652.332, the employer is hereby directed to pay the Commissioner of the Bureau of Labor and Industries the amount of the wage claims * * *." The Order, as well as the Agency's letters, constitutes "written notice of nonpayment" within the meaning of ORS 652.150(2). There is no dispute that it was received by both Casteel and Rivers, or that they failed to pay Claimant's wages within 12 days after receiving the Order of Determination, despite the fact that they did not dispute the amount of unpaid wages at hearing. Consequently, Rivers's argument fails.

CLAIMANT IS OWED $3,600 IN CIVIL PENALTIES UNDER ORS 653.055

In its Order of Determination, the Agency also sought $3,600 in civil penalties based on Respondents' alleged failure to pay Claimant "less than the wages to which Claimant was due under ORS 653.010 to 653.261." When an employer pays an employee "less than the wages to which the employee is entitled under ORS 653.010 to 653.261," the forum may award civil penalties to the employee. "Willfulness" is not an element.[6] ORS 653.055; *Cornier v. Paul Tulacz, DVM PC*, 176 Or App 245 (2001); *In the Matter of TCS Global Corp.,* 25 BOLI 1, 15

[5] *See* Findings of Fact ## 23 and 24 – The Merits, *supra*.

[6] *Compare* ORS 652.150(1) ("if an employer willfully fails to pay any wages * * * of any employee whose employment ceases, * * * then as a penalty * * * the wages * * * shall continue[.]")

(2003). *See also In the Matter of Larson Golf Construction, Inc.,* 25 BOLI 204, 216 (2004); *In the Matter of William Presley,* 25 BOLI 56, 73 (2003), *aff'd Presley v. Bureau of Labor and Industrie*s, 200 Or App 113, 112 P3d 485 (2005). Here, the unpaid wages include an undisputed 15 hours of unpaid overtime wages that Claimant earned during the wage claim period. The statutory requirement to pay overtime is contained in ORS 653.261 and OAR 839-020-0030, the Agency rule interpreting the statute. In addition, the affirmative defense of financial inability to pay at the time wages accrued set out in ORS 652.150 is not available under ORS 653.055. Therefore, Respondents' failure to pay overtime wages to Claimant entitles Claimant to a civil penalty, in addition to the penalty wages awarded under ORS 652.150. The civil penalty is computed in the same manner as ORS 652.150 penalty wages (hourly rate - $15 x eight hours per day x 30 days = $3,600).

LIABILITY FOR CLAIMANT'S UNPAID WAGES, PENALTY WAGES, AND CIVIL PENALTIES

Under Oregon law, "the association of two or more persons to carry on as co-owners a business for profit creates a partnership, whether or not the persons intend to create a partnership." ORS 67.055(1). ORS 67.055(4) provides:

> "In determining whether a partnership is created, the following rules apply:
>
> "(a) Factors indicating that persons have created a partnership include:
>
> "(A) Their receipt of or right to receive a share of profits of the business;
>
> "(B) Their expression of an intent to be partners in the business;
>
> "(C) Their participation or right to participate in control of the business;
>
> "(D) Their sharing or agreeing to share losses of the business or liability for claims by third parties against the business; and
>
> "(E) Their contributing or agreeing to contribute money or property to the business."

Here, both Casteel and Rivers testified as to their right to receive a share of profits that Captain Hooks generated, that they intended to be partners, that they participated and had the right to participate in the control of the business, that they both suffered losses in the business, and that they both intended to and did contribute money or property to Captain Hooks. The forum therefore concludes that Captain Hooks was a partnership during Claimant's employment.

ORS 67.105 defines the extent of a partner's liability. It provides, in relevant part:

> "(1) Except as otherwise provided in this section, all partners are liable jointly and severally for all obligations of

> the partnership unless otherwise agreed by the claimant or provided by law.
>
> "* * * * *
>
> "(3)(a) An obligation of a partnership incurred while the partnership is a limited liability partnership, whether arising in contract, tort or otherwise, is solely the obligation of the partnership. A partner is not personally liable, directly or indirectly, by way of indemnification, contribution or otherwise, for such an obligation solely by reason of being or so acting as a partner.
>
> "(b) Notwithstanding paragraph (a) of this subsection, a partner of a limited liability partnership shall continue to be liable for any obligation of the partnership for which the partner was liable before the partnership became a limited liability partnership."

Unless an exception exists, a partner is jointly and severally liable for all debts of the partnership. In this case, Rivers claimed the exception in ORS 67.105(3)(a) which excuses partners from personal liability for any obligations of the partnership if the obligation arises "while the partnership is a[n LLP]." In the alternative, he asserted he was not personally liable because Captain Hooks was entitled to the *de facto* legal status of a limited liability company ("LLC") based on the intent of Casteel and Rivers. Although Casteel did not raise these issues, the same argument applies to him. In addition, Rivers argued that if he was held personally liable for the unpaid wages, he should not be held liable for penalty wages based on his personal financial inability to pay those wages at the time they accrued.

Limited liability partnerships ("LLPs") are a form of partnership that the Oregon legislature created in 1997. Partnership conditions, regulations, and liabilities for LLPs and its member partners are contained in ORS 67.500 to 67.680.

Rivers contends that he is entitled to the liability exception in ORS 67.105(3) (a) because he and Casteel registered their partnership as an LLP with the Secretary of State. ORS 67.590 states the procedure by which a partnership becomes an LLP:

> "(1) After the approval required by ORS 67.500(3), a partnership may become a limited liability partnership by delivering an application for registration to the office of the Secretary of State for filing.
>
> "* * * * *
>
> "(4) The filing of an application for registration establishes that the partnership has satisfied all conditions precedent to the qualification of the partnership as a limited liability partnership."

It is undisputed that Casteel and Rivers delivered an application for registration to the office of the Secretary of State for filing on October 8, 2003, and that the

Secretary of State accepted the application. This meets the statutory procedural formalities for registering a partnership as an LLP. However, there is another hurdle that Rivers and Casteel cannot cross.

As a threshold matter, ORS 67.500(1) sets out eligibility criteria that a partnership must meet before it can become an LLP. It provides:

> "(1) Notwithstanding any other provision of this chapter, a partnership, not including a limited partnership, may register as a limited liability partnership or apply for authority as a foreign limited liability partnership only if it:
>
> "(a) Renders professional service; or
>
> "(b) Is affiliated with a limited liability partnership or a foreign limited liability partnership that renders professional service and renders services related to or complementary to the professional service rendered by, or provides services or facilities to, the limited liability partnership or foreign limited liability partnership that renders professional service."

"Notwithstanding any other provision of this chapter" is an unambiguous, unequivocal restrictive clause that limits LLP status to a specific class of partnerships – those that "[render] professional service" or "[are] affiliated with a limited liability partnership * * * that renders professional service and renders services related to or complementary to the professional service rendered by * * * or provides services or facilities to, the limited liability partnership * * * that renders professional service."

"Professional service" means "the service rendered by a professional." ORS 67.005(13). "Professional" is defined in ORS 67.005(12) to include persons who are licensed under Oregon Revised Statutes the laws of another state as accountants, attorneys, chiropractors, dentists, landscape architects, naturopaths, nurse practitioners, psychologists, physicians, podiatrists, radiologic technologists, real estate appraisers, and "[o]ther persons providing to the public types of personal service or services substantially similar to those listed [above] that may be rendered lawfully only pursuant to a license."

It is undisputed that neither Rivers nor Casteel were licensed to pursue any of the professions listed in OAR 67.005(12) and did not provide any services that a licensed professional in one of the enumerated professions is licensed to provide. However, Rivers argued that he and Casteel, under the LLP of Captain Hooks, provided "professional services" because they fit into the category of a "person[s] providing to the public types of personal service or services substantially similar * * * that may be rendered lawfully only pursuant to a license." The license in question is the wrecking certificate owned by Casteel, which presumably was

obtained from the state pursuant to the provisions of ORS 822.100 to 822.150.[7]

Under ORS 822.100(1), a "wrecker certificate" entitles the holder to do the following:

> "(a) Carr[y] on or conduct[], in whole or in part, the business of buying, selling or dealing in vehicles for the purpose of wrecking, dismantling, disassembling and offering for sale the used vehicle components thereof.
>
> "(b) Carr[y] on or conduct[], in whole or in part, the business of buying, selling or dealing in vehicles for the purpose of wrecking, dismantling, disassembling or substantially altering the form of any motor vehicle.
>
> "(c) Carr[y] on or conduct[], in whole or in part, the business of selling at wholesale wrecked, dismantled, disassembled or substantially altered vehicles.
>
> "(d) Engage[] in the activity of wrecking, dismantling, disassembling or substantially altering vehicles including the crushing, compacting or shredding of vehicles."

The forum is left with the task of determining whether the business activities described in ORS 67.100(1) are "substantially similar" to any of the types of personal service provided by persons licensed to practice the professions set out in ORS 67.005(13)(a)-(m). This requires the forum to determine the meaning of the words "substantially similar."

Where statutory interpretation is required, the forum must attempt to discern the legislature's intent. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610 (1993). *See also In the Matter of Elisha, Inc.,* 25 BOLI 125, 148 (2004), *aff'd without opinion, Elisha, Inc. v. Bureau of Labor and Industries,* 198 Or App 285, 108 P3d 1219 (2005). To do that, the forum first examines the text and context of the statute. *Id.* The text of the statutory provision itself is the starting point for interpretation and the best evidence of the legislature's intent. *Id.* Also relevant is the context of the statutory provision, which includes other provisions of the same statute and other related statutes. *Id*. at 611. If the legislature's intent is clear from the text and context of the statutory provision, further inquiry is unnecessary.

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[7] "Wreckers" are regulated under ORS 822.100 to 822.150. Based on Casteel and Rivers's testimony, the forum takes judicial notice that they could not have legally conducted Captain Hooks's business of auto salvage and wrecking without a certificate obtained under those statutes. However, the wrecker certificate was not offered as evidence and there was no testimony about the specific means by which Casteel obtained the certificate. As an aside, it also appears that Casteel and Rivers were required to obtain a supplemental wrecker certificate in order to conduct a wrecking business at Captain Hooks under Casteel's license. ORS 822.135(1)(b).

The words "substantially similar" are not defined in ORS Chapter 67 and the forum has found no case law on point. Because these words are not defined anywhere in the statute or related statutes and they are words of common usage, the forum ascribes to them their plain, natural and ordinary meaning. *Young v. State of Oregon,* 161 Or App 32, 36, *rev den* 329 Or 447 (1999) (citing *PGE* at 611). *See also Elisha* at 148.

The ordinary meaning of "similar" is "**1 :** having characteristics in common **:** very much alike * * * **2 :** alike in substance or essentials * * *." *Webster's Third New Int'l Dictionary* 2120 (unabridged ed 2002). The ordinary meaning of "substantially" is "in a substantial manner." *Id.* at 2280. In this context, the ordinary meaning of "substantial" is "sharing the nature of[.]" *Id.*

The types of personal services provided by Captain Hooks -- auto salvage, wrecking, and towing – have nothing in common with the types of professional personal services that accountants, attorneys, chiropractors, dentists, landscape architects, naturopaths, nurse practitioners, psychologists, physicians, podiatrists, radiologic technologists, real estate appraisers are licensed to provide. Accordingly, the forum concludes that the personal service or services provided by Casteel and Rivers doing business as Captain Hooks were not "substantially similar" to the personal service or services provided by the types of professionals listed in ORS 67.005(13)(a)-(m). As a result, the LLP name that Casteel and Rivers registered with the Secretary of State did not acquire the legal status of an LLP, and Casteel and Rivers are jointly and severally liable for the obligations incurred by Captain Hooks under ORS 67.105(1), including Claimant's unpaid wages, penalty wages, and civil penalties. ORS 67.105(1).

Rivers alternatively argued that if Captain Hooks was not an LLP, then it was a *de facto* limited liability company ("LLC"). This argument fails because an LLC, as a matter of law, cannot exist until the LLC's "articles of organization" have been "execut[ed] and deliver[ed] to the [Secretary of State] for filing." ORS 63.044. No such events happened here.

In conclusion, Casteel and Rivers are jointly and severally liable for Claimant's unpaid wages and the civil penalty awarded to Claimant. Casteel is also jointly and severally liable for Claimant's penalty wages. Rivers's liability for Claimant's penalty wages is discussed below.

RIVERS'S PERSONAL LIABILITY FOR PENALTY WAGES

In his answer, Rivers raised the affirmative defense of financial inability to pay Claimant's wages at the time they accrued. This defense was not plead by Casteel or Captain Hooks and only applies to Rivers's personal liability. An employer bears the burden of proving this defense. *In the Matter of*

Debbie Frampton, 19 BOLI 27, 41 (1999). Rivers testified that, at the time Claimant worked for Captain Hooks, he lacked the personal financial resources to pay the lease or utilities on the property used by Captain Hooks, that he lived in a "5th wheeler" with his wife in a trailer park, that he "was having trouble putting food on [his] table," and was barely making enough money to pay the trailer park rent and utilities. He also testified he had not worked for pay since August 1999.

Even if the forum believed all of Rivers's testimony, his defense would fail. Because Captain Hooks was a partnership, the real question is whether the partnership had sufficient assets to pay Claimant's wages on November 7, 2003. If so, then Casteel and Rivers are jointly and severally liable, regardless of Rivers's personal financial situation. To meet its burden of proof, an employer must provide specific information as to the financial resources and expenses of both the business and the employer personally during the wage claim period, including submission of records from which that information came. *See In the Matter of Westland Resources,* 23 BOLI 276, 281 (2002); *In the Matter of Graciela Vargas,* 16 BOLI 246, 257 (1998); *In the Matter of U. S. Telecom International,* 13 BOLI 114, 122-23 (1994); *In the Matter of Lois Short,* 5 BOLI 277, 288 (1986). Testimony of an employer, even when found credible, is ordinarily insufficient in and of itself to establish an inability to pay. *Vargas,* at 257. The only evidence provided regarding Captain Hooks's expenses was that a check was made out to Watkins on an undisclosed date to cover her mortgage payment and that only $10 was left in Captain Hooks's checking account as of November 20, 2003. This evidence is insufficient to meet Rivers's burden of proof, and the forum finds Rivers jointly and severally liable for Claimant's penalty wages.

DUE PROCESS

In his post-hearing memorandum, Rivers argued that the Agency conceded that Captain Hooks was an LLP because it addressed both demand letters to "Captain Hooks Salvage and Auto Wrecking LLP," because the Claimant stated on his wage claim form that "Captain Hooks Wrecking and Auto Salvage, LLP" was the "NAME OF EMPLOYER'S BUSINESS," and because the Agency captioned its case summary in the following words: GARY RIVERS AND CHARLES CASTEEL AND CAPTAIN HOOKS SALVAGE & AUTO WRECKING LLP." Rivers argued that if the Agency intended to question the existence of the LLP, "it was required to allege the impropriety of the LLP in its charging documents" and "it violates Respondents' due process rights to present them with new facts and new allegations in the middle of the hearing." Rivers cites OAR 839-050-0060(1) in support of its argument.

OAR 839-050-0060(1) contains the following language:

> "1) A charging document will contain:
>
> "(a) A reference to the particular statutes or administrative rules involved in the violation;
>
> "(b) A short and concise statement of the matters that constitute the violation; and
>
> "(c) A statement of the remedies sought and, when appropriate, the penalty imposed."

Rivers argued that the Agency's failure "to allege the impropriety of the LLP in its charging documents" constitutes a failure to include a "statement of the matters that constitute the violation," which in turn violated Rivers's due process rights. Rivers is mistaken. The "impropriety of the LLP" is not a "matter" that constituted an alleged "violation." Rather, it is a matter that relates to the joint and several liability of Casteel and Rivers, both whom were named, along with Captain Hooks, as the employer in the Agency's Order. The forum concludes that Rivers's due process rights were not violated.[8]

ORDER

NOW, THEREFORE, as authorized by ORS 652.332 and ORS 653.256 and as payment of the unpaid wages, penalty wages, and civil penalties Respondents owe as a result of their violations of ORS 652.140(2) and ORS 653.055(1), the Commissioner of the Bureau of Labor and Industries hereby orders **Charles Casteel** and **Gary Rivers** to deliver to the Fiscal Services Office of the Bureau of Labor and Indus

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[8] *Compare Drayton v. Department of Transportation,* 186 Or App 1, 62 P3d 430 (2003) (reversed and remanded because the Department based its decision on a rule that was not cited in its notice of violation).

tries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, the following:

> A certified check payable to the Bureau of Labor and Industries in trust for Claimant Jesus H. Ramos in the amount of NINE THOUSAND THREE HUNDRED THIRTY SEVEN DOLLARS and FIFTY CENTS ($9,337.50), less appropriate lawful deductions, representing $2,137.50 in gross earned, unpaid, due and payable wages, $3,600 in penalty wages, and $3,600 in civil penalties, plus interest at the legal rate on the sum of $2,137.50 from November 1, 2003, until paid, and interest at the legal rate on the sum of $7,200 from January 1, 2004, until paid.

In the Matter of

CARL ODOMS dba Island City Auto Body

Case No. 12-06

Final Order of Commissioner Dan Gardner

Issued June 12, 2006

SYNOPSIS

The Agency paid out $5,579.13 in unpaid wages to four wage claimants in a Wage Security Fund payout and sought reimbursement of that amount from Respondent, plus a $1,394.78 penalty and $8400 in penalty wages. The forum ordered Respondent to repay $5,399.13 to the Wage Security Fund, a twenty-five percent penalty of $1,349.78, and $8400 in penalty wages. ORS 652.150; 652.414; OAR 839-001-0510, OAR 839-001-0515.

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Dan Gardner, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on May 2, 2006, at the Senior Center, Dwight Hopkins Memorial Room, 1504 Albany Street, La Grande, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Cynthia L. Domas, case presenter, an employee of the Agency. Respondent Carl Odoms did not appear at the hearing and was held in default.

The Agency called the following witnesses: Jahnae Nelson, Christopher Bashon, and Troy Tucker, wage claimants; and Newell Enos (telephonic), Wage & Hour Division compliance specialist.

The forum received into evidence:

a) Administrative exhibits X-1 through X-10 (submitted or generated prior to hearing); and

b) Agency exhibits A-1 through A-20[1] (submitted prior to hearing).

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

FINDINGS OF FACT– PROCEDURAL

1) On or about January 31, 2005, Claimant Nelson ("Nelson") filed a wage claim with the Agency alleging that Respondent Carl Odoms had employed her and failed to pay her all earned, due, and owing wages.

2) At the time Nelson filed her wage claim, she assigned to the Commissioner of the Bureau of Labor and Industries, in trust for herself, all wages due from Respondent. On June 6, 2005, Nelson signed BOLI's "Wage Security Fund" assignment of wages Form WH-10B.

3) In or around May 2005, Claimant Bashon ("Bashon") filed a wage claim with the Agency alleging that Respondent Carl Odoms and Scott Davis had employed him and failed to pay him all earned, due, and owing wages.

4) At the time Bashon filed his wage claim, he assigned to the Commissioner of the Bureau of Labor and Industries, in trust for himself, all wages due from Respondent. On June 13, 2005, Bashon signed BOLI's "Wage Security Fund" assignment of wages Form WH-10B.

5) On June 1, 2005, Claimant Donell Michael ("Michael") filed a wage claim with the Agency alleging that Respondent Carl Odoms had employed him and failed to pay him all earned, due, and owing wages.

6) On May 27, 2005, Michael assigned to the Commissioner of the Bureau of Labor and Industries, in trust for himself, all wages due from Respondent by signing and dating BOLI's "Wage Security Fund" assignment of wages Form WH-10B.

7) On June 2, 2005, Claimant Tucker ("Tucker") filed a wage claim with the Agency alleging that Respondent Carl Odoms had employed him and failed to pay him all earned, due, and owing wages.

8) On June 1, 2005, Tucker assigned to the Commissioner of the Bureau of Labor and Industries, in trust for himself, all wages due from Respondent. On May 27, 2005, Tucker signed BOLI's "Wage Security Fund" assignment of wages Form WH-10B.

9) On July 28, 2005, the Agency issued Order of Determination No. 05-1900 in which it alleged that Claimants were employed by Respondent for different periods of time between December 1, 2004, and May 8, 2005; that

[1] Exhibits A-6, A-7, and A-8 all contain two pages. Only page one of each exhibit was offered and received.

Claimants worked straight time and overtime hours for Respondent for which they were not compensated;[2] that Respondent owed Claimants a total of $5,579.13 in unpaid wages; that Respondent willfully failed to pay the wages and owed Claimants $8,400 in penalty wages, plus interest; that the Bureau had paid Claimants $5,579.13 from the Wage Security Fund ("WSF"); and that the Commissioner was entitled to recover a penalty of $1,394.78 (25 percent of the sum paid from the WSF), plus interest.

10) On August 10, 2005, Respondent filed an answer and request for hearing.

11) On January 26, 2006, the Hearings Unit issued a Notice of Hearing to Respondent and the Agency stating the time and place of the hearing as May 2, 2006, at 9 a.m., at the Senior Center, Dwight Hopkins Memorial Room, 1504 Albany Street, La Grande, Oregon. Together with the Notice of Hearing, the forum sent a copy of the Order of Determination, a document entitled "Summary of Contested Case Rights and Procedures" containing the information required by ORS 183.413, a Servicemembers Civil Relief Act (SCRA) Notification, and a copy of the forum's contested case hearings rules, OAR 839-050-000 to 839-050-0440.

12) On February 22, 2006, the Agency filed a motion to amend the Order of Determination by interlineation as follows:

> "Pursuant to ORS 652.414 the Bureau has also determined that the Wage Claimants referred to in Exhibit A and incorporated by reference herein, are entitled to and have received payment from the Wage Security Fund (Fund) in the amounts set forth in Exhibit A, the total amount which is $5,579.13 plus interest as set out in Exhibit A. The Commissioner of the Bureau of Labor and Industries is entitled by ORS 652.414(3) to recover and seeks recovery from the employer amounts paid from the Fund, together with a penalty of 25 percent of the sums paid from the Fund or $200, whichever is greater. In this matter the penalty amount is $1,394.78, as set forth in Exhibit C and incorporated by reference herein, along with interest at the legal rate of payment from the dates such amounts were paid from the Fund until the date the penalty amount is paid. The Bureau is not seeking to have the employer pay the wages to the Wage Claimants as the Wage

[2] The Order of Determination alleged Bashon was owed $1,977 based on 253 straight time hours worked from 2-16-05 to 4-11-05; Michael was owed $1,032 based on 138 straight time hours and 31.5 overtime hours worked from 4-11-05 to 5-8-05; Nelson was owed $796.50 based on 88.5 straight time hours worked from 12-1-04 to 12-17-04; and Tucker was owed $1,773.63 based on 196.5 straight time hours and 50.75 overtime hours worked from 4-1-05 to 5-8-05.

Claimants have been paid from the Fund."

13) On March 15, 2006, the ALJ granted the Agency's motion to amend the Order of Determination.

14) 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.

15) At hearing, the Agency moved to amend the Order of Determination to allege that Nelson 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.

16) The ALJ issued a proposed order on May 25, 2006, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. No exceptions were filed.

FINDINGS OF FACT – THE MERITS

1) Between December 1, 2004, and May 8, 2005, Respondent Carl Odoms owned and operated an auto body shop in Island City, Oregon, under the assumed business name of Island City Auto Body, and engaged the personal services of one or more employees, including Claimants Nelson, Bashon, Tucker, and Michael.

2) Nelson worked for Respondent from November 15 to December 20, 2004 at the agreed rate of $9.00 per hour. She did filing, computer work, accounts payable and receivable, and answered phones. At Respondent's request, she maintained a contemporaneous record of the hours that she worked. She worked 68.5 straight time hours between December 6 and December 17, 2004, for Respondent, earning $616.50 in gross wages (68.5 x $9), and was not paid anything for those hours. She worked another six hours on December 20, 2004, earning another $54 in gross wages, then voluntarily quit after work that day because she had not been paid and Respondent did not pay her when she asked for her wages.

3) Bashon worked for Respondent from January 5 through April 11, 2005, at the agreed rate of $9.00 per hour. He washed, prepped, and painted cars. On March 4, 2005, he received an NSF paycheck from Respondent for the work he performed in the second half of February 2005. After that, he maintained a contemporaneous record of his work hours until he left Respondent's employment. Bashon worked 253 straight time hours from February 16 to April 11, 2005, earning $2277 in gross wages (253 hours x $9). The only

pay he received for that work were two draws of $100 and $200, respectively. He quit Respondent's employment on April 11, 2005, because he had not been paid and Respondent did not pay him when he asked for his wages. When he quit, Respondent owed him $1977 in unpaid, due and owing gross wages.

4) Tucker worked for Respondent from February 1 through May 8, 2005, at the agreed rate of $9.00 per hour. He sanded, prepped, taped, and did body work on cars. While working for Respondent, he maintained a contemporaneous record of his work hours that Respondent reviewed and approved. Between April 1 and May 8, 2005, he worked 176.5 straight time hours, earning $1,768.50 (176.5 x $9) and 50.75 overtime hours, earning $685.13 (50.75 hours x $13.50), for a total of $2,453.63. The only pay he received for that work was $680. He quit Respondent's employment on May 8, 2005, because he had not been paid and Respondent did not pay him when he asked for his wages. When he quit, Respondent owed him $1,777.63 in unpaid, due and owing gross wages.

5) Michael worked for Respondent from April 11 through May 8, 2005, at the agreed rate of $8.00 per hour. He sanded, prepped, and taped cars and worked with Tucker. Between April 11 and May 8, 2005, he worked 138 straight time hours and 31.5 overtime hours, earning $1,482 (138 hours x $8 = $1,104; 31.5 hours x $12 = $378; $1,104 + $378 = $1,482). The only pay he received for that work was $450. His last day of work was May 8, 2005. When he left Respondent's employment, Respondent owed him $1,777.63 in unpaid, due and owing gross wages. Respondent did not pay him when he asked for his wages.

6) Respondent was still in business on May 11, 2005, but was evicted from his shop after that and was no longer doing business as of June 2005.

7) Newell Enos, an Agency compliance specialist, investigated the wage claims of Claimants Nelson, Bashon, Tucker, and Michael. Based on his interviews with the Claimants, the time records they provided, his interview with Respondent, and Respondent's failure to provide any time records, Enos determined that Claimants had valid wage claims for the following amounts:

Jahnae Nelson: $796.50

Christopher Bashon: $1,977.00

Troy Tucker: $1,773.63

Donell Michael: $1,032.00

8) Based on his interview with Respondent, Enos determined that Respondent closed his business in June 2005, that Respondent was in jail in June 2005, and that Respondent lacked sufficient assets to pay the wage claims in a timely matter.

9) As a result of his investigation, Enos recommended that all four Claimants be paid their un-

paid, due and owing wages from the WSF.

10) On June 22, 2005, BOLI caused the WSF to issue checks in the amount of $1,548.83 to Bashon, $577.86 to Michael, $663.74 to Nelson, and $1,591.77 to Tucker, representing gross wages, less statutory deductions. In July 2005, BOLI determined that Tucker had been underpaid by $50 and, on July 27, 2005, BOLI caused the WSF to issue a second check to Tucker for $50.

11) 25 percent of $5,579.13 is $1,394.78.

12) The actual total of unpaid wages due to the four Claimants was $5,399.13, and 25 percent of that sum is $1,349.78.

13) On February 7, 2005, the Agency sent a letter to Respondent stating that Jahnae Nelson had filed a wage claim with BOLI alleging "[U]npaid wages of $607.50 at the rate of $9.00 per hour from December 6, 2004 to December 20, 2004" and demanding that Respondent immediately send a check if the claim was correct. Respondent paid no additional wages to Nelson.

14) On May 3, 2005, the Agency sent a letter to Respondent stating that Christopher Bashon had filed a wage claim with BOLI alleging "[U]npaid regular wages of $2,108.50 and unpaid statutory overtime wages of $67.50 at the rate of $9.00 per hour from February 16, 2005 to April 11, 2005 for a total claim of $2,176.00" and demanding that Respondent immediately send a check if the claim was correct. Respondent paid no additional wages to Bashon.

15) On June 3, 2005, the Agency sent a letter to Respondent stating that Donell Michael and Troy Tucker had filed a wage claims with BOLI alleging "unpaid regular wages of $584.00 at the rate of $8.00 per hour and unpaid overtime of $252.00 at the rate of $12.00 per hour from April 16, 2005 to May 8, 2005 for a total claim of $836.00" for Michael and "unpaid regular wages of $1,195.00 at the rate of $9.00 per hour and unpaid overtime of $560.25 at the rate of $13.50 per hour from April 1, 2005 to May 8, 2005 for a total claim of $1,755.25" for Tucker. The letter demanded that Respondent immediately send checks if the claims were correct. Respondent paid no additional wages to Michael or Tucker.

16) Pursuant to ORS 652.150, penalty wages are calculated as follows:

Nelson, Bashon, and Tucker: $9 x 8 hours = $72 x 30 days = $2,160

Michael: $8 x 8 hours = $64 x 30 days = $1,920

17) Claimants Nelson, Bashon, and Tucker, and Agency Compliance Specialist Enos were credible witnesses.

ULTIMATE FINDINGS OF FACT

1) Between November 15, 2004, and May 8, 2005, Respondent Carl Odoms was a

person who operated an auto body shop in Island City, Oregon and engaged the personal services of one or more persons, including Claimants Nelson, Bashon, Tucker, and Michael.

2) Nelson worked for Respondent from November 15 to December 20, 2004, at the agreed rate of $9.00 per hour. She worked 68.5 straight time hours between December 6 and December 17, 2004, for Respondent, earning $616.50 in gross wages, was not paid anything for those hours. She worked another six hours on December 20, 2004, earning another $54 in gross wages, and was owed a total of $670.50 in unpaid wages when she left Respondent's employment, none of which has been paid by Respondent.

3) Bashon worked for Respondent from January 5 through April 11, 2005, at the agreed rate of $9.00 per hour. He worked 253 straight time hours from February 16 to April 11, 2005, earning $2,277 in gross wages, and was only paid $300 for that work. When he left Respondent's employment, Respondent owed him $1,977 in unpaid wages, none of which has been paid by Respondent.

4) Tucker worked for Respondent from February 1 through May 8, 2005, at the agreed rate of $9.00 per hour. Between April 1 and May 8, 2005, he worked 176.5 straight time and 50.75 overtime hours, earning a total of $2,453.63, and was paid only $680 for that work. When he left Respondent's employment, Respondent owed him $1,777.63 in unpaid wages, none of which has been paid by Respondent.

5) Michael worked for Respondent from April 11 through May 8, 2005, at the agreed rate of $8.00 per hour. In that time, he worked 138 straight time and 31.5 overtime hours, earning a total of $1,482, and was paid only $450 for his work. When he left Respondent's employment, Respondent owed him $1,032 in unpaid wages, none of which has been paid by Respondent.

6) An Agency compliance specialist investigated the wage claims of Nelson, Bashon, Tucker, and Michael and made a determination that all four Claimants had a valid wage claims for the amounts shown in Finding of Fact 7 – The Merits, that Respondent had ceased doing business, and that Respondent lacked sufficient assets to fully and promptly pay the wage claim at the cessation of business.

7) BOLI caused the WSF to issue checks in the amount of $1,548.83 to Claimant Bashon, $577.86 to Claimant Michael, $663.74 to Claimant Nelson, and $1,591.77 and $50.00 to Claimant Tucker, representing their gross, unpaid claimed wages, less statutory deductions.

8) The actual total of gross unpaid wages due to the four Claimants was $5,399.13, and 25 percent of that sum is $1,349.78.

9) Respondent willfully failed to pay wages to Nelson, Bashon, Tucker, and Michael.

10) On February 7, 2005, the Agency sent a letter to Respondent alleging unpaid wages of $607.50 to Nelson. On May 3, 2005, the Agency sent a letter to Respondent alleging unpaid wages of $2,176.00 to Bashon. On June 3, 2005, the Agency sent a letter to Respondent alleging unpaid wages of $836.00 and $1,755.25, respectively, to Michael and Tucker. All four letters demanded that Respondent immediately send checks if the claims were correct.

11) On July 28, 2005, the Agency issued Order of Determination No. 05-1900 in which it alleged, among other things, that Nelson, Bashon, Tucker, and Michael were employed by Respondent and were owed unpaid wages in the respective amounts of $796.50, $1,977.00, $1,773.63, and $1,032. Respondent received this Order.

12) Nelson, Bashon, and Tucker are each owed $2,160 in penalty wages. Michael is owed $1,920 in penalty wages.

CONCLUSIONS OF LAW

1) During all times material herein, Respondent was an employer subject to the provisions of ORS 653.261 and 652.110 to 652.414, and Nelson, Bashon, Tucker, and Michael were Respondent's employees.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and Respondent herein. ORS 653.261 and ORS 652.310 to 652.414.

3) Respondent violated ORS 652.140(2) by failing to pay Nelson, Bashon, Tucker, and Michael all wages earned and unpaid not later than five days, excluding Saturdays, Sundays and holidays, after termination of their employment.

4) Respondent's failure to pay Nelson, Bashon, Tucker, and Michael all wages due and owing was willful. Respondent owes Nelson, Bashon, and Tucker $2,160 each in penalty wages. Respondent owes Michael $1,920 in penalty wages. ORS 652.150; OAR 839-001-0470.

5) The Agency paid out a total of $5,579.13 from the WSF to Nelson, Bashon, Tucker, and Michael and is entitled to recoup $5,399.13, plus a 25 percent penalty of $1,349.78 from Respondent. ORS 652.414(1), ORS 652.414(3).

6) Under the facts and circumstances of this record, and according to the law applicable to this matter, the Commissioner of the Bureau of Labor and Industries has the authority to order Respondent to reimburse the Wage Security Fund, to pay a 25 percent penalty on the amount paid out by the Wage Security Fund, and to pay Claimants their penalty wages, plus interest on all sums until paid. ORS 652.332, ORS 653.256.

OPINION

WAGE SECURITY FUND RECOVERY

In cases involving payouts from the WSF, where (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) the Agency has paid out money from the Fund and seeks to recover that money, there is a rebuttable presumption that the Agency's determination is valid for the sums actually paid out. *In the Matter of Catalogfinder, Inc.,* 18 BOLI 242, 260 (1999). In this case, the Agency presented credible evidence, through documentary evidence and witness testimony, that established: (1) it made a determination on the validity of the claims of Claimants; (2) it based its determination on the information available at the time; and (3) it paid out money from the WSF and seeks to recover that money. However, the presumption regarding the validity of the amount paid out to Claimant Nelson was rebutted by Nelson's own testimony. The WSF payout of $796.50 to Nelson was based on the Agency's allegation that she was not paid for 88.5 hours that she worked from December 1 to December 17, 2004. In contrast, Nelson testified at hearing that her wage claim period covered the 74.5 hours she worked during the period from December 6 to December 20, 2004, earning $670.50 in gross wages. This amount is further reduced by the $54 in gross wages Nelson earned on December 20 because the Agency's Order of Determination only sought recovery for wages Nelson earned through "12-17-04."[3]

Respondent's liability to the WSF is limited to the amount disbursed that equals the amount Respondent owed Claimants when he left Respondent's employ, as alleged in the Agency's Order of Determination. Consequently, Respondent is liable to the WSF for $5,399.13 for unpaid wages paid out to Nelson, Bashon, Tucker, and Michael.

WAGE SECURITY FUND PENALTY

Pursuant to ORS 652.414(3), the Commissioner is entitled to recover a 25 percent penalty on the amount paid or $200, whichever is greater. In this case, $1,349.78 is greater and Respondent is liable to the Commissioner for that amount.

PENALTY WAGES

An award of penalty wages turns on the issue of willfulness. An employer is liable for penalty

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[3] In a default case, the 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). The forum cannot order Respondent to reimburse the WSF for the wages Claimant Nelson earned on December 20, 2004, because the Agency's Order of Determination did not allege that Nelson was owed any wages on December 20, 2004.

wages when it willfully fails to pay any wages or compensation of any employee whose employment ceases. *In the Matter of Procom Services, Inc.,* 24 BOLI 238, 245 (2003). Willfulness does not imply or require blame, malice, wrong, perversion, or moral delinquency, but only requires that that which is done or omitted is intentionally done with knowledge of what is being done and that the actor or omittor be a free agent. *Sabin v. Willamette Western Corp.*, 276 Or 1083, 557 P2d 1344 (1976).

The Agency proved that all four Claimants worked hours for which they were not paid. All four Claimants asked Respondent to pay them the wages they had earned and Respondent declined to pay them. There was no evidence that Respondent acted other than voluntarily or as a free agent in declining to pay Claimants their unpaid, due and owing wages. More than 12 days have elapsed since written notice of Claimants' wage claim was sent to Respondent by BOLI and received by Respondent, and more than 30 days have elapsed since Claimants' last workday. Penalty wages are therefore assessed for all four Claimants and calculated pursuant to ORS 652.150 -- 8 hours x $9 per hour x 30 days = $2,160 (Nelson, Bashon, Tucker), and 8 hours x $8 per hour x 30 days = $1,920 (Michael).

ORDER

NOW, THEREFORE, as authorized by ORS 652.150 and 652.414, and as payment of the amounts paid from the Wage Security Fund as a result of his violation of ORS 652.140, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **Carl Odoms** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, the following:

(1) A certified check payable to the Bureau of Labor and Industries in the amount of SIX THOUSAND SEVEN HUNDRED FORTY EIGHT DOLLARS AND NINETY ONE CENTS, representing $616.50 of the $796.50 paid to Jahnae Nelson from the Wage Security Fund, $1,977.00 paid to Christopher Bashon from the Wage Security Fund, $1,032.00 paid to Donell Michael from the Wage Security Fund, and $1,773.63 paid to Troy Tucker from the Wage Security Fund, totaling $5,399.13; and a 25 percent penalty of $1,349.78 on the sum of $5,399.13, plus interest at the legal rate on the sum of $6,698.91 from June 22, 2005, until paid, plus interest at the legal rate on the sum of $50.00 from July 27, 2005, until paid; and

(2) A certified check payable to the Bureau of Labor and Industries, in trust for Claimant Jahnae Nelson, in the amount of TWO THOUSAND ONE HUNDRED AND SIXTY DOLLARS ($2,160), representing $2,160 in penalty wages, plus

interest at the legal rate on the sum of $2,160 from February 1, 2005, until paid;

(3) A certified check payable to the Bureau of Labor and Industries, in trust for Claimant Christopher Bashon, in the amount of TWO THOUSAND ONE HUNDRED AND SIXTY DOLLARS ($2,160), representing $2,160 in penalty wages, plus interest at the legal rate on the sum of $2,160 from June 1, 2005, until paid;

(4) A certified check payable to the Bureau of Labor and Industries, in trust for Claimant Troy Tucker, in the amount of TWO THOUSAND ONE HUNDRED AND SIXTY DOLLARS ($2,160), representing $2,160 in penalty wages, plus interest at the legal rate on the sum of $2,160 from July 1, 2005, until paid;

(5) A certified check payable to the Bureau of Labor and Industries, in trust for Claimant Donell Michael, in the amount of ONE THOUSAND NINE HUNDRED AND TWENTY DOLLARS ($1,920), representing $1,920 in penalty wages, plus interest at the legal rate on the sum of $1,920 from July 1, 2005, until paid.

In the Matter of

EMERALD STEEL FABRICATORS, INC.,

Case No. 30-04

Final Order on Reconsideration of Commissioner Dan Gardner

Issued July 13, 2006

SYNOPSIS

Complainant, a disabled person, used medical marijuana to reduce the symptoms of debilitating medical conditions caused by Complainant's mental and physical impairments. Complainant requested reasonable accommodation for these limitations. Respondent failed to reasonably accommodate Complainant by not engaging in a meaningful interactive process with him to determine if his limitations could be reasonably accommodated and by not providing him with reasonable accommodation that was available in violation of ORS 659A.112(2)(e). Respondent also denied an employment opportunity to Complainant based on Respondent's need to make reasonable accommodation to Complainant's physical and mental impairments in violation of ORS 659A.112(2)(f). Respondent did not discharge Complainant because he was a disabled person in violation of ORS 659A.112(1). Respondent did not utilize standards, criteria or methods of administration that

have the effect of discrimination on the basis of disability in violation of ORS 659A.112(2)(c). Respondent did not use qualification standards, employment tests or other selection criteria that screen out or tend to screen out a disabled person or a class of disabled persons in violation of ORS 659A.112(2)(g). Complainant was awarded $8,013.50 in back pay and $20,000 in damages for emotional distress. ORS 659A.112(1), ORS 659A.112(2)(c), ORS 659A.112(2)(e), ORS 659A.112(2)(f), ORS 659A.112(2)(g).

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Dan Gardner, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on January 24, 2005, at the Bureau's office located at 1400 Executive Parkway, Suite 200, Eugene, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter Cynthia L. Domas, an employee of the Agency. Complainant Anthony Scevers was present throughout the hearing and was not represented by counsel. Terence J. Hammons, attorney at law, represented Respondent. Donald Mathews, Respondent's owner, was present throughout the hearing for the purpose of assisting Respondent's counsel in the presentation of Respondent's case.

The Agency called the following witnesses: Anthony Scevers, Complainant; Stella Eller, Complainant's mother; John Eller, Complainant's stepfather; Kelly White, Complainant's supervisor while Complainant worked at Respondent's facility; Elizabeth Price, Human Resources Director for Peterson Pacific; and Dr. Grant Higginson (telephonic), Public Health Officer for the state of Oregon.

Respondent called the following witnesses: Donald Mathews, Respondent's owner; Patricia Edwards, sales associate for Staffing Services; and Kelly White.

The forum received into evidence:

a) Administrative exhibits X-1 through X-42 (submitted or generated prior to hearing) and exhibit X-43 (submitted at hearing);

b) Agency exhibits A-1 through A-12, A-14 (submitted prior to hearing), and A-16 (submitted at hearing);

c) Respondent exhibits R-1 through R-9 (submitted prior to hearing) and R-10 (submitted at hearing).

On September 16, 2005, after fully considering the entire record in this matter, I, Dan Gardner, Commissioner of the Bureau of Labor and Industries, issued the Findings of Fact (Procedural and On the Merits), Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order in this case. After Respondent timely sought judicial review in the Oregon Court of Ap-

peals on September 9, 2005, I filed a Notice of Withdrawal of Order for Purposes of Reconsideration in the Court of Appeals on May 18, 2006. Having reconsidered the final order, I hereby issue this Final Order on Reconsideration.

FINDINGS OF FACT – PROCEDURAL

1) On or about May 15, 2003, Complainant filed a verified complaint with the Agency's Civil Rights Division alleging that he was the victim of the unlawful employment practices of Respondent. The Division found substantial evidence of said practices on the part of Respondent.

2) On July 26, 2004, the Agency issued Formal Charges alleging that Respondent discriminated against Complainant by denying him employment and discharging him because of his disability in violation of ORS 659A.112(1) and ORS 659A.112(2)(c) & (g) and by failing to reasonably accommodate his disability in violation of ORS 659A.112(2)(e) & (f). The Agency sought damages of "[l]ost wages, including but not limited to, lost benefits and out-of-pocket expenses in an amount to be proven at hearing and estimated to be $20,000" and "for mental, emotional and physical suffering in the amount of $25,000."

3) On July 26, 2004, the forum served the Formal Charges on Respondent, accompanied by the following: a) a Notice of Hearing setting forth November 16, 2004, in Eugene, Oregon, as the time and place of the hearing in this matter; b) a Summary of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case process; and d) a separate copy of the specific administrative rule regarding responsive pleadings.

4) On August 2, 2004, Respondent, through counsel, filed a motion 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.

5) On August 11, 2004, the Agency moved for a protective order regarding Complainant's "medical, psychological, counsel-

ing, and therapy records." The Agency further 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."

6) On August 26, 2004, the ALJ issued an interim order denying Respondent's motions to dismiss and to strike. The ALJ concluded that Respondent was not constitutionally entitled to a jury trial, citing *Cornelison v. Seabold,* 254 Or 401, 404-05 (1969) for the proposition that a party is constitutionally entitled to a jury trial only "in the classes of cases wherein the right was customary at the time the constitution was adopted." The ALJ relied on *Williams v. Joyce*, 4 Or App 482, 501 (1971), *Fred Meyer, Inc. v. Bureau of Labor,* 39 Or App 253 (1979), and *City of Portland v. Bureau of Labor and Industries,* 61 Or App 182, 193 (1982) in support of the conclusion that the Commissioner has the authority to award damages in an administrative hearing. Finally, the ALJ relied in the Commissioner's holding in *In the Matter of Alpine Meadows Landscape Maintenance, LLC*, 19 BOLI 191, 118-220 (2000) as the basis for rejecting Respondent's equal protection argument.

7) On September 3, 2004, the ALJ issued an interim order granting 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. The ALJ postponed ruling on the Agency's request for two separate proposed orders and final orders. That request is hereby **DENIED**. That ruling is confirmed.

8) On September 9, 2004, Respondent, through counsel, filed an answer to the Formal Charges.

9) On October 7, 2004, Respondent filed a motion to postpone the hearing because Respondent's attorney had a previously set trial anticipated to begin on November 1 and last for at least two weeks. The Agency did not object and the ALJ granted Respondent's motion, rescheduling the hearing to begin on January 24, 2005.

10) On December 23, 2004, the Agency filed a motion for a discovery order to require Respondent to produce relevant documents that had been sought on an informal basis and not provided and an order to compel Respondent to respond to interrogatories sent to Respondent on November 18, 2004.

11) On January 3, 2005, the ALJ granted the Agency's motions. The ALJ issued an interim order requiring Respondent to provide the sought after documents to the Agency case presenter and respond to the interrogatories no later than January 10, 2005.

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

13) The ALJ issued a proposed order on March 24, 2005, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. Respondent filed exceptions that are discussed in the Opinion section of this Final Order.

FINDINGS OF FACT – THE MERITS

1) At all times material, Respondent Emerald Steel Fabricators, Inc. was an Oregon employer involved in the manufacturing of steel products and employed six or more employees.

2) Complainant was born in 1973. In 1992, he joined the U.S. Army. While in the Army, he began experiencing emotional problems, as well as nausea, cramps, and vomiting. In August 1994, an Army psychiatrist examined Complainant and diagnosed his problems as "correlates of anxiety and stress." The Army psychiatrist recommended that Complainant be discharged from the Army as "the quickest and most effective way to relieve this stress and anxiety." Complainant was honorably discharged from the Army shortly thereafter based on the psychiatrist's recommendation.

3) Starting in 1994, Complainant recurrently experienced depression, anxiety, and nausea. In January and March 1996, he sought medical help for depression and was given samples of Zoloft and Prozac. He took the Zoloft, but stopped taking it after a couple of days because of nausea. There is no evidence that he took the Prozac or, if so, how he tolerated it.

4) Between 1996 and the date of hearing, Complainant experienced ongoing depression, sleep disorder, anxiety, nausea, vomiting, severe stomach cramps, panic attacks, and eating difficulties. Notes in his medical records indicate that his nausea, stomach cramps, and vomiting were associated with his anxiety and panic attacks. He consulted with a number of physicians and a number of drugs were prescribed or administered at different times to treat his symptoms, including Amitriptyline, Buspar, Elavil, Inapsine, Klonopin, Paxil, Phenergan, Promethazine, Prozac, Wellbutrin, Xanax, and Zoloft. About 1996, Complainant began using marijuana and found that it gave him more relief from his nausea than the prescription drugs.

5) From 1996 on Complainant smoked marijuana to ease his

nausea, vomiting, and severe stomach cramps except for intervals when he would quit for a couple of weeks and seek "alternative medication" from doctors. Marijuana has given him the best relief from his nausea, vomiting, and severe stomach cramps; however, it only gives him partial relief.

6) There is no evidence that Complainant sought treatment from any medical provider between March 1996 and June 1998 for any of the medical conditions listed in Finding of Fact 4 – The Merits.

7) Doctor's notes indicate that Complainant sought medical treatment on at least five occasions in 1998 for problems involving nausea, stomach cramps, vomiting, anxiety, or panic attacks.[1] Those visits, including Complainant's complaints, pertinent comments, and the medications he was prescribed or that were discussed are summarized as follows:

a) June 1998. Complaints of heart pumping fast, nausea and dizziness. Prescriptions: 15mg Buspar and Xanax.

b) July 1998. Still taking Buspar and also taking Alprazolam. He was down to 3-4 panic attacks a week and "never felt this good."

c) September 1998. Still taking Buspar and Xanax and said he was "very pleased with the medication" and "never felt better in his life."

d) October 1998. "Actually feeling a little better"; still taking Buspar, Xanax, and Klonopin added to prescriptions.

e) November 1998. Buspar increased to 20 mg, Klonopin stopped, and 10mg Amitriptyline added.

8) Doctor's notes indicate that Complainant sought medical treatment on at least six occasions in 1999 for problems involving nausea, stomach cramps, vomiting, anxiety, or panic attacks.[2] Those visits, including Complainant's complaints, pertinent comments, and the medications he was prescribed or that were discussed are summarized as follows:

a) March 1999. Still taking Buspar 20mg "and doing really well with that."

b) August 3, 1999. Visit for "nausea and vomiting." "He has been trying to take Buspar and he just can't; the thought of it makes him want to vomit. He claims that he drinks 3 beers every other night and drinks hard liquor, 3 to 4 mixed drinks of the week-end * * * He does not smoke or use mariju-

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[1] Complainant may have sought medical treatment on more occasions, but these are the only visits reflected in the record and there is no evidence in the record that Complainant sought medical treatment on any other occasions in this particular year.

[2] *Id.*

ana and he just does not feel well. * * * He does not feel that the Buspar is working any longer, that he has too many ups and downs during the day because he has to take it 3X a day. CURRENT MEDICATIONS: Buspar 20 mg t.i.d. * * * P: * * * Promethazine 50 mg, ½ tablet at hs, #12, no refill. Wellbutrin SR 150 mg; he will start taking that in the morning and a Buspar in the evening at bedtime, but no other Buspar doses."

c) August 5, 1999. "He is here today stating that he threw up a few more times and is wondering what to do now. He was started on Wellbutrin and given some Promethazine and says that he is actually feeling better today. * * * He states that he was able to keep his Wellbutrin down today and has taken his Buspar only at night time. CURRENT MEDICATIONS: Buspar 20 mg at hs, Wellbutrin 150 mg in the a.m."

d) August 9, 1999. "getting panic – worse in morning - Buspar for 1 year – made me throw up. * * * Welbutrin – just started last week. * * * Current medications: Welbutrin, still tapering off Buspar. Something for nausea – can't remember name. Medication history: Amitriptyline – didn't work, felt depressed. * * * Pot – helps with nausea – every day now."

e) August 19, 1999. "[a] history of recurrent depression, anxiety and PTSD - Tried * * * Buspar past year. Recently started on Welbutrin * * * mixed results. Some improvement noted at first but unable to keep meds down due to repeated nausea – anxiety * * *Zoloft – 100mg ½ tab for 3 days then 1 tab in am. #30. Xanax 5 mg 1 tab * * *anxiety. #30."

f) September 9, 1999. "Tony reported no nausea or vomiting for the past 2 weeks. * * * Denied being currently depressed and stopped his Zoloft. Experiencing intermittent anxiety but hasn't use [sic] his Xanax – I recommended for him to try it as needed * * * Tony decided not to take an anti depressant med at this time[.]"

9) From 1994 through the date of hearing, Complainant has had continual eating difficulties because of his nausea and vomiting, which has caused him to lose weight at different times. In his words, "[I] eat something, and it comes back up."

10) Doctor's notes indicate that Complainant sought medical treatment on at least four occasions in 2000 for problems involving nausea, stomach cramps, vomiting, anxiety, or panic attacks.[3] Those visits, including Complainant's complaints, pertinent comments, and the medications he was prescribed or that were discussed are summarized as follows:

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[3] *Id.*

a) April 9, 2000. "This 27-year-old man over the last week or so has had a variety of symptoms including some nausea, some vomiting, chills, fever. * * * The patient admits to a severe anxiety disorder, occasionally gets nausea and vomiting from this, although he is not sure that this is related."

b) April 10, 2000. "Mr. Scevers describes a long history of panic disorder, which at one point was treated with a combination of Buspar, Elavil and a third medication he cannot remember the name of. He did not like the way those medications made him feel, so he is not taking anything currently. His panic attacks consist of nausea, syncopal episodes, chills and severe anxiety. He has been having these daily over the last week, with no atypical features at all. * * * MEDICATIONS: Phenergan."

c) April 12, 2000. "Chief complaint: Panic attacks[.] S: Patient's [sic] a 27-year-old male who states that, over the last few weeks, he's had a recurrence of his 'panic attacks.' He states he gets very sweaty and gets palpitations. He also gets very nauseated and occasionally vomits. He says he's vomited two-to-three times every morning over the last week or so. * * * He has been able to eat. * * * Current medications: Phenergan, which he states does not help his nausea and vomiting. * * * Patient started on Paxil 10 mg p.o.q.d. He was cautioned that this may initially effect [sic] his nausea. He was given a prescription for Compazine 10 mg p.o. q6h p.r.n. nausea."

d) April 14, 2000. "Patient's [sic] following up status post-panic attacks and anxiety[.] Patient's [sic] a 27-year-old male who was seen previously and placed on Paxil for episodes of palpitations, anxiety, and nausea. However, I think the nausea may have been secondary to his alcohol intake, at which time the patient had denied it. * * * The patient states that he has not had any alcohol in one week's time. He is eating better and sleeping through the night. He feels the Paxil is helping him and has not aggravated his nausea. He has not had to use the Phenergan much to control his nausea or vomiting. * * * Current medications: Paxil and Phenergan p.r.n."

11) Doctor's notes indicate that Complainant sought medical treatment on at least one occasion in 2001 for problems involving nausea, stomach cramps, vomiting, anxiety, or panic attacks.[4] That visit, including Complainant's complaints, pertinent comments, and the medications he was prescribed or that were discussed are summarized as follows:

a) November 6, 2001. "S: Patient is a 28 YO male who

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[4] *Id.*

> presents complaining of some nausea and vomiting. * * * He has had previous episodes where he has had fairly persistent vomiting with no firm diagnosis being made. He does admit he is fairly anxious and has had some problems with anxiety. * * * PAST MEDICAL HISTORY: Some previous episodes of anxiety and some chronic vomiting. He does continue to smoke. * * * He did complain of continued nausea, I did give him INAPSINE 0.25cc, but he became quite agitated and anxious following this. * * * He is given Phenergan 25mg q 6h prn nausea, #15[.]"

12) On April 28, 2002, Complainant consulted Dr. Leveque at the Compassion Clinic for the purpose of obtaining an Oregon Medical Marijuana ("OMM") card. In the "Attending Physician's Statement" required by the OMM program, Dr. Leveque noted that Complainant had the debilitating medical conditions of "severe nausea & vomiting" and "persistent muscle spasms," adding that "Cannabis gives good relief." Dr. Leveque noted on another document entitled "Physical Examination" that "pt has chronic cramps[,] nausea & vomiting. He was given Buspar, paxil[,] Elavil[,] Xanax[.] Cannabis gives good relief[.] Has used 6 yrs[.]"

During his visit, Complainant completed several Compassion Clinic forms. The first, entitled "Clinic Registration," asked Complainant to provide information by completing several phrases. The phrase in which Complainant described his condition is printed below, with Complainant's response printed in italic:

> "My debilitating condition as I understand it is *cronic nausia* [sic], *and stomatch* [sic] *cramps*, *cronic* [sic] *vomiting*."

On the second form, entitled "Medical History," Complainant stated he had or had in the past the medical conditions of "asthma," "nervous breakdown," and "stomatch [sic] cramps, nausia [sic], vomiting[.]"

The third form completed by Complainant was entitled "Present Medical Condition." The first page of the form asked Complainant to provide information by answering several phrases. The form's questions and Complainant's answers are noted below, with Complainant's responses printed in italic:

> "Primary medical condition, injury or illness for which you use marijuana as medicine? *Nausia [sic], stomatch [sic] cramps, vomiting*[.] Date of onset of illness or injury *1997*
>
> "Describe any treatment, surgery or medication prescribed for your condition or any alternative care. Be as complete and accurate as possible. *Buspar, Paxil, Amitriptilene, plus others, didn't realy [sic] help enough to function normaly [sic], just made things a little better but not enough pain relief, to help enough.*

"Secondary medical condition, injury or illness for which you use marijuana as medicine? *Anxiety attacks* Date of onset of illness or injury *1998*

"Describe any treatment, surgery or medication prescribed for this condition or any alternative care. Be as complete and accurate as possible. *Can be trigured [sic] by loud noises, or certain smells or be in closed in small spaces; also the nausea [sic] and cramping can be trigured [sic] by Anxiety Attacks.*

"List any other medical reason for which you use marijuana. *Can't sleep enough*.

"How does marijuana help your condition? *It seems to eliminate 95% of my Anxiety Attacks; and nausea [sic], stomatch [sic] cramps, and vomiting are 90% less in ocurrence [sic].*

"Does marijuana reduce your need for prescribed medication? *YES*

"Do you use marijuana to alleviate unwanted side effects of any prescribed medications? *In the past.* If yes, list these side effects and how marijuana helps. Be as complete and accurate as possible. *Buspar takes away nausia* [sic] *but gave me diarea* [sic]*, marijuana stoped* [sic] *the diarea* [sic]

Have you experienced any unwanted side effects from medical use of marijuana? *No*

The second page of the "Present Medication Condition" form listed a number of medications, including "Other," and asked Complainant to note all medications he was currently taking, all medications he had discontinued, and any "unwanted side effects, or reason(s) for discontinuing." Complainant did not indicate that he was currently taking any medications. He noted he had discontinued Xanax, Paxil, Prozac, Aspirin, Ibuprofen, Buspar, and Amitryptiline. His stated reasons for discontinuing these drugs were the following (Complainant's response in italics):

> "Xanax – Increased nausia [sic]
>
> Paxil – Depresion [sic]
>
> Prozac - Depresion [sic]
>
> Aspirin – no reason given
>
> Ibuprofen – no reason given
>
> Buspar – Depresion [sic], diarea [sic], low bowel control
>
> Amitryptiline - Depresion [sic], withdraw from social events"

13) In order to obtain an OMM card, an applicant must satisfy three primary requirements. First, provide personal information, including photo identification and physician's address. Second, pay a $55 fee for a new application or renewal, unless the applicant is "financially handicapped," in which case the fee is $20. Third, provide a written statement by the applicant's attending physician confirming: (1) that the applicant has one of

the debilitating medical conditions that are listed in the Oregon Medical Marijuana Act ("OMMA"), and (2) that the attending physician believes that the patient may benefit from the use of medical marijuana.

14) After consulting with Complainant, Dr. Leveque recommended that Complainant administer medical marijuana by "inhalation," with a frequency of "5-7" times per day based on his debilitating medical conditions of "severe nausea and vomiting" and "chronic cramps."

15) The Oregon Health Division issued OMM card number 09812 to Complainant on June 11, 2002. Complainant renewed his card when it expired on June 11, 2003. Complainant did not renew it when it expired in 2004 because he could not afford to see the doctor and pay the fees for the card.

16) Complainant worked as a lathe and grinder operator from September 1994 to June 1995. Complainant worked as a drill press operator and CNC machinist for Rosen from 1995 to 2001. The work he performed involved "setup, operate CNC milling machines, lathes, manual mills and lathes; make parts to complex blueprints with high tolerance work." Rosen laid off Complainant due to lack of work.

17) In 2003, Respondent used Staffing Services, Inc. ("SSI"), a temporary employment agency located in Eugene, Oregon, to screen and refer workers to Respondent.

18) In 2003, Respondent's agreement with SSI included a stipulation that all prospective workers referred to Respondent were to undergo a drug screen by SSI before starting work at Respondent's facility. SSI itself had a written drug testing policy that stated, in pertinent part:

> "To help ensure a safe and healthful working environment, job applicants and employees may be asked to provide body substance samples (such as urine and/or blood) to determine the illicit or illegal use of drugs and alcohol. Refusal to submit to drug testing may result in disciplinary action, up to and including termination of employment."

19) On January 13, 2003, Complainant filled out an employment application at SSI.

20) Sometime in the following week, SSI referred Complainant to an interview at Respondent's shop for a position as drill press operator. At that time, Complainant was working at Shamrock Steel, a fabrication shop, where his duties included operating the burn table and big drill and general shop help.

21) SSI did not ask Complainant to take a drug test before referring him to Respondent's workplace or at any time during Complainant's employment with Respondent. Edwards, SSI's sales associate, did not tell Complainant about SSI's requirement for a drug test.

22) Complainant went to Respondent's shop and was interviewed by Kelly White, Respondent's machine shop foreman. White offered employment to Complainant, who accepted. During the interview, White told Complainant that at the end of 90 days Respondent required prospective permanent employees to take a pre-employment drug screen before they could be hired as permanent employees.

23) At all times material, Respondent's policy when hiring temporary employees referred by SSI was to use them a minimum of three months. After that, the employees were evaluated as to whether they would be needed any further. If Respondent decided there was enough work to justify hiring them, the employees were required to undergo a comprehensive drug screen at a local hospital. The purpose of the drug screen was to test for the presence of illegal drugs.

24) At all times material, Respondent had a written drug policy that is printed on its "Conditional Job Offer" form, a form shown to prospective employees at the time Respondent makes a conditional job offer to them. In pertinent part, it reads:

> "Emerald Steel Fabricators, Inc. is committed to providing a safe and drug-free workplace. Reporting for work under the influence of alcohol or controlled or illegal drugs is strictly prohibited. While on Emerald Steel premises or during working hours, no employee may use, possess, distribute, sell, or be under the influence of alcohol, controlled or illegal drugs, or any other substance that may impair job performance or pose a hazard to the safety and welfare of the employee or other individuals."

Complainant was never shown a copy of that policy.

25) Complainant did not tell anyone at SSI or Respondent when he applied for work that he had an OMM card because he was afraid he wouldn't be hired.

26) Complainant reported to work at Respondent's facility on January 23, 2003, about a week after his interview. Neither White nor anyone else working at Respondent's asked Complainant at that time or any other time if he had taken a drug test at SSI or to take a drug test.

27) Respondent hired Complainant because of increased orders from Peterson Pacific, a logging equipment manufacturer whose orders comprised "90-95%" of the work done in Respondent's machine shop.

28) Complainant's basic work schedule at Respondent's was 7 a.m. – 4:30 p.m., Monday through Friday. His starting wage was $10 per hour. Complainant averaged five hours of overtime work per week.

29) White was Complainant's immediate supervisor throughout his employment with Respondent and told Complainant

when to report to work and what work to perform.

30) During Complainant's employment at Respondent, SSI's interactions with Complainant were limited to delivering paychecks to Respondent once a week for distribution of wages to Complainant and other temporary employees whom SSI referred to Respondent.

31) Respondent employed two temporary employees referred by SSI – Bill Chance and George McGeorge -- during Complainant's first week of employment with Respondent. Chance and McGeorge were paid $8 per hour. McGeorge began work for Respondent on December 23, 2002, as a helper/clean-up person in Respondent's machine shop.[5]

32) While Complainant worked at Respondent's facility, SSI issued his paychecks. His paychecks were initially based on a $10 per hour wage rate. In turn, SSI billed Respondent $14.50 for every straight time hour that Complainant worked.

33) During Complainant's employment, Respondent had 20-25 fulltime employees.

34) Complainant was hired to operate a drill press in Respondent's machine shop and Complainant performed that job while employed by Respondent.

35) Complainant showed up for work on time and performed his work satisfactorily. White never disciplined Complainant and never talked to him about his attitude or any work related issues.

36) On two occasions, Complainant told White that he liked his job and wanted to keep it.

37) White gave Complainant a $1 per hour raise on March 1, 2003, raising his pay to $11 per hour. White's general policy is to give temporary employees a raise three to four weeks after hire if their work is satisfactory.

38) Complainant continued to experience nausea and severe stomach cramps while in Respondent's employ, usually in the morning but sometimes throughout the day.

39) Complainant used medical marijuana one to three times per day while employed by Respondent. It gave him partial relief from his nausea and stomach cramps. He never used medical marijuana at work or on Respondent's property. The number of times he used it depended on his symptoms that day.

40) While Complainant was employed with Respondent, there were eight employees in the machine shop, including Complainant and White. All eight employees could operate the drill press. Complainant, Larry Groesbeck and Chris Quest were the primary drill press operators during Complainant's employ. The other employees operated a lathe

[5] No evidence was offered to show Chance's job duties or the area in which he worked.

(manual and CNC) and did millwork (CNC).

41) On March 6, 2003, Complainant told White that he needed to let him know about his "medical problem" to see if it affected his chances of being hired as a regular employee. Complainant told White he had an OMM card. White asked Complainant if he had tried other medication for his medical problem. Complainant said he had, but medical marijuana worked best for him. Complainant told White he was hoping to be hired as a regular employee by Respondent, that he needed White to be aware of his medical problem, and that he hoped this information would not get him fired. Complainant did not identify his specific medical problem, but showed White his OMM card and the paperwork completed by Dr. Leveque[6] as part of Complainant's application for his OMM card. White told Complainant he did not know the answer, but he would talk it over with his boss.

42) Prior to Complainant's disclosure of his use of medical marijuana, White did not suspect that Complainant used marijuana or any other drug.

43) White met with Mathews and told him that Complainant had an OMM card, that Complainant used medical marijuana for a medical condition, and that Complainant wanted to know if Respondent was going to hire him as a regular employee. In response to Mathews's inquiry, White told Mathews that Complainant said it was the only drug he could take that alleviated his medical problem. White also told Mathews that Complainant was doing a reasonably good job. Mathews and White discussed whether Complainant would be hired and decided there was no need to keep Complainant on fulltime or hire him as a regular employee.[7]

44) From the time Complainant told White about his OMM card until Complainant's termination, neither Mathews nor White asked Complainant if there was anything Respondent could do to help Complainant with his medical problem and neither Mathews nor White made any additional inquiry about Complainant's medical problem.

45) On March 13, 2003, Complainant told White that he needed to move to a different residence and needed to know if Respondent was going to hire him. White told Complainant he wasn't needed to work for Respondent anymore.

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

[7] White's specific testimony in this regard was:

Q. "Whose decision was it to terminate Mr. Scevers?"

A. "Don and I both discussed it. He [Complainant] had asked for a decision and we did not see a need to keep him on fulltime or hire him and he needed to know whether or not that was going to happen."

46) Respondent employed eight other temporary employees referred by SSI during Complainant's employment with Respondent. Five worked in Respondent's fabrication shop as welders or painters. Two worked as "Helper/Clean-up" in Respondent's machine shop. There is no evidence as to the duties performed by Bill Chance, the eighth temporary employee. At the time of Complainant's discharge, Chance, who was paid $8 per hour, was the only temporary employee working in the machine shop.

47) On March 25, 2003, Respondent hired Russ Williams as a temporary helper in the machine shop. On April 2, 2003, Respondent hired Joseph Jordan as a temporary helper in the machine shop. On April 21, 2003, Respondent hired Wade Risley as a temporary CNC lathe operator in the machine shop. Between June 1 and June 30, 2003, Respondent hired five temporary employees in the fabrication shop. Williams, Jordan, and Risley were still employed in Respondent's machine shop on June 30, 2003.[8] No evidence was presented as to how long Williams, Jordan, and Risley continued to be employed by Respondent, if at all, after June 30, 2003, or as to their wage rate.

48) After Complainant's discharge, Respondent did not hire any temporary employees to operate the drill press in the machine shop. Instead, other permanent employees in Respondent's machine shop operated the drill press. Respondent has not hired any permanent, fulltime employees since Complainant's discharge.

49) Peterson Pacific had a substantial slowdown in work in June 2003.

50) Complainant had been optimistic and excited about his job with Respondent. He felt distraught and depressed when he was terminated and experienced heightened anxiety and sleep disturbance because of his discharge. These feelings were "pretty severe" for three weeks, at which time Complainant's anxiety, depression, and sleeplessness returned to their normal levels.

51) Complainant had to borrow money to keep his rental place after his discharge. Complainant collected unemployment benefits and was still collecting unemployment benefits at the time of the hearing.

52) Complainant was depressed and pessimistic and had a lot of negative feelings before going to work for Respondent. He had financial troubles before he started work for Respondent and continued to experience financial

[8] The forum infers that Williams, Jordan, and Risley were still working for Respondent as of June 30, 2003, based on Mathews's sworn responses to the Agency's interrogatories in which the Agency asked for "a list of all employees that were laid off during the time period November 1, 2002, through June 30, 2003." Williams, Jordan, and Risley were not listed in Respondent's answer.

troubles after his discharge from Respondent's employment.

53) Respondent referred Complainant back to SSI after discharging him. Complainant went to SSI, where Edwards told Complainant she would find other employment for him. Thereafter, Complainant called SSI every morning until September 10, 2003, when Edwards referred Complainant to a labor job at Rosboro that involved stacking lumber and sweeping up sawdust and veneer chunks. That job was a temporary job on graveyard shift (11 p.m. to 7 a.m.) that paid $13.77 per hour. Complainant worked one hour, then left because of pain in his low back.

54) After Respondent discharged him, Complainant asked about work at Shamrock and was told no jobs were available. Complainant also looked for work with other employers.

55) On May 30, 2003, Complainant visited the Compassion Clinic again and completed a form titled "PATIENT CLINIC RENEWAL." The form asked him to provide information by completing several phrases. Those phrases follow, with Complainant's responses printed in italic:

> "My debilitation condition as I understand it is *severe chronic nausia* [sic], *and cramps in stomatch* [sic], *wieght loss* [sic], *fatiuge* [sic]
>
> "My condition has changed since my last visit *No*
>
> "My condition has not changed since my last visit with the doctor *Leveque*

There is no evidence that he was seen by a doctor on this visit.

56) On July 21, 2003, Complainant visited the Compassion Clinic for the purpose of renewing his registration with the OMM program and was examined by Dr. Alan Cohn, MD. In the "Attending Physician's Statement" required by the OMM program, Dr. Cohn noted that Complainant had the debilitating medical conditions of "severe pain" and "severe nausea." In a section for comments, Dr. Cohn wrote "* * * also long documented hty of chronic N & V along * * * diarrhea. Cannabis reportedly provides best relief."[9] Dr. Cohn also made the following handwritten notes:

> "S. Pt has stomach cramps and nausea 'Too high strung, discharged from military because of it. Panic attacks'--tried buspar (built up tolerance) amytriptine, just not effective, … made me * * *. Heartburn daily, pepcid AC 2-3x day. Wellbutrin fenegran tried in the past. Pt. did not like how they made me feel. Anxiety triggers it all leading to nausea. Reduced ETOH. Cannabis 'takes away the nausea instantly, takes away the cramping and depression.'

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[9] Several abbreviations in his comments are illegible and have therefore been reproduced in this sentence as "* * *."

> "Medical record were reviewed and are on file[.]
>
> "O: Physical examination
>
> "A: GERD with nausea & pain which pt. uses cannabis to relieve. Also * * *, panic * * * ETOH * * *[.]
>
> "P: Discussed nutritional * * * and strategies. Also relaxation techniques[.]
>
> "Follow up with me in one year. The PCP or pt. will call me as needed with questions, concerns or problems. Vaporization as route of administration has been described and discussed. Risk information sheet regarding use of cannabis was provided to the pt."

57) Complainant then renewed his OMM registration in 2003, but did not renew it when it expired in 2004 because he could not afford to see the doctor and pay the fees for the card.

58) On or about November 1, 2003, Complainant started work for Chrome World as a CNC machinist. Complainant was paid $14 per hour. He worked Monday through Friday and started on swing shift before being transferred to day shift. He worked for approximately one month, earning $3,095.75 in gross wages. He was fired on December 1, 2003. He was upset and distressed over being fired.

59) Kelly White, Patricia Edwards, Elizabeth Price, and Grant Higginson were credible witnesses and the forum has credited their testimony in its entirety.

60) Don Mathews gave credible testimony at the hearing, but his sworn answers relating to Respondent's reasons for discharging Complainant that he made in response to the Agency's interrogatories were not credible, for reasons explained in the Opinion. Mathews's testimony at hearing was believed when it was corroborated by other credible testimony, but the forum has not believed the statements he made in his response to the Agency's interrogatories regarding the reasons for Complainant's discharge.

61) Stella Eller was a credible witness. Her testimony about Complainant's medical and emotional state and behavior, both before and after his employment with Respondent, was candid and consistent with Complainant's medical records. Her testimony has been credited in its entirety.

62) John Eller, Complainant's stepfather, testified primarily about his observations of Complainant's medical problems and Complainant's reaction to being discharged by Respondent. His testimony regarding Complainant's post-discharge emotional distress corroborated the testimony of Complainant and Stella Eller, his wife and Complainant's mother. However, his testimony was somewhat exaggerated. For example, he described Complainant as being "devastated" at being terminated, adding that "[Complainant] worried himself sick"

over it, and further testified that Complainant "frantically" began looking for other work. Neither Complainant nor Stella Eller, who was in a better position to observe Complainant's emotional distress than her husband, described Complainant's emotional distress in such dramatic terms. Consequently, the forum has only credited his testimony regarding Complainant's emotional distress when it was corroborated by the credible testimony of Stella Eller and Complainant.

63) Complainant was extremely soft spoken, difficult to hear, and did not make eye contact with anyone present at the hearing. He expressed no emotion whatsoever in his testimony or demeanor, even when testifying about his emotional distress. With two exceptions, his testimony was internally consistent and consistent with prior statements concerning the issues in the hearing. First, Complainant told the Agency's investigator that he had not used marijuana before the medical marijuana program, whereas he testified at hearing that he used marijuana for six years before obtaining his OMM card, a fact he also previously reported to at least two physicians. Second, Complainant testified that he reported his OMM card to White about two to three weeks after he was hired, then later testified he reported his card to White one week prior to his discharge. Since Complainant worked seven consecutive weeks (January 23 – March 15, 2003), this creates an inconsistency of three to four weeks. Because Respondent does not dispute the "one week prior" reporting date, the forum has concluded that that Complainant first reported his OMM card to White one week prior to his discharge. The forum has credited all of Complainant's testimony except for these two inconsistencies.

ULTIMATE FINDINGS OF FACT

1) At all times material, Respondent Emerald Steel Fabricators, Inc. was an Oregon employer involved in the manufacturing of steel products and employed six or more employees, including Complainant.

2) From 1992 until the time of hearing, Complainant has continually suffered from the conditions of anxiety disorder, panic attacks, nausea, vomiting, and severe stomach cramps that have substantially limited his ability to eat.

3) Complainant sought medical treatment for these conditions. Between January 1996 and November 2001, Complainant was prescribed or administered numerous drugs, including Amitriptyline, Buspar, Elavil, Inapsine, Klonopin, Paxil, Phenergan, Promethazine, Prozac, Wellbutrin, Xanax, and Zoloft. None of these drugs alleviated his conditions for an extended period of time and some had negative side effects.

4) In 1996, Complainant also began using marijuana to self-medicate his conditions and continued to use marijuana for this reason, except for brief periods,

up to the time of hearing. Marijuana gave him the best relief from his conditions through the time of the hearing, but did not completely alleviate his conditions.

5) On April 28, 2002, Complainant consulted with Dr. Leveque of the Compassion Clinic for the purpose of obtaining an OMM card. Dr. Leveque recommended that Complainant use medical marijuana 5-7 times a day based on his debilitating medical conditions of “severe nausea and vomiting” and “chronic cramps.”

6) On June 11, 2002, the Oregon Health Division issued an OMM card to Complainant, with an expiration date of June 11, 2003. Complainant renewed his card in 2003, but did not renew it in 2004 because he could not afford to see the doctor and pay the fees for the card.

7) On January 23, 2003, Respondent employed Complainant as a drill press operator.

8) Complainant worked an average of 45 hours per week while employed by Respondent. His starting wage was $10 per hour. His work was satisfactory and he was given a raise to $11 per hour on March 1, 2003. He was supervised by Kelly White.

9) Complainant used medical marijuana one to three times per day while employed by Respondent. He never used marijuana at work or on Respondent’s property. Before March 6, 2003, his supervisor did not suspect that Complainant used marijuana or any other drug.

10) On March 6, 2003, Complainant told White, his supervisor, that he had an OMM card and used medical marijuana for a medical problem. Complainant showed White the paperwork completed by Dr. Leveque as part of Complainant’s application for his OMM card. White asked Complainant if he had tried any other medications to deal with his medical problem. Complainant said he had, but medical marijuana worked best for him.

11) White met with Mathews, Respondent’s owner, and told him that Complainant had an OMM card and used medical marijuana for a medical condition.

12) From the time Complainant told White about his OMM card until Complainant’s discharge, neither Mathews nor White asked Complainant if there was anything Respondent could do to help Complainant with his medical problem and neither Mathews nor White made any additional inquiry about Complainant’s medical problem.

13) On March 13, 2003, White discharged Complainant.

14) There was work available for Complainant in Respondent’s machine shop through June 30, 2003.

15) Respondent could have reasonably accommodated Complainant.

16) Respondent did not show that providing Complainant with reasonable accommodation would have imposed an undue

hardship on the operation of Respondent's business.

17) Respondent did not discharge Complainant because he is a disabled person.

18) Complainant experienced substantial emotional distress for three weeks as a result of his discharge from Respondent's employment.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent was an employer subject to the provisions of ORS 659A.100 to ORS 659A.139.

2) The actions, inactions, statements, and motivations of Donald Mathews and Kelly White are properly imputed to Respondent.

3) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the persons and subject matter herein and the authority to eliminate the effects of any unlawful employment practice found. ORS 659A.800 to ORS 659A.865.

4) At all times material herein, Complainant was a "disabled person" as defined by ORS 659A.100(1)(a).

5) Complainant requested reasonable accommodation for his physical and mental limitations. Respondent violated ORS 659A.112(2)(e) by failing to engage in a meaningful interactive process with Complainant to determine if his limitations could be reasonable accommodated and by not providing him with reasonable accommodation that was available.

6) Respondent violated ORS 659A.112(2)(f).by denying employment opportunities to Complainant based on Respondent's need to make reasonable accommodation to Complainant's physical and mental impairments.

7) Respondent did not discharge Complainant because of his disability in violation of ORS 659A.112(1).

8) Respondent did not apply standards, criteria or methods of administration to Complainant that had the effect of discrimination based on Complainant's disability and did not violate ORS 659A.112(2)(c).

9) Respondent did not apply qualification standards to Complainant that screened him out or tended to screen him out because he was a disabled person and did not violate ORS 659A.112(2)(g).

10) Pursuant to ORS 659A.850, the Commissioner of the Bureau of Labor and Industries has the authority under the facts and circumstances of this case to award Complainant lost wages resulting from Respondent's unlawful employment practice and to award money damages for emotional distress sustained and to protect the rights of Complainant and others similarly situated. The sum of money awarded and the other actions required of Respondent in the Order below are an appropriate exercise of that authority.

OPINION

RESPONDENT WAS COMPLAINANT'S EMPLOYER

In its answer, Respondent raised the defense that SSI, not Respondent, was Complainant's employer. "Employer" is defined in ORS 659A.001(4) as "any person who, in this state, directly or through an agent, engages or uses the personal service of one or more employees, reserving the right to control the means by which such service is or will be performed." A "person" includes a corporation. ORS 659A.001(9). An employer must employ "six or more persons" to be subject to the provisions of ORS chapter 659A.100 to ORS 659A.145. ORS 659A.109.

It is undisputed that SSI was a temporary employment service that hired Complainant and referred him to Respondent, who employed six or more persons, for an interview. SSI paid Complainant's wages, billing Respondent for the amount of Complainant's wages, plus a premium. While Complainant performed work for Respondent, his work was supervised and controlled by Respondent, as were the terms and conditions of his employment. SSI's only appearance at Respondent's workplace while Complainant worked there was to deliver weekly paychecks for Complainant and SSI's other employees. Based on these facts, the forum concludes that Respondent was Complainant's employer.[10]

COMPLAINANT IS A "DISABLED PERSON"

The Agency has alleged that Respondent unlawfully discriminated against Complainant in violation of ORS 659A.112(1), ORS 659A.112(2)(c), ORS 659A.112(2)(e), ORS 659A.112(2)(f), and ORS 659A.112(2)(g). To be protected by those statutes, a Complainant must be a "disabled person." A "disabled person" is "an individual who has a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment or is regarded as having such an impairment." ORS 659A.100(1)(a).

A. <u>Complainant has mental and physical impairments.</u>

OAR 839-006-0205(10) defines "physical or mental impairment" as:

> "any physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting one or more of the following body systems: neuro-

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[10] *See In the Matter of Servend International, Inc.,* 21 BOLI 1 (2000), *aff'd without opinion, Servend International, Inc. v. Bureau of Labor and Industries,* 183 Or App 533, 53 P3d 471 (2002) (respondent and temporary employment service who referred all temporary employees to respondent were found to be joint employers of complainant under similar circumstances).

logical, musculoskeletal, special sense organs, respiratory (including speech organs), cardiovascular, reproductive, digestive, genito-urinary, hemic and lymphatic, skin and endocrine; or any mental or psychological disorder, such as mental retardation, organic brain syndrome, emotional or mental illness, and specific learning disabilities."

Undisputed testimony by Complainant and his mother and Complainant's medical records established that Complainant has suffered from a number of physiological, disorders or conditions and mental or psychological disorders for at least 10 years. Among the conditions and disorders are nausea, severe stomach cramps, and vomiting, which affect the digestive system; anxiety, depression, and panic attacks, which are emotional illnesses; and sleep disorder. Complainant's medical records indicate that his nausea and vomiting have been associated with his anxiety and panic attacks. Complainant's medical records also confirm that Dr. Leveque recommended medical marijuana for him to treat his chronic nausea, stomach cramps, and vomiting. The forum concludes that Complainant's depression, anxiety, panic attacks, sleep disorder, long-term nausea, stomach cramps, and vomiting constitute physical and mental impairments as defined in OAR 839-006-0205(10).

B. Complainant's physical and mental impairments substantially limit one or more of Complainant's major life activities.

ORS 659A.100(2)(a) provides that "[m]ajor life activity includes but is not limited to, self-care, ambulation, communication, transportation, education, socialization, employment and ability to acquire, rent or maintain property. OAR 839-006-0205(6)(a) further provides that "[e]xamples of specific major life activities include, but are not limited to, walking, sitting, standing, lifting, reaching, speaking, interacting with others, seeing, hearing, breathing, learning, sleeping, performing manual tasks, reproduction and working." Complainant's medical records documented that Complainant's anxiety and panic attacks trigger his nausea, stomach cramps, and vomiting, which in turn make it difficult or impossible for him to eat, and that Complainant's sleep disorder causes problems with his sleep. Sleeping and eating[11] are both major life activities. In contrast, although Complainant's medical records revealed a continuing diagnosis of depression, no evidence was presented to show which of Complainant's major life activities, if any, were specifically impacted by his depression.

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[11] *See Fraser v. Goodale,* 342 F3d 1032, 1039 (9th Cir. 2003), *cert. den.* 541 U.S. 937, 124 S.Ct. 1663,158 L.Ed.2d358 (2004) (under the ADA, "eating is a major life activity").

ORS 659A.100(2)(d) states that " [s]ubstantially limits" means:

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

OAR 839-006-0212 provides additional guidance in determining whether a person is substantially limited. It states:

> "(1) The following factors should be considered in determining whether a person with an impairment is substantially limited in a major life activity:
>
> "(a) The nature and severity of the impairment;
>
> "(b) The length of time an impairment persists or is expected to persist; and
>
> "(c) The permanent or expected long-term effect resulting from the impairment.
>
> "(2) The determination of whether a person is substantially limited in a major life activity must be made on a case-by-case basis."

The medical evidence presented was insufficient for the forum to determine the specific nature and severity of sleep disorder Complainant suffers from,[12] the extent to which his sleeping has been affected and how consistently it has been affected, how long it is expected to persist, and the resultant permanent or expected long-term effect. Consequently, the forum cannot conclude that Complainant is "substantially limited" in his sleeping under ORS 659A.100(2)(d) and OAR 839-006-0212.[13] In contrast, there was substantial evidence that Complainant's anxiety, panic attacks, nausea, stomach cramps, and vomiting are chronic ongoing conditions that have chronically impaired his ability to eat for at least 10 years. This is a substantial restriction in the manner in which Complainant has been able to eat as compared to the manner under which the average person in the general population eats. There is no evidence that these conditions are likely to go away. In its original Final Order, the forum concluded that these facts alone supported a conclusion that Complainant was substantially limited in the major life activity of eating. Based on the Oregon Supreme Court's sub-

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[12] Complainant's medical records showed that his sleep problems ranged from sleeping too much to sleeping too little.

[13] *Fraser, supra,* at 1040 (fact that an impairment causes a person to suffer "some limit" does not mean that the person suffers a "substantial limit").

sequent decision in *Washburn v. Columbia Forest Products,* 340 Or 469, 134 P3d 161 (2006), the forum reconsiders this conclusion.

In *Washburn*, plaintiff, a millwright, alleged that his employer was required to accommodate his use of medical marijuana. Plaintiff suffered from muscle spasms in his legs that, left untreated, "limit[ed] his ability to sleep." "At one time," he "took prescription medication that alleviated those spasms and helped him to rest[.]" His doctor then approved his use of medical marijuana. He "began smoking marijuana in the evening before going to bed, and, according to plaintiff, the marijuana was more effective in helping him sleep than the prescription drugs[.]" *Id.* at 472, 162.

The trial court in *Washburn* granted defendant's motion for summary judgment on the grounds that Complainant was not a qualified person with a disability under Oregon law because his mitigating use of medical marijuana "alleviate[d] [his] problem and because the OMM does not require employers to accommodate medical marijuana users. *Washburn v. Columbia Forest Products,* 197 Or App 104, 108, 611 (2005). The Court of Appeals reversed, holding Oregon courts are not bound to consider mitigating measures in determining whether or not a person is "disabled." *Id.* at 111, 613. The Court also rejected the trial court's conclusion that the OMM does not require employers to accommodate medical marijuana users, holding that that "question remains to be resolved by the trial court, applying pertinent aspects of Oregon disability law to the particular facts." *Id.* at 116, 616.

On review, the Supreme Court concluded that "the question of plaintiff's status as a disabled person is dispositive in this case" and limited its scope of inquiry to that issue. *Washburn,* 340 Or 469, 134 P3d 161 (2006) at 164, 475. Based on a textual analysis, the Court concluded that ORS 659A.100(1)(a) requires the definition of "'disabled person' to be construed in light of mitigating measures that counteract or ameliorate an individual's impairment." *Id.* at 166, 479. The Court then held as follows:

> "In this case, plaintiff argues that he is disabled by virtue of his leg spasms, a condition that he claims substantially limits one of his major life activities, i.e., sleeping. However, as the trial court noted below, it is undisputed that plaintiff is able to counteract those leg spasms and the resulting sleep problems by using prescription medication. As a result, we conclude that, because plaintiff can counteract his physical impairment through mitigating measures, his impairment does not, at this time, rise to the level of a substantial limitation on a major life activity. Consequently, we *480 conclude that plaintiff is not a "disabled person" for purposes of ORS 659A.112 to 659A.139. Because plaintiff is

> not a "disabled person" under those statutes, employer had no statutory duty to accommodate plaintiff's physical limitation in the manner sought by plaintiff."

Id.

In this case, Complainant, like the plaintiff in *Washburn*, tried to obtain relief from his medical conditions through prescription medications and medical marijuana, but did not achieve the same result. Complainant's medical history, reflected in Findings of Fact – The Merits 4-11, reveals that 12 different medications were either prescribed or administered to him by physicians between 1996 and 2001 for the purpose of counteracting his stomach cramps, nausea, vomiting, anxiety, and panic attacks; his physicians associating the latter two conditions with his stomach cramps, nausea, and vomiting. None of these medications gave him relief from his conditions for an extended period of time and some had negative side effects. In 1996, Complainant began using marijuana to self medicate his conditions, and he obtained an OMM card in 2003. His credible testimony and medical records establish that the medical marijuana worked better than his prescription medications, but still only gave him partial relief. Despite his attempts to obtain relief by using prescription medication and medical marijuana, alone or in combination, Complainant continued to experience nausea, stomach cramps, and vomiting that, in turn, made it difficult for him to eat because he would vomit up his food after eating. The Commissioner hereby takes notice that the average person in the general population does not become nauseated and vomit after eating. In conclusion, the forum finds that, even with mitigating measures, Complainant's impairments significantly restrict the condition and manner under which he has been able to eat, compared to the condition and manner under which the average person in the general population can eat. The forum concludes that Complainant is substantially limited in the major life activity of eating and is a "disabled person" under ORS 659A.100(1)(a).

RESPONDENT'S AFFIRMATIVE DEFENSES

Respondent raised four affirmative defenses in its answer that were rejected in a similar medical marijuana case decided by the Oregon Court of Appeals after Respondent filed its answer. *See Washburn v. Columbia Forest Products, Inc.,* 197 App 104, 104 P3d 609 (2005). Those affirmative defenses include the following:

> "Oregon's Medical Marijuana Law does not require employers to accommodate the use of medical marijuana in the workplace or to accommodate off-duty use of medical marijuana in such a fashion that the employee would or could still be affected by such usage while on duty.

> "Respondent is not required to accommodate medical marijuana users by permitting them to work in safety-sensitive positions that would or could endanger the safety of themselves, co-workers or the public.
>
> "Respondent is free to require that employees behave in conformance with the Federal Drug-Free Workplace Act of 1988. ORS 659A.127(4). The protections of that Act do not apply to someone illegally using drugs, and marijuana is an illegal drug under Federal Law.
>
> "Oregon law prescribes that ORS 659A.112 be construed to the extent possible in a manner that is consistent with any similar provisions of the Federal Americans with Disabilities Act of 1990, as amended. ORS 659A.139. That Act does not permit the use of marijuana because marijuana is an illegal drug under Federal Law."

At hearing, Respondent conceded that *Washburn*, as it stood at the time of hearing, would result in these four affirmative defenses being denied as a matter of law and did not present any evidence in support of them.

As noted earlier, the Oregon Supreme Court reversed the Court of Appeals decision on May 4, 2006. However, the court's scope of inquiry did not reach to any of these affirmative defenses. As a result, the forum does not consider them.

RESPONDENT DISCHARGED COMPLAINANT BASED ON HIS USE OF MEDICAL MARIJUANA

At hearing, Respondent argued that Complainant was discharged because he "ducked" SSI's drug test, and that this constitutes a legitimate, nondiscriminatory reason ("LNDR") for Complainant's discharge. Respondent provided no evidence at hearing to show that Respondent discharged Complainant for this reason. In fact, there was no evidence to establish that Respondent was aware that Complainant had not taken a drug test at SSI at the time Mathews and White made their decision to discharge Complainant. The following two statements by Mathews in Respondent's responses to the Agency's interrogatory #8 are the only evidence in the record in support of Respondent's argument.

> "Emerald Steel Fabricators did not discharge Mr. Scevers because he suffers from stomach problems. His temporary employment ended because, by his own admission, he could not pass a drug test and comply with our drug policy. If Mr. Scevers had undergone the initial drug screen per our agreement with Staffing Services, Inc. and had failed to pass, or if he had disclosed his marijuana use, he would not have been placed on a work assignment at Emerald Steel."
>
> "We believe that Anthony Scevers intentionally misrepresented his eligibility for a

> temporary work assignment at Emerald Steel Fabricators by failing to disclose his marijuana use and not completing the pre-placement drug screen at Staffing Services."

There is no evidence Complainant stated he could not pass a drug test or that he was even aware of Respondent's drug policy, as that policy was not provided to employees until a conditional job offer was made to them, and Respondent never made a conditional job offer to Complainant. Furthermore, Mathews's statements do not specify that Complainant was discharged for this perceived misrepresentation, only that Respondent believed Complainant had made a misrepresentation.

Although White told Complainant during his initial interview that Respondent required prospective permanent employees to take a pre-employment drug screen before they could be hired as permanent employees, there is no evidence that Complainant was ever asked about drug use by anyone at SSI or Respondent prior to his disclosure of his OMM card to White. Complainant credibly testified that he did not tell anyone at SSI or Respondent when he applied for work that he had an OMM card because he feared he wouldn't be hired if he disclosed this information. Although the evidence was undisputed that Respondent's agreement with SSI required SSI to drug test all employees, there was no evidence that either SSI or Respondent asked Complainant to take a drug test or that Complainant took any deliberate action to evade taking a drug test.

To sum up the relevant facts, on March 6, 2003, Complainant told White that he used medical marijuana for a medical problem and showed him Dr. Leveque's written statement that Complainant had the debilitating medical conditions of "severe nausea," "vomiting," and "chronic cramps." Complainant said he hoped to be hired as a regular employee by Respondent and needed White to be aware of his medical problem, and that he hoped this information would not get him fired. Up to that time, Complainant's work was satisfactory, Respondent had no problems with his work, and White had no suspicions that Complainant was used marijuana or any other drug. White then told Mathews that Complainant had an OMM card, that Complainant used medical marijuana for a medical condition and said medical marijuana was the only drug he could take that alleviated his medical problem, that Complainant hoped to be hired as a permanent employee, and that Complainant was doing a reasonably good job. Mathews and White discussed whether Complainant would be hired and decided there was no need to keep Complainant on full time or hire him as a regular employee. When White next talked to Complainant about employment with Respondent, he told Complainant that his services were no longer needed.

In addition to Respondent's failed LNDR argument, Respondent argued alternatively that work had slowed down and Complainant's services were no longer needed. This argument is undercut by credible evidence that Respondent hired three more temporary employees through SSI to work in its machine shop within five weeks of Complainant's discharge to perform work that Complainant had the skills to perform and these employees continued to work until at least June 30, 2003.[14]

The foregoing evidence points overwhelmingly to one conclusion – Respondent discharged Complainant solely because he disclosed his use of medical marijuana. There is no credible evidence that Respondent relied on any other factor in its decision to discharge Complainant.

Respondent's discharge of Complainant based on his use of medical marijuana is not a *per se* violation of ORS 659A.112(1). In pertinent part, ORS 659A.112(1) provides: "It is an unlawful employment practice for any employer to * * * discharge from employment * * * because an otherwise qualified person is a disabled person." Mathews and White were both aware that Complainant used medical marijuana for his medical problems, and Complainant gave Dr. Leveque's note to White. However, there is no evidence to show either that Mathews was even aware of Complainant's specific medical problems or of any intent on White's part to discharge Complainant because of those medical problems. Rather, all the evidence points to the fact that Respondent discharged Complainant solely because he used medical marijuana, not because of his physical or mental impairments that qualify him as a "disabled person" under ORS 659A.100(1)(a). This is not a violation of the discharge prohibition in ORS 659A.112(1). Although the forum has concluded that Respondent did not violate ORS 659A.112(1) by discharging Complainant, this conclusion does not resolve the Agency's allegations that Respondent failed to reasonably accommodate Complainant's known physical or mental limitations and denied him employment opportunities based on Respondent's need to make reasonable accommodation to Complainant's physical or mental impairments.

REASONABLE ACCOMMODATION

ORS 659A.112(2) provides in part that "[a]n employer violates subsection (1) of this section if the employer does any of the following:"

> "(e) The employer does not make reasonable accommodation to the known physical or mental limitations of an otherwise qualified disabled person who is a job applicant or employee, unless the employer can demonstrate that the accommodation would impose an undue hardship on the opera-

[14] *See* Findings of Fact 16, 47 – The Merits, *supra*.

tion of the business of the employer.

"(f) The employer denies employment opportunities to a job applicant or employee who is an otherwise qualified disabled person, if the denial is based on the need of the employer to make reasonable accommodation to the physical or mental impairments of the employee or applicant."

The Agency alleged that Respondent violated subsection (2)(e) by failing "to make reasonable accommodation or to engage in interactive dialog regarding reasonable accommodations for the known physical or mental limitations of Complainant." ORS 659A.139 provides that "ORS 659A.112 to 659A.139 shall be construed to the extent possible in a manner that is consistent with any similar provisions of the federal Americans with Disabilities Act, as amended." 42 U.S.C. § 12112(b)(5)(A) of the Americans with Disabilities Act ("ADA") is similar to ORS 659A.112(2)(e) and the forum relies in part on federal case law interpreting this provision in the forum's interpretation and application of ORS 659A.112(2)(e).

The Agency further alleged that Respondent violated subsection (2)(f) by its "denial of employment to Complainant * * * based on Respondent's need to make reasonable accommodation for Complainant's known physical or mental impairments."

A. <u>Complainant was entitled to reasonable accommodation under ORS 659A.112(2)(e).</u>

Reasonable accommodation is required under ORS 659A.112(2)(e) & (f) when an employee is "an otherwise qualified disabled employee." The forum has already determined that Complainant is a "disabled" person. ORS 659A.115 provides that "[f]or the purposes of ORS 659A.112, a disabled person is otherwise qualified for a position if the person, with or without reasonable accommodation, can perform the essential functions of the position." "Essential functions" are the "fundamental duties of a position a disabled person holds or desires." OAR 839-006-0205(4).

The "position" in this case was drill press operator in Respondent's machine shop, the position that Complainant was initially hired to perform and sought to continue performing. It is undisputed that Complainant performed all the duties of this position in a satisfactory manner during his employment with Respondent, making him an "otherwise qualified disabled person."

An employer's duty to reasonably accommodate an employee or job applicant is triggered when an employee or applicant requests accommodation or when the employer recognizes the need for accommodation. *Stamper v. Salem-Keizer School District,* 195 Or App 291, 97 P3d 680 (2004), *citing Barnett v. U.S. Air, Inc.,* 228

F3d 1105 (9th Cir. 2000), *vac'd on other grounds sub nom U.S. Airways, Inc. v. Barnett,* 535 U.S. 391, 122 S.Ct 1516, 152 L.Ed.2d 589 (2002).

When an employee requests accommodation, the employee must let the employer know that the employee needs an adjustment or change at work for a reason related to a medical condition. The employee need not mention the ADA, Oregon laws protecting disabled persons, or the term "reasonable accommodation."[15] In this case, Complainant told his supervisor that he used medical marijuana for a medical problem and disclosed his problem as "severe nausea and vomiting" and "chronic cramps" while inquiring if this would affect his chances at permanent employment. Under Oregon law, this constituted a request for reasonable accommodation.

B. <u>Respondent violated ORS 659A.112(2)(e) by failing to engage in a meaningful interactive process with Complainant.</u>

The Agency alleges that Respondent's failure to engage in an "interactive dialog" with Complainant regarding his need for accommodation was a *per se* violation of ORS 659A.112(2)(e). Although neither ORS chapter 659A nor BOLI's administrative rules specifically mention or require an "interactive dialog" as part of an employer's duty to reasonable accommodate a disabled person, the Oregon Court of Appeals provided guidance on this issue in *Stamper*.

In *Stamper,* a teacher alleged discrimination based on the school district's failure to reasonably accommodate his disability under the ADA and ORS 659.112. One of the issues before the court was plaintiff's allegation that the school district unreasonably refused to engage in a meaningful interactive process concerning how his disability might be accommodated. The court noted that neither Oregon law nor BOLI administrative rules specifically require an "interactive process," then stated that the Ninth Circuit Court of Appeals[16] and other federal courts have held that the ADA's reasonable accommodation provisions require employers to engage in a meaningful interactive process with employees who have a disability and seek an accommodation. *Stamper* at 297. The court did not specifically discuss whether Respondent's several offers of accommodation to Complainant constituted engagement in a "meaningful interactive process," but impliedly held that ORS 659A.112 requires

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[15] *See, e.g., Schmidt v. Safeway, Inc.,* 864 F. Supp 991, 997 (D. Or. 1994) ("the [ADA] does not require the plaintiff to speak any magic words before he is subject to its protections.")

[16] *See Barnett v. U.S. Air, Inc.,* 228 F3d 1105 (9th Cir. 2000), *vac'd on other grounds sub nom U.S. Airways, Inc. v. Barnett,* 535 U.S. 391, 122 S.Ct 1516, 152 L.Ed.2d 589 (2002).

an employer to engage in a meaningful interactive process with an employee who seeks accommodation for a disability. This forum adopts the same standard.

In this case, Complainant used medical marijuana as a physician recommended, legal palliative measure for his disability. He was in the same position as any other person with a disability who has to take prescribed medication on a regular basis to cope with their disability. He disclosed his use of medical marijuana to White, his supervisor, because he hoped to obtain permanent employment with Respondent and knew that Respondent required prospective employees to pass a drug test. At the time he disclosed his use of medical marijuana to White, he also disclosed his disability by showing White documentation that he used medical marijuana for the debilitating medical conditions of severe nausea, vomiting, and chronic cramps. At this point of disclosure, Respondent became legally obligated to engage in a meaningful interactive process with Complainant to see if reasonable accommodation was possible. This did not happen. Instead, Respondent's sole inquiry before discharging Complainant was whether Complainant had tried any medication other than marijuana for his medical conditions. Respondent's failure to engage in a meaningful interactive process to determine if Complainant's disability could be reasonably accommodated constitutes a violation of ORS 659A.112(2)(e).

In its exceptions, Respondent implies that the interactive process would have been fruitless because no reasonable accommodation was possible. As discussed below, the Agency presented evidence that reasonable accommodation was possible. In addition, Respondent misses a critical point. Engaging in a meaningful interactive process is the mandatory first step in the process of reasonable accommodation, and failure to engage in that process is a *per se* violation of ORS 659A.112(2)(e), regardless of whether Respondent was ultimately able to provide Complainant with a reasonable accommodation.

C. <u>Respondent violated ORS 659A.112(2)(e) by failing to reasonably accommodate Complainant.</u>

In the context of this case, "reasonable accommodation" is a change in working conditions made for an "otherwise qualified disabled employee" so that the employee can perform the essential functions of the job. Although the steps that an employer must take to make "reasonable accommodation" are not specifically set out in ORS chapter 659A, ORS 659A.118(1) provides some examples of actions an employer may take that constitute reasonable accommodation. Those include:

> "(a) Making existing facilities used by employees readily accessible to and usable by disabled persons.

"(b) Job restructuring, part-time or modified work schedules or reassignment to a vacant position.

"(c) Acquisition or modification of equipment or devices.

"(d) Appropriate adjustment or modification of examinations, training materials or policies.

"(e) The provision of qualified readers or interpreters."

The administrative rules promulgated by BOLI interpreting Oregon's employment disability laws further define "reasonable accommodation" to mean "modifications or adjustments:"

"(a) To a job application process that enable a qualified disabled applicant to be considered for the position;

"(b) To the work environment, or to the manner or circumstances under which a position is customarily performed, that enable a qualified, disabled person to perform the position's essential functions; or

"(c) That enable a covered entity's disabled employee to enjoy equal benefits and privileges of employment as are enjoyed by similarly situated, non-disabled employees."

OAR 839-006-0205(11). OAR 839-006-0206 also provides examples of reasonable accommodation, but these are of little help, as they merely parrot the examples set out in ORS 659A.118.

Respondent argues in its exceptions that the Agency presented no evidence that there was any reasonable accommodation available for Complainant. Respondent is in error. First, the Agency established through the testimony of White and Complainant that Complainant performed his job duties satisfactorily for seven weeks without any accommodation whatsoever. This establishes that the accommodation of simply allowing Complainant to continue his employment was available. Respondent's defense to this accommodation was to demonstrate that it posed an "undue hardship on the operation of [its] business[.]" ORS 659A.112(2)(e). Respondent presented no evidence in support of that defense. Second, the forum draws an inference from evidence presented by Respondent concerning its drug testing policy and the use of illegal drugs by its employees that a second accommodation was available.[17] The primary concern raised by Respondent at hearing was whether Complainant was using illegal drugs that would have been detected through Respondent's or SSI's drug tests. One way of satisfying Respondent's concern and reasonably accommodating Complainant would have been to require Complainant

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[17] *See In the Matter of Labor Ready Northwest, Inc.,* 23 BOLI 156, 202 (2002), *appeal pending* ("[P]roof includes both facts and inferences.")

to take SSI's standard drug test that SSI usually conducted on employees referred to Respondent. If SSI's test showed no illegal drugs other than marijuana, which Complainant was authorized to use under Oregon law, Respondent could allow Complainant to continue his temporary employment so long as there was work for him, then engage in an interactive dialog with Complainant to address any concerns about how Complainant's off-duty use of medical marijuana related to his work. This accommodation fits within the scope of "appropriate adjustment or modification of examinations" in ORS 659A.118(1)(d) and "modifications or adjustments" to "a job application process that enable a qualified disabled applicant to be considered for the position" in OAR 839-006-0205(11)(a) and would have also applied to Respondent's potential consideration of Complainant as a permanent employee. Again, Respondent provided no evidence that this procedure would have caused an "undue hardship" to Respondent's business.

In conclusion, Respondent violated ORS 659A.112(2)(e) by failing to make reasonable accommodation to Complainant's known physical or mental limitations.

D. Respondent violated ORS 659A.112(2)(f) by denying Complainant employment opportunities based on Respondent's need to make reasonable accommodation to Complainant's physical and mental impairments.

Complainant disclosed his use of medical marijuana and related disability to White because he hoped to become a permanent employee and was aware he would need to pass a drug test if Respondent decided to extend a job offer to him. At that point, Respondent was put on notice that Complainant required reasonable accommodation in order to continue his employment, as a positive drug test for marijuana, an illegal drug in Oregon[18] except when used under the provisions of the OMMA, automatically disqualified applicants from employment with Respondent. It is undisputed that Complainant's work was satisfactory up to the point of his discharge, and that Respondent had actually given him a raise. White, Complainant's supervisor, testified that Complainant's use of marijuana did not affect Complainant's work in an observable manner. Instead of engaging in an interactive process with Complainant to determine if reasonable accommodation was possible, Respondent inquired only whether Complainant had tried

[18] ORS 475.992(4) makes persons "in unlawful possession of less than one avoirdupois ounce of the dried leaves, stems and flowers of the plant Cannabis family Moraceae" guilty of a "violation" and subject to a fine or "not less than $500 and not more than $1,000."

any other medications for his disability, then discharged him because he used medical marijuana.

In this case, "employment opportunities" included both Complainant's temporary employment and the possibility of permanent employment with Respondent. Credible evidence in the record shows that a temporary employment opportunity was available for Complainant through at least June 30, 2003. There is no reliable evidence to show whether Complainant would have been hired as a permanent employee.

Respondent admits, and the forum has concluded, that Respondent discharged Complainant based on his use of medical marijuana, a drug that Complainant legally used to enable him to cope with his physical and mental impairments. Since Respondent was unwilling to employ someone who used marijuana, this created a "need" for Respondent to make reasonable accommodation for Complainant's physical or mental impairments so that Complainant could continue his "employment opportunity" as a temporary employee. Respondent, unwilling to meet this need, summarily terminated Complainant's temporary employment opportunity and violated ORS 659A.112(2)(e).

RESPONDENT DID NOT VIOLATE ORS 659A.112(2)(C) OR ORS 659A.112(2)(G)

The Agency also alleged in its Formal Charges that Respondent violated ORS 659A.112(2)(c) and ORS 659A.112(2)(g). Those two subsections provide that "[A]n employer violates subsection (1) of this section if the employer does any of the following:

> "(c) The employer utilizes standards, criteria or methods of administration that have the effect of discrimination on the basis of disability, or that perpetuate the discrimination of others who are subject to common administrative control."
>
> "(g) The employer uses qualification standards, employment tests or other selection criteria that screen out or tend to screen out a disabled person or a class of disabled persons unless the standard, test or other selection criterion, as used by the employer, is shown to be job-related for the position in question and is consistent with business necessity."

The Agency contends that Respondent violated ORS 659A.112(2)(c) by "apparently assum[ing], when the record was to the contrary, that Complainant was unable to perform the essential functions of his job, that Complainant had job safety issues, that Complainant was intoxicated or under the influence of marijuana while performing his job, or that Complainant could not pass a drug screening test." The Agency contends that Respondent violated ORS 659A.112(2)(g) in that "[a]cting on the apparent assumptions detailed [in the

previous sentence] amounts to use of qualification standards that screen out or tend to screen out a disabled person, with no showing that the standard is job related and consistent with business necessity * * *."

The Agency's allegation is based on the Agency's theory that Respondent acted on certain assumptions when it took actions towards Complainant that resulted in Complainant's discharge, and that those assumptions were "standards, criteria or methods of administration" or "qualification standards, employment tests or other selection criteria." There is no credible evidence in the record to support a conclusion that Respondent assumed that Complainant was unable to perform the essential functions of his job or had job safety issues, that Complainant was intoxicated or under the influence of marijuana while performing his job, or that Complainant could not pass a drug screening test.[19] Without proof that Respondent's discharge of Complainant was based on these assumptions, the Agency cannot prevail in its allegations that Respondent violated ORS 659A.112(2)(c) and ORS 659A.112(2)(g).

DAMAGES

In its Formal Charges, the Agency sought $20,000 in lost wages and $25,000 for emotional distress. The forum awards Complainant lost wages and emotional distress damages based on Respondent's failure to reasonably accommodate Complainant, in violation of ORS 659A.112(2)(e), and Respondent's denial of employment opportunities to Complainant based on its need to make reasonable accommodation to Complainant, in violation of ORS 659A.112(2)(f). Damages are not predicated solely on Respondent's failure to engage in a meaningful interactive process with Complainant in violation of ORS 659A.112(2)(e).[20]

A. Lost Wages.

The purpose of a back pay award is to compensate a complainant for the loss of wages and benefits the complainant would have received but for the respondent's unlawful discrimination. *See, e.g., In the Matter of Southern Oregon Subway, Inc.,* 25 BOLI 218, 242 (2004). Where a respondent commits an unlawful employment practice by discharging a complainant, the forum is authorized

[19] In response to the Agency's interrogatory, Mathews stated that "[Complainant's] temporary employment ended because, by his own admission, he could not pass a drug test * * *." The forum has not concluded that Respondent assumed Complainant could not pass a drug test because it did not believe Complainant made that admission to Respondent.

[20] *See Barnett, supra,* at 1116 ("[E]mployers, who fail to engage in the interactive process in good faith, face liability for the remedies imposed by the statute if a reasonable accommodation would have been possible.")

to award the complainant back pay for the hours the employee would have worked absent the discrimination. *In the Matter of Northwest Pizza, Inc.,* 25 BOLI 79, 88 (2004). A complainant who seeks back pay is required to mitigate damages by using reasonable diligence in finding other suitable employment. *See, e.g., In the Matter of Servend International, Inc*., 21 BOLI 1, 30 (2000), *aff'd without opinion, Servend International, Inc. v. Bureau of Labor and Industries,* 183 Or App 533, 53 P3d 471 (2002).

Respondent's records established that, at the time of Complainant's discharge, he worked an average of 45 hours per week at the wage rate of $11 per hour and $16.50 per hour for overtime. He was a temporary employee who had been referred by SSI, with the hope, but no promise, of permanent employment. Up to the time of his discharge, his work had been satisfactory, and he had received one pay raise. There was no evidence that Respondent would have terminated his employment on March 13, 2003, had Complainant not disclosed his use of medical marijuana. From the date of Complainant's discharge to June 30, 2003, Respondent hired three more persons through SSI to work in Respondent's machine shop, and all three were still working as of June 30, 2003. Respondent has hired no permanent employees in its machine shop since Complainant's discharge.

Complainant credibly testified that he actively looked for work after his discharge and that he did not find comparable work until on or about November 1, 2003. There was credible evidence that Respondent experienced a slowdown in the machine shop beginning in June 2003 and no evidence presented as to how long the three temporary employees referred by SSI after Complainant's discharge continued to work after June 30, 2003, if at all. The forum declines to speculate as to how long Complainant might have continued to work after June 30, 2003, had he not been discharged, and awards him back pay from March 14 through June 30, 2003. Calculated at $522.50 per week (40 hours at $11 per hour; 5 hours at $16.50 per hour), Complainant would have earned an additional $8,013.50, had he not been discharged. Complainant earned no other income during that time period to offset that award.

B. <u>Emotional Distress.</u>

In determining damages for emotional distress, the commissioner considers a number of things, including the type of discriminatory conduct, and the duration, frequency, and pervasiveness of that conduct. The amount awarded depends on the facts presented by each complainant. *Northwest Pizza, Inc.,* 25 BOLI at 89. A complainant's testimony about the effects of a respondent's conduct, if believed, is sufficient to support a claim for emotional distress damages. *Id*.

The Agency relied on the testimony of Complainant, his mother, and his stepfather to establish emotional distress damages. The forum found Complainant and his mother to be credible witnesses as to the type and extent of Complainant's emotional distress and relies on their testimony to formulate a damage award.

The Agency established that Complainant experienced significantly heightened levels of anxiety, depression, and sleeplessness for three weeks after his discharge, at which time his anxiety, depression, and sleeplessness returned to their normal levels. These are all types of emotional distress for which the Commissioner has previously awarded damages. *See, e.g., Northwest Pizza, Inc.,* 25 BOLI at 90; *In the Matter of Alpine Meadows Landscape,* 19 BOLI 191, 216 (2000). The fact that Complainant suffered from the same symptoms at a reduced level prior to his discharge is not a bar to an award of damages, but the forum must consider that fact in calculating an appropriate award. *See In the Matter of Magno-Humphries,* 25 BOLI 175, 199 (2004), *appeal pending*; *In the Matter of Entrada Lodge, Inc., amended final order on remand*, 24 BOLI 126, 154 (2003). The Agency also established that Complainant experienced financial troubles as a result of his discharge. However, the Agency did not establish that those troubles caused him any more distress than the continual financial troubles he had experienced since obtaining his OMM card. Consequently, the forum does not consider Complainant's financial difficulties in calculating emotional distress damages.

The forum bases its award of emotional distress damages on Complainant's significantly heightened levels of anxiety, depression, and sleeplessness for three weeks after his discharge. Because of Complainant's neutral demeanor, almost complete lack of eye contact, and total absence of expression during his testimony, as well as his prior and subsequent history of depression and anxiety, it was difficult to assess his level of emotional distress during those three weeks.

In its Formal Charges, the Agency asked the forum to award $25,000 in emotional distress damages to Complainant. The forum finds that figure to be excessive. Although awards of emotional distress damages are dependent on the facts presented in each case, the forum also strives for consistency with cases presenting similar issues and facts. Here, the forum finds that *Entrada*, a case heard in 2000, presented similar facts to support an emotional distress award. *Entrada* was an OFLA case in which the Complainant was not restored to her pre-OFLA leave position. Complainant was already experiencing considerable stress and acute financial distress at the time Respondent failed to restore her. For three weeks after Respondent failed to restore her, Complainant

experienced a heightened stress level that manifested itself in frequent tears, worry, fright, and additional financial distress. The Commissioner awarded $15,000 in emotional distress damages. Based on the similarities between *Entrada* and this case and the fact that *Entrada* is five years old, the forum finds that $20,000 is an appropriate award of emotional distress damages.

RESPONDENT'S EXCEPTIONS

A. Exception 1.

Respondent's first exception disputed the ALJ's characterization that the *Washburn* decision cited in the Proposed Opinion rendered four of Respondent's affirmative defenses "moot." Because that case was on appeal at the time the original Final Order was issued, the forum modified the language in the section in the Opinion discussing these affirmative defenses to correctly characterize their status. Since then, the Supreme Court issued its decision and reversed the Court of Appeals, but did not address any of these four affirmative defenses. Consequently, the forum declines to consider them.

B. Exception 2.

Respondent excepted to the ALJ's conclusion in the Proposed Opinion that "[t]here is no evidence Complainant stated * * * that he was even aware of Respondent's drug policy." Respondent correctly points out that the ALJ concluded in Proposed Finding of Fact 1[6] – The Merits that White told Complainant that Respondent "required prospective employees to take a pre-employment drug screen before they could be hired as permanent employees." These two statements are not mutually exclusive. Respondent's drug policy and the requirement of a pre-employment drug screen are two different things. As stated in the Proposed Opinion and also stated in Proposed Finding of Fact 18 – The Merits, which Respondent did not contest in exceptions, Complainant was never shown a copy of Respondent's drug policy. Respondent's exception is overruled.

C. Exception 3.

Respondent excepted to the ALJ's statement in the Proposed Opinion that "Respondent violated ORS 659A.112(2)(e) by failing to make reasonable accommodation for [Complainant] [.]". Respondent argued that "[c]omplainant introduced no evidence that there was any reasonable accommodation available for him. * * * Complainant made no showing that there was any fashion in which is [sic] use of medical marijuana could have been accommodated at this job position." Respondent is mistaken. Undisputed evidence that Complainant's job performance prior to his discharge was satisfactory and inferences that can reasonably be drawn by evidence in the record establish the possibility that Respondent could have reasonably accommodated Complainant. This is explained in more detail in the Opinion, which has been modified to address Respondent's exception.

D. Exception 4.

Respondent excepted to the ALJ's statements in two different sections of the Proposed Opinion that Complainant would not have failed a drug screening test. In response, the forum has deleted the first statement and modified the second.

E. Exception 5.

Respondent excepted to the proposed award of $20,000 for emotional distress damages. ORS 659A.850(4) authorizes the commissioner to issue an Order requiring a respondent to "[p]erform an act * * * reasonably calculated to carry out the purposes of this chapter, to eliminate the effects of the unlawful practice that the respondent is found to have engaged in, and to protect the rights of the complainant * * *." ORS 659A.103(1) states that "[i]t is the public policy of Oregon to guarantee disabled persons the fullest possible participation in the social and economic life of the state [and] to engage in remunerative employment * * * without discrimination." ORS 659A.103(2) states that "[t]he right to otherwise lawful employment without discrimination because of disability where the reasonable demands of the position do not require such a distinction * * * [is] hereby recognized and declared to be the rights of all the people of this state. It is hereby declared to be the policy of the State of Oregon to protect these rights[.]" The $20,000 award recommended in the Proposed Order is consistent with the purposes set out in ORS 659A.103. It is supported by a preponderance of the evidence in the form of credible testimony by Complainant, his mother, and his stepfather and is an appropriate exercise of the commissioner's discretion. Respondent's exception is overruled.

RESPONDENT'S SUPPLEMENTAL EXCEPTION

In a supplemental exception, Respondent asked that the forum consider *Gonzales v. Raich*, 125 S. Ct. 2195 (2005), a medical marijuana case decided after the Proposed Order was issued. Respondent argued that *Raich* supported Respondent's fourth and fifth affirmative defenses. In *Raich*, the U. S. Supreme Court held that Congress has the authority to prohibit the wholly local cultivation of marijuana even if it was used for wholly medicinal purposes pursuant to California law. According to the Oregon Attorney General, *Raich* does not invalidate the OMMA nor require that Oregon repeal the OMMA, and does not oblige Oregon to follow the federal Controlled Substances Act, 21 USC § 801 *et seq.*[21] Accordingly, *Gonzales* does not affect the outcome of this case.

ORDER

NOW, THEREFORE, as authorized by ORS 659A.850, and to

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[21] Chief Counsel for Oregon Department of Justice, June 17, 2005, letter of advice to Susan M. Allan, Public Health Director, Department of Human Services.

eliminate the effects of Respondent's violations of ORS 659A.112(2)(e) and ORS 659A.112(2)(f), and in payment of the damages awarded, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **Emerald Steel Fabricators, Inc.** to:

1) Deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, a certified check payable to the Bureau of Labor and Industries in trust for Complainant Anthony L. Scevers in the amount of:

a) EIGHT THOUSAND THIRTEEN DOLLARS AND FIFTY CENTS ($8,013.50), less appropriate lawful deductions, representing wages lost by Anthony L. Scevers between March 13, 2003, and June 30, 2003, as a result of Respondent's unlawful practices found herein, plus interest at the legal rate on that sum from July 1, 2003, until paid, plus

b) TWENTY THOUSAND DOLLARS ($20,000), representing compensatory damages for emotional distress, plus interest on that sum at the legal rate from the date of the Final Order until paid.

2) Cease and desist from discriminating against any employee or prospective employee based upon the employee's disability.

In the Matter of

TROY WINGATE.

Case No. 69-06

Final Order of Commissioner Dan Gardner

Issued July 18, 2006

SYNOPSIS

Respondent, a residential painting contractor, failed to complete and return BOLI's 2005 prevailing wage rate survey by the date BOLI had specified. The Commissioner found that aggravating circumstances outweighed the mitigating evidence presented by the Respondent, and that $750 was an appropriate civil penalty for Respondent's violation of ORS 279C.815(3). ORS 279C.815(3), ORS 279C.865; OAR 839-025-0520; OAR 839-025-0530; OAR 839-025-0540.

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Dan Gardner, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on June 6, 2006, in the conference room of the Oregon Bureau of Labor and Industries, 3865 Wolverine NE, E-1, Salem, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter Cynthia L. Domas, an employee of the Agency. Respondent Troy Wingate was present and was not represented by counsel.

The Agency called two witnesses: Marsha Jossy and Vee Souryamat, Wage and Hour Division employees.

Respondent called himself as a witness.

The forum received into evidence:

a) Administrative exhibits X-1 through X-16 (submitted or generated prior to hearing);

b) Agency exhibits A-1 through A-3 (submitted prior to hearing), and A-4 through A-6 (submitted at hearing).

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

FINDINGS OF FACT – PROCEDURAL

1) On March 24, 2006, the Agency issued a Notice of Intent to Assess Civil Penalties ("Notice") in which it alleged that Respondent Troy Wingate Painting was an employer that performed nonresidential construction work in 2005 and received the Commissioner's 2005 Construction Industry Occupational Wage Survey, failed to complete and return the forms by September 19, 2005, as required by the Commissioner, and has never completed and returned the Survey, in violation of ORS 279C.815(2). The Agency alleged the violations were aggravated in that Respondent knew, or should have known of these violations and had more than ample opportunity to comply with the law, but failed to do so; that Respondent failed to take appropriate action

after having its violation pointed out to remedy the violation or prevent its recurrence; and that the Agency had to expend significant resources trying to obtain Respondent's compliance with the law. The Agency further alleged that the violation was serious and of great magnitude of the violation since it affects the Commissioner's ability to accurately determine the prevailing wage rates and could result in skewing of the established rates, which in turn impacts contractors, subcontractors, and employees throughout the site working on public projects and also on the public agencies and the public fisc. The Agency sought a civil penalty of $1,000 for the alleged violation.

2) On March 27, 2006, Troy Wingate faxed three pages to the Agency in response to its Notice of Intent, including a one page answer and request for hearing on behalf of Troy Wingate Painting, in which Wingate alleged, among other things:

> "* * * I didn't think the survey applied to me when it was first mailed because I noticed that it said on the front of the survey that it applied to commercial work. I only do residential work * * *. I have complied with you by returning the completed survey * * *."

3) On April 27, 2006, the Hearings Unit issued a Notice of Hearing to Respondent and the Agency stating the time and place of the hearing as June 6, 2006, at 10:00 a.m., at BOLI's Salem office located at 3865 Wolverine St. NE, Bldg. E-1, Salem, Oregon. Together with the Notice of Hearing, the forum sent a copy of the Order of Determination, a document entitled "Summary of Contested Case Rights and Procedures" containing the information required by ORS 183.413, a Servicemembers Civil Relief Act (SCRA) Notification, and a copy of the forum's contested case hearings rules, OAR 839-050-000 to 839-050-0440.

4) On April 28, 2006, the Agency moved to amend its Notice of Intent by interlineation as follows:

> a) Delete the "(c)" after the cite to ORS 279C.815(c) in the first line of paragraph 1, so it reads "The Commissioner, consistent with ORS 279.815, established . . .";
>
> b) Change paragraph 2 in the following manner by interlineation:
>
> i) Change the first full sentence to "Respondent, an Oregon employer during all times relevant in 2005, received . . ."
>
> ii) Change the cite to ORS 279.815(2) to ORS 279C.815(3),"
>
> iii) Change the cite to OAR 839-025-530(3)(i) to OAR 839-025-530(n).

Respondent filed no objections, and on May 9, 2006, the ALJ granted the Agency's motion.

5) On May 8, 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."

6) On May 10, 2006, the Agency moved a second motion to amend its Notice of Intent by interlineation to name "reflect the real party in interest, Troy Wingate." In support of its motion, the Agency attached a Corporation Division check to show that "Troy Wingate Painting is not registered with the Division" and a CCB license check "showing the business as a sole proprietorship."

7) On May 17, 2006, Troy Wingate mailed objections to the Agency's motion for partial summary judgment.

8) On May 24, 2006, the ALJ issued an Interim Order granting the Agency's second motion to amend and denying 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.

9) On May 30, 2006, the Agency filed a second motion for partial summary judgment, this time against Respondent Troy Wingate. The motion was based on the same grounds as the original motion.

10) On June 2, 2006, the ALJ issued an Interim Order denying the Agency's second motion for partial summary judgment because of timeliness. In pertinent part, the Interim Order stated:

> "The hearing in this matter is scheduled for June 6, 2006. OAR 839-050-0150 does not place any time restrictions on when a motion for summary judgment may be filed. Given the significance of a summary judgment ruling and the fact that I am not able to issue a substantive ruling on the Agency's motion until June 5 because of my work schedule, I conclude that the Agency's motion is untimely. The Agency's motion is **DENIED**. The Agency will need to prove its case in its entirety at hearing."

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

12) The ALJ issued a proposed order on June 15, 2006, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. The Agency timely filed a request for an extension of time to file exceptions. Based on the Agency's showing of good cause, the ALJ granted an extension until July 3, 2006. On July 3, 2006, the Agency filed exceptions to the proposed order.

FINDINGS OF FACT – THE MERITS

1) Respondent was a sole proprietorship and painting con-

tractor in the year 2005 who only worked on residential projects. Respondent was also an employer in 2005. At all times material herein, Respondent received his mail at 1175 Tucker Road, Hood River, OR 97031.

2) The Research and Analysis section of the Employment Department contracted with BOLI in 2005 to conduct a Construction Industry Occupational Wage Survey. The BOLI Commissioner planned to, and did use the survey to aid in the determination of the prevailing wage rates in Oregon.

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

4) On July 5, 2005, the Employment Department mailed a "presurvey postcard" to Oregon business contractors, including "Troy Wingate Painting, 1175 Tucker Road, Hood River, OR 97031." The following pertinent statements were printed on the back of the folded postcard:

> "Oregon law requires the Commissioner of the Bureau of Labor and Industries to determine the prevailing wage rate for work performed in Oregon in specified trades and occupations in the construction industry. Your firm has been identified as a construction-related business.
>
> "Please review the information on the inside of this pre-survey postcard."

The following statements were printed on the inside of the folded postcard:

> "2005 CONSTRUCTION INDUSTRY OCCUPATIONAL WAGE SURVEY
>
> "The Construction Industry Occupational Wage Survey is an annual mandatory survey of all employers with construction-related employment. Your firm will receive a survey booklet in the mail in late August that contains all of the necessary forms and instructions for completing the survey.
>
> "The following guidelines will help your firm prepare your records.
>
> "The survey period includes September 1, 2004 through August 31, 2005.
>
> "You will be asked to select the week during which your firm performed the most **non-residential** hours of work. This week is referred to as your "peak week". You will only submit data for this peak week. If your firm does both residential and non-residential work, now may be a good time to begin to identify the non-residential jobs. The survey asks for wage data on **all non-**

residential work, not just prevailing wage work.

"You will be asked to identify the location of the work. Please keep track of the counties in which non-residential work is performed. A map will be included on the survey form to help you identify in which BOLI wage rate regions the counties are located.

"* * * * *

"If your firm has closed or no longer performs construction-related work, please call us at * * *. You may also contact us by e-mail at boli.survey@state.or.us."

5) On August 10, 2005, the Employment Department mailed a 2005 wage survey booklet to "Troy Wingate Painting, 1175 Tucker Road, Hood River, OR 97031" that included a postage paid envelope for return of the survey.

6) The 2005 wage survey booklet was 8½" x 11" in size, with the following words printed on the cover in several different sizes of large type (approximate relative sizes shown):

"**BOLI**

Oregon Bureau of Labor and Industries

This survey is

Required by Law

(ORS 279C.815)

CONSTRUCTION INDUSTRY

OCCUPATIONAL WAGE SURVEY 2005

FILING DEADLINE:

September 19, 2005

FOR PUBLIC AND PRIVATE PROJECTS

(DOES NOT INCLUDE RESIDENTIAL PROJECTS)"

7) The inside front cover of the 2005 wage survey booklet asked the recipient to provide the firm's name, name and title of the person who completed the survey, Construction Contractors Board (CCB) number, phone, e-mail, and fax number, along with a certification that the information provided in the wage survey was correct. The following language was printed immediately afterwards:

"THIS COVER AND THE NEXT FULL COLORED PAGE SHOULD BE REMOVED TO COMPLETE THE SURVEY. ELECTRONIC FILING INSTRUCTIONS ARE INCLUDED ON THE BACK OF THE WAGE DATA FORM.

"QUESTION 1 Did your firm do any non-residential work in the state of Oregon between September 1, 2004, and August 31, 2005? This includes excavation, remodeling, painting, and temporary workers

sent to construction sites. Labor performed on site in connection with material deliveries is also considered construction work. If your firm had no employees, other than the owner(s) or executive officers, please answer no."

Printed immediately after this statement was a large "NO" that could be circled and a bold arrow after it. Directly underneath the "NO" was printed "Go to Question 2." The following language was printed on the bottom on the inside front cover:

"You are required by Oregon law (ORS 279C.815) to provide this information. The full text of the law is available at *www.boli.state.or.us*. Failure to return this survey or filing fraudulent or incomplete information may result in penalties. Please retain a copy of your forms for your records."

8) Question 2 is printed on the lower half of the inside back cover of the booklet. It asks for a response to the following:

"Which of the following circumstances best describes why your firm answered no to Question 1:

"The firm did **only residential work** between September 1, 2004, and August 31, 2005.

"The firm is **closed.**

"The firm had **no employees** other than owners or corporate officers.

"The firm had **no work in Oregon** within the survey period.

"The firm had **subcontracted out all work.**

"The firm **does not do construction work.** (Please write below a brief description of the type of work the firm does.)

"If you answered **NO** to Question 1 and have checked a box for Question 2, please sign and return this form in the postage paid envelope. Do not complete the wage data form which is only for non-residential construction data."

9) Respondent received the survey booklet, but did not return it until March 2006 because he did not believe it applied to him. Respondent based his belief on the language on the front page of the booklet that stated "FOR PUBLIC AND PRIVATE PROJECTS (DOES NOT INCLUDE RESIDENTIAL PROJECTS)" and the fact that he only works on residential projects.

10) On September 26, 2005, the Employment Department mailed a reminder postcard to "Troy Wingate Painting, 1175 Tucker Road, Hood River, OR 97031." The following language was printed on the postcard:

"Survey Past Due [-] Please Respond

"The Oregon Employment Department recently mailed the Construction Industry Occupational Wage Survey book to your company. The survey filing deadline has passed. We

have not received a completed survey from your firm.

"If you received the survey book, please complete and return the survey form in the postage paid envelope. You may also e-mail your response to *boli.survey@state.or.us* following the electronic filing guidelines printed in the survey book.

"If you have not received the survey book or need assistance completing the survey, please contact the BOLI Wage Analysis Unit. You may call 503.947.1282 or toll free 800.262.3912 ext. 7-1282 (TDD 503.947.1391). You may also contact BOLI Wage Analysis Unit via e-mail: *boli.survey@state.or.us* or via fax at 503.947.1210.

"Your timely response and cooperation are essential for determining accurate and fair wage rates for Oregon's contractors and workers.

"You are required by Oregon law (ORS 279C.815) to provide the information requested. The full text of the law is available at *www.boli.state.or.us*. Filing fraudulent or incomplete information may result in a monetary fine (civil penalties) of up to $5,000."

11) On October 10, 2005, the Employment Department mailed a second 2005 wage survey booklet to "Troy Wingate Painting, 1175 Tucker Road, Hood River, OR 97031." The booklet was identical to the booklet sent to Respondent on August 10, 2005, with one significant difference – the following statements were also printed conspicuously on the front cover:

"SURVEY PAST DUE

"Please Respond Immediately

Final Notice"

12) Returned wage surveys were accepted and included in the survey results as late as October 28, 2005. The survey database was then closed to prepare for a rate setting meeting with the Commissioner of the BOLI and his staff on November 4, 2005. Any surveys received after October 28, 2005, were not considered when the Commissioner reviewed the survey data for the setting of the prevailing wage rates.

13) On February 17, 2006, the Prevailing Wage Unit of the Bureau of Labor and Industries mailed a letter to "Troy Wingate Painting, 1175 Tucker Road, Hood River, OR 97031" that contained the following pertinent language:

"The prevailing wage rate laws require the Commissioner of the Bureau of Labor and Industries to conduct an annual wage survey to determine the wages rates for work performed in Oregon in specified trades and occupations in the non-residential construction industry. * * * Based on the information obtained in this survey, prevailing rates of wage are determined by the Commissioner to be used on

public works contracts in the state.

"ORS 279C.815 requires you to report information pertaining to wages paid in non-residential construction to the Commissioner as requested in the annual survey. Our records indicate that despite reminders, you failed to return a report for the 2005 Construction Industry Occupational Wage Survey by September 19, 2005. Our records also indicate that this may not be the first time you have failed to respond as required. If that is the case, you have violated the law in multiple years.

"Since you have not responded to the survey, it has become necessary to begin the Administrative Process. We will soon serve upon you a Notice of Intent and ultimately a judgment in this matter. You are advised that failure to return this survey or filing fraudulent or incomplete information will result in penalties. We would prefer to resolve this matter prior to taking legal action; however, without your cooperation, this is not possible. You may stop this action by completing and returning the enclosed Industry Occupational Wage Survey by no later than March 3, 2006.

"If you did not perform any non-residential construction within Oregon during the time period covered by this survey, you can satisfy your legal obligation to respond to the survey by answering questions 1 and 2 of the survey as directed, signing it where indicated and returning it in the pre-addressed, postage paid envelope included in the survey booklet.

"If we do not receive a completed survey from you by March 3, 2006, we will assess a civil penalty against you based on your continuing violations. Each day that you do not provide the survey is a separate violation, and each violation can subject you to a civil penalty of up to $5,000. * * *"

14) From August 2005 to the present, Respondent has had two tenants in his house. Sometimes his roommates pick up his mail and misplace or mishandle it. Because of this, Respondent was not aware that the Employment Department's July 5, 2005 pre-survey postcard, or the Department's September 26 and October 10, 2005, reminders had been sent to him until he received the Agency's case summary. Respondent was also not aware of BOLI's February 17, 2006, letter until he received the Agency's case summary. Respondent has since resolved the problem with his tenants and they no longer handle his mail.

15) Jossy and Souryamat were credible witnesses and the forum has credited their testimony in its entirety.

16) With one exception, the forum found Troy Wingate's testimony entirely credible, including

his statement that he believed he was not required to complete the wage survey because of the language on the survey's front cover stating "FOR PUBLIC AND PRIVATE PROJECTS (DOES NOT INCLUDE RESIDENTIAL PROJECTS)." Wingate testified that he mailed a wage survey form to the Employment Department and faxed a copy to BOLI with his answer and request for hearing after receiving the Agency's Notice of Intent. The Employment Department's records do not show that they ever received a survey from Respondent, casting doubt on Wingate's claim that he mailed the survey to the Employment Department. There is no dispute that Respondent faxed his answer and request for hearing to BOLI. The answer, which is one page long, includes the statement "I have complied with you by returning the completed survey" and was offered by the Agency as Exhibit A-3. However, the fax machine printed the characters "P:1/3" on the upper right hand side of the answer, indicating that Respondent's fax included two more pages. Those pages were not offered in evidence. Exhibit A-5, which is a copy of the wage survey form pages that Respondent was required to submit and appears to be the original of a document Respondent filed in support of his objections to the Agency's motion for partial summary judgment, coincidentally is also two pages long. That document is dated "3/26/06," the date before Respondent faxed his answer to BOLI. Respondent's testimony, in combination with the missing pages that were in the Agency's power to produce or explain, creates an inference that Respondent in fact faxed the completed wage survey to BOLI with his answer.

ULTIMATE FINDINGS OF FACT

1) Respondent was an Oregon employer in the year 2005.

2) The Commissioner conducted a wage survey in 2005 that required persons receiving the surveys to make reports or returns to the Agency for the purpose of determining the prevailing rates of wage.

3) Respondent received the 2005 wage survey packet.

4) Respondent failed to return the completed survey by September 19, 2005, the date specified by the Commissioner.

CONCLUSIONS OF LAW

1) At all times material herein, Respondent was a person as defined in ORS 279C.815(1).

2) Respondent's failure to complete and return the Commissioner's 2005 wage survey in a timely manner constitutes one violation of ORS 279C.815(3).

3) The Commissioner has the authority to assess a civil penalty for violations of ORS 279C.815(3). ORS 279C.865. The imposition of a $750 civil penalty for Respondent's single violation of ORS 279C.815(3) is an appropriate exercise of the Commissioner's discretion.

OPINION

INTRODUCTION

To prove that Respondent violated ORS 279C.815(3), the Agency must establish the following elements:

(1) Respondent is a "person";

(2) The Commissioner conducted a survey in 2005 that required persons receiving the surveys to make reports or returns to the Agency for the purpose of determining the prevailing rates of wage;

(3) Respondent received the Commissioner's 2005 survey; and

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

In the Matter of Cedar Landscape, Inc., 23 BOLI 287, 292 (2002).

A. Respondent was a "person" in 2005.

Under ORS 279C.815(3), a "person" includes an employer. Respondent's admission that he employed persons in his painting business in 2005 proves the first element of the Agency's case.

B. The Commissioner conducted a wage survey in 2005.

The Agency submitted an affidavit by Leanna D. Harmon, a Research Analyst employed by the Oregon Employment Department, that established: (1) BOLI contracted with the Employment Department from 1999 to 2005 to conduct Construction Industry Occupational Wage Surveys; (2) the purpose of the surveys was to aid in the determination of the prevailing wage rates in Oregon; and (3) that those surveys, including the 2005 survey, were in fact conducted. The Agency also provided a copy of the survey booklet. This proves the second element of the Agency's case.

C. Respondent received the Commissioner's 2005 wage survey.

The Agency alleged in its Notice of Intent that Respondent received the Commissioner's wage survey in 2005 and Respondent testified that he received it at 1175 Tucker Road, Hood River, OR 97031, the address to which it was sent. This proves the third element of the Agency's case.

D. Respondent failed to return the 2005 wage survey within the time prescribed by the Commissioner.

Harmon's affidavit and the text printed on the front cover of the wage survey booklet establish that the filing deadline for the Commissioner's 2005 wage survey was September 19, 2005. Harmon's affidavit further establishes that any surveys submitted after October 28, 2005, could not be considered when the Commissioner reviewed the survey data for the setting of the prevailing wage rates because the Employment Department closed its survey database on that date to

prepare for a rate setting meeting with the Commissioner of BOLI and his staff on November 4, 2005. Respondent testified that he submitted the wage survey to the BOLI and Employment Department on or about March 27, 2005, but not before. This evidence establishes that Respondent did not timely submit the 2005 wage survey and satisfies the final element of the Agency's case.

CIVIL PENALTY

In this case, the Agency seeks a $1,000 civil penalty for Respondent's 2005 wage survey violation. In determining the appropriate size of the penalty, the forum must consider the aggravating and mitigating factors set out in OAR 839-025-0520.

A. Aggravating circumstances.

The Agency alleged several aggravating circumstances.

First, Respondent knew, or should have known, of his violation and had ample opportunity to comply with the law, but failed to do so. There is no dispute that Respondent actually received the wage survey booklet mailed to him on August 10, 2005, at 1175 Tucker Road, Hood River, OR 97031. Also undisputed is the fact that the Employment Department mailed its pre-survey notice and two reminders to the same address. Respondent did not dispute that these mailings arrived at his house, only that he did not receive them because of his tenants' mishandling of his mail. However, since the mailings were sent to the correct address, Respondent is accountable to have read them, despite any mishandling by his tenants.[1] Had Respondent read the pre-survey notice, he would have learned that the wage survey "is an annual mandatory survey of all employers with construction-related employment." Similarly, the Employment Department's first reminder would have informed him that he was "required by Oregon law * * * to provide the information requested."

Second, Respondent failed to take appropriate action, after having its violation pointed out, to remedy the violation or prevent its recurrence; and the Agency had to expend significant resources trying to obtain Respondent's compliance with the law. The Agency established that the Employment Department sent two reminder notices to Respondent after mailing the survey booklet, that the Agency sent a follow-up letter indicating its intent to issue a Notice of Intent and assess civil penalties if Respondent failed to comply, and that Respondent still failed to submit the 2005 wage survey, necessitating the present enforcement action.

Third, the Agency further alleged that the violation was serious and of great magnitude

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[1] *Cf. In the Matter of Landscape Company of Portland, LLC,* 22 BOLI 69, 76 (2001) (the disarray of respondent's internal affairs was not a mitigating factor; employers cannot avoid their legal responsibilities by inattention.)

since it affected the Commissioner's ability to accurately determine the prevailing wage rates and could result in skewing of the established rates, which in turn impacts contractors, subcontractors, and employees throughout the site working on public projects and also on the public agencies and the public fisc. Based on the fact that the survey asks contractors to state whether or not they performed non-residential construction, the forum infers that the survey was intended to be the Commissioner's source of information as to whether or not the surveyed contractors were required to submit wage data.[2] The forum further infers that, in the absence of Respondent fulfilling his legal obligation to complete and return the survey, the Commissioner had no way of knowing if Respondent had wage data that might affect the calculation of prevailing wage rates. If all contractors imitated Respondent's non-compliance, it would be impossible for the Commissioner to carry out his statutory duty of determining the prevailing wage rates. Consequently, even though Respondent would not have provided any wage data because he only performed residential work, during the survey period, this must be considered a serious violation. *See In the Matter of Emmert Industrial Corporation,* 26 BOLI 284, 289 (2005).

[2] If the Commissioner already knew this information, there would be no reason to ask for it in the survey.

B. <u>Mitigating circumstances.</u>

The forum considers two mitigating circumstances. First, because Respondent performed only residential work during the wage survey period, his failure to timely submit the wage survey had no statistical impact on the Commissioner's ability to carry out his statutory duty of accurately determining the prevailing wage rates. Second, his belief, based on the fact that he performed only residential work, that he was not required to complete the survey based on the following statement conspicuously printed on the front cover of the 2005 wage survey booklet: "FOR PUBLIC AND PRIVATE PROJECTS (DOES NOT INCLUDE RESIDENTIAL PROJECTS)." However, this belief is negated by the language in the pre-survey postcard stating that the survey was a "mandatory survey of all employers with construction-related employment."

C. <u>Amount of civil penalty.</u>

The Agency sought a civil penalty of $1,000. There are several aggravating factors and only one mitigating factor. Under the circumstances, $750 is an appropriate civil penalty.

AGENCY'S EXCEPTIONS

The Agency filed exceptions in which it objected to the ALJ's reduction of the proposed amount of civil penalty from $1,000 to $100. The forum has addressed those exceptions in the Opinion and increased the amount of civil penalty from $100 to $750.

ORDER

NOW, THEREFORE, as authorized by ORS 279C.865, and as payment of the civil penalty assessed as a result of his single violation of ORS 279C.815(3), the Commissioner of the Bureau of Labor and Industries hereby orders **Troy Wingate** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, a certified check payable to the Bureau of Labor and Industries in the amount of SEVEN HUNDRED AND FIFTY DOLLARS ($750.00), plus any interest that accrues at the legal rate on that amount from a date ten days after issuance of the Final Order and the date Respondent complies with the Final Order.

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