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1.0 GENERALLY

1.1 --- Definitions

1.1.1 --- "Apprentice"

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1.1.10 --- "Public Works Project"

☐ Turning first to the text of the statute, the forum tries to determine the meaning of the term "project;" it is defined neither in the statute, nor in appellate case law interpreting the statute. In the context of an earlier version of the prevailing wage statutes, the commissioner found that a "project" would include "a multi-phase endeavor that may encompass more than one contract." ***----- In the Matter of NW Housing Alternatives, Inc., 33 BOLI 165, 170 (2014).***

☐ The forum applied the dictionary definition of "project" as "an undertaking devised to effect the reclamation or improvement of a particular area of land." It was clear from the history of the board's consideration, as reflected in its minutes, that the reclamation of the entire parcel was considered as a unitary project from the beginning. The final reality will be a single redevelopment of the Requester's campus, with all three components — office, building, homeless shelter/community building, and affordable housing—designed by the same architect and built by the same general contractor at the same time. ***----- In the Matter of NW Housing Alternatives, Inc., 33 BOLI 165, 171 (2014).***

☐ A "project"—which is now a completely separate statutory sub-set of "public works"—may be much more all-encompassing than a single building ***----- In the Matter of NW Housing Alternatives, Inc., 33 BOLI 165, 172 (2014).***

☐ The forum concluded that notwithstanding the presence of several different buildings in Requester's campus redevelopment, and even though those buildings served various interests in the over-all mission of Requester, the over-all redevelopment constituted a single project. ***----- In the Matter of NW Housing Alternatives, Inc., 33 BOLI 165, 172 (2014).***

1.1.11 --- "Retainage"

1.1.12 --- "Trade or Occupation"

1.1.13 --- "Worker"

1.1.14 --- "Other"

2.0 AUTHORITY OF COMMISSIONER

☐ It is the responsibility of the commissioner to determine the prevailing rate of wage for workers in each trade or occupation in each locality. ***----- In the Matter of Hard Rock Concrete, Inc. and Rocky Evans, 33 BOLI 77, 96 (2014).***

Appeal pending.

3.0 TRADE OR OCCUPATION

☐ It would be impossible to determine the correct prevailing wage without determining which work falls into which "trade or occupation." In other words, the statutory obligation to determine the amount of the prevailing rate of wage is, inextricably, a function of the proper classification of the work. ***----- In the Matter of Hard Rock Concrete, Inc. and Rocky Evans, 33 BOLI 77, 96 (2014).***

Appeal pending.

4.0 APPRENTICES/TRAINEES

5.0 ART, INSTALLATION

6.0 BASIC HOURLY RATE OF WAGE

7.0 FRINGE BENEFITS

☐ In a prevailing wage case, when the evidence was that the employer paid an ascertained amount of money to a 401(k) plan, the stock market had crashed while the claimant's funds were invested in the account, the crash was of a severity that could explain the difference between the amount paid in

and the ultimate payout, and neither the agency nor the employer could demonstrate what happened to the particular funds credited to the claimant's account, the agency failed to satisfy its burden to prove that the employer did not pay all of the claimant's deducted fringe benefits into the 401(k) plan. ***----- In the Matter of Green Thumb Landscape and Maintenance, Inc., 32 BOLI 185, 198 (2013).***

8.0 RECORDS

☐ When the agency alleged allegation in its NOI respondents filed inaccurate and incomplete certified statements for work performed on a project and failed to certify the accuracy of the payroll, and the allegation in the applicable exhibit to the NOI was that respondent failed to keep records for 11 weeks before the project had begun and make them available to BOLI, and there was no evidence of respondent's submissions of certified payroll for the listed weeks, the forum dismissed the allegation based on the agency's failures to identify the violations correctly in the exhibit or to move to amend the NOI at hearing. ***----- In the Matter of Green Thumb Landscape and Maintenance, Inc., 32 BOLI 185, 201-02 (2013).***

9.0 RECORDS AVAILABILITY

☐ When the agency alleged allegation in its NOI respondents filed inaccurate and incomplete certified statements for work performed on a project and failed to certify the accuracy of the payroll, and the allegation in the applicable exhibit to the NOI was that respondent failed to keep records for 11 weeks before the project had begun and make them available to BOLI, and there was no evidence of respondent's submissions of certified payroll for the listed weeks, the forum dismissed the allegation based on the agency's failures to identify the violations correctly in the exhibit or to move to amend the NOI at hearing. ***----- In the Matter of Green Thumb Landscape and Maintenance, Inc., 32 BOLI 185, 201-02 (2013).***

10.0 PUBLIC AGENCY LIABILITY

11.0 FEE FOR COSTS OF ADMINISTERING LAW

12.0 FAILURE TO PAY PREVAILING WAGE RATE

☐ Although respondent contended that the worker did not perform work on the disputed dates, based on the daily reports maintained by the prime contractor on the project, the forum concluded that the worker did in fact perform work for the respondent on the project on those days. By not paying the worker for that work, respondent violated ORS 279C.840(1) and OAR 839-025-0035. ***----- In the Matter of High Mountain Plumbing and Diane Marie Cina, 33 BOLI 40, 47 (2014).***

☐ A contractor's or subcontractor's obligation to pay the prevailing rate of wage includes the obligation to pay overtime. Overtime pay is required when labor is employed by a state or a county, school district, municipality, municipal corporation or subdivision thereof through a contractor. Community colleges are formed through the creation of a "community college district" that are funded by tax levies assessed in their respective districts and, as such, are "school districts.". Accordingly, respondent was required to pay overtime wages. ***----- In the Matter of High Mountain Plumbing and Diane Marie Cina, 33 BOLI 40, 47 (2014).***

☐ Subcontractors required by ORS 279C.540 to pay overtime wages must pay overtime wages for all hours worked on Saturdays. Those wages must be paid on the subcontractor's "regular payday." The forum concluded that by not paying the overtime wages to its workers for their overtime work on November 26, 2011, until a year after it was due, respondent committed a violation. ***----- In the Matter of High Mountain Plumbing and Diane Marie Cina, 33 BOLI 40, 47 (2014).***

☐ Christmas Day and New Year's Day are legal holidays on which overtime wages must be paid. When those days fall on a Sunday, the succeeding Monday shall be recognized as a legal holiday. December 25, 2011, and January 1, 2012, both fell on Sunday, thereby requiring respondent to pay its workers overtime for work performed on the succeeding Mondays of December 26, 2011, and January 2, 2012. Respondent committed a violation by failing to do so. ***----- In the Matter of High Mountain Plumbing and Diane Marie Cina, 33 BOLI 40, 48 (2014).***

☐ The quality of the work is not the issue; it is the character—or type—of work that is legally significant for purposes of paying the minimum prevailing wage. ***----- In the Matter of Hard Rock Concrete, Inc. and Rocky Evans, 33 BOLI 77, 103 (2014).***

Appeal pending

☐ When respondent admitted underpaying its workers on a project over several weekly pay periods and its records listed four of the claimants as having worked on the project during those pay periods, the forum found four violations of prevailing wage laws. ***----- In the Matter of Green Thumb Landscape and Maintenance, Inc., 32 BOLI 185, 199-200 (2013).***

☐ When respondent admitted underpaying its workers on a project over several weekly pay periods, but there was no evidence that the first worker was employed on the project during the applicable pay periods, and the only evidence of the second worker's employment was a statement to that effect in a letter from the agency's compliance specialist to the respondent together with the respondent's subsequent payment to that worker of $22.40, the forum did not find any violations regarding payment of prevailing wages to either of the two workers. ***----- In the Matter of Green Thumb Landscape and Maintenance, Inc., 32 BOLI 185, 199-200(2013).***

13.0 FAILURE TO POST PREVAILING WAGE RATE

☐ The forum did not find a separate violation for failing to post prevailing wage fringe benefits. As a general rule, fringe benefits are considered to be a part of the prevailing wage. Due to the absence of authority suggesting or mandating otherwise, the forum found that failure to post the amount of fringe benefits was part and parcel of a failure to post the amount of the prevailing wage. It therefore did not constitute a separate violation. If respondent had been a participant in a separate health and welfare or pension plan, it would have been required to post a notice describing the plan. ***----- In the Matter of Diamond Concrete, Inc. and Eric James O'Malley and Marnie Leanne O'Malley, 33 BOLI 68, 73 (2014).***

14.0 OTHER VIOLATIONS

14.1 --- Taking Action to Circumvent the PWR Laws

14.2 --- Dividing a Public Works Project for the Purpose of Avoiding Compliance with the PWR Laws

14.3 --- Failure to Make and Maintain Necessary Records

14.4 --- Failure to Make Records Available to Wage and Hour Division

14.5 --- Failure to Complete and Return PWR Survey

14.6 --- Filing Incomplete, Inaccurate, or Untimely Certified Payroll Statements

☐ Respondent's certified payroll reports for the weeks ending August 13, 20, and 27, September 3, 17, and 26, 2011, all omitted the hours that one employee worked on August 12, 19, and 26, and September 2, 16 and 23. The forum held that respondent's omission of those hours constitutes six violations. ***----- In the Matter of High Mountain Plumbing and Diane Marie Cina, 33 BOLI 40, 49 (2014).***

☐ Respondent's certified payroll report for the week ending November 26, 2011, stated that four of its employees were all paid straight time for the work on November 26, a Saturday. However, respondent was required to pay them overtime for that work. By reporting that these four workers were paid straight time, respondent failed to report the gross wages these four workers actually earned, thereby violating ORS 279C.845 and OAR 839-025-0010(1). ***----- In the Matter of High Mountain Plumbing and Diane Marie Cina, 33 BOLI 40, 49 (2014).***

☐ Respondent's certified payroll reports for the weeks ending December 31, 2011, and January 7, 2012, report three workers being paid straight time for their work on December 26, 2011 and January 2, 2012. Under ORS 279C.540, those days are considered to be legal holidays, and workers must be paid overtime for any work performed on those days. By reporting that three workers were paid straight time for their work on those two days, respondent failed to report the gross wages these four workers actually earned, thereby committing two violations of ORS 279C.845 and OAR 839-025-0010(1). ***----- In the Matter of High Mountain Plumbing and Diane Marie Cina, 33 BOLI 40, 49 (2014).***

☐ When an employee's pay stub showed that he worked 8 hours on each of two days on a project and respondent's certified payroll report did not list that employee as having worked on the project, the payroll report was inaccurate and incomplete, constituting one violation of ORS 279C.845(3) and OAR 839-025-0010. ***----- In the Matter of Green Thumb Landscape and Maintenance, Inc., 32 BOLI 185, 201-02 (2013).***

☐ When the only evidence of a worker's employment was a statement to that effect in a letter from the agency's compliance specialist to the respondent, that evidence was not sufficient to prove the worker worked on the prevailing wage project and should have been listed on the WH-38s. ***----- In the Matter of Green Thumb Landscape and Maintenance, Inc., 32 BOLI 185, 201 (2013).***

14.7 --- Failure to File Certified Payroll Statements

14.8 --- Failure to Pay Fee for Costs of Administering Law

15.0 CIVIL PENALTIES

15.1 --- Generally

☐ The criteria used to determine the amount of penalties are: the actions of the employer in responding to previous violations, prior violations, opportunity and degree of difficulty to comply, magnitude and seriousness of the violation, and whether the employer knew or should have known of the violation. ***----- In the Matter of Hard Rock Concrete, Inc. and Rocky Evans, 33 BOLI 77, 103 (2014).***

Appeal pending

☐ With respect to civil penalties, the existence of intent is irrelevant. ***----- In the Matter of Diamond Concrete, Inc. and Eric James O'Malley and Marnie Leanne O'Malley, 33 BOLI 68, 73 (2014).***

15.2 --- Failure to Pay PWR

☐ Respondent's failure to pay wages on six Fridays in August and September 2011 are partially mitigated by undisputed evidence that the wage claimant did not disclose these hours until he filed his wage claim and respondent's prompt payment of overtime wages to three other workers when BOLI made demand for the wages, this is overcome by respondent's subsequent refusal to pay the due and owing wages to Williamson after being informed by BOLI that they were due. Under these circumstances, an appropriate civil penalty is $1,000 per violation, for a total of $4,000. ***----- In the Matter of High Mountain Plumbing and Diane Marie***

Cina, 33 BOLI 40, 49 (2014).

- ☐ When all seven Contested Wage Workers were underpaid prevailing wages; the forum imposed penalties for the underpayments in the total amount of $4,800.***----- In the Matter of Hard Rock Concrete, Inc. and Rocky Evans, 33 BOLI 77, 105 (2014).***

  Appeal pending

- ☐ When respondent's first incident of violation of the prevailing wage laws consisted of four violations, with a total underpayment of wages of $261.29 that were promptly paid upon BOLI's notification, and there were aggravating circumstances connected to a consent order with no mitigating circumstances, a penalty of $1250 was imposed for each of the four violations. ***----- In the Matter of Green Thumb Landscape and Maintenance, Inc., 32 BOLI 185, 200 (2013).***

- ☐ A negligent or otherwise inadvertent failure to pay the prevailing wage is sufficient to require the repayment of the back wages and liquidated damages to the employee and to invoke civil penalties. ***----- In the Matter of Green Thumb Landscape and Maintenance, Inc., 32 BOLI 185, 204 (2013).***

15.3 --- Failure to Post PWR Rules

15.4 --- Failure to Pay Fee for Costs of Administering Law

15.5 --- Failure to File Certified Payroll Statements

15.6 --- Filing Incomplete, Inaccurate, or Untimely Certified Payroll Statements

- ☐ The agency sought $1,000.00 penalties for each of separate inaccurate WH-38 form. Twenty-two inaccurate WH-38 forms were filed. Given the nature of the violations and the aggravating and mitigating criteria discussed above, a penalty of $400.00 for each inaccurate WH-38 form filed was appropriate resulting in a total penalty for filing inaccurate or certified payroll of $8,800. ***----- In the Matter of Hard Rock Concrete, Inc. and Rocky Evans, 33 BOLI 77, 105 (2014).***

  Appeal pending

- ☐ In its NOI, the agency asked the forum to assess a civil penalty of $1,000 for each of respondent's nine certified payroll report violations. However, due to an agreement that one worker would only work 32 hours a week, respondent justifiably relied on the worker to report his hours worked, and the worker's contemporaneously failed to report the hours he worked on those days. As well, respondent paid the worker for working more than 32 hours a week when he reported working more than that number of hours. Therefore, the forum found a total of $3,000 in civil penalties. Although Respondent should have known all the hours the worker was working, the worker's contemporaneous misrepresentation of those hours and HMPC's justifiable reliance on those misrepresentations leads the forum to conclude that $500 is a more appropriate civil penalty for HMPC's certified payroll report violations for the weeks ending August 13, 20, and 27, September 3, 17, and 26, 2011, for a total of $3,000 in civil penalties. In conclusion, the forum assessed $6,000 for HMPC's nine certified payroll reports violations. ***----- In the Matter of High Mountain Plumbing and Diane Marie Cina, 33 BOLI 40, 50 (2014).***

- ☐ The civil penalty for failure to list one covered employee on a WH-38, aggravated by the fact that the employer knew or should have known of it, and without mitigating circumstances, is $1000. ***----- In the Matter of Green Thumb Landscape and Maintenance, Inc., 32 BOLI 185, 201-02 (2013).***

15.7 --- Failure to Complete and Return PWR Survey

15.8 --- Failure to Make Records Available to Wage and Hour Division

15.9 --- Penalties for Other Violations

15.10 --- Aggravating Circumstances

15.10.1 --- Response to Prior Violations of Statutes and Rules

15.10.2 --- Prior Violations of Statutes and Rules

15.10.3 --- Opportunity and Degree of Difficulty to Comply

15.10.4 --- Magnitude and Seriousness of Violation

15.10.5 --- Knowledge of Violation

- ☐ Misclassifying jack hammer work and underpaying a worker for his first day on the job constituted two more aggravating circumstances based on knowledge that these classifications were improper, moderated by the relatively low amounts of money involved and the fact that the violations seemed to derive, as did other violations, from a knowledge arising from incorrigible inattention, rather than malevolent intent.***----- In the Matter of Hard Rock Concrete, Inc. and Rocky Evans, 33 BOLI 77, 102-03 (2014).***

  Appeal pending

- ☐ A final aggravating factor was the knowing failure to pay Cement Mason 1 wages to those workers who earned them by doing finish work during the sidewalk phase. ***----- In the Matter of Hard Rock Concrete, Inc. and Rocky Evans, 33 BOLI 77, 105 (2014).***

  Appeal pending

- ☐ The forum found a violation of failure to pay prevailing wages to be aggravated because the circumstances surrounding a prior consent order indicated respondent knew or should have known of the violation. ***----- In the Matter of Green Thumb Landscape and Maintenance, Inc., 32 BOLI 185, 200 (2013).***

- ☐ The civil penalty for failure to list one covered employee on a WH-38, aggravated by the fact that the employer knew or should have known of it, and without mitigating circumstances, is $1000. ***----- In the Matter of Green Thumb Landscape and Maintenance, Inc., 32 BOLI 185, 201-02 (2013).***

15.10.6 --- Other

- ☐ Prevailing wage underpayment of any kind is serious. Even though the amount for one worker was only $11.76, it was an aggravating factor with respect to the violations based upon an inaccurate certified payroll. ***----- In the Matter of Hard Rock Concrete, Inc. and Rocky Evans, 33 BOLI 77, 103 (2014).***

  Appeal pending

15.11 --- Mitigating Circumstances

- ☐ The difficulty in determining whether "mucking concrete" was covered by the Laborer 2 classification prevented a finding of knowledge that would aggravate the penalty. The agency compliance specialist's difficulty in describing how mucking concrete fits within the classification demonstrated the difficulty an employer, such as respondents, might have figuring out the proper classification. This difficulty mitigated the amount of the penalty for violations arising solely from misclassifying mucking concrete. ***----- In the Matter of Hard Rock Concrete, Inc. and Rocky Evans, 33 BOLI 77, 104 (2014).***

  Appeal pending

- ☐ Determining the proper classification for the work of laying or setting out stakes could have been confusing and difficult, and was a mitigating factor as to whether there was a finding of knowledge that would aggravate the penalty. ***----- In the Matter of Hard Rock Concrete, Inc. and Rocky Evans, 33 BOLI 77, 104 (2014).***

  Appeal pending

- ☐ Inexperience is not a mitigating factor in itself. ***----- In the Matter of Hard Rock Concrete, Inc. and Rocky Evans, 33 BOLI 77, 104 (2014).***

  Appeal pending

- ☐ The forum did not give credit to respondent Evans's testimony, or his writing in his letter to the agency that his classification decision was based on the fact that an agency "PWR worksheet" was absolutely clear that the disputed tasks were Laborer 1 tasks. His letter purported to quote from the worksheet that "set stakes, set grade stakes, spreads concrete w/hand tools" are L1 tasks. This would be a strong point in mitigation but for the fact that respondent Evans never produced a copy of the "PWR worksheet" or introduced it into evidence. And the Definition for Laborer 1, the closest thing to the "worksheet" that is in evidence, does not contain those words. ***----- In the Matter of Hard Rock Concrete, Inc. and Rocky Evans, 33 BOLI 77, 104 (2014).***

  Appeal pending

- ☐ Respondents asked that their dire financial circumstances be a mitigating factor. However, the evidence on financial inability was inconsistent and unconvincing. Assuming, without deciding, that financial circumstances can be a mitigating factor, the evidence on that point failed. ***----- In the Matter of Hard Rock Concrete, Inc. and Rocky Evans, 33 BOLI 77, 104-05 (2014).***

  Appeal pending

16.0 PLACEMENT ON INELIGIBLE LIST

16.1 --- In General

- ☐ A corporate officer or agent responsible for the failure or refusal to pay can only be debarred if the corporation's failure or refusal to pay was "intentional." ***----- In the Matter of Green Thumb Landscape and Maintenance, Inc., 32 BOLI 185, 205, fn. 11 (2013).***

16.2 --- Intentional Failure to Pay PWR

- ☐ A good-faith failure to pay, even if negligent and even if based on a legal mistake, is not sufficient to establish intent. Evidence of intent was lacking with respect to the classification decision regarding mucking concrete, as well as the decision regarding Cement Mason 1 wages for laying out or setting out stakes. Evidence was also insufficient to establish the culpable mental state required to establish intent on account of the failure to pay Laborer 2 wages for jack-hammering. ***----- In the Matter of Hard Rock Concrete, Inc. and Rocky Evans, 33 BOLI 77, 106-07 (2014).***

  Appeal pending

- ☐ The evidence was sufficient to establish that respondent intentionally failed to pay Cement Mason 1 wages to those Contested Wage Workers who earned it by performing finish work during the sidewalk construction phase. respondent testified that he was on the job site every day and was nearly always doing the work with them. The forum concluded that it was not credible to believe that respondent never saw any Contested Wage Worker perform the finish concrete work. Respondent also he knew that finish concrete work, including the use of a bull float or fresno, qualified the work to be paid at the Cement Mason 1 rate. Respondent likewise acted intentionally in failing to pay one worker at the Cement Mason 1 rate for his first day on the job, when he set the forms for pouring sidewalk. ***----- In the Matter of Hard Rock Concrete, Inc. and Rocky Evans, 33 BOLI 77, 107 (2014).***

  Appeal pending

- ☐ 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. A negligent or otherwise inadvertent failure to pay the prevailing wage, while sufficient to require the repayment of the back wages and liquidated damages to the employee and to invoke civil penalties, is not sufficient to impose debarment. Rather, a culpable mental state must be shown for

the forum to conclude that respondent "intentionally" failed to pay the prevailing wage rate. ***----- In the Matter of High Mountain Plumbing and Diane Marie Cina, 33 BOLI 40, 51 (2014).***

- In this case, respondent was incorporated by its corporate president for the specific reason of taking over Superior Plumbing's subcontract on the project and bailing out a bookkeeping client of the corporate president who owned Superior Plumbing. Respondent knew the project was a prevailing wage rate job, as shown by the filing of certified payroll reports on respondent's behalf through respondent's work on the project. Respondent also knew the correct straight time prevailing wage rate for plumbers on the project and paid that rate for all hours contemporaneously reported to her. In addition, the corporate president was the person responsible for payment of wages to respondent's employees. Based on the corporate president's testimony, the forum concluded that the failure to pay overtime wages to four employees on the regular payday on which they were due was an oversight based on her inexperience, and she initially did not pay one employee anything for his work on various dates, because he did not tell the corporate president he had worked those days. However, the corporate president's continuing failure to pay those wages after BOLI's notification that those wages were due and owing, based on her belief that Williamson did not work those hours, was a deliberate and conscious choice on her part and converts her inadvertent failure to pay into an intentional failure to pay. Based on that intentional failure, the commissioner is required to place respondent and its corporate president on BOLI's list of ineligibles to receive contracts or subcontracts for public works for a period of three years. ***----- In the Matter of High Mountain Plumbing and Diane Marie Cina, 33 BOLI 40, 51-52 (2014).***

- Respondent's intentional failure to pay the prevailing wage to its employees working on a public works constituted adequate grounds for placing it on the List of Ineligibles. Facts establishing that violation were alleged in the NOI and admitted in the Answer. ***----- In the Matter of Diamond Concrete, Inc. and Eric James O'Malley and Marnie Leanne O'Malley, 33 BOLI 68, 74 (2014).***

- 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. A negligent or otherwise inadvertent failure to pay the prevailing wage is not sufficient to impose debarment. Rather, a culpable mental state must be shown for the forum to conclude that respondent intentionally failed to pay the prevailing wage rate. ***----- In the Matter of Green Thumb Landscape and Maintenance, Inc., 32 BOLI 185, 204 (2013).***

- When respondent's bookkeeper erroneously determined the amount of the prevailing wage and there was no evidence that a respondent corporate officer or the bookkeeper chose not to determine the prevailing wage rate or knew the correct rate and chose not to pay it, the agency failed to prove that either the respondent corporate officer respondent was responsible for underpaying the four workers during the project, and the corporate respondent promptly paid the wages and liquidated damages when informed by the agency of the underpayment, the agency did not prove the employer "intentionally" failed or refused to pay its four workers the prevailing wage rate under ORS 279C.860(1)(a). ***----- In the Matter of Green Thumb Landscape and Maintenance, Inc., 32 BOLI 185, 203 (2013).***

16.3 --- Intentional Failure to Post PWR

16.4 --- Payment of subcontractor's employee's wages by contractor

- The agency asserted that placement on the List of Ineligibles was appropriate, regardless of intent, because the general contractor paid the wages to respondent's employees. ORS 279C.860(1)(b) provides for such placement when the subcontractor has failed to pay to the subcontractor's employees the required amounts and the contractor has paid those amounts on the subcontractor's behalf; The NOI and the Answer established that respondent failed to pay its employees and that a "prime" contractor paid them on its behalf. The NOI nowhere alleged, however, that respondent was a subcontractor on the project. It merely alleged throughout that respondent was a contractor, thereby leaving open the possibility that it was a general contractor, perhaps one of two or more. Accordingly, the requirements of ORS 279C.860(1)(b) were not established. ***----- In the Matter of Diamond Concrete, Inc. and Eric James O'Malley and Marnie Leanne O'Malley, 33 BOLI 68, 74 (2014).***

16.5 --- Liability of Corporate Officers or Agents

- The corporate respondent was a subcontractor, and it failed to pay all the wages due its employees. The general contractor ultimately paid the wages in dispute. It was undisputed that respondent Evans was the corporate officer responsible for failing to pay the wages owed by the corporate respondent. Accordingly, under ORS 279C.860 (1) (b), the corporate respondent must be debarred from contracting on public works. And under ORS 279C.860(3), respondent Evans must also be debarred. ***----- In the Matter of Hard Rock Concrete, Inc. and Rocky Evans, 33 BOLI 77, 106 (2014).***

  Appeal pending

- In this case, respondent was incorporated by its corporate president for the specific reason of taking over a subcontract on the project and bailing out a bookkeeping client of the corporate president who owned Superior Plumbing. Respondent knew the project was a prevailing wage rate job, as shown by the filing of certified payroll reports on respondent's behalf through respondent's work on the project. Respondent also knew the correct straight time

prevailing wage rate for plumbers on the project and paid that rate for all hours contemporaneously reported to her. In addition, the corporate president was the person responsible for payment of wages to respondent's employees. Based on the corporate president's testimony, the forum concluded that the failure to pay overtime wages to four employees on the regular payday on which they were due was an oversight based on her inexperience, and she initially did not pay one employee anything for his work on various dates, because he did not tell the corporate president he had worked those days. However, the corporate president's continuing failure to pay those wages after BOLI's notification that those wages were due and owing, based on her belief that Williamson did not work those hours, was a deliberate and conscious choice on her part and converts her inadvertent failure to pay into an intentional failure to pay. Based on that intentional failure, the commissioner is required to place respondent and its corporate president on BOLI's list of ineligibles to receive contracts or subcontracts for public works for a period of three years. ***----- In the Matter of High Mountain Plumbing and Diane Marie Cina, 33 BOLI 40, 51-52 (2014).***

☐ As the corporate officer responsible for the intentional failure to pay the prevailing wage, Mr. O'Malley must likewise be placed on the list of ineligibles. ***----- In the Matter of Diamond Concrete, Inc. and Eric James O'Malley and Marnie Leanne O'Malley, 33 BOLI 68, 74 (2014).***

☐ A corporate officer responsible for a subcontractor's failure to pay is also personally placed on the List of Ineligibles if the failure or refusal to pay prevailing wages was intentional or if the wages are ultimately paid by a contractor, presumably the general or prime contractor on the project. ***----- In the Matter of Hard Rock Concrete, Inc. and Rocky Evans, 33 BOLI 77, 106 (2014).***

16.6 --- Aggravating Circumstances

16.7 --- Mitigating Circumstances

☐ In this case, respondent was incorporated by its corporate president for the specific reason of taking over a subcontract on the project and bailing out a bookkeeping client of the corporate president who owned Superior Plumbing. Respondent knew the project was a prevailing wage rate job, as shown by the filing of certified payroll reports on respondent's behalf through respondent's work on the project. Respondent also knew the correct straight time prevailing wage rate for plumbers on the project and paid that rate for all hours contemporaneously reported to her. In addition, the corporate president was the person responsible for payment of wages to respondent's employees. Based on the corporate president's testimony, the forum concluded that the failure to pay overtime wages to four employees on the regular payday on which they were due was an oversight based on her inexperience, and she initially did not pay one employee anything for his work on various dates, because he did not tell the corporate president he had worked those days. However, the corporate president's continuing failure to pay those wages after BOLI's notification that those wages were due and owing, based on her belief that Williamson did not work those hours, was a deliberate and conscious choice on her part and converts her inadvertent failure to pay into an intentional failure to pay. Based on that intentional failure, the commissioner is required to place respondent and its corporate president on BOLI's list of ineligibles to receive contracts or subcontracts for public works for a period of three years. ***----- In the Matter of High Mountain Plumbing and Diane Marie Cina, 33 BOLI 40, 51-52 (2014).***

16.8 --- Length of Debarment

☐ Even though the rule in effect at the time of the violations in this case, OAR 839-025-0085, had not been amended to conform to the statute, and still referred to debarment for a "period not to exceed three years," if debarment must be imposed, it cannot be imposed for any period less than three years (the amount set forth in the current statute). ***----- In the Matter of Hard Rock Concrete, Inc. and Rocky Evans, 33 BOLI 77, 106 (2014).***

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17.0 LIQUIDATED DAMAGES

18.0 AFFIRMATIVE DEFENSES

18.1 --- Equitable Estoppel (*see also* Ch. III, sec. 86.0)

18.2 --- Ignorance of Law

18.3 --- Other

☐ The weight of the evidence showed that Zoom Garage Door was not owned by respondent at the times material to the case. The contract for the purchase of the business was signed and appeared by its terms to be effective, prior to the subcontract and prevailing wage law violations at issue. No evidence was presented suggesting this contract was not authentic or that it was a sham.***----- In the Matter of Zoom Contracting, LLC dba Zoom Garage Door, Inc., 33 BOLI 111, 119-20 (2014).***

19.0 EXEMPTIONS

20.0 PREVAILING WAGE RATE DETERMINATION

20.1 --- Generally

☐ If records of the Secretary of State had been offered into evidence by way of a certification from the Secretary of State, ORS 56.110 would require the forum to find them to constitute prima facie evidence of the fact that anything done by Zoom Garage Door can be attributed to respondent. And as prima facie evidence, that fact would be entitled to a presumption that it is true. ORS 40.135(2). When there was no evidence produced casting any doubt whatsoever on the authenticity of the records from the Secretary of State' office, the forum accepted those records as establishing the prima facie case—the presumption—that Zoom Garage Door was, at the times material to this case, the business name of Zoom Contracting, LLC, and that Zoom

Contracting, LLC was therefore legally responsible for any violations of the prevailing wage laws by Zoom Garage Door. ***----- In the Matter of Zoom Contracting, LLC dba Zoom Garage Door, Inc., 33 BOLI 111, 118 (2014).***

☐ On the whole, the evidence—from the contract of sale, from Mr. Champ's exercise of ownership of the assets, and from the understanding of the claimants who engaged in business with Mr. Champ—established that the subcontractor on the public works contract was not respondent, but was Mr. Champ. ***----- In the Matter of Zoom Contracting, LLC dba Zoom Garage Door, Inc., 33 BOLI 111, 119-20 (2014).***

20.2 --- ALJ Order for Prehearing Written Statements

☐ Pursuant to an order issued by the ALJ, the agency submitted a copy of the Determination, the name of its proposed witness, and materials provided by the Requester and material relied upon by the agency in reaching its Determination. ***----- In the Matter of NW Housing Alternatives, Inc., 33 BOLI 165, 166 (2014).***

☐ Pursuant to an order issued by the ALJ, the requester designated its witness and it submitted a pre-hearing statement identifying its reasons for contesting the Determination. ***----- In the Matter of NW Housing Alternatives, Inc., 33 BOLI 165, 166 (2014).***

20.3 --- List of Witnesses

20.4 --- Effective Date of HB 2140

20.5 --- Exemptions from HB 2140

20.6 --- Agency's Duty in Making Prevailing Wage Rate Determination

☐ The commissioner is authorized and directed to issue a "determination" as to whether prevailing wages must be paid to workers who will perform the labor in the demolition of the old buildings and the construction of the new ones and whether that construction fits within the definition of a "public works" such that the project is subject to the prevailing wage requirements. The determination can be issued if certain procedural pre-requisites are met, including the obligation to provide all the needed documents, records or other information. ***----- In the Matter of NW Housing Alternatives, Inc., 33 BOLI 165, 169 (2014).***

20.7 --- Dividing a Project

☐ If it is a single public works project and is not divided, there is no question but that prevailing wages must be paid, because, even though the requester is a private entity and private funds are being used, the total public funds in the project exceed $750,000, and it is therefore a "public works," with no applicable exemption. ***----- In the Matter of NW Housing Alternatives, Inc., 33 BOLI 165, 172 (2014).***

☐ If a project is a "public works," the commissioner shall divide the project, if appropriate, after applying the considerations set forth in ORS 279C.827(1)(c) to separate the parts of the project that include funds of a public agency … from the parts of the project that do not include funds of a public agency. ***----- In the Matter of NW Housing Alternatives, Inc., 33 BOLI 165, 172 (2014).***

20.8 --- Definitions

20.8.1 --- "Apartment Building"

20.8.2 --- "Construction"

20.8.3 --- "Dormitory"

20.8.4 --- "Major Renovation"

20.8.5 --- "Public Contract"

20.8.6 --- "Project"

☐ Turning first to the text of the statute, the forum tries to determine the meaning of the term "project;" it is defined neither in the statute, nor in appellate case law interpreting the statute. In the context of an earlier version of the prevailing wage statutes, the commissioner found that a "project" would include "a multi-phase endeavor that may encompass more than one contract." ***----- In the Matter of NW Housing Alternatives, Inc., 33 BOLI 165, 170 (2014).***

☐ The forum applied the dictionary definition of "project" as "an undertaking devised to effect the reclamation or improvement of a particular area of land." It was clear from the history of the board's consideration, as reflected in its minutes, that the reclamation of the entire parcel was considered as a unitary project from the beginning. The final reality will be a single redevelopment of the Requester's campus, with all three components — office, building, homeless shelter/community building, and affordable housing—designed by the same architect and built by the same general contractor at the same time. ***----- In the Matter of NW Housing Alternatives, Inc., 33 BOLI 165, 171 (2014).***

☐ A "project"—which is now a completely separate statutory sub-set of "public works"—may be much more all-encompassing than a single building ***----- In the Matter of NW Housing Alternatives, Inc., 33 BOLI 165, 172 (2014).*** The forum concluded that notwithstanding the presence of several different buildings in Requester's campus redevelopment, and even though those buildings serve various interests in the over-all mission of Requester, the over-all redevelopment constitutes a single project. ***----- In the Matter of NW Housing Alternatives, Inc., 33 BOLI 165, 172 (2014).***

20.8.7 --- "Public Works"

☐ The construction of a single building may constitute a "public works." ***----- In the Matter of NW Housing Alternatives, Inc., 33 BOLI 165, 172 (2014).***

20.8.8 --- "Reconstruction" or "Restoration"

20.8.9 --- "Residential Construction

20.9 --- Local Ordinances and Codes

20.9 --- All Agency Memorandum No. 130

21.0 STATUTORY INTERPRETATION

- ☐ In interpreting a statute, the forum looks first to the text and context of the statute; pertinent legislative history may also be consulted. ***----- In the Matter of NW Housing Alternatives, Inc., 33 BOLI 165, 170 (2014).***

- ☐ "Project" is a word of common meaning, and generally, one turns to dictionary definitions to determine the ordinary meaning of undefined statutory terms. ***----- In the Matter of NW Housing Alternatives, Inc., 33 BOLI 165, 170 (2014).***

22.0 AGENCY RULE INTERPRETATION

- ☐ The forum concluded that the Agency's interpretation of the definition was at least as plausible as the interpretation advanced by respondent; in fact, it was more plausible. Respondents' appeal to the principle that ambiguous documents are construed against the drafter was of no avail. The agency's Definitions of Covered Occupations, like rules or statutes, are not drafted for the agency's benefit; they are drafted for the guidance of building contractors and the benefit of workers. In that commercial context, a greater burden was placed on the respondent to resolve possible vagueness or ambiguity. Similarly, a greater burden was placed on respondents when there was the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process. ***----- In the Matter of Hard Rock Concrete, Inc. and Rocky Evans, 33 BOLI 77, 98 (2014).***

  Appeal pending