

**In the Matter of****SERVEND INTERNATIONAL,  
INC., dba Flomatic International,  
Respondent.****Case No. 01-00****Final Order of the****Commissioner Jack Roberts****Issued August 28, 2000**

ment by Respondent's employees to the joint employer who had referred her to Respondent. The commissioner awarded Complainant \$20,000 in mental suffering damages, but did not award back pay damages, finding that Complainant had failed to mitigate her damages. ORS 659.030(1)(b); ORS 659.030(1)(f); OAR 839-005-0010(1); OAR 839-005-0010(4).

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**SYNOPSIS**

Complainant, an African American, alleged that Respondent subjected her to racial harassment through co-workers and a supervisor by exhibiting nooses in her presence and engaging in actions and making remarks derogatory towards African Americans, then retaliated against her by terminating her employment with Respondent when she complained of the harassment to Employment Trends, her joint employer. The commissioner found that Complainant's race/color was not a reason for the nooses and actions and remarks associated with them, that a reasonable African American would not have perceived the derogatory remarks and actions directed towards her by a co-worker as sufficiently severe or pervasive to create a hostile, intimidating or offensive working environment, and that Respondent had not violated ORS 659.030(1)(b). The commissioner held that Respondent unlawfully discharged Complainant based on her complaints of racial harass-

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 September 16 and 17, 1999, in Hearings Room 1004, Portland State Office Building, 800 NE Oregon St., Portland, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Linda Lohr, an employee of the Agency. Complainant Lynice Morgan was present. Kenneth C. Crowley, counsel for Complainant, was present on September 16. Respondent was represented by John E. Murray, of the law firm Davis & Kuelthau, and Gayle K. Rowe, of the law firm Dunn, Carney, Allen, Higgins & Tongue. Robin LaKamp was present throughout the hearing as Respondent's representative. An Oregon State Police officer was

also present throughout the hearing to provide security.

The Agency called as witnesses, in addition to Complainant: Dorothy Weiss, assignment manager for Employment Trends; and Peter Martindale, Civil Rights Division senior investigator.

Respondent called as witnesses: Dorothy Weiss; Jennifer Henry, Complainant's former co-worker; Nye Sherwood, Respondent's production manager; and Tracie Basile, division manager of Employment Trends.

The forum received into evidence:

a) Administrative exhibits X-1 through X-28 (submitted or generated prior to the hearing).

b) Administrative exhibits X-1a,<sup>1</sup> X-29<sup>2</sup> and X-30.<sup>3</sup>

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<sup>1</sup> Exhibit X-1a is a copy of the Agency's Request for Hearing that was not present in the original hearings file at the time of hearing. Subsequently, the forum obtained a copy of that document from the Agency case presenter for inclusion as an administrative exhibit.

<sup>2</sup> Exhibit X-29 is a letter sent by facsimile from Respondent's counsel Murray to the ALJ, dated September 8, 1999, in which Murray responded to the Agency's request to cross-examine witnesses. See Finding of Fact – Procedural 17, *infra*.

<sup>3</sup> Exhibit X-30 is a letter Complainant's counsel Crowley sent directly by facsimile to the ALJ on September 13, 1999. See Finding of Fact – Procedural 19, *infra*.

c) Agency exhibits A-1 through A-5 (submitted prior to hearing with the Agency's case summary), A-6 and A-7 (submitted at hearing).

d) Respondent's exhibits R-2, R-5 through R-8, R-10, R-11, R-13, R-15, and R-17 through R-20 (submitted prior to hearing with Respondent's case summary).

Having fully considered the entire record in this matter, I, Jack Roberts, 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 14, 1998, Complainant filed a verified complaint with the Civil Rights Division of the Bureau of Labor and Industries alleging that she was the victim of the unlawful employment practices of Respondent in that she was subjected to racial harassment and retaliation in the form of discharge on June 16, 1998. On January 20, 1999, BOLI amended Complainant's complaint to correct a technical defect. After investigation and review, the Civil Rights Division issued an Administrative Determination finding substantial evidence supporting the allegations regarding Respondent's discharge of Complainant.

2) On July 13, 1999, the Agency submitted to the forum Specific Charges alleging that Respondent discriminated against

Complainant by subjecting her to "an intimidating, hostile and offensive work environment" by harassing her based on her race/color in violation of ORS 659.030(1)(b), and by discharging her based on her opposition to the harassment in violation of ORS 659.030(1)(f). The Agency also requested a hearing.

3) On July 21, 1999, the forum served on Respondent the Specific Charges, accompanied by the following: a) a Notice of Hearing setting forth September 16, 1999, in Portland, Oregon, as the time and place of the hearing in this matter; b) a notice 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 12, 1999, Respondent, through local counsel George J. Cooper of Dunn, Carney, filed an answer to the Specific Charges.

5) On August 20, 1999, Respondent, through local counsel Cooper and Gayle K. Rowe, also of Dunn, Carney, filed a motion for out of state counsel John E. Murray, and the firm of Davis & Kuelthau, S.C., Milwaukie, Wisconsin, to appear *pro hac vice* for Respondent. The motion was accompanied by an affidavit of Mr. Murray and exhibits certifying compliance with the requirements of ORS 9.241 and UTCR 3.170.

6) On August 24, 1999, the forum granted Respondent's motion to allow Mr. Murray to appear and participate in this case as counsel *pro hac vice* for Respondent.

7) On August 24, 1999, Respondent filed a motion to be allowed to depose Complainant. This document was not served on Kenneth C. Crowley, Complainant's attorney of record.

8) On August 25, 1999, the forum ordered the Agency and Respondent 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; a statement of any agreed or stipulated facts; a brief statement of the elements of the claim and any damages calculations (for the Agency only); and a brief statement of any defenses to the claim (for Respondent only). The forum ordered the participants to submit case summaries by September 7, 1999, and notified them of the possible sanctions for failure to comply with the case summary order.

9) On August 26, 1999, the forum issued a notice that the correct case docket number was "01-00."

10) On August 30, 1999, the Agency filed objections to Respondent's request to depose Complainant, stating that Complainant was unavailable for deposition in that she had left Oregon in early August based on her husband's threats of retaliation for having filed a criminal

action against him, now pending, involving child abuse. The Agency stated that Complainant did not intend to return to Oregon except for the duration of the hearing. The Agency also noted that a telephone deposition was not practical because of the uncertainty of Complainant's whereabouts. This document was not served on Crowley, Complainant's attorney.

11) On August 30, 1999, the Agency requested that an Oregon State Police officer be present during the hearing to provide security in the event Complainant's husband attempted to retaliate against her.

12) On August 30, 1999, the ALJ conducted a pre-hearing conference with Ms. Lohr and Mr. Murray to discuss Respondent's motion to depose Complainant and the Agency's objections. At the conclusion of the conference, the ALJ concluded that, based on the materiality of Complainant's testimony and the short time remaining before hearing, a deposition was an appropriate means of discovery. The ALJ granted Respondent's motion to depose Complainant and Mr. Murray and Ms. Lohr agreed that Complainant would be deposed at the offices of Dunn, Carney at 9 a.m. on September 15, 1999. On August 31, 1999, the ALJ issued a written interim order memorializing the pre-hearing conference, the ALJ's ruling, and Ms. Lohr's and Mr. Murray's agreement as to the deposition time and place. By oversight, this interim order was

not served on Crowley, Complainant's attorney.

13) On August 31, 1999, the forum granted the Agency's request for security.

14) On September 7, 1999, the Agency and Respondent timely filed their case summaries.

15) On September 8, 1999, the Agency made a written request that Respondent make available Robin LaKamp, Nancy Kerrigan, and the author of Exhibit R-13 available for cross-examination at the hearing.

16) On September 8, 1999, the forum granted the Agency's request in an interim order and notified Respondent and the Agency that Respondent's failure to make LaKamp, Kerrigan, and the author of Exhibit R-13 available for cross-examination "may result in the exclusion of Exhibits R-12, R-13, and R-14 [which Kerrigan had authored] from evidence at the hearing or the hearing being continued at a later date in order to allow the Agency an opportunity to rebut the evidence."

17) On September 8, 1999, Respondent sent a letter directly to the ALJ, via facsimile, stating its intent to offer R-14, despite the probable absence of Nancy Kerrigan from the hearing, and that Robin LaKamp, who authored Exhibit R-12, and Dorothy Weiss or Tracie Basile, one of whom authored Exhibit R-13, would be present at the hearing.

18) On September 8, 1999, Respondent filed a letter with the

Hearings Unit stating that Respondent did not agree with the Agency's statement of agreed or stipulated facts in the Agency's case summary, specifically, proposed stipulated facts numbers 4, 5, and 6.

19) At 3:57 p.m. on September 13, 1999, Kenneth C. Crowley sent a letter directly to the ALJ, via facsimile, in which he identified himself as Complainant's attorney and objected to Respondent's deposition of Complainant on September 15, 1999, because he had only learned that morning that the forum had ruled on Respondent's motion to depose Complainant and he was unavailable at the time set for deposition because he was preparing for a five-day jury trial in Federal District court set to begin on September 20. Mr. Crowley mailed the original letter to the Hearings Unit that same day.

Under the circumstances, the ALJ concluded that Mr. Crowley's suggestion that Mr. Murray be allowed a similar scope of inquiry in his cross-examination of Complainant that he would have been entitled to in a deposition was an acceptable solution. On the evening of September 13, the ALJ telephoned Mr. Murray and left a voice mail message regarding his decision. Mr. Murray telephoned the ALJ the next morning and stated his unhappiness with the solution, but indicated a willingness to proceed. He suggested several compromise solutions involving a delay in the hearing that would allow him to depose Com-

plainant prior to the hearing. The ALJ telephoned Mr. Crowley and Ms. Lohr to present Mr. Murray's compromise solutions, but found that they were unworkable, given Mr. Crowley's schedule. The ALJ then telephoned Mr. Murray, Mr. Crowley, and Ms. Lohr and informed them that the hearing was reset for 8:30 a.m. on September 16, and that Mr. Murray would be allowed considerable latitude in his cross examination of Complainant. Mr. Murray indicated he intended to file an objection to the forum denying him the opportunity to depose Complainant before the hearing.

20) After receiving Crowley's letter on September 13, the ALJ attempted to conduct a pre-hearing conference with Ms. Lohr, Mr. Crowley, and Mr. Murray regarding Mr. Crowley's concern, but was unable to reach all three individuals at the same time. The ALJ then contacted these individuals separately and engaged in a teleconference with Ms. Lohr and Mr. Crowley in an attempt to resolve this matter. In the course of these conversations, several things became apparent to the ALJ. First, that Mr. Crowley was insistent on representing his client at any deposition and was not available on the afternoon of September 14 or any time on September 15. Second, that Complainant could not be reached with any certainty prior to the evening of September 14 because she had taken a bus from the Midwest to Portland for the deposition and hearing, and did not have the financial resources to

make a second trip back if the hearing was postponed. Third, that Mr. Murray believed he needed to depose Complainant in order to represent his client adequately, and was willing to conduct that deposition during the evening or on the first day of the hearing, if necessary, to accommodate everyone's schedule. Fourth, that Mr. Crowley would not object to Mr. Murray being given considerable leeway at the hearing during his cross-examination of Complainant to essentially inquire into the same areas he would have inquired into in a deposition, if that would solve the problem and allow the hearing to continue, a suggestion to which Ms. Lohr did not object. Fifth, the ALJ was not available to continue the hearing on September 18, if necessary, and could not come back on the 20<sup>th</sup> because of a hearing set with Ms. Lohr in Eugene on the 21<sup>st</sup>.

21) At the commencement 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.

22) Prior to opening statements, Respondent objected to the ALJ's denial of Respondent's motion to depose Complainant, contending that Respondent suffered considerable prejudice as a result, in that cross-examination is not a substitute for a deposition, and Respondent would incur additional expenses at hearing because of its inability to conduct

a deposition of Complainant before the hearing.

23) On November 5, 1999, the ALJ discovered that neither participant had provided a copy of Exhibit X-28 to him. The ALJ telephoned both Ms. Lohr and Mr. Murray that day and asked them each to provide him with a copy of that document. On November 10, 1999, the ALJ received a copy of Exhibit X-28 from Mr. Murray, a copy of which Mr. Murray also served on Ms. Lohr.

24) On March 22, 2000, the ALJ issued a proposed order that notified the participants that they were entitled to file exceptions to the proposed order.

25) On March 31, 2000, Respondent filed timely exceptions to the proposed order.

26) On April 3, 2000, the Agency requested an extension of time until April 7, 2000 in which to file exceptions to the proposed order.

27) On April 3, 2000, Respondent filed supplemental exceptions to the proposed order and a request for a new hearing with a new ALJ, with the right to depose Complainant prior to the hearing. Respondent alleged its inability to depose Complainant violated its due process rights and caused severe prejudice to Respondent at the hearing. Respondent's request is denied, for reasons stated in the Opinion section.

28) On April 4, 2000, the ALJ issued an interim order grant-

ing the Agency an extension until April 7, 2000, in which to file exceptions to the proposed order.

29) On April 7, 2000, the Agency filed exceptions to the proposed order.

#### **FINDINGS OF FACT – THE MERITS**

1) Complainant is an African American.

2) At all times material herein, Respondent Servend International, Inc., was a foreign corporation engaged in the business of assembling beverage dispensing valves that operated in Portland, Oregon, under the assumed business name of Flomatic International, and was an Oregon employer that utilized the personal services of one or more persons.

3) Complainant applied and was hired at Employment Trends ("ET"), a temporary employment agency, in March 1998.

4) Respondent became a client employer of ET in 1996 when Respondent began utilizing ET to provide temporary employees. In 1998, an average of 30 to 45 ET employees were jointly employed at Respondent as a result of ET's referrals. In 1998, Respondent got all of their temporary production employees from ET.

5) At all material times, ET employees who were jointly employed by client employers were paid by checks written by ET. ET employed site managers who periodically visited the work sites of client employers. Client employers of ET had the unilateral right

to terminate the assignment of an ET employee. ET directed its employees to notify it of any problems they had with client employers.

6) ET employs assignment managers who are responsible for meeting the staffing needs of specific client employers. In 1998, Dorothy Weiss was ET's assignment manager in charge of Respondent's account.

7) When ET initially referred employees to Respondent, ET's onsite representative would give them an orientation handbook, which Respondent and ET had jointly developed and go over its rules. Respondent expected ET's onsite representative to explain that Respondent has "zero tolerance" for discrimination, and that any problem should be brought to the attention of Sherwood, Respondent's production supervisor, or another supervisor if Sherwood was absent. Respondent did not have a written harassment policy during Complainant's employment with Respondent.

8) On or about March 12, 1998, Weiss referred Complainant to Respondent's Portland facility. Weiss also told Complainant that Nye Sherwood, Respondent's production supervisor, was a very nice guy and she could take any problems to Sherwood, but should also report any problems, including racial harassment, to Weiss or anyone else available at ET.

9) ET referred Complainant to Respondent because of her prior experience in assembly and pro-

duction. At Respondent's facility, Complainant was assigned to work in the electric room, wiring solenoids.

10) Complainant worked 8 hours per day, Monday through Friday, during her employment with Respondent, and was paid \$7.00 per hour.

11) Complainant's immediate supervisor in the electric room was Andy Thomas. Thomas' supervisor was Nye Sherwood, a Caucasian who was Respondent's production, quality assurance, and customer service manager.

12) Respondent had about 30 employees during Complainant's employment. An average of 10 persons worked in the electric room, most of them temporary employees of ET. Complainant was the only African American working in the electric room, a room approximately 12' by 14' in size that had five different workstations. Because of the small size of the room, Complainant and her co-workers could hear whatever conversations were occurring in the electric room.

13) Shortly after starting work for Respondent, Complainant asked for and was given a week off to assist her mother after her mother fell off her bike and broke her kneecap. At Sherwood's request, ET reassigned Complainant to Respondent at the end of the week. Sherwood made this request based on his observation that Complainant was a good worker.

14) Complainant had no problems with her co-workers from the time she began work with Respondent until June 1998. During that time, she and Jennifer Henry, a Caucasian who was also an ET employee, became friends. Complainant and Henry talked about their families and listened to "Walkman" radios, telling each other when certain songs came on the radio. Henry bought Complainant a tape of some music that she knew Complainant liked.

15) One of Jennifer Henry's hobbies is doing macramé with hemp string. On June 2, 1998, Henry returned from a lunch break with some brown hemp string. While Complainant was sitting right next to her, she tossed a short length of brown hemp string across the table to Nate Hall, a Caucasian co-worker who had a special expertise in tying knots, and instructed him to make her a "noose." Hall made a noose and threw it back to Henry, who put it around the neck of a water bottle on the table, looked at Complainant, swung it, and said, "see, and it works, too." There were five or six persons in the electric room when this incident occurred.

16) Complainant became very upset and went downstairs for about five minutes. The incident particularly upset her because it reminded her of what happened to her father. Before Complainant was born, some men in Mississippi put a rope or chain around her father's neck and dragged him. Complainant's father later told her about this

incident. When she saw the noose, it brought back memories of that story to her and she "kind of felt what he was going through." During the hearing, Complainant cried the first time she testified about the Henry noose incident.

17) When Complainant returned to the electric room, the bottle and noose were gone. Complainant never told anyone employed by Respondent or ET of her father's experience. Complainant never saw Henry's string again.

18) On Friday, June 5, 1998, Complainant and a number of other co-workers employed by Respondent and ET, including Henry, did not work because Respondent was doing inventory. When Complainant went to Respondent's facility to pick up her check that day, she talked to Sherwood, telling him she had a problem she wanted to talk to him about. She told him that Henry had Hall make a noose with string, that Hall threw it across the table, and that Henry put it around the neck of a water bottle, dangled the bottle, and said "see it works." Although Complainant did not tell Sherwood of her father's experience, by the end of the conversation, Sherwood understood that the Henry noose incident was racially offensive to Complainant. During the conversation, Complainant also requested a transfer to another department. At the end of the conversation, Sherwood told Complainant he would talk with

her again on the following Monday.

19) Complainant did not complain to Sherwood about Henry's noose until June 5 because Respondent held a company party on a yacht on a date between June 2 and June 5, and Complainant did not want to upset anyone before the party, which she planned to attend.

20) On June 8, the Monday following Complainant's conversation with Sherwood, Sherwood approached Complainant at her workstation and asked her to come to his office. During their subsequent conversation, which lasted 30 to 45 minutes, Complainant described more details about the noose incident with Henry. Complainant told Sherwood she perceived the incident as racial harassment and requested a transfer to another department. Sherwood told Complainant he would talk to Henry about the incident.

21) Immediately afterwards, Sherwood spoke with Henry. Henry told Sherwood that she makes macramé things out of hemp string, asked Hall to show her some new knots, and that one of Hall's knots had included a knot around the neck of a bottle. Sherwood told Henry that Complainant had perceived it as a noose with racial connotations. Henry told her nothing racial was intended and that she was sorry if she had offended Complainant. Sherwood told Henry that it was a serious incident, told her of Respondent's "zero tolerance"

discrimination policy, and advised that her assignment with Respondent might be ended if some kind of agreement couldn't be reached with Complainant. Sherwood also spoke with Hall and Complainant's other co-workers in the electric room. Hall corroborated Henry's story, but did not describe his knot as a "noose." No one else in the electric room told Sherwood that they had heard Henry use the word "noose."

22) Immediately after meeting with Henry and talking with the other electric room employees, Sherwood spoke with Complainant again. He told her what Henry and her co-workers had told him, and said that Henry seemed sincere and was sorry if Complainant was offended. Complainant again asked him to transfer her to another department. Sherwood then asked Complainant to meet with Henry to see if they could work things out, adding that if it didn't work out, a transfer was possible.

23) Complainant then met with Henry for 30 to 45 minutes. It was a very emotional meeting, during which both Complainant and Henry cried. Henry was apologetic and told Complainant that she meant nothing racial by the knot and was very sorry if it offended Complainant. Henry also told Complainant that she had a sister in a skinhead gang and was trying hard not to be like her. Complainant told Henry she did not believe that nothing racial was intended by the knot.

24) Following her meeting with Henry, Sherwood had Com-

plainant meet with him again in his office. During this meeting, Complainant noticed a full-sized rope noose hanging on the wall inside Sherwood's office. Complainant was upset and crying, but was shocked and stopped crying when she noticed the noose. Complainant said nothing about it to Sherwood, as she believed there was no point in talking about the noose in Sherwood's office because she had complained to him about the Henry noose incident on the previous Friday, her current meeting with Sherwood involved that incident, yet Sherwood displayed a full-sized noose in his office.

25) The rope noose was given to Sherwood a few years earlier by Nancy Kerrigan, a former employee of Respondent, as a "suicide" joke. Sherwood kept it in his office as a macabre reminder that there was always a way out if things got too bad. Nooses lacked racial significance to Sherwood until Complainant complained on June 5 about Henry's noose.

26) During the meeting, Sherwood asked Complainant if she wanted him to terminate Henry. Sherwood told her if he discussed the incident with ET, ET might suggest ending both Henry's and Complainant's assignments, and that he would probably also recommend this, since he thought the incident was an unfortunate misunderstanding and it would be unfair to punish only Henry.

27) At the conclusion of his third meeting with Complainant on June 8, Sherwood instructed Complainant to immediately report to him anything in Respondent's workplace that she perceived as racial harassment.

28) Complainant never saw the noose in Sherwood's office again.

29) Sherwood did not report Complainant's complaint about Henry and the noose to ET, although his verbal agreement with ET called for him to do so.

30) Later in the week beginning June 8, 1998, an ET representative advised Sherwood that the noose on his wall was inappropriate and he removed it from his office that same week.

32) On June 9, 10, and 11, Complainant worked in Respondent's downstairs department doing covers for machines. During that time, Sherwood approached several times and asked her how things were going. Each time, she told him she was comfortable. Sherwood told her that he was looking for a permanent transfer for her, but there might be days when she would have to work with Henry.

31) Complainant returned to work in the electric room on June 8, following her third meeting of the day with Sherwood. Later that day, Sherwood approached Complainant on three occasions and asked her how things were going. The first two times, Complainant said she was fine. The third time, Complainant said she was uncom-

fortable. Complainant then approached Andy Thomas, the electric room supervisor, and asked if there was any other place in the building for her to work. Subsequently, Thomas told Complainant that she could take a vacationing employee's place for three days in Respondent's downstairs department.

33) On Friday, June 12, Complainant was assigned to work in the electric room again.

34) During Complainant's employment with Respondent, Respondent had five different departments. The valve production and mounting block departments shared the same room. The other three departments, including the electric room, were all in separate rooms. Departmental transfer of employees was not unusual, and was normally based on Respondent's business needs. Because of the small size of Respondent's operation, peaks in demand necessitated that all employees at some time temporarily transfer to other departments to avoid slowdowns in production.

35) Mike Jones is a Caucasian who worked in Respondent's electric room and was also employed by ET. On the morning of June 12, Complainant was the only African American in the electric room. She heard Jones tell another co-worker, "Lynice thinks I'm poor white trash." Jones then turned to Complainant and said, "You think I'm poor white trash, don't you." Another Caucasian co-worker then asked Jones if he lived in a trailer home and had

clothes hanging out on a line. When Jones answered "yes," that co-worker told him he was "poor white trash." Jones then asked Complainant what she thought. Complainant responded by asking what it had to do with her job. Jones said nothing else to Complainant that day. Complainant believed Jones was picking on her and trying to get her to start an argument and perceived that Jones was "harassing" her. Prior to this incident, Complainant and Jones had worked together without any problems.

36) During the afternoon of June 12, in Complainant's presence, Jones made some comments about "gangbangers," made some gestures that Complainant believed were "gang signs," and commented "what you got on this bag," which Complainant interpreted as being related to drug dealers. Complainant was the only African American in the electric room at the time. Complainant perceived that Jones was speaking and acting in a way intended to imitate African-American males and was offended by these remarks.

37) During Complainant's employment at Respondent, she heard no other comments she perceived as racial other than those described in Findings of Fact – The Merits 15, 35, and 36.

38) On June 12, 1998, Complainant went to ET after work and complained to Weiss about the Henry noose incident and Jones' "poor white trash" comments.

39) On June 15, 1998, Weiss called Sherwood and related Complainant's complaints to him. Sherwood was surprised and upset. He told Weiss that he had already spent several hours investigating the Henry noose incident. Regarding the Jones allegation, he expressed upset that Complainant hadn't followed his instructions to come to him immediately if any harassment had occurred. He told Weiss Complainant had been insubordinate by not coming to him immediately with her complaints about Jones and asked Weiss to terminate Complainant's assignment.

40) Complainant did not complain to Sherwood about Jones because she believed it would do no good, based on Sherwood's response to her complaint about Henry's noose, which had left her with the feeling that she was supposed to solve the problem herself, and the presence of the noose in his office after she complained to him about Henry's noose.

41) Sherwood never told Complainant not to take any complaint to ET.

42) Before, during, and after Complainant's employment with Respondent, Sherwood held regular meetings for all permanent and temporary employees, including Complainant while she was employed by Respondent. Racial harassment and discrimination were among the subjects discussed at those meetings. At the meetings, Sherwood stated that

racial harassment would not be tolerated in Respondent's workplace, and that anyone who felt they had been harassed should come to him or any supervisor immediately. Sherwood stated that Respondent would investigate the complaining employee's allegations and take whatever steps were appropriate. At the meetings, Sherwood never told employees not to also go to ET with complaints of harassment.

43) On June 15, the same day Sherwood had asked ET to terminate Complainant, Liz Cole, ET's site manager who was assigned to Respondent, met with Complainant at Respondent's facility. Cole told Complainant she wanted to talk to her because she had heard about the problems Complainant had been having at Respondent's. Cole told Complainant she wanted to assign her to a job in another environment where she would be happier. Cole offered Complainant a temporary job in ET's office doing fulltime clerical work that required no skill or prior experience, at \$8.00 per hour, until ET could find another assembly and production position for Complainant. Cole told Complainant she could wear whatever she wanted while working at ET and that ET would train her. During this conversation, Cole was insistent that Complainant work somewhere else, but Complainant responded that she wanted a couple of days to think over Cole's proposal.

44) On the morning of June 16, Cole met with Complainant

again at Respondent's facility. Complainant insisted that she wanted to continue working for Respondent, but Cole told her that her assignment with Respondent was terminated. Cole told her it was Sherwood's decision. When Complainant asked why, Cole responded "You made the complaint; you have to go." This upset Complainant and she cried. She went back to the electric room and got her things, telling her co-workers goodbye and that she was being kicked off the job.

45) Complainant liked the type of work she performed for Respondent, was a good worker, and would have liked to keep working there if Respondent had taken appropriate steps to eliminate racial harassment from its workplace.

46) On June 16, Sherwood met with Jones and questioned him about Complainant's "poor white trash" allegation. Jones admitted making the alleged comments and had no explanation for them. Sherwood told Jones that his comments were inappropriate in the workplace, that they might be misconstrued, and that he should not make comments like that again. Sherwood told Jones that his assignment with Respondent might be ended if he made similar comments again. Sherwood also believed that Jones' comments were not racial harassment.

47) The Henry noose incident, Complainant's observation of Sherwood's noose, and Jones' comments on June 12 upset

Complainant. Before her discharge from Respondent, she talked with two co-workers and told them she felt she had been treated unfairly and she was upset about it. When ET terminated her assignment with Respondent based on Respondent's wishes, she was upset because she felt it was unfair. She felt that way for a long time, and at the time of the hearing, still felt upset that Respondent had treated her unfairly.

48) ET paid Complainant's wages for the full week of June 15-19, 1998, as though she had continued working for Respondent.

49) On June 19, 1998, Complainant met with Weiss and Tracey Basile, ET's branch manager at the ET location where Weiss was employed. During that meeting, Complainant informed Weiss and Basile that Jones was imitating African-American males and had made comments about "gangbangers" the same day he made the "poor white trash" comments. Complainant told them she believed Jones' "poor white trash" comments were racial harassment.

50) At the hearing, Complainant testified that she thought Jones' "poor white trash" comments were "harassment" and stated she did not think of them "as being racial discrimination." Complainant also testified that she thought the "gangbanger" comments were "racial."

51) On June 22, 1998, ET again offered Complainant a job

working at ET's "Halsey" office doing clerical work at \$8.00 per hour until ET could locate an assembly and production job for Complainant. This job was closer to Complainant's home than Respondent's facility. Complainant declined the job because she wanted assembly and production work, not clerical work, and wanted to return to work for Respondent. Because Complainant would have been physically present in ET's office when employers called ET seeking employees, accepting ET's offer would have put her in the position of being the first person offered any assembly and production job openings that came up in ET's office.

52) Sometime between June 19 and June 24, 1998, Sherwood became aware of Complainant's allegations that Jones had imitated African-American males and made comments about "gangbangers." Sherwood questioned Jones and other employees in the electric room about Complainant's allegations. Jones denied them, and none of the other employees he talked with corroborated Complainant's allegations. As a result, Sherwood concluded that the incidents complained of by Complainant had not occurred. Sherwood then held an employee meeting to address discrimination, telling Respondent's employees that Respondent has "zero tolerance" for "discrimination or harassment" and that employees needed to report any incidents of

discrimination or harassment to him immediately.

53) On June 24, 1998, Weiss and Basile met with Sherwood to discuss Complainant's allegations. Sherwood indicated that he had already conducted his own investigation, informed Weiss and Basile of the results, and told them he did not want them to interview Henry and Jones.

54) On June 23, July 1, and July 10, 1998, ET telephoned Complainant with several job offers at assembly and production jobs that paid \$7.00 per hour. Complainant, who did not have voice mail at the time but did have caller I.D., returned ET's calls. Each time, the jobs had already been filled.

55) On July 14, 1998, ET offered and Complainant accepted an assembly and production job at Connor Formed Metal Products Assembly that paid \$7.25 per hour. The job was expected to last about two weeks. Complainant quit the job on July 20, 1998, because she was upset at ET for ET's handling of the situation with Respondent and ET's refusal to refer her back to Respondent for further employment. Complainant did not return to Connor to see if they would rehire her.

56) Between July and November 1998, Complainant checked the want ads two or three times a week looking for work. She also registered with a couple of temporary employment agencies that did not call her. She filled out two job applications a

week on the average, but did not find work until November. In November 1998, she was referred to Vision Plastics by another temporary employment agency. Complainant worked there for six months, earning \$7.00 per hour. Complainant left Vision after she had earned enough money to catch up on her bills.

57) In July 1999, Complainant learned of behavior by her husband that came as a terrible shock to her and made her angry and upset. In response, she immediately left for the Midwest with her three children, fearing for their safety. Subsequently, she filed criminal charges against him. During the hearing, she feared that her husband would retaliate against her during her stay in the Portland area. She was still mad and upset about her husband's behavior at the time of the hearing.

58) Weiss and Basile created contemporaneous incident reports regarding Complainant's allegations, their meetings with Complainant, and their conversations with Sherwood. These incident reports were neither complete nor entirely accurate.

59) Sometime within a year after Complainant's termination from Respondent, Sherwood created a three page "Incident Report" describing his knowledge of Complainant's allegations and actions taken in response to those allegations. Sherwood did not contemporaneously document any of these events, and this document was created solely from

memory. The forum finds that Sherwood's report is incomplete and unreliable, based on inconsistencies between the report, Sherwood's testimony, and other credible evidence presented at the hearing.

60) Both the Agency and Respondent listed Mike Jones as a witness in their case summary list, but neither called him to testify as a witness at the hearing.

61) On July 20, 1998, Complainant filed a complaint with the Civil Rights Division of BOLI alleging that ET subjected her to different treatment in Respondent's workplace based on her race/color and failed to take action on her complaints of racial harassment in Respondent's workplace. The Division investigated this complaint, interviewing Weiss and Basile in the process.<sup>4</sup>

62) At the time of the hearing, Dorothy Weiss was currently employed by ET as a sales representative and had worked for ET for four years at the time of the hearing. She had almost no current recollection of the events surrounding Complainant's allegations, and her testimony was based almost exclusively on her notes, which were incomplete and

not entirely accurate.<sup>5</sup> Consequently, her testimony has been credited only where it is corroborated by other credible evidence.

63) Tracie Basile was very candid and straightforward during direct examination, but defensive on cross-examination as she was questioned about evidentiary documents that were created by ET. She acknowledged that her incident reports, upon which she based a significant part of her testimony, were not entirely complete. However, her current recollection of the events surrounding Complainant's allegations was better than Weiss's almost negligible recollection, supporting her assertion, made on recross, that she had an independent recollection of some of the events that were not recorded in ET's "incident reports." Although her testimony regarding specific dates of events was not entirely credible, the forum has credited the substance of her testimony regarding the actual events themselves.

64) Jennifer Henry was an extremely nervous witness who was conveniently unable to recollect specifics concerning the noose incident, the central subject of her testimony. Specifically, she couldn't recall whether or not she asked Nate Hall to make a "noose," whether she and Hall said anything at all to each other while he was tying knots, and whether or not she swung the bot-

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<sup>4</sup> Although the record does not reflect what happened to the complaint against ET, the forum notes that joint employers, including temporary employment agencies such as ET, are also prohibited from discriminating.

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<sup>5</sup> See Finding of Fact – The Merits 58, *supra*.

tle around after putting the noose on it. In addition, Henry had become a permanent employee of Respondent about one year prior to the hearing and the forum believes this may have influenced her testimony. She also testified she couldn't recall if she told Complainant that her sister is a skinhead, then later denied that her sister is a skinhead. In conclusion, the forum finds that her inability to recall was based on an unwillingness to tell the truth and has discredited her testimony except where it was corroborated by other credible evidence.

65) Nye Sherwood presented a forthright demeanor to the forum while he testified. However, his memory of the relevant events had faded and he had no reliable, documentation to rely upon to assist his recollection due to his failure to contemporaneously document the events surrounding Complainant's allegations. In addition, Sherwood's testimony concerning his role in Complainant's temporary transfer to Respondent's downstairs department is at odds with the time frame it actually occurred in. Sherwood testified that he had Andy Thomas relocate Complainant to a different department 1 ½ to 2 weeks after her complaint about Henry, whereas the forum has determined that Complainant's last day of work with Respondent was only eleven days after she first brought the Henry matter to Sherwood's attention. Respondent did not call Thomas as a witness to corroborate Sher-

wood's version of Complainant's transfer.

66) Complainant was a credible witness. She testified in a straightforward, consistent, and convincing manner during direct and cross-examination. Although her memory had dimmed somewhat with regard to several events, such as the exact date when she first reported Mike Jones' "gangbanger" comments to ET and the specific date she met with Dorothy Weiss and Tracie Basile, her memory was unimpaired and her testimony convincing concerning the substance of her allegations. The forum's conclusion in this regard is bolstered by two additional statements. First, her candid statement that she did not consider Mike Jones' "poor white trash" remarks to be "racial discrimination." Second, she did not embellish Jones' "gangbanger" comments in an effort to show that they were specifically directed at African Americans. In conclusion, the forum has credited her testimony in its entirety except in those instances where her memory was not certain. In those instances, the forum has credited her testimony wherever it was corroborated by other credible evidence. The forum has credited Complainant's testimony wherever it conflicts with Sherwood's as to material issues.

#### **ULTIMATE FINDINGS OF FACT**

1) Complainant is an African American.

2) At all times material herein, Respondent was an employer in the state of Oregon utilizing the personal services of one or more persons.

3) Complainant was jointly employed by Respondent and Employment Trends, a temporary employment agency, between March 12, 1998, and June 16, 1998.

4) On June 2, 1998, Jennifer Henry, one of Complainant's Caucasian co-workers, asked Nate Hall, another Caucasian co-worker, to make a noose out of a short length of some hemp string she used for macramé. Hall did this and gave it to Henry, who put the noose around the neck of a water bottle, looked at Complainant, who was seated next to her, swung it, and said "see, and it works, too." Henry's and Hall's actions and statements were not based upon Complainant's race/color.

5) Complainant believed Henry's statements and actions were because of Complainant's race/color and was upset and offended by them.

6) On Friday, June 5, a day Complainant was not scheduled to work, Complainant told Nye Sherwood, Respondent's production manager who was in the direct line of people with supervisory authority over Complainant, about the Henry noose incident and requested a transfer to another department. At the end of the conversation, Sherwood understood that Henry's noose was

racially offensive to Complainant and said he would talk more about it with Complainant on Monday, June 8, Complainant's next scheduled workday.

7) On June 8, Complainant discussed the Henry noose incident at length with Sherwood and asked again to be transferred to another department. Sherwood promptly investigated the incident. He told Henry that it was a serious incident, told her of Respondent's "zero tolerance" discrimination policy, and advised that her assignment with Respondent might be ended if some kind of agreement couldn't be reached with Complainant. Sherwood told Complainant his conclusion, then asked Complainant to meet with Henry to try and work things out.

8) Complainant met with Henry, who apologized, told Complainant that she had a skinhead sister and was trying hard not to be like her, and told Complainant that the noose had no racial meaning to her.

9) Complainant then met with Sherwood again and told him she didn't believe Henry was sincere. During this meeting, she noticed a full-sized noose hanging on his office wall. Complainant was shocked by the presence of the noose, but did not comment on it. Sherwood asked Complainant if she wanted him to terminate Henry, noting that ET might suggest terminating both Complainant and Henry and that he would concur with this suggestion. Sherwood also instructed Complainant to immediately report any

further harassment to him so he could conduct an immediate investigation.

10) The noose was a gift to Sherwood from a former co-worker, and he kept it on the wall as a macabre reminder that there was always a way out if things got too bad. It had no racial significance to him until Complainant complained on June 5 about Henry's noose.

11) In the afternoon of June 8, Complainant asked Andy Thomas, the electric room supervisor, for a transfer. Thomas arranged for a temporary, three-day transfer into Respondent's downstairs department.

12) Later in the week beginning June 8, Sherwood removed the noose from his wall on the advice of an ET representative.

13) On June 12, Complainant was reassigned to the electric room. That morning, Mike Jones, a Caucasian co-worker, directed comments towards Complainant in which he referred to himself as "poor white trash." That afternoon, Jones made comments about "gangbangers," made gestures Complainant believed to be gang signs, and made a remark Complainant believed was drug-related, all the time speaking and acting in a way that Complainant perceived to be an imitation of African-American males. These remarks and behavior were offensive to Complainant.

14) On June 12, Complainant went to ET after work and complained about the Henry

noose incident and Jones' "poor white trash" remarks. Complainant did not complain to Sherwood because of her reasonable belief that it would do no good, based on his response to her complaint about Henry's noose and the noose in his office.

15) On June 15, a representative of ET telephoned Sherwood and told him of Complainant's complaints about the Henry noose incident and Jones' "poor white trash" remarks. Sherwood was upset because Complainant had not followed his directive to immediately notify him of any racial harassment, because he thought he had already taken care of the Henry noose incident, and because she had complained to ET. Sherwood asked ET to terminate Complainant's assignment to Respondent.

16) On June 16, ET terminated Complainant's assignment to Respondent based on Sherwood's request.

17) On June 19, Complainant told ET about Jones' "gangbanger" comments and imitation of African-American males. ET reported this to Sherwood between June 19 and June 24. Sherwood promptly investigated by interviewing Jones and his co-workers, who denied that the alleged incidents had occurred. Based on their denials, Sherwood concluded that Complainant's allegations were unfounded. Sherwood then held an employee meeting, at which he told employees again that Respondent had zero tolerance for racial harass-

ment and that any harassment should be reported to him immediately.

18) Complainant experienced substantial mental suffering as a result of the Henry noose incident, her observation of Sherwood's noose, and Jones' remarks and behavior detailed in Ultimate Finding of Fact 12, and the termination of her assignment with Respondent.

19) Complainant suffered three weeks' lost wages as a result of the termination of her assignment with Respondent, but failed to mitigate her wage loss by declining ET's June 22, 1998, job offer described in Findings of Fact – The Merits 43 and 51.

### CONCLUSIONS OF LAW

1) At all times material herein, Respondent Servend International, Inc. dba Flomatic International was an employer subject to the provisions of ORS 659.010 to 659.110.

2) The actions, inactions, statements, and motivations of Nye Sherwood are properly imputed to Respondent.

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

4) ORS 659.030(1)(f) provides, in pertinent part:

“(1) For the purposes of ORS 659.010 to 659.110, \* \* \*, it is an unlawful employment practice:

“\* \* \* \* \*

“(f) For any employer \* \* \* to discharge \* \* \* any person because the person has opposed any practices forbidden by this section \* \* \*.”

Nye Sherwood requested termination of Complainant's assignment to Respondent in retaliation for her complaints of racial harassment to Employment Trends, and Complainant was discharged from Respondent's employment for that reason, constituting a violation of ORS 659.030(1)(f).

5) ORS 659.030(1)(b) provides, in pertinent part:

“For the purposes of ORS 659.010 to 659.110 \* \* \*, it is an unlawful employment practice:

“(b) For an employer, because of an individual's race, \* \* \*, color \* \* \* to discriminate against such individual \* \* \* in terms, conditions or privileges of employment.”

OAR 839-005-0010(1) provides:

(1) Substantial evidence of intentional unlawful discrimination exists if the Civil Rights Division's investigation discovers such evidence as a reasonable person would accept as sufficient to support the following four elements:

“(a) The Respondent is a Respondent as defined by statute;

“(b) The Complainant is a member of a protected class;

“(c) The Complainant was harmed by an action of the Respondent; and

“(d) The Complainant’s protected class was a reason for the Respondent’s action.”

OAR 839-005-0010(4) provides, in pertinent part:

“(4) Harassment in employment based on an employee’s protected class is a type of intentional unlawful discrimination. \* \* \*

“(a) Conduct of a verbal or physical nature relating to protected classes other than sex is unlawful when:

“(A) Substantial evidence of the four elements of OAR 839-005-0010(1) is shown; and

“(B) Such conduct is sufficiently severe or pervasive to have the purpose or effect of unreasonably interfering with an individual’s work performance or creating an intimidating, hostile or offensive working environment.”

“\* \* \* \* \*

“(b) The standard for determining whether harassment is sufficiently severe or pervasive to create a hostile, intimidating or offensive working environment is whether a reasonable person in the circumstances of the complainant would so perceive it.”

“\* \* \* \* \*

“(d) Harassment by Supervisor, No Tangible Employment

Action: Where harassment by a supervisor with immediate or successively higher authority over the individual is found to have occurred but no tangible employment action was taken:

“(A) The employer is liable if the employer knew of the harassment unless the employer took immediate and appropriate corrective action.

“(B) The employer is liable if the employer should have known of the harassment. The Civil Rights Division will find that the employer should have known of the harassment unless the employer can demonstrate:

“(i) That the employer exercised reasonable care to prevent and correct promptly any harassing behavior; and

“(ii) That the complaining individual unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.

“(e) Harassment by Coworkers or Agents: An employer is liable for harassment by any of the employer’s employees or agents who do not have immediate or successively higher authority over the complaining individual where the employer knew or should have known of the conduct, unless the employer took immediate and appropriate corrective action.”

Complainant’s race/color was not a reason for the June 2, 1998,

Henry noose incident, and the Henry noose incident does not constitute a violation of ORS 659.030(1)(b). Complainant's race/color was a reason for the June 12, 1998, "gangbanger" comments and related behavior by Jones; however, these comments and behavior were not severe or pervasive enough to have the purpose or effect of creating an intimidating, hostile or offensive working environment for a reasonable African American in the circumstances of Complainant and did not constitute a violation of ORS 659.030(1)(b).

Complainant's race/color was not a reason for the existence of the full-sized noose in Sherwood's office on June 8, 1998. Consequently, Sherwood's noose did not constitute a violation of ORS 659.030(1)(b).

6) Pursuant to ORS 659.060(3) and by the terms of ORS 659.010(2), the Commissioner of the Bureau of Labor and Industries has the authority to issue a Cease and Desist order requiring Respondent: to refrain from any action that would jeopardize the rights of individuals protected by ORS 659.010 to 659.110, to perform any act or series of acts reasonably calculated to carry out the purposes of said statutes, to eliminate the effects of an unlawful practice found, and to protect the rights of the Complainant and other persons similarly situated.

## OPINION

## INTRODUCTION

In its Specific Charges, the Agency alleged that Respondent unlawfully discriminated against Complainant: (1) in terms and conditions of employment by subjecting her to racial harassment by coworkers and a supervisor, in violation of ORS 659.030(1)(b); and (2) by discharging her in retaliation for complaining of racial harassment, in violation of ORS 659.030(1)(f). The Agency sought \$5,000 in back pay and \$30,000 in mental suffering damages.

## TERMS AND CONDITIONS OF EMPLOYMENT – RACIAL HARASSMENT

### A. The Henry noose incident.

This incident occurred when Henry, a Caucasian co-worker of Complainant's, asked Hall, another Caucasian co-worker, to make a noose out of a short length of brown hemp string. Hall made a noose and threw it back to Henry, who put it on the neck of a water bottle on the table, looked at Complainant, who was sitting next to her, swung it, and said, "see, and it works, too." This act caused Complainant to "kind of fe[el]" what her father had gone through while being dragged by the neck by a rope or chain in Mississippi a number of years earlier and upset her so much she had to leave her work area until she could gain control of her emotions. The noose incident upset Complainant so much she felt she could no longer work with Henry, and she cried during the hearing the first time she testified about it.

A prima facie case of co-worker harassment in this case consists of the following elements:

(1) The Respondent is a Respondent as defined by statute [OAR 839-005-0010(1)(a)];

(2) The Complainant is a member of a protected class [OAR 839-005-0010(1)(b)];

(3) The Complainant was harmed by harassment directed at her by co-workers [OAR 839-005-0010(1)(c); OAR 839-005-0010(4)(e)];

(4) The Complainant's protected class was a reason for the co-worker harassment [OAR 839-005-0010(1)(d)];

(5) The harassment was sufficiently severe or pervasive to have the purpose or effect of unreasonably interfering with the Complainant's work performance or creating an intimidating, hostile or offensive working environment [OAR 839-005-0010(4)(a)(B)];

(6) The standard for determining whether harassment was sufficiently severe or pervasive to create a hostile, intimidating or offensive working environment is whether a reasonable African American in the circumstances of the Complainant would so perceive it [OAR 839-005-0010(4)(b)];

(7) The Respondent knew or should have known of the harassment [OAR 839-005-0010(4)(e)].

The first and second elements of the Agency's prima facie case are undisputed, and the forum's analysis begins with the third element, whether or not Complainant was harmed.

1. Was Complainant harmed by Henry's noose?

Complainant's credible testimony established that she was offended by the noose incident and so upset that she had to leave her work station temporarily and felt she could no longer work with Henry, as evidenced by her subsequent requests to Sherwood for a transfer to a different department. This satisfies the "harm" requirement of OAR 839-005-0010(1)(c).

2. Was Complainant's race/color a reason for Henry's noose?

There was no direct evidence presented linking Henry's noose to Complainant's race/color. Circumstantial evidence indicating that Complainant's race/color may have been a reason for Henry's noose consisted of the following: (1) Although there were five or six other employees in the electric room at the time of the incident, Henry's use of the noose to swing the bottle and her related comment were directed at Complainant; (2) There is a cultural significance to a noose in race relations between Caucasians and African Americans<sup>6</sup>; and

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<sup>6</sup> See The Columbia Encyclopedia (5<sup>th</sup> ed. 1993) ("Between 1882, when reliable data was first collected, and 1968, when the crime had largely dis-

(3) Henry's credibility was suspect, casting doubt on her assertion that Complainant's race/color was not a reason for the noose. Circumstantial evidence leading to a contrary inference included: (1) A preponderance of the evidence did not establish that Henry bore a racial animus towards African Americans or had ever engaged in any other racial harassment of African Americans; (2) Henry and Complainant had been friends at work until the Henry noose incident; (3) A preponderance of the evidence did not establish that Henry was aware of the cultural significance of a noose to African Americans in the United States; and (4) Henry was not aware that Complainant's father had been the victim of a noose incident.

Although the noose and Henry's behavior surrounding it were sufficient to cause Complainant, based on her specific

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appeared, there were at least 4730 lynchings in the United States, including some 3440 black men and women. Most of these were in the Reconstruction era South, where southern whites used lynching and other terror tactics to intimidate blacks into political and social submission. \* \* \* Most blacks were lynched for outspokenness, in the aftermath of race riots, and for other presumed offenses against whites.") However, the forum also notes that the only evidence produced at hearing related to this was Complainant's testimony concerning the specific incident that occurred to her father in Mississippi before she was born.

circumstances, to reasonably conclude that her race/color were a reason for the noose and behavior, her conclusion is not supported by a preponderance of the evidence, and the Agency has failed to meet its burden of proof on this element of its prima facie case. Consequently, the Agency's claim regarding the Henry noose incident must fail.

**B. The Sherwood noose incident.**

While meeting with Sherwood on June 8 to discuss the Henry noose incident, Complainant observed a full-sized rope noose hanging on the wall in his office. She was shocked, but said nothing, concluding that there was no point in talking about Sherwood's noose because she had complained to him about Henry's noose both on June 5 and earlier that morning and her meeting with Sherwood involved that noose, yet Sherwood still had a full-sized noose hanging in his office. Sherwood's explanation, which the forum has accepted as credible, was that it had been hanging on his wall for several years as a macabre "suicide" joke, and that it had no racial significance to him until Complainant told him she found Henry's noose to be racially offensive. Sherwood took the noose down later that week, after he discussed it with an ET representative, who advised him it was inappropriate to have a noose hanging in his office. Complainant never saw the noose again after her June 8 meeting with Sherwood.

In this case, a prima facie showing of harassment by a supervisor, with no tangible employment action, consists of the following elements:

(1) The Respondent is a Respondent as defined by statute [OAR 839-005-0010(1)(a)];

(2) The Complainant is a member of a protected class [OAR 839-005-0010(1)(b)];

(3) The Complainant was harmed by harassment directed at her by a supervisor with immediate or successively higher authority over her [OAR 839-005-0010(1)(c); OAR 839-005-0010(4)(d)];

(4) The Complainant's protected class was a reason for the supervisory harassment [OAR 839-005-0010(1)(d)];

(5) The harassment was sufficiently severe or pervasive to have the purpose or effect of unreasonably interfering with the Complainant's work performance or creating an intimidating, hostile or offensive working environment [OAR 839-005-0010(4)(a)(B)];

(6) The standard for determining whether harassment was sufficiently severe or pervasive to create a hostile, intimidating or offensive working environment is whether a reasonable African American in the circumstances of the Complainant would so perceive it. [OAR 839-005-0010(4)(b)];

(7) The Respondent knew or should have known of the harassment [OAR 839-005-0010(4)(d)]

Again, the first two elements of the Agency's prima facie case are undisputed, and the forum's analysis begins with the third element, whether or not Complainant was harmed by Sherwood's noose.

1. Was Complainant harmed by Sherwood's noose?

Complainant observed Sherwood's full-sized rope in his office while meeting with him to discuss racial harassment she believed she had experienced from Henry's noose. Complainant was upset and crying, but was shocked and stopped crying when she noticed the noose. At that point, based on the presence of the noose while they were talking about another offensive noose, Complainant concluded that Sherwood would not take any meaningful action about any future complaints of harassment. This emotional upset on Complainant's part satisfies the "harm" requirement of OAR 839-005-0010(1)(c).

2. Was Complainant's race/color a reason for Sherwood's noose?

Sherwood's original intention in hanging the noose in his office had nothing to do with Complainant's race/color. On June 5, he was put on notice that nooses were racially offensive to Complainant. No evidence was presented to establish that Sherwood was aware that a noose could have a racial significance

before that date. Complainant saw the noose on June 8, then never saw it again. Later that week, Sherwood removed it from his office. Although the presence of Sherwood's noose was sufficient to cause Complainant, based on her specific circumstances, to reasonably conclude that her race/color was a reason for the noose, her conclusion is not supported by a preponderance of the evidence, and the Agency has failed to meet its burden of proof on this element of its prima facie case. Therefore, the Agency's claim regarding the Sherwood noose incident must fail.

**C. Mike Jones "poor white trash" remarks.**

On June 12, Complainant was reassigned to the electric room. On the morning of June 12, 1998, Mike Jones, a Caucasian co-worker, directed remarks referring to himself as "poor white trash" to Complainant, the only African American in the electric room, and asked her if she thought he was "poor white trash." At the time the remarks were made, Complainant perceived them as "harassment," but not as "racial discrimination." When Sherwood investigated this allegation, Jones admitted making the remarks and had no explanation for them. Sherwood concluded that Jones' remarks did not constitute racial harassment and counseled Jones that his assignment with Respondent might be ended if he made similar remarks again.

The forum evaluates this claim under the same standards as the Henry noose incident. Once more, the first two elements of the Agency's prima facie case are undisputed, and the forum's analysis begins with the third element, whether or not Complainant was harmed by Sherwood's noose.

**1. Was Complainant harmed by Jones' remarks?**

Based on Complainant's credible testimony that she felt "harassed," the forum concludes that she was harmed by Jones' remarks.

**2. Were Jones' remarks based on Complainant's race/color?**

Several facts give rise to an inference that Complainant's race/color was a reason for Jones' remarks. First, their subject matter was race/color, albeit Jones' race/color. Second, they were directed at Complainant, the only African American in the room. Third, Jones had no explanation for his remarks when questioned about them by Sherwood. Giving rise to the opposite inference are the facts that Jones' remarks were derogatory towards himself, not African Americans; Complainant did not believe at the time that they were directed at her because of her race<sup>7</sup>; and there was no

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<sup>7</sup> The forum notes that Complainant had changed her mind about the reason for Jones' remarks by the time she complained to ET on June 19 about the "gangbanger" remarks and had come to believe that her race/color was a reason for his re-

testimony, credible or incredible, to shed light on Jones' state of mind when he made these remarks. Jones' remarks may have been intended to racially harass Complainant or may have been intended as self-deprecation. The Agency bears the burden of proving, by a preponderance of the evidence, that Complainant's race/color was a reason for Jones' remarks and has not met that burden in this instance.

**D. Mike Jones' "gangbanger" remarks.**

In the afternoon of June 12, the same day that Jones earlier made the "white trash" remarks, Jones made some comments in Complainant's presence about "gangbangers," made some gestures that Complainant believed were "gang signs," and commented "what you got on this bag," which Complainant interpreted as being related to drug dealers. Complainant perceived that Jones was speaking and acting in a way that was intended to imitate African American males and was offended by these remarks. Complainant brought this behavior to ET's attention after Respondent terminated her assignment, and ET passed the complaint on to Sherwood. Sherwood interviewed Jones and his co-workers, all of whom denied that the behavior had occurred, and concluded that the incidents had not occurred. He then held an employee meeting to remind all

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marks, apparently as a result of his subsequent "gangbanger" comments.

employees of Respondent's "zero tolerance" policy and that employees needed to immediately report any incidents of discrimination or harassment to him.

The forum evaluates this claim under the same standards as the Henry noose incident.

1. Was Complainant harmed by Jones' behavior?

Complainant credibly testified that she was offended by Jones' conduct, which satisfies the prima facie element of harm.

2. Was Complainant's race/color a reason for Jones' behavior?

Complainant, who was the only African American present when Jones' behavior occurred, testified credibly to her perception and the basis for her perception that Jones was speaking and acting in a way intended to imitate African-American males and portray them as gang members and drug dealers. Complainant was also the only actual witness to the event who testified. In that testimony, she testified credibly that she believed his behavior was "racial." In defense, Respondent presented testimony by Sherwood that he had investigated Complainant's allegations and determined that they had not occurred. Based on an assessment of Complainant's credibility, the forum has already determined that Jones in fact engaged in the alleged behavior. Accordingly, Sherwood's determination carries no weight as to whether Jones' behavior was based on Com-

plainant's race/color. Based on Complainant's credible account of Jones' behavior and the fact that Complainant was the only African American present when the behavior occurred, the forum concludes that Jones' behavior was based on Complainant's race/color.

3. Was Jones' conduct sufficiently severe or pervasive to have created an intimidating, hostile and offensive working environment in the perception of a reasonable African American in the circumstances of Complainant?

The forum applies an objective standard to determine whether Jones' conduct was sufficiently severe or pervasive to have created an "intimidating, hostile or offensive working environment" for a "reasonable person in the circumstances of the Complainant," applying this standard in light of the "totality of the circumstances." *Fred Meyer*, 152 Oregon App 307, 309. This forum has previously recognized that "there is an inverse relationship between the requisite severity and pervasiveness of harassing conduct: as the severity of the conduct increases, the frequency of the conduct necessary to establish harassment decreases." *In the Matter of Chalet Restaurant and Bakery*, 10 BOLI 183, 195-96 (1992). The forum finds that Jones' conduct, standing alone, was not sufficiently severe to have created an intimidating, hostile or offensive

working environment for a reasonable African American in the circumstances of the Complainant. Furthermore, because it was the only incident in which Complainant's race/color was a reason for the harassment, the forum also finds that the incident was not part of an environment or series of events in which harassment was sufficiently pervasive to have created an intimidating, hostile or offensive working environment for a reasonable African American in the circumstances of the Complainant.<sup>8</sup>

**DID SHERWOOD TERMINATE COMPLAINANT'S ASSIGNMENT WITH RESPONDENT IN RETALIATION FOR HER COMPLAINTS OF RACIAL HARASSMENT?**

ORS 659.030(1)(f) prohibits an employer from discharging an employee because the employee has opposed any practice forbidden by ORS Chapter 659. It gives an employee the right to oppose what the employee reasonably believes to be an unlawful practice. As long as the employee's belief that discrimination has occurred is a reasonable one, the employee is

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<sup>8</sup> *Compare In the Matter of Auto Quencher*, 13 BOLI 14, 21-22 (1994) (During an African American's two week period of employment, his Caucasian supervisor stated that "there ain't nothing worse than a black assed nigger" and that "blacks had smaller brains than white people." The forum held that this behavior was sufficiently severe to create an offensive working environment for the complainant and to a reasonable person.)

protected against retaliation for complaining about the discrimination. *In the Matter of Pzazz Hair Designs*, 9 BOLI 240, 255 (1991).<sup>9</sup> The rationale is that appropriate opposition should not be chilled by fear of retaliation – even if, as a matter of fact or law, there is no violation.<sup>10</sup> The manner of opposition must be reasonable.<sup>11</sup>

In this case, Complainant was discharged by Respondent after she complained about the Henry noose incident and Jones' "white trash" remarks to ET, her joint employer. The forum has concluded that, at the time of her June 12 complaint to ET, Complainant had a reasonable subjective belief that her race/color was a reason for the Henry noose incident, although it is not clear from the evidence she believed at that time that the "poor white trash" comments were related to her race/color. Under the circumstances, Complainant reasonably believed, at the time of her complaint, that at least one of the incidents she was fired for complaining about constituted unlawful harassment.

When ET brought those complaints to the attention of Sherwood, he became upset and immediately instructed ET to terminate Complainant's assignment. Sherwood acknowledged that he terminated Complainant's assignment to Respondent in direct response to being informed of these complaints by ET, but stated that the termination was not based on the complaints but on the fact that Complainant's complaints to ET established that Complainant had been insubordinate in failing to complain immediately to him about Jones' remarks. Respondent's contention that it had the right to terminate Complainant for insubordination because she ignored Sherwood's directive to complain to him "immediately" if she experienced harassment does not hold water. To begin with, Complainant had the absolute right to complain to ET, or anyone else for that matter, about racial harassment she experienced at Respondent's place of business.<sup>12</sup> Second, by failing to take appropriate corrective action after Complainant's first complaint in requiring that Complainant try to work things out herself with Henry, failing to adequately consider transferring her to another department where she did not have to work with Henry, and threatening to retaliate against Complainant by discharging her if Henry was discharged, Sherwood

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<sup>9</sup> See also EEOC Compliance Manual, Section 8, Retaliation, p. 9. This document may be found on the Internet at [www.eeoc.gov/docs/retal.txt](http://www.eeoc.gov/docs/retal.txt) (visited February 18, 2000).

<sup>10</sup> See Lindeman and Grossman, *Employment Discrimination Law*, Third Edition, vol. 1, at 657 (1996).

<sup>11</sup> *EEOC Compliance Manual, Retaliation*, at p. 9.

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<sup>12</sup> *Id.*, at p. 7.

himself created a situation whereby Complainant reasonably believed that he would not take appropriate action with regard to any harassment complaint she brought to his attention and brought her next complaint to the attention of ET, instead of Sherwood. Third, ET was Complainant's joint employer and had instructed Complainant to bring any harassment to their attention. Fourth, a retaliatory motive was established on Sherwood's part after the Henry noose incident, when he told Complainant that he could tell ET about the incident and that ET might suggest ending both Henry's and Complainant's assignments to Respondent, noting that he would probably agree with that suggestion. Fifth, Complainant testified credibly that Liz Cole, the ET representative who formally terminated Complainant's assignment with Respondent, told her "You made the complaint; you have to go" in response to Complainant's query about why Sherwood wanted her discharged. Finally, Sherwood did not discharge Complainant after she complained to him about the Henry noose incident, but only after she went to ET, giving rise to the inference that she was terminated because she went "whistleblowing" to ET.

Based on all these reasons, the forum concludes that Respondent discharged Complainant based on her opposition to racial harassment in the workplace, violating ORS 659.030(1)(f) in the process.

## DAMAGES

### A. Back Pay

Where a respondent commits an unlawful employment practice under ORS chapter 659 by discharging a complainant, the forum is authorized to award the complainant back pay, absent unusual circumstances. *In the Matter of ARG Enterprises, Inc.*, 19 BOLI 116, 136 (2000). The purpose of a back pay award is to compensate a complainant for the loss of wages and benefits that the complainant would have received but for the respondent's unlawful discrimination. *In the Matter of Salem Construction Company, Inc.*, 12 BOLI 78, 90 (1993). A complainant in an employment discrimination case who seeks back pay is required to mitigate damages by using "reasonable diligence in finding other suitable employment." *ARG*, 19 BOLI at 136; *In the Matter of City of Portland*, 6 BOLI 203, 210-11 (1987). Where the forum determines that a back pay award is appropriate, a respondent bears the burden of proving that a complainant failed to mitigate his or her damages. *ARG*, 19 BOLI at 136; *In the Matter of Thomas Myers*, 15 BOLI 1, 16 (1996). To meet this burden, a respondent must prove that the complainant failed to use reasonable care and diligence in seeking employment and that jobs were available which, with reasonable diligence, the complainant could have discovered and for which the complainant was qualified. *ARG*, 19 BOLI at 137.

In this case, Complainant earned \$7.00 per hour while employed by Respondent. She was discharged on June 16, 1998. However, ET paid her wages in full through June 19, 1998. On June 15, and again on June 22, 1998, ET made Complainant a fulltime job offer to perform unskilled clerical work in ET's Halsey office. There was no evidence to indicate this was not a good faith job offer. The job was closer to Complainant's house than Respondent's facility, would have paid \$8.00 per hour, did not require Complainant to dress any differently than she would have for assembly and production work, and would have only lasted until ET was able to successfully refer Complainant to another assembly and production job. However, Complainant declined ET's offer, as she did not want to perform clerical work and wanted to return to work for Respondent. ET's records show that Complainant could have been placed at an assembly and production job paying \$7.00 per hour as early as June 23, had she accepted ET's offer to perform clerical work in ET's office. Instead, Complainant was not at home when ET called her on June 23 with a job referral that would have paid \$7.00 per hour, and the job was filled by the time she returned ET's call. ET also called Complainant with job referrals on July 1 and July 10 for jobs that paid \$7.00 per hour, but Complainant was not available to take the calls.

ET continued to contact Complainant with job referrals, and

placed her at Connor Formed Metal Products Assembly on July 14, 1998, in a fulltime job doing assembly and production that paid \$7.25 per hour. Complainant quit that job and her employment with ET on July 20, 1998, because she was upset at ET's handling of the situation with Respondent and ET's refusal to refer her back to Respondent. In November 1998, Complainant found another job.

Under these specific circumstances, the forum concludes that Complainant's refusal of ET's temporary good faith job offer at \$8.00 for performing unskilled clerical work constituted failure to use reasonable care and diligence in seeking employment. It also constitutes proof that a job was available which, with reasonable diligence, the complainant could have discovered and for which the complainant was qualified. Respondent has satisfied its burden of proving showing that Complainant failed to mitigate her back pay loss, and Complainant is not entitled to any damages for back pay.

### **B. Mental Suffering**

In determining mental distress awards, the commissioner considers a number of things, including the type of discriminatory conduct, and the duration, frequency, and pervasiveness of that conduct. *In the Matter of James Breslin*, 16 BOLI 200, 219 (1997), *aff'd without opinion, Breslin v. Bureau of Labor and Industries*, 158 Or App 247, 972 P2d 1234 (1999). Awards for mental suffering damages depend

on the facts presented by each complainant. A complainant's testimony about the effects of a respondent's conduct, if believed, is sufficient to support a claim for mental suffering damages. *In the Matter of Sears, Roebuck and Company*, 18 BOLI 47, 77 (1999).

In this case, the forum's award of mental suffering damages is based on Complainant's retaliatory discharge. Complainant testified that she was upset over her discharge and felt it was unfair that she was fired, accurately perceiving that she had been fired because she complained about behavior that she reasonably believed to have been motivated by her race/color. She credibly testified that she felt upset about the discharge for a long time afterward and was still upset, to some degree, at the time of the hearing.

Considering all of these factors, the forum concludes that \$20,000 is an appropriate award of mental suffering damages. In formulating this award, the forum takes into consideration the fact that since July 1999, over a year after the discriminatory acts, Complainant has also experienced difficult circumstances caused by a collateral source that have caused extreme emotional distress.<sup>13</sup>

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<sup>13</sup> See Finding of Fact – The Merits, 57, *supra*.

### RESPONDENT'S REQUEST FOR A NEW HEARING

As noted in Finding of Fact – Procedural 27, within the time period for filing exceptions, Respondent requested a new hearing with a new ALJ and the right to depose Complainant before the new hearing. Respondent claimed it had been denied due process and severely prejudiced by the ALJ's denial of Respondent's request to depose Complainant before the hearing. Respondent argues that Complainant, unlike Respondent's witnesses, had no documentation of her allegations at the time of her testimony and "Consequently, there was no paper record that could contradict any of her testimony at the hearing." Respondent could have obtained any existing "paper record" by making an informal discovery request of the Agency prior to the hearing for documentation of the Complainant's allegations, then requesting a discovery order for these documents if the Agency refused to provide them. *Former OAR 839-050-0200(2)(c) and (3)*. There is no evidence in the record that Respondent ever requested these documents.

Furthermore, there is no automatic entitlement to conduct depositions in this administrative forum. The ALJ, "In his or her discretion \* \* \* may order discovery by a participant," and "The authority to order and control discovery rests with the administrative law judge." *Former OAR 839-050-0200(1) and (9)*.

The ALJ initially granted Respondent's motion to take Complainant's deposition in that, "based on the materiality of Complainant's testimony \* \* \* a deposition was an appropriate means of discovery in this case." A finding of materiality is not synonymous with due process. The ALJ later rescinded his interim order because Complainant's private counsel was unavailable. Complainants have the right to have their private counsel present at depositions, and Respondent's argument that Complainant and Crowley, her private counsel, had the time to participate in a deposition based on the facts that Crowley was present at the hearing during Complainant's testimony and met with Complainant for 30-40 minutes the morning of September 14, 1999, is not compelling. Furthermore, the forum notes that Respondent did not serve Crowley with its motion to depose Complainant; the ALJ, by oversight, did not serve its August 31, 1999 interim order granting Respondent's motion to depose Complainant on Crowley; and the Agency case presenter apparently also neglected to inform Crowley until September 13, 1999 of the pending deposition.

Respondent's request for a new hearing, with a new ALJ, is denied.

#### **RESPONDENT'S EXCEPTIONS**

Respondent's exceptions fall into four categories. First, Respondent argues that there was no evidence that Complainant's allegations of racial harassment

were because of her race. Second, Respondent challenges that its workplace was not a racially hostile work environment as a matter of law. Third, Respondent excepts that Complainant was discharged based on her failure to bring her complaints of harassment to Nye Sherwood, not in retaliation for making the complaints. Fourth, Respondent contends that the award for mental suffering is excessive.

#### **A. Harassment "because of" race/racially hostile work environment.**

Respondent argues that the conduct of Henry, Sherwood, and Jones which the ALJ determined constituted racial harassment was in fact unrelated to Complainant's race and that there is "no evidence" supporting the ALJ's conclusion. The forum has reviewed the facts and the law and determined that Complainant's race/color was not a reason for the Henry or Sherwood noose incidents or the Mike Jones' "poor white trash" remarks and revised the Ultimate Findings of Fact, Conclusions of Law, Opinion, and Order to reflect that determination. The forum has also determined that, although Complainant's race/color was a reason for Jones' "gangbanger" comments, those comments were not sufficiently severe or pervasive to constitute unlawful discrimination and made corresponding revisions to the Conclusions of Law, Opinion, and Order.

### **B. Retaliatory discharge.**

Respondent's exception that Complainant was discharged based on her failure to bring her complaints of harassment to Nye Sherwood, not in retaliation for making the complaints, is not supported by the record. Respondent argues that the ALJ failed to focus on the Agency's burden of persuasion that Respondent's LNDR was pretextual. To the contrary, the proposed opinion articulates a number of specific reasons supporting the conclusion that Respondent's termination of Complainant was both pretextual and retaliatory. Respondent's exception is denied.

### **C. Mental suffering damages.**

Respondent excepts to the ALJ's proposed \$30,000 award for mental suffering damages. Respondent argues that the ALJ gave insufficient weight to the traumatic circumstances Complainant was experiencing at the time of the hearing based on her husband's alleged criminal behavior towards her child and his threats of violence against Complainant. Respondent cites *A.L.P. Inc. v. Bureau of Labor and Industries*, 161 Or App 417 (1999), in which the commissioner awarded a complainant \$20,000 in mental suffering damages for more egregious harassment, as precedent for lowering the damage award to Complainant.

The forum disagrees with both of Respondent's contentions. First, the traumatic circumstances experienced by Complainant

arose in July 1999, over a year after the date of the discriminatory acts. Complainant testified that she was upset over Respondent's discriminatory acts even up to the time of the hearing. Duration of a complainant's mental distress is a factor this forum considers in determining mental distress awards. *In the Matter of Vision Graphics and Publishing, Inc.*, 16 BOLI 21, 27 (1997). Even if the forum discounts Complainant's upset after July 1999, this still leaves thirteen months in which Complainant experienced mental suffering as a result of Respondent's discriminatory act. In *A.L.P.*, the complainant's mental distress only lasted for two months.<sup>14</sup>

The commissioner is authorized to award complainants damages designed to eliminate the effects of any unlawful practice found. *ORS 659.010(2)*, *ORS 659.060(3)*. In this case, a \$20,000 award for mental suffering damages is an appropriate exercise of that authority, based on the mental suffering testified to by Complainant that she experienced between June 16, 1998 and July 1999. The forum has reduced the ALJ's proposed award of \$30,000 for mental suffering damages to \$20,000 based on the determination that Complainant was not a victim of unlawful racial harassment.

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<sup>14</sup> *In the Matter of A.L.P. Incorporated*, 15 BOLI 211, 223 (1997), *aff'd*, 161 Or App 417 (1999).

## THE AGENCY'S EXCEPTIONS

The Agency excepts to the ALJ's conclusion that Complainant failed to mitigate her back pay loss, citing *In the Matter of Snyder Roofing & Sheet Metal, Inc.*, 11 BOLI 61 (1992) to support its position that Complainant was not required to accept ET's \$8.00 per hour clerical position because it was not "substantially equivalent" to the position she held prior to her unlawful termination. On this issue, *Snyder* is not helpful to the Agency, as it does not define "substantially equivalent" employment and merely stands for the proposition that a complainant who is unlawfully discharged is not required to go into business for himself in order to mitigate back pay loss. *Id.*, at 82-83.

The Agency also argues that ET's job offer was not in good faith, justifying Complainant's refusal to accept it. However, the Agency presented no evidence to show it was not a good faith offer or that Complainant perceived it was not a good faith offer. On the contrary, Complainant testified that she declined the job because she did not want to do clerical work and wanted to return to work for Respondent. Neither reason is an indicator she perceived bad faith on the part of ET.

Finally, the Agency contends that the ALJ based the determination that Complainant's refusal to accept ET's clerical job foreclosed her from a back pay award on the fact that, by declining the job, Complainant "missed an opportunity to be physically present on

ET's premises when a job in her field became available." This is incorrect. Complainant's missed opportunity was merely a byproduct of her failure to accept ET's clerical job offer, not the basis for the ALJ's conclusion that she failed to use reasonable care in seeking employment. The forum takes issue with the Agency's assertion that "employment agencies could limit potential damages for their wayward clients, and possibly themselves, by offering a terminated employee a job scrubbing toilets, as long as it paid more than the employee's previous job." The determination of whether or not a Complainant has exercised reasonable care and diligence in seeking employment is dependent upon the facts of each case. The preponderance of the evidence in this case supports the conclusion that Complainant did not exercise reasonable care and diligence in mitigating her back pay loss.

## ORDER

NOW, THEREFORE, as authorized by ORS 659.010(2) and ORS 659.060(3), and in order to eliminate the effects of the unlawful practices found in violation of ORS 659.030(1)(f) and as payment of the damages awarded, Respondent SERVEND INTERNATIONAL, INC. is hereby ordered to:

- 1) Deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, a certified check payable to the Bureau of

Labor and Industries in trust for Complainant LYNICE MORGAN, in the amount of TWENTY THOUSAND DOLLARS AND NO CENTS (\$20,000.00), representing compensation for mental suffering caused by Respondent's unlawful acts, plus interest at the legal rate on the sum of \$20,000.00 from the date of the final order in this case until paid.

2) Cease and desist from discriminating against any employee based upon opposition to any practices forbidden by ORS 659.030.

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**In the Matter of**

**LANE-DOUGLAS CONSTRUCTION, INC., Respondent.**

**Case No. 68-00  
Final Order of the  
Commissioner  
Jack Roberts**

**Issued August 28, 2000**

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**SYNOPSIS**

Respondent employed Claimant as its company foreman and paid him a weekly salary, with no additional pay for overtime hours worked, claiming that Claimant was an "executive employee" who was exempt from the provisions of ORS 653.010 to 653.261. The

Agency alleged that Claimant was entitled to \$5,803.13 to compensate him for 309.5 hours worked over 40 hours in a given work week. The commissioner found that Claimant's primary duty was management of Respondent's field operations, that Claimant customarily and regularly directed the work of two or more other employees, that Claimant's suggestions and recommendations as to hiring, firing, and raises were given particular weight, that Claimant exercised independent judgment and customarily and regularly exercised discretionary powers, and that Claimant earned a salary and was paid on a salary basis. The commissioner concluded that Claimant was an exempt "executive employee" who was not entitled to additional compensation for overtime hours worked and dismissed the Order of Determination. ORS 653.020, ORS 653.025, ORS 653.261, OAR 839-020-0030(1), OAR 839-020-0004(25), (29), (30), OAR 839-020-0005(1).

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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 May 10-11 and 16-17 at the Bureau of Labor and Industries' office located at 165 E. 7<sup>th</sup>, Suite 220, Eugene, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency")

was represented by Cynthia L. Domas, an employee of the Agency. Claimant Ronald G. Smith was present throughout the hearing and was not represented by counsel. Respondent was represented by Brian D. Cox, attorney at law. Michael S. ("Scott") Bond, Respondent's corporate president, was present throughout the hearing as Respondent's representative.

The Agency called as witnesses, in addition to Claimant: Scott Bond; Harvey R. Epperson, Respondent's bookkeeper and office manager; Shane E. Cogburn, Wayne A. McCormick, and Tim B. Jenrette, former employees of Respondent; Leslie Laing, Agency compliance specialist; and Shelby J. Cogburn, who lived with Claimant during the wage claim period.

Respondent called as witnesses: Bond; Epperson; John I. Strandquist, Respondent's employee; and Cary Kuvaas, general manager of Flex Force.

The forum received into evidence:

a) Administrative exhibits X-1 through X-11 (submitted or generated prior to hearing);

b) Agency exhibits A-1 through A-15 (submitted prior to hearing), A-16 and A-18 (submitted at hearing);

c) Respondent exhibits R-101 through R-121 (submitted prior to hearing).<sup>1</sup>

Having fully considered the entire record in this matter, I, Jack Roberts, 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 18, 1999, Claimant filed a wage claim with the Agency. He alleged that Respondent 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 Labor and Industries, in trust for Claimant, all wages due from Respondent.

3) Claimant brought his wage claim within the statute of limitations.

4) On October 6, 1999, the Agency served Order of Determination No. 99-0568 on Respondent based upon the wage claim filed by Claimant and the Agency's investigation. The Order of Determination alleged that Respondent owed a total of \$5,822.31 in unpaid wages and \$3,000.00 in civil penalty wages, plus interest, and required that,

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<sup>1</sup> This includes Exhibit R-105a, which was submitted prior to hearing, but renumbered at hearing.

within 20 days, Respondent 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.

5) On October 23, 1999, Respondent, through counsel, filed an answer and request for hearing. Respondent's answer included the affirmative defense that Respondent was not required to pay Claimant overtime wages because Claimant was an excluded executive employee. (Exhibit X-1c)

6) On March 6, 2000, the Agency filed a "BOLI Request for Hearing" with the forum.

7) On March 10, 2000, the Hearings Unit issued a Notice of Hearing to Respondent, the Agency, and the Claimant stating the time and place of the hearing as May 10, 2000, at 9:00 a.m., in Eugene, 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, and a copy of the forum's contested case hearings rules, OAR 839-050-000 to 839-050-0440.

8) On March 14, 2000, the forum ordered the Agency and Respondent 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; a brief statement of the

elements of the claim (for the Agency only); a brief statement of any defenses to the claim (for Respondent only); 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 May 1, 2000, and notified them of the possible sanctions for failure to comply with the case summary order.

9) On April 24, 2000, the Agency filed a motion for a discovery order seeking documents relevant to the Claimant's wage claim that had been unsuccessfully sought through an informal exchange of information.

10) On April 28, 2000, the ALJ issued a discovery order requiring Respondent to produce the documents sought by the Agency no later than 5 p.m. on May 2, 2000. The ALJ noted that any objections filed by Respondent would be treated as a request for reconsideration of the discovery order.

11) On April 28, 2000, Respondent filed objections to the Agency's motion for a discovery order, noting that most of the requested documents had been provided and that some of the requested documents did not appear reasonably likely to produce information generally relevant to the case.

12) On May 1, 2000, the ALJ conducted a pre-hearing conference with Ms. Domas and Mr. Cox at the Eugene BOLI office,

with the purpose of attempting to resolve any outstanding discovery issues. During that conference, Ms. Domas and Mr. Cox stipulated that Claimant was employed by Respondent between October 5, 1997 through October 10, 1998 (the "wage claim period"), and that Claimant was paid \$31,412.19 for work performed in the wage claim period. Mr. Cox further stipulated that Claimant worked 2,256 hours for Respondent in the wage claim period, and that if Claimant was due overtime pay, it would be for 295 hours. Because Ms. Domas had not yet received the documents sent by Mr. Cox in response to the Agency's request for discovery, the ALJ scheduled a follow-up conference for May 3. On May 3, 2000, the ALJ conducted another pre-hearing conference. During that conference, Ms. Domas indicated she had reviewed the documents provided by Mr. Cox, and withdrew the Agency's request for any additional documentation. Accordingly, the ALJ advised Mr. Cox that Respondent did not need to provide any additional documents in response to the forum's April 28 discovery order.

13) The Agency and Respondent both filed their case summaries, with attached exhibits, on May 1, 2000. The Agency filed an addendum to its case summary on May 4, 2000.

14) At the start of the hearing, pursuant to ORS 183.415(7), 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.

15) Prior to opening statements, the Agency and Respondent stipulated that the following exhibits would be admitted without objection:

a) Exhibits A-1, A-2, A-5, A-7 through A-10, and A-13 through A-15;

b) Exhibits R-101 through R-110, R-112 through R-115, R-116 (except for the "cc" note on the bottom of the exhibit), R-117, and R-118.

16) Prior to opening statements, the Agency and Respondent stipulated that Claimant was entitled to \$5,803.13 in unpaid overtime wages, based on 309.5 hours worked during the wage claim period over 40 hours in a given work week, if the forum concluded that Claimant was not an excluded executive employee during the wage claim period. The Agency moved, without objection, to amend the Order of Determination to conform to that figure, and the amendment was granted.

17) During the hearing, the Agency offered exhibits A-17 and A-18 as rebuttal evidence. Both appeared to be job descriptions similar in form and substance to R-119. Respondent objected to the admission of both documents. The ALJ did not receive A-17 because it did not rebut any evidence on the record. The ALJ received A-18 because differences between R-119 and A-18

raised the question of which was Claimant's actual job description.

18) The evidentiary record of the hearing closed on May 17, 2000.

19) The ALJ issued a proposed order on July 24, 2000, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. No exceptions were filed with the Hearings Unit.

#### **FINDINGS OF FACT – THE MERITS**

1) In June 1994, Scott Bond purchased a construction business from Earl McDonald and incorporated the business as Lane-Douglas Construction, Inc., doing business out of Cottage Grove, Oregon, with Bond as corporate president.

2) Since June 1994, Respondent has been an Oregon corporation in the construction business in the state of Oregon, engaging the personal services of one or more employees.

3) At the time of incorporation, Respondent's primary business was installing retrofit insulation in existing houses, along with some siding and roofing jobs. Respondent's business has evolved continually since then. By May 1997, Respondent was working almost exclusively as a subcontractor on new commercial construction, and the primary jobs being performed by Respondent were caulking, insulation installation, and waterproofing. During the year prior to the hearing, Re-

spondent had also begun performing the jobs of firestopping and fireproofing.

4) Tim Jenrette was employed by McDonald as an applicator<sup>2</sup> in June 1994. Respondent continued Jenrette's employment after purchasing McDonald's business and Bond promoted Jenrette to the position of "working foreman." Jenrette remained in this position until sometime in the latter half of 1996. During this time, Respondent typically worked on only one job at a time. Jenrette's job responsibilities involved working side-by-side with Respondent's applicators and making sure "things got done." Based on Bond's instructions, Jenrette directed applicators where to go. Jenrette trained new employees while working side-by-side with them. He did not directly hire any employees. There was no evidence presented to indicate that he had the authority to recommend hiring or firing employees, recommend raises, order materials, or place a job order for temporary employees. During this time period, Jenrette was paid an hourly wage of \$10.00 or \$10.50 per hour.

5) Claimant was initially employed by Respondent on June

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<sup>2</sup> "Applicator" was the term consistently used by witnesses during the hearing to describe Respondent's crewmembers who had no supervisory responsibilities, and the forum uses that term throughout the proposed order to refer to employees who fall into this category.

17, 1996 as an applicator. He was hired as an hourly employee and paid \$8.50 per hour. Between June 17, 1996 and August 1997, Claimant installed insulation, did occasional inventory, and assisted in training of new employees as his knowledge of Respondent's business increased. He also made occasional calls to obtain the services of temporary employees from Flex Force, a temporary employment agency used by Respondent. 6) By August 1, 1997, Respondent's business had grown considerably since its inception, and Respondent often worked on multiple jobs at different sites at the same time. In June 1997 Bond hired Harvey Epperson as a bookkeeper and office manager to manage Respondent's office, which was physically located at 80110 Sears Road in Cottage Grove.

7) During Claimant's employment, Bond kept Respondent's supplies, such as insulation and caulking, in a barn located in the Cottage Grove area.

8) After Jenrette left Respondent's employment, Respondent did not have a foreman, and Bond assumed all the supervisory responsibilities. By August 1, 1997, Bond decided he needed to free up more time for himself to do sales and estimating. After discussing the situation with Claimant, he promoted Claimant to the position of company foreman.

9) Bond and Claimant agreed that Claimant would be paid a base salary of \$26,000 per year,

or \$500 per week, for his work as company foreman, regardless of the number of hours he worked. Bond anticipated that Claimant would work about 50 hours per week.

10) During the wage claim period, which extended from October 5, 1997 through October 10, 1998, Claimant's reported work hours per week ranged from a low of 25.5 to a high of 77.5. Claimant worked less than 40 hours during 17 weeks of the wage claim period, and was paid a base salary of \$500 for each of these weeks. Claimant was paid more than his base salary of \$500 per week during a number of weeks when he worked on prevailing wage rate jobs.

11) Claimant perceived himself as Respondent's company foreman, second in command to Bond, during the wage claim period,<sup>3</sup> and believed he was ultimately responsible for the work done on Respondent's jobs, no matter who did the work. At least two other employees of Respondent, including Bond, also perceived him as the company foreman.

12) After his promotion to company foreman, Claimant gradually assumed the duties of that position under Bond's tutelage.

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<sup>3</sup> When Claimant was asked if he was John Strandquist's supervisor, he testified "I was the foreman of the company."

13) During the wage claim period, Bond's primary work involved doing sales and estimating. Bond performed this work both in Respondent's office and in the field. Sometimes Bond visited Respondent's job sites to see how work was progressing.

14) During the wage claim period, Claimant was in contact, by radio or phone, with Bond or Epperson several times a day to discuss Respondent's jobs. Claimant regularly expressed his opinion during these conversations.

15) During the wage claim period, if a problem arose with a general contractor on one of Respondent's jobs, Claimant usually discussed the problem with Bond.

16) During the wage claim period, Claimant was expected to interview prospective new employees and make a recommendation to Bond as to whether or not the prospective employee should be hired. In total, Claimant interviewed about 5-6 prospective new employees, including Dave Strandquist, Thomas Ortiz, and Joshua and Jason Stroud, and made hiring recommendations to Bond. Bond hired all these employees.

17) Respondent contracted with Flex Force, a temporary employment agency, to provide temporary employees as needed by Respondent. One of Claimant's duties was to ensure that Flex Force was contacted if Respondent needed temporary help on a job. During the wage claim

period, Flex Force referred 28 temporary employees to Respondent, some of whom later became permanent employees of Respondent. Temporary employees referred to Respondent by Flex Force reported to the job site designated by Respondent and were not interviewed prior to starting work. Claimant was listed as Respondent's contact person on 14 of the 28 job orders received by Flex Force.

18) During the wage claim period, Claimant had the authority to discipline employees and warned at least one employee, Rick Kilgore, about his work performance.

19) During the wage claim period, Claimant had the authority to recommend raises for employees. Claimant recommended that Kilgore be given a \$0.50 per hour raise, and Bond gave Kilgore a \$0.50 per hour raise. Claimant promised Eric Cavanaugh a \$1.00 per hour raise and recommended this to Bond; Bond gave Cavanaugh a \$0.75 per hour raise.

20) During the wage claim period, Claimant had the authority to recommend that temporary and permanent employees be terminated. He recommended that Cavanaugh and Shane Cogburn be terminated. In response, Bond instructed Claimant to terminate Cavanaugh, but told him not to terminate Cogburn because Cog-

burn was quitting in two weeks.<sup>4</sup> When Aron Rowe told Claimant he did not want to insulate a crawl floor, Claimant told Rowe he could do the work or go home. Rowe went home and was terminated at that time.<sup>5</sup> After Claimant had experienced numerous performance problems with Kilgore, he discussed these problems with Bond, who instructed Claimant to terminate Kilgore. Claimant followed Bond's instructions and terminated Kilgore.

21) During the wage claim period, Claimant was responsible for all work done on all of Respondent's projects.

22) During the wage claim period, Claimant had authority to make and regularly made independent decisions concerning his work schedule, the particular job sites he visited and the times he visited them, and the work he did on those job sites. Claimant had authority to make and regularly assigned applicators to specific jobs, reassigned applicators to other tasks on a particular job site, and reassigned applicators to other job sites. Claimant also had authority to make and made decisions regarding whether or not temporary labor from Flex Force was needed.

23) During the wage claim period, Claimant had supervisory authority over all of Respondent's applicators, which included all of Respondent's employees except for Bond, Epperson, and an outside salesperson.

24) During the wage claim period, Claimant's job duties included inspection of work in progress at Respondent's different job sites and making sure all work was done correctly and in a timely manner.

25) During the wage claim period, Claimant conducted short employee meetings most mornings before employees left Respondent's barn for a job site. Bond did not usually attend these meetings.

26) During the wage claim period, Claimant often drove other employees, in Respondent's company vehicle, to the job site where Claimant and the employee or employees would be working that day.

27) During the wage claim period, Claimant met with general contractors at Respondent's job sites. Bond had business cards printed for Claimant that identified him as Respondent's foreman and listed the number of his cell phone. Claimant passed these cards out to Respondent's customers, which included general contractors. Bond did this because he wanted customers to call Claimant instead of Bond. Bond was not usually present on Respondent's job sites.

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<sup>4</sup> Cogburn testified he quit Respondent's employment in September 1998 to attend college.

<sup>5</sup> This event occurred on 9/8/97, prior to the wage claim period but after the time Claimant had been promoted to company foreman.

28) During the wage claim period, Claimant consulted nightly with Bond about the status of Respondent's projects and appropriate assignments for Respondent's applicators the next day. Some of these consultations occurred at Respondent's office and others on the phone after Claimant had gone home for the night. The consultations lasted an average of 15 minutes. Claimant did not record this time on his daily time reports.<sup>6</sup>

29) During the wage claim period, Claimant received phone calls at home, on an average of three nights per week, from applicators wanting to know their job assignment for the next day. These calls typically lasted a few minutes.

30) During the wage claim period, Claimant was responsible for training newly hired permanent and temporary employees. Claimant trained these employees by working side-by-side with them while they learned the job. Claimant did not spend substantial amounts of time training employees because insulating and caulking, the primary types of work performed by applicators, did not require extensive training. In addition, because Respondent had multiple job sites, the most senior or experienced crewmember on the job site routinely acted as a leadworker and did whatever training was required.

31) During the wage claim period, Claimant ordered and picked up materials that had not already been delivered to the job site. Bond and Epperson also ordered materials.

32) During the wage claim period, Claimant completed daily time reports for himself and other applicators who worked with him that day and submitted those time reports to Epperson.

33) During the wage claim period, Claimant spent "15 to 20%" of his time in Respondent's office doing paperwork related to his position as company foreman.

34) During the wage claim period, Claimant did the same work as Respondent's applicators when he was not in Respondent's office or performing the tasks listed in Findings of Fact – The Merits 14-32.

35) During the wage claim period, Claimant carried a combination radio/cell phone with him in order to communicate with Bond, Epperson, general contractors, and Respondent's applicators. Claimant worked on job sites by himself on 15 to 20 different days. At least 12 of those days, Claimant worked in Roseburg, where his radio/cell phone could not reach any employees on Respondent's job sites. During those days, Claimant only called Bond.

36) During the wage claim period, Respondent always employed at least two applicators who were supervised by Claimant.

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<sup>6</sup> See Finding of Fact – The Merits 38, *infra*.

37) In June 1998, Bond went on vacation for a week. During Bond's absence, Claimant supervised all of Respondent's crews.

38) While foreman, Claimant filled out daily time reports showing the different amounts of time each day he spent working on the job, driving, and performing "administrative" tasks.<sup>7</sup> The Agency offered, as Exhibit A-5, 196 of these reports as representative samples of the types of work performed by Claimant. On 50 of these, Claimant stated that he had performed no "administrative" tasks.<sup>8</sup> Based on Claimant's tes-

timony that he performed some administrative work every day, and that he did not list the amount of time on the reports he spent on the phone with Bond and crewmembers each night after work, the forum finds that Exhibit A-5 understates the amount of time Claimant spent performing duties during the claim period that would qualify him as an exempt "executive employee." Consequently, the forum has not relied on Exhibit A-5 to determine the exact percentage of time Claimant spent performing duties that would qualify him as an exempt "executive employee" during the claim period. The forum notes that based on Claimant's record of his administrative time contained in Exhibit A-5, including driving and shop time,<sup>9</sup> Claimant spent a far greater

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<sup>7</sup> Although Claimant and Bond used the term "administrative" in listing the types of supervisory or management-related work Claimant was supposed to list on Claimant's time reports, based on the affirmative defense plead in Respondent's answer, which exactly mirrors the definition of "Executive Employee" contained in OAR 839-020-0005(1), the forum understands Respondent's affirmative defense to be that Claimant was exempt from overtime as an "Executive Employee," not as an "Administrative Employee" pursuant to OAR 839-020-0005(2), and has evaluated Claimant's claim and Respondent's defense under that standard.

<sup>8</sup> Claimant testified that, for purposes of filling out the time reports, he considered "administrative" tasks to be time spent driving, loading and unloading materials, waiting for deliveries, and sometimes training new employees. Because there were often a number of time reports for the same date, these 50 time cards did not reflect that Claimant wrote he had worked no "administrative" time on 50

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separate days. In fact, they only reflected four days within the wage claim period for which Claimant recorded no "administrative" time.

<sup>9</sup> Claimant and Bond seemed to be in agreement that the time Claimant reported as "shop," "drive," and "administrative" time was related to Claimant's job as company foreman. This is supported by testimony that Claimant's time in the shop involved meeting with Bond, doing paperwork, and meeting with applicators, as well as testimony that Claimant's driving time included transporting applicators to job sites in one of Respondent's vehicles, and driving from one job site to another. In the context of Claimant's overall job duties, these specific duties were management functions. Accordingly, the forum infers that all the time recorded by Claimant as "shop," "drive," and "administrative" time was time spent in performance of

amount of time performing his duties as company foreman than his testimony reflected. Exhibit A-5 reflects a total of 836.25 hours worked, including 480.25 hours (57%) spent working on a specific job, and 356 hours (43%) spent in the shop, driving, or doing "administrative" work. In marked comparison, Claimant testified that he spent "75-80%" of his time working shoulder-to-shoulder with Respondent's applicators.

39) During the wage claim period, applicators employed by Respondent were paid the following wages: Shane Cogburn - \$6.50 per hour, Wayne McCormick - \$8.00 per hour, Dave Strandquist - \$9.00 per hour, John Standquist - \$8.00 per hour.<sup>10</sup>

40) While Claimant was foreman, Bond counseled Claimant on "multiple" occasions that he was spending too much time doing the job with crewmembers and he needed to spend more time doing administration.

41) Bond gave Claimant a written job description on August 14, 1998. At that time, Claimant's job title was changed to Construction Operations Supervisor

("COS").<sup>11</sup> Bond took this action because of his concerns that Claimant was not spending enough time on management duties to adequately perform his job or to meet the statutory requirement for an exempt salaried employee. Claimant's duties and rate of pay did not change.

42) During the wage claim period, Claimant spent substantial amounts of time working side-by-side with applicators on job sites because he understood he was responsible for making sure Respondent's multiple jobs got done, and he believed it was the only way he could make sure the jobs were completed. As time went on, Claimant tried to work harder on Respondent's jobs, spreading himself out more to make sure Respondent's applicators had enough help to get the job done, and suggested hiring additional temporary employees when he perceived the need. Throughout the wage claim period, Claimant determined the personnel requirements for Respondent's jobs by personal observation and talking to Respondent's applicators at night.

43) During the wage claim period, Claimant worked 309.5 hours that were hours over 40 hours in a given work week. Based on Claimant's \$500 per week salary, overtime wages for Claimant would have been calculated at \$18.75 per hour.

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duties that would qualify Claimant as an exempt "executive employee."

<sup>10</sup> No evidence was presented concerning the wage rate received by other crewmembers employed by Respondent while Claimant was company foreman.

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<sup>11</sup> To avoid confusion, the forum has referred to Claimant as a "foreman" throughout the wage claim period.

44) On October 12, 1998, Bond demoted Claimant to the position of hourly employee, removed his supervisory responsibilities, and reduced his pay to \$11.00 per hour. In a memorandum written on or about that same day, Bond documented his action in the following words:

“Meeting with Ron Smith

“Due to the job responsibilities not being fulfilled (sic) as Construction Operations Supervisor Ron Smith is relinquishing these responsibilities. effective immediately.

“Ron’s wages are \$11.00 per hour”

45) Respondent did not hire or promote anyone to perform the supervisory duties that Claimant was responsible for as COS. Instead, Bond resumed the field supervisory functions he had performed prior to Claimant’s promotion. Since Claimant’s demotion, Bond has been Respondent’s only supervisory employee.

46) On March 23, 1999, Bond sent a letter to BOLI responding to receiving notice of Claimant’s wage claim. In pertinent part, Bond wrote:

“3. Mr. Smith was warned on several occasions that he was not complying with the time constraints required for salary exempt status and for not fulfilling other responsibilities.

“4. Eventual[ly] Mr. Smith was returned to his former hourly laborers position because he

fail[ed] to perform job responsibilities and to schedule time according to what was necessary for exempt status.”

47) When Bond wrote Exhibit A-13, he believed that Oregon law required that, to qualify as “a salary overtime exempt employee,” that employee had to spend “not less than 51%” of his or her time performing management and supervisory responsibilities and “not more than 49% of his or her time performing on the job duties normally designated for hourly workers.”

48) Tim Jenrette’s testimony was straightforward and consistent with other credible evidence on the record, and the forum has credited Jenrette’s testimony in its entirety.

49) The testimony of Cary Kuvaas was brief and not contradicted by any other evidence in the record, and the forum has credited her testimony in its entirety.

50) John Strandquist appeared to listen carefully to questions asked him and responded in a direct, straightforward manner to all questions asked. His testimony was internally consistent and consistent with other credible evidence on the record and did not appear tailored to benefit Respondent, despite the fact that he was working as an applicator for Respondent at the time of the hearing. The forum has credited his testimony in its entirety.

51) Shane Cogburn's mother, Shelby Cogburn, had been living with Claimant for almost three years at the time of the hearing, and Shane Cogburn ("Cogburn") lived with them at the time of the hearing, a fact that he did not disclose on direct examination. Cogburn also testified that he was "kind of close" to Claimant and would help Claimant out "if he was in a bind." Weighed against other credible evidence, his statement that he trained other new workers within a couple of days after he was hired was inherently improbable and seemed calculated to aid Claimant's case. Cogburn contradicted himself by testifying on cross-examination that he did not recall Claimant ever changing his task on any job site, then testifying minutes later that it was a fairly routine daily activity for Claimant to reassign him to another task on the same job site. Because of his apparent bias, and the contradiction and improbability in his testimony, the forum has credited Cogburn's testimony only where it was corroborated by other credible evidence.

52) Much of Wayne McCormick's testimony was confusing and he appeared to answer questions without giving them serious consideration, sometimes answering them before they were fully asked. He was not hired until mid-August 1998, which gave him only seven weeks during the claim period to observe Claimant's work. He testified that Claimant was demoted from the COS position "four months" after

McCormick was hired, whereas the facts showed that Claimant's demotion occurred only one and one-half months after McCormick's hire, placing further doubt on the reliability of McCormick's testimony. The forum has credited McCormick's testimony only where it was corroborated by other credible evidence.

53) Shelby Cogburn is Claimant's girlfriend and had lived with him for almost three years at the time of the hearing. Her rebuttal testimony was limited in focus, responsive to the questions put to her, and unimpeached. Despite her bias, her testimony was credited in full.

54) Harvey Epperson's answers were responsive to the questions asked of him. He did not attempt to testify to matters of which he had no direct knowledge and did not exaggerate the facts. Although he was Respondent's office manager at the time of the hearing, the forum has concluded that his testimony was not slanted in favor of Respondent and has credited Epperson's testimony in its entirety.

55) Claimant was on the witness stand for almost an entire day. Although a large part of his testimony was credible, there were some significant internal inconsistencies in his testimony. This included conflicting testimony that he spent "15 to 20%" of his time in the office and that he was in the office "two to three times a week" from "minutes up to an hour"; testimony that he spent "75 to 80%" of his time working shoul-

der-to-shoulder with his crews, compared with his time reports, which showed that he spent 43% of his time driving, in the office, or doing “administrative duties”; testimony that it wasn’t his job to go out and pick up materials on the job, compared with his statement in his wage claim form (Exhibit A-2) that his job duties included “picking up materials;” and testimony that he took directions from John Strandquist, contrasted with testimony that he bore the ultimate responsibility for all work done on Respondent’s jobs. In addition, Claimant’s unequivocal testimony that he had the ultimate responsibility for all work done on Respondent’s jobs was in marked contrast with his exaggerated attempts to downplay his authority in actual practice, e.g. that his recommendations as to hiring and firing and where applicators should be assigned were given no particular weight by Bond. Consequently, the forum has credited Claimant’s testimony concerning the extent of his authority, his primary job duties, and the amount of time spent performing those job duties only where it is not disputed or is corroborated by other credible evidence. In addition, the forum has credited Claimant’s contemporaneous handwritten record of how much time he spent each day in the performance of supervisory duties where it conflicted with his testimony.

56) Scott Bond was truthful in most of his testimony. However, his testimony contained an internal inconsistency that lessened his credibility regarding the

extent to which Claimant carried out his primary duties. On one hand, Bond testified at length as to Claimant’s freedom to make independent decisions and the extent to which Claimant carried his primary duties in an autonomous or semi-autonomous manner; on the other hand, he testified that Claimant had difficulty making the transition from worker to supervisor, that it was an ongoing process to get Claimant to perform the work necessary to qualify for an executive exemption, that Claimant wasn’t doing his job, and that he finally demoted Claimant because he wasn’t fulfilling his job responsibilities. In addition, Bond’s testimony that Claimant had unilateral hiring and firing authority conflicted with Respondent’s actual hiring and firing process.<sup>12</sup> Overall, the forum found Bond’s testimony more credible than Claimant’s regarding the extent to which Claimant actually performed his primary duties, and the forum has credited Bond’s testimony over Claimant’s on this issue except for the extent of Claimant’s authority in the hiring and firing process. In addition, the forum has credited Bond’s testimony in full regarding the nature of Claimant’s primary duties and the extent of Claimant’s authority.

#### **ULTIMATE FINDINGS OF FACT**

1) At all times material herein, Respondent Lane-Douglas Construction, Inc. was an Oregon

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<sup>12</sup> See Opinion, section “C,” *infra*, for a more detailed discussion on this point.

corporation doing business in the state of Oregon, and engaged the personal services of one or more employees.

2) Respondent employed Claimant in Oregon from June 1996 through February 4, 1999.

3) Between October 5, 1997, and October 10, 1998 (the "wage claim period"), Claimant's primary duty consisted of management of Respondent's field operations.

4) During the wage claim period, Claimant customarily and regularly directed the work of two or more other employees.

5) During the wage claim period, Claimant's suggestions and recommendations as to the hiring or firing and as to the advancement and promotion of any other change of status of other employees were given particular weight.

6) During the wage claim period, Claimant exercised independent judgment and customarily and regularly exercised discretionary powers.

7) During the wage claim period, Claimant was paid a minimum of \$500 per week, a predetermined amount constituting all or part of Claimant's compensation that was never less than the minimum wage and was not subject to deduction because of lack of work for part of a work week.

8) During the wage claim period, Claimant worked a total of 309.5 hours that were hours worked over 40 hours per week in a given work week. Claimant left

Respondent's employment on February 4, 1999, and Claimant has not been paid wages for any of the 309.5 overtime hours.

9) At the time Claimant left Respondent's employment, Respondent did not owe Claimant any wages, and did not willfully fail to pay Claimant any earned wages.

#### CONCLUSIONS OF LAW

1) During all times material herein, Respondent was an employer and Claimant was an employee subject to the provisions of ORS 652.110 to 652.200 and 652.310 to 652.405. During all times material herein, Respondent employed Claimant.

2) The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter and the Respondent herein. ORS 652.310 to 652.405.

3) ORS 653.261(1) provides, in pertinent part:

"The Commissioner of the Bureau of Labor and Industries may issue rules prescribing such minimum conditions of employment, excluding minimum wages, in any occupation as may be necessary for the preservation of the health of employees. Such rules may include, but are not limited to, \* \* \* maximum hours of work, but not less than eight hours per day or 40 hours per week; however, after 40 hours of work in one week overtime may be paid, but in no case at a rate higher than one and

one-half times the regular rate of pay of such employees when computed without benefit of commissions, overrides, spiffs and similar benefits.”

OAR 839-020-0030(1) provides, in pertinent part:

“Except as provided in OAR 839-020-0100 to 839-020-0135 all work performed in excess of forty (40) hours per week must be paid for at the rate of not less than one and one-half times the regular rate of pay when computed without benefits of commissions, overrides, spiffs, bonuses, tips or similar benefits pursuant to ORS 653.261(1).”

ORS 653.020 provides, in pertinent part:

“ORS 653.010 to 653.261 does not apply to any of the following employees:

“\* \* \* \* \*

“(3) An individual engaged in administrative, executive or professional work who:

“(a) Performs predominantly intellectual, managerial or creative tasks;

“(b) Exercises discretion and independent judgment; and

“(c) Earns a salary and is paid on a salary basis.”

OAR 839-020-0005 provides, in pertinent part:

“As used in ORS 653.010 to 653.261 and in these rules, unless the context requires otherwise:

“(1) ‘Executive Employee’ means any employee:

“(a) Whose primary duty consists of the management of the enterprise in which he/she is employed or of a customarily recognized department or subdivision thereof \* \* \* and;

“(b) Who customarily and regularly directs the work of two or more other employees therein; and

“(c) Who has the authority to hire or fire other employees or whose suggestions and recommendations as to the hiring or firing and as to the advancement and promotion of any other change of status of other employees will be given particular weight; and

“(d) Who customarily and regularly exercises discretionary powers; and

“(e) Who earns a salary and is paid on a salary basis pursuant to ORS 653.025 exclusive of board, lodging, or other facilities.”

OAR 839-020-0004 provides, in pertinent part:

“(25) ‘Primary duty’ means, as a general rule, the major part, or over 50 percent, of an employee’s time. However, a determination of whether an employee has management as his/her primary duty must be based on all the facts of a particular case. Time alone is not the sole test and in situations where the employee does not spend over 50 percent of

his/her time in managerial duties, he/she might have management as a primary duty if other pertinent factors support such a conclusion. Factors to be considered include, but are not limited to, the relative importance of the managerial duties as compared with other duties, the frequency with which the employee exercises discretionary powers, the relative freedom from supervision, and the relationship between the salary paid the employee and wages paid other employees for the kind of non-exempt work performed by the supervisor.

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“(29) ‘Salary’ means a predetermined amount constituting all or part of the employee’s compensation paid for each pay period of one week or longer (but not to exceed one month) and in no instance shall be any amount less than required to be paid pursuant to ORS 653.025.

“(30) ‘Salary basis’ means a salary as defined in section (29) of this rule, which is not subject to deduction because of lack of work for part of a work week, however, deductions for absences of one day or more may be made if the employee is absent for other reasons. Deductions may not be made for absences of less than one day, except as permitted for employers covered by the federal Family and Medical Leave Act of 1993,

Public Law 103-3, for part-day absences due to leave pursuant to that law. Employees who are not paid for work weeks in which they performed no work are considered to be on a salary basis provided they are paid on a salary basis in work weeks when work is performed.

“(b) Payment of additional compensation is not inconsistent with the salary basis of payment.”

Claimant was an exempt “executive employee” as defined by OAR 839-020-0005(1). Pursuant to OAR 653.020(3), Respondent was not required to pay Claimant wages for his overtime work.

4) ORS 653.055(1) provides:

"(1) Any employer who pays an employee less than the wages to which the employee is entitled under ORS 653.010 to 653.261 is liable to the employee affected:

"(a) For the full amount of the wages, less any amount actually paid to the employee by the employer; and

"(b) For civil penalties provided in ORS 652.150."

ORS 652.140(2) provides:

“When an employee who does not have a contract for a definite period quits employment, all wages earned and unpaid at the time of quitting become due and payable immediately if the employee has given to the employer not less than 48

hours' notice, excluding Saturdays, Sundays and holidays, of intention to quit employment. If notice is not given to the employer, the wages shall be due and payable within five days, excluding Saturdays, Sundays and holidays, after the employee has quit, or at the next regularly scheduled payday after the employee has quit, whichever event first occurs."

Respondent did not owe Claimant any unpaid wages at the time Claimant left Respondent's employment and did not violate ORS 652.140(2).

5) ORS 652.150 provides:

"If an employer willfully fails to pay any wages or compensation of any employee whose employment ceases, as provided in ORS 652.140 and 652.145, then, as a penalty for such 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; provided, that in no case shall such wages or compensation continue for more than 30 days from the due date; and provided further, the employer may avoid liability for the penalty by showing financial inability to pay the wages or compensation at the time they accrued."

Respondent did not willfully fail to pay any wages or compensation

to Claimant and does not owe any penalty wages to Claimant.

6) Under the facts and circumstances of this record, and according to the law applicable to this matter, the wage claim and Agency's Order of Determination filed against Respondent, as amended at hearing, are hereby dismissed.

## OPINION

### INTRODUCTION

The Agency alleges that Respondent owes Claimant \$5,803.13 based on 309.5 hours worked in excess of 40 hours in a given work week during the wage claim period. Respondent does not dispute the number of hours or amount of overtime wages computed for those hours. The only issue is whether Respondent is liable for payment of those wages, based on Respondent's affirmative defense that Claimant was an "Executive Employee" under ORS 653.020, and as such, exempt from the overtime requirements of ORS 653.261(1) and OAR 839-020-0030(1). To resolve this issue, the forum examines ORS 653.020, OAR 839-020-0004(25)(29)(30), OAR 839-020-0005(1), prior Final Orders, and related federal statutes and administrative regulations.

### "EXECUTIVE EMPLOYEE"

Respondent bears the burden of proof of establishing that Claimant was exempt as an "executive employee" from the overtime requirements of ORS 653.261 and OAR 839-020-

0030(1). *In the Matter of Diran Barber*, 16 BOLI 190, n. 198 (1997). Simply giving Claimant the title of company foreman and putting him on salary is not enough to automatically exclude him from the requirements of Oregon's minimum wage law regarding payment of overtime wages. See, e.g., *Barber*, at 16 BOLI 190, n. 197; *In the Matter of Burrito Boy, Inc.*, 16 BOLI 1, 19 (1997). Rather, Respondent must establish all three elements of ORS 653.020(3) and the five elements contained in OAR 839-020-0005(1)'s definition of "Executive Employee" in order to prevail in this matter.

In this case, those elements are as follows:

- (1) Claimant's primary duty consisted of the management of Respondent's field operations [ORS 653.020(3)(a); OAR 839-020-0005(1)(a)];
- (2) Claimant customarily and regularly directed the work of two or more other employees in Respondent's field operations [OAR 839-020-0005(1)(b)];
- (3) Claimant had authority to hire or fire other employees, or his suggestions and recommendations as to the hiring or firing and as to the advancement and promotion of any other change of status of other employees was given particular weight [OAR 839-020-0005(1)(c)];
- (4) Claimant exercised independent judgment and

customarily and regularly exercised discretionary powers [ORS 653.020(3)(b); OAR 839-020-0005(1)(d)];

(5) Claimant earned a salary and was paid on a salary basis pursuant to ORS 653.025 [OAR 839-020-0005(1)(d)].

The forum evaluates these elements in order of their factual and legal complexity, starting with the simplest.

**A. Claimant Earned a Salary and was Paid on a Salary Basis.**

"Salary" is a "predetermined amount constituting all or part of the employee's compensation paid for each pay period of one week or longer" that cannot be less than minimum wage. OAR 839-020-0004(29). It is undisputed that Claimant was paid a base salary of \$500 per week, on a weekly basis, during the wage claim period, and that his pay rate never went below the minimum wage. "Salary basis" means a "salary" that is not subject to deduction because of "lack of work for part of a work week." OAR 839-020-0004(30). Undisputed evidence also establishes that Claimant was paid his full salary each week during the wage claim period, including 17 weeks when he worked fewer than 40 hours. Accordingly, the forum concludes that Claimant earned a salary and was paid on a salary basis during the wage claim period.

**B. Claimant Customarily and Regularly Directed the Work of Two or More Other Employees in Respondent's Field Operations.**

The evidence was undisputed that Claimant had supervisory authority over all of Respondent's applicators on all of Respondent's job sites, and that there were a minimum of two applicators employed by Respondent at all times during the wage claim period. Although Claimant attempted to downplay the extent to which he actually exercised this authority, the forum has determined, based on assessments of witness credibility, that Claimant exercised his supervisory authority in Respondent's field operations on a customary and regular basis, directing the work of two or more employees.<sup>13</sup>

**C. Claimant's Suggestions and Recommendations as to the Hiring or Firing and as to the Advancement and Promotion of any Other Change of Status of Other Employees were Given Particular Weight.**

Bond, Respondent's president, testified that Claimant had unilateral hiring and firing authority, and the evidence shows that Aron Rowe was terminated, apparently by Claimant, when he refused to perform an assigned task. How-

ever, the forum remains skeptical that Claimant had unilateral hiring and firing authority throughout the wage claim period. The main reason for this is because undisputed evidence showed that Respondent's hiring process for applicators consisted of an interview with Claimant, who in turn made a recommendation to Bond, who made the final hiring decision. The same type of process was followed with terminations and raises – Claimant made recommendations to Bond, who made a final decision.

The forum draws a different conclusion as to the weight Bond gave to Claimant's recommendations. Claimant opined that Bond did not give his recommendations regarding hiring, firing, or raises any particular weight. However, this opinion is not borne out by the facts. First, Bond hired every person recommended by Claimant, and there is no evidence that he hired anyone whom Claimant had not recommended by Claimant. Second, Claimant recommended that Eric Cavanaugh and Shane Cogburn be terminated, and discussed Rick Kilgore's numerous performance problems with Bond. Bond instructed Claimant to terminate Cavanaugh and Kilgore, but told him not to terminate Cogburn on the grounds that Cogburn would be leaving in two weeks anyway. Third, Claimant recommended that Kilgore and Cavanaugh be given raises of \$0.50 per hour and \$1.00 per hour, respectively, and Bond gave Kilgore and Cavanaugh raises of \$0.50 per hour and \$0.75 per

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<sup>13</sup> See Findings of Fact – The Merits 22-26, 29-30, 35-37, 50-56, *supra*.

hour. In sum, except for his disagreement that Cogburn should be terminated immediately, and his decision that Cavanaugh should get a \$0.75 per hour raise instead of the \$1.00 per hour recommended by Claimant, Bond followed every one of Claimant's recommendations regarding hiring, firing, and raises. This undisputed evidence, coupled with Bond's credible testimony that he listened to Claimant's recommendations and gave them weight, overcomes Claimant's unsupported opinion that Bond did not give Claimant's recommendations any particular weight, and leads the forum to conclude exactly the opposite.

**D. Claimant Exercised Independent Judgment and Customarily and Regularly Exercised Discretionary Powers.**

This forum has not previously discussed this element of the executive exemption in any depth, and there are no reported Oregon cases on point. Consequently, the forum looks for guidance to the federal regulations interpreting the federal exemption statute, which is nearly identical to ORS 653.020(3).<sup>14</sup> Those regulations

provide that this requirement will be met by an employee who normally and recurrently is called upon to exercise and does exercise discretionary powers in the day-to-day performance of his duties, but will not be met by the occasional use of discretionary powers. 29 CFR § 541.107. A person whose work is so completely routinized that he has no discretion does not qualify for an executive exemption. *Id.*

Based on its credibility assessments, the forum finds that Claimant's depiction of the extent to which he exercised independent judgment and customarily and regularly exercised discretionary powers was understated in the same manner that he attempted to downplay the extent to which he supervised Respondent's applicators. The evidence established that Claimant independently exercised a number of discretionary powers, including determining when temporary help was needed; determining if work was being done correctly and in a timely manner; disciplining employees; deciding his own work schedule, the particular job sites he visited, the times he visited them, and the work he did on those job sites; assigning applicators to specific jobs; reassigning applicators to other tasks on a particular job site; and reassigning applicators to another job site. Some of these discretionary powers may have

<sup>14</sup> See 29 USCS § 213 (1), which exempts:

“[a]ny employee employed in a bona fide executive, administrative, or professional capacity \* \* \* (as such terms are defined and delimited from time to time by regulations of the Secretary,

subject to the provisions of the Administrative procedure Act \* \* \*) [.]”

been exercised on an occasional basis, such as disciplining employees, but on the whole they involve the type of discretion that a company foreman who had ultimate responsibility over Respondent's field operations would be expected to normally and recurrently exercise in the day-to-day performance of his duties. A preponderance of evidence presented at the hearing established that Claimant in fact independently exercised these discretionary powers on a regular basis. Based on the above, the forum concludes that Respondent has met its burden of proof on this element.

**E. Claimant's Primary Duty Consisted of the Management of Respondent's Field Operations.**

OAR 839-020-0004(25) contains the definition of "primary duty" as it relates to the "executive employee" exemption:

"Primary duty" means, as a general rule, the major part, or over 50 percent, of an employee's time. However, a determination of whether an employee has management as his/her primary duty must be based on all the facts of a particular case. Time alone is not the sole test and in situations where the employee does not spend over 50 percent of his/her time in managerial duties, he/she might have management as a primary duty if other pertinent factors support such a conclusion.

Factors to be considered include, but are not limited to, the relative importance of the managerial duties as compared with other duties, the frequency with which the employee exercises discretionary powers, the relative freedom from supervision, and the relationship between the salary paid the employee and wages paid other employees for the kind of non-exempt work performed by the supervisor."

The forum interprets Bond's written acknowledgment that Claimant "was not complying with the time restraints required for salary exempt status" during the wage claim period,<sup>15</sup> coupled with the fact that Bond believed a supervisory employee had to spend "not less than 51%" of work time performing management and supervisory duties to be exempt from overtime,<sup>16</sup> as an admission that Claimant spent less than 51% of his time performing duties that would qualify him as an "executive employee" under OAR 839-020-0005(1). If percentage of time spent in performance of management duties were the sole determinant of whether or not Claimant's "primary duty" was management of Respondent's field operations, the forum's inquiry would be at an end. However, because OAR 839-020-0004(25) specifically provides that

<sup>15</sup> See Finding of Fact – The Merits 46, *supra*.

<sup>16</sup> See Finding of Fact – The Merits 47, *supra*.

the forum's determination "must be based on all the facts of a particular case," and that "[t]ime alone is not the sole test \* \* \*," the forum must consider the other factors listed in the rule to determine if Claimant's "primary duty consist[ed] of management of \* \* \* a customarily recognized department or subdivision" of Respondent's business, in this case, Respondent's field operations. OAR 839-020-0005(1)(a). Before examining the other factors listed in OAR 839-020-0004(25), the forum notes that there is no dispute that Claimant's duties as company foreman were carried out in relationship to Respondent's field operations, or that Respondent's field operations meet the definition of "a customarily recognized department or subdivision" of Respondent's business.

1. The relative importance of Claimant's managerial duties as compared with other duties.

An accurate perspective of the relative importance of Claimant's managerial duties, as compared with his other duties, can be obtained by reviewing the evolution of Respondent's business and Claimant's role and responsibilities during that evolution.

When Claimant was first hired by Respondent in June 1996, Respondent typically worked on only one job at a time, performing commercial and residential caulking and insulation. Respondent employed Tim Jenrette as a "working foreman," at the wage

rate of \$10.00 or \$10.50 per hour, to work side-by-side with applicators and make sure "things got done" on Respondent's jobs. Scott Bond performed all other managerial responsibilities, such as hiring and firing. By the time Claimant was promoted to company foreman in August 1997, Respondent's business had undergone a substantial change. Respondent was working almost exclusively as a subcontractor on new commercial construction, had begun doing waterproofing, and frequently worked on multiple jobs at different job sites at the same time. Because of these changes, Bond determined that he needed to hire a company foreman in order to free himself to spend more time on sales and estimating.

Bond met with Claimant, and they mutually agreed to Claimant's promotion, new duties, and salary, which represented a substantial increase in pay. Although the participants disagreed as to the extent to which Claimant subsequently performed his new duties, they were in agreement as to the nature of those duties, which made Claimant responsible for virtually every aspect of running Respondent's field operations.

During the wage claim period, Claimant identified himself as the "company foreman" who had ultimately responsibility for the work done on Respondent's multiple job sites, no matter who did the work. Claimant was the only foreman employed by Respondent in that time, and Bond was the

only person above him in the company hierarchy. Testimony by Bond and time reports maintained by Claimant establish that Claimant spent 40-50% of his time performing duties of the type listed in OAR 839-020-0005(1). He received warnings from Bond that he was inadequately performing his foreman duties, and he was finally demoted for that reason, taking a substantial reduction in pay.<sup>17</sup> There is no evidence that Claimant was ever criticized for “applicator” work he performed during the wage claim period, or that his demotion was based on unsatisfactory “applicator” work.

Based on the relative importance that both Claimant and Bond ascribed to Claimant’s “foreman” duties and the actual amount of time Claimant spent

performing those duties, the forum concludes Claimant’s managerial duties were of greater relative importance than his non-managerial duties.

2. The frequency with which Claimant exercised discretionary powers.

This issue was discussed in the Opinion, *infra*, under the subtitle “D. Claimant Customarily and Regularly Exercised Discretionary Powers,” in which the forum concluded that Claimant exercised a number of discretionary powers associated with management of Respondent’s field operations on a regular basis. The frequency to which Claimant exercised his discretionary powers points to the conclusion that Claimant’s primary duty was managerial in nature.

3. Claimant’s relative freedom from supervision.

Claimant’s only supervisor was Bond. Claimant testified that his daily contacts with Bond consisted of up to several phone calls a day to discuss the status of Respondent’s jobs and a 15 minute consultation with Bond each night to discuss the next day’s work, as well as the status of Respondent’s jobs. The rest of the time, Claimant determined the manner in which he carried out the tasks he performed each day. While it is undoubtedly true that Bond had a say in how Claimant performed his daily tasks, the same holds true for any management employee who is not the owner or CEO of a company. The bottom line is that Claimant supervised

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<sup>17</sup> The Agency argued that the circumstances of Claimant’s demotion proved that Claimant’s primary duties were not managerial, in that Claimant was demoted based on not spending at least 51% of his time performing those duties and his inadequate performance of those duties, the latter flowing in part from the former. Where there is no evidence of subterfuge showing that the employer is deliberately attempting to circumvent the overtime laws, the extent of duties assigned to an employee is undisputed, and those duties place an employee within the statutory definition of an “Executive Employee,” the forum does not believe that the law was intended to make the employee’s inadequate performance of those duties a basis for retroactively lifting the employee’s exemption from entitlement to overtime pay.

the employees he spent the bulk of his time with each day; they did not supervise him. This evidence supports a conclusion that Claimant's primary duty was management.

4. The salary paid the Claimant and wages paid to other employees for the kind of non-exempt work performed by Claimant.

Claimant earned \$8.50 per hour before his promotion, the equivalent of \$12.50 per hour during the wage claim period,<sup>1</sup> and \$11.00 per hour after he was demoted. Other applicators employed during the wage claim period earned \$6.50 to \$9.00 per hour for performing the kind of non-exempt work performed by Claimant. This substantial difference in pay rate supports a conclusion that Claimant's primary duty was management.

5. Conclusion.

Based on the four factors discussed above, the forum concludes that Respondent satisfied its burden of proving that Claimant's "primary duty" consisted of the management of Respondent's field operations. In doing so, Respondent has established that Claimant was an "executive employee" pursuant to ORS 653.020(3) and OAR 839-

020-0005(1) who was exempt from the requirements of ORS 653.010 to 653.261, including the entitlement to overtime wages for hours worked over 40 in a given work week.

**ORDER**

NOW, THEREFORE, as Respondent has been found to have paid Claimant all wages due and owing by the date of his termination from Respondent's employment, the Commissioner of the Bureau of Labor and Industries hereby orders that Order of Determination 99-0568 against Lane-Douglas Construction, Inc., is hereby dismissed.

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In the Matter of

**SCHNEIDER EQUIPMENT, INC.,  
Respondent.**

**Case No. 72-00**

**Final Order of the  
Commissioner Jack Roberts  
Issued September 14, 2000**

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**SYNOPSIS**

Respondent failed to return BOLI's 1998 and 1999 prevailing wage rate surveys by the dates specified. The commissioner imposed a \$500.00 civil penalty for each of Respondent's violations, for a total of \$1,000.00. ORS 279.359, ORS 279.370, OAR 839-016-0520, OAR 839-016-0530, OAR 839-016-0540.

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<sup>1</sup> This figure is derived from the Agency's calculations of overtime wages and civil penalty wages, both of which were based on an hourly figure of \$12.50 per hour.

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 June 27, 2000, 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 David Gerstenfeld, an employee of the Agency. Respondent was represented by its vice president and authorized representative, Stephen J. Schneider ("Schneider").

The Agency called Schneider, Respondent's authorized representative, as its only witness. Respondent called Schneider and Michele Darby, Respondent's office manager, as witnesses.

The forum received into evidence:

a) Administrative exhibits X-1 through X-21 (generated or filed prior to hearing).

b) Agency exhibits A-1 to A-3 (submitted prior to hearing with the Agency's case summary).

c) Respondent exhibits R-1 to R-3, R-6,<sup>2</sup> R-7 (submitted prior to

hearing with Respondent's case summary), R-14, and R-16 to R-19 (submitted at hearing). Exhibits R-4, R-5, and R-8 were not offered. Exhibits R-9 to R-13 were offered, but not received based on their lack of relevance. Exhibit R-15 was offered but not received based on its lack of foundation or probative value. Respondent's authorized representative was allowed to make verbal offers of proof for all Respondent exhibits that the forum did not receive into evidence.

Having fully considered the entire record in this matter, I, Jack Roberts, 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 December 20, 1999, the Agency issued a Notice of Intent to Assess Civil Penalties ("Notice") in which it alleged that Respondent received, and unlawfully failed to complete and return: (a) the 1998 Construction Industry Occupational Wage Survey, within two weeks of receipt, as required by the commissioner, in violation of ORS 279.359(2); and (b) the 1999 Construction Industry Occupational Wage Survey by September 15, 1999, as required by the commissioner, also in violation of ORS 279.359(2). The Agency sought a civil penalty of \$500.00 for each alleged violation, for a total of \$1,000.00.

<sup>2</sup> R-6 is an affidavit of Michelle Darby, Respondent's office manager since April 12, 1999. Only paragraphs 1-4 and 7 of R-6 were received into evidence.

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

3) On December 20, 1999, the Agency sent Respondent a letter that included the following statements:

“As the Notice of Intent to Assess Civil Penalties indicates, the Bureau intends to assess civil penalties against you of \$500 for each survey you failed to return. These penalty amounts are based on the premise that you will be completing the enclosed 1999 survey and returning the completed, accurate form to the Bureau on or before December 31, 1999.

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“If you fail to complete and return the 1999 survey, after your similar failure in 1998 and after initiation of this action, the Bureau will move to amend the Notice of Intent to substantially increase the amount of civil penalties.”

The letter did not enclose a 1999 survey. The Agency did not move at hearing to increase the amount of civil penalties sought in the Notice.

4) The Marion County Sheriff's department, acting on behalf of the Agency, served the Notice on Stephen J. Schneider, Respon-

dent's registered agent, on January 4, 2000, at 10:16 a.m.

5) On January 24, 2000, the Agency sent a Notice of Intent to Issue Final Order by Default notifying Respondent that it had not yet filed an answer or request for hearing, and that a Final Order on Default would be issued if no answer and request for hearing were received by February 3, 2000.

6) On January 24, 2000, Thomas A. Schneider, Respondent's president, sent a letter to Commissioner Roberts protesting the Notice. The letter addressed the allegations raised in the Notice and raised affirmative defenses that included the following:

“The time allotted for submission of wage surveys is totally unreasonable. Statute empowers you to be able to require wage reports from us within a time established by yourself. We doubt that the legislature intended to empower you to impose costly and restrictive requirements on us that are not necessary in order to accomplish the collection of wage data.

“Even the IRS and OR Department of Revenue give a person several months to submit financial data and also the opportunity for an extension beyond that. Why can't BOLI?

“The Notice was threatening and arrogant, hardly what we believe our government should be or needs to be. In addition, it was significantly flawed \* \* \*.

“[C]oncerns about confidentiality[.]”

The letter also stated that Stephen J. Schneider would be acting as Respondent’s authorized representative in this matter.

7) On January 28, 2000, the Agency sent a letter to Respondent stating that its answer was insufficient because it did not include a request for a contested case hearing, and that a Final Order on Default would be executed if a request for contested case hearing was not received by February 7, 2000.

8) On February 4, 2000, Respondent filed a request for a contested case hearing in this matter.

9) The Agency filed a request for hearing with the Hearings Unit on March 1, 2000, and served it on Respondent.

10) On March 10, 2000, the Hearings Unit served Respondent with: a) a Notice of Hearing that set the hearing for June 27, 2000; 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.

11) On March 14, 2000, the forum ordered the Agency and Respondent 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; a brief statement of the elements of the claim and penalty calculations (for the Agency only); a brief statement of any defenses to the claim (for Respondent only); and a statement of any agreed or stipulated facts. The forum ordered the participants to submit their case summaries by June 19, 2000, and notified them of the possible sanctions for failure to comply with the case summary order. The forum also provided a form for Respondent’s use in preparing a case summary.

12) On June 1, 2000, Respondent filed a motion for postponement, alleging that the Agency was also conducting the “Siletz” investigation against Respondent, that the Siletz investigation involved over a million dollars, and that the Siletz investigation should be completed before a hearing was conducted in this matter. Respondent also stated that the ongoing status of the Siletz investigation made it difficult for Respondent to adequately pursue discovery in this matter, and that the existence of the Siletz investigation would bias the forum in this matter.

13) On June 6, 2000, the Agency filed objections to Respondent’s motion for postponement, which included an affidavit by the Agency’s compliance specialist in charge of the Siletz investigation. Included in the affidavit were statements that it was unlikely the Siletz investigation would be concluded short of a hearing or court trial, and that the

Siletz investigation was unrelated to the matter set for hearing.

14) On June 7, 2000, the forum denied Respondent's motion for postponement based on Respondent's failure to establish good cause.

15) On June 9, 2000, Respondent sent a two-page letter to the Agency requesting discovery and sent a copy of that letter to ALJ McCullough.

16) On June 16, Respondent filed a motion to the Hearings Unit asking for forum to issue a *subpoena duces tecum* to Commissioner Roberts requiring him to produce certain documents, or in the alternative, a subpoena to an unnamed Agency employee who could explain the documents, together with a subpoena for Commissioner Roberts to testify at the hearing. The documents sought by Respondent consisted of the following:

"1. List of Contractors, with addresses, or documents which show who were sent, and timely returned Wage Surveys for 1998 and 1999;

"2. List, or Documents, showing all contractors who received a notice of Intent to Assess Civil Penalties for failure to return said notices;

"3. List, or Documents, showing the penalties claimed in such Notices and paid by said contractors;

"4. All textual advice issued by the Bureau on how a contractor should determine proper

job classifications for its workers, other than that appearing in OAR Chapter 839, Division 16;

"5. All mathematical and textual examples of proper methods of calculating Weighted Average overtime, other than those appearing in Appendix D to the Bureau's document titled: "Prevailing Wage Rate Laws covering the calendar years of 1998, 1999 & 2000;

"6. All records of phone conversations between [Jack Roberts] and Respondent;

"7. All records concerning a decision to send out said Surveys in the summers of 1998 and 1999 and setting deadlines for the return of said Surveys;

"8. All records, of any kind, demonstrating the data, or lack of data, from Respondent affects the Bureau's ability to accurately determine the prevailing wage rates, or that the lack of data could result in 'skewing of the established rates.'"

17) On June 19, 2000, the Agency filed objections to Respondent's motion for discovery and subpoenas.

18) On June 20, 2000, the forum ruled on Respondent's motion for discovery and subpoenas. The forum denied Respondent's request for a *subpoena duces tecum* to obtain the documents sought in Respondent's requests

2-7 based on Respondent's failure to show that the requests either sought information relevant to the case or that the specific information sought was reasonably likely to produce information generally relevant to the case.

The forum granted Respondent's requests 1 and 8 and issued a *subpoena duces tecum* to Respondent to serve on Christine Hammond, the Administrator of the Wage & Hour Division, whom the Agency case presenter had named, at the forum's request, as the custodian of the records sought by Respondent in Respondent's requests 1 and 8. The forum mailed the *subpoena duces tecum* to Respondent, and informed Respondent that it was responsible for serving the subpoena and paying applicable witness fees, if any.

The forum treated Respondent's request to obtain the testimony of Commissioner Roberts as a motion for a *subpoena ad testificandum* and denied the request based on Respondent's failure to make a showing that the alleged conversations between Respondent and Commissioner Roberts were in any way related to this hearing.

The forum also treated Respondent's motion to obtain the testimony of an unnamed BOLI employee who could explain the documents sought by Respondent as a motion for a *subpoena ad testificandum*, and denied the request on the basis that it could not issue a *subpoena ad testificandum* to an unnamed individual.

19) The Agency and Respondent timely filed their case summaries, with exhibits, on June 19, 2000.

20) On June 21, 2000, the Agency requested that Respondent make Michele Darby available for cross-examination at the hearing, based on her affidavit that was included in the exhibits accompanying Respondent's case summary.

21) At the start of the hearing, the ALJ confirmed that Respondent had received the Summary of Contested Case Rights and had no questions about it at that time.

22) Pursuant to ORS 183.415(7), 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. Several times during the hearing, the ALJ advised Respondent's authorized representative of the procedures governing the conduct of the hearing, including the manner in which objections might be made and matters preserved for appeal.

23) During the hearing, Respondent's authorized representative inquired about calling Commissioner Roberts, who had been listed as a witness on Respondent's case summary, and Christine Hammond, who had not been listed as a witness on Respondent's case summary, as witnesses to testify on Respondent's behalf. The ALJ advised Respondent's authorized repre-

sentative that he had no authority to compel the testimony of any witness who had not been served with a *subpoena ad testificandum* and did not require Roberts or Hammond to testify as witnesses.

24) The ALJ issued a proposed order on July 26, 2000, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. On August 7, 2000, Respondent timely filed exceptions. Those exceptions are addressed in the Opinion section of this Final Order.

#### FINDINGS OF FACT – THE MERITS

1) At all material times, Respondent was an Oregon corporation and an employer engaged in the business of the construction of wells, water treatment plants, and irrigation systems in the states of Oregon and Washington.

2) The Research and Analysis section of the Oregon Employment Department ("Employment Department") contracted with BOLI in 1998 and 1999 to conduct Construction Industry Occupational Wage Surveys ("wage surveys"). The BOLI Commissioner planned to, and did, use the surveys to aid in the determination of the prevailing wage rates in Oregon.

3) On or about September 2, 1998, the Employment Department mailed a form letter to Respondent and a number of other contractors informing them of the upcoming 1998 wage sur-

vey and their legal obligation to complete the survey. The form letter included a statement that the survey covered **"all non-residential construction work performed in Oregon during a specified period, including BOTH private work and pre-vailed or public improvement work."** (emphasis in original) This letter, and all other correspondence to Respondent from the Employment Department regarding the 1998 and 1999 wage surveys, were mailed to Respondent's correct address of 21881 River Rd NE, Saint Paul, OR 97137.

4) On or about September 15, 1998, the Employment Department mailed Respondent a wage survey packet, which included a postage paid envelope for return of the survey. Printed on the cover sheet of the packet was a map of Oregon divided into 14 numbered districts, along with the title "BOLI – Construction Industry Occupational Wage Survey 1998." The second page was a one-page form letter to construction contractors that included statements that any information provided was confidential, that contractors' "timely response and cooperation are essential for determining accurate and fair wage rates for Oregon's contractors and workers," a request that recipients **"Please return your completed survey form in the enclosed postage-paid envelope within two weeks,"** and the statement that **"Failure to return a completed survey form may result in a monetary fine."** (emphasis in

original) The form asked contractors to provide wage data for all types of non-residential construction projects, including both "prevailing wage and non-prevailing wage work." An instruction sheet enclosed with the packet included the following statement printed in boldface type:

**"RESIDENTIAL CONSTRUCTION**

**PLEASE NOTE: THIS PREVAILING WAGE SURVEY DOES NOT COVER RESIDENTIAL CONSTRUCTION WORKERS. IF ALL OF YOUR WORK FOR THE SELECTED REPORTING PERIOD WAS DONE ON RESIDENTIAL CONSTRUCTION, PLEASE CHECK 'RESIDENTIAL ONLY' IN QUESTION IV ON THE SURVEY FORM, THEN FILL OUT ONLY THE FIRM INFORMATION ON THE FORM, AND RETURN IT TO OUR OFFICE IN THE POSTAGE-PAID ENVELOPE."**

5) On or about October 5, 1998, the Employment Department mailed a reminder card to Respondent and other contractors from whom completed 1998 wage surveys had not yet been received. On or about October 19, 1998, a second reminder card was sent to Respondent and other contractors from whom completed 1998 wage surveys had not yet been received, with "Final Notice" stamped on its front.

6) Respondent received the 1998 wage survey packet, but did

not return it to the Employment Department within a two week period. Respondent never completed and returned the 1998 wage survey packet to the Employment Department or BOLI.

7) Schneider saw the 1998 wage survey packet in October 1998. Respondent decided not to complete and return it because of "the requirement to essentially drop everything and return it within two weeks during peak construction season." Respondent did not subsequently complete and submit the 1998 wage survey for the reason that "[s]ince we could not meet the time requirements imposed by \* \* \* the 1998 \* \* \* survey, and the expressed urgency, we felt submission in the winter months when staff was a little more poised to prepare it would be a useless expenditure of time and talent since it would be several months after the deadlines."

8) On or about June 15, 1999, the Employment Department mailed a preliminary postcard survey to Respondent asking if Respondent, in the past year, "had employed workers on any non-residential construction projects," "has delivered supplies to a construction site," and if "the delivery worker [has] performed work on the construction site." Jere Harrington, Respondent's office manager at that time, signed and dated the postcard "6-22-99" and returned it to the Employment Department. On the postcard, she answered "Yes" to each question.

9) On or about August 18, 1999, the Employment Department mailed a wage survey packet, which included a postage paid envelope for return of the survey, to Respondent and other contractors based on their responses to the preliminary postcard survey. The phrase "FILING DEADLINE: September 15, 1999" was prominently displayed on the front of the survey form. The packet asked contractors to provide wage data for "all [non-residential] construction work performed for the survey period – both prevailing wage and non-prevailing wage work." A letter included with the wage survey packet notified contractors that "[f]ailure to return a completed survey form may result in a monetary fine." (emphasis in original) An instruction sheet enclosed in the wage survey packet included the following statement printed in boldface type:

**RESIDENTIAL CONSTRUCTION**

**PLEASE NOTE: THIS PREVAILING WAGE SURVEY DOES NOT COVER RESIDENTIAL CONSTRUCTION WORKERS. IF ALL OF YOUR WORK FOR THE SELECTED REPORTING PERIOD WAS DONE ON RESIDENTIAL CONSTRUCTION, PLEASE FILL OUT THE FIRM INFORMATION ON THE SURVEY FORM, AND WRITE IN THE WAGE DATA GRID THAT YOUR FIRM ONLY PERFORMED RESIDENTIAL WORK. RETURN**

**IT TO OUR OFFICE IN THE POSTAGE-PAID ENVELOPE."** (emphasis in original)

10) Respondent received the 1999 wage survey packet before September 15, 1999, and Schneider saw it before September 15, 1999.

11) On or about September 20, 1999, the Employment Department mailed a "Survey Past Due" card to Respondent and other contractors who had been sent a 1999 wage survey but had not yet returned it. On or about October 18, 1999, another "Survey Past Due" card was sent to Respondent with "Final Notice" stamped on it.

12) Respondent decided not to complete and return the 1999 wage survey in 1999 because of "the requirement to essentially drop everything and return it within two weeks during peak construction season." Respondent did not subsequently complete and submit the 1999 wage survey until after being served with the Notice for the reason that "[s]ince we could not meet the time requirements imposed by \* \* \* the 1999 survey, and the expressed urgency, we felt submission in the winter months when staff was a little more poised to prepare it would be a useless expenditure of time and talent since it would be several months after the deadlines."

13) Respondent did not ask for an extension of time to complete either the 1998 or 1999 surveys. All 1998 and 1999 wage

survey related mailings sent by the Employment Department to Respondent listed phone numbers, including a toll-free number, for employers to call if they had questions about the wage survey form. Respondent did not call these numbers or attempt to contact BOLI about the wage survey forms.

14) Respondent began work on the 1999 wage survey after being served with the Notice on January 4, 2000, completed it on January 7, 2000, and mailed it back to the Employment Department, which received Respondent's survey on January 24, 2000.<sup>3</sup>

15) In 1998 and 1999, Respondent completed and timely submitted reports on a monthly basis to the Employment Department, each of which took about an hour to prepare.

16) In 1998, Respondent employed workers on non-residential construction projects in Oregon.<sup>4</sup>

17) In 1999, Respondent employed workers on non-residential construction projects in Oregon.

18) A single contractor's failure to return the wage survey may adversely affect the accuracy of the Agency's prevailing wage rate determinations.

#### **ULTIMATE FINDINGS OF FACT**

1) Respondent is an Oregon employer.

2) The commissioner conducted wage surveys in 1998 and 1999 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 1998 and 1999 wage surveys.

4) Respondent deliberately failed to complete and return the 1998 survey.

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Oregon in 1998. However, the forum infers from Respondent's statement that the 1998 survey required Respondent to "essentially drop everything and return it within two weeks during peak construction season" that Respondent employed workers in 1998 on non-residential construction projects. If not, the wage survey only required Respondent to check a box on the survey form, fill out "some firm information," and return the form in the Employment Department's postage-paid envelope, a procedure that would hardly have required Respondent to "essentially drop everything." See Finding of Fact – The Merits 4.

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<sup>3</sup> Pursuant to Respondent's motion and the confidentiality provision of ORS 279.359(3), Respondent's completed 1999 wage survey, which was offered as Exhibits A-3, pp. 89-92, and R-1, both of which were received into evidence by the forum, has been placed under seal in the original hearings file and is not subject to disclosure under any of the provisions of ORS chapter 192.

<sup>4</sup> No specific evidence was presented concerning whether or not Respondent employed workers on non-residential construction projects in

5) Respondent deliberately failed to complete and return the 1999 survey in the time period required by the commissioner. Respondent did complete and return the 1999 survey after being served with the Agency's Notice.

6) Respondent employed workers on non-residential construction projects in 1998 and 1999.

7) Respondent could have completed and returned the 1998 wage survey within two weeks after September 15, 1998.

8) Respondent employed construction workers in 1999 on non-residential construction projects.

9) Respondent could have completed and returned the 1999 wage survey by September 15, 1999.

10) There is no evidence in the record that Respondent has committed other violations of the prevailing wage rate laws.

#### CONCLUSIONS OF LAW

1) ORS 279.359 provides, in pertinent part:

"(1) The Commissioner of the Bureau of Labor and Industries shall determine the prevailing rate of wage for workers in each trade or occupation in each locality under ORS 279.348 at least once a year by means of an independent wage survey \* \* \* .

"(2) A person shall make such reports and returns to the Bureau of Labor and Industries as the commissioner may re-

quire to determine the prevailing rates of wage. The reports and returns shall be made upon forms furnished by the bureau and within the time prescribed therefor by the commissioner. The person or an authorized representative of the person shall certify to the accuracy of the reports and returns.

"\* \* \* \* \*

"(5) As used in this section, 'person' includes any employer, labor organization or any official representative of an employee or employer association."

Respondent was a person required to make reports and returns under ORS 279.359(2). Respondent's failures to return a completed 1998 wage survey within two weeks of September 15, 1998, and a 1999 wage survey by September 15, 1999, constitute two separate violations of ORS 279.359(2).

2) 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 839-016-0520 provides:

"(1) The commissioner shall consider the following mitigat-

ing 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.

"\* \* \* \* \*

"(3) The commissioner may assess a civil penalty against a contractor or subcontractor for any of the following violations:

"\* \* \* \* \*

"(i) Failure to submit reports and returns in violation of ORS 279.359(2)[.]"

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.

"\* \* \* \* \*

"(5) The civil penalty for all \* \* \* violations [other than violations of ORS 279.350 regarding payment of the prevailing wage and ORS 279.375 regarding fees to be paid to BOLI by the contractor] shall

be set in accordance with the determinations and considerations referred to in OAR 839-016-0530.”

The Commissioner of the Bureau of Labor and Industries is authorized to impose civil penalties for the violations found herein, and the commissioner's imposition of the penalties assessed in the Order below is a proper exercise of that authority.

### OPINION

#### **DID RESPONDENT VIOLATE ORS 279.359(2) IN 1998 AND 1999?**

The Agency alleges that Respondent violated ORS 279.359(2) in 1998 and 1999 and seeks a civil penalty of \$500.00 for each violation. To prove these violations, the Agency must show that:

- (1) Respondent is a “person”;
- (2) The commissioner conducted surveys in 1998 and 1999 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 1998 and 1999 surveys; and
- (4) Respondent failed to make the required reports or returns within the time prescribed by the commissioner.

Schneider's admission that Respondent had employees during 1998 and 1999 established that Respondent was a “person” for

purposes of ORS 279.359. Schneider's testimony and the affidavit of Mary Wood, the Employment Department's representative who conducted the wage surveys, along with the Agency's supporting documentation in Exhibit A-3, established that the commissioner conducted wage surveys in 1998 and 1999 requiring persons to return completed wage survey forms. Respondent admitted in its answer, and Schneider testified that Respondent received the 1998 and 1999 wage surveys. Respondent admitted in its answer, and Schneider testified that Respondent never returned the 1998 wage survey and that the 1999 wage survey was not returned until January 2000, well after the September 15, 1999, deadline for submission. Based on this undisputed evidence, the forum concludes that Respondent violated ORS 279.359(2) in 1998 and 1999 as alleged by the Agency.

#### **CIVIL PENALTIES**

The commissioner may impose penalties of up to \$5000.00 each for Respondent's violations of ORS 279.359(2). In this case, the Agency seeks \$500 for each violation. In determining the appropriate size of the penalties, the forum must consider the “mitigating and aggravating circumstances” set out in OAR 839-016-0520.<sup>5</sup> It is Respon-

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<sup>5</sup> See also OAR 839-016-0540(1), which provides that “[t]he actual amount of the civil penalty will depend

dent's responsibility to provide the commissioner with evidence of mitigating circumstances. OAR 839-016-0520(2). The forum evaluates the appropriate civil penalties for Respondent's 1998 and 1999 violations under these standards.

**A. The 1998 violation.**

One mitigating factor, and several aggravating factors are present in this case. The mitigating factor is that there was evidence that Respondent had not previously violated the prevailing wage rate laws. A discussion of the aggravating factors follows. First, Respondent argued that timely completion of the wage survey was extremely difficult, imposing a burden so onerous that Respondent was essentially required to suspend its business operations during peak construction season. However, Respondent did not produce reliable evidence to support this contention. Second, Respondent employed workers on non-residential construction projects in 1998. Mary Wood's affidavit and a portion of a textbook discussing the evaluation of statistical data that was offered into evidence by the Agency and received without objection established that the absence of Respondent's data could adversely affect the accuracy of the Agency's prevailing wage determination, the whole purpose of the wage survey. Although the magnitude and seriousness of

Respondent's violation was not as serious as violations like failure to pay or post the prevailing rate of wage, it was more than nominal. Third, Respondent was well aware that the wage survey had arrived and deliberately chose to ignore it, despite receiving reminders from the Employment Department. The forum finds that a \$500.00 penalty is appropriate under these circumstances.

**B. The 1999 Violation.**

Except for the fact that Respondent had a previous violation of the prevailing wage rate laws – its failure to complete and return the 1998 wage survey – all the same considerations for determining the amount of civil penalty for Respondent's 1998 violation apply to Respondent's 1999 violation. The forum does not consider Respondent's January, 2000 submission of the 1999 wage survey as a mitigating factor because: (1) it was only submitted after Respondent received the Notice of Intent and the Agency's threat to impose a larger penalty if it was not submitted; and (2) there is no evidence that it was submitted in time for the commissioner to use its data in carrying out his statutory mandate of calculating the prevailing wage rate. ORS 279.359(1). Under these circumstances, the forum assesses the \$500.00 penalty sought by the Agency.

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on all the facts and on any mitigating and aggravating circumstances.”

**OTHER ISSUES RAISED BY  
RESPONDENT DURING THE  
HEARING**

Respondent's authorized representative, Stephen Schneider, argued at hearing that other factors existed that should prevent the commissioner from finding that Respondent had violated the law or that civil penalties should be imposed. The following discussion summarizes those arguments.

**A. "Self-Incrimination."**

Respondent argued that the requirement that Respondent complete and return the commissioner's 1998 and 1999 wage surveys was invalid because it placed Respondent in the position of being "self-incriminating" if it completed and returned the wage surveys. The forum interprets this as a constitutional argument, which an authorized representative is not authorized to make. OAR 839-050-0110(4); OAR 137-003-0008(4). Even if Respondent had properly raised the argument through counsel, the forum would reject it because the privilege against self-incrimination is only applicable in criminal proceedings.<sup>6</sup>

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<sup>6</sup> Article I, Section 12 of the Oregon Constitution provides "[n]o person shall be \* \* \* compelled in any criminal proceeding to testify against himself." Amendment V of the U.S. Constitution provides "[n]o person \* \* \* shall be compelled in any criminal case to be a witness against himself[.]"

**B. No Specific Statutory Cite in  
Wage Surveys.**

Respondent argued that civil penalties could not be assessed because there was no specific statutory cite in the wage surveys authorizing the assessment of civil penalties in any amount for Respondent's failure to complete and return the 1998 and 1999 wage surveys. Respondent was clearly placed on notice of the law by the unequivocal language on both wage survey forms that completion and submission of the wage surveys is a requirement of "Oregon law" and that "[f]ailure to complete a completed survey form may result in a monetary fine." (emphasis in original) "A specific statutory cite" of the type described by Respondent is not required by the law.

**C. "Lack of Custody or Control" of Wage Surveys  
by the Agency.**

Respondent argued that it should not be required to complete and return the 1998 and 1999 wage surveys because of a "lack of custody or control" by the Agency, as manifested by the Agency's contract with the Employment Department to gather this information. The forum rejects this defense because ORS 279.359(4) specifically authorizes the commissioner to enter into contracts with "public or private parties" such as the Employment Department to conduct wage surveys.

**D. The Commissioner's Timelines were Unreasonable.**

Respondent argued that the commissioner's prescribed timelines for completing the wage surveys were unreasonable, given that Respondent and other contractors were required to complete them in a short period of time during peak construction season. In 1998, that prescribed timeline was "two weeks"; in 1999 it was twenty-seven days. The 1998 survey was due at the end of September 1998; the 1999 survey was due on September 15, 1999. According to Schneider's undisputed testimony, both periods of time fell into Respondent's peak construction period and made it unreasonable for Respondent to comply.

To resolve this issue, the forum must decide if the commissioner exercised his discretion within the range of discretion delegated to him by law, whether the commissioner's action followed the procedures prescribed by statute, and whether the substance of the commissioner's action was reasonable.<sup>7</sup>

In this case, commissioner exercised his discretion in the precise manner required of him by ORS 279.359. He contracted with the Employment Department to conduct wage surveys in 1998 and 1999, utilized the surveys to calculate the prevailing rate of wage, and made the data available to the public in published booklets entitled "Prevailing Wage Rates for Public Works Contracts in Oregon." Respondent argued that the timeline prescribed by the commissioner was unreasonable because it imposed a burden so onerous that Respondent was essentially required to suspend its business operations during peak construction season in order to complete the surveys. There is no reliable evidence to support this argument, and no evidence was presented to establish that the many other contractors in Oregon who were subject to the same timeline were unable to comply for this reason. Although Respondent could have easily done so, it never contacted BOLI within the timelines that the wage surveys were due to complain about them being unreasonable or to ask for an extension. Based on the above, the forum concludes that

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<sup>7</sup> See *Hymes v. Keisling*, 327 Or 556, 563 (1998), *reconsideration denied* 329 Or 273 ("The proper sequence in analyzing the legality of action taken by officials who are exercising delegated authority is to determine first whether the officials acted within the scope of their authority and then whether the action that they took followed the procedures prescribed by

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statute or regulation. \* \* \* The next determination is whether the substance of the action departed from a legal standard expressed or implied in the law being administered." In this case, given the broad delegation of authority contained in the statute, the forum concludes that ORS 279.359 contains an implication that wage survey respondents should have a "reasonable" time to comply.)

the commissioner exercised his discretion in prescribing timelines for completion of the 1998 and 1999 wage surveys in a manner that was reasonable.

#### **RESPONDENT'S EXCEPTIONS**

Respondent raised a total of 42 exceptions to the ALJ's Proposed Order. The forum has made two changes in response to Respondent's exceptions, adding the words "at that time" to the end of Procedural Finding of Fact 21, and changing "Schneider Industries, Inc." to "Schneider Equipment, Inc." in the Order in response to exceptions 9 and 41. The remaining 40 exceptions are discussed below.

#### **A. Exceptions 1, 2, 3, 42.**

These exceptions allege no specific procedural or substantive error and are overruled.

#### **B. Exception 4.**

Respondent excepts that there is no evidence to support the forum's conclusion that Stephen J. Schneider was served with the Agency's Notice on January 4, 2000. This is incorrect. Exhibit X-1-d is an affidavit from the Marion County Sheriff's office attesting that Schneider was personally served with the Notice at 10:16 a.m. on January 4, 2000.

#### **C. Exception 5.**

The omissions from Proposed Finding of Fact – Procedural 6 cited by Respondent do not affect Respondent's procedural or substantive rights. The ALJ is not required to cite verbatim all docu-

mentary and testimonial evidence put forth in the pleadings or offered at hearing. Respondent's "confidentiality" and "unreasonableness" defenses put forth in Respondent's answer were both raised at hearing and addressed adequately in the Proposed Order.

#### **D. Exceptions 6-8, 10-12, 14-18, 25-31, 39.**

These exceptions are argumentative and lack merit. The findings and conclusions referred to in these exceptions are supported by substantial evidence in the record, and the alleged omissions are argumentative or irrelevant. These exceptions are overruled.

#### **E. Exception 13.**

Respondent excepts that Proposed Finding of Fact – The Merits 7 is incorrect and/or incomplete. The forum disagrees. This finding is based on Respondent's answer and the testimony of Stephen J. Schneider. Respondent's exception is overruled.

#### **F. Exception 19.**

Respondent excepts that a new finding of fact is required stating that "The wage survey classifications are inconsistent with the published wage determinations." Respondent raised this issue at hearing; however, it is irrelevant to the forum's determination. Respondent's exception is overruled.

#### **G. Exception 20.**

Respondent excepts that a new finding of fact is required in-

dicating that the wage surveys were required to be completed and submitted during Respondent's peak season. This issue was considered and rejected as lacking merit in the Proposed Opinion in the section entitled "D. The Commissioner's Timelines were Unreasonable." Respondent's exception is overruled.

#### **H. Exceptions 21-23.**

These exceptions allege that three new findings of fact are required stating that the 1998 and 1999 wage surveys had different completion schedules and that the documents related to the wage surveys did not specifically state the appropriate statutory references. The completion schedules for the 1998 and 1999 wage surveys were specially stated in Proposed Findings of Fact – The Merits 4-11, and citation of specific statutes related to the wage surveys is irrelevant to the forum's determination. Respondent's exceptions are overruled.

#### **I. Exception 24.**

Respondent excepts that the Proposed Order failed to state that Respondent designated Stephen J. Schneider, its vice president, as its authorized representative. These facts are recited in the introductory paragraphs to the Proposed Order and in Proposed Finding of Fact – Procedural 6. Respondent's exception is overruled.

#### **J. Exceptions 32-34.**

Respondent excepts that new ultimate findings and conclusions

of law are required stating that "Respondent's actions resulted in no measurable apparent or proven harm," and that the Agency violated wage survey confidentiality requirements by allowing them to be discussed during the hearing. Respondent's exceptions are argumentative and inaccurate and are overruled.

#### **K. Exceptions 35-38.**

These exceptions are argumentative, and the issues they raise were adequately considered in the Proposed Order. Respondent's exceptions are overruled.

#### **L. Exception 40.**

Respondent excepts to the Proposed Order's conclusion that the dates imposed by the commissioner for submission of the 1998 and 1999 wage surveys were reasonable. This issue was adequately considered in the Proposed Order. Respondent's exception is overruled.

### **ORDER**

NOW, THEREFORE, as authorized by ORS 279.370 and as payment of the penalties assessed as a result of Respondent's two violations of ORS 279.359(2), the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **Schneider Equipment, Inc.**, to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232, a certi-

fied check payable to the Bureau of Labor and Industries in the amount of ONE THOUSAND DOLLARS (\$1,000.00), 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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**In the Matter of**

**SHARON KAYE PRICE dba Willow Bay Manor, Respondent.**

**Case No. 101-00  
Final Order of the  
Commissioner Jack Roberts  
Issued October 3, 2000**

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**SYNOPSIS**

Respondent willfully failed to pay two employees all wages they earned. The commissioner ordered Respondent to pay the employees their unpaid wages plus civil penalty wages. ORS 652.140, ORS 652.150, ORS 653.025, ORS 653.055, ORS 653.261, OAR 839-001-0470, OAR 839-020-0010, OAR 839-020-0042.

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The above-entitled case came on regularly for hearing before Erika L. Hadlock, 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 June 29, 2000, at the Salem office of the Bureau of Labor and Industries, located at 3865 Wolverine Street NE, Building E-1, Salem, Oregon.

Cynthia Domas, an employee of the Bureau of Labor and Industries ("BOLI" or "the Agency") represented the Agency. Wage claimant Tina Walker was present during the hearing. She was not represented by counsel. Wage claimant Tamara Cox was not present during the hearing and was not represented by counsel. Respondent did not appear at hearing either personally or through counsel.

The Agency called as witnesses: Claimant Tina Walker, Agency compliance specialist Newell Enos, Minnie Berset (a friend of Tina Walker) and Charles Walker. (Tina Walker's brother).

The forum received:

b) Agency exhibits A-1 through A-9 (filed with the Agency's case summary).

a) Administrative exhibits X-1 through X-12 (received by the Hearings Unit or generated prior to hearing) and X-13 through X-17 (received or generated by the Hearings Unit after the hearing).

Having fully considered the entire record in this matter, I, Jack Roberts, 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 26, 1999, Claimant Tina Walker filed a wage claim form in which she stated that Respondent had employed her from April 5, 1999, until May 9, 1999. Walker asserted that her pay rate was \$7.50 per hour, that she should have been paid a total of \$703.00, and that Respondent had not paid her any of the wages she earned. Walker filed a form assigning her wage claim to the commissioner at the same time she filed her wage claim form.

2) On or about May 27, 1999, Claimant Tamara Cox filed a wage claim form in which she stated that Respondent had employed her from September 11, 1998, until May 3, 1999. Cox asserted that her pay rate was \$160.00 per weekend, which lasted from 8:00 a.m. Saturday through 8:00 a.m. Monday, and that Respondent had failed to pay her \$640.00 of the wages she had earned during April and May 1999. Cox filed a form assigning her wage claim to the commissioner at the same time she filed her wage claim form.

3) On or about August 31, 1999, the Agency served Respondent with an Order of Determination. The Agency alleged that Respondent had employed Claimant Walker from April 5 to May 9, 1999, at the rate of \$7.50 per hour and had failed to pay her \$746.25 in wages. The Agency further alleged that Respondent had employed Claimant Cox from September 11, 1998, to

May 3, 1999, at the rate of \$6.50 per hour and had failed to pay her \$897.00 in wages. Finally, the Agency alleged that Respondent's failure to pay the overtime wages was willful and that Respondent, therefore, owed Claimants penalty wages totaling \$3360.00.

4) Respondent filed an Answer and Request for Hearing in which she denied both that "the amount of \$1643.25 is owed" and that she willfully failed to pay wages.

5) On May 2, 2000, the Agency requested a hearing. On May 4, 2000, the Hearings Unit issued a Notice of Hearing stating that the hearing would commence at 9:00 a.m. on June 29, 2000. With the Notice of Hearing, the forum included a copy of the Order of Determination, a "SUMMARY OF CONTESTED CASE RIGHTS AND PROCEDURES" and a copy of the forum's contested case hearings rules, OAR 839-050-0000 to 839-050-0440.

6) On May 18, 2000, the ALJ issued a case summary order requiring the Agency and Respondent to submit summaries of the case that included: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a brief statement of the elements of the claim (for the Agency only); and any wage and penalty calculations (for the Agency only). The ALJ ordered the participants to submit their case summaries by June 15, 2000, and notified them of the possible sanctions for failure to

comply with the case summary order. The ALJ also included a form that Respondent could use to comply with the order.

7) On May 24, 2000, the Agency moved for an extension of time until June 19, 2000, in which to file its case summary. The ALJ granted the motion and issued an order changing the deadline to June 19, 2000, for both participants.

8) On May 31, 2000, the Hearings Unit received notice from the United States Postal Service that Respondent's address had changed from 235 44<sup>th</sup> Avenue, NE, Salem, Oregon, to 4172 Sylvia Street, SE, Salem. The ALJ ordered Respondent to provide her correct mailing address to the Hearings Unit and the Agency no later than June 8, 2000. Respondent never notified the Hearings Unit of her correct address and, from June 1, 2000, forward, the forum sent all documents it issued to both of Respondent's Salem addresses.

9) The Agency filed a motion for discovery order on June 8, 2000. On June 12, 2000, the ALJ granted the Agency's motion as to eight of nine categories of documents sought and ordered Respondent to produce the information to the Agency no later than June 22, 2000. The ALJ did not grant the Agency's motion as to the remaining information because the relevance of the requested information (names, phone numbers, and addresses of all of Respondent's employees between April 1, 1999, and June

1, 1999) was not apparent from the motion. On June 14, the Agency filed a supplemental motion for discovery order in which it explained the relevancy of that information. The ALJ granted the supplemental motion by order dated June 15, 2000. The ALJ noted that "the Agency's request [was] not actually a request for documents, but [was] more similar to an interrogatory." The ALJ stated that the distinction made no difference to her ruling and required Respondent to produce the requested information by June 23, 2000.

10) The Agency filed a timely case summary on June 14, 2000. Respondent did not file a case summary.

11) Respondent did not appear at the time set for hearing and nobody appeared on her behalf. Pursuant to OAR 839-050-0330(2), the ALJ waited thirty minutes past the time set for hearing. When Respondent still did not appear, the ALJ declared Respondent to be in default and commenced the hearing.

12) Pursuant to ORS 183.415(7), the ALJ verbally advised the Agency of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

13) During the hearing, the Agency moved for a protective order preventing the participants from disclosing the contents of Exhibit A-9 outside of the contested case hearing process and requiring that Exhibit A-9 be

placed in a sealed envelope as part of the record. The ALJ granted that motion because Exhibit A-9 contains medical records of residents at Willow Bay Manor.

14) At the close of the hearing, the Agency moved to amend the Order of Determination to increase the amount of unpaid wages sought. The ALJ denied the motion, but said that the Agency had until 5:00 p.m. on Wednesday, July 5, to file written argument asking the ALJ to reconsider her ruling. The Agency later withdrew the motion.

15) The ALJ issued a proposed order on July 7, 2000, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. The Agency filed a timely exception on July 11, 2000, noting that the proposed order did not mention the fact that the ALJ had granted the Agency's motion for an order protecting Exhibit A-9. This Final Order includes a new procedural finding of fact reflecting that protective order.

#### **FINDINGS OF FACT – THE MERITS**

1) At all material times, Respondent owned and operated an adult foster care home in Salem, Oregon, called Willow Bay Manor.

2) Claimant Tamara Cox worked for Respondent at Willow Bay Manor starting in September 1998. Cox's primary responsibility was caring for the residents of Willow Bay Manor. Her duties included bathing, dressing and feeding the residents, giving the

residents their medications, cleaning the foster care facility, doing laundry, and cooking meals. Cox typically worked the weekend shift from 8:00 a.m. Saturday morning through 8:00 a.m. Monday morning. Cox stayed at Willow Bay Manor for the full 48 hours of each weekend shift and was the only employee on the premises during that time. Respondent agreed to pay Cox \$160.00 for each of these shifts.

3) Respondent did not pay Claimant Cox for three weekend shifts she worked in April 1999 and did not pay her for one weekend shift she worked on May 1<sup>st</sup> through 3<sup>rd</sup>, 1999. May 3, 1999, was Cox's last day as Respondent's employee.

4) In 1999, Oregon law required employers to pay employees a minimum wage of \$6.50 per hour. The rate at which Respondent agreed to pay Cox came to less than minimum wage, even assuming that Cox was able to get two eight-hour periods of uninterrupted sleep during each 48-hour weekend shift.<sup>1</sup>

5) On April 4, 1999, Claimant Walker interviewed for a job with Respondent, who hired her at \$7.50 per hour. Respondent trained Walker for two hours on April 5, 1999, and Walker worked her first full day on April 6, 1999. Walker's duties at Willow Bay Manor were the same as Cox's.

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<sup>1</sup> \$160.00/shift x 1 shift/32 hours = \$5.00/hour.

6) Claimant Walker did not have a regular work schedule. Instead, she worked at Willow Bay Manor whenever Respondent called and said she was needed. Claimant frequently worked split shifts at Willow Bay, working from 8:00 a.m. until noon, and then from early afternoon until evening. Claimant worked most days during the week, excluding weekends.

7) Claimant Walker's brother, Charles Walker, sometimes drove Claimant Walker to or from work at Willow Bay. Walker's friend, Minnie Berset, once met Claimant at Willow Bay at the end of her shift so they could go shopping together. Berset and Walker spoke to each other by telephone two or three times each day that Walker worked at Willow Bay.

8) Each day she worked for Respondent, Claimant Walker recorded her hours on two calendars at Willow Bay Manor – one in the kitchen and another in Respondent's office. Claimant Walker also recorded her hours on her own calendar in a residence she shared with Berset, who babysat Walker's children. Walker needed to record how many hours Berset babysat her children, which coincided with the number of hours Walker worked, so Walker could receive money from AFS to pay Berset for watching the children.

9) In late April 1999, Claimant Walker and Berset determined from their home calendar that Walker had worked a total of 66 hours in April. At some point after

that, Walker and Berset moved to a new residence. They have been unable to locate their old calendar since then.

10) When Respondent hired Claimant Walker, she anticipated that Walker would take over Cox's weekend duties in May, because Cox planned to stop working for Respondent. Respondent told Walker that she would earn \$160.00 for working from Saturday morning until Monday morning. Respondent told Walker that she would be getting paid for working 16 hours each day, because she could spend eight hours each day sleeping. This rate of pay came to less than the minimum wage.<sup>2</sup>

11) In May 1999, Claimant Walker worked her first weekend shift, starting at 9:00 a.m. on Friday, May 7. Walker was supposed to continue working until Monday morning. However, she injured herself at work and called Respondent to come finish her shift. Respondent showed up at Willow Bay Manor at 3:30 on Sunday, May 9, and took over for Walker. May 9, 1999, was Walker's last day as Respondent's employee.

12) Respondent never paid Claimant Walker any wages for the work Walker performed at Willow Bay Manor.

13) Other than Respondent's daughter, Claimants were

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<sup>2</sup> See Finding of Fact – the Merits 4, *supra*.

Respondent's only employees during April and May 1999.

14) After Walker and Cox filed their wage claims in May 1999, the Agency sent a letter to Respondent notifying her of the claims. Enclosed with that letter was an employer response form that Respondent was asked to use to either confirm or deny that the wages were owed. The Agency did not receive a response to that letter.

15) Agency compliance specialist Newell Enos was assigned to investigate the two wage claims. Enos had conversations with both Claimants regarding their claims. He also called Respondent, who said she'd mailed checks to both Claimants. Enos asked her to complete the employer response form and return it to the Agency by July 16, 1999. Respondent did not return the form.

16) On July 15, 1999, Enos sent Respondent another letter reminding her of her obligation to maintain time records and asked her to provide the records by July 23, 1999. Respondent did not provide any time or payroll records.

17) Enos later sent Respondent a letter informing her of the amounts of wages he believed Respondent owed Claimants. Respondent did not answer that letter, so Enos sent another letter stating that the administrative process of collecting wages had been initiated. At that point, Respondent called Enos and requested a

meeting, which they scheduled. The morning the meeting was to take place, Respondent called Enos and said she was not going to be able to make it. Enos requested that she mail him any records she had that would show what hours the Claimants worked. Respondent never provided Enos with any such records. Nor did she ever provide proof that she had paid Claimants the wages they had earned.

18) During the time that Walker worked for her, Respondent maintained logs of medications given to residents. Each time an employee gave a resident medicine, the employee was required to initial the log. Claimant Walker initialed such logs every day she worked for Respondent. Consequently, the medication logs would provide evidence regarding the days on which Claimants worked at Willow Bay. Respondent did not provide the logs to Enos.

19) As part of his investigation, Enos determined that Claimant Cox had worked 138 hours in April and May 1999 for which Respondent had not compensated her. Enos's calculation was based on a determination that, during each weekend shift, Cox was able to get two eight-hour periods of uninterrupted sleep, for which Respondent was not required to compensate her. No evidence in the record refutes Enos's determination that Claimant Cox received those sleep periods. Nevertheless, the forum disagrees with his calculation of

the number of uncompensated hours Cox worked in April and May 1999. Cox worked four identical weekend shifts, from 10:00 a.m. Saturday morning until 10:00 a.m. Monday morning. In each of the 48-hour periods, she received 16 hours of sleep for which Respondent was not required to compensate her. Consequently, each shift included 32 hours of compensable time. Claimant Cox worked four of these shifts during April and May 1999, for a total of only 128 hours of work.

20) Enos determined that Claimant Walker had worked 66 hours in April 1999, as Walker reported. The forum agrees with Enos that Walker's determination of the total number of hours she worked in April is credible, and bases its damage award on that number.

21) Enos also determined that Walker worked 33.5 hours in May 1999 – 13 hours on Friday, May 7, 18 hours on Saturday, May 8, and 2.5 hours on Sunday, May 9. That determination was based on Enos's belief that Claimant had eight hours of sleep on Friday and Saturday nights for which Respondent was not required to pay her. Claimant Walker testified that the hearing, however, that she had not had eight hours of uninterrupted sleep during the nights she slept at Willow Bay Manor. Both nights, a resident with Alzheimer's Disease woke her two or three times during the night and required assistance. Unfortunately, there is no evidence in the record of the amount of time Walker

spent assisting the resident during the night. Moreover, there is no evidence that, despite these interruptions, Walker was not able to get at least five continuous hours of sleep each night. Consequently, Enos was correct in determining that Claimant was not entitled to be compensated for the two eight-hour sleeping periods on Friday and Saturday nights. Enos did make one mistake in his calculation of Walker's hours because he believed, from looking at a somewhat sloppy entry on Walker's wage calendar, that she had worked only until 8:30 on Sunday, May 9. In fact, Walker had worked until 3:30 that afternoon.

22) The forum calculates the hours Walker worked in May 1999 as follows. From 9:00 a.m. Friday, May 1, until 3:30 p.m. Sunday, May 3, is a period of 54.5 hours. After subtracting 16 hours for sleep periods, Walker worked a total of 38.5 hours for which Respondent was required to compensate her.

23) The forum calculates penalty wages in accordance with ORS 652.150, OAR 839-001-0470, and Agency policy as follows:

"Total earned during the wage claim period divided by the total number of hours worked during the wage claim period, multiplied by eight hours, multiplied by 30 days.' \* \* \* Statement of Agency Policy, July 23, 1996."

*In the Matter of Belanger General Contracting*, 19 BOLI 17, 26 (1999). Claimant Cox worked a total of 128 hours during the claim period, earning a total of \$832.00 (128 hours x \$6.50/hour). Respondent, therefore, owes her penalty wages of \$1560.00 ( $\$832.00/128 \times 8 \times 30$ ).

24) Claimant Walker worked a total of 104.5 hours during the claim period, earning a total of \$745.25 ((66 hours x \$7.50/hour) + (38.5 hours x \$6.50/hour)). Respondent owes Walker penalty wages of \$1711.58 ( $\$745.25/66 \times 8 \times 30$ ).

25) Enos testified that the Agency has received additional wage claims against Respondent and has issued Orders of Determination asserting that Respondent owes wages to other employees. In those cases, Respondent has defaulted by not requesting contested case hearings. The forum gives that testimony no weight and has not relied on it in determining the relevant facts in this case. The forum believes the testimony to be credible, but finds the other evidence in the record is sufficient to establish the Agency's case with regard to both Walker and Cox.

26) The testimony of all witnesses was credible.

#### **ULTIMATE FINDINGS OF FACT**

1) At all material times, Respondent owned and operated the Willow Bay Manor adult foster care home in Salem, Oregon. Respondent employed Claimants to care for residents and perform

housekeeping work at Willow Bay Manor during 1999.

2) In April and May 1999, Claimant Cox rendered personal services to Respondent by working 128 hours at Willow Bay Manor. Respondent never paid Claimant Cox any wages for those services.

3) The rate at which Respondent agreed to pay Claimant Cox was less than the statutory minimum wage of \$6.50 per hour. Consequently, Respondent was legally required to pay Claimant Cox \$6.50 per hour for the work she did in April and May 1999.

4) Claimant Walker rendered personal services to Respondent by working at Willow Bay Manor for 66 hours in April 1999 and for 54.5 hours in May 1999. Respondent never paid Claimant Walker any wages for those services.

5) Respondent had agreed to pay Claimant Walker \$7.50 per hour for her work in April 1999. The rate at which Respondent had agreed to pay Claimant Walker for her work in May 1999 was less than the statutory minimum wage. Consequently, Respondent was legally required to pay Claimant Walker \$6.50 per hour for the work she performed that month.

6) Respondent's failure to pay wages to both Claimants was willful and more than 30 days have passed since those wages became due.

7) Civil penalty wages for Claimant Cox, calculated in accordance with ORS 652.150, OAR

839-001-0470, and Agency policy, equal \$1560.00. Civil penalty wages for Claimant Walker equal \$1711.58.

### CONCLUSIONS OF LAW

1) ORS 653.010 provides, in pertinent part:

"(3) 'Employ' includes to suffer or permit to work \* \* \*.

"(4) 'Employer' means any person who employs another person \* \* \*."

Respondent employed both Claimant Cox and Claimant Walker.

2) ORS 653.055(1) provides:

"(1) Any employer who pays an employee less than the wages to which the employee is entitled under ORS 653.010 to 653.261 is liable to the employee affected:

"(a) For the full amount of the wages, less any amount actually paid to the employee by the employer; and

"(b) For civil penalties provided in ORS 652.150."

Respondent owes Claimant Cox \$832.00 (128 hours x \$6.50/hour) in unpaid wages plus penalty wages. Respondent owes Claimant Walker \$745.25 ((66 hours x \$7.50/hour) + (38.5 hours x \$6.50/hour)) in unpaid wages plus penalty wages.

3) ORS 652.140 provides, in pertinent part:

"(2) When an employee who does not have a contract for a

definite period quits employment, all wages earned and unpaid at the time of quitting become due and payable immediately if the employee has given to the employer not less than 48 hours' notice, excluding Saturdays, Sundays, and holidays, of intention to quit employment. If notice is not given to the employer, the wages shall be due and payable within five days, excluding Saturdays, Sundays and holidays, after the employee has quit, or at the next regularly scheduled payday after the employee has quit, whichever event first occurs."

Claimant Cox's last day of work was Monday, May 3, 1999. Consequently, her wages were due and payable no later than Monday, May 10, 1999. Claimant Walker's last day of work was Sunday, May 9, 1999. Consequently, her wages were due and payable no later than Monday, May 17, 1999. Respondent violated ORS 652.140 by not paying Claimants all wages they were owed by those dates.

4) ORS 652.150 provides:

"If an employer willfully fails to pay any wages or compensation of any employee whose employment ceases, as provided in ORS 652.140 and 652.145, then, as a penalty for such 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; provided, that in no case shall such wages or compensation continue for more than 30 days from the due date; and provided further, the employer may avoid liability for the penalty by showing financial inability to pay the wages or compensation at the time they accrued."

OAR 839-001-0470 provides:

"(1) When an employer willfully fails to pay all or part of the wages due and payable to the employee upon termination of employment within the time specified in OAR 839-001-0420, 839-001-0430 and 839-001-0440, the employer shall be subject to the following penalty:

"(a) The wages of the employee shall continue from the date the wages were due and payable until the date the wages are paid or until a legal action is commenced, whichever occurs first;

"(b) The rate at which the employee's wages shall continue shall be the employee's hourly rate of pay times eight (8) hours for each day the wages are unpaid;

"(c) Even if the wages are unpaid for more than 30 days, the maximum penalty shall be no greater than the employee's hourly rate of pay times 8 hours per day times 30 days.

"(2) The wages of an employee that are computed at a rate other than an hourly rate shall be reduced to an hourly rate for penalty computation purposes by dividing the total wages earned while employed or the total wages earned in the last 30 days of employment, whichever is less, by the total number of hours worked during the corresponding time period."

Respondent owes Claimant Cox penalty wages of \$1560.00. Respondent owes Claimant Walker penalty wages of \$1711.58.

### OPINION

#### DEFAULT

Respondent failed to appear at hearing and the forum held her in default pursuant to OAR 839-050-0330. When a respondent defaults, the Agency must establish a prima facie case to support the allegations of the charging document. *In the Matter of Belanger General Contracting*, 19 BOLI 17, 25 (1999). The Agency met that burden in this case, as discussed *infra*.

#### RESPONDENT FAILED TO PAY CLAIMANTS ALL WAGES THEY EARNED

##### A. Respondent Owes Claimant Cox \$832.00 in Unpaid Wages

To establish a prima facie case supporting a wage claim, the Agency must prove: 1) that Respondent employed Claimant; 2) any pay rate upon which Respon-

dent and Claimant agreed, if it exceeded the minimum wage; 3) that Claimant performed work for Respondent for which she was not properly compensated; and 4) the amount and extent of work Claimant performed for Respondent. *In the Matter of Barbara Coleman*, 19 BOLI 230, 262-63 (2000). In this case, Claimant Cox asserted in her wage claim that she had worked four weekend shifts at Willow Bay Manor for which Respondent had not compensated her. The fact that Respondent employed Cox was corroborated by Claimant Walker, who testified credibly that she twice saw Cox at work at Willow Bay. In addition, Walker testified that Respondent hoped that Walker would take over Cox's weekend shifts after Cox stopped working at Willow Bay. Cox's wage claim forms and Walker's testimony establish a prima facie case that Respondent employed Cox to work 48-hour weekend shifts at Willow Bay Manor.

Cox's wage claim also is sufficient to establish the rate at which Respondent agreed to pay Cox and the fact that Respondent paid her no wages for four weekend shifts. Oregon law requires employers to maintain accurate records of the hours their employees work and the wages they are paid. See, e.g., *In the Matter of Barbara Coleman*, 19 BOLI at 265. Despite several requests from the Agency, Respondent provided no records of the hours Cox had worked or any pay she had received. In the absence of any evidence to the contrary, the

forum has no reason to disbelieve Cox's assertion that Respondent failed to pay her for four weekend shifts she worked at Willow Bay.

Enos testified that he believed that Cox received two eight-hour sleep periods during each 48-hour weekend shift. Employers are not required to compensate their employees for such sleeping time. OAR 839-020-0042(2). However, employees are entitled to compensation for any interruptions of their sleep periods and must be compensated for the entire sleeping period if the interruptions are so frequent that they cannot get at least five continuous hours of sleep. OAR 839-020-0042(2), (3). There is no evidence in the record that Cox's sleep periods were interrupted. Consequently, the forum finds that Respondent was required to compensate Cox for 32 hours she worked during each of the four weekend shifts, for a total of 128 hours.

ORS 653.025 prohibits employers from paying employees less than the Oregon minimum wage, which was \$6.50 in 1999. Respondent had promised to pay Cox \$160.00 for each of her weekend shifts, which comes to only \$5.00 per hour. Accordingly, Respondent must pay Cox the minimum wage of \$6.50 per hour for each of the 128 hours she worked without compensation, for a total of **\$832.00**.

**B. Respondent Owes Claimant Walker \$745.25 in Unpaid Wages**

The credible testimony of Claimant Walker establishes that she worked 66 hours for Respondent in April 1999. Respondent agreed to pay Walker \$7.50 for each of those hours, but paid her nothing, leaving \$495.00 due and owing for that month. Walker also worked a long weekend shift for Respondent in May 1999, working a total of 38.5 hours, not counting her two eight-hour sleeping periods.<sup>3</sup> The amount Respondent agreed to pay Walker for the weekend shift was less than the minimum wage. Accordingly, Respondent was required to pay Claimant \$6.50 for each of the 38.5 hours she worked in May, for a total of \$250.25. Adding together the wages Respondent owes Claimant Walker for the hours she worked in April and May 1999, Respondent must pay Walker a total of **\$745.25**.

**RESPONDENT MUST PAY PENALTY WAGES TO BOTH CLAIMANTS**

The forum may award penalty wages where the 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).

In this case, it is clear that Respondent knew the hours Claimants worked. Other than Respondent's daughter, Claimants were Respondent's only employees at Willow Bay Manor, a facility that provided round-the-clock care for elderly residents. That fact alone is sufficient to establish that Respondent must have known the hours that Claimants were present at Willow Bay Manor and caring for its residents. In addition, Claimant Walker recorded the hours she worked on calendars at Willow Bay Manor. Because that is something that Respondent required of Walker, the forum infers that Cox also recorded her hours on the calendars. Furthermore, all of Respondent's employees were required to initial medication logs whenever they gave medicine to a resident. Because this happened every day, the medication logs provided Respondent with additional information regarding the hours her employees worked. Finally, as a sole proprietor, Respondent was directly responsible for ensuring that her employees were paid and would know whether that had happened. Based on these facts, the forum finds that Respondent voluntarily and as a free agent failed to pay Claimants the wages they earned in April and May 1999.

As this forum previously has explained, penalty wages are cal-

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<sup>3</sup> See Finding of Fact – the Merits 22, *supra*.

culated in accordance with the relevant laws and Agency policy as follows:

"Total earned during the wage claim period divided by the total number of hours worked during the wage claim period, multiplied by eight hours, multiplied by 30 days.' \* \* \* Statement of Agency Policy, July 23, 1996."

*In the Matter of Mark Johnson*, 15 BOLI 139, 143 (1996); see ORS 652.150; OAR 839-001-0470. Respondent owes Claimant Cox \$1560.00 in civil penalty wages and owes Claimant Walker \$1711.58 in civil penalty wages.

#### ORDER

NOW, THEREFORE, as authorized by ORS 652.332, and as payment of the unpaid wages and civil penalty wages she owes as a result of her violation of ORS 652.140, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **Sharon Kaye Price, dba Willow Bay Manor**, to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, the following:

1) A certified check payable to the Bureau of Labor and Industries in trust for Tamara Cox in the amount of \$2392.00 (TWO THOUSAND THREE HUNDRED NINETY-TWO DOLLARS) less appropriate lawful deductions, representing \$832.00 in gross

earned, unpaid, due, and payable wages and \$1560.00 in penalty wages, plus interest at the legal rate on the sum of \$832.00 from July 1, 1999, until paid and interest at the legal rate on the sum of \$1560.00 from August 1, 1999, until paid.

2) A certified check payable to the Bureau of Labor and Industries in trust for Tina Walker in the amount of \$2456.83 (TWO THOUSAND FOUR HUNDRED FIFTY-SIX DOLLARS AND EIGHTY-THREE CENTS) less appropriate lawful deductions, representing \$745.25 in gross earned, unpaid, due, and payable wages and \$1711.58 in penalty wages, plus interest at the legal rate on the sum of \$745.25 from July 1, 1999, until paid and interest at the legal rate on the sum of \$1711.58 from August 1, 1999, until paid.

**In the Matter of****BUBBAJOHN HOWARD WASHINGTON, Respondent.****Case No. 92-00****Final Order of the****Commissioner Jack Roberts****Issued October 10, 2000****SYNOPSIS**

Respondent Bubbajohn Howard Washington employed Claimant as a parking lot attendant and failed to pay Claimant any wages upon termination, in violation of ORS 652.140(2). Respondent's failure to pay the wages was willful, and Respondent was ordered to pay civil penalty wages. ORS 652.140(2), 652.150.

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 August 10, 2000, in a conference room in the Salem office of the Bureau of Labor and Industries, located at 3865 Wolverine N.E., E-1, Salem, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Cynthia L. Domas, an employee of the Agency. Wage claimant Dale Roth ("Claimant") was present throughout the hearing. Respon-

dents did not appear at the hearing by 9:30 a.m. and were held in default.

The Agency called as witnesses, in addition to Claimant: Jacqueline Winters, owner of Jackie's Ribs; Rhonda Buffington, Claimant's stepdaughter; and Margaret Trotman, Wage and Hour Division Compliance Specialist.

The forum received into evidence:

a) Administrative exhibits X-1 to X-10 (submitted or generated prior to hearing) and X-11 (submitted at hearing);

b) Agency exhibits A-1 to A-8 (submitted or generated prior to hearing) and A-8 to A-10 (submitted at hearing).

Having fully considered the entire record in this matter, I, Jack Roberts, 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 September 20, 1999, Claimant filed a wage claim with the Agency alleging that Respondent John Washington 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) Claimant brought his wage claim within the statute of limitations.

4) On February 4, 2000, the Agency issued Order of Determination No. 99-3540 based upon the wage claim filed by Claimant and the Agency's investigation. The Order of Determination alleged that Respondents "Bubbajohn Howard Washington and Christine Marie Dean, partners, aka Inside Out Training Assoc. and aka Inside Out Training Associates, Inc." owed a total of \$279.50 in unpaid wages and \$1,560.00 in civil penalty wages, 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.

5) On March 22, 2000, the Agency issued Amended Order of Determination No. 99-3540 that realleged all matters alleged in the original Order of Determination, but changed the caption to identify Respondents as "Bubbajohn Howard Washington and Christine Marie Dean, partners, aka Inside Out Training Assoc. and aka Inside Out Training Associates, Inc., and Inside Out Training Associates, Inc." The Agency served this Amended Order on Respondents' attorney, Dirk L. Pierson, by certified mail on March 23, 2000.

6) On March 23, 2000, Respondents, through counsel

Pierson, filed an answer and request for hearing. Respondents' answer denied the allegations and included four alternative affirmative defenses:

a) Claimant was never an employee of Respondents;

b) Respondents Washington and Dean were acting in an agency capacity for Respondent Inside Out Training Associates, Inc., and were not liable for any wages owed by Respondent Inside Out Training Associates, Inc.;

c) Respondents' actions were not willful as required by ORS 6592.150 (sic) to allow for penalty wages because Respondents Washington and Dean had no knowledge of any facts that would put them on notice that they had employed Claimant;

d) Claimant was not an "employee" as defined by ORS 652.210(2) and 652.310(2) because Respondents never paid or agreed to pay for Claimant's services.

7) On March 27, 2000, Respondents Washington and Dean were served with the Amended Order of Determination.

8) On April 20, 2000, the Agency filed a "BOLI Request for Hearing" with the forum.

9) On May 2, 2000, the Hearings Unit issued a Notice of Hearing to Respondents, the Agency, and the Claimant stating the time and place of the hearing as August 10, 2000, at 9:00 a.m.,

at 3865 Wolverine Street 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, and a copy of the forum's contested case hearings rules, OAR 839-050-000 to 839-050-0440. These documents were mailed to Respondents at 780 Commercial SE, Suite 105, Salem, Oregon 97301. None of these documents were returned to the Hearings Unit by the U.S. Postal Service.

10) On June 15, 2000, the case was reassigned from ALJ Hadlock to ALJ McCullough.

11) On June 19, 2000, the forum ordered the Agency and Respondent 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; a brief statement of the elements of the claim (for the Agency only); a brief statement of any defenses to the claim (for Respondent only); 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 no later than July 31, 2000, and notified them of the possible sanctions for failure to comply with the case summary order.

12) On June 21, 2000, Respondents' attorney filed a letter stating that he no longer repre-

sented Respondents and that all future correspondence should be sent directly to Respondents at 780 Commercial St., Suite 105, Salem, Oregon 97302.

13) On June 30, 2000, the forum issued another Case Summary Order that was mailed to Respondents at 780 Commercial St., Suite 105, Salem, Oregon 97302 and included a case summary form designed to assist *pro se* Respondents and authorized representatives in filing a case summary. This document was not returned to the Hearings Unit by the U. S. Postal Service.

14) On July 12, 2000, Cynthia L. Domas filed a letter with the forum stating that she had been substituted as Agency case presenter.

15) The Agency filed its case summary, with attached exhibits, on July 28, 2000. The Agency filed an addendum to its case summary on August 7, 2000.

16) On August 10, 2000, at 9 a.m., Respondents did not appear for the hearing. The ALJ went on the record and announced that he would wait until 9:30 a.m., pursuant to OAR 839-050-0330, to commence the hearing and that Respondents would be in default if they did not make an appearance by that time.

17) At 9:15 a.m., Respondent Washington telephoned and asked where the hearing was and what time it started, claiming he had no prior notice of the hearing date, time, or location. The ALJ advised him of the hearing loca-

tion and that he needed to arrive no later than 9:30 a.m. if he wished to avoid being in default. Washington stated he would try to be there.

18) At 9:30 a.m., Respondents had not appeared at the hearing. Pursuant to OAR 839-050-0330, the ALJ declared Respondents to be in default. The ALJ then explained the issues involved in the hearing, the matters to be proved, and the procedures governing the conduct of the hearing.

19) At 9:50 a.m., Respondent Washington ("Washington") appeared at the hearing. Washington advised the ALJ he had never received a copy of the Notice of Hearing, and the ALJ allowed Washington to state, on the record, why he should not be declared in default. At the conclusion of Washington's statements, which included a statement that his attorney had not informed him of the hearing date, the ALJ concluded that Washington had not stated facts to support a finding of good cause for not appearing timely at the hearing and denied him relief from default. Washington advised the forum that he wanted the Proposed Order mailed to P.O. Box 21174, Keizer, Oregon 97308, then left the hearing.

20) The evidentiary record of the hearing closed on August 10, 2000.

21) The ALJ issued a proposed order on September 7, 2000 that notified the participants

they were entitled to file exceptions to the proposed order within ten days of its issuance. The Agency filed a timely exception, and Respondents did not file any exceptions. The forum has changed the date in Procedural Finding of Fact 20 in response to the Agency's exception.

#### **FINDINGS OF FACT – THE MERITS**

1) Inside Out Training Assoc. was registered as an assumed business name on July 14, 1993, with John H. Washington as the registrant and authorized representative. On January 3, 1994, Inside Out Training Assoc. was voluntarily cancelled. On January 3, 1994, Inside Out Training Associates, Inc., was incorporated with Christine Dean as the registered agent and secretary and John Washington as president. On February 4, 1997, Inside Out Training Associates, Inc. was voluntarily dissolved by its shareholders. On February 4, 1997, Inside Out Training Assoc. was registered again as an assumed business name with Christine Dean as the registrant and authorized representative. On February 5, 1999, Inside Out Training Assoc. became inactive as an assumed business name.

2) In 1999, Jacqueline Winters was president of a corporation that owned and operated a restaurant named Jackie's Ribs that is located across the street from the Oregon State Fair in Salem, Oregon, and has an extra parking lot that will accommodate about 100 cars. In years prior to 1999, Win-

ters had hired staff to rent spaces in the parking lot during the State Fair. In 1999, it was her intent to hire Claimant to manage the parking lot during the Oregon State Fair as an employee of Jackie's Ribs.

3) In 1999, Washington asked Winters if he could rent the parking lot adjacent to Jackie's Ribs during the Oregon State Fair to make money for his counseling business that helps at risk youth. Winters agreed to this arrangement in exchange for a percentage of the revenue. Winters and Washington agreed that Washington would assume total responsibility of the parking lot, including hiring staff, paying staff, and any the cost incurred in the conduct of doing business pertaining to the lot, including collecting all parking lot revenues. Winters also told Washington about her prior intention to hire Claimant, and Washington told Winters that he wanted Claimant to work for him.

3) A few days prior to August 26, 1999, Claimant met with Washington and Winters to discuss the situation involving Jackie's Ribs' extra parking lot during the State Fair. Winters asked Claimant if it mattered who he worked for. Claimant said it didn't matter. Immediately after that conversation, Claimant met with Washington outside Jackie's Ribs. Claimant asked Washington what time to report to work. Washington told him to come about noon. Claimant replied he thought that might be too late, and

Washington told Claimant to come to work at 10 a.m. Claimant subsequently reported to work at 10 a.m. each day he worked for Washington.

4) Claimant and Washington did not agree upon a wage rate. Claimant assumed he would be paid minimum wage.

5) Washington instructed Claimant on the procedures he should use at the parking lot, telling him to make sure he got money from each customer, and to fill up the outside of the parking lot first, then work towards the center.

6) At all times material herein, Respondent Dean ("Dean") was Washington's "significant other."

7) On his first day of work, Claimant had to make change from his own money until Dean arrived on the parking lot later that morning. Dean reimbursed Claimant and took money from customers the rest of the day.

8) Dean gave Claimant a roll of tickets to use each day until she and Washington arrived at the parking lot. Washington and Dean showed up at the parking lot each day between 11 a.m. to noon. After Washington and Dean arrived at the parking lot, Claimant parked cars and they took money from customers. Washington and Dean were at the parking lot most of the afternoon each day that Claimant worked.

9) On one of the days when he worked at the parking lot, Claimant cut brush in the parking

lot, at Washington's direction, so that more cars could fit into the lot.

10) Washington never told Claimant not to show up for work or that he didn't want Claimant working for him.

11) Claimant worked 7 hours on August 26 and 27, 1999; 10 hours on August 28, 1999; 8 hours on August 30, 1999; 6 hours on August 31, 1999; and 5 hours on September 2, 1999, for a total of 43 hours. Claimant wrote the hours he worked down on a calendar the same day that he worked those hours. Claimant was not paid anything for his work.

12) Claimant voluntarily quit working for Washington after Claimant left work on September 2, 1999.

13) After Claimant left Washington's employment, he made three unsuccessful attempts to get his wages. On one of his attempts, he contacted Winters and informed her that he had not been paid. Winters then met with Washington, as Washington had not yet paid her. During that meeting, Winters advised Washington that Claimant had informed her that he had not been paid by Washington. Washington advised Winters that he had every intention of paying Claimant and for her to tell Claimant to call him and he would take care of the matter immediately.

14) Buffington, who is Winters' legislative assistant, then called Washington and asked why Claimant had not been paid.

Washington told her that Claimant should call him, and all he needed was Claimant's social security number in order to issue a check, and that Claimant would be paid as soon as he provided his social security number.

15) The state minimum wage was \$6.50 per hour in 1999.

16) At the time Claimant left Washington's employment, Claimant was owed \$279.50 in unpaid wages (43 hours x \$6.50 per hour).

17) Margaret Trotman investigated Claimant's wage claim. In December 1999, during her investigation, she spoke with Washington. During that conversation, Washington admitted hiring David Kistner to park cars during the Oregon State Fair. Kistner parked cars for Washington at the same parking lot as Claimant.

#### **ULTIMATE FINDINGS OF FACT**

1) Respondent Bubbajohn Howard Washington employed Claimant from August 26, 1999, through September 2, 1999. During that time, Washington suffered or permitted Claimant to render personal services to him. Respondents Christine Dean and Inside Out Training Associates, Inc. were not Claimant's employers.

2) Washington agreed to pay Claimant for his work at Jackie's Ribs' extra parking lot during the Oregon State Fair, although he and Claimant did not agree on a specific rate of pay.

3) From August 26, 1999, through September 2, 1999, Claimant rendered personal services to Washington at Jackie's Ribs' extra parking lot. Claimant worked a total of 43 hours.

4) The state minimum wage during 1999 was \$6.50 per hour.

5) Washington was aware of the hours that Claimant worked, and never paid Claimant any wages for the work Claimant performed. At the time Claimant left Washington's employment, Washington owed Claimant \$279.50 in unpaid wages.

6) Washington's failure to pay Claimant's wages was willful and more than 30 days have passed since Claimant's wages became due.

7) Civil penalty wages, computed in accordance with ORS 652.150 and OAR 839-001-0470, equal \$1,560.00.

**CONCLUSIONS OF LAW**

1) ORS 653.010 provides, in pertinent part:

"(3) 'Employ' includes to suffer or permit to work \* \* \*.

"(4) 'Employer' means any person who employs another person \* \* \*."

During all times material herein, Respondent Washington employed Claimant by suffering or permitting him to work as a parking lot attendant during the 1999 Oregon State Fair.

2) ORS 653.025 provides, in pertinent part:

"Except as provided by ORS 652.020 and the rules of the Commissioner of the Bureau of Labor and Industries issued under ORS 653.030 and 653.261, for each hour of work time that the employee is gainfully employed, no employer shall employ or agree to employ any employee at wages computed at a rate lower than:

"\* \* \* \* \*

"(3) For calendar years after December 31, 1998, \$6.50. \* \* \*"

Respondent Washington was required to pay Claimant at least \$6.50 for each hour he rendered personal services to Washington as a parking lot attendant during the 1999 Oregon State Fair.

3) ORS 653.055(1) provides, in pertinent part:

"(1) Any employer who pays an employee less than the wages to which the employee is entitled under ORS 653.010 to 653.261 is liable to the employee affected:

"(a) For the full amount of the wages, less any amount actually paid to the employee by the employer; and

"(b) For civil penalties provided in ORS 652.140.

"\* \* \* \* \*

"(3) The Commissioner of the Bureau of Labor and Industries has the same powers and duties in connection with a wage claim based on ORS 653.010 to 653.261 as the

commissioner has under ORS 652.310 to 652.445 \* \* \* .”

Respondent Washington is liable to Claimant for \$279.50 in unpaid wages (43 hours x \$6.50 per hour) plus penalty wages.

4) At times material, ORS 652.140(2) provided:

“When an employee who does not have a contract for a definite period quits employment, all wages earned and unpaid at the time of quitting become due and payable immediately if the employee has given to the employer not less than 48 hours’ notice, excluding Saturdays, Sundays and holidays, of intention to quit employment. If notice is not given to the employer, the wages shall be due and payable within five days, excluding Saturdays, Sundays and holidays, after the employee has quit, or at the next regularly schedule payday after the employee has quit, whichever event first occurs.”

Respondent Washington violated ORS 652.140(2) by failing to pay Claimant all wages earned and unpaid not later than September 10, 1999, five business days after Claimant quit.

5) ORS 652.150 provides:

“If an employer willfully fails to pay any wages or compensation of any employee whose employment ceases, as provided in ORS 652.140 and 652.145, then, as a penalty for such 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; provided, that in no case shall such wages or compensation continue for more than 30 days from the due date; and provided further, the employer may avoid liability for the penalty by showing financial inability to pay the wages or compensation at the time they accrued.”

Respondent Washington is liable for \$1,560.00 in civil penalties under ORS 652.150 for willfully failing to pay all wages or compensation to Claimant when due as provided in ORS 652.140(2).

6) OAR 839-050-0330(1) and (2) provide, in pertinent part:

“(1) Default can occur in four ways:

“ \* \* \* \*

“(d) Where a party fails to appear at the scheduled hearing.

“(2) When a party notifies the agency that it will not appear at the specified time and place for the contested case hearing or, without such notification, fails to appear at the specified time and place for the contested case hearing, the administrative law judge shall take evidence to establish a prima facie case in support of the charging document and shall then issue a proposed order to the commissioner and all par-

ticipants pursuant to OAR 839-050-0370. Unless notified by the party, the administrative law judge shall wait no longer than thirty (30) minutes from the time set for the hearing in the notice of hearing to commence the hearing.”

Respondent Dean did not appear at the hearing at all, and Respondent Washington appeared at the hearing at 9:50 a.m. after notifying the forum at 9:15 a.m. that he would try to be at the hearing at 9:30 a.m. Neither counsel nor an authorized representative made an appearance on behalf of Inside Out Training Associates, Inc. Respondents were properly found in default when 30 minutes had elapsed after the specified time for the contested case hearing.

7) 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 Washington to pay Claimant his earned, unpaid, due and payable wages and the civil penalty wages, plus interest on both sums until paid. ORS 652.332.

## OPINION

### INTRODUCTION

The Agency alleged in its Amended Order of Determination that Claimant was not paid for 43 hours of work he performed for Respondents “Bubbajohn Howard Washington and Christine Dean, partners, aka Inside Out Training Assoc. and aka Inside Out Train-

ing Associates, Inc., and Respondent Inside Out Training Associates, Inc.” between August 26, 1999, and September 2, 1999. The Agency further alleged that Claimant was entitled to the minimum wage of \$6.50 per hour and is owed a total of \$279.50 in unpaid wages and \$1560.00 in penalty wages.

### DEFAULT

Respondents filed an answer and request for hearing, but failed to appear at hearing and were held in default pursuant to OAR 839-050-0330. When a respondent defaults, the Agency must establish a prima facie case to support the allegations of the charging document. *In the Matter of Leslie and Roxanne DeHart*, 18 BOLI 199, 206 (1999). The task of this forum, therefore, is to determine if a prima facie case supporting the Agency’s Amended Order of Determination has been made on the record. *Id.* at 206.

### PRIMA FACIE CASE

In this wage claim case, the elements of a prima facie case consist of proof of the following: (1) Respondents employed Claimant; (2) any 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 performed by Claimant. *In the Matter of Barbara Coleman*, 19 BOLI 230, 262-63 (2000).

**A. Respondent Washington  
Employed Claimant**

The Agency alleges that Claimant was employed by multiple Respondents; however, the facts narrow the field to Respondent Washington. First, the undisputed facts show that Respondent Inside Out Training Associates, Inc. ceased to exist on February 4, 1997, and therefore could not have been Claimant's employer. Second, the Agency alleges that Washington and Dean were partners doing business as Inside Out Training Assoc. at the time of Claimant's employment. A partnership is never presumed; the burden of proving a partnership is upon the party alleging it. *In the Matter of Diran Barber*, 16 BOLI 190, 196 (1997). ORS 68.110(1) defines a partnership as "an association of two or more persons to carry on as coowners a business for profit." The essential test in determining the existence of a partnership is whether the parties intended to establish such a relationship. *Id.* at 195. In the absence of an express agreement, the status may be inferred from the conduct of the parties. *Id.* In this case, Washington and Dean were each other's "significant others" during Claimant's employment. Previously, Washington was the authorized representative and registrant for the assumed business name of Inside Out Training Assoc. between July 14, 1993 and January 3, 1994; Dean was the authorized representative and registrant for the same assumed business name between February

4, 1997, and February 5, 1999; and Washington and Dean were both corporate officers of Inside Out Training Associates, Inc. between January 3, 1994, and February 4, 1997. Washington and Dean were both present on the parking lot while Claimant worked there. However, undisputed evidence shows that Washington negotiated the parking lot rental with Winters, Winters expected to receive an agreed percentage of revenues from Washington, Washington hired Claimant and directed his work, and Claimant considered Washington to be his employer and expected to get his pay from Washington. There was no evidence presented that Dean participated in the decision to hire Claimant, that she directed Claimant's work in any way, that she shared in any profits or liability from the parking lot rentals, or that she controlled the operation of the parking lot, other than taking money from customers.<sup>1</sup> This

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<sup>1</sup> See, e.g., *In the Matter of Diran Barber*, 16 BOLI 190, 195 (1997), quoting *Stone-Fox, Inc. v. Vandehey Development Co.*, 290 Or 779, 626 P2d 1365, 1367 (1981) ("when faced with intricate transactions that arise, this court looks mainly to the right of a party to share in the profits, his liability to share losses, and the right to exert some control over the business.") Compare *In the Matter of Flavors Northwest*, 11 BOLI 215, 224, 228-29 (1993) (Where respondents, a husband and wife, were co-registrants of an assumed business name, and where she was viewed as a co-owner by the public, and the claimants

evidence leads the forum to conclude that Respondent Washington was Claimant's employer, and sole employer at that.

Respondents' answer raised an affirmative defense that Claimant was not an "employee" as defined by ORS 652.210(2) and 652.310(2) because Respondents never paid or agreed to pay for Claimant's services. ORS chapter 653 governs minimum wage claims. For purposes of chapter 653, a person is an "employee" of another if that other "suffer[s] or permit[s]" the person to work. *In the Matter of Barbara Coleman*, 19 BOLI at 264. Because Respondent Washington suffered or permitted Claimant to work for him, Claimant was his employee for purposes of ORS chapter 653.

#### **B. Claimant's Rate of Pay**

Claimant testified that he and Washington did not agree upon a rate of pay, and that he expected to receive minimum wage. Where there is no agreed upon rate of pay, the employer is required to pay at least the minimum wage, which was \$6.50 per hour in 1999. *Id.* at 262-63. Consequently, Claimant was entitled to be paid \$6.50 per hour for his work for Washington.

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viewed her as a co-owner and operator of the business with her husband, and where she had an active role in obtaining applications and other documents, keeping records, and preparing payrolls for the business, the commissioner held that she was a partner and was liable for unpaid wages and penalty wages.)

#### **C. Claimant Performed Work for Which He was not Properly Compensated**

Claimant testified credibly that he worked for Respondent Washington and was paid nothing. His testimony was supported by the credible testimony of Winters, who observed him working on the parking lot, and the credible testimony of Buffington, who testified that Washington told her that Claimant would be paid as soon as he provided his social security number. Based on this evidence, the forum concludes that Claimant performed work for Washington for which he was not paid.

#### **D. The Amount and Extent of Work Performed by Claimant**

The final element of the Agency's prima facie case requires proof of the amount and extent of work performed by Claimant. The Agency's burden of proof can be met by producing sufficient evidence from which "a just and reasonable inference may be drawn." *In the Matter of Majestic Construction, Inc.*, 19 BOLI 59, 58 (1999). A claimant's credible testimony may be sufficient evidence. *In the Matter of Ann L. Swanger*, 19 BOLI 42, 56 (1999).

Claimant testified credibly that he worked 43 hours for Respondent Washington and as to the dates he worked those hours. The credibility of his testimony was enhanced by his contemporaneous documentation of his hours. This is sufficient evidence

to establish the amount and extent of Claimant's work.

**PENALTY WAGES**

An award of penalty wages turns on the issue of willfulness. 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. *In the Matter of Barbara Coleman*, 18 BOLI at 219. Respondent Washington, as an employer, had a duty to know the amount of wages due his employees. *In the Matter of R.L. Chapman Ent. Ltd.*, 17 BOLI 277, 285 (1999). Based on Claimant's credible testimony that Washington told Claimant what time to report for work and was present at the parking lot during much of time that Claimant worked, the forum infers that Washington knew Claimant's hours of work. There is no evidence that Washington acted other than voluntarily or as a free agent. Accordingly, the forum concludes that Washington acted willfully and assesses penalty wages in the amount of \$1,560.00, the amount sought in the Amended Order of Determination. This figure is computed by multiplying \$6.50 per hour x 8 hours per day x 30 days, pursuant to ORS 652.150 and OAR 839-001-0470.

**ORDER**

NOW, THEREFORE, as authorized by ORS 652.332, and as payment of the unpaid wages and civil penalty wages he owes as a result of his violation of ORS 652.140, the Commissioner of the Bureau of Labor and Industries hereby orders **Bubbajohn Howard Washington**, 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 trust for Dale Leon Roth in the amount of ONE THOUSAND EIGHT HUNDRED THIRTY-NINE DOLLARS AND FIFTY CENTS (\$1,839.50), less appropriate lawful deductions, representing \$279.50 in gross earned, unpaid, due, and payable wages and \$1,560.00 in penalty wages, plus interest at the legal rate on the sum of \$279.50 from October 1, 1999, until paid and interest at the legal rate on the sum of \$1,560.00 from November 1, 1999, until paid.

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**In the Matter of****JOHNSON BUILDERS, INC. and  
Laine Johnson, Respondents.****Case No. 29-00****Final Order of the****Commissioner Jack Roberts****Issued October 16, 2000**

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**SYNOPSIS**

Where respondents, a corporation and its president, performed a subcontract on two public works projects and intentionally failed to pay seven workers the prevailing wage rate, in violation of ORS 279.350(1), filed twenty-three inaccurate and incomplete certified payroll reports and did not file nine required certified payroll reports in violation of ORS 279.354, and failed to make records available deemed necessary by the commissioner to determine if the prevailing rate of wage was being paid by respondents on two public works projects, in violation of ORS 279.355(2), respondents became ineligible to receive any contract or subcontract for public works, pursuant to ORS 279.361, and the commissioner assessed the respondent corporation \$72,750.00 for those violations, pursuant to ORS 279.370. ORS 279.350(1); 279.354; 279.355(2); OAR 839-016-0010; 839-016-0030; 839-016-0035; and 839-016-0520 to 839-016-0540.

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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 July 18 and 19, 2000, in a conference room located at the Salem office of the Bureau of Labor and Industries, 3865 Wolverine St. N.E., E-1, Salem, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Cynthia L. Domas, an employee of the Agency. No one appeared on behalf of Respondents, and Respondents were held in default.

The Agency called as witnesses: Wage and Hour Division ("WHD") Compliance Specialist Tyrone Jones; Kyle Costa, Melvern Harper III, Dylan Buzzell, William "Mike" Conty, and James McNie, former employees of Respondent Johnson Builders, Inc. ("JBI"); and Sandra Nantt, subcontract specialist for Andersen Contracting, Inc. ("ACI").

The forum received into evidence:

- a) Administrative exhibits X-1 through X-11 (submitted or generated prior to hearing) and X-12 (submitted after the hearing);
- b) Agency exhibits A-1 through A-28 (submitted prior to hearing), and A-29, A-30, and A-31 (submitted at hearing).

Having fully considered the entire record in this matter, I, Jack

Roberts, 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 8, 2000, the Agency issued a Notice of Intent to Place on List of Ineligibles and to Assess Civil Penalties (“Notice”) against Respondents JBI, Laine Johnson, and Karl Johnson. In its Notice, the Agency’s charges and civil penalties sought included:

a) Respondents provided manual labor on the Clatsop Assisted Living Project (“Clatsop Project”), a public works project subject to regulation under Oregon’s prevailing wage rate laws, and intentionally failed to pay approximately \$4,852.62 in prevailing wages to four employees – Brian Embury, Dylan Buzzell, Darin Larson, and Melvern Harper III, in violation of ORS 279.350 and OAR 839-016-0035. (Civil Penalties of \$12,000 against JBI for four “first” violations.)

b) Respondents filed inaccurate and incomplete certified payroll reports covering the periods November 22-28; November 29 to December 5; December 6-12; December 13-19; December 20-26; December 27, 1998 to January 3, 1999; January 3-9; January 11-15, and January 25-31,

1999. Respondents failed to file any certified payroll reports covering work between February 21 to June 30, 1999, in violation of ORS 279.354 and OAR 839-016-0010. (Civil Penalties of \$27,500 against Respondent JBI for 11 violations.)

c) Respondents provided manual labor on the Edgefield Children’s Center Project (“Edgefield Project”) in 1998 and 1999, a public works project subject to regulation under Oregon’s prevailing wage rate laws, and intentionally failed to pay approximately \$8,899.69 in prevailing wages to four employees – Kyle Costa, William Conty, James McNie, and Gary Hathaway, in violation of ORS 279.350 and OAR 839-016-0035. (Civil Penalties of \$16,000 against JBI for four “first repeated” violations.)

d) Respondents, for work performed on the Edgefield Project, filed inaccurate and incomplete certified payroll reports covering the period between the week of August 23, 1998, through the week of November 28, 1998, and did not file any certified payrolls between November 28, 1998, and March 4, 1999, the end of the project, in violation of ORS 279.354 and OAR 839-016-0010. (Civil Penalties of \$42,500 against Respondent JBI for 17 violations.)

e) Respondents failed to maintain records required by OAR 839-016-0025(2)(b), (c),

(e) and (f) for workers on the Clatsop and Edgefield Projects, and failed to provide the Agency with records necessary to determine if the prevailing rate of wage was paid to employees on the Clatsop and Edgefield Projects, in violation of ORS 279.355 and OAR 839-016-0030. (Civil Penalties of \$10,000 against Respondent JBI for two violations.)

The Agency also alleged that Respondents and any firm, corporation, partnership or association in which they had a financial interest should be placed on the list of those ineligible to receive contracts or subcontracts for public works for a period of three years based on the intentional failure of Respondents, who were subcontractors, to pay the prevailing rate of wage to Respondents' employees on the Clatsop and Edgefield Projects, and the payment of those wages to Respondents' employees by ACI, the general contractor on the Clatsop and Edgefield Projects, on Respondents' behalf.

2) The Notice of Intent instructed Respondents that if they wished to exercise their right to a contested case hearing, they were required to make a written request within 20 days of the date on which they received the Notice.

3) The Agency served the Notice on Respondent Laine Johnson, who is also the registered agent for Respondent JBI, on April 4, 2000, and on Respondent Karl Johnson on April 15, 2000, together with a document

providing information on how to respond to a notice of intent.

4) On April 20, 2000, the Agency received a written answer and request for hearing filed by Respondent Laine Johnson that denied that Respondent had violated as alleged and further alleged "[n]either Laine Johnson nor Johnson Builders Inc. intended that any laws should be violated, and made good faith attempts to conform to the law in the face of severe economic hardship caused by Andersen Construction's failure to release funds that they had previously agreed to release."

5) On April 21, 2000, the Agency sent a "Notice of Insufficient Answer" to Respondent Laine Johnson informing him that corporations must be represented by an attorney or "authorized representative" at all stages of the hearing.

6) On May 2, 2000, Respondent Laine Johnson mailed a letter to the Agency authorizing himself to appear on behalf of JBI.

7) The Agency filed a request for hearing with the Hearings Unit on May 30, 2000.

8) On June 2, 2000, the Hearings Unit served Respondents with: a) a Notice of Hearing that set the hearing for July 18, 2000; 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.

9) On June 14, 2000, the Agency notified the forum that Respondent Karl Johnson had defaulted by failing to file an answer and request for hearing within 20 days after service of the Notice. The Agency provided the forum with the original of the Final Order on Default issued to Respondent Karl Johnson by the Agency.

10) On June 14, 2000, 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 any penalty calculations (for the Agency only). The forum ordered the participants to submit their case summaries by June 10, 2000, and notified them of the possible sanctions for failure to comply with the case summary order. The forum also provided a form that Respondents could use to prepare a case summary.

11) On June 16, 2000, the forum issued an interim order modifying the case summary due date to July 10, 2000.

12) On July 10, 2000, the Agency filed its case summary.

13) On July 13, 2000, the Agency moved to amend the Notice to:

a) Include Gary Hathaway as a worker on the Clatsop Project, instead of the Edgefield Project, who was intentionally

paid less than the prevailing rate of wage by Respondent, and increase the civil penalties sought to \$15,000 for five violations related to the Clatsop Project, and decrease the civil penalties sought to \$12,000 on the Edgefield Project regarding the Agency's allegations that Respondent intentionally paid its employees less than the prevailing rate of wage;

b) Reduce the number of violations alleged regarding Respondents' failure to file accurate and complete certified payroll records on the Clatsop Project to ten, from 11, and decrease the amount of civil penalties sought for these violations from \$27,500 to \$25,500;

c) Change the ending date on which Respondents failed to file certified payroll reports for the Clatsop Project to March 13, 1999, from June 30, 1999.

The Agency served its motion on Laine Johnson on July 13, 2000. Johnson did not file a response.

14) On July 13, 2000, the Agency filed an addendum to its case summary that included two additional exhibits, A-27 and A-28, and listed the witnesses who would be testifying by telephone.

15) Respondent Laine Johnson did not appear at the time set for hearing and no one appeared on his behalf or on behalf of Respondent JBI. Respondents had not notified the forum that they would not be appearing at the hearing. Pursuant

to OAR 839-050-0330(2), the ALJ waited thirty minutes past the time set for hearing. When Respondents still did not appear, the ALJ declared Respondents JBI and Laine Johnson to be in default and commenced the hearing.

16) Pursuant to ORS 183.415(7), the ALJ verbally advised the Agency of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

17) At the outset of the hearing, the ALJ granted the Agency's July 13, 2000, motion to amend the Notice.

18) At the conclusion of the hearing, the ALJ instructed the Agency case presenter to submit the Agency's closing argument in writing, no later than July 28, 2000. The Agency timely submitted its written closing argument.

19) The ALJ issued a proposed order on August 31, 2000, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. No exceptions were filed.

#### **FINDINGS OF FACT – THE MERITS**

1) At all times material herein, Respondent JBI was an Oregon corporation engaged in the construction business, and Respondent Laine Johnson was JBI's president and registered agent.

#### **THE CLATSOP AND EDGEFIELD PROJECTS**

2) On May 9, 1998, ACI was awarded a contract in the amount of \$5,400,000 with Clatsop Care Health District. The contract was for construction of the "Clatsop Assisted Living" Project. The Clatsop Project was not regulated by the Davis-Bacon Act and was subject to regulation under Oregon's prevailing wage rate laws (ORS 279.348 *et seq.*). The Clatsop Project was first advertised for bid on August 1, 1997.

3) On September 24, 1998, JBI entered into a written subcontract with ACI, in the amount of \$336,797.00, to do all the rough framing and carpentry on the Clatsop Project. Laine Johnson signed the subcontract on behalf of JBI.

4) Pursuant to a June 26, 1998, request by John Hartsock, project manager of the Clatsop Project, the commissioner of BOLI made a special residential wage rate determination for the Clatsop Project that established the prevailing wage rate for carpenters on the Clatsop Project as \$8.06 per hour, with no payment of fringe benefits required.

5) JBI continuously employed workers on the Clatsop Project between October 1998 and March 5, 1999.

6) JBI made individual agreements with workers it employed as carpenters on the Clatsop Project to pay them a wage higher than \$8.06 per hour.

7) On September 18, 1997, ACI was awarded a contract in the amount of \$3,879,777.00 with Multnomah County Facilities and Property Management. The contract was for construction of the "Edgefield Children's Center" Project. The Edgefield Project was not regulated by the Davis-Bacon Act and was subject to regulation under Oregon's prevailing wage rate laws (ORS 279.348 *et seq.*). The Edgefield Project was first advertised for bid on September 13, 1996.

8) On June 22, 1998, JBI entered into a written subcontract with ACI, in the amount of \$142,200.00, to do all the rough framing and carpentry on the Edgefield Project. Laine Johnson signed the subcontract on behalf of JBI.

9) JBI employed workers on the Edgefield Project between August 1998 and January 7, 1999.

10) JBI agreed to pay laborers and carpenters it employed on the Edgefield Project \$26.04 per hour and \$30.29 per hour, respectively. Both rates were higher than the applicable prevailing wage rates in effect at the time.<sup>1</sup>

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<sup>1</sup> WHD Compliance Specialist Jones testified that these rates were higher than the applicable prevailing wage rates for laborer and carpenter, and that the applicable prevailing wage rates for these classifications was contained in Exhibit A-27; however, there was no evidence presented indicating which of the multiple prevailing wage rates listed for these

### **WAGE CLAIMS FILED AGAINST JBI ON THE CLATSOP AND EDGEFIELD PROJECTS**

11) On March 9, 1999, the Agency received a wage claim from Brian Embury alleging he had been employed by JBI as a carpenter on the Clatsop Project and had not been paid the prevailing wage rate for all the time he worked on the project.

12) On March 17, 1999, the Agency received wage claims from Kyle Costa and James McNie alleging they had been employed by JBI as carpenters on the Edgefield Project and had not been paid the prevailing wage rate for all the time they worked on the project.

13) On March 19, 1999, the Agency received a wage claim from Darin Larson alleging he had been employed by JBI as a carpenter on the Clatsop Project and had not been paid the prevailing wage rate for all the time he worked on the project.

14) On April 5, 1999, the Agency received a wage claim from Dylan Buzzell alleging he had been employed by JBI as a carpenter on the Clatsop Project and had not been paid the prevailing wage rate for all the time he worked on the project.

15) On April 26, 1999, the Agency received a wage claim from William "Mike" Conty alleging he had been employed by JBI as

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classifications in Exhibit A-27 were in effect at the Edgefield Project.

a carpenter on the Edgefield Project and had not been paid the prevailing wage rate for all the time he worked on the project.

16) On June 28, 1999, the Agency received a wage claim from Melvern Harper III alleging he had been employed by JBI as a carpenter on the Clatsop Project and had not been paid the prevailing wage rate for all the time he worked on the project.

17) On July 19, 1999, the Agency received a wage claim from Gary Hathaway alleging he had been employed by JBI as a carpenter in December 1998 and January 1999 and had not been paid the wages due to him. Although his wage claim did not state the location where he was employed, JBI's certified payroll reports show that Hathaway was employed at the Clatsop Project in December 1998.

#### **THE AGENCY'S INVESTIGATION OF THE WAGE CLAIMS**

18) WHD Compliance Specialist Jones conducted an investigation to determine if JBI had violated Oregon's prevailing wage rate laws. His investigation included evaluating documents submitted with the wage claimants' wage claims; reviewing certified payroll reports filed by JBI during the performance of the Clatsop and Edgefield Projects; interviewing most of the wage claimants; interviewing a representative of Staffco, JBI's payroll service; interviewing Respondent Karl Johnson; and interviewing

Nantt, ACI's subcontract specialist.

19) On April 12, 1999, as part of his investigation, Jones wrote a letter addressed to "Johnson Builders, Laine Johnson, 7644 Hwy 38, Drain, OR 97435." Jones wrote the letter in response to the wage claims received by BOLI alleging that JBI had not paid the prevailing rate of wage on the Clatsop and Edgefield Projects. In pertinent part, the letter stated:

"The Bureau has received a complaint that your company has failed to pay prevailing wages, and overtime for work performed on the [Clatsop and Edgefield Projects].

"In order to determine if the correct wages were paid to the workers, I am requesting that you supply the following records to me before April 22, 1999.

"1. Names, addresses and phone numbers for all employees who worked on the project.

"2. Time cards for all employees who worked on this project.

"3. Payroll records and copies of canceled checks for employees who worked on the project.

"4. Documentation of any fringe benefit amounts paid to third party trusts.

"If you have questions, please contact me at the number given below. Thank you for

your cooperation in this matter.”

20) Jones sent his April 12, 1999, letter by first class mail. The address he mailed the letter to - 7644 Hwy 38, Drain, OR 97435 - was the address for Johnson Builders, Inc., on file with the Corporation Division and Construction Contractors Board at the time the letter was sent. On April 16, 1999, Karl Johnson telephoned Jones “in regards to BOLI’s letter of April 12, 1999.” Johnson acknowledged that JBI owed wages to “four or five employees” but claimed ACI was responsible based because ACI had withheld from JBI “approximately \$75,000.00 from the contract.” Johnson told Jones it was okay for ACI to pay wages to the employees from JBI’s retainage. Jones’ letter was not returned to BOLI by the U. S. Postal Service, and JBI never sent any records to BOLI.

21) Jones did not have any discussion with Laine or Karl Johnson or any other agent or employee of JBI concerning whether or not JBI maintained records necessary to determine whether the prevailing rate of wage and overtime had been paid to JBI’s employees on the Clatsop and Edgefield Projects.

22) Jones did not make a request to enter JBI’s office or business establishment at any time during his investigation.

23) Jones worked with ACI’s onsite coordinator to verify the hours worked claimed by the wage claimants.

24) At the end of his investigation, Jones concluded that the wage claimants, with the exception of Hathaway,<sup>2</sup> had worked the dates and hours claimed in their wage claims and had been underpaid as follows:

a) Embury worked 154 hours as a carpenter for JBI at the agreed rate of \$12.50 per hour between January 22, 1999, and March 6, 1999 on the Clatsop Project, during which time he earned \$1925.00 in gross wages. JBI paid him nothing for this work.

b) Costa worked 84 hours as a carpenter for JBI at the agreed rate of \$30.29 per hour on the Edgefield Project between December 21, 1998, and January 7, 1999, during which time he earned \$2,544.36 in gross wages. JBI paid him nothing for this work.

c) McNie worked 37 hours as a carpenter for JBI at the agreed rate of \$30.29 per hour on the Edgefield Project between December 31, 1998, and January 7, 1999, during which time he earned \$1,120.73 in gross wages. JBI paid him nothing for this work.

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<sup>2</sup> Jones testified that he administratively closed Hathaway’s claim because Hathaway failed to respond to Jones’ letter asking for the name of Hathaway’s supervisor and co-workers who could verify that Hathaway worked the dates and hours claimed, and Jones was unable to independently verify Hathaway’s allegations.

d) Larson worked 112 hours as a carpenter for JBI at the agreed rate of \$10.25 per hour on the Clatsop Project between February 15, 1999, and March 4, 1999, during which time he earned \$1,148.00 in gross wages. JBI paid him nothing for this work.

e) Buzzell worked 32 hours as a carpenter for JBI at the agreed rate of \$10.00 per hour on the Clatsop Project between January 4-8, 1999, earning \$320.00 gross wages. JBI paid him nothing for this work.

f) Conty worked 608.5 hours for JBI as a carpenter on the Edgefield Project between August 1, 1998, and December 20, 1998, for which JBI paid him only \$26.04 per hour, instead of the agreed rate of \$30.29 per hour for carpenters.<sup>3</sup> In all, Conty was underpaid \$2,586.30 for this work.

In addition, Conty worked 70 hours for JBI as a carpenter at the agreed rate of \$30.29 per hour on the Edgefield Project between December 21, 1998 and January 7, 1999, earning \$2,120.30 gross wages, and was paid nothing by JBI for this work.

g) Harper worked 144 hours as a carpenter for JBI at the agreed rate of \$9.00 per hour on the Clatsop Project be-

tween January 25, 1999, and February 25, 1999, earning \$1,296.00 gross wages. JBI paid him nothing for this work.

25) Jones' conclusions in the previous Finding of Fact are supported by the credible testimony of Costa, Conty, McNie concerning their own and each other's terms and conditions of employment; credible testimony by Harper and Buzzell concerning their own and each other's terms and conditions of employment; credible testimony by Jones, Nantt, Harper, and Buzzell concerning the terms and conditions of the employment of Larson and Embury; credible documentation submitted by Costa, Conty, McNie, Embury, Buzzell, Larson, and Harper in support of their wage claims; and contemporaneous time records created by a supervisory employee of JBI during the Clatsop Project; and the forum adopts Jones' conclusions as facts.

26) During JBI's performance of its subcontracts with ACI on the Clatsop and Edgefield Projects, ACI paid all monies to JBI that it was obligated to under the terms of the contracts between ACI and JBI.

27) When it became apparent that JBI was not going to pay the wage claims, ACI issued checks to BOLI representing gross wages, in trust for the wage claimants, in the following amounts:

a) Embury - \$2,090.62;

b) Costa - \$2,544;

<sup>3</sup> See Finding of Fact – The Merits 10, *supra*.

- c) McNie- \$1,120.73;
- d) Larson - \$1,148.00<sup>4</sup>;
- e) Buzzell - \$320.00;
- f) Conty - \$4,706.60;
- g) Harper - \$1,296.00.

**LAINE JOHNSON'S RESPONSIBILITY FOR JBI'S FAILURE TO PAY THE PREVAILING RATE OF WAGE**

28) During the life of the Clatsop and Edgefield Projects, JBI used Staffco, another company, to handle its payroll. During those projects, Staffco issued payroll checks to JBI's workers. Staffco also completed certified payroll reports for JBI during the Clatsop and Edgefield Projects, except for payroll periods on the Edgefield Project from July 20, 1998, through October 18, 1998, during which time Laine Johnson completed certified payroll reports for JBI.

29) During the life of the Clatsop and Edgefield Projects, Laine Johnson was responsible for providing records of hours worked by JBI's employees to Staffco and sending funds to Staffco so that Staffco could issue paychecks to JBI's employees.

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<sup>4</sup> Larson was issued a check, but Jones closed Larson's claim and returned the check to ACI after he received notification from Larson's attorney that he was representing Larson in a private action to recover Larson's wages.

**CERTIFIED PAYROLL REPORTS**

30) Nantt asked Karl and Laine Johnson to provide ACI with certified payroll reports during the Clatsop and Edgefield Projects and gave them a copy of a WH-38 form and an example of how to complete the form. Throughout the projects, Nantt repeatedly admonished the Johnsons to accurately complete and timely file WH-38 forms and became very frustrated at their repeated failure to comply.

**CERTIFIED PAYROLL REPORTS – THE CLATSOP PROJECT**

31) JBI filed certified payroll reports for the Clatsop Project for the weeks of November 22-28, 1998, November 29 – December 5, 1998, December 6-12, 1998, December 13-19, 1998, December 20-26, 1998, December 28, 1998 – January 3, 1999. These reports inaccurately certified that the work classification of Melvern Harper and Dylan Buzzell was "laborer."

32) JBI filed a certified payroll report for the Clatsop Project for the week of January 3-9, 1999. This report failed to list Dylan Buzzell, who worked as a carpenter during that time period.

33) JBI employed carpenters on the Clatsop Project during the week of January 10-16, 1999, but did not file a certified payroll report for that week.

34) JBI employed carpenters on the Clatsop Project during the week of January 24-30, 1999, but only filed a certification state-

ment without an accompanying payroll report for the week.

35) JBI employed carpenters on the Clatsop Project during the weeks of February 21-27, 1999, and February 28 – March 6, 1999, but did not file any certified payroll report for those weeks.

#### **CERTIFIED PAYROLL REPORTS – THE EDGEFIELD PROJECT**

36) JBI filed a certified payroll report for the week of August 17-23, 1998. This report inaccurately certified that William County's work classification was "laborer."

37) JBI filed certified payroll reports for the weeks of August 24-30, 1998; August 31 - September 6, 1998; September 7-13, 1998; and September 14-20, 1998. Each report inaccurately stated that William County's work classification was that of "laborer." In addition, JBI failed to accompany these payroll reports with certified statements attesting to the accuracy and completeness of the reports.

38) JBI filed certified payroll reports for the weeks of September 21-27, 1998, September 28 – October 4, 1998, October 5-11, 1998; October 12-18, 1998; October 19-25, 1998; October 26 – November 1, 1998; November 1-7, 1998; and November 8-14, 1998. All eight reports inaccurately certified that William County's work classification was "laborer."

39) JBI employed carpenters on the Edgefield Project during the week of November 15-21, 1998, but only filed a certifica-

tion statement without an accompanying payroll report for the week.

40) JBI filed a certified payroll report for the week of November 22-28, 1998. This report inaccurately certified that William County's work classification was "laborer."

41) JBI employed carpenters on the Edgefield Project during the weeks of November 29 – December 6, 1998; December 7-13, 1998; December 14-20, 1998; December 21-28, 1998; December 29, 1998 – January 3, 1999; and January 4-10, 1999, but did not file any certified payroll report for those weeks.

#### **ULTIMATE FINDINGS OF FACT**

1) Respondent JBI was a subcontractor performing rough framing and carpentry work on the Clatsop Project, a public works project in Oregon, between October 1998 and March 5, 1999.

2) Respondent JBI intentionally failed to pay Brian Embury, Darin Larson, Dylan Buzzell, and Melvern Harper III \$4,589 in prevailing wages on the Clatsop Project.

3) Respondent JBI filed six certified payroll reports on the Clatsop Project that inaccurately certified the work classification of Melvern Harper and Dylan Buzzell as "laborer."

4) Respondent JBI filed one certified payroll report on the Clatsop Project that did not list Dylan Buzzell, who worked as a carpenter for JBI during the week

encompassed by the certified payroll report.

5) Respondent JBI filed a certified statement, but no accompanying payroll report, for one week in which JBI performed work on the Clatsop Project.

6) Respondent JBI did not file certified payroll reports for three different weeks in which JBI performed work on the Clatsop Project.

7) Respondent JBI was a subcontractor performing rough framing and carpentry work on the Edgefield Project, a public works project in Oregon, between August 1998 and January 7, 1999.

8) Respondent JBI intentionally failed to pay Kyle Costa, James McNie, and William "Mike" Conty \$5,785.39 in prevailing wages on the Edgefield Project.<sup>5</sup>

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<sup>5</sup> This figure omits an additional \$2,586.30 in wages that Jones determined was owed to Conty, and that ACI actually paid to Conty, representing the difference between the agreed rates of \$26.04 per hour for laborer that Conty was paid between August 1, 1998, and December 20, 1998, and the agreed rate of \$30.29 per hour for carpenter that Conty should have been paid. Because of the evidence did not establish the specific prevailing wage rate in effect for carpenters on the Edgefield Project, the forum is unable to determine if the \$26.04 per hour paid to Conty by JBI while he worked as a carpenter between August 1, 1998, and December 20, 1998, was less than the prevailing wage and therefore omits the aforementioned \$2,586.30. See footnote 1, *supra*.

9) Respondent JBI filed ten certified payroll reports on the Edgefield Project that inaccurately certified the work classification of William "Bill" Conty as "laborer."

10) Respondent JBI filed a certified statement, but no accompanying payroll report, for one week in which JBI performed work on the Edgefield Project.

11) Respondent JBI filed four payroll statements for four different weeks that JBI performed work on the Edgefield Project that had no accompanying certified statement and misstated the work classification of Conty as "laborer."

12) Respondent JBI did not file certified payroll reports for six different weeks in which JBI performed work on the Edgefield Project.

13) Respondent Laine Johnson was responsible for JBI's failure to pay prevailing wages to Embury, Larson, Buzzell, Harper, Costa, McNie, and Conty, and knew or should have known of JBI's failure to pay those wages.

14) On April 12, 1999, Tyrone Jones, WHD Compliance Specialist, made a written request asking Respondent JBI to provide records in the possession or control of JBI deemed necessary by the commissioner to determine if the prevailing rate of wage had actually been paid by JBI to its workers on the Clatsop and Edgefield Projects. Respondent JBI received Jones's letter and provided no records in response.

**CONCLUSIONS OF LAW**

1) ORS 279.348(3) defines "Public works" as follows:

"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 further provides:

"(17) '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.

"(18) 'Public works contract' or 'contract' means any contract, agreement or understanding, written or oral, into which a public agency enters for any public work."

The Clatsop and Edgefield Projects were public works projects subject to Oregon's prevailing wage rate laws.

2) ORS 279.350(1) provides, in pertinent part:

"(1) The hourly rate of wage to be paid by any \* \* \* subcontractor to workers upon all public works shall be not less than the prevailing rate of wage for an hour's work in the trade or occupation in the locality where such labor is performed. \* \* \*"

OAR 839-016-0035(1) provides:

"(1) Every \* \* \* subcontractor 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."

Respondent JBI committed seven violations of ORS 279.350(1) and OAR 839-016-0035(1) by failing to pay any wages at all to seven workers employed by JBI for work performed on the Clatsop and Edgefield Projects during the periods of time specified in Finding of Fact – The Merits 24.

3) ORS 279.354 provides, 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 Bu-

reau 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. \* \* \*"

OAR 839-016-0010 provides, 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 WH38.

"(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.

"\* \* \* \* \*

"(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 payroll and certified statement as follows:

"\* \* \* \* \*

"(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 contractor.”

On the Clatsop Project, Respondent JBI committed seven violations of ORS 279.354 and OAR 839-016-0010 by filing inaccurate certified payroll reports, one violation by filing a certified statement that was unaccompanied by a payroll report, and three violations by not filing any certified payroll reports for three different weeks in which JBI performed work on the Clatsop Project. On the Edgefield Project, Respondent JBI committed ten violations of ORS 279.354 and OAR 839-016-0010 by filing inaccurate certified payroll reports, one violation by filing a certified statement that was unaccompanied by a payroll report, four violations by filing payroll reports that misclassified a worker and were unaccompanied by a certified statement, and six violations by not filing any certified payroll reports for six different weeks in which JBI performed work on the Edgefield Project. In all, Respondent JBI committed 32 violations of ORS 279.354 and OAR 839-016-0010.

4) ORS 279.355(1) and (2) provide:

“(1) At any reasonable time the Commissioner of the Bureau of Labor and Industries may enter the office or business establishment of any

contractor or subcontractor performing public works, and gather facts and information necessary to determine if the prevailing rate of wage is actually being paid by such contractor or subcontractor to workers upon public works.

“(2) 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 839-016-0025 provides, in pertinent part:

“(1) All contractors and subcontractors performing work on public works contracts shall make and maintain for a period of three (3) years from the completion of work upon such public works records necessary to determine whether the prevailing rate of wage and overtime has been or is being paid to workers upon public works.”

“(2) In addition to the Payroll and Certified Statement, Form WH-38, records necessary to determine whether the prevailing wage rate and overtime

wages have been or are being paid include but are not limited to records of:

\*\*\*\*\*

“(b) The work classification or classifications of each employee;

“(c) The rate or rates of monetary wages and fringe benefits paid to each employee;

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“(e) Total daily and weekly compensation paid to each employee;

“(f) The daily and weekly hours worked by each employee.”

OAR 839-016-0030(1) and (2) provide:

"(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 sums paid as fees to the bureau. Such records shall be made available to representatives of the Wage and Hour Division for inspection and transcription during normal business hours.

"(2) The contractor or subcontractor shall make the records referred to in section (1) of this rule available within 24 hours of a request from a

representative of the Wage and Hour Division or at such later date as may be specified by the division."

Respondent JBI committed one violation of ORS 279.355(2) and OAR 839-016-0030(1) and (2) by failing to make available to the commissioner records in the possession or under the control of JBI that were deemed necessary by the commissioner to determine if the prevailing rate of wage had actually being paid by JBI to its workers on the Clatsop and Edgefield Projects.

5) ORS 279.370(1) provides:

"In addition to any other penalty provided by law, the Commissioner of the Bureau of Labor and Industries may assess a civil penalty not to exceed \$5,000 for each violation of any provision of ORS 279.348 to 279.380 or any rule of the commissioner adopted pursuant thereto."

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 \* \* \* subcontractor \* \* \* 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 \* \* \* subcontractor for any of the following violations:

"(a) Failure to pay the prevailing rate of wage in violation of ORS 279.350;

"\* \* \* \* \*

"(d) Failure to file certified statements in violation of ORS 279.354;

"(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[.]”

The commissioner has appropriately exercised his authority by imposing \$72,750.00 in civil penalties for Respondent’s seven violations of ORS 279.350 and OAR 839-016-0035(1), Respondent’s 32 violations of ORS 279.354 and OAR 839-016-0010, and Respondent’s single violation of ORS 279.355(2) and OAR 839-016-0030(1) and (2), as ordered below.

6) ORS 279.361(1) and (2) provide:

“(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, a subcontractor has paid those amounts on the subcontractor’s behalf, 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, 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 subcontractor on the ineligible list as provided in this section to receive any contractor 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.

“(2) When the contractor or subcontractor is a corporation, the provisions of subsection (1) of this section shall apply to any corporate officer or corporate agent who is responsible for the failure or refusal to pay or post the prevailing rate of wage or the failure to pay to a subcontractor’s employees amounts required by ORS 279.350 that are paid by the contractor on the subcontractor’s behalf.”

OAR 839-016-0085 provides, in pertinent part:

“(1) Under the following circumstances, the commissioner, in accordance with the Administrative proce-

dures Act, may determine that for a period not to exceed three years, a contractor, sub-contractor or any firm, limited liability company, partnership or association in which the contractor or subcontractor has a financial interest is ineligible to receive any contract or sub-contract for a public work:

“(a) The contractor or sub-contractor has intentionally failed or refused to pay the prevailing rate of wage to workers employed on public works as required by ORS 279.350;

“(b) The subcontractor has failed to pay its employees the prevailing rate of wage required by ORS 279.350 and the contractor has paid the employees on the subcontractor’s behalf;

“\* \* \* \* \*

“(2) When the contractor or subcontractor is a corporation, the provisions of section (1) of this rule shall apply to any corporate officer or corporate agent who is responsible for the failure or refusal to pay or post the prevailing wage rates.

“(3) As used in section (2) of this rule, any corporate officer or corporate agent responsible for the failure to pay or post the prevailing wage rates or for the failure to pay to a subcontractor’s employees amounts required by ORS 279.350 that are paid by the contractor on the subcontractor’s behalf includes, but is not limited to the

following individuals when the individuals knew or should have known the amount of the applicable prevailing wages or that such wages must be posted:

“(a) The corporate president;

“(b) The corporate vice president;

“(c) The corporate secretary;

“(d) The corporate treasurer;

“(e) Any other person acting as an agent of a corporate officer or the corporation.”

“(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.”

OAR 839-016-0090(1) provides:

“(1) The name of the contractor, subcontractor or other persons and the names of any firm, corporation, partnership or association in which the contractor or subcontractor has

a financial interest whom the Commissioner has determined to be ineligible to receive public works contracts shall be published on a list of person ineligible to receive such contracts or subcontracts.”

The commissioner has appropriately exercised his authority in determining Respondents JBI and Laine Johnson, and any firm, corporation partnership or association in which they have a financial interest, to be ineligible to receive public works contracts and subcontracts for a period of three years from the date of publication of their names on the commissioner’s list of those contractors, subcontractors, and other persons ineligible to receive public works contracts and subcontracts.

### OPINION

#### DEFAULT

Respondents failed to appear at hearing and the forum held both Respondents in default pursuant to OAR 839-050-0330. When a respondent defaults, the Agency must establish a prima facie case to support the allegations of the charging document. *In the Matter of Majestic Construction, Inc.*, 19 BOLI 59, 67 (1999). The task of this forum, therefore, is to determine if a prima facie case supporting the Agency’s Notice has been made on the record. *Id.*

### JBI’S FAILURE TO PAY WORKERS THE PREVAILING RATE OF WAGE

#### A. The Alleged Violations

The Agency alleged that JBI violated ORS 279.350(1) eight times by intentionally failing to pay the prevailing rate of wage to eight different workers who subsequently filed wage claims with BOLI - five on the Clatsop Project (Embury, Larson, Buzzell, Harper, and Hathaway) and three (Costa, McNie, Conty) on the Edgefield Project. To establish a prima facie case, the Agency must prove by credible evidence<sup>6</sup> that: (1) JBI employed the eight claimants on the Clatsop or Edgefield Projects; and (2) The claimants performed work for which JBI did not pay them the prevailing rate of wage. In support of the first element, JBI’s own certified payroll reports establish that all eight wage claimants were employed by JBI on the Clatsop or Edgefield Projects. As for the second element, the Agency presented: (1) credible testimony from five of the claimants (Costa, Harper, Buzzell, Conty, McNie) and Nantt, ACI’s subcontract specialist, that they were carpenters for JBI and worked specific hours on the Clatsop or Edgefield Projects for which they were paid nothing; (2)

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<sup>6</sup> See, e.g. *In the Matter of Catalog-finder, Inc.*, 18 BOLI 242, 263-64 (1999) (In a default case involving 15 wage claims, the commissioner rejected 11 of the wage claims for the reason that they were unsupported by credible testimony or documentation.)

credible testimony from Jones, Harper, Buzzell, and Nantt that Embury and Larson were employed on the Clatsop Project, the hours as to which they worked, and that they worked specific hours for which they were paid nothing; (3) credible documentation submitted by the wage claimants, with the exception of Hathaway, in support of their claims; and (4) contemporaneous time records maintained by a supervisory employee of JBI during the Clatsop Project. This evidence establishes that all the wage claimants, with the exception of Hathaway, worked some period of time on the Clatsop or Edgefield Projects for which they were paid nothing. This evidence is sufficient to establish the Agency's prima facie case, and the forum finds that JBI committed seven violations of ORS 279.350(1). The forum rejects the allegation concerning Hathaway because it is not supported by credible evidence.<sup>7</sup>

### **B. Civil Penalties**

The Agency sought civil penalties of \$15,000 (\$3,000 each) for five "first violations" involving Embury, Buzzell, Larson, Harper, and Hathaway on the Clatsop Project, and civil penalties of \$12,000 (\$4,000 each) for three "first repeated violations" involving McNie, Costa, and Conty on the Edgefield Project. The facts, however, indicate that the Clatsop Project violations were "first re-

peated violations" and Edgefield Project violations were "first violations," inasmuch as the Edgefield Project violations occurred *before* the Clatsop Project violations.<sup>8</sup> In addition, the forum has determined that JBI committed only four violations on the Clatsop Project.

Aggravating circumstances regarding the three "first violations" on the Edgefield Project are as follows: (1) JBI not only paid its three employees less than the prevailing wage rate, it paid them nothing at all for the periods of time set out in Finding of Fact – The Merits 24; (2) In those time periods, JBI failed to pay its three employees a total of \$5,785.39 in prevailing wages; (3) Laine Johnson, JBI's president who was in charge of payroll, knew or should have known of JBI's failure to pay the wages and intentionally failed to pay them; and (4) In the same time period JBI failed to pay its employees, it also committed 32 violations of ORS 279.354 and OAR 839-016-0010 by filing inaccurate or uncertified payroll reports or no reports at all, as well as one violation of ORS 279.355(2). There are no mitigating circumstances. Aggravating circumstances regarding the five "first repeated violations" on the Clatsop Project are identical, with the exception that JBI underpaid its employees \$4,589 in prevailing wages, and JBI had violated ORS 279.350 previously on the Edge-

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<sup>7</sup> See footnote 2, *supra*.

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<sup>8</sup> See Finding of Fact – The Merits 24, *supra*.

field Project. Again, there are no mitigating circumstances.

OAR 839-016-0540(3)(a) requires the commissioner to assess a *minimum* civil penalty of “[A]n equal amount of the unpaid wages or \$1,000, whichever is less, for the first violation.” (emphasis added) JBI’s three violations on the Edgefield Project fit in the category of “first violation.” The forum finds that JBI’s failure to pay its three workers any money whatsoever for their work is of great seriousness and magnitude. Coupled with the other aggravating circumstances and lack of any mitigating circumstances, the forum finds that \$2,000 for each violation, or \$6,000 in total, is an appropriate civil penalty for JBI’s three violations on the Edgefield Project.

For JBI’s four “first repeated violations” that occurred on the Clatsop Project, OAR 839-016-0540 requires the commissioner to assess a *minimum* civil penalty of “[T]wo times the amount of unpaid wages or \$3,000, whichever is less, for the first repeated violation.” (emphasis added) Two times \$4,589 is \$9,178, and four times \$3,000 is \$12,000. Accordingly, the minimum penalty that the forum can assess for JBI’s Clatsop Project violations is \$9,178. Again, the forum finds that JBI’s failure to pay its four workers any money whatsoever for their work is of great seriousness and magnitude. Coupled with the other aggravating circumstances and lack of any mitigating circumstances, the forum finds

that \$3,750 for each violation, or \$15,000 in total, is an appropriate civil penalty for JBI’s five violations on the Clatsop Project.<sup>9</sup>

### **JBI’S INTENTIONAL FAILURE TO PAY WORKERS THE PREVAILING RATE OF WAGE**

#### **A. The Alleged Violation**

The forum has already concluded that JBI failed to pay seven workers the prevailing rate of wage. Whether or not these seven violations were intentional is a separate issue.

“Intentional” means that the person knows what he is doing, intends to do what he is doing, and is a free agent. *In the Matter of Southern Oregon Flagger, Inc.*, 18 BOLI 138, 160 (1999). In this case, Respondent JBI used a payroll company, Staffco, to write and issue checks to its employees. Staffco, in turn, was dependent on Laine Johnson, JBI’s corporate president, for payroll information concerning dates and hours that employees worked and their rate of pay. JBI, as an Oregon employer, was obligated to create and maintain a record of the hours worked by its employees. OAR 839-016-0025; ORS 653.045. Oregon law imposes a duty upon employers to know the wages that are due to their em-

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<sup>9</sup> In this case, the forum would have assessed a \$4,000 civil penalty per violation, but was limited by the Agency’s charging document, which sought a total of \$15,000 for the JBI’s Clatsop Project violations of failure to pay the prevailing rate of wage.

ployees. *In the Matter of Sealing Technology*, 11 BOLI 241, 252 (1993). There was no evidence presented that Laine Johnson and JBI were unaware of the wages due, or that the wages due were ever paid by JBI. Staffco was also dependent on Laine Johnson to send funds so Staffco could write checks to pay JBI's employees. There is no evidence that Johnson sent any funds to Staffco to pay the seven claimants or that Johnson was not acting as a free agent in failing to send those funds. Accordingly, the forum finds that JBI's failure to pay the prevailing wage rate to its seven employees on the Clatsop and Edgefield Projects was intentional.

#### **B. Placement on the List of Ineligibles**

ORS 279.361(1) requires that a subcontractor be placed on the commissioner's list of ineligibles for a period not to exceed three years when the commissioner determines, through a contested case proceeding, that the subcontractor has intentionally failed to pay the prevailing rate of wage to workers employed upon public works, or where the subcontractor has failed to pay the prevailing rate of wage to its employees and the contractor has paid those amounts on the subcontractor's behalf. In this case, the forum has determined that both situations occurred. Under the circumstances, the forum finds it appropriate to place Respondent JBI on the list of ineligibles for three years.

### **LAINE JOHNSON'S RESPONSIBILITY FOR JBI'S INTENTIONAL FAILURE TO PAY WORKERS THE PREVAILING RATE OF WAGE**

#### **A The Alleged Violation**

The Agency alleged that Laine Johnson, JBI's president, was responsible for JBI's failure to pay the prevailing rate of wage on the Clatsop and Edgefield Projects. The forum has already determined that JBI intentionally failed to pay the prevailing rate of wage to the seven claimants on those projects. Credible testimony from the Agency's witnesses established that Laine Johnson was personally responsible for providing records of dates and hours worked by JBI's employees to Staffco and sending funds to Staffco so that Staffco could issue paychecks to JBI's employees.<sup>10</sup> Consequently, Johnson must be held responsible for failing to provide records and funds that would have allowed Staffco to pay the seven claimants.

#### **B Placement on List of Ineligibles**

ORS 279.361(2) and OAR 839-016-0085(3) provides that a corporate president who is responsible for a respondent corporation's intentional failure to pay the prevailing wage rate may be placed on the commissioner's list of ineligibles. Given Laine Johnson's direct responsibility for JBI's intentional failure to pay the

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<sup>10</sup> See Finding of Fact – The Merits 29, *supra*.

prevailing wage rate, the forum finds it appropriate to place Respondent Laine Johnson on the list of ineligible for three years.

## **JBI'S CERTIFIED PAYROLL REPORT VIOLATIONS**

### **A. The Alleged Violations**

#### **1. The Clatsop Project.**

In its Amended Notice, the Agency alleged JBI committed ten certified payroll report violations on the Clatsop Project covering the periods November 22-28; November 29 to December 5; December 6-12; December 13-19; December 20-26; December 27, 1998 to January 3, 1999; January 3-9; January 11-15, January 25-31, 1999, and February 21 - March 13, 1999. Credible testimony of the Agency's witnesses, as well as actual certified payroll reports filed by JBI, establish that JBI violated ORS 279.354 and OAR 839-016-0010 a number of times during the dates alleged in the Notice, as reflected in Proposed Findings of Fact – The Merits 31-35. However, by the forum's reckoning, JBI committed eleven violations, not ten, within the time periods encompassed by the pleadings.

#### **2. The Edgefield Project.**

In its Notice, the Agency alleged JBI committed seventeen certified payroll report violations on the Edgefield Project between the week of August 23, 1998, through the week of March 4, 1999. Credible testimony of the Agency's witnesses, as well as actual certified payroll reports that

JBI submitted, establish that JBI violated ORS 279.354 and OAR 839-016-0010 a number of times during the dates alleged in the Notice, as reflected in Findings of Fact – The Merits 36-41. However, by the forum's reckoning, JBI committed twenty-one violations, not seventeen, within the time periods encompassed by the pleadings.

### **B. Civil Penalties**

#### **1. The Clatsop Project.**

The Agency sought \$25,500 in civil penalties for ten violations related to the Clatsop Project, or \$2,550 per violation. The forum has concluded that eleven violations occurred on the Clatsop Project. The Agency sought another \$42,500 in civil penalties for seventeen violations related to the Edgefield Project, or \$2,500 per violation. The forum has concluded that twenty-one violations occurred on the Edgefield Project. Aggravating circumstances consist of the following: (1) JBI also committed seven violations of ORS 279.350 and a violation of ORS 279.355(2) on the Clatsop and Edgefield Projects; (2) JBI could have easily complied with the law and was repeatedly reminded by Nantt about the necessity of filing timely and accurate WH-38s, as well as given instructions by Nantt about how to complete the WH-38 correctly; (3) Laine Johnson, JBI's president, knew of the violations; and (4) The violations were serious and of considerable magnitude, in that they were numerous; ACI and the Agency had to conduct an exten-

sive investigation to determine whether or not JBI had paid the prevailing rate of wage; and ACI ultimately had to pay JBI's workers. There are no mitigating factors. In determining the appropriate civil penalty, the forum reviews the handful of final orders in which a violation of ORS 279.354 was alleged and civil penalties assessed. The first case is *In the Matter of Larson Construction Co., Inc.*, 17 BOLI 54 (1998). In *Larson*, the Agency sought a single \$5,000 civil penalty for the respondent's multiple failures to file accurate and complete certified payroll reports. In imposing that penalty, the forum considered numerous aggravating factors. *Id.* at 79. The second case is *In the Matter of Northwest Permastore*, 18 BOLI 1 (1999), *on appeal*. In *Northwest*, the Agency sought a \$1,000 civil penalty based on a respondent's filing of a certified payroll report that inaccurately stated the classification of five workers, and the forum imposed a \$1,000 civil penalty. *Id.* at 20. The third case is *In the Matter of Southern Oregon Flagging, Inc.*, 18 BOLI 138 (1999). In *Southern Oregon*, the Agency sought \$24,000 in civil penalties for the respondent's filing of 24 certified payroll reports that inaccurately reported hours and dates of work, which resulted in two wage claims, payment for four other workers of \$900, and a BOLI warning letter. However, the respondent also proved mitigating circumstances, including payment of the prevailing wage rate to all workers after receipt of the BOLI

warning letter. The forum imposed civil penalties of \$250 per violation, for a total of \$6,000. *Id.* at 166-67.

Based on the aggravating factors in this case and prior final orders, the forum imposes a civil penalty of \$1,250 for each of JBI's twenty-three violations based on misclassification of workers or submission of certified statements without accompanying payroll. The forum considers JBI's nine violations of failing to file any certified payroll reports of greater magnitude, and imposes a civil penalty of \$2,000 each for those violations, for a total of \$48,750.

**JBI'S ALLEGED FAILURE TO MAINTAIN RECORDS NECESSARY TO DETERMINE IF THE PREVAILING RATE OF WAGE WAS PAID**

**A. The Alleged Violation**

The Agency alleged that JBI failed to maintain records required by OAR 839-016-0025(2)(b), (c), (e) and (f) for workers on the Clatsop and Edgefield Projects. However, the only evidence offered by the Agency in support of its allegation was the testimony of Jones that these records were requested, but not provided, and the absence of nine certified payroll reports. Although the former goes to a violation of failure to make records available, failure to provide records and file certified payroll reports does not, *ipso facto*, prove that those records were not maintained. The Agency has failed to establish a prima facie case es-

tablishing a violation of OAR 839-016-0025(2).

**JB I'S FAILURE TO MAKE AVAILABLE RECORDS NECESSARY TO DETERMINE IF THE PREVAILING RATE OF WAGE WAS PAID**

**A. The Alleged Violation**

On April 12, 1999, WHD Compliance Specialist Jones sent a letter to JBI requesting that JBI provide records, no later than April 22, 1999, deemed necessary to determine if JBI had paid the prevailing rate of wage. That letter was part of Jones' investigation of the wage claims filed by Embury, Costa, McNie, Larson, and Buzzell, all of them alleging that JBI had not paid them the prevailing rate of wage on a public works job. JBI had not filed certified payroll reports for most of the time covered by the wage claims, and Jones' letter sought records that documented dates and hours worked by the claimants and the specific wages and fringe benefits, if any, that they were paid.<sup>11</sup> Jones' testimony established that JBI received the letter, but failed to provide any records in response.

**B. The Law**

This is the first case to come before the forum in which the Agency has alleged a violation of ORS 279.355 and OAR 839-016-0030. In its Notice, the Agency alleges a violation of "ORS 279.355"

and does not specify whether section (1) or (2) of the statute was violated. The purpose of both sections is the same – to enable the commissioner to determine whether the prevailing rate of wage is being paid.

ORS 279.355(1) gives the commissioner the authority "[A]t any reasonable time [to] enter the office or business establishment of any \* \* \* subcontractor performing public works, and gather facts and information necessary to determine if the prevailing rate of wage is actually being paid \* \* \*." In this case, there was no attempt by the Agency to "enter" JBI's premises, and section (1) does not apply.

ORS 279.355(2), on the other hand, requires "subcontractor[s] performing work on public works [to] make available to the commissioner for inspection \* \* \* and, upon request made a reasonable time in advance, any payroll or other records in the possession or under the control of the \* \* \* subcontractor that are deemed necessary by the commissioner to determine if the prevailing rate of wage is actually being paid by such \* \* \* subcontractor to workers upon public works." In contrast to section (1), section (2) gives the commissioner the authority to require a subcontractor to make records available within a reasonable time after the commissioner's request. The critical element is that the records be made available. Without the availability of records, the commissioner cannot accomplish the

<sup>11</sup> See Finding of Fact – The Merits 19, *supra*.

statute's purpose – determining whether the prevailing rate of wage has been paid. In section (2), the records availability requirement encompasses an on-site inspection, as well as the commissioner's authority to request that copies of the subcontractor's records be delivered to the Agency. If the latter was not the case, the commissioner would have no viable means of inspecting these records if the subcontractor had left the job site, moved out of state, or gone out of business, and consequently, no way of verifying whether or not the prevailing rate of wage had been paid.

In this case, given JBI's failure to file certified payroll reports for the time periods covered by the wage claims, the forum concludes that the records sought by Jones were necessary to determine if JBI had paid the prevailing rate of wage to the claimants or, for that matter, to determine if JBI had paid them anything. The 10-day deadline Jones gave JBI for providing these records was a reasonable period of time, and the evidence showed that JBI in fact received Jones' letter by April 16, 1999, at the latest. Despite receiving Jones' letter, JBI provided no records, and Jones was forced to conduct an extensive investigation in order to resolve the wage claims. The forum concludes that JBI's failure to provide the records requested by Jones constitutes a violation of ORS 279.355(2), as well as OAR 839-016-0030(1) and (2).

### **C. Civil Penalty**

The Agency sought a civil penalty of \$5,000 for this violation. Aggravating circumstances consist of the following: (1) JBI also committed seven violations of ORS 279.350 and 32 violations of ORS 279.354 on the Clatsop and Edgefield Projects; (2) JBI was required by law to maintain the records of the type requested by the Agency; there is no evidence that JBI could not have easily provided the records; and JBI had ample time in which to comply with the Agency's request for records; (3) JBI knew of the request, yet ignored it; and (4) The violation was serious and of considerable magnitude, in that ACI and the Agency had to conduct an extensive investigation to determine whether or not JBI had paid the prevailing rate of wage; and ACI ultimately had to pay JBI's workers. There are no mitigating factors. Under the circumstances, the forum assesses the maximum civil penalty of \$5,000.

### **ORDER**

NOW, THEREFORE, as authorized by ORS 279.361, the Commissioner of the Bureau of Labor and Industries hereby orders that Respondents Johnson Builders, Inc., and Laine Johnson or 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 a period of 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, ORS 279.354, ORS 279.355(2), OAR 839-016-0010, OAR 839-016-0030, and OAR 839-016-0035, the Commissioner of the Bureau of Labor and Industries hereby orders Johnson Builders, 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 SEVENTY-TWO THOUSAND SEVEN HUNDRED AND FIFTY DOLLARS (\$72,750.00), plus interest at the legal rate on that sum between a date ten days after the issuance of the final order and the date Respondent Johnson Builders, Inc. complies with the Final Order.

In the Matter of  
**GREEN PLANET  
LANDSCAPING, INC.**

**Case No. 94-00**  
**Final Order of the**  
**Commissioner Jack Roberts**  
**Issued November 21, 2000**

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**SYNOPSIS**

Respondent failed to return BOLI's 1999 prevailing wage rate survey by the date BOLI had specified. The commissioner imposed a \$500.00 civil penalty for this violation of ORS 279.359(2). The Agency did not meet its burden of proving that Respondent committed a second violation of ORS 279.359(2) by failing to return the 1998 prevailing wage rate survey because the Agency did not prove by a preponderance of the evidence that Respondent received that survey. ORS 279.359, ORS 279.370, OAR 839-016-0520, OAR 839-016-0530, OAR 839-016-0540.

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The above-entitled case came on regularly for hearing before Erika L. Hadlock, 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 July 6, 2000, in the conference room of the Oregon State Employment Department, 1100 East Marina Way, Suite 121, Hood River, Oregon.

The Bureau of Labor and Industries (“BOLI” or “the Agency”) was represented by David Gerstenfeld, an employee of the Agency. Respondent was represented by its authorized representative, Guy Bowie, who is Respondent’s secretary.

The Agency called no witnesses, relying solely on documentary evidence. Respondent introduced no evidence into the record.

The forum received into evidence:

a) Administrative exhibits X-1 to X-4 (generated or filed prior to hearing).

b) Agency exhibits A-1 to A-2 (submitted prior to hearing with the Agency’s case summary).

Having fully considered the entire record in this matter, I, Jack Roberts, 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 December 20, 1999, the Agency issued a Notice of Intent to Assess Civil Penalties in which it alleged that Respondent unlawfully failed to complete and return the 1998 Construction Industry Occupational Wage Survey (“1998 survey”) within two weeks as required by the commissioner. The Agency also alleged that Respondent unlawfully failed to complete

and return the 1999 Construction Industry Occupational Wage Survey (“1999 survey”) by September 15, 1999. The Agency sought a civil penalty of \$500.00 for each of these two alleged violations of ORS 279.359(2).

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 it wished to exercise its right to a hearing.

3) The Agency served the Notice of Intent on Respondent’s registered agent, Guy Bowie, on or about January 25, 2000.

4) On or about February 6, 2000, Guy Bowie, Respondent’s “owner,” sent the Agency a letter authorizing himself to represent Respondent in this proceeding. Respondent also requested a hearing.

5) On February 17, 2000, the Agency issued a Notice of Intent to Issue Final Order by Default, stating that it would issue a Final Order by Default if it did not receive an answer and request for hearing from Respondent by February 28, 2000.

6) On February 24, 2000, the Agency received a letter from Respondent asserting that it never had received the wage surveys. Respondent again requested a hearing.

7) On March 15, 2000, the Agency moved to amend the Notice of Intent to reflect that it was

seeking a civil penalty of \$1000.00 for Respondent's alleged failure to return the 1999 survey, bringing the total penalties sought to \$1500.00. The Agency withdrew that motion on April 5, 2000.

8) The Agency filed a request for hearing with the Hearings Unit on March 15, 2000, and served it on Respondent.

9) On May 2, 2000, the Hearings Unit served Respondent with: a) a Notice of Hearing that set the hearing for July 6, 2000; 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.

10) On May 23, 2000, the forum ordered the Agency and Respondent 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 any wage, damages, and penalties calculations (for the Agency only). The forum ordered the participants to submit their case summaries by June 22, 2000, and notified them of the possible sanctions for failure to comply with the case summary order. The forum also provided a form that Respondent could use to prepare a case summary.

11) The Agency filed a timely case summary on June 22, 2000. Respondent did not file a case summary despite the fact

that its authorized representative received the case summary order.

12) At the start of the hearing, the ALJ confirmed that Respondent's authorized representative had received the Summary of Contested Case Rights.

13) Pursuant to ORS 183.415(7), 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.

14) At the start of the hearing, the participants stipulated to the following facts:

a) Respondent is an employer in the construction industry.

b) The Commissioner, consistent with ORS 279.359(1), established a survey entitled Construction Industry Occupational Wage Survey 1998 to collect data for use in determining the prevailing rates of wage for workers in trades or occupations in the localities designated in ORS 279.348. This 1998 survey included forms that the survey recipients were required to complete and return within two weeks of their receipt.

c) Respondent never completed nor returned the 1998 survey.

d) The Commissioner, consistent with ORS 279.359(1), established a survey entitled Construction Industry Occupational Wage Survey 1999 to

collect data for use in determining the prevailing rates of wage for workers in trades or occupations in the localities designated in ORS 279.348. This 1999 survey included forms that the survey recipients were required to complete and return by September 15, 1999.

e) Respondent never completed nor returned the 1999 survey.

15) During the hearing, Respondent sought to introduce testimony of its secretary, Guy Bowie. The Agency objected to that testimony on the grounds that Respondent had not filed a case summary, that the Agency did not know that Bowie had knowledge of any facts relevant to the case, and that the Agency, therefore, would be prejudiced if Bowie were allowed to testify to facts that the Agency would not be prepared to rebut. The ALJ sustained the Agency's objection and did not allow Bowie to testify.

16) The ALJ issued a proposed order on July 11, 2000, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance.

17) On July 12, 2000, the Agency filed exceptions to the proposed order. The Agency accepted to the ALJ's conclusion that the Agency had not proven, by a preponderance of the evidence, that Respondent had received the 1998 wage survey. The Agency's exceptions are ad-

dressed in the rewritten Opinion section of this Final Order under the heading "The 1998 Wage Survey." For the reasons stated in that section, the Agency's exceptions are overruled.

#### **FINDINGS OF FACT – THE MERITS**

1) Since 1996, Respondent has been an Oregon corporation engaged in landscape and horticultural services. Respondent employs workers in the construction industry. Respondent has been based in Hood River, Oregon, since at least 1999.

2) The Research and Analysis section of the Oregon Employment Department ("Employment Department") contracted with BOLI in 1998 and 1999 to conduct a Construction Industry Occupational Wage Survey ("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) On or about September 15, 1998, the Employment Department sent Respondent a wage survey packet, which included a postage paid envelope for return of the survey. The letter accompanying the survey stated in bold print that the survey had to be returned within two weeks and that failure to return a completed survey form could result in a monetary fine.

4) The Employment Department never received a 1998 wage survey from Respondent.

5) The Employment Department sent the 1998 wage survey packet discussed above to Respondent at 2751 Webster Rd, Hood River, OR 97031 ("the Webster Road address"). The Webster Road address is not Respondent's current address. No evidence in the record explains why the Employment Department associated the Webster Road address with Respondent. The only evidence in the record linking Respondent to that address is the following statement in the affidavit of Mary Wood, a research analyst with the Employment Department:

"A preliminary 1999 survey postcard was sent to Respondent at 2751 Webster Rd. The postcard was received back from Respondent. It indicated they had a new address of 2763 Odell Hwy, Hood River, OR 97031 ["the Odell Highway address"]. Based on the information Respondent supplied on this postcard, they were included in the 1999 wage survey."

This assertion is sufficient to establish that Respondent, by some unknown means, came into possession of a postcard that had been mailed to it at the Webster Road address, presumably sometime in mid-1999.<sup>1</sup> The statement, however, is not sufficient to establish by a preponderance of the

evidence that the Webster Road address was Respondent's correct address in 1998, when the 1998 wage survey materials were mailed, particularly in the face of Respondent's assertion that it did not receive the survey. The Agency did not meet its burden of proving that Respondent received the 1998 wage survey.

6) On or about August 16, 1999, a copy of the 1999 wage survey packet was sent to Respondent by first-class mail at the Odell Highway address. The Odell Highway address was Respondent's correct address as of February 2000 and throughout this contested case hearing process. Because Respondent informed the Employment Department sometime before the 1999 wage survey was sent out that its address was 2763 Odell Highway, the forum infers that the Odell Highway address was Respondent's correct address at all subsequent points in time.

7) The 1999 wage survey packet sent to Respondent included a postage paid envelope for return of the survey. The phrase "FILING DEADLINE: September 15, 1999" was displayed prominently on the front of the survey form. A letter included with the survey form notified contractors that "[f]ailure to return a completed survey form [might] result in a monetary fine."

8) On or about August 18, 1999, a form letter was sent to Respondent by first-class mail at the Odell Highway address providing additional information needed

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<sup>1</sup> The 1999 wage surveys were mailed on or about August 16, 1999, and it is fair to assume that the preliminary postcards were sent shortly before then. (Exhibit A-2 at 2)

for completion of the wage survey form.

9) Respondent did not return the 1999 wage survey by the September 15, 1999, deadline. On or about September 20, 1999, a "Survey Past Due" card was sent by first-class mail to Respondent at the Odell Highway address. A second "Survey Past Due" card was sent to Respondent at the same address on October 18, 1999, this time with "Final Notice" stamped on it.

10) None of the mail sent to Respondent at either the Webster Road address or the Odell Highway address was returned to the Employment Department, either as "undeliverable" or for any other reason.

11) The forum infers from the facts discussed in Findings of Fact – the Merits 6 through 10 that Respondent did receive the 1999 wage survey packet.

12) Respondent never returned the 1999 wage survey to the Employment Department.

13) A single contractor's failure to return the wage survey may adversely affect the accuracy of the Agency's prevailing wage rate determinations.

#### **ULTIMATE FINDINGS OF FACT**

1) Respondent is an Oregon employer.

2) The commissioner conducted a wage survey in 1998 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) The Agency did not meet its burden of proving that Respondent received the commissioner's 1998 wage survey.

4) The commissioner conducted another wage survey in 1999 that required persons receiving the surveys to make reports or returns to the Agency for the purpose of determining the prevailing rates of wage.

5) Respondent received the commissioner's 1999 wage survey.

6) Respondent failed to return a completed 1999 survey by September 15, 1999, the date specified by the commissioner.

7) There is no evidence in the record that Respondent committed previous violations of the prevailing wage rate laws.

8) Respondent could easily have returned the 1999 survey by September 15, 1999, and knew or should have known of its failure to do so.

#### **CONCLUSIONS OF LAW**

1) ORS 279.359 provides, in pertinent part:

"(2) A person shall make such reports and returns to the Bureau of Labor and Industries as the commissioner may require to determine the prevailing rates of wage. The reports and returns shall be made upon forms furnished by the bureau and within the time prescribed therefor by the

commissioner. The person or an authorized representative of the person shall certify to the accuracy of the reports and returns.

\*\* \* \* \* \*

"(5) As used in this section, 'person' includes any employer, labor organization or any official representative of an employee or employer association."

Respondent was a person required to make reports and returns under ORS 279.359(2). Respondent's failure to return a completed 1999 wage survey by September 15, 1999, violated ORS 279.359(2).

2) 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 839-016-0520 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.

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“(3) The commissioner may assess a civil penalty against a contractor or subcontractor for any of the following violations:

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“(i) Failure to submit reports and returns in violation of ORS 279.359(2)[.]”

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.

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“(5) The civil penalty for all \* \* \* violations [other than violations of ORS 279.350 regarding payment of the prevailing wage] shall be set in accordance with the determinations and considerations referred to in OAR 839-016-0530.”

The commissioner has exercised his discretion appropriately by imposing a \$500.00 civil penalty for Respondent's single violation of ORS 279.359(2).

**OPINION**

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.

The first, second, and fourth elements are not contested in this case, as Respondent concedes that it did not return either the 1998 wage survey or the 1999 wage survey. The only question is whether Respondent received those surveys so it would be in a position to complete and return them.

**THE 1998 WAGE SURVEY**

The Employment Department mailed the 1998 survey to Respondent at 2751 Webster Road, Hood River, Oregon. However, nothing in the record explains how the Employment Department determined that 2751 Webster Road was Respondent’s correct address. The Agency argues that three facts, taken together, create an inference that Respondent received the 1998 survey, and that this inference establishes the third element of the Agency’s case by a

preponderance of the evidence. First, the 1998 wage survey was not returned to the Employment Department, either as undeliverable or for any other reasons. This establishes that mail was received by the addressee, but does not establish that 2751 Webster Road was Respondent's correct address. Second, the forum infers from Respondent's return of the preliminary postcard sent to 2751 Webster Road in mid-1999, on which Respondent wrote that its new address was 2763 Odell Highway, that Respondent came into possession of that postcard by some means. Third, Respondent received the 1999 survey but denied this fact in the Answer, casting doubt on the credibility of Respondent's denial that it received the 1998 survey.

It is possible to infer from these circumstances, as the Agency argues in its exceptions, that Respondent's correct address in 1998 was 2751 Webster Road, and that Respondent received the 1998 wage survey form. However, the evidence in the record is not sufficient to support this inference.<sup>2</sup> Under the circumstances,

the forum declines to draw the inference sought by the Agency and concludes that the Agency has failed to prove, by a preponderance of the evidence, that Respondent received the 1998 wage survey.

### THE 1999 WAGE SURVEY

The Agency did prove that Respondent received and failed to return the 1999 wage survey. Before that survey was mailed out, Respondent had informed the Employment Department that its correct address was on the Odell Highway, and that address remained Respondent's correct address through the time of hearing. The Employment Department mailed the 1999 wage survey and follow-up reminders to Respondent at the correct Odell Highway address. None of those documents was ever returned to the Employment Department as "undeliverable" or for any other reason. From these facts, the forum infers that Respondent received the 1999 wage survey, which Respondent concedes it never returned. The Agency proved that Respondent violated ORS 279.359(2) by failing to re-

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<sup>2</sup> Among the ways this inference could have been supported are: (1) A statement from Wood explaining why the Employment Department believed 2751 Webster Road was Respondent's correct address at the time of the mailing; (2) Other documents, such as contractor registration forms or Corporation Division records showing that 2751 Webster Road was Respondent's address at the time of the mailing; (3) A statement by a Re-

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spondent representative, either directly from that person or made to an Agency investigator, as to Respondent's address at the time of the mailing; (4) Respondent's 1998 business records on which Respondent's address was imprinted; these could have been obtained through discovery since Respondent's 1998 address was an issue.

turn the 1999 wage survey by the deadline set by the commissioner.

The commissioner may impose a penalty of up to \$5000.00 for Respondent's single proven violation of ORS 279.359(2). In determining the appropriate size of the penalty, the forum must consider the factors set out in OAR 839-016-0520. In this case, two factors weigh in favor of a relatively light penalty. First, there is no evidence that Respondent previously has violated the prevailing wage rate laws. Second, although the accuracy of the Agency's prevailing wage rate determinations depends on receiving completed surveys from all contractors, Respondent's violation is not as serious as violations like failure to pay or post the prevailing rate of wage. On the other hand, it would have been relatively easy for Respondent to comply with the law by returning the 1999 wage survey, and the Agency gave Respondent at least two warnings before issuing the Notice of Intent. Under these circumstances, the forum finds that the \$500.00 penalty proposed by the Agency is appropriate.

#### **ORDER**

NOW, THEREFORE, as authorized by ORS 279.370 and as payment of the penalty assessed as a result of Respondent's violation of ORS 279.359(2), the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **GREEN PLANET LANDSCAPING, INC.** to deliver to the Fiscal Services Office of the Bureau of Labor and

Industries, 800 NE Oregon Street, Portland, Oregon 97232, a certified check payable to the Bureau of Labor and Industries in the amount of FIVE HUNDRED DOLLARS (\$500.00), 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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#### **In the Matter of**

**STEVEN D. HARRIS, dba Color World Painting, Respondent.**

#### **Case No. 39-00**

**Final Order of the Commissioner**

**Jack Roberts**

**Issued November 21, 2000**

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#### **SYNOPSIS**

Respondent, a contractor on a public works project, failed to pay the fee required by ORS 279.375 and OAR 839-016-0200, and the commissioner ordered him to pay a civil penalty of \$1,000 for one violation. ORS 279.375, ORS 279.370, OAR 839-016-0200, OAR 839-016-0520, OAR 839-016-0530, OAR 839-016-0540.

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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 October 10, 2000 in Hearings Room #1004 of the State Office Building, 800 NE Oregon Street, Portland, Oregon.

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

The Agency called Susan Wooley, Wage & Hour Division Compliance Specialist, as its only witness.

The forum received into evidence:

a) Administrative exhibits X-1 through X-10 (submitted or generated prior to the hearing);

b) Agency exhibits A-1 through A-8 (submitted prior to the hearing).

Having fully considered the entire record in this matter, I, Jack Roberts, 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 25, 2000, the Agency issued a Notice of Intent to Assess Civil Penalties ("Notice") in which it alleged that Respondent did not pay the fee required by ORS 279.375 and OAR 839-016-0200 related to the Primate Exhibit Resurfacing Pro-

ject, a public works contract costing over \$25,000 that was not regulated by the federal Davis-Bacon Act. The Agency sought a civil penalty of \$2,500.

2) The Notice instructed Respondent that he was required to file an answer and written request for a contested case hearing within 20 days of the date on which he received the Notice, if he wished to exercise his right to a hearing.

3) The Agency served the Notice on Respondent on March 29, 2000.

4) On April 21, 2000, the Agency sent a Notice of Intent to Issue Final Order by Default to Respondent notifying him that he had not yet filed an answer or request for hearing, and that a Final Order on Default would be issued if no answer and request for hearing were received by May 1, 2000.

5) On May 1, 2000, Respondent filed an answer with the Agency.

6) On May 2, 2000, the Agency sent a letter to Respondent notifying him that his request for hearing was insufficient because it did not request a hearing, and that a Final Order on Default would be issued if Respondent did not request a hearing by May 12, 2000.

7) On May 11, 2000, Respondent requested a hearing.

8) The Agency filed a request for hearing with the Hearings Unit on June 19, 2000.

9) On July 7, 2000, the Hearings Unit served Respondent with: a) a Notice of Hearing that set the hearing for October 10, 2000; 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.

10) On July 31, 2000, the forum ordered the Agency and Respondent 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; a brief statement of the elements of the claim and penalty calculations (for the Agency only); a brief statement of any defenses to the claim (for Respondent only); and a statement of any agreed or stipulated facts. The forum ordered the participants to submit their case summaries by September 26, 2000, and notified them of the possible sanctions for failure to comply with the case summary order. The forum also provided a form for Respondent's use in preparing a case summary.

11) The Agency filed a motion for partial summary judgment on September 13, 2000. Respondent filed no response to that motion.

12) On September 26, 2000, the Agency filed its case summary. On September 27, 2000, the Agency filed an addendum to its case summary.

13) On September 29, 2000, the ALJ granted the Agency's motion for partial summary judgment in an interim order that stated:

**“Introduction**

“On September 13, 2000, the Agency filed a motion for summary judgment, contending that undisputed facts entitle the Agency to summary judgment as a matter of law. Respondent did not file a responsive pleading.

**“Summary Judgment Standard**

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

‘ \* \* \* No genuine issue as to a material fact exists if, based upon the record before the court viewed in a manner most favorable to the adverse party, no objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject of the motion for summary judgment. The adverse party has the burden of producing evidence on any issue raised in the motion as to which the adverse party would have the bur-

den of persuasion at [hearing].’ ORCP 47C.

#### **“The Agency’s Allegations**

“The Agency’s Notice of Intent to Assess Civil Penalties (“Notice”) alleges that Respondent violated ORS 279.375 and OAR 839-016-0200 by failing to pay the fee required by ORS 279.375 and OAR 839-016-0200 after entering into a public works contract (“Primate Exhibit Resurfacing Project”) in March 1999 with Metro, an Oregon public agency, that cost over \$25,000 and was not regulated by the federal Davis-Bacon Act.

#### **“The Undisputed Facts And The Law**

“Respondent, in his answer dated May 1, admitted entering into a contract for more than \$25,000 on the Primate Resurfacing Project. Because Respondent’s answer did not address whether or not the Primate Resurfacing Project was regulated by the Davis-Bacon Act, the Agency’s allegation that the Project was *not* regulated by the Davis-Bacon Act is deemed admitted. OAR 839-050-0130(2). Respondent did not deny the date the contract was entered into or that it was a public works contract with Metro, an Oregon public agency, and those facts are deemed admitted. Respondent also stated that he lost over \$20,000 on the Project. From that statement, the forum infers that Respondent had

completed the project by the time he filed his answer.

“The only disputed material fact is whether or not Respondent paid the prevailing wage rate fee required by ORS 279.375. In his answer, Respondent stated “To the best of our knowledge at Color World Painting, [the] Prevailing Wage Fee[s] were paid by our office[.]” In support of its motion, the Agency provided an affidavit by the lead worker assigned to the Prevailing Wage Rate section of BOLI’s Wage and Hour Division, dated September 13, 2000, attesting to the fact that BOLI has never received the prevailing wage rate fee from Respondent for the Primate Resurfacing Project. If Respondent had any evidence that would create a genuine issue of fact as to whether or not he paid the prevailing wage rate fee, he was obligated to provide that evidence in response to the Agency’s motion to avoid summary judgment. Respondent did not do this. Based on the Agency’s uncontested affidavit, the forum finds there is no genuine issue of fact as to whether or not Respondent paid the prevailing wage rate fee on the Primate Resurfacing Project.

“ORS 279.375 requires the Commissioner of the Bureau of Labor and Industries, by rule, to establish a fee to be paid by the contractor to whom a contract for a public work subject to ORS 279.348 to 279.380

has been awarded. That rule has been promulgated. OAR 839-016-0200 to 839-016-0240. The fee, which is set at one tenth of the contract price,<sup>1</sup> with a minimum fee of \$100 and a maximum fee of \$5,000, must be paid at the time of the first progress payment or 60 days after work on the contract begins, whichever is earlier. ORS 279.375(1)(b).

"In this case, the undisputed material facts are that Respondent entered into a public works contract subject to ORS 279.348 to 279.380 and did not pay the prevailing wage rate fee required by ORS 279.375 within 60 days after work on the contract began. These facts establish a violation of ORS 279.375 as a matter of law, and subject Respondent to a potential civil penalty.

"The Agency's motion for summary judgment is **GRANTED** on the issue of whether or not Respondent violated ORS 279.375. However, the hearing will be convened on the date scheduled, October 10, to determine the amount of civil penalty, if any, to be assessed against Respondent for his violation. At the hearing, Respondent and the Agency will be expected to present evidence of any mitigating or aggravating

circumstances relevant to the Agency's proposed assessment of a civil penalty.

"This interim order will become part of the Proposed Order that is issued subsequent to the hearing."

14) In the same interim order, the ALJ reset the hearing time from 9:00 a.m. to 10:30 a.m.

15) When Respondent did not appear at the hearing on October 10 by 10:30 a.m., the ALJ recessed the hearing until 11:00 a.m. Respondent did not appear by 11:00 a.m. and the ALJ declared him in default and commenced the hearing.

16) Pursuant to ORS 183.415(7), the ALJ verbally advised the Agency of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

17) On October 26, 2000, the ALJ issued a proposed order that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. The forum received no exceptions.

#### **FINDINGS OF FACT – THE MERITS**

1) On March 21, 1999, Respondent was awarded a contract called the Primate Exhibit Resurfacing Project ("Project") to perform painting at the Oregon Zoo in Portland, Oregon for Metro, an Oregon public agency. The contract award was for the amount of \$74,994.00 and was

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<sup>1</sup> The fee stated in the ALJ's interim order is in error. The actual fee is ".1 percent of the contract price." ORS 279.375(1)(b).

not regulated by the Davis-Bacon Act (40 U.S.C. 276a).

2) On March 23, 1999, Respondent signed a contract with Metro authorizing him to perform the work that was the subject of the contract award. The following language was included in the terms of the contract:

“The contractor is required to pay a fee equal to one-tenth of one percent (.1 percent) of the price of the contract, but not less than \$100 nor more than \$5,000, under ORS 279.352(2) and section 5(1), ch 594, 1995 Oregon Laws. The fee shall be paid on or before the first progress payment or 60 days from the date work first began on the contract, whichever comes first. The fee is payable to the Bureau of Labor and Industries at the following address:

Bureau of Labor and Industries, Wage and Hour Division, Prevailing Wage Unit, 800 NE Oregon Street, #32, Portland, Oregon 97232

“\* \* \* \* \*

“For public work subject to ORS 279.348 to 279.365, the Contractor shall pay prevailing wages and shall pay an administrative fee to the Bureau of Labor and Industries pursuant to the administrative rules established by the Commissioner of the Bureau of Labor and Industries.”

3) On July 1, 1999, the contract was amended to increase the

amount payable to a maximum of \$87,464.00.

4) On July 29, 1999, Hedera Trumbo, Prevailing Wage Coordinator of the Wage & Hour Division (“WHD”), sent a letter to Respondent at 11949 SE Dorset Lane, Portland, Oregon 97266-6820<sup>2</sup> advising that contractors on public works projects were required to pay a fee equal to one-tenth of one percent of the total contract price, that the fee could be no more than \$5,000 and no less than \$100, and that BOLI had not received Respondent’s \$100 fee for the Project.

5) On August 12, 1999, Trumbo sent Respondent another letter at 11949 SE Dorset Lane stating that the prevailing wage rate fee for the Project had not been received, and that BOLI was considering taking action against Respondent for failure to submit the fee. Trumbo advised Respondent that the minimum civil penalty was “an amount equal to the unpaid fee or \$1,000, whichever is greater.”

6) On August 25, 1999, Trumbo called Respondent and left a message for him to call back. Respondent did not call her back.

7) On September 17, 1999, Lois Banahene, WHD Lead Com-

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<sup>2</sup> This is the same address that appears on the “Notice of Award of Public Works Contract” that was provided to BOLI by Metro and is the address used by Respondent in his answer and request for hearing.

pliance Specialist, sent a letter to Respondent at 11949 SE Dorset Lane stating that he had not yet paid the prevailing wage rate fee for the Project, and that if the \$100.00 fee was not paid by September 27, 1999, BOLI would initiate administrative action that might include assessment of civil penalties. Banahene enclosed a copy of OAR 839-016-0200(1) with her letter.

8) On October 18 and 19, 1999, Susan Wooley, WHD Compliance Specialist, telephoned Respondent and left messages requesting that he return her call regarding an outstanding prevailing wage rate fee. Respondent did not return Wooley's calls.

9) On October 27, 1999, Wooley sent a letter to Respondent at 11949 SE Dorset Lane making a "last request for payment" of the \$100.00 prevailing wage rate fee due from the Project. Wooley enclosed a copy of ORS 279.375.

10) None of the letters sent from BOLI to Respondent were returned by the U.S. Postal Service and Respondent did not contact BOLI in response.

11) Effective September 17, 1999, Metro terminated the contract with Respondent "due to cost over run and changes in the scope of the work." At that time, Respondent had performed more than \$25,000 worth of work.

12) Respondent has never paid the \$100 prevailing wage rate fee due to BOLI from the Project.

13) Respondent performed another public works contract for Metro in the amount of \$70,255 that began on November 30, 1998. Respondent paid the correct prevailing wage rate fee of \$100 to BOLI for this contract.

14) Respondent entered into two public works contracts in amounts over \$25,000 in 1996 (Otty Rd. Reservoir Repainting Project) and 1998 (Exterior Painting Thomas Junior High) and paid the correct prevailing wage rate fee of \$100 to BOLI for both of these projects.

#### **ULTIMATE FINDINGS OF FACT**

1) On March 21, 1999, Respondent was awarded a contract called the Primate Exhibit Resurfacing Project to perform painting at the Oregon Zoo in Portland, Oregon for Metro, an Oregon public agency. The contract award was for the amount of \$74,994.00 and was not regulated by the Davis-Bacon Act (40 U.S.C. 276a).

2) ORS 279.375 required Respondent to pay a \$100 prevailing rate fee to BOLI for this Project.

3) From the date of signing the contract for the Project, Respondent knew that he was required to pay a \$100 prevailing wage rate fee to BOLI.

4) More than 60 days has gone by since Respondent begun work on the Project.

5) Before initiating this action, BOLI sent Respondent four letters reminding him of his obligation to pay the prevailing wage rate fee

for the Project and unsuccessfully attempted to contact him by telephone on three occasions.

6) Respondent has not paid the \$100 prevailing wage rate fee due to BOLI for the Project.

7) Respondent paid the correct prevailing wage rate fee on three other public works projects he performed between 1996 and 1998.

**CONCLUSIONS OF LAW**

1) ORS 279.348(3) defines "Public works" as follows:

"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 further provides:

"(17) '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 in-

clude the reconstruction or renovation of privately owned property which is leased by a public agency.

"(18) 'Public works contract' or 'contract' means any contract, agreement or understanding, written or oral, into which a public agency enters for any public work."

The Primate Exhibit Resurfacing Project was a public works project subject to Oregon's prevailing wage rate laws.

2) ORS 279.375 provides, in pertinent part:

"(1)(a)The Commissioner of the Bureau of Labor and Industries, by rule, shall establish a fee to be paid by the contractor to whom the contract for a public work subject to ORS 279.348 to 279.380 has been awarded. \* \* \*

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(b) The fee shall be .1 percent of the contract price. However, in no event shall a fee be charged and collected that is more than \$5,000 nor less than \$100.

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"(3) The fee to be paid pursuant to this section shall be paid at the time of the first progress payment or 60 days after work on the contract has begun, whichever date is earlier.

"(4) Failure to make timely payment pursuant to subsection (3) of this section shall subject the contractor to a civil

penalty under ORS 279.370, in such amount as the commissioner, by rule, shall specify.”

OAR 839-016-0200 provides, in pertinent part:

“(1) Every contractor awarded a contract for a public work which is regulated under the Prevailing Wage Rate Law ORS 279.348 to 279.380 shall pay a fee.

“(2) The amount of the fee shall be one tenth of one percent (.001) of the contract price. However, the fee shall be no less than \$100 nor more than \$5,000 regardless of the contract price.

“(3) The fee is payable to the Bureau of Labor and Industries and shall be mailed or delivered to the bureau at the following address: Prevailing Wage Rate Unit, Wage and Hour Division, Bureau of Labor and Industries, 800 N.E. Oregon Street #32, Portland, OR 97232.

“(4) The fee shall be paid no later than 10 days following receipt by the contractor of the first progress payment on the contract or 60 days after work on the project has begun, whichever date is earlier.

“\* \* \* \* \*

“(6) As used in this rule:

“(a) ‘Contract price’ means the dollar amount of the contract on the date it was awarded to the contractor and the dollar amount of any sub-

sequent change orders or other adjustments.

“(b) ‘Work on the project’ shall mean work performed after the date the contract was awarded and for which the contractor is paid as part of the contract price.

“(c) The ‘date work on the project has begun’ shall be the date the contractor actually starts work on the project or, if the contractor cannot determine the date the contractor actually started working on the project, the date the contracting agency establishes as the date work actually started on the project or, if neither the contractor nor the contracting agency can determine the date the contractor actually started work on the project, the date the contracting agency authorized the contractor to begin work on the project.”

Respondent was obligated to pay a \$100 fee to BOLI for the Primate Resurfacing Project. By not paying that fee, Respondent committed one violation of ORS 279.375 and OAR 839-016-0200. The ALJ’s interim order granting the Agency summary judgment on this issue is affirmed.

3) ORS 279.370(1) provides:

“In addition to any other penalty provided by law, the Commissioner of the Bureau of Labor and Industries may assess a civil penalty not to exceed \$5,000 for each violation of any provision of ORS 279.348 to 279.380 or any rule

of the commissioner adopted pursuant thereto."

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 \* \* \* 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:

"\* \* \* \* \*

"(k) Failure to timely pay the fee required by ORS 279.375."

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 mitigat-

ing and aggravating circumstances.

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“(4) Notwithstanding any other section of this rule, when the commissioner determines to assess a civil penalty for violations of ORS 279.375, OAR 839-016-0200 or 839-016-0220 regarding fees to be paid by the contractor, the minimum penalty to be assessed shall be calculated as follows:

“(a) An equal amount of the unpaid fee or \$1,000, whichever is greater, for the first violation[.]”

The commissioner has appropriately exercised his authority by imposing \$1,000 in civil penalties for Respondent’s single violation of ORS 279.375 and OAR 839-016-0200.

## OPINION

### INTRODUCTION

Respondent filed an answer and request for hearing. Prior to the hearing, the Agency moved for partial summary judgment on the issue of liability. The forum granted the Agency’s motion, leaving the amount of civil penalties as the only issue at hearing. Respondent failed to appear at hearing and was held in default pursuant to OAR 839-050-0330. As a general rule, when a respondent defaults, the Agency must establish a prima facie case to support the allegations of the charging document. *In the Matter of Leslie and Roxanne DeHart*, 18 BOLI 199, 206 (1999). In this

case, the ALJ issued an interim order granting the Agency summary judgment on the issue of whether or not Respondent violated ORS 279.375 and OAR 839-016-0200, and that ruling has been affirmed in this proposed order. The remaining task of the forum is to evaluate the evidence presented by the Agency and assess an appropriate civil penalty.

### AMOUNT OF CIVIL PENALTY

The Notice of Intent asks that a civil penalty of \$2500 be assessed against Respondent. OAR 839-016-0520 states the mitigating and aggravating circumstances that the commissioner shall consider when determining an amount of civil penalties. Here, the applicable circumstances include the opportunity and degree of difficulty to comply, the magnitude and seriousness of the violation, and Respondent’s knowledge of the violation.

Respondent had ample opportunity to comply. BOLI personnel sent him four warning letters stating that the \$100 fee was due and where to send it before issuing a Notice of Intent. Respondent could have complied and avoided this action by simply mailing the \$100 fee to BOLI. However, he chose to ignore those letters. Respondent knew of his legal obligation to pay the fee from paying a fee to BOLI on three previous public works contracts, from the contract language, and from BOLI’s four warning letters. The violation is serious and of some magnitude because Respondent failed to pay a fee

dedicated to paying the costs of determining the prevailing wage rate, enforcing the prevailing wage rate laws, and educating the public on prevailing wage rate laws. These are significant concerns, and the public interest suffers when contractors and subcontractors fail to pay this fee. Mitigating these concerns is the fact that this is Respondent's first violation of Oregon's prevailing wage rate laws.

This is the first case before the forum in which the Agency has alleged a violation of ORS 279.375 and sought civil penalties for that violation. The minimum civil penalty that can be imposed is \$1,000. Under the facts of this case, the forum finds that a \$2,500 civil penalty is disproportionate to the violation and assesses the minimum civil penalty of \$1,000.

#### ORDER

NOW, THEREFORE, as authorized by ORS 279.370 and as payment of the civil penalty assessed as a result of his violation of ORS 279.375 and OAR 839-016-0200, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent Steven D. Harris to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, the following:

140, as amended 20 BOLI 151 (2000). Persons wishing a complete copy of the amended final

A certified check payable to the Bureau of Labor and Industries in the amount of ONE THOUSAND DOLLARS (\$1,000.00), plus any interest thereon that accrues at the legal rate between a date ten days after the issuance of the Final Order and the date Respondent complies with the Final Order.

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In the Matter of

**STEVEN D. HARRIS, dba Color  
World Painting**

**Case No. 39-00**

**Amended Final Order of the  
Commissioner Jack Roberts**

**Issued December 6, 2000**

Ed.: The final order in this case initially was issued on November 21, 2000, and published at 21 BOLI 140 (2000). The commissioner later discovered that the order incorrectly included the word "Proposed" before "Conclusions of Law" in the section of the order containing Conclusions of Law. That term was deleted. In addition, the term "proposed" was deleted from the second to last sentence in the "Introduction" section of the "Opinion." The final order should be cited as: 20 BOLI

order should contact the Hearings Unit of the Bureau of Labor and Industries.

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contracts or subcontracts for a period of three years.

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**In the Matter of**

**WILLIAM GEORGE ALLMENDINGER dba Top Notch Construction & Roofing and dba Top Notch Construction, and Marion Allmendinger, dba Top Notch Construction,**

**Case Nos. 90-00, 103-00  
Final Order of the  
Commissioner Jack Roberts  
Issued December 29, 2000**

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**SYNOPSIS**

Respondent William George Allmendinger, a subcontractor on a project subject to Oregon's prevailing wage rate laws, intentionally failed to pay the prevailing rate of wage to two of his employees on that project. Allmendinger also filed two incomplete certified payroll reports and failed to provide payroll records from the project to the Agency upon its request. The commissioner imposed civil penalties totaling \$7500.00 for these five violations of the prevailing wage rate laws. The commissioner also ordered that Respondent William George Allmendinger and any firm, corporation, partnership or association in which William George Allmendinger has a financial interest be placed on the list of those ineligible to receive public works

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The commissioner found the Agency failed to prove that Respondent Marion Allmendinger committed any violations of the prevailing wage rate laws or that she was a partner of William George Allmendinger in the work he did on the project. Although Respondent Marion Allmendinger consented to placement on the List of Ineligibles for a period of three years, the commissioner found that her unilateral consent to such placement was not binding because she had not violated any prevailing wage rate laws and her consent was not part of a settlement agreement of the case with the Agency pursuant to OAR 839-050-0220. Accordingly, the commissioner dismissed the Notice of Intent as to Respondent Marion Allmendinger. ORS 279.350, ORS 279.354, ORS 279.355, ORS 279.361, ORS 279.370, OAR 839-016-0010, OAR 839-016-0030, OAR 839-016-0035, OAR 839-016-0085, 839-016-0090, OAR 839-050-0220, OAR 839-016-0520, OAR 839-016-0530, OAR 839-016-0540.

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The above-entitled case came on regularly for hearing before Erika L. Hadlock, 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 June 27, 2000, in the conference room of

the Oregon Bureau of Labor and Industries, 165 East Seventh Street, Eugene, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Linda Lohr, an employee of the Agency. Respondent George Allmendinger did not appear at the hearing and nobody appeared on his behalf. Respondent Marion Allmendinger made a brief appearance through her attorney, Gary Ackley.

The Agency called Rohini Lata, Tyrone Jones, and Cynthia Domas as its witnesses. Respondents called no witnesses.

The forum received into evidence:

a) Administrative exhibits X-1 to X-20 (generated or filed prior to hearing) and X-21 to X-26 (generated or filed after hearing).

b) Agency exhibits A-1 through A-23 (submitted prior to hearing with the Agency's case summary) and A-24 to A-28 (submitted during the hearing).

c) ALJ exhibit ALJ-1.

Having fully considered the entire record in this matter, I, Jack Roberts, 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 29, 2000, the Agency issued a Notice of Intent

to Place on List of Ineligibles and to Assess Civil Penalties in which it made the following charges against Respondent William George Allmendinger ("George Allmendinger"):

a) Between approximately December 5 and December 12, 1998, Respondent provided manual labor on a public works project subject to regulation under Oregon's prevailing wage rate laws and intentionally failed to pay \$1907.24 in prevailing wages to three employees – Robert Russell, Brian Bowen, and Brent Corbin - in violation of ORS 279.350 and OAR 839-016-0035. The Agency sought a \$3000.00 penalty for each of these three alleged violations.

b) Respondent filed two inaccurate and incomplete certified payroll reports covering the periods September 16 through October 6, 1998 and October 7 through November 10, 1998, in violation of ORS 279.354 and OAR 839-016-0010. The Agency sought a \$5000.00 penalty for each of these two alleged violations.

c) Respondent did not comply with the Agency's request to provide records necessary to determine if it had paid its employees the prevailing rate of wage, within the time period set by the Agency, in violation of ORS 279.355 and OAR 839-016-0030. The Agency sought a \$3500.00 penalty for this alleged violation.

The Agency also asked that Respondent George Allmendinger and any firm, corporation, partnership or association in which he had a financial interest be placed on the list of those ineligible to receive contracts or subcontracts for public works for a period of three years.

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

3) The Agency served the Notice of Intent on George Allmendinger by certified mail at 84920 Ridgeway Road, Pleasant Hill, Oregon 97455, together with a document providing information on how to respond to a notice of intent.

4) Respondent George Allmendinger mailed an answer and request for hearing on March 23, 2000, which the Agency received on March 27. In his answer, George Allmendinger stated that his address was 84920 Ridgeway Road, Pleasant Hill, Oregon 97455 and admitted that:

-He was a subcontractor on the South Umpqua High School Reroofing Project ("Project") in Oregon;

-The Project was a public works project conducted by the South Umpqua School District #19 and consisted of construction, reconstruction and/or major renovation;

-The Project cost in excess of \$25,000.00, was not regulated under the federal Davis-Bacon Act, and was subject to regulation under Oregon's prevailing wage rate laws; and

- The Project was first advertised for bid on June 15, 1998, and the February 15, 1998, prevailing wage rate booklet applied to the Project.

George Allmendinger further alleged that two of the workers who claimed unpaid wages had "falsified their hours."

5) The Agency filed a request for hearing with the Hearings Unit on April 5, 2000.

6) On April 7, 2000, the Hearings Unit served Respondent George Allmendinger with: a) a Notice of Hearing in Case Number 90-00 that set the hearing for May 23, 2000; 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.

7) On April 11, 2000, the ALJ ordered the Agency and Respondent George Allmendinger 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 any wage, damages, and penalties calculations (for the Agency only). The ALJ ordered the participants to submit their case summaries by

May 9, 2000, and notified them of the possible sanctions for failure to comply with the case summary order. The ALJ also provided a form that Respondent could use to prepare a case summary.

8) On April 21, 2000, the Agency issued a second Notice of Intent to Place on List of Ineligibles and to Assess Civil Penalties, in which it made the following charges against Respondents Marion Allmendinger, dba Top Notch Construction, and John Wardle, dba Top Notch Construction:

a) Between approximately December 5 and December 12, 1998, Respondents provided manual labor on a public works project subject to regulation under Oregon's prevailing wage rate laws and intentionally failed to pay \$1907.24 in prevailing wages to three employees, in violation of ORS 279.350 and OAR 839-016-0035. The Agency sought a \$3000.00 penalty for each of these three alleged violations.

b) Respondents filed two inaccurate and incomplete certified payroll reports covering the periods September 16 through October 6, 1998 and October 7 through November 10, 1998, in violation of ORS 279.354 and OAR 839-016-0010. The Agency sought a \$5000.00 penalty for each of these two alleged violations.

c) Respondents did not comply with the Agency's request to provide records necessary

to determine if they had paid their employees the prevailing rate of wage, within the time period set by the Agency, in violation of ORS 279.355 and OAR 839-016-0030. The Agency sought a \$3500.00 penalty for this alleged violation.

The Agency also asked that Respondents Marion Allmendinger and John Wardle 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 for a period of three years.

9) This second Notice of Intent instructed Respondents Marion Allmendinger and John Wardle that they were required to make a written request for a contested case hearing within 20 days of the date on which they received the Notice, if they wished to exercise their right to a hearing.

10) The Agency served the second Notice of Intent on Marion Allmendinger and John Wardle by certified mail at 84920 Ridgeway Road, Pleasant Hill, Oregon, together with a document providing information on how to respond to a notice of intent.

11) By letter to the Agency dated April 22, 2000, Respondent Marion Allmendinger asserted that she had "never been a licensed contractor or performed any work as such." She further stated that she "did register for a business name, but never followed through

with the licensing,” that she “was never involved with the South Umpqua School District or performed any work for them,” and that she had “never had any employees.” Marion Allmendinger also stated that her son, Respondent Wardle, was serving with the military overseas.

12) The Agency notified Marion Allmendinger that her answer was insufficient because she had not requested a hearing. Marion Allmendinger then requested a hearing.

13) On May 5, 2000, the Agency requested a hearing in the case involving Respondents Marion Allmendinger and John Wardle. The Agency asked that this second case be consolidated with the case against Respondent George Allmendinger.

14) On May 8, 2000, the Hearings Unit served Respondents Marion Allmendinger and John Wardle with: a) a Notice of Hearing in Case Number 103-00 that set the hearing for May 23, 2000; 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) That same day, the ALJ granted the Agency's motion to consolidate Case Numbers 90-00 and 103-00. The ALJ extended the deadline for all participants to file case summaries until May 15, 2000.

16) On May 15, 2000, counsel for Respondent Marion Allmendinger filed a motion to postpone the hearing in the consolidated cases. The Agency filed a timely opposition to the motion.

17) The ALJ granted the motion to postpone by motion dated May 17, 2000, because: no previous postponements had been requested or granted; the request was timely; the second Notice of Hearing issued an unusually short time before the scheduled hearing date; Marion Allmendinger's counsel had a previously scheduled vacation; and Marion Allmendinger had not delayed obtaining counsel. Because of these circumstances, particularly the very short time between issuance of the second Notice and the scheduled hearing date, the ALJ found that the scheduling conflict of Marion Allmendinger's attorney constituted good cause for postponement. The ALJ requested that the participants confer on mutually acceptable hearing dates.

18) By letter dated May 23, 2000, case presenter Lohr notified the forum that she and Marion Allmendinger's attorney had determined that all participants other than John Wardle would be available for hearing during the week of June 26, 2000. Accordingly, the ALJ reset the hearing to commence on Tuesday, June 27, 2000, and changed the deadline for filing case summaries to June 13, 2000.

19) By letter dated June 7, 2000, the Agency moved to “de-

lete John Wardle as a respondent in \* \* \* Case No. 103-00," based on its satisfaction that Wardle was "in the military serving overseas." The ALJ granted the motion, noting that the hearing as to Respondents George Allmendinger and Marion Allmendinger remained scheduled to commence at 9:00 a.m. on Tuesday, June 27, 2000. The ALJ also reminded the participants that case summaries were due on June 13.

20) The Agency filed a timely case summary on June 13, 2000. Neither Respondent filed a case summary.

21) Respondent George Allmendinger did not appear at the scheduled time and place for hearing. The ALJ waited one-half hour for George Allmendinger to make an appearance. When he still had not appeared after the half-hour, the ALJ declared George Allmendinger to be in default.

22) Pursuant to ORS 183.415(7), the ALJ verbally advised the Agency and counsel for Respondent Marion Allmendinger of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

23) After case presenter Lohr made an opening statement for the Agency, Gary Ackley, counsel for Respondent Marion Allmendinger, made a brief statement in which he asserted that Marion Allmendinger would consent to being debarred for three years but contested the civil pen-

alties sought by the Agency. Ackley also asserted that Respondent Marion Allmendinger had been a registrant only of Top Notch Construction, not of Top Notch Construction & Roofing, which he asserted was the subcontractor in the case. Finally, Ackley presented a document to Lohr and asserted that it was a bankruptcy petition that Marion Allmendinger recently had filed. Ackley did not formally offer the petition as evidence, but the ALJ received it into evidence as Exhibit ALJ-1 at the close of the hearing.

24) After making his statement on behalf of Respondent Marion Allmendinger, Ackley stated that he would not be presenting evidence or making further argument. Ackley left the hearing before the Agency called its first witness.

25) The ALJ issued a proposed order on July 10, 2000, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. On July 18, 2000, the Agency filed exceptions. On July 19, 2000, Respondent Marion Allmendinger filed exceptions. These exceptions are addressed in the Opinion section of this Final Order.

26) On October 19, 2000, the forum issued an interim order reopening the record for the purpose of obtaining the Agency's statement on whether or not the Agency intended to accept Marion Allmendinger's consent to debarment for three years in settlement

of the charges against her in the Agency's second Notice of Intent.

27) On October 31, 2000, the Agency responded to the forum's interim order. The Agency stated that it did not intend to accept Marion Allmendinger's voluntary consent to debarment as an informal disposition of the Agency's charges against her and repeated its request that Marion Allmendinger be held jointly responsible for the violations found and jointly liable for civil penalties assessed.

#### **FINDINGS OF FACT – THE MERITS**

1) The Respondent in Case Number 90-00 is William George Allmendinger, who sometimes signs his name "George Allmendinger" and sometimes calls himself "William Allmendinger." The forum finds that the documents in this record<sup>1</sup> referring to William George Allmendinger, George William Allmendinger, George Allmendinger, or William Allmendinger all relate to the Respondent in Case Number 90-00. The order refers to this Respondent as "George Allmendinger," as that appears to be a name he frequently used.

2) On June 15, 1998, South Umpqua School District No. 19 advertised for bid the "South Umpqua High School 1998 Reroofing Project" in Myrtle Creek, Oregon ("the Project"). The Project was a

public works project that was not regulated under the federal Davis-Bacon Act, cost in excess of \$25,000.00, and was subject to regulation under Oregon's prevailing wage rate laws.

3) Harmon Construction was the prime contractor on the Project.

4) Because the Project was first bid in June 1998, the Agency's February 1998 prevailing wage rate book set forth the prevailing wage rates that were to be paid on the project. The applicable prevailing wage rate for roofers was \$17.64 per hour plus \$5.78 per hour in fringe benefits.

5) Respondent George Allmendinger registered the assumed business name "Top Notch Construction & Roofing" in 1996. That assumed business name failed on April 24, 1998, before the Project was bid.

6) Respondent George Allmendinger also registered with the Construction Contractors' Board ("CCB") in 1996 and was assigned CCB number 0117960. Allmendinger's CCB status became inactive when his bond lapsed in December 1997.

7) George Allmendinger was a subcontractor on the Project.

8) George Allmendinger employed Robert Russell, Brian Bowen, Robert Ward, and Brent Corbin as roofers on the Project.

9) Robert Russell filed a wage claim and a prevailing wage rate complaint with the Agency on December 24, 1998, claiming unpaid

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<sup>1</sup> Other than Exhibits A-24 and A-25. See Finding of Fact – the Merits 30, *infra*.

wages for work performed on the Project from December 2 to December 11, 1998. In his wage claim, Russell identified his employer as "George Allmondener" and "George Almondinger" and the name of his employer's business as "Top Notch" and "Top Notch Con."

10) Russell performed 54 hours of work for Respondent George Allmendinger on the Project from December 2, 1998, to December 11, 1998. Russell did not work more than 8 hours on any one day but did work two hours one Saturday. George Allmendinger had agreed to pay Russell \$10.00 per hour for the work he did on the Project but paid him only \$130.00.

11) To comply with the prevailing wage rate law, Respondent George Allmendinger would have had to pay Russell a total of \$1282.32 for the work he performed on the Project [54 total hours x (\$17.64 + \$5.78)/ hour + 2 overtime hours x (0.5 x \$17.64/overtime hour)].

12) Brian Bowen filed a wage claim and a prevailing wage rate complaint with the Agency on December 24, 1998, claiming unpaid wages for work performed on the Project from December 2 to December 11, 1998. In his wage claim, Russell identified his employer as "George Almendinger" and the name of his employer's business as "Top-Notch Construction" and "Top Notch Con."

13) Bowen also performed 54 hours of work for Respondent

George Allmendinger on the Project from December 2, 1998, to December 11, 1998. Bowen did not work more than 8 hours on any one day but did work two hours one Saturday. George Allmendinger had agreed to pay Bowen \$10.00 per hour for the work he did on the Project but paid him only \$70.00. To comply with the prevailing wage rate law, George Allmendinger would have had to pay Bowen \$1282.32 for the work he performed on the Project.

14) Harmon Construction paid \$400.00 each to Russell and Bowen as partial compensation for the wages George Allmendinger had not paid them.

15) On January 1, 1999, the architect for the Project, acting on behalf of South Umpqua School District No. 19, completed and submitted to the Agency a form entitled "Contracting Agency Information." One of the questions on the form requests "Names of known subcontractors." The handwritten answer includes the names "Top Notch Roofing, Custom Roofing, Harvey & Price Co., Bower Mechanical Contractors, Kunert Electric."

16) On January 13, 1999, Harmon Construction provided copies of two certified payroll reports ("CPRs") to the Agency. One of those CPRs was for the period of September 16, 1998, to October 6, 1998. Its author was George Allmendinger, who identified himself as the "owner" of the subcontractor, which he identified as "Top Notch Const." Allmend-

inger stated that his CCB registration number was 117960. The CPR listed only one employee, Robert Ward, who had worked as a roofer. The document did not state how many hours Ward had worked each day, only that he had worked a total of 80 hours. The CPR stated that Ward had been paid \$17.64 per hour, plus \$5.78 per hour in fringe benefits, for a total of \$1873.61.

17) The second CPR was for the period October 9, 1998, to November 10, 1998. The subcontractor again was identified as "Top Notch Const.," CCB number 117960. George Allmendinger identified himself as the owner of Top Notch Construction. The CPR listed two employees who had worked as roofers – Robert Ward and Brent Corbin. The document stated that Ward had worked 99 hours, for which he had been paid \$2318.58, and that Corbin had worked 30 hours, for which he had been paid \$702.60. The statement did not indicate how many hours these employees had worked each day.

18) The contract between Harmon Construction Company and South Umpqua School District No. 19 for the Project was offered and received into the record. A subcontract between Harmon Construction and George Allmendinger or Marion Allmendinger for work on the Project was not offered or produced at hearing.

19) Respondent Marion Allmendinger has the same address as Respondent George Allmend-

inger. In July 1998, Marion Allmendinger registered the assumed business name "Top Notch Construction." She remained the registrant for the assumed business name until January 29, 1999.

20) There is no evidence that Respondent Marion Allmendinger contracted or subcontracted to perform work on the Project, actually performed work on the Project, or employed any workers on the Project. There is no evidence in the record that Marion Allmendinger received or had a right to receive a share of any profits George Allmendinger may have made from subcontracting on the Project. There is no evidence in the record that Marion Allmendinger or George Allmendinger had expressed intent to form a partnership that would engage in work on the Project. There is no evidence in the record that Marion Allmendinger participated or had a right to participate in controlling the business that engaged in work on the Project. There is no evidence in the record that Marion Allmendinger and George Allmendinger shared or agreed to share losses of the business that engaged in work on the Project or liability for claims by third parties against that business. There is no evidence in the record that Marion Allmendinger contributed or agreed to contribute money or property to that business.

21) On February 9, 1999, Agency compliance specialist Rohini Lata sent a letter addressed to "Mr. Marion Allmendinger, Top Notch Construction, 84920

Ridgeway, Pleasant Hill, Oregon 97455" by certified mail in which Lata stated the Agency had received wage claims alleging that Top Notch Construction had failed to pay the prevailing wage on the South Umpqua High School Re-roofing Project. Lata requested all time records, payroll records, and certified payroll records for all persons who performed work on the Project, including the number of hours worked each day. She asked that the records be submitted no later than February 23, 1999, and stated that a failure to respond would result in additional enforcement action according to the prevailing wage rate laws. Lata explained at hearing that she had addressed the letter to "Mr. Marion Allmendinger" because that was the name of the current registrant for Top Notch Construction.

22) The post office returned Lata's February 9 letter as "unclaimed." Lata later resent the letter by regular mail and it was not returned.

23) On March 2, 1999, the Agency sent a Notice of Claim to Harmon Construction and the South Umpqua School District, informing them that there were pending prevailing wage claims on the Project. This Notice included Lata's preliminary determinations that the workers were owed unpaid wages as shown in the following chart. The amounts for Ward and Corbin were based on the hours worked as reported in the certified payroll reports, with no amount credited as having

been paid, as Lata had not yet received any evidence that those workers had received wages.

<u>Employee</u>	<u>Wages earned</u>	<u>Wages paid</u>	<u>Wages due</u>
Ward	\$4192.26	\$0.00	\$4192.26
Corbin	\$ 702.60	\$0.00	\$ 702.60
Russell	\$1307.70	\$130.00	\$1177.70
Bowen	\$1282.32	\$ 70.00	\$1212.32

24) On March 16, 1999, Lata sent a second letter by regular first class mail to "Mr. Marion Allmendinger" at "84920 Ridgeway, Pleasant Hill, Oregon 97455" in which she stated her conclusion that Allmendinger had violated the prevailing wage rate laws. Lata stated the amounts of wages she then believed were owing to Allmendinger's employees and explained that Allmendinger owed the workers those amounts, plus liquidated damages. She further explained the commissioner's ability to assess civil penalties and to debar subcontractors for prevailing wage rate violations. Lata asked Allmendinger to pay the individual workers the amounts they were owed by March 29, 1999.

25) On March 29, 1999, Respondent George Allmendinger sent Lata a letter stating that work on the Project had been performed by "Top Notch Construction & Roofing not Top Notch Construction." He further asserted that "Top Notch Construction & Roofing is owned by G. William Allmendinger, who is responsible for this, NOT Top Notch Construction." Respondent George Allmendinger acknowledged that he owed some wages

to Bowen and Russell, stating that he had paid only \$130.00 to Russell and only \$70.00 to Bowen. He denied the workers' claims that they had worked 54 hours, stating they had worked only 40 hours and denied owing any wages to Ward or Corbin. He asserted that he had paid \$702.60 to Corbin for work performed from October 7 through November 10. He also asserted that he had paid Ward \$1873.60 for work performed from September 16 to October 6 and \$2318.58 for work performed from October 7 through November 10.

26) Lata never received any information contradicting George Allmendinger's assertions regarding the amounts of money he had paid these four workers. The amounts Allmendinger claimed to have paid Corbin and Ward were the amounts required by the prevailing wage rate law, assuming the employees did not work overtime hours.

27) Lata wrote letters to Ward and Corbin asking them to contact her if Allmendinger owed them money. She received no response to those letters.

28) Lata sent another letter to "G. William Allmendinger, Top Notch Construction & Roofing, 84920 Ridgeway, Pleasant Hill, Oregon 97455" on April 21, 1999, again asking for all time records, payroll records, and certified payroll records for all persons who performed work for Allmendinger's company on the Project, including records of daily hours worked. She also asked for the names, addresses, and telephone num-

bers of all of Allmendinger's workers. Lata again explained the actions the Agency could take against Allmendinger for violations of the prevailing wage rate laws.

29) By May 21, 1999, Lata had received no response from Respondent George Allmendinger. Lata sent Allmendinger another letter stating that he owed unpaid wages of \$342.60 to Corbin, \$752.32 to Russell, and \$812.32 to Bowen.<sup>2</sup> Lata asked Allmendinger to pay these individuals the amounts owed by May 28, 1999. Lata never received any further communications from Allmendinger, who never paid the employees.

30) Lata's last day of employment with BOLI was May 31, 1999, and BOLI compliance specialist Tyrone Jones was assigned to complete the Allmendinger investigation.

31) As part of a settlement with BOLI, Harmon Construction paid the unpaid wages of George Allmendinger's workers by sending checks to BOLI in the amounts of \$752.32 for Russell, \$812.32 for Bowen, and \$342.60 for Corbin. BOLI distributed that money to the three workers.

32) The forum finds the claims of Bowen and Russell to be

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<sup>2</sup> Lata gave George Allmendinger credit for the \$400.00 Harmon Construction had paid to Bowen and to Russell. There is no explanation in the record for Lata's conclusion that George Allmendinger owed Corbin \$342.60 in unpaid wages.

credible. Each worker admitted that he had received a small payment from Respondent George Allmendinger and each further admitted that he had received \$400.00 from Harmon Construction. In the absence of any credible evidence to the contrary, the forum has no reason to disbelieve that Bowen and Russell worked the number of hours they claimed.

33) The forum disbelieves those statements of Respondent George Allmendinger that conflict with other credible evidence, particularly his claim that Russell and Bowen each worked only 40 hours. The forum disbelieves Allmendinger's claim primarily because it is not supported by any payroll records, which employers are legally obliged to maintain. Allmendinger never provided such records to the Agency, despite Lata's requests. Second, Allmendinger's claim conflicts with the assertions of Bowen and Russell, which the forum has concluded are credible. The forum's determination that certain statements of Respondent George Allmendinger are not credible is *not* based on Exhibits A-24 and A-25, records of two felony convictions of a "George William Allmendinger." Those records do not contain any information, such as a social security number or address, confirming that the subject of the records is the William George Allmendinger who is a respondent in this case. Accordingly, the forum gives them no weight.

#### ULTIMATE FINDINGS OF FACT

1) The Project was a construction, reconstruction or major renovation project carried out by the South Umpqua School District, a public agency, to serve the public interest. The Project was not regulated under the federal Davis-Bacon Act and had a cost of more than \$25,000.00.

2) Respondent George Allmendinger was a subcontractor on the Project.

3) Respondent George Allmendinger failed to pay two of his employees – Russell and Bowen - the prevailing rate of wage for the roofing work they did on the Project. Harmon Construction, the prime contractor on the Project, paid those wages because George Allmendinger had not.

4) Respondent George Allmendinger's failure to pay Russell and Bowen the prevailing rate of wage for all hours they worked on the Project was intentional.

5) The Agency did not meet its burden of proving that Respondent George Allmendinger failed to pay Corbin the prevailing rate of wage for the work he performed on the Project.

6) The two CPRs that Respondent George Allmendinger submitted for work on the Project were incomplete in that they did not specify the number of hours Corbin and Ward worked each day.

7) Respondent George Allmendinger knew or should have known that the CPRs were in-

complete. It would not have been difficult for him to file complete CPRs.

8) By letter dated April 21, 1999, Agency compliance specialist Lata asked Respondent George Allmendinger to provide time records, payroll records, and CPRs for all persons who performed work on the Project for his company, including records of daily hours worked. Lata asked George Allmendinger to provide the documentation by April 30, 1999. George Allmendinger did not respond to that letter and never supplied the requested records.

9) The Agency must know the daily hours worked by employees on public works projects to determine whether those employees have been paid or are being paid the prevailing rate of wage and any overtime wages that are due.

10) Respondent Marion Allmendinger was not a contractor or subcontractor on the Project and was not a partner of George Allmendinger in his work on the 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.”

See also OAR 839-016-0004(17) (similar). 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 Project was a public works project.

2) ORS 279.357 provides, in pertinent part:

“(1) ORS 279.348 to 279.380 do not apply to:

“(a) Projects for which the contract price does not exceed \$25,000.

“(b) Projects regulated under the Davis-Bacon Act (40 U.S.C. 276a). \* \* \*”

The Project did not fall within the exemptions created by ORS 279.357.

3) ORS 279.350 provides, in pertinent part:

“(1) 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, by the making of contributions of a type referred to in ORS 279.348(4)(a), or by the assumption of an enforceable commitment to bear the costs of a plan or program of a type referred to in ORS 279.348(4)(b), or any combination thereof, where the aggregate of any such payments, contributions and costs is not less than the prevailing rate of wage.”

OAR 839-016-0035 provides, in pertinent part:

“(1) 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.

“(2) Every person paid by a contractor or subcontractor in any manner for the person’s labor in the construction, reconstruction, major renovation or painting of a public work is employed and must receive no less than the prevailing rate of wage, regardless of any contractual relationship alleged to exist. Thus, for example, if partners are themselves performing the duties of a worker, the partners must receive no less than the prevailing rate of wage for the hours they are so engaged.”

Respondent George Allmendinger was required to pay the prevailing rate of wage to all workers he employed on the Project. George Allmendinger committed two violations of ORS 279.350 and OAR 839-016-0035 by failing to pay Russell and Bowen the prevailing wage rate for each hour they worked on the Project. The Agency did not meet its burden of proving that Respondent George Allmendinger failed to pay Corbin the prevailing rate of wage.

4) ORS 279.354(1) provides:

“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."

OAR 839-016-0010 provides, 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 contractor's 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."

The two CPRs Respondent George Allmendinger filed were incomplete because they did not state the daily hours worked by Corbin and Ward. Respondent George Allmendinger committed two violations of ORS 279.354(1) by submitting those incomplete CPRs.

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 ad-

vance, 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(1) and (2) provide:

"(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 sums paid as fees to the bureau. Such records shall be made available to representatives of the Wage and Hour Division for inspection and transcription during normal business hours.

"(2) The contractor or subcontractor shall make the records referred to in section (1) of this rule available within 24 hours of a request from a representative of the Wage and Hour Division or at such later date as may be specified by the division."

Respondent George Allmendinger violated ORS 279.355(2) and OAR 839-016-0030 by failing to provide payroll and time records, specifically records indicating daily

hours worked by each of his employees on the Project, after the Agency's April 21, 1999, request.

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 839-016-0520 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;

“\* \* \* \* \*

“(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 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 in this case is an appropriate exercise of his discretion.

7) ORS 279.361 provides, in pertinent part:

“(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, a subcontractor has failed to pay to its employees amounts required by ORS 279.350 and the contractor has paid those amounts on the subcontractor’s behalf, 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, 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;

“(b) The subcontractor has failed to pay its employees the prevailing rate of wage required by ORS 279.350 and the contractor has paid the employees on the subcontractor’s behalf[.]

“\* \* \* \* \*

“(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.”

OAR 839-016-0090 provides, in pertinent part:

“(1) The name of the contractor, subcontractor or other persons and the names of any firm, corporation, partnership or association in which the contractor or subcontractor has a financial interest whom the Commissioner has determined to be ineligible to receive pub-

lic works contracts shall be published on a list of persons ineligible to receive such contracts or subcontracts.

“(2) The list of persons ineligible to receive contracts or subcontracts on public works shall be known as the List of Ineligibles.”

Respondent George Allmendinger intentionally failed to pay the prevailing wage rate to Russell and Bowen for all the work they did on the Project. In addition, because of Respondent’s failure to pay the prevailing wage rate to these employees, Harmon Construction, the prime contractor on the Project, paid those wages on Respondent’s behalf. For both of these reasons, the commissioner must place Respondent George Allmendinger on the List of Ineligibles for a period not to exceed three years. The commissioner’s decision to place Respondent on the list for the entire three-year period is an appropriate exercise of his discretion.

8) Respondent Marion Allmendinger was not a contractor or subcontractor on the Project and was not a partner of George Allmendinger in his work on the Project. Accordingly, the charges against Marion Allmendinger are dismissed.

## OPINION

### DEFAULT

Respondent George Allmendinger failed to appear at hearing and the forum held him in default pursuant to OAR 839-050-0330.

When a respondent defaults, the Agency must establish a prima facie case to support the allegations of the charging document. *In the Matter of Belanger General Contracting*, 19 BOLI 17, 25 (1999). The Agency met that burden with regard to most of the charges against George Allmendinger, as discussed *infra*.

## LIABILITY OF RESPONDENT GEORGE ALLMENDINGER

### A. The violations

#### 1. Failure to pay the prevailing rate of wage

To establish a violation of ORS 279.350(1), which requires payment of the prevailing rate of wage on public works contracts, the Agency must prove:

- 1) The project at issue was a public work, as that term is defined in ORS 279.348(3);
- 2) The respondent was a contractor or subcontractor that employed workers on the public works project whose duties were manual or physical in nature;
- 3) The respondent failed to pay those workers at least the prevailing rate of wage for each hour worked on the project.

*In the Matter of Keith Testerman*, 20 BOLI 112, 126-27 (2000). With regard to Respondent George Allmendinger, only the third element is in dispute.

The Agency presented persuasive evidence that George Allmendinger failed to pay Russell

and Bowen the prevailing rate of wage for each hour they worked on the Project. George Allmendinger admitted in his March 29, 1999, letter to the Agency that he had paid only \$130.00 to Russell and only \$70.00 to Bowen – far less than the prevailing wage, even if the two men had worked only 40 hours each, as George Allmendinger asserted. This admission corroborates the claims of Russell and Bowen that George Allmendinger did not pay them all wages due. The evidence in the record is sufficient to establish that Respondent George Allmendinger committed two violations of ORS 279.350(1) by failing to pay Russell and Bowen the prevailing rate of wage for each hour they worked on the Project.

The Agency did not meet its burden of proving that George Allmendinger committed a third violation of ORS 279.350(1) by failing to pay Corbin the prevailing wage rate. The only evidence in the record concerning Corbin's work on the Project is the CPR stating that Corbin worked 30 hours and George Allmendinger's uncontroverted assertion that he paid Corbin \$702.60 for that work – the exact amount Lata calculated Corbin should have been paid under the prevailing wage rate laws. Corbin never claimed that Respondent had not paid him the wages he was due and there simply is no explanation in the record for Lata's conclusion that Respondent owed Corbin \$342.60 in unpaid wages.

## 2. Failure to provide documents

The Agency established that Respondent George Allmendinger did not respond to the Agency's April 21, 1999, request for payroll records the Agency deemed necessary to determine whether George Allmendinger had paid the prevailing wage rate to his employees on the Project. George Allmendinger violated ORS 279.355(2) and OAR 839-016-0030 by failing to provide the records upon the Agency's request.

## 3. Filing inaccurate or incomplete certified payroll reports

The two CPRs that Respondent George Allmendinger completed do not state the hours Corbin and Ward worked each day, as required by ORS 279.354(1). George Allmendinger committed two violations of ORS 279.354(1) by filing the two incomplete CPRs.

## **B. Civil Penalties**

The commissioner may impose a civil penalty up to \$5000.00 for each violation of the prevailing wage rate laws. OAR 839-016-0540(1).

The Agency seeks a \$3000.00 penalty for each of Respondent George Allmendinger's three alleged violations of ORS 279.350(1). For violations of ORS 279.350(1), which requires payment of the prevailing wage, the minimum civil penalty is \$1000.00 or the amount of unpaid wages,

whichever is less. OAR 839-016-0540(3).

The forum finds that George Allmendinger's two violations of ORS 279.350(1) are similar in severity to the violations committed by the subcontractor in the *Testerman* case. *Testerman*, 20 BOLI 112. In that case, Testerman, a subcontractor, failed to pay each of three employees all the wages they were due under the prevailing wage laws and the prime contractor paid the wages on Testerman's behalf. *Id.* at 128. The forum imposes the same penalty on Respondent George Allmendinger that it imposed on the *Testerman* subcontractor – a \$1000.00 penalty for each violation of ORS 279.350(1), for a total of \$2000.00.

The Agency seeks a \$3500.00 penalty for George Allmendinger's violation of ORS 279.355, which requires subcontractors on public works projects to provide the Agency with certain records upon the Agency's request. In determining the appropriate penalty, the forum considers: the subcontractor's actions in responding to previous violations, if any; the opportunity and degree of difficulty to comply; the magnitude and seriousness of the violation; and whether the subcontractor knew or should have known of the violation. OAR 839-016-0520(1).

In this case, each of the factors listed above suggests that a large penalty is appropriate. Respondent George Allmendinger provided very few payroll records to the Agency, only casual state-

ments of gross and net wages purportedly paid to Corbin and Ward. He provided *no* records related to the work performed by Russell and Bowen on the Project. It should not have been difficult for George Allmendinger to provide the records requested by the Agency, as he was legally required to make and maintain them. See OAR 839-016-0025. George Allmendinger had ample opportunity to comply with the Agency's request and did not do so. He knew or should have known of the violation because the Agency's April 1999 request for records was addressed to him personally. Finally, the forum finds George Allmendinger's violation of ORS 279.355(2) to be serious. The failure of subcontractors to provide requested records to the Agency undermines the Agency's ability to ensure that laborers on Oregon public works projects are paid the wages to which they are statutorily entitled.

The single factor mitigating the seriousness of this violation is the lack of evidence that George Allmendinger committed violations of the prevailing wage rate laws on previous occasions. That absence of previous violations does not outweigh the several aggravating factors in this case, discussed above. In light of those aggravating circumstances, the forum agrees with the Agency that a civil penalty of \$3500.00 is appropriate for George Allmendinger's violation of ORS 279.355(2).

The forum also penalizes Respondent George Allmendinger for

his two violations of ORS 279.354(1), which requires subcontractors to file complete and accurate certified payroll reports. The forum finds these violations to be similar in magnitude to the violations committed by the subcontractor in *Testerman* and imposes the same penalty as it did in that case -- \$1000.00 for each violation, for a total of \$2000.00. The forum disagrees with the Agency's assertion that the maximum \$5000.00 penalty for each violation is appropriate. The forum imposes that penalty in cases where the violations are widespread and the CPRs include intentional falsification of hours worked and wages paid. See, e.g., *In the Matter of Larson Construction Co., Inc.*, 17 BOLI 54, 79 (1998). Those aggravating factors are not present in this case.

### **C. Placement on the List of Ineligibles**

When the commissioner determines that a contractor or subcontractor has intentionally failed to pay the prevailing rate of wage, the commissioner must place the contractor or subcontractor and any firm, corporation, partnership or association in which the contractor or subcontractor has an interest on the list of those ineligible to receive public works contracts or subcontracts (the "List of Ineligibles") for a period not to exceed three years. ORS 279.361(1); *In the Matter of Southern Oregon Flagging*, 18 BOLI 138, 169 (1999). The commissioner must also place on the List of Ineligibles any subcontractor

that has failed to pay the prevailing rate of wage, whether or not that failure was intentional, if the contractor has paid the wages on the subcontractor's behalf. ORS 279.361(1). In this case, Respondent George Allmendinger must be placed on the List of Ineligibles both because his failure to pay the prevailing wage rate was intentional and because Harmon Construction paid wages to Russell and Bowen on his behalf.

Although the commissioner must place a contractor or subcontractor who commits such violations on the List of Ineligibles for a period not to exceed three years, he may consider mitigating factors in determining whether the debarment should last less than the entire three-year period. See *In the Matter of Southern Oregon Flagging*, 18 BOLI 138, 169 (1999). In this case, there are no mitigating factors except for the lack of evidence that George Allmendinger previously has violated the prevailing wage rate laws. Despite that fact, the forum finds George Allmendinger's current violations of the prevailing wage rate laws sufficiently serious to warrant a three-year debarment. Accordingly, this Order places George Allmendinger and any firm, corporation, partnership or association in which he has a financial interest on the List of Ineligibles for the entire three years permitted by law.

## LIABILITY OF RESPONDENT MARION ALLMENDINGER

Respondent Marion Allmendinger, through counsel, consented to being placed on the List of Ineligibles for a period of three years. Based on that concession, the ALJ recommended in the Proposed Order that Marion Allmendinger and any firm, corporation, partnership or association in which she has a financial interest should be ineligible to receive any contract or subcontract for public work for a period of three years from the date of publication of her name on the list of those ineligible to receive such contracts. The ALJ declined to assess any civil penalties against Marion Allmendinger, finding that she was not a subcontractor on the Project or a partner with George Allmendinger in work performed on the Project.

In its exceptions, the Agency contends that Respondent Marion Allmendinger should be placed on the List of Ineligibles and held jointly and severally liable for the civil penalties imposed on George Allmendinger because she was the owner, or alternatively, co-owner, of the “Top Notch” business that did roofing work on the Project.

The Agency argues that circumstantial evidence consisting of the pre-Project failure of George Allmendinger’s assumed business name<sup>3</sup> and Marion Allmendinger’s

subsequent registration under the assumed business name of “Top Notch Construction” during the performance of the Project<sup>4</sup> create an inference that Marion Allmendinger was a sole proprietor and the actual owner of the business. In contrast, Respondent George Allmendinger admitted he was the subcontractor and actual owner of the business, two employees identified him as the subcontractor and their employer, and the contracting agency identified “Top Notch Roofing” as a subcontractor on the Project. Under these circumstances, the forum declines to draw the inference sought by the Agency.<sup>5</sup>

In the alternative, the Agency argues that George and Marion Allmendinger were co-owners and partners in the business that did roofing work on the Project. The only evidence in the record connecting Marion Allmendinger with the Project is the fact that she was the registrant of Top Notch Construction, the assumed business name that George Allmendinger used in completing the two certified payroll statements, and she

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<sup>4</sup> See Finding of Fact – The Merits 19, *supra*.

<sup>5</sup> The forum notes that if the Agency’s argument prevailed, the forum would have to dismiss the charges against Respondent George Allmendinger. The forum is only authorized to assess civil penalties or place on the List of Ineligibles an actual contractor or subcontractor. Where the contractor or subcontractor is a sole proprietor, only that individual can be held liable.

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<sup>3</sup> See Finding of Fact – The Merits 5, *supra*.

has the same address as George Allmendinger. Those two facts alone are not sufficient to establish a partnership.

In the absence of any evidence that Marion Allmendinger and George Allmendinger intended to form a partnership, that Marion Allmendinger invested in George Allmendinger's business, that she had a right to receive profits from or to control the business, or that she was involved in any way in George Allmendinger's work on the Project, the forum will not infer that a partnership existed.<sup>6</sup> Furthermore, because Marion Allmendinger was not a partner of George Allmendinger in his work on the Project, she could not have been a contractor or subcontractor on the Project.

In conclusion, the forum overrules the Agency's exceptions and

will not hold Marion Allmendinger jointly and severally liable for the penalties imposed on George Allmendinger for his violations of the prevailing wage rate laws. Since Marion Allmendinger was not a contractor or subcontractor who intentionally failed or refused to pay the prevailing rate of wage to workers employed upon public works, the forum lacks authority to place her on the List of Ineligibles unless her consent to such placement was part of a settlement agreement arrived at pursuant to OAR 839-050-0220. That is not the case.<sup>7</sup> The forum therefore dismisses the charges against her.

#### ORDER

NOW, THEREFORE, as authorized by ORS 279.370 and as payment of the penalty assessed as a result of Respondent William George Allmendinger's violations of ORS 279.350, ORS

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<sup>6</sup> Cf. *In the Matter of Harold Zane Block*, 17 BOLI 150, 161 (1998) (Agency failed to establish a prima facie case of partnership where there was no evidence that the respondents intended to form a partnership or that the respondent whom the Agency sought to prove was a partner of the liable employer "owned any assets of the business, shared in any of the business's losses, or controlled the business's operations."). Compare *In the Matter of Scott A. Andersson*, 17 BOLI 15 (1998) (existence of partnership proved by evidence that respondent "had the right to share in the profits, the liability to share losses, \* \* \* the right to exert some control over the business" and "characterized herself as an 'owner' of the business in her answer.").

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<sup>7</sup> See Findings of Fact – Procedural 23, 26, 27, *supra*.

279.354, ORS 279.355, OAR 839-016-0010, OAR 839-016-0030, and OAR 839-016-0035, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **William George Allmendinger** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232, a certified check payable to the Bureau of Labor and Industries in the amount of SEVEN THOUSAND FIVE HUNDRED DOLLARS (\$7500.00), plus any interest that accrues at the legal rate on that amount from a date ten days after issuance of the Final Order in this case and the date Respondent complies with the Final Order.

FURTHERMORE, as authorized by ORS 279.361, the Commissioner of the Bureau of Labor and Industries hereby orders that Respondent **William George Allmendinger** and any firm, corporation, partnership or association in which he has a financial interest shall be ineligible to receive any contract or subcontract for public work for a period of three years from the date of publication of his name on the list of those ineligible to receive such contracts maintained and published by the Commissioner of the Bureau of Labor and Industries.

The commissioner further dismisses the Notice of Intent as to Respondent Marion Allmendinger.

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**In the Matter of**

**COX AND FREY ENTERPRISES,  
INC., dba Builders/Interwest,  
Respondent.**

**Case No. 07-01  
Final Order of the  
Commissioner Jack Roberts  
Issued January 18, 2001**

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**SYNOPSIS**

Respondent employed Claimant as a construction worker for five years, during which time Respondent unlawfully deducted and retained \$8,899.62 in "process fees" from Claimant's paychecks to offset Respondent's undocumented administrative expenses related to issuing hundreds of payroll draws to Claimant. In addition, Respondent's payroll records show that another \$4,018.24 in unsubstantiated deductions were taken from Claimant's paychecks during Claimant's last several years of work. Respondent was ordered to pay \$12,917.86 in due and unpaid wages. Respondent's failure to pay the wages was willful, and Respondent was ordered to pay \$2,400.00 in civil penalty wages. ORS 652.140(2), 652.150, 652.610.

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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 October 24, 2000, in the conference room of the Bureau of Labor and Industries, 165 E. 7<sup>th</sup>, Suite 220, Eugene, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by David K. Gerstenfeld, an employee of the Agency. Claimant Kenneth R. Dick was present throughout the hearing and was not represented by counsel. Cox and Frey Enterprises, Inc. ("Respondent") was represented by Michael T. Barrett, attorney at law. Marvin "Pete" Cox was present throughout the hearing as the person designated by Respondent to assist in the presentation of its case.

The Agency called as witnesses, in addition to Claimant: Marvin "Pete" Cox, Respondent's general manager, and Margaret Trotman, Compliance Specialist, Wage and Hour Division.

Respondent called Marvin "Pete" Cox as a witness.

The forum received into evidence:

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

b) Agency exhibits A-1 through A-8 (submitted prior to hearing) and A-10 (submitted at hearing).

Respondent offered no exhibits.

Having fully considered the entire record in this matter, I, Jack Roberts, 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 May 10, 1999, Claimant filed a wage claim with the Agency. He alleged that Respondent 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 Labor and Industries, in trust for Claimant, all wages due from Respondent.

3) Claimant brought his wage claim within the statute of limitations.

4) On May 1, 2000, the Agency served Order of Determination No. 99-1661 on Respondent based upon the wage claim filed by Claimant and the Agency's investigation. The Order of Determination alleged that Respondent owed a total of \$12,917.68 in unpaid wages and \$2,428.80 in civil penalty wages, plus interest, and required that, within 20 days, Respondent 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.

5) On May 10, 2000, Respondent, through counsel Michael T. Barrett, filed an answer and request for hearing. Respondent's answer included counterclaims that Claimant used two trucks belonging to Respondent for personal business and owed Respondent \$5,000, calculated at the rate of \$.40 per mile, and that Claimant performed a roofing job on his own time using Respondent's tools and materials without permission or authorization, to Respondent's detriment in the amount of \$1,500.

6) On August 1, 2000, the Agency filed a "BOLI Request for Hearing" with the forum.

7) On August 2, 2000, the Hearings Unit issued a Notice of Hearing to Respondent, Respondent's counsel, the Agency, and the Claimant stating the time and place of the hearing as October 24, 2000, at 9:00 a.m., in Eugene, 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, and a copy of the forum's contested case hearings rules, OAR 839-050-000 to 839-050-0440.

8) On August 14, 2000, the Notice of Hearing packet sent to Michael T. Barrett, Respondent's counsel, was returned to the forum by the U.S. Postal Service.

The envelope was stamped "RETURN TO SENDER[.] BARRETT'MICHAEL MOVED[.] LEFT NO ADDRESS[.] UNABLE TO FORWARD[.] RETURN TO SENDER."

9) On August 15, 2000, the forum issued an interim order directing Respondent to notify the forum whether it was still represented by Mr. Barrett and, if so, to provide his current address and telephone number.

10) On August 22, 2000, the Agency case presenter notified the forum that Mr. Barrett's new mailing address was 3000 Market St. Plaza, Suite 515, Salem, Oregon 97301.

11) On or about August 25, 2000, the forum mailed the Notice of Hearing packet to Mr. Barrett at his new mailing address.

12) On August 28, 2000, the forum ordered the Agency and Respondent 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; a brief statement of the elements of the claim (for the Agency only); a brief statement of any defenses to the claim (for Respondent only); 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 October 13, 2000, and notified them of the possible sanctions for failure to comply with the case summary order.

13) On September 29, 2000, the Agency filed a motion for partial summary judgment on the following issues:

a) That Respondent owes Claimant \$3,899.62 in unpaid wages, plus interest, for the time period covering the weeks ending November 2, 1996, through April 17, 1999, for "process fees" Respondent withheld from Claimant's paychecks;

b) That Respondent owes Claimant \$2,400 in penalty wages, plus interest thereon at the legal rate.

14) On October 5, 2000, Respondent filed objections to the Agency's motion.

15) On October 11, 2000, the forum issued an interim order granting the Agency's motion for partial summary judgment. That interim order, which contains the following language, is affirmed:

#### **"Introduction**

"This is a single claimant wage claim case involving a wage claim filed by Kenneth R. Dick ('Claimant') against Respondent. In its Order of Determination, the Agency alleged that Respondent owed Claimant owed \$12,917.86 in unpaid wages. On September 29, 2000, the Agency filed a motion for partial summary judgment, contending that undisputed facts entitle the Agency to judgment as a matter of law on two issues: (1) Respondent owes Claimant

\$3,899.62 in unpaid wages that were deducted from pay advances issued to Claimant as 'process fees'; and (2) Respondent is liable for civil penalty wages in the amount of \$2400 based on those deductions. Respondent filed a responsive pleading on October 6 in which it opposed 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 follows:

' \* \* \* No genuine issue as to a material fact exists if, based upon the record before the court viewed in a manner most favorable to the adverse party, no objectively reasonable juror could return a verdict for the adverse party on the matter that is the subject of the motion for summary judgment. The adverse party has the burden of producing evidence on any issue raised in the motion as to which the adverse party would have the burden of persuasion at [hearing].' ORCP 47C.

**“Respondent’s Deduction Of \$3,899.62 For “Process Fees.”**

“The undisputed facts show the following. Claimant was employed by Respondent between approximately August 9, 1994 through April 17, 1999. Between the weeks ending November 2, 1996 through April 17, 1999, Claimant requested and received literally hundreds of checks that constituted advance draws on his pay. For all but a handful of these payroll draws, Respondent charged a process fee amounting to \$5.00 or 10% of the advance, whichever was greater. Before each draw, Claimant signed a “draw form” with form language that read as follows:<sup>1</sup>

‘AMOUNT OF DRAW  
PROCESS FEE  
TOTAL AMOUNT TO BE WITHHELD FROM PAYROLL  
WEEK ENDING: \_\_\_\_\_  
CK: \_\_\_\_\_  
I AM HEREWITH REQUESTING THAT THE COMPANY ADVANCE THESE FUNDS TO ME AND REDUCE MY PAYROLL BY AN AMOUNT EQUAL TO THE DRAW AMOUNT PLUS ANY FUNDS OWED TO THE COMPANY. I AM AWARE

<sup>1</sup> Although Respondent only submitted a copy of one draw form signed by Claimant on 1/15/98 in support of its objections to the Agency’s motions, for the purpose of this motion, the forum assumes that Claimant signed a draw form before obtaining each draw.

THAT A PROCESS FEE WILL BE CHARGED ON THE DRAW AND I AM AUTHORIZING BOTH THE DRAW AND THE PROCESS FEE.

This document also serves as a “Promissory Note” payable to Builders Interwest. For value received, the undersigned promises to pay the full amount of this draw together with interest at the rate of 24% per annum.

The undersigned waives demand, presentment and notice of dishonor.

EMPLOYEE SIGNATURE: \_\_\_\_\_

DATE: \_\_\_\_\_

APPROVAL SIGNATURE \_\_\_\_\_

DATE \_\_\_\_\_

The total amount of process fees charged to Claimant on account of his payroll draws and deducted from his wages during this time period was \$3,899.62.

“The Agency contends that these deductions were unlawful as a matter of law. Respondent contends that the deductions were authorized by ORS 652.610(3)(b).

“ORS 642.610(3) governs deductions that may be taken from an employee’s wages. It provides that an employer may not deduct any part of an employee’s wages unless one of five specific exceptions applies. The Agency and Respondent are in agreement that four of those exceptions do not apply, and the forum agrees with that conclusion. ORS 652.610(3)(b) contains the remaining exception, which Respondent contends applies

to this case. It reads as follows:

'(3) No employer may withhold, deduct or divert any portion of an employee's wages unless:

\*\* \* \* \* \*

'(b) The deductions are authorized in writing by the employee, are for the employee's benefit, and are recorded in the employer's books[.]'

Respondent argues this exception applies because: (1) Claimant authorized the deduction in writing when he signed the draw forms; (2) The deductions were recorded in Respondent's books; and (3) The deductions were for Claimant's benefit, in that it was not feasible for Respondent to provide draws to Claimant without charging a process fee, given the huge number of draws requested by Claimant and costs incurred by Respondent in providing those draws.

"Viewing the evidence in the light most favorable to Respondent, it appears that the deductions were recorded in Respondent's books. The draw form, however, conspicuously fails to mention the charge for process fees. Claimant cannot be said to have authorized a deduction in an unspecified amount. Respondent's claim that the deductions were for Claimant's benefit also fails. Respondent

was the beneficiary of the deductions, not Claimant. The fact that Claimant was required to authorize a deduction of indeterminate amount as a condition to getting one of his numerous pay draws does not lead to the corollary that the resultant deduction was a benefit to him.

"Respondent's deductions of \$3,899.62 from Claimant's wages for 'process fees' do not fall within the statutory exception created by ORS 652.610(3)(b). The Agency's motion for partial summary judgment on this sum, with interest thereon, is **GRANTED**.

#### **"Civil Penalty Wages**

"ORS 652.150 provides:

'If an employer willfully fails to pay any wages or compensation of any employee whose employment ceases, as provided in ORS 652.140 and 652.145, then, as a penalty for such non-payment, 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; provided, that in no case shall such wages or compensation continue for more than 30 days from the due date; and provided further, the employer may avoid liability for the penalty by showing financial inability to pay the

wages or compensation at the time they accrued.'

The undisputed facts pertinent to this issue are that Claimant was paid \$10.00 per hour during his employment with Respondent and more than 30 days has expired since Respondent last made a deduction for 'process fees' from Claimant's wages. Respondent has not plead financial inability to pay. The only issue is whether Respondent's unlawful deductions were 'willful,' a term this forum has frequently interpreted in the past. 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. *In the Matter of Barbara Coleman*, 18 BOLI at 219. Respondent, as an employer, had a duty to know the amount of wages due its employees. *In the Matter of R.L. Chapman Ent. Ltd.*, 17 BOLI 277, 285 (1999). There is no dispute that Respondent knew the amount of wages due Claimant or the amount it deducted for 'process fees.' Respondent argues it 'was not a free agent as defined by caselaw cited by [the] Agency, in that it had to have some way of recovering the costs it incurred to make this benefit to Claimant possible.' However, Respondent has produced no evidence to show it was under

duress or coercion in making its business decision to charge process fees. The need to recover costs does not mean Respondent was not a free agent in deciding to recover those costs by deducting them directly from Claimant's paycheck. Accordingly, the forum concludes that Respondent acted willfully.

"The Agency's motion for summary judgment on the issue of civil penalty wages is **GRANTED**. The forum assesses penalty wages in the amount of \$2,400.00, the amount sought in the Order of Determination. This figure is computed by multiplying \$10.00 per hour x 8 hours per day x 30 days, pursuant to ORS 652.150 and OAR 839-001-0470."

16) The Agency filed its case summary, with attached exhibits, on October 12, 2000. Respondent filed its case summary, without exhibits, on October 12, 2000.

7) At the start of the hearing, pursuant to ORS 183.415(7), 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.

18) Prior to opening statements, the Agency and Respondent stipulated that exhibits A-1 through A-9 would be admitted without objection. Respondent also withdrew the

affirmative defenses and counter-claims raised in its Answer.

19) During the hearing, the Agency and Respondent stipulated that Respondent deducted \$5,000 from Claimant's wages for "process fees" associated with pay advances given to Claimant between August 1994 and October 26, 1996.

20) The evidentiary record of the hearing closed on October 24, 2000.

21) The ALJ issued a proposed order on November 29, 2000, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. The forum received no exceptions.

#### **FINDINGS OF FACT – THE MERITS**

1) At all times material herein, Respondent Cox and Frey Enterprises, Inc. was an Oregon corporation doing business under the assumed business name of Builders Interwest and engaged the personal services of one or more employees.

2) Claimant was employed by Respondent from August 1994 through April 12, 1999. Claimant ran Respondent's gutter truck crew.

3) Between October 27, 1996, and May 30, 1998, Respondent paid Claimant the agreed upon wage of \$9.50 per hour. Respondent paid Claimant the agreed upon wage of \$10.00 per hour during Claimant's last year of employment with Respondent.

4) During Claimant's employment, Respondent's work week was Sunday to Saturday. Respondent paid its employees on Friday immediately following the work week.

5) During Claimant's employment, Claimant requested and received hundreds of payroll draws on wages that were not yet due, and sometimes had not been earned.

6) Claimant signed an authorization slip for the majority of payroll draws that he received.<sup>2</sup>

7) For all but a handful of these payroll draws, Respondent charged a process fee of \$5.00 or 10% of the draw, whichever was greater. Each process fee was subsequently deducted from Claimant's paychecks.

8) The process fee was Respondent's attempt to recoup administrative expenses associated with issuing payroll draws to Claimant. Respondent retained each process fee deducted from Claimant's paychecks.

9) Respondent intentionally deducted the process fees.

10) Respondent made no attempt to calculate its costs associated with issuing payroll draws to Claimant.

11) Between August 1994 and October 26, 1996, Respondent deducted \$5,000.00 from

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<sup>2</sup> See Finding of Fact – Procedural 15, *supra*, for the exact wording of the authorization slips.

Claimant's pay for process fees related to payroll draws issued to Claimant. Respondent retained these deductions.

12) Margaret Trotman is the Agency Compliance Specialist who investigated Claimant's wage claim. During her investigation, Respondent provided her with "payroll check history reports" related to Claimant's wages paid by check between October 11, 1996, through April 23, 1999. These reports contain entries in the following categories for each paycheck issued by Respondent to Claimant in this time period:

- a) Check date;
- b) Check number;
- c) Regular hours worked;
- d) Overtime hours worked;
- e) Gross wages;
- f) Federal withholding;
- g) FICA withholding;
- h) Medicare withholding;
- i) State withholding;
- j) Other taxes;
- k) Other deductions;
- l) Check amount.

13) During Trotman's investigation, Respondent provided records of all payroll advances received by Claimant and the amount of process fee deducted for each advance between October 29, 1996, and April 17, 1999. Those records showed that Respondent paid out \$35,740.88 in payroll advances and deducted

\$3,899.62 in process fees in that time period.

14) Trotman used Respondent's payroll check history reports and records of payroll advances and process fee deductions to prepare a spreadsheet that chronologically listed and summarized the figures contained in those reports and records for the period of time covering paychecks issued beginning November 8, 1996,<sup>3</sup> until April 23, 1999. Trotman's summary appears on page 20 of Exhibit A-5.

15) Marvin Cox, Respondent's general manager, testified that he had reviewed page 20 of Exhibit A-5 and that the figures listed on it were accurate.

16) Respondent's "payroll check history reports" show that Claimant earned \$54,019.83 gross wages between October 27, 1996, and April 12, 1999, his last date of employment with Respondent. Trotman recalculated the gross wages earned by Claimant in this time and determined that Claimant had actually earned only \$53,596.19 during that time period. The Agency based its pleadings on Trotman's calculations, and the forum adopts the lower figure of \$53,596.19 as the gross wages earned by Claimant

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<sup>3</sup> Because Respondent issued paychecks to its employees six days after the conclusion of the work week in which the wages were earned, the November 8, 1996, paycheck reflects wages earned between October 27 and November 2, 1996. See Finding of Fact – The Merits 4, *supra*.

for work performed between October 27, 1996, and April 12, 1999.

17) Claimant was actually paid \$45,678.33 in gross wages for work performed between October 27, 1996, and April 12, 1999. This figure was derived by adding together the amount of lawful deductions<sup>4</sup> taken from Claimant's checks (\$7,298.47), his total payroll draws (\$35,740.88), and the net amount of his payroll checks (\$2,638.98).

18) The difference between what Claimant earned in wages between October 27, 1996, and April 12, 1999, and what Respondent paid Claimant is \$7,917.86. \$3,889.62 of this sum represents process fees.<sup>5</sup> The remaining \$4,018.24 represents unsubstantiated deductions Respondent took from Claimant's paychecks. Cox testified that an unspecified amount of garnishments and loan repayments were included in this \$4,018.24 total, but Respondent did not provide documentation or written authorization for these deductions.

19) Claimant quit Respondent's employment on April 12, 1999, and was issued his final paycheck on April 23, 1999.

20) Respondent has not paid Claimant the \$5,000 in process fees that were deducted from his wages between August 1994 and October 26, 1996, or the \$7,917.86 in process fees and unsubstantiated deductions that Respondent deducted from Claimant's wages between October 27, 1996, and April 23, 1999. Total unpaid wages due and owing to Claimant amount to \$12,917.86.

22) Civil penalty wages, computed in accordance with ORS 652.150 and OAR 839-001-0470(1), equal \$2,400 (\$10.00 per hour x 8 hours x 30 days = \$2400).

#### ULTIMATE FINDINGS OF FACT

1) At all times material herein, Respondent Cox and Frey Enterprises, Inc. was an Oregon corporation doing business under the assumed business name of Builders Interwest that engaged the personal services of one or more employees.

2) Claimant was employed by Respondent from August 1994 through April 12, 1999.

3) Between August 1994 and October 26, 1996, Respondent deducted \$5,000.00 from Claimant's wages for process fees related to payroll draws issued to Claimant.

4) Between October 27, 1996, and April 12, 1999, Claimant earned \$53,596.19 in gross wages and has only been paid \$45,678.33. Claimant was paid the agreed upon rate of \$10.00

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<sup>4</sup> The forum includes federal withholding, FICA withholding, Medicare withholding, and state withholding in the category of "lawful deductions."

<sup>5</sup> See Finding of Fact – The Merits 13, *supra*.

per hour during his last year of employment with Respondent.

5) Between October 27, 1996, and April 23, 1999, Respondent deducted \$3,889.62 from Claimant's wages for process fees related to payroll draws issued to Claimant.

6) Claimant signed an authorization slip for the majority of his payroll draws.<sup>6</sup> Respondent deducted process fees from Claimant's paychecks in an attempt to recoup the cost of issuing payroll draws to Claimant. Respondent retained the deducted process fees and made no attempt to calculate its costs associated with issuing payroll draws to Claimant.

7) Between October 27, 1996, and April 23, 1999, Respondent made an additional \$4,018.24 in unsubstantiated deductions from Claimant's paychecks.

8) Respondent has not reimbursed Claimant for any of these deductions and owes Claimant \$12,917.86 in due and unpaid wages.

9) Respondent willfully failed to pay Claimant \$12,917.86 in earned, due, and payable wages within five days, excluding Saturdays, Sundays, and holidays, after Claimant quit, and more than 30 days have elapsed from the date Claimant's wages were due.

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<sup>6</sup> However, this authorization slip did not meet the requirements of ORS 652.610. See Finding of Fact – Procedural 15, *supra*.

## CONCLUSIONS OF LAW

1) During all times material herein, Respondent Cox and Frey Enterprises, Inc. was an employer and Claimant was an employee subject to the provisions of ORS 652.110 to 652.200 and 652.310 to 652.405. During all times material, Respondent employed Claimant.

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) At times material, ORS 652.140(2) provided:

“When an employee who does not have a contract for a definite period quits employment, all wages earned and unpaid at the time of quitting become due and payable immediately if the employee has given to the employer not less than 48 hours' notice, excluding Saturdays, Sundays and holidays, of intention to quit employment. If notice is not given to the employer, the wages shall be due and payable within five days, excluding Saturdays, Sundays and holidays, after the employee has quit, or at the next regularly schedule payday after the employee has quit, whichever event first occurs.”

At times material, ORS 652.610 provided:

“(1) All persons, firms, partnerships, associations, cooperative associations, cor-

porations, municipal corporations, the state and its political subdivisions, except the federal government and its agencies, employing, in this state, during any calendar month one or more persons, and withholding for any purpose, any sum of money from the wages, salary or commission earned by an employee, shall provide such employee on regular paydays with a statement sufficiently itemized to show the amount and purpose of such deductions made during the respective period of service which said payment covers.

“(2) The itemized statement shall be furnished to the employee at the time payment of wages, salary or commission is made, and may be attached to or be a part of the check, draft, voucher or other instrument by which payment is made, or may be delivered separately from such instrument.

“(3) No employer may withhold, deduct or divert any portion of an employee's wages unless:

“(a) The employer is required to do so by law;

“(b) The deductions are authorized in writing by the employee, are for the employee's benefit, and are recorded in the employer's books;

“(c) The employee has voluntarily signed an authorization for a deduction for any other

item, provided that the ultimate recipient of the money withheld is not the employer, and that such deduction is recorded in the employer's books;

“(d) The deduction is authorized by a collective bargaining agreement to which the employer is a party; or

“(e) The deduction is made from the payment of wages upon termination of employment and is authorized pursuant to a written agreement between the employee and employer for the repayment of a loan made to the employee by the employer, if all of the following conditions are met:

“(A) The employee has voluntarily signed the agreement;

“(B) The loan was paid to the employee in cash or other medium permitted by ORS 652.110;

“(C) The loan was made solely for the employee's benefit and was not used, either directly or indirectly, for any purpose required by the employer or connected with the employee's employment with the employer;

“(D) The amount of the deduction at termination of employment does not exceed the amount permitted to be garnished under ORS 23.185 (1)(a) or (d); and

“(E) The deduction is recorded in the employer's books.

“(4) Nothing in this section shall be construed as prohibiting the withholding of amounts authorized in writing by the employee to be contributed by the employee to charitable organizations, including contributions made pursuant to ORS 243.666 and 663.110; nor shall this section prohibit deductions by check-off dues to labor organizations or service fees, where such is not otherwise prohibited by law; nor shall this section diminish or enlarge the right of any person to assert and enforce a lawful setoff or counterclaim or to attach, take, reach or apply an employee's compensation on due legal process.

Respondent deducted \$8,899.62 in process fees from Claimant's wages between August 1994 and April 12, 1999. These deductions were not authorized by law. Respondent additionally took \$4,018.24 in unsubstantiated deductions from Claimant's wages between October 27, 1996, and April 23, 1999. Respondent violated ORS 652.140(2) by failing to pay Claimant these wages no later than April 19, 1999, five business days after Claimant quit. In total, Respondent owes Claimant \$12,917.86 in unpaid wages that are due and owing.

4) ORS 652.150 provides:

“If an employer willfully fails to pay any wages or compensation of any employee whose employment ceases, as provided in ORS 652.140 and 652.145, then, as a penalty for

such 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; provided, that in no case shall such wages or compensation continue for more than 30 days from the due date; and provided further, the employer may avoid liability for the penalty by showing financial inability to pay the wages or compensation at the time they accrued.”

OAR 839-001-0470(1) provides:

“(1) When an employer willfully fails to pay all or part of the wages due and payable to the employee upon termination of employment within the time specified in OAR 839-001-0420, 839-001-0430 and 839-001-0440, the employer shall be subject to the following penalty:

“(a) The wages of the employee shall continue from the date the wages were due and payable until the date the wages are paid or until a legal action is commenced, whichever occurs first;

“(b) The rate at which the employee's wages shall continue shall be the employee's hourly rate of pay times eight (8) hours for each day the wages are unpaid;

“(c) Even if the wages are unpaid for more than 30 days, the maximum penalty shall be

no greater than the employee's hourly rate of pay times 8 hours per day times 30 days."

Respondent is liable for \$2,400 in civil penalties under ORS 652.150, computed by multiplying Claimant's hourly rate (\$10.00 per hour) x 8 hours per day x 30 days = \$2,400, for willfully failing to pay all wages or compensation to Claimant when due as provided in ORS 652.140(2).

5) 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 pay Claimant his earned, unpaid, due and payable wages and the civil penalty wages, plus interest on both sums until paid. ORS 652.332.

#### OPINION

#### INTRODUCTION

In its Order of Determination, the Agency alleged that Respondent owes Claimant \$12,917.86 in unpaid wages and \$2,400 in civil penalty wages. The Agency filed a motion for partial summary judgment on the issue of civil penalty wages and \$3,899.62 of the unpaid wages that were deducted from Claimant's paychecks as "process fees." That motion was granted, and the only issues at hearing were whether Claimant was owed an additional \$5,000 in wages that were deducted as "process fees" between August 1994 and October 26, 1996, along with \$4,018.24 in unsubstantiated deductions taken from Claimant's

paychecks for work performed between October 27, 1996, and April 12, 1999.

#### AMOUNT OF UNPAID WAGES DUE AND OWING TO THE CLAIMANT

Claimant's alleged unpaid wages can be divided into three categories. First, the \$5,000.00 in "process fees" deducted by Respondent from Claimant's paychecks between August 1994 and October 26, 1996. Second, the \$3,899.62 in "process fees" deducted by Respondent from Claimant's paychecks between October 27, 1996, and April 23, 1999. Third, the \$4,018.24 in unsubstantiated deductions taken by Respondent from Claimant's paychecks between October 27, 1996, and April 23, 1999.

#### A. The \$3,899.62 in "Process Fees."

This issue was resolved prior to hearing when the forum granted the Agency's motion for partial summary judgment. That ruling has been confirmed in this Order and requires no further discussion.

#### B. The \$5,000 in "Process Fees."

These "process fees," like the \$3,899.62, were deducted from Claimant's paychecks and retained by Respondent in a misguided attempt to recoup their administrative costs. The legal analysis used by the forum in granting the Agency's motion for partial summary judgment applies equally to this sum. As a result,

the forum concludes that Respondent's deductions of \$5,000 in process fees from Claimant's wages between August 1994 and October 26, 1996, do not fall within the statutory exception created by ORS 652.610(3)(b). This sum is due and owing to Claimant as unpaid wages.

**C. The \$4,018.24 in Unsubstantiated Deductions.**

The Agency arrived at this sum by a two-step process based on undisputed figures provided by Respondent. First, the Agency subtracted the gross wages (\$45,678.33) paid to Claimant between October 27, 1996, and his termination from the gross wages (\$53,596.17) he earned in that period of time. This left a remainder of \$7,917.86. Second, the Agency subtracted the \$3,899.62 in "process fees" deducted from Claimant's wages during that period of time from \$7,917.86. This left a remainder of \$4,018.24. Cox, Respondent's general manager, attempted to explain these deductions as garnishments and loan repayments, but provided no documentation of individual deductions or written authorization from the Claimant for the deductions. Claimant did not testify that he authorized any of the deductions in writing or that they were to repay loans or satisfy garnishments required by law.

ORS 652.610 requires employers to provide employees with itemized statements showing the amount and purpose of all payroll deductions. The purpose of that requirement is to apprise employ-

ees of the statutory deductions that have been withheld from their paychecks, e.g. FICA, and to prevent employers from making unlawful deductions. If Respondent lawfully deducted the \$4,018.24 from Claimant's paychecks, it could have provided copies of Claimant's itemized deduction slips, as well as documentation supporting those deductions.<sup>7</sup> Respondent did not do so, and Cox's unsupported, generic testimony regarding those deductions is no substitute. Based on the undisputed figures provided by Respondent showing Claimant's gross wages earned and paid, and Respondent's inability to satisfactorily account for \$4,018.24 in deductions, the forum concludes that these deductions constitute unpaid wages that are due and owing to the Claimant.

**CIVIL PENALTY WAGES**

This issue was resolved prior to hearing when the forum granted the Agency's motion for partial summary judgment and awarded Claimant \$2,400 in civil penalty wages. That ruling has been confirmed in this Order. At hearing, the Agency sought to increase the amount of civil penalty wages to \$2,429 based on the "Interpretation" contained on page 201 of the Agency's Field Operations Manual regarding how civil penalty wages should be calculated. This interpretation states that "same hourly rate" as set forth in ORS 652.150

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<sup>7</sup> For example, a writ of garnishment.

is "the average hourly rate for the period covered by the claim," and that figure is determined by an equation set forth by Agency policy consisting of "**Total earned during wage claim period divided by Total number of hours worked during wage claim period multiplied by 8 hours. multiplied by 30 days.**" (emphasis in original) The problem with this approach is that the wage claim goes back to August 1994, and there is no evidence in the record showing how many hours Claimant worked and how much he earned between August 1994 and October 26, 1996. Consequently, the forum relies on Claimant's hourly wage of \$10.00 per hour during his last year of employment to calculate civil penalty wages. Using \$10.00 per hour as a factor results in civil penalty wages of \$2,400, the figure awarded by the forum in its ruling granting the Agency's motion for partial summary judgment.

#### ORDER

NOW, THEREFORE, as authorized by ORS 652.332, and as payment of the unpaid wages and civil penalty wages owed as a result of its violation of ORS 652.140, the Commissioner of the Bureau of Labor and Industries hereby orders **Cox and Frey Enterprises, 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 trust for Kenneth Ray Dick in the

amount of FIFTEEN THOUSAND THREE HUNDRED SEVENTEEN DOLLARS AND EIGHTY SIX CENTS (\$15,317.86), less appropriate lawful deductions, representing \$12,917.86 in gross, earned, unpaid, due, and payable wages and \$2,400.00 in penalty wages, plus interest at the legal rate on the sum of \$12,917.86 from May 1, 1999, until paid and interest at the legal rate on the sum of \$2,400.00 from June 1, 1999, until paid.

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#### In the Matter of

**FRANCISCO CISNEROS dba Sergio's Dos Mexican & Seafood Restaurant, Respondent.**

**Case No. 93-00  
Final Order of the  
Commissioner Jack Roberts  
Issued February 7, 2001**

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#### SYNOPSIS

Respondent employed the three wage Claimants as kitchen help. Respondent agreed to pay them a fixed salary based on working 80 hours every two weeks, but failed to pay them for overtime hours worked. Respondent failed to pay two of the wage Claimants all of the straight time wages they earned. The commissioner ordered Respondent to pay the Claimants \$15,602.40, \$7,581.49, and \$3,962.04, respectively, representing unpaid, due and owing

straight time wages, as well unpaid, due and owing overtime wages that were earned within two years of the issuance of the Agency's Order of Determination. The commissioner also found that Respondent's failure to pay the Claimants these wages was willful and ordered Respondent to pay the Claimants \$3,492, \$2,126, and \$1,819, respectively, in civil penalty wages. ORS 12.110(3), ORS 652.140, ORS 652.150, ORS 653.261, OAR 839-020-0030, OAR 839-020-0470.

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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 July 25 and 26, 2000. From 9 a.m. on July 25 to 11:40 a.m. on July 26, the hearing was conducted at the Oregon State Employment Department, 801 Oak Avenue, Klamath Falls, Oregon. To accommodate the participants' schedules, the location of the hearing was moved at lunchtime on July 26 and reconvened at 1:30 p.m. at the Elks Lodge, 601 Main, Klamath Falls, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Linda Lohr, an employee of the Agency. Francisco Guerra Guerra, Jose Segura Guerra, and Valentin Segura Guerra, the three wage Claimants, were present throughout the hearing, except when one

of them was testifying. None of the Claimants were represented by counsel. Respondent Francisco Cisneros was present during the majority of the hearing and was represented by Michael L. Spencer, attorney at law. Also present throughout the hearing was Steve Tillson, an interpreter in Spanish, who translated the proceedings in their entirety.

The Agency called as witnesses, in addition to Claimants: Antonio Cisneros, Respondent's general manager; Moises Galvan, Jocabel Segura, Luis Mora, former co-workers of Claimants; and Gerhard Taeubel, Agency compliance specialist.

Respondent called as witnesses: Antonio Cisneros and Francisco Cisneros. The forum received into evidence:

a) Administrative exhibits X-1 through X-7 (submitted or generated prior to hearing), and X-8 and X-13 (submitted or generated after the hearing);

b) Agency exhibits A-1 through A-16 and A-19 through A-21 (submitted prior to hearing), A-25 (submitted at hearing), and A-30 through A-32 (submitted after the hearing);

c) Respondent exhibits R-1 through R-8 (submitted prior to hearing), and R-12 through R-15 (submitted at hearing).

Having fully considered the entire record in this matter, I, Jack Roberts, hereby make the following Findings of Fact (Procedural and on the Merits), Ultimate Find-

ings of Fact, Conclusions of Law, Opinion, and Order.

**FINDINGS OF FACT –  
PROCEDURAL**

1) On April 13, 1999, Claimant Jose Segura Guerra (“J. Segura”) filed a wage claim with the Agency alleging that Respondent had employed him and failed to pay wages earned and due to him.

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

3) On August 25, 1999, Claimant Valentin Segura (“V. Segura”) filed a wage claim with the Agency alleging that Respondent had employed him and failed to pay wages earned and due to him.

4) At the time he filed his wage claim, Claimant V. Segura assigned to the Commissioner of the Bureau of Labor and Industries, in trust for Claimant V. Segura, all wages due from Respondent.

5) On August 25, 1999, Claimant Francisco Guerra Guerra (“F. Guerra”) filed a wage claim with the Agency alleging that Respondent had employed him and failed to pay wages earned and due to him.

6) At the time he filed his wage claim, Claimant F. Guerra assigned to the Commissioner of the Bureau of Labor and Industries, in trust for Claimant F.

Guerra, all wages due from Respondent.

7) On February 3, 2000, the Agency issued Order of Determination No. 99-1396 based upon the wage claims filed by Claimants and the Agency’s investigation. The Order of Determination alleged that Respondent Francisco Cisneros owed a total of \$16,192 in unpaid wages and \$4,966.00 in civil penalty wages to Claimants V. Segura, J. Segura, and F. Guerra, plus interest, and required that, within 20 days, Respondent 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. The Agency computed the amount of wages allegedly owed on the basis that Respondent:

“was required to compensate the wage Claimants at the rates not less than \$6.00 per hour and \$6.50 per hour for each hour worked by the provision of ORS 653.025. In addition, the employer was required by the provisions of OAR 839-020-0030 to compensate the wage Claimants at one and one half times the regular rates of pay for each hour worked over 40 hours in a given work week.”

The Agency sought the following wages for each Claimant:

V. Segura: \$ \$3,003.25 in unpaid wages for the time period January 11, 1998 to August

13, 1999; \$1,644.00 in civil penalty wages.

J. Segura: \$7,585.67 in unpaid wages for the time period January 11, 1998 to April 9, 1999; \$1,673.00 in civil penalty wages.

F. Guerra: \$5,604.00 in unpaid wages for the time period June 20, 1998 to July 24, 1999; \$1,649.00 in civil penalty wages.

8) On February 18, 2000, Respondent, through counsel, filed an answer and request for hearing. Respondent's answer admitted he employed Claimants, but denied that the Claimants had worked the claimed hours or were entitled to any unpaid wages. The answer also denied that any potential underpayment, if found to exist, was willful.

9) On April 20, 2000, the Agency filed a "BOLI Request for Hearing" with the forum. The Request included a statement that a Spanish interpreter would be needed at the hearing.

10) On May 2, 2000, the Hearings Unit issued a Notice of Hearing to Respondent, the Agency, and the Claimant stating the time and place of the hearing as July 25, 2000, at 9:00 a.m., at the Oregon State Employment Department, 801 Oak Avenue, Klamath Falls, 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, and a copy of the forum's contested case hearings rules, OAR 839-050-000 to 839-050-0440.

11) On June 14, 2000, the forum ordered the Agency and Respondent 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; a brief statement of the elements of the claim (for the Agency only); a brief statement of any defenses to the claim (for Respondent only); 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 no later than July 14, 2000, and notified them of the possible sanctions for failure to comply with the case summary order.

12) On July 11, 2000, Respondent's attorney filed a letter stating his belief that a Spanish speaking interpreter would be needed at the hearing because it appeared many of the witnesses in the case would not be able to communicate in English.

13) The Agency filed its case summary, with attached exhibits, on July 14, 2000. The Agency filed an addendum to its case summary on July 17, 2000.

14) Respondent filed its case summary, with attached exhibits, on July 13, 2000

15) At the outset 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.

16) After opening statements were made, the Agency moved to exclude witnesses, including Antonio Cisneros ("A. Cisneros"), who was listed as a witness in the Agency's case summary. Respondent moved to allow A. Cisneros, Respondent's brother, to remain in the hearings room throughout the hearing as Respondent's authorized representative. Respondent stated that Francisco Cisneros ("F. Cisneros") had very little to do with the day-to-day operations of Respondent's business, that A. Cisneros was the manager, and that Respondent could not effectively present its case and would be prejudiced without the presence of A. Cisneros to assist Respondent's counsel. The ALJ ruled that A. Cisneros could not be present as Respondent's authorized representative and excluded him from the hearing unless he was testifying. The ALJ noted that if Respondent chose to have A. Cisneros remain in the hearings room after testifying, A. Cisneros would not be able to testify again. Subsequently, A. Cisneros testified as the Agency's first witness, then remained outside the hearings room while the remaining witnesses testified. The ALJ excluded all other witnesses.

17) During the hearing, Respondent provided the original timecards that comprised the third page of exhibit R-2 and the second page of exhibits R-3 through

R-8 for the inspection of the ALJ and Agency case presenter due to the illegibility of copies offered as evidence. The ALJ subsequently copied the originals, copying the front and back of each timecard onto one page, and substituted these copies for exhibits R-2 through R-8 that were provided with Respondent's case summary. The ALJ mailed the original and a copy of the substituted exhibits back to Respondent's counsel and the Agency.

18) During the hearing, the Agency moved to amend the Order of Determination to increase the amount of wages and penalty wages owed to all three Claimants. The Agency's motion was based on evidence produced without objection during the hearing that showed the Claimants were paid on a salary basis. Respondent objected to the Agency's motion, and the ALJ deferred ruling until the proposed order.

19) On August 1, 2000, the ALJ issued an interim order scheduling oral argument on August 16, 2000, on the Agency's motion to amend the Order of Determination. The order required the Agency to prepare an exhibit with specific wage calculations in support of its proposed amendment and serve it on Respondent's attorney no later than August 10, 2000.

20) On August 10, 2000, the Agency filed exhibits X-9, A-31, A-32, and A-33 with the Hearings Unit in response to the ALJ's August 1 interim order.

21) On August 16, 2000, the ALJ conducted a teleconference in which the Ms. Lohr and Mr. Spencer presented closing arguments concerning the Agency's motion to amend the Order of Determination.

22) Through its motion to amend and exhibits X-9, A-31, A-32, and A-33, the Agency sought to amend the Order of Determination to seek the following wages:

V. Segura: \$13,410.80 in unpaid wages; \$3,151 in civil penalty wages.

J. Segura: \$9,710.40 in unpaid wages; \$1,906 in civil penalty wages.

F. Guerra: \$4,788.80 in unpaid wages; \$4,890 in civil penalty wages.

The Agency's motion to amend the Order of Determination is **GRANTED**. A discussion of the reasons for granting the Agency's motion is contained in the Opinion section of this Order.

23) The ALJ issued a proposed order on November 15, 2000, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance.

24) On November 21, 2000, Respondent filed a motion requesting a one week extension of time to file exceptions.

25) On November 26, 2000, the ALJ granted Respondent's motion and extended the deadline for filing exceptions for both the

Agency and Respondent to December 6, 2000.

26) Respondent timely filed exceptions on December 6, 2000. Those exceptions are addressed in the Opinion section of this Order.

#### **FINDINGS OF FACT – THE MERITS**

1) During all times material, Respondent Francisco Cisneros owned and operated a restaurant called Sergio's and Sergio's Dos Mexican & Seafood Restaurant ("Sergio's Dos") in Klamath Falls, Oregon. He was the sole owner of both restaurants.

2) Sergio's opened for business in 1994. Sergio's Dos opened for business in 1995. Both have operated continually since they opened.

3) In 1998-99, Antonio Cisneros ("A. Cisneros"), managed both Sergio's and Sergio's Dos, though not at the same time.

4) In 1998 and 1999, Respondent paid his employees every two weeks ("bi-weekly").

5) In 1998 and 1999, Respondent employed one chef and three cook's helpers at Sergio's Dos, and one chef and two cook's helpers at Sergio's. On all shifts at both restaurants, Respondent always had either a chef and a cook's helper or two cook's helpers working together in the kitchen.

6) In 1998 and 1999, Respondent paid chefs and cook's helpers on a salary basis. This

salary was based on 80 or less hours of work every bi-weekly pay period. This salary was not intended to cover time worked in excess of 80 hours in any bi-weekly pay period.

7) A. Cisneros and F. Cisneros jointly decided the salary that each chef and cook's helper would be paid.

8) During the Claimants' employment, Respondent did not use a written work schedule for chefs and cook's helpers. Respondent kept no records of the hours worked by chefs and cook's helpers, including overtime hours.

9) During the Claimants' employment, Respondent was open for customers from 11 a.m. until 10 p.m., seven days a week.

10) V. Segura was hired by Respondent at Sergio's in 1994 as a dishwasher. Shortly afterward, he was promoted to cook's helper. In 1997, he was promoted to chef. Between January 11, 1998, and August 13, 1999, he was the chef at Sergio's Dos.

11) Between January 11, 1998, and August 13, 1999, V. Segura worked 51 hours per week. He worked 12 hours on Monday, 7 hours on Tuesday through Thursday, 9 hours on Friday and Saturday, and had Sundays off.

12) Between January 11, 1998, and August 13, 1999, Respondent paid V. Segura a bi-weekly salary of \$1,050, which equates to \$525 per week. This

salary was intended to compensate him for 80 hours of work.

13) Between January 11, 1998, and August 13, 1999, Respondent paid V. Segura his bi-weekly salary of \$1,050 in full. Prior to May 21, 1999, Respondent paid part of V. Segura's salary by check and part in cash. Respondent did not keep a record of the amount of cash paid to V. Segura. Starting on May 21, 1999, Respondent began paying V. Segura's entire salary by check.

14) V. Segura took a week off for vacation sometime in 1998. He also was off work on vacation from May 21, 1999, through June 20, 1999.

15) V. Segura quit Respondent's employment on August 13, 1999. There is no evidence in the record of the number of hours he worked on August 13, 1999.

16) Between January 11, 1998, and August 13, 1999, V. Segura's regular hourly rate of pay was \$13.13 per hour (\$1050 divided by 80 hours). V. Segura's overtime rate of pay was \$19.70 per hour (\$13.13 x 1.5).

17) Respondent paid V. Segura a total of \$39,375.00 in wages between January 11, 1998, and August 9, 1999.<sup>1</sup> This figure

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<sup>1</sup> The most recent check stub for V. Segura in the record is for the bi-weekly payroll period ending July 5, 1999 (Exhibit A-12, p.4). Based on this check stub, the forum has calculated that V. Segura's last full week of employment ended on August 9,

was arrived at by multiplying 75 weeks x \$525. Respondent paid V. Segura a total of \$37,800.00 in wages between February 3, 1998, and August 9, 1999. This figure was computed by subtracting \$1,575 (three weeks pay earned between January 11, 1998, and February 2, 1998) from \$39,375.00.

18) V. Segura earned \$16,252.50 in overtime wages between January 11, 1998, and August 9, 1999.<sup>2</sup> Five weeks were excluded from this time period based on evidence that V. Segura took five weeks of vacation in this time period. This figure was computed as follows: 75 weeks x 11 hours per week x \$19.70 per hour. V. Segura earned \$15,602.40 in overtime wages between February 3, 1998, and August 9, 1999. This figure was computed by subtracting \$650.10 (three weeks overtime pay earned between January 11, 1998, and February 2, 1998) from \$16,252.50. Respondent has not paid V. Segura any of these overtime wages.

19) Pursuant to ORS 652.150 and OAR 839-001-0470, V. Segura is entitled to \$3,492.00 in civil penalty wages. This figure was computed by determining V. Segura's total wage entitlement

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1999. Because the record does not show how many hours V. Segura worked on August 13, 1999, his last date of employment, the forum has only calculated V. Segura's earned wages through August 9, 1999.

<sup>2</sup> *Id.*

for the wage claim period of February 3, 1998, to August 9, 1999 (\$37,800 actually paid plus \$15,602.40 in unpaid overtime wages = \$53,402.40), dividing that sum by total hours worked in the same period (72 weeks x 51 hours = 3,672), multiplying the resultant average hourly wage (\$14.55 per hour) by 8 hours, and multiplying that figure (\$116.40) by 30 days.

20) J. Segura was hired by Respondent in September 1997 as a cook's helper at Sergio's Dos. He worked as a cook's helper throughout his employment with Respondent. About Thanksgiving 1998, he transferred to Sergio's and worked there until he was fired on April 10, 1999.

21) While employed by Respondent, J. Segura worked an alternating weekly schedule, working 48 hours one week and 54 hours the next, for a total of 102 hours each bi-weekly pay period, an average of 51 hours per week.

22) From the time he was hired until August 22, 1998, Respondent paid J. Segura a bi-weekly salary of \$600, which equates to a weekly salary of \$300. This salary was intended to compensate him for 80 hours of work every two weeks.

23) Between January 11, 1998, and August 22, 1998, Respondent paid J. Segura a total of \$9,600 (\$300 x 32 weeks) in cash to compensate him for 80 hours worked during each bi-weekly period during that time period. Between February 3, 1998, and August 22, 1998, Respondent

paid J. Segura a total of \$8900 (\$300 x 29 weeks).

24) Between January 11, 1998, and August 22, 1998, J. Segura's regular hourly rate of pay was \$7.50 per hour (\$600 divided by 80 hours). His overtime rate of pay during this time was \$11.25 per hour (\$7.50 x 1.5).

25) Between January 11, 1998, and August 22, 1998, J. Segura earned \$3,960.00 in overtime wages. This figure was computed as follows: 32 weeks x 11 hours per week x \$11.25 per hour. Between February 3, 1998, and August 22, 1998, J. Segura earned \$3,588.75 in overtime wages. Respondent has not paid J. Segura any of these wages.

26) On September 7, 1998, Respondent began paying J. Segura his salary by check and cash. Between August 23, 1998,<sup>3</sup> and January 11, 1999, Respondent paid him bi-weekly with a check in the gross amount of \$600.00, less standard deductions, and also gave him approximately \$60 cash with each check to bring his gross salary to \$660 and his net salary to \$600.<sup>4</sup> This equates to a weekly salary of \$330. This salary was intended to compensate him for 80 hours of

work during each bi-weekly period between August 23, 1998, and January 11, 1999.

27) Between August 23, 1998, and January 11, 1999, Respondent paid J. Segura a total of \$6,270 (\$330 x 19 weeks) in checks and cash.

28) Between August 23, 1998, and January 11, 1999, J. Segura's regular hourly rate of pay was \$8.25 per hour (\$660 divided by 80 hours). His overtime rate of pay during this time was \$12.38 per hour (\$8.25 x 1.5).

29) Between August 23, 1998, and January 11, 1999, J. Segura earned \$2,587.42 in overtime wages. This figure was computed as follows: 19 weeks x 11 hours per week x \$12.38 per hour. Respondent has not paid J. Segura any of these wages.

30) Between January 11, 1999, and April 5, 1999,<sup>5</sup> J. Segura was paid a bi-weekly salary consisting of a check for \$500.00, less standard deductions, and \$92 in cash that was given to him with each check. This equates to a weekly salary of \$296. This salary was intended to compensate him for 80 hours of work.

31) Between January 12, 1999, and April 5, 1999, Respondent paid J. Segura a total of

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<sup>3</sup> J. Segura was not issued his first check until September 7, 1998, but it covered the period extending back to August 23, 1998.

<sup>4</sup> For example, on January 11, 1999, he was given a net check for \$540.82 and approximately \$60 in cash, to bring his net pay to \$600.

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<sup>5</sup> Although J. Segura worked until April 10, 1999, the last check stub showing he was paid on a salary basis covers the payroll period ending April 5, 1999.

\$3,256 (\$296 x 11 weeks) in checks and cash.

32) Between January 12, 1999, and April 5, 1999, J. Segura's regular hourly rate of pay was \$7.40 per hour (\$592 divided by 80 hours). His overtime rate of pay during this time was \$11.10 per hour (\$7.40 x 1.5).

33) Between January 12, 1999, and April 5, 1999, J. Segura earned \$1,343.10 in overtime wages. This figure was computed as follows: 11 weeks x 11 hours per week x \$11.10 per hour. Respondent has not paid J. Segura any of these wages.

34) Respondent did not keep a record of the amount of cash paid to J. Segura.

35) Respondent fired J. Segura on April 10, 1999. There is no evidence in the record of the number of hours J. Segura worked on April 10, 1999.

36) On April 21, 1999, J. Segura was issued a final paycheck in the gross amount of \$115.38. He received no cash with this check. Respondent intended to compensate him for 24 hours of work between April 6 and April 10. There is no evidence in the record that the wage agreement described in Finding of Fact – The Merits 30 was changed between April 6 and April 10.

37) Respondent paid J. Segura in full for all straight time hours<sup>6</sup> worked between January

11, 1998, and April 5, 1999, paying him a total of \$19,126.00 in wages over this period of time.

38) Respondent paid J. Segura in full for all straight time hours worked between February 3, 1998, and April 5, 1999, paying him a total of \$18,226.00 in wages over this period of time. This figure was computed by subtracting \$900, or three weeks pay earned between January 11, 1998, and February 2, 1998, from \$19,126.00.

39) J. Segura earned \$7,890.52 in overtime wages between January 11, 1998, and April 5, 1999. He earned \$7,519.27<sup>7</sup> in overtime wages between February 3, 1998, and April 5, 1999. Respondent has not paid him any of these wages.

40) J. Segura earned \$177.60 in straight time wages between April 6 and April 10, 1999, and was only paid \$115.38. Based on a wage rate of \$7.40 per hour, he should have been paid gross wages of \$177.60.<sup>8</sup> Respondent has not paid him the difference of \$62.22.

41) Pursuant to ORS 652.150 and OAR 839-001-0470,

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weekly period, the number of hours Respondent intended J. Segura's salary to cover.

<sup>7</sup> This figure was computed by multiplying 3 weeks (January 11, 1998, to February 2, 1998) x 11 hours x \$11.25 per hour = \$371.25 and subtracting \$371.25 from \$7,890.52.

<sup>8</sup> This assumes that J. Segura only worked 24 hours in this time period.

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<sup>6</sup> In this context, "straight time" hours refers to 80 hours worked each bi-

J. Segura is entitled to \$2,126.00 in civil penalty wages. This figure was calculated by determining J. Segura's total wage entitlement for the wage claim period of February 3, 1998, to April 5, 1999 (\$19,126.00 actually paid plus \$7,519.27 in unpaid overtime wages = \$26,645.27), dividing that sum by total hours worked in the same period (59 weeks x 51 hours = 3,009 total hours), multiplying the resultant average hourly wage (\$8.86) by 8 hours, multiplying that figure (\$70.88) by 30 days, then rounding to the nearest dollar.

42) F. Guerra was hired by Respondent at Sergio's Dos on or about June 20, 1998. He worked as a dishwasher until December 27, 1998.<sup>9</sup>

43) F. Guerra was paid \$6.00 per hour while he worked as a dishwasher. He worked 6 hours on Tuesday through Saturday and 11 hours on Sunday, for a total of 41 hours per week. His overtime rate of pay was \$9.00 per hour.

44) F. Guerra earned a total of \$6,723.00 in wages while working as a dishwasher for Respondent. This figure was computed as follows: 27 weeks x 40 hours x \$6.00 per hour = \$6,480.00; 27 hours of overtime x \$9.00 per hour = \$243.00; \$6,480.00 + \$243.00 = \$6,723.00.

45) F. Guerra was paid a total of \$5,496.00 while working as a dishwasher for Respondent. This figure was derived from the "YTD" salary printed on the pay stub accompanying Respondent's check No. 2768, the paycheck F. Guerra received for Respondent's "12/14/98-12/27/98" payroll period.

46) Respondent owes F. Guerra \$1,227.00 in unpaid wages for his work as a dishwasher between June 20, 1998, and December 27, 1998. Respondent has not paid F. Guerra any of these wages.

47) Respondent had a time clock at Sergio's Dos in 1998. All hourly employees, including F. Guerra, were expected to punch in on the time clock when they arrived at and left work. The time cards used in the time clock covered Respondent's bi-weekly payroll period.

48) Respondent provided time cards purported to be those of F. Guerra for the time periods purported to cover June 15-28, 1998, July 27-September 6, 1998; and November 15-December 27, 1998. However, the forum gives no weight to the dates and hours worked printed on those time cards because undisputed testimony, as well as the timecards themselves, established that the time clock did not accurately reflect dates and hours worked. For example, Exhibit R-6 has the dates "11/16-11/29" handwritten on the top of the time card, but the date entered by the time clock is "AGO," meaning August. Typical

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<sup>9</sup> This date is based on Exhibit A-16, p. 6, which shows the payroll period ending 12/27/98 as the last payroll period for which F. Guerra was paid an hourly wage.

of the entries printed by the time clock are two days showing F. Guerra working from 3:02 a.m. until 10:13 a.m., and from 10:00 p.m. until 3:55 a.m.<sup>10</sup>

49) On exhibits R-2, R-3, R-4, R-5, R-6, R-7, and R-8, either F. Cisneros or A. Cisneros wrote the number of hours worked for each day beside the time clock printouts for each day, totaled all hours worked at the end of the payroll period, wrote the total on each time card, and instructed Respondent's bookkeeper to write a paycheck based on their handwritten total of hours. Exhibit R-2 reflects a total of 75 hours, 1 minute actually worked; the handwritten total is 74 hours. Exhibit R-3 reflects a total of 81 hours, 25 minutes actually worked; the handwritten total is 80 hours. Exhibit R-4 shows a total of 82 hours, 12 minutes actually worked; the handwritten total is 75 hours. Exhibit R-5 shows a total of 77 hours, 37 minutes actually worked; the handwritten total is 71 hours. Based on Respondent's own time records, Respondent appears to have underpaid F. Guerra by at least 16 hours and 15 minutes of time that F. Guerra worked over four payroll periods.

50) On or about December 28, 1998, F. Guerra was promoted to cook's helper. He worked as cook's helper at Sergio's Dos until July 24, 1999, when he quit Respondent's employment.

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<sup>10</sup> In contrast, Respondent was only open for customers from 11 a.m. until 10 p.m.

51) F. Guerra worked two different shifts as cook's helper, "day" and "night" shift. He worked about 50% of the time on each shift. On day shift, he worked 8 a.m. to 3 p.m., Tuesday through Thursday, 8 a.m. to 2 p.m. and 6 p.m. to 8 p.m. on Friday and Saturday, and 8 a.m. to 10 p.m. on Sunday, with a two hour break, for a total of 49 hours per week. On night shift, he worked 3 p.m. to 10 p.m., Tuesday through Saturday, and 8 a.m. to 10 p.m. on Sunday, with a two hour break, for a total of 47 hours per week. He averaged 48 hours per week.

52) Between December 28, 1998, and July 19, 1999, Respondent paid F. Guerra by check and cash. In that period of time, Respondent paid him bi-weekly with checks in the gross amount of either \$550 or \$600, less standard deductions, and also gave him enough cash with each check to bring his net salary to \$600. This salary was intended to compensate him for 80 hours of work. Respondent did not keep a record of the cash paid to F. Guerra.

53) Between December 28, 1998, and July 19, 1999,<sup>11</sup> F. Guerra earned and received

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<sup>11</sup> Because F. Guerra was terminated in the middle of a bi-weekly pay period, and there is nothing in the record to reflect the amount of his final check or the shift he worked his last week, the forum has no basis on which to calculate the number of hours he worked, the amount he earned, or the amount he was paid after July 18, 1999.

\$9,111.58 in straight time wages.<sup>12</sup> His regular hourly rate of pay was \$8.14 per hour (\$9,111.58 total wages received divided by 1120 hours worked during 14 bi-weekly periods). His overtime rate of pay during this time was \$12.21 per hour.

54) Between December 28, 1998, and July 19, 1999, F. Guerra earned \$2,735.04 in overtime wages. This figure was computed as follows: 28 weeks x 8 hours per week x \$12.21 per hour = \$2,735.04. Respondent has not paid him any of these overtime wages.

55) Pursuant to ORS 652.150 and OAR 839-001-0470, F. Guerra is entitled to \$1,819.00 in civil penalty wages. This figure was calculated by determining F. Guerra's total wage entitlement for the wage claim period (\$14,607.58 actually paid + \$1,227.00 unpaid straight time and overtime wages earned from June 20, 1998, to December 27, 1998 + \$2,735.04 unpaid overtime

wages earned from December 28, 1998, to July 19, 1999 = \$18,569.62), dividing that sum by total hours worked in the same period (2,451),<sup>13</sup> multiplying the resultant average hourly wage (\$7.58 per hour) by 8 hours, multiplying that figure (\$60.64) by 30 days, and rounding to the nearest dollar.

56) Luis Mora worked as a cook's helper for Respondent in 1998 and 1999. Moises Galvan worked as a cook's helper and chef for Respondent from 1995 until March 1998. Both worked at least 100 hours bi-weekly as cook's helpers. Respondent routinely paid Mora and Galvan by check and cash.

### CREDIBILITY FINDINGS

57) Moises Galvan was the only witness not related to one of the Claimants or to Respondent, and the only witness who had nothing to gain or lose from the outcome of the hearing. His testimony was straightforward, thoughtful, and internally consistent. The forum has credited his testimony in its entirety.

58) Luis Mora is the nephew of V. Segura and J. Segura and lived in the same house with them while he worked for Respondent. Despite this inherent familial bias, his testimony was candid and did

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<sup>12</sup> "Straight time" refers to 80 hours worked each bi-weekly period, the number of hours Respondent intended F. Guerra's salary to cover. The figure of \$9,111.58 was derived by adding together: (1) the gross amounts from each of F. Guerra's checks as reflected in Exhibit A-16; (2) \$550 for the payroll periods December 28, 1998 – January 11, 1999, and January 12-24, 1999; (3) \$600 for the payroll period from July 6-20, 1999; (4) \$1,161.58 in cash received reflecting the difference between F. Guerra's net checks and \$600 each payroll period.

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<sup>13</sup> This total was computed by multiplying the 27 weeks F. Guerra worked as a dishwasher x 41 hours, multiplying the 28 weeks F. Guerra worked as a cook's helper x 48 hours, and adding the two sums together.

not appear to be slanted in favor of the Claimants. The forum found him to be a credible witness.

59) Jocabel Segura is the sister-in-law of V. Segura and J. Segura. Her testimony was directly responsive to questions and internally consistent. Despite her inherent familial bias, the forum found her testimony to be credible and has credited it in its entirety. However, the forum has not relied on her testimony in determining the number of hours worked by the Claimants, their rate of pay, or whether they were paid by check or cash.

60) Gerhard Taeubel was a credible witness. However, the forum has not relied on his testimony to determine the number of hours worked by V. Segura or F. Guerra, the three Claimants' rate of pay, or whether they were paid by check or cash. The forum has relied on his interview notes to determine the number of hours worked by J. Segura.

61) Antonio Cisneros is Respondent's brother and long-time managerial employee, giving him a financial and familial bias. This bias was reflected in his testimony, which was internally inconsistent, inconsistent with the testimony of more credible witnesses and, in some cases, simply not believable.

Internally inconsistent statements included testimony that he lowered J. Segura's pay in January 1999 due to a drop in business at Sergio's at that time,

compared with testimony that business dropped from September-December 1999, at which time he lowered the pay of Sergio's kitchen staff. He testified that Respondent's chef currently earns \$9.50 per hour, more than chefs earned during the Claimants' employment, but also testified that V. Segura earned \$1050 bi-weekly, based on an 80-hour workweek, at the time of his termination, which equals \$13.13 per hour.

He testified about several issues in a manner that was inconsistent with testimony elicited from more credible witnesses. His testimony that both Sergio's and Sergio's Dos each always employed one chef and three cook's helpers contrasted with Moises Galvan's testimony that Sergio's employed only one chef and two cook's helpers. His testimony that chefs and cook's helpers rarely worked more than 80 hours in a bi-weekly period was in marked contrast to the testimony of Galvan, Mora, V. Segura, J. Segura, and F. Guerra, and was not supported by the records that Respondent was required to maintain pursuant to ORS 653.045.<sup>14</sup> A. Cisneros testified as to two implausible, mutually exclusive reasons why Respondent paid

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<sup>14</sup> ORS 653.045 requires employers required to pay a minimum wage to any employees to "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: \* \* \* (b) The actual hours worked each week and each pay period by each employee."

chefs and cook's helpers cash. First, that chefs and cook's helpers were paid cash as a bonus to compensate them for overtime hours, and second, that a cash bonus was paid when business was good. Galvan, Mora, and the three Claimants all testified credibly that they were regularly paid substantial amounts of cash as part of their salary. Further, there is no evidence to dispute J. Segura's testimony that he was paid *entirely* in cash between September 1997 and August 22, 1998.

Cisneros's testimony on two issues was simply unbelievable. The first issue concerns his testimony that he gave V. Segura a \$400 bi-weekly raise in order to keep him from quitting, and that he agreed to this raise *after* V. Segura's May 21-June 20, 1999 vacation. This would have meant that V. Segura had been earning only \$650 bi-weekly, or \$150 less than Galvan had earned a year earlier at Sergio's, where there was less business. Even if this pay discrepancy could be explained, Respondent's own documents show that V. Segura was paid \$1050 in a check dated May 21, 1999 that was intended to cover the pay period from May 6, 1999 to May 20, 1999. The second issue involves Cisneros's testimony about how he computed J. Segura's final check. Cisneros testified to using two different formulas to arrive at the figure of \$115.38, the gross amount of J. Segura's final check. The first was multiplying 24 hours by the minimum wage (\$6.50), which

yields a result of \$156.00. The second was dividing J. Segura's \$500 bi-weekly salary by 13, the number of the days in the payroll period, and multiplying that figure by the four days J. Segura worked. That formula yields the sum of \$153.85.

Finally, A. Cisneros's testimony was further discredited by the mathematical chicanery he and F. Cisneros performed on F. Guerra's purported timecards. By rounding off time in Respondent's favor, and in two cases, not even adding in hours worked on two days, Cisneros came up with hourly totals that resulted in underpayment to F. Guerra by \$97.50 in wages<sup>15</sup> over four bi-weekly pay periods in 1998.

Based on all of the above, the forum has only credited A. Cisneros's testimony where it was supported by other credible evidence and, in some cases, has not believed his testimony even where it was undisputed.

62) Claimants V. Segura and J. Segura are brothers; Claimant F. Guerra is their cousin.

63) V. Segura testified primarily about his own working conditions. His testimony was internally consistent and consistent with prior statements made to the Agency during the investigation of his wage claim. His testimony

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<sup>15</sup> This figure was arrived at by multiplying 16.25 hours x \$6.00 per hour, the minimum wage in 1998. See Finding of Fact – The Merits 49, *supra*.

concerning the number of hours he worked during the wage claim period – 51 hours a week – was consistent with the credible testimony of Agency witnesses concerning the work schedule at Sergio's Dos and the number of hours per week worked by other chefs and cook's helpers employed by Respondent. Significantly, he testified that Respondent paid him more in 1998 than the sum of \$15,300.00 printed by Respondent on his 1998 W-2 form. Despite V. Segura's significant financial interest in the outcome of this case, the forum has found his testimony credible and has credited V. Segura's testimony in its entirety.

64) J. Segura, like V. Segura and F. Guerra, has a significant financial interest in the outcome of the case. That interest affected his testimony and written statements he made in his wage claim that exaggerated the number of hours he worked during the wage claim period. In his wage claim and accompanying calendar, he claimed he worked 112 hours every two weeks, alternating between 52 and 60 hours per week. Under oath, he verified this schedule. However, on June 1, 1999, J. Segura told Taeubel, the Agency's investigator, that he worked an alternating weekly schedule of 54 and 48 weeks. This inconsistency puts J. Segura's entire testimony about his hours worked in doubt. However, based on several factors, the forum concludes that J. Segura worked an alternating weekly schedule of 54 and 48 hours per

week. First, he told Taeubel that he worked that schedule. Second, he was a cook's helper and Luis Mora, Moises Galvan, and V. Segura all testified credibly that cook's helpers at Sergio's and Sergio's Dos consistently worked at least 100 hours every two weeks in 1998 and 1999. Third, Respondent did not come produce any records or credible testimony to dispute this conclusion.

J. Segura's testimony also contained an inconsistency regarding the amount of money Respondent paid him. He testified Respondent paid him only \$5400, the amount shown on his W-2, in 1998. He also testified that Respondent paid him \$600 in cash, bi-weekly, from January 11-August 22, 1998, then a check in the gross amount of \$600, less standard deductions, plus extra cash with each check to bring his net salary to \$600 during the rest of 1998. This latter amount far exceeds \$5400. The forum has relied on the latter amount because it amounts to an admission against interest, being far greater than that shown in Respondent's records, and because of Respondent's admission that he paid J. Segura \$17,718.08 from January 11, 1998, to April 9, 1999.<sup>16</sup>

Finally, J. Segura inexplicably testified that Taeubel wrote and sent Exhibit A-6 to him. Since the letter is clearly addressed to

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<sup>16</sup> The Agency alleged this figure in Exhibit A of its Order of Determination, and Respondent did not deny this in its Answer.

Taeubel,<sup>17</sup> signed by “Juan Jose Segura Guerra,” and its contents present no motive for J. Segura to lie, this testimony makes no sense whatsoever.

Based on all of the above, the forum has credited J. Segura’s testimony where it was corroborated by other credible evidence or undisputed.

65) F. Guerra, like V. and J. Segura, has a significant financial interest in the outcome of this case. His testimony, like J. Segura’s, was problematical in some respects. On one occasion, when he answered questions about the amount of salary he received by check and cash, the forum was unable to determine whether he was attempting to be deceitful or simply didn’t understand the questions. His testimony as to the dates and hours that he worked was not entirely consistent with the hours shown on his wage claim. For example, he stated that he worked “3-4 months” as a dishwasher, whereas his pay stubs show he worked from June 20, 1998, through December 27, 1998, as a dishwasher, a period of six months. In contrast, his testimony that he worked a weekly schedule that varied in hours as it alternated between “day” and “night” schedule was consistent with the schedules worked by other cook’s helpers. However, the forum disbelieved his testi-

mony that he worked from 2 p.m. to 11 p.m. on Fridays and Saturdays. Based on Mora’s testimony that day shift cook’s helpers worked from 8 a.m. to 3 p.m., that cook’s helpers on night shift worked from 3 p.m. until 10 p.m., and undisputed testimony that Respondent closed at 10 p.m., the forum has only credited F. Guerra with working from 3 p.m. to 10 p.m. on Fridays.

The forum was most concerned with his testimony that he worked Sundays as a cook’s helper to V. Segura. In contrast, V. Segura credibly testified that he only rarely worked on Sundays in 1999. Nonetheless, the forum concludes that F. Guerra worked the hours claimed on Sunday, but did not work with V. Segura on that day. This conclusion is inferred from several facts. First, credible testimony by Luis Mora and V. Segura that they worked all day on Monday so cook’s helpers who worked all day Sunday could have the day off. Second, Sergio’s Dos only employed three cook’s helpers in 1999, and a chef and cook’s helper or two cook’s helpers were present at all times. Since Mora and Segura worked all day Mondays, F. Guerra must have worked all day Sundays with another cook’s helper. Third, Mora, Galvan, and V. Segura all testified credibly that cook’s helpers at Sergio’s and Sergio’s Dos consistently worked at least 100 hours every two weeks in 1998 and 1999. Fourth, Respondent did not produce any records or credible testimony to dispute this conclusion.

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<sup>17</sup> The inside address reads “Gerhard Taeubel, 800 NE Oregon St. #32, Portland, Or 97232” and the salutation reads “Estimado Sr. Gerhard.”

Based on the above, the forum has found that F. Guerra worked overtime, although less than he claimed, and has credited his testimony concerning his dates of employment, his rate of pay, and the amount of pay he received from Respondent. The forum has credited the remainder of his testimony where it is supported by credible evidence.

#### **ULTIMATE FINDINGS OF FACT**

1) At all times material herein, Respondent was a sole proprietorship who engaged the personal services of one or more persons in the state of Oregon, including Claimants, who were Respondent's employees.

2) V. Segura earned \$16,252.50 in overtime wages between January 11, 1998, and August 9, 1999. Between February 3, 1998, and August 9, 1999, V. Segura earned \$15,602.40 in overtime wages. Respondent has not paid V. Segura any of these overtime wages.

3) Respondent willfully failed to pay V. Segura \$15,602.40 in earned, due, and payable overtime wages within five days, excluding Saturdays, Sundays, and holidays, after he quit, and more than 30 days have elapsed from the date V. Segura's wages were due.

4) Civil penalty wages for V. Segura, computed in accordance with ORS 652.150 and OAR 839-001-0470, equal \$3,492.00.

5) J. Segura earned \$7,890.52 in overtime wages between Janu-

ary 11, 1998, and April 5, 1999. Between February 3, 1998, and April 5, 1999, J. Segura earned \$7,519.27 in overtime wages. Respondent has not paid J. Segura any of these overtime wages. Between April 6, 1999, and April 10, 1999, J. Segura earned at least \$177.60 and was only paid \$115.38. Respondent has not paid him the \$62.22 difference in wages between the \$177.60 he earned and the \$115.38 he was paid.

6) Respondent willfully failed to pay J. Segura \$7,581.49 in earned, due, and payable overtime and straight time wages by the end of the first business day after Respondent discharged J. Segura.

7) Civil penalty wages for J. Segura, computed in accordance with ORS 652.150 and OAR 839-001-0470, equal \$2,126.00.

8) F. Guerra earned \$18,569.62 in straight time and overtime wages between June 20, 1998, and July 19, 1999, and was only paid \$14,607.58, leaving a balance of \$4,006.56 that Respondent has not paid F. Guerra.

9) Respondent willfully failed to pay F. Guerra \$4,006.56 in earned, due, and payable straight time and overtime wages within five days, excluding Saturdays, Sundays, and holidays, after he quit, and more than 30 days have elapsed from the date F. Guerra's wages were due.

10) Civil penalty wages for F. Guerra, computed in accordance with ORS 652.150 and

OAR 839-001-0470, equal \$1,819.00.

### CONCLUSIONS OF LAW

1) During all times material herein, Respondent Francisco Cisneros was an employer doing business as Sergio's and Sergio's Dos Mexican & Seafood Restaurant in Klamath Falls, Oregon. V. Segura, J. Segura, and F. Guerra were employees subject to the provisions of ORS 652.110 to 652.200 and 652.310 to 652.405. During all times material herein, Respondent employed Claimants.

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) At times material, ORS 652.140(1) and (2) provided:

“(1) Whenever an employer discharges an employee or where such employment is terminated by mutual agreement, all wages earned and unpaid at the time of such discharge or termination shall become due and payable not later than the end of the first business day after the discharge or termination.

“(2) When an employee who does not have a contract for a definite period quits employment, all wages earned and unpaid at the time of quitting become due and payable immediately if the employee has given to the employer not less than 48 hours' notice, excluding Saturdays, Sundays and

holidays, of intention to quit employment. If notice is not given to the employer, the wages shall be due and payable within five days, excluding Saturdays, Sundays and holidays, after the employee has quit, or at the next regularly schedule payday after the employee has quit, whichever event first occurs.”

ORS 653.261(1) provides:

“The Commissioner of the Bureau of Labor and Industries may issue rules prescribing such minimum conditions of employment, excluding minimum wages, in any occupation as may be necessary for the preservation of the health of employees. Such rules may include, but are not limited to \* \* maximum hours of work, but not less than eight hours per day or 40 hours per week; however, after 40 hours of work in one week overtime may be paid, but in no case at a rate higher than one and one-half times the regular rate of pay of such employees when computed without benefit of commissions, overrides, spiffs and similar benefits.”

OAR 839-020-0030 provides, in pertinent part:

“(1) Except as provided in OAR 839-020-0100 to 839-020-0135 all work performed in excess of forty (40) hours per week must be paid for at the rate of not less than one and one-half times the regular rate of pay \* \* \*.

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“(3) Methods for determining amount of overtime payment under different compensation agreements:

“(d) Compensation based upon a weekly salary agreement for a regular work week of 40 hours:

“(A) Where the employee is employed on a weekly salary, the regular hourly rate of pay is computed by dividing the salary by the number of hours which the salary is intended to compensate;

“(B) For example, where an employee is hired at a salary of \$280 and it is understood that this weekly salary is compensation for a regular work week of 40 hours, the employee’s regular rate of pay is \$7 per hour and such employee must be compensated at the rate of \$10.50 per hour for each hour worked in excess of 40 hours in such work week.

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“(g) Fixed salary for periods other than work week: Where a salary covers a period longer than a work week, such as a month, it must be reduced to its work week equivalent. \* \* \*”

ORS 12.110(3) provides:

“An action for overtime \* \* \* shall be commenced within two years.”

The Agency issued its Order of Determination on February 3, 2000, and is barred by ORS

12.110(3) from seeking unpaid overtime wages that accrued before February 3, 1998.

Respondent violated ORS 652.140(2) by failing to pay Claimant V. Segura all unpaid wages earned between February 3, 1998, and August 13, 1999, not later than August 20, 1999, five business days after he quit, excluding Saturday and Sunday. Those wages amount to \$15,602.40.

Respondent violated ORS 652.140(1) by failing to pay Claimant J. Segura all unpaid wages earned between February 3, 1998, and April 10, 1999, not later than April 11, 1999, the first business day after he was discharged. Those wages amount to \$7,581.49.

Respondent violated ORS 652.140(2) by failing to pay Claimant F. Guerra all unpaid wages earned not later than July 30, 1999, five business days after he quit, excluding Sunday. Those wages amount to \$4,006.56.

4) ORS 652.150 provides:

“If an employer willfully fails to pay any wages or compensation of any employee whose employment ceases, as provided in ORS 652.140 and 652.145, then, as a penalty for such 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; provided, that in no case shall

such wages or compensation continue for more than 30 days from the due date; and provided further, the employer may avoid liability for the penalty by showing financial inability to pay the wages or compensation at the time they accrued.”

OAR 839-001-0470(2) provides:

“The wages of an employee that are computed at a rate other than an hourly rate shall be reduced to an hourly rate for penalty wage computation purposes by dividing the total wages earned while employed or the total wages earned in the last 30 days of employment, whichever is less, by the total number of hours worked during the corresponding time period.”

Respondent is liable for \$3,492.00 civil penalty wages under ORS 652.150 for willfully failing to pay all wages or compensation to Claimant V. Segura when due as provided in ORS 652.140(2).

Respondent is liable for \$2,126.00 in civil penalty wages under ORS 652.150 for willfully failing to pay all wages or compensation to Claimant J. Segura when due as provided in ORS 652.140(1).

Respondent is liable for \$1,819.00 in civil penalty wages under ORS 652.150 for willfully failing to pay all wages or compensation to Claimant F. Guerra when due as provided in ORS 652.140(2).

5) 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 pay the Claimants their earned, unpaid, due and payable wages and the civil penalty wages, plus interest on both sums until paid. ORS 652.332.

## **OPINION**

### **INTRODUCTION**

In this case, the Agency alleges that Respondent, the owner of two restaurants in Klamath Falls, employed the three wage Claimants in 1998-99 and substantially underpaid them for their work. In defense, Respondent contends that the Claimants did not work the hours claimed and are not entitled to any unpaid wages.

### **THE AGENCY’S MOTION AT HEARING TO AMEND THE ORDER OF DETERMINATION**

The Agency’s Order of Determination sought unpaid wages and penalty wages calculated on the assumption that the Claimants were only entitled to the minimum wage. At hearing, Antonio Cisneros and all three Claimants testified, without objection, that the Claimants were paid a salary intended to compensate them for 80 hours of work every two weeks, except for the period of time that F. Guerra was a dishwasher. The three Claimants all testified, without objection, as to the amount of salary they received

in the form of checks and cash. The Agency offered exhibits A-4, A-12, and A-16, consisting of check stubs created by Respondent showing that the Claimants were paid on a salary basis, and the amount of salary they were paid. These exhibits were received without objection. At hearing, the Agency moved to amend the Order of Determination to recalculate unpaid wages based on the undisputed salary basis by which Claimants were actually paid. The Agency's amended calculations resulted in a significantly higher amount of unpaid wages and penalty wages.<sup>18</sup>

Respondent objected to the Agency's motion to amend at the time the motion was made. Respondent argued that all evidence regarding Respondent's payment of a salary to Claimants was admissible and not subject to objection, and Respondent had therefore never expressly or impliedly consented to the amendment. Respondent also argued that the Agency did not show good cause for failing to amend the Order of Determination prior to hearing. Finally, Respondent objected to the admission of Exhibits A-30, A-31, A-32, the Agency's written statement of unpaid wages due the three Claimants computed on a salary

basis, which was submitted at the forum's order.<sup>19</sup>

OAR 839-050-0140 governs amendments to charging documents in this forum. It provides:

"(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 freely be given when justice so requires.

"(2)(a) After commencement of the hearing, issues not raised in the pleadings may be raised and evidence presented on such issues, provided there is express or implied consent of the participants. Consent will be implied where there is no objection to the introduction of the issues and evidence or where the participants address the issues. Any participant raising new issues must move the administrative law judge to amend its pleading to conform to the evidence and to reflect issues presented. The administrative law judge may address and rule upon such issues in the Proposed Order.

"(b) If evidence is objected to at hearing on the grounds that it is not within the issues

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<sup>18</sup> See Findings of Fact – Procedural 7 and 22, *supra*.

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<sup>19</sup> See Finding of Fact – Procedural 19, *supra*.

raised by the pleadings, the administrative law judge may allow the pleadings to be amended to conform to the evidence presented. The administrative law judge shall allow the amendment where the participant seeking to amend its pleading shows good cause for not having included the new matter in its pleading prior to hearing and the objecting participant fails to satisfy the administrative law judge that it would be substantially prejudiced by the admission of such evidence. The administrative law judge may grant a continuance to enable the objecting participant to meet such evidence.

“(c) Charging documents and answers may be amended as provided in paragraphs (a) and (b) of this rule. Permissible amendments to charging documents include, but are not limited to: additions to or deletions of charges; changes to theories of liability; and increases or decreases to the damages, penalties, or other remedies sought. Permissible amendments to answers include, but are not limited to, additions to or deletions of affirmative defenses.”

The Agency’s amendment increases damages and penalties, both permissible subjects of amendment under paragraph (2)(c). While being examined by the Agency case presenter, A. Cisneros testified, without objection from Respondent, that all

three claimants were paid on a salary basis while employed as chefs or cook’s helpers. Respondent did not object to any evidence elicited by the Agency from its witnesses related to Respondent’s payment of Claimants on a salary basis, and both participants addressed that issue during witness examination. The Agency offered Exhibits A-4, A-12, and A-16, check stubs created by Respondent for the Claimants indicating that Claimants were paid on a salary basis; these exhibits were received without objection. Respondent’s argument that no objection was made because the evidence would have been admitted as relevant on other grounds is without merit. Consequently, the conditions attached to proposed amendments in paragraph (2)(b) are inapplicable. Based on implied consent of the participants, the Agency’s amendment is allowed. Respondent’s exception to the amendment is overruled.

#### **THE AGENCY’S AMENDMENT AND THE FORUM’S CALCULATION OF UNPAID WAGES AND PENALTY WAGES**

The forum’s calculation and award of unpaid wages and penalty wages differs considerably from the Agency’s calculations. It is based on the forum’s independent calculations, which in turn are based on the forum’s independent determination of the number of hours worked, total amounts earned, and total amounts paid to each claimant. The forum has awarded J. Segura and F. Guerra less, and V. Segura more, in un-

paid wages and penalty wages than sought by the Agency in its amendment. This forum has previously held that the commissioner has authority to award monetary damages exceeding those sought in the charging document where damages are awarded as compensation for statutory violations alleged in the charging document. *In the Matter of Contractor's Plumbing Service, Inc.*, 20 BOLI 257, 273-74 (2000). On that basis, the forum awards V. Segura damages as calculated by the forum instead of the lesser damages sought by the Agency in its amended Order of Determination.

### **PRIMA FACIE CASE**

To establish a prima facie case supporting these wage claims, the Agency must prove: 1) that Respondent employed the Claimants; 2) any pay rate upon which Respondent and the Claimants agreed, if it exceeded the minimum wage; 3) that the Claimants performed work for Respondent for which they were not properly compensated; and 4) the amount and extent of work the Claimants performed for Respondent. *In the Matter of Barbara Coleman*, 19 BOLI 230, 262 (2000). The first and second elements are undisputed.

The forum relies on the testimony of the Claimants, Moises Galvan, Luis Mora, Antonio Cisneros, and exhibits A-4 and A-16 to determine whether the Claimants performed work for which they were not properly compensated. Based on exhibit A-4 and

A. Cisneros's testimony, the forum has concluded that J. Segura performed at least 24 hours of work during his last week of employment for which he was not properly compensated. Based on exhibit A-16, p.6 (F. Guerra's last pay check stub as a dishwasher) and F. Guerra's undisputed testimony that he worked at least 40 hours a week as a dishwasher at minimum wage, the forum has concluded that Respondent did not pay F. Guerra in full for the time he worked as a dishwasher. It is undisputed that Respondent paid all three Claimants in full for the straight time hours worked as chef and cook's helpers. However, testimony by the Claimants, Galvan, and Mora establishes by a preponderance that the Claimants worked overtime every week and were not paid anything for those overtime hours. This satisfies the third element of the Agency's prima facie case.

The final element of the Agency's prima facie 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." *In the Matter of Debbie Frampton*, 19 BOLI 27, 38-39 (2000). Where an employer produces no records of hours or dates worked by Claimants, the commissioner may rely on evidence produced by the agency, including credible testimony by the Claimants, "to show the amount and extent of the employee's work as a matter of just and reasonable

inference,” and “may then award damages to the employee, even though the result be only approximate.” *In the Matter of Diran Barber*, 16 BOLI 190, 196-97 (1997), citing *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88 (1946). The rationale for this policy is “not to penalize the employee by denying him any recovery on the ground that he is unable to prove the precise extent of uncompensated work” when such inability is based on “an employer’s failure to keep proper records, in conformity with his statutory duty \* \* \*.” *Frampton*, at 39, citing *Anderson*.

Respondents neither kept nor produced a record of hours or dates worked by Claimants V. and J. Segura, and produced only unreliable records purporting to represent F. Guerra’s hours worked as a dishwasher. As there are no accurate records to rely on, the forum examines the Agency’s evidence to determine if it shows “the amount and extent of the employee’s work as a matter of just and reasonable inference.” *Barber*, at 196-97.

V. Segura testified credibly that he worked 51 hours per week as a chef, and the forum has accepted his credible testimony as fact.

J. Segura’s testimony as to the number of hours he worked per week was less credible than V. Segura’s, but his testimony and statement to Taubel that he worked an average of 102 hours every two weeks was accepted as credible because it was supported

by the credible testimony of Galvan and Mora.

F. Guerra’s testimony as to the number of hours he worked per day and per week was inconsistent with the credible testimony of Mora and V. Segura. Based on Guerra’s undisputed testimony about the hours he worked as a dishwasher, credible testimony by Mora and Galvan as to the number of hours worked by cook’s helpers, and the circumstances outlined in Finding of Fact – The Merits 65 that led the forum to conclude that F. Guerra must have worked Sundays, the forum concludes that the Agency has established, by a preponderance, that F. Guerra worked an average of 41 hours a week as a dishwasher and 48 hours per week as a cook’s helper.

In contrast, Respondent presented only incomplete and inaccurate records to establish the time periods of the Claimants’ employment and the amount the Claimants were paid. Respondent presented no credible records to show how many hours the Claimants worked. Respondent’s case summary listed twelve persons, who might be called as witnesses at hearing. Presumably, these witnesses would have testified as to the dates and hours worked by the Claimants. Respondent called none of them except for Francisco Cisneros and Antonio Cisneros. Their only relevant testimony was A. Cisneros’s statement that chefs and cook’s helpers “very rarely” worked more than 80 hours per week, and F. Cisneros’s testimony

that he had no knowledge that any of his employees had worked more than 80 hours per week. The former has been discredited; the latter only shows that Respondent was apparently ignorant of his employee's schedules. In short, Respondent's case consisted almost entirely of an attempt to discredit the Agency's witnesses. That attempt failed.

### **CIVIL PENALTY WAGES**

An award of penalty wages turns on the issue of willfulness. 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. *In the Matter of Barbara Coleman*, 19 BOLI 230, 265 (2000). Respondent, as an employer, had a duty to know the amount of wages due his employees. *Id.*

Respondent was aware that Claimants were employed by him and performing work on his behalf. Respondent was aware of the salary agreement with Claimants and was legally obligated to pay Claimants all overtime wages earned computed in accordance with OAR 839-020-0030(3)(d). Respondent's purported ignorance, which was based in part on a deliberate failure to maintain statutorily-mandated records and a malfunctioning time clock, is not a defense. There is no evidence that Respondent was other than a free agent in failing to pay the Claimants the wages they earned.

The forum derives its penalty wage computations with ORS 652.150 and OAR 839-001-0470(2). OAR 839-001-0470(2) provides that, for penalty wage computation purposes, the hourly rate of an employee who is not paid by the hour is determined by:

"dividing the total wages earned while employed or the total wages earned in the last 30 days of employment, whichever is less, by the total number of hours worked during the corresponding time period."

Because of Respondent's failure to maintain records, the forum is unable to determine either the total wages earned or total number of hours worked in each of the Claimants' last days of employment that fall outside a payroll period. Consequently, the forum has calculated penalty wages by dividing the total wages earned through each Claimant's last payroll period by the total number of hours worked during that same time period. Those calculations are reflected in Findings of Fact – The Merits 19, 41, and 55.

### **RESPONDENT'S EXCEPTIONS**

Respondent filed exceptions objecting to the ALJ's conclusions regarding the hours worked and rate of pay for all three Claimants, the ALJ's credibility findings, the ALJ's granting of the Agency's amendment to the pleadings, statements in Proposed Finding of Fact – The Merits 62 concerning the experience of Moises Galvan and salary received by Galvan, and the ALJ's computation of un-

paid wages due to the Claimants. Respondent also argued that the ALJ incorrectly shifted the burden of proof to Respondent, contending that the Agency presented no credible evidence supporting its prima facie case and that the ALJ penalized Respondent solely because Respondent failed to keep time records as required by ORS 653.045.

The forum has altered Finding of Fact – The Merits 61<sup>20</sup> to accurately reflect Galvan’s experience as depicted in the record.

Respondent’s objection to the Agency’s amendment has been addressed in the section of the Opinion entitled “The Agency’s Motion At Hearing To Amend The Order Of Determination.”

Respondent’s exception to the ALJ’s credibility findings is overruled. A review of the record shows that they are supported by substantial evidence in the record. The ALJ’s conclusions as to the hours worked and rate of pay for the three Claimants are primarily based on the same credibility findings and Respondent’s exceptions to those conclusions are likewise overruled.

Respondent’s exception that the ALJ incorrectly shifted the burden of proof from the Agency to Respondent and penalized Respondent solely because

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<sup>20</sup> This was Proposed Finding of Fact – The Merits 62, but was renumbered because of an error in numbering the Findings of Fact – The Merits in the proposed order.

Respondent failed to keep time records as required by ORS 653.045 is misplaced. The ALJ did not find Respondent liable for unpaid wages based solely on Respondent’s failure to produce those time records. Respondent was held liable for those unpaid wages because the Agency proved its prima facie case by means of credible evidence. Respondent’s failure to produce records required by statute or to otherwise provide any credible evidence of the number of hours worked by the Claimants was considered because it was an aid to the forum in evaluating the credibility of the Claimants.<sup>21</sup> The burden of proof never shifted to Respondent. Respondent’s exceptions on these points are overruled.

#### ORDER

NOW, THEREFORE, as authorized by ORS 652.332 and as payment of the unpaid wages and civil penalty wages he owes as a result of his violations of ORS 652.140 and OAR 839-020-0030, the Commissioner of the Bureau of Labor and Industries hereby orders **Francisco Cisneros** to

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<sup>21</sup> See, e.g., *In the Matter of Robert Gonzalez*, 12 BOLI 181, 200 (1994) (One factor in determining the credibility of testimony is whether it is corroborated or contradicted by other testimony or evidence). See also *In the Matter of Kenny Anderson*, 12 BOLI 275, 280 (1994) (“Respondent’s testimony was evaluated, not only by its own intrinsic weight, but also according to the evidence that was in his power to produce.”)

deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, the following:

(1) A certified check payable to the Bureau of Labor and Industries in trust for Valentin Segura Guerra in the amount of NINETEEN THOUSAND NINETY FOUR DOLLARS AND FORTY CENTS (\$19,094.40), less appropriate lawful deductions, representing \$15,602.40 in gross earned, unpaid, due, and payable wages and \$3,492.00 in penalty wages, plus interest at the legal rate on the sum of \$15,602.40 from September 1, 1999, until paid, and interest at the legal rate on the sum of \$3,492.00 from October 1, 1999, until paid.

(2) A certified check payable to the Bureau of Labor and Industries in trust for Jose Segura Guerra in the amount of NINE THOUSAND SEVEN HUNDRED SEVEN DOLLARS AND FORTY NINE CENTS (\$9,707.49), less appropriate lawful deductions, representing \$7,581.49 in gross earned, unpaid, due, and payable wages and \$2,126.00 in penalty wages, plus interest at the legal rate on the sum of \$7,581.49 from May 1, 1999, until paid, and interest at the legal rate on the sum of \$2,126.00 from June 1, 1999, until paid.

(3) A certified check payable to the Bureau of Labor and Industries in trust for Francisco Guerra Guerra in the amount of FIVE THOUSAND EIGHT HUNDRED TWENTY FIVE DOLLARS AND FIFTY SIX CENTS (\$5,825.56), less appropriate lawful deductions, representing \$4,006.56 in gross earned, unpaid, due, and payable wages and \$1,819.00 in penalty wages, plus interest at the legal rate on the sum of \$4,006.56 from August 1, 1999, until paid, and interest at the legal rate on the sum of \$1,819.00 from September 1, 1999, until paid.

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**In the Matter of**

**DANNY VONG PHUOC TRUONG  
dba DANNY'S AUTO REPAIR,**

**Case No. 38-01**

**Final Order of the Commissioner  
Jack Roberts**

**Issued March 16, 2001**

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**SYNOPSIS**

Respondent employed Claimant as a salaried auto shop helper and failed to pay him overtime wages for hours worked over 40 in a given workweek. The forum found that Claimant worked 435 hours of overtime for which he was not paid and Respondent was

ordered to pay Claimant \$4,224.11 in due and unpaid wages. Respondent's failure to pay the wages was willful, and Respondent was ordered to pay \$2,100.00 in civil penalty wages. ORS 652.140(2), 652.150, OAR 839-020-0030.

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 23<sup>rd</sup> and 24<sup>th</sup>, 2001, in Hearings Room #1004 of the State Office Building, 800 NE Oregon Street, Portland, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Cynthia L. Domas, an employee of the Agency. Wage claimant Liem Ngoc Nguyen ("Claimant") was present throughout the hearing and was not represented by counsel. Respondent Danny Vong Phuoc Truong ("Respondent") was present throughout the hearing and was represented by David B. Wagner, attorney at law.

Helen Luong Burton, an interpreter in Vietnamese, was also present throughout the hearing as the forum's interpreter. Ms. Burton translated the proceedings in their entirety.

The Agency called as witnesses: Liem Ngoc Nguyen, the wage claimant; Irene Zentner and Kathleen Johnson, Wage & Hour

Division Compliance Specialists; Catherine Lieu Van, Respondent's wife; Quan Van Do and Ricky Lihn Dihn, Respondent's former employees; and Vu Thi Phuong Loan, Claimant's wife.

Respondent called as witnesses: Danny Vong Phuoc Truong, Respondent; Catherine Lieu Van; Vu Mai Hoang, a current employee of Respondent; and Thanh Hoai Phan, Respondent's former employee.

The forum received into evidence:

a) Administrative exhibits X-1 through X-19 (submitted or generated prior to hearing);

b) Agency exhibits A-1 through A-11 (submitted prior to hearing), and A-12 through A-14 (submitted at hearing);

c) Respondent exhibits R-1 through R-4 (submitted prior to hearing), R-5, R-6, and R-7 (submitted at hearing).

Having fully considered the entire record in this matter, I, Jack Roberts, 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 3, 2000, Claimant filed a wage claim with the Agency. He alleged that Respondent 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 Labor and Industries, in trust for Claimant, all wages due from Respondent.

3) Claimant brought his wage claim within the statute of limitations.

4) On September 11, 2000, the Agency served Order of Determination No. 00-2802 on Respondent based upon the wage claim filed by Claimant and the Agency's investigation. The Order of Determination alleged that Respondent owed a total of \$6,193.96 in unpaid overtime wages and \$1,749.60 in civil penalty wages, plus interest, and required that, within 20 days, Respondent 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.

5) On September 19, 2000, Respondent, through counsel David B. Wagner, filed an answer and request for hearing. Respondent's answer admitted that Respondent had been Claimant's employer and that Respondent owed Claimant \$911.25 in unpaid overtime wages, and denied the other allegations in the Order of Determination.

6) On November 21, 2000, the Agency filed a "BOLI Request for Hearing" with the forum.

7) On December 7, 2000, the Hearings Unit issued a Notice of

Hearing to Respondent, Respondent's counsel, the Agency, and the Claimant stating the time and place of the hearing as January 23, 2001, at 9:00 a.m., in the 10<sup>th</sup> floor Hearings Room, State Office Building, 800 NE Oregon Street, 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, and a copy of the forum's contested case hearings rules, OAR 839-050-000 to 839-050-0440.

8) On December 8, 2000, the forum ordered the Agency and Respondent 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; a brief statement of the elements of the claim (for the Agency only); a brief statement of any defenses to the claim (for Respondent only); 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 January 15, 2001, and notified them of the possible sanctions for failure to comply with the case summary order. On January 3, 2001, the forum issued an interim order changing the filing date for case summaries to January 16, 2001.

9) On December 11, 2001, the Agency filed an exhibit referred to in Respondent's answer, but not

filed with Respondent's answer, that Respondent's counsel provided to the Agency on November 24, 2000.

10) On December 29, 2000, the Agency moved for a Discovery Order requesting a complete list of Respondent's employees during the Claimant's employment, any and all documentation showing dates and hours worked by and wages paid to the Claimant, and the original calendars from which Respondent had previously made and submitted copies to the Agency. The Agency characterized the latter request as a "new request for discovery." The Agency provided documentation showing that the other requested items had previously been requested on an informal basis. The Agency did not include a statement of relevancy for any of the requested documents.

11) On December 29, 2000, the Agency moved to amend the Order of Determination to increase the amount of wages sought to \$10,723.51 and penalty wages sought to \$2,100.00. The proposed amendment was premised on the Agency's recalculation of Claimant's wages based on the 40-hour workweek admitted in Respondent's answer.

12) On January 9, 2001, Respondent filed untimely objections to the Agency's motions for a discovery order and to amend the Order of Determination.

13) On January 10, 2001, the forum issued an interim order granting the Agency's motion to

amend the Order of Determination.

14) On January 10, 2001, the forum issued an interim order granting the Agency's motion for a discovery order in part. The forum denied the Agency's request for a complete list of Respondent's employees during Claimant's employment on the basis that the relevancy of the request was not apparent and denied the Agency's request for original calendars because the Agency had not first sought the calendars through informal discovery.

15) On January 15, 2001, Respondent filed its case summary, with attached exhibits. On January 16, 2001, the Agency filed its case summary, with attached exhibits.

16) On January 16, 2001, the Agency renewed its motion for a discovery order, providing a statement indicating the relevancy of a list of Respondent's employees during the Claimant's employment and the requested calendars, as well as stating the Agency had made informal attempts to obtain the requested calendars.

17) On January 16, 2001, the forum issued an interim order requiring Respondent: (1) to provide any existing documents to the Agency showing the names and dates of employment of Claimant's co-workers or a list showing the same; and (2) to produce the requested original calendars for the inspection of the Agency's case presenter.

18) On January 20, 2001, the Agency submitted an addendum to its case summary containing damage computations and attaching Exhibit A-7a.

19) At the start of the hearing, pursuant to ORS 183.415(7), 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.

20) Prior to opening statements, the Agency and Respondent stipulated that Respondent was Claimant's employer, that Claimant was employed by Respondent from November 17, 1998, through June 7, 2000, and that Respondent paid Claimant \$24,785 in total.

21) On January 23, after the Agency completed presentation of its case in chief, Respondent's counsel stated his intent to call Vu Mai Hoang, a current employee of Respondent; and Thanh Hoai Phan, a former employee of Respondent, as witnesses. These witnesses were not listed in Respondent's case summary. Mr. Wagner stated that he had only learned of the existence of these witnesses that morning, and had disclosed their names to Ms. Domas just prior to the start of the hearing. Mr. Wagner also stated that these witnesses were Claimant's former co-workers and would be testifying about the hours worked by Claimant. The Agency objected on the grounds that the witnesses had not been disclosed in Respondent's case summary

and that the Agency would be prejudiced by its inability to adequately question the witnesses due to lack of opportunity for preparation. The ALJ ruled that the witnesses would be allowed to testify, but that the hearing would be continued to give the Agency an adequate opportunity to prepare for their testimony. Mr. Wagner agreed to make the witnesses available for questioning in private by Ms. Domas, before they testified, after the hearing recessed for the day. Ms. Domas agreed that would cure the prejudice to the Agency. The hearing was then recessed, and Ms. Domas conducted a private interview with both witnesses to determine if the services of an interpreter were required. Ms. Domas determined she did not need an interpreter, and the forum excused Ms. Burton for the day. Ms. Domas then conducted private interviews with both witnesses. The hearing was reconvened at 1:30 p.m. the next day.

22) The evidentiary record of the hearing closed on January 24, 2001.

23) On February 16, 2001, the ALJ issued a proposed order that notified the participants that were entitled to file exceptions to the proposed order. The forum received no exceptions.

#### **FINDINGS OF FACT – THE MERITS**

1) During all times material herein, Danny Vong Phuoc Truong, an individual person, owned and operated an auto re-

pair shop under the assumed business name of Danny's Auto Repair.

2) Claimant was employed by Respondent between November 17, 1998, and June 7, 2000, as a shop helper. Claimant quit Respondent's employment on June 7, 2000.

3) Respondent hired Claimant on November 16, 1998. Claimant's first day of work was November 17, 1998. Claimant was hired as a shop helper at the agreed upon rate of a \$1200 month salary. This salary was intended to compensate him for 40 hours of work per week. This equates to an hourly rate of \$6.92 per hour, and an overtime rate of \$10.38 per hour.<sup>1</sup>

4) Claimant had no prior experience working in an auto repair shop prior to going to work for Respondent.

5) Throughout Claimant's employment with Respondent, Danny's Auto Repair was open for customers from 8:30 a.m. until 6 p.m., Monday through Friday, and 9 a.m. until 3 p.m. on Saturday. However, Respondent's employees often worked as late as 5 p.m. on Saturday, and as late as 6 p.m. on at least one occasion.

6) Throughout Claimant's employment, Respondent came

home each day and told his wife, Catherine Van, the hours that his employees had worked that day. Each day, Van wrote down on a calendar the time span that Respondent told her his employees had worked.<sup>2</sup> On occasion, she wrote the total number of hours worked by an employee in parentheses after the employee's name. On each occasion, the number of hours in parentheses was less than the total hours in the notated time span.<sup>3</sup>

7) Claimant did not keep a contemporaneous record of the hours he worked during his employment with Respondent. After Claimant left Respondent's employment, and just before he filed his wage claim, he created a calendar showing the hours he worked for Respondent. The hours he wrote down are only an approximation and Claimant's best guess of the hours he worked. On the calendar, Claimant claimed to have worked 10 hours per day, six days a week, from November 17, 1998, to May 2, 1999; nine hours per day, six days a week, from May 3, 1999, to October 31, 1999; four hours per day from November 1, 1999, to November 27, 1999; and 8½ hours per day from November 29, 1999, to June 7, 2000.

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<sup>1</sup> These rates were determined pursuant to OAR 839-020-0030(3)(g) by the following calculations: (1) \$1200 x 12 = \$14,400 ÷ 52 = \$276.92 ÷ 40 = \$6.92; (2) \$6.92 x 1.5 = \$10.38.

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<sup>2</sup> For example, the entry on February 1, 1999 reads: "Vu 4[,] Thanh 9-5[,] Liem 9-5"

<sup>3</sup> For example, the entry on January 23, 1999 reads: "Vu off[,] Thanh 9-3(5)[,] Liem 9-3(5)"

8) Claimant stated on his wage claim form that he worked "60-70 hrs/wk." while employed by R.

9) On July 3, 2000, Claimant told Zentner that he worked from 9 a.m. until 8 p.m. or 9 p.m., six days per week.

10) On August 21, 2000, the Agency received a letter from Catherine Van that read, in pertinent part:

"Enclosed please find copies of the calendar which show the hours that Mr. Nguyen worked, the days that he was not at work, and the days that the shop was closed per your request."

The letter enclosed a copy of Respondent's calendar upon which Van had written the hours worked by employees. Beginning with the entry on December 3, 1998, and ending with the entry on March 1, 1999, the calendar copy contains numerous changes from and additions to the original calendar that are handwritten in pencil. All the changes are related to specific hours and total hours worked by Claimant each day.<sup>4</sup>

11) Respondent's workweek was Monday through Saturday.

12) Throughout Claimant's employment, Respondent paid its employees every two weeks for work performed from Monday until Saturday the following week.

13) Claimant took no breaks and had irregular lunch hours during his employment with Respondent. Usually, he took 15-20 minutes to eat lunch whenever he had time. Sometimes he took an hour break for lunch.

14) Between November 17, 1998, and April 17, 1999, Claimant worked 844 straight time hours and 82.58 overtime hours, for a total of 926.58 hours. Based on an hourly rate of \$6.92 per hour and an overtime rate of \$10.38 per hour, Claimant earned \$5,840.48 in straight time pay and \$857.18 in overtime pay, for a total of \$6,697.66.

15) On April 18, 1999, Claimant was given a raise to \$1300 per month, based on a 40-hour workweek. This equates to an hourly wage of \$7.50 per hour, and an overtime rate of \$11.25 per hour.<sup>5</sup>

16) Between April 18, 1999, and November 27, 1999, Claimant worked 1199 straight time hours and 173.08 overtime hours, for a total of 1,372.08 hours. Based on an hourly rate of \$7.50 per hour and an overtime rate of \$11.25 per hour, Claimant earned \$8,992.50 in straight time pay and \$1,947.15 in overtime pay, for a total of \$10,939.65.

17) On November 28, 1999, Claimant was given a raise to

<sup>4</sup> For example, the entry on December 3, 1998 was changed from "Liem 9-5(7)" to "Liem 9-6(8)."

<sup>5</sup> These rates were determined pursuant to OAR 839-020-0030(3)(g) by the following calculations: (1)  $\$1300 \times 12 = \$15,600 \div 52 = \$300 \div 40 = \$7.50$ ; (2)  $\$7.50 \times 1.5 = \$11.25$ .

\$650 every two weeks, based on a 40-hour workweek. This equates to an hourly wage of \$8.13 per hour, and an overtime rate of \$12.19 per hour.<sup>6</sup>

18) Between November 28, 1999, and April 1, 2000, Claimant worked 713.83 straight time hours and 121.92 overtime hours, for a total of 835.75 hours. Based on an hourly rate of \$8.13 per hour and an overtime rate of \$12.19 per hour, Claimant earned \$5,803.44 in straight time pay and \$1,486.20 in overtime pay, for a total of \$7,289.64.

19) On April 2, 2000, Claimant was given a raise to \$700 every two weeks, based on a 40-hour workweek. This equates to an hourly wage of \$8.75 per hour, and an overtime rate of \$13.13.

20) Between April 2, 2000, and June 7, 2000, Claimant worked 381 straight time hours and 57 overtime hours, for a total of 438 hours. Based on an hourly rate of \$8.75 per hour and an overtime rate of \$13.13 per hour, Claimant earned \$3,333.75 in straight time pay and \$748.41 in overtime pay, for a total of \$4,082.16.

21) Claimant earned a total of \$29,009.11 in gross wages while employed by Respondent and has only been paid a total of \$24,785 in gross wages.

22) Respondent owes Claimant a total of \$4,224.11 in unpaid wages.

23) Civil penalty wages are computed as follows for the Claimant, in accordance with ORS 652.150 and OAR 839-001-0470(2): \$8.75 per hour x 8 hours x 30 days = \$2,100.00.

24) Catherine Van had a financial and familial bias because she is Respondent's wife. Her credibility was lessened by her alteration of Claimant's hours on the calendar that she mailed to the Agency.<sup>7</sup> She testified she paid Claimant \$600 in cash, and \$600 by check for fulltime work in November 1999; however, the documents she testified were Claimant's complete payroll records only showed two \$300 payments to Claimant in November 1999. The forum has relied on the original calendar contemporaneously created by Van showing hours worked by the Claimant and other employees, but has not relied on any of her testimony that is not supported by other credible evidence.

25) Quan Do was a credible witness. He responded to questions in direct and cross-examination in a straightforward manner, without hesitation or apparent attempt to deceive. He had no apparent bias, and his testimony concerning his work hours and Claimant's work hours was generally consistent with Respon-

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<sup>6</sup> These rates were calculated by dividing \$650 by 80 hours, which equals \$8.13, then multiplying \$8.13 x 1.5, which equals \$12.19.

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<sup>7</sup> See Finding of Fact – The Merits 10, *supra*.

dent's hours of business. His only major inconsistency was his statement that he worked nine months for Respondent, whereas Respondent's calendar shows he only worked seven months, May through December 1999. However, the forum has not relied upon his testimony that Claimant worked until after 6 p.m. Monday through Friday because of inconsistencies with Claimant's statements.<sup>8</sup>

26) Ricky Dinh worked for Respondent from August 1, 1999, until June 7, 2000. He quit Respondent's employment at the same time as Claimant because of a dispute over his wages. Like Quan Do, his testimony was straightforward, with no apparent attempt to deceive. Like Do, he testified that Claimant worked longer hours than Van wrote on Respondent's calendar; however, the forum has not relied upon this testimony because of inconsistencies with Claimant's statements<sup>9</sup> and because Dinh did not provide specific dates that Claimant worked after 6 p.m.

27) Vu Thi Phuong Loan is Claimant's wife. Her testimony, which described her attempts to telephone Claimant at home and Claimant's work schedule in November 1999, was not material to the forum's determination and has not been relied upon by the forum.

28) Irene Zentner and Kathleen Johnson, both Agency compliance specialists, were both credible witnesses regarding the substance of their investigation. The forum has not relied on Johnson's calculation of wages due to the Claimant because it was based on Claimant's version of hours worked, which the forum has determined is not reliable.

29) Vu Mai Hoang has been continuously employed by Respondent since February 1997 on a part-time basis as an auto mechanic. His testimony, which primarily concerned Claimant's work schedule in November 1999, was contradicted by Respondent's payroll records and calendar, and the forum has not relied upon his testimony in determining the hours worked by the Claimant.

30) Thanh Phan worked for Respondent from December 10, 1998, through March 13, 1999, as an auto mechanic. His testimony primarily concerned Claimant's work schedule and is generally consistent with the hours shown on Respondent's original calendar. However, his testimony that he "sometimes" worked "a few hours" on Saturday is belied by Respondent's original calendar, which shows Phan working every Saturday during his employment

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<sup>8</sup> Claimant's calendar (Exhibit A-4) states Claimant only worked "9 hours per day" from "5/3/99 to 10/31/99," and "8 1/2 hours per day" from "11/29/99 to 6/7/00," the time period encompassing Do's employment. If Claimant started work at 9, took no lunch hour, and worked 9 hours, his work would have ended at 6 p.m. each day. If Claimant started work at 9, took no lunch hour, and worked 8 1/2 hours, his work would have ended at 5:30 p.m. each day.

<sup>9</sup> *Id.*

except for December 26, when Respondent was closed. On several Saturdays, he worked from 9 a.m. to 5 p.m. His testimony that he worked 40 hours a week and “sometimes” more is also in contrast to Respondent’s original calendar, which shows him working more than 40 hours per week his last nine consecutive weeks of employment.<sup>10</sup> Because of these inconsistencies in his testimony concerning his own hours, the forum has not relied on Phan’s testimony in determining the number of hours worked by the Claimant.

31) Danny Truong was an emotional witness who believed he had done Claimant a favor by hiring him when Claimant had no job skills and that he had an employment contract with Claimant that excused him from having to pay overtime wages. Nonetheless, the forum found his testimony credible that he informed Van each night of the hours that employees had worked that day and that Van wrote those hours down at that time on a calendar and has credited Truong’s testimony about the calendar in its entirety.

32) Claimant’s prior inconsistent statements concerning his work schedule, coupled with his lack of any contemporaneous or

accurate record of his work hours, made his testimony concerning his work hours unreliable. In consequence, the forum has not relied on Claimant’s version of his work hours except where they are corroborated by Van’s notations on Respondent’s original calendar. However, the forum has credited Claimant’s testimony that he generally did not get a lunch hour on those days where Respondent’s calendar does not contain a number in parentheses after Claimant’s work schedule for that day.

33) The forum has relied exclusively on Respondent’s original calendar in calculating the total hours worked by Claimant each week. Even though credible testimony from the Agency’s witnesses indicates that Claimant may have worked longer hours on some days than those shown on the calendar, the forum finds that Respondent’s calendar is the most reliable record of the hours worked by Claimant for two reasons. First, there is credible evidence that it was contemporaneously created. Second, there is no other credible or reliable record of Claimant’s hours. Where that calendar notes hours worked by Claimant with a number in parentheses after those hours, the forum has credited Claimant with having worked the number of hours shown in parentheses.<sup>11</sup>

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<sup>10</sup> The forum arrived at this conclusion by calculating Phan’s hours worked in the same manner that Claimant’s were calculated. See Finding of Fact – The Merits 33, *infra*, and accompanying footnote.

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<sup>11</sup> For example, the entry on November 20, 1998, reads “Liem 9-5:30 (71/2).” The forum has credited Claimant with having worked 71/2 hours that day.

Where the calendar notes hours worked by Claimant with no number in parentheses after those hours, the forum has credited Claimant with having worked the entire time span encompassed by the entry<sup>12</sup> and has not subtracted any time for a lunch break.<sup>13</sup>

#### **ULTIMATE FINDINGS OF FACT**

1) At all times material herein, Respondent Danny Vong Phuoc Truong was an individual doing business under the assumed business name of Danny's Auto Repair and engaged the personal services of one or more employees.

2) Claimant was employed by Respondent from November 17, 1998, through June 7, 2000, when he quit Respondent's employment.

3) From November 17, 1998, to June 7, 2000, Claimant earned

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<sup>12</sup> For example, the entry on February 17, 1999, reads "Liem 9-5." The forum has credited Claimant with having worked 8 hours that day.

<sup>13</sup> Claimant testified that he never got a one-hour lunch break, and Respondent testified that Claimant and other employees routinely took one-hour lunch breaks. The forum resolves this issue by basing its conclusion on the most reliable record of Claimant's work schedule – Respondent's original calendar. Where Respondent's total of hours for Claimant reflects a deduction from the total time span worked, the forum has relied on that total. Where Respondent did not deduct any time from Claimant's workday, the forum has not deducted any time.

\$29,009.11 and has only been paid \$24,785.00. Claimant was paid the agreed upon salary of \$700 every two weeks during his last month of employment with Respondent, which equates to an hourly rate of \$8.75.

4) Respondent owes Claimant \$4,224.11 in due and unpaid wages.

5) Respondent willfully failed to pay Claimant \$4,224.11 in earned, due, and payable wages within five days, excluding Saturdays, Sundays, and holidays, after Claimant quit, and more than 30 days have elapsed from the date Claimant's wages were due.

#### **CONCLUSIONS OF LAW**

1) During all times material herein, Respondent Danny Vong Phuoc Truong was an employer and Claimant was an employee subject to the provisions of ORS 652.110 to 652.200 and 652.310 to 652.405. During all times material, Respondent employed Claimant.

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) At times material, ORS 652.140(2) provided:

"When an employee who does not have a contract for a definite period quits employment, all wages earned and unpaid at the time of quitting become due and payable immediately if the employee has given to the employer not less

than 48 hours' notice, excluding Saturdays, Sundays and holidays, of intention to quit employment. If notice is not given to the employer, the wages shall be due and payable within five days, excluding Saturdays, Sundays and holidays, after the employee has quit, or at the next regularly scheduled payday after the employee has quit, whichever event first occurs."

ORS 653.261(1) provides:

"The Commissioner of the Bureau of Labor and Industries may issue rules prescribing such minimum conditions of employment, excluding minimum wages, in any occupation as may be necessary for the preservation of the health of employees. Such rules may include, but are not limited to \* \* \* maximum hours of work, but not less than eight hours per day or 40 hours per week; however, after 40 hours of work in one week overtime may be paid, but in no case at a rate higher than one and one-half times the regular rate of pay of such employees when computed without benefit of commissions, overrides, spiffs and similar benefits."

OAR 839-020-0030 provides, in pertinent part:

"(1) Except as provided in OAR 839-020-0100 to 839-020-0135 all work performed in excess of forty (40) hours per week must be paid for at the rate of not less than one and

one-half times the regular rate of pay \* \* \* .

"\* \* \* \* \*

(3) Methods for determining amount of overtime payment under different compensation agreements:

"(d) Compensation based upon a weekly salary agreement for a regular work week of 40 hours:

"(A) Where the employee is employed on a weekly salary, the regular hourly rate of pay is computed by dividing the salary by the number of hours which the salary is intended to compensate;

"(B) For example, where an employee is hired at a salary of \$280 and it is understood that this weekly salary is compensation for a regular work week of 40 hours, the employee's regular rate of pay is \$7 per hour and such employee must be compensated at the rate of \$10.50 per hour for each hour worked in excess of 40 hours in such work week.

"\* \* \* \* \*

"(g) Fixed salary for periods other than work week: Where a salary covers a period longer than a work week, such as a month, it must be reduced to its work week equivalent. \* \* \*"

ORS 12.110(3) provides:

"An action for overtime \* \* \* shall be commenced within two years."

The Agency issued its Order of Determination on September 1, 2000, which is less than two years after December 15, 1998, the date Claimant's first earned overtime wages became due.<sup>14</sup> Respondent violated ORS 652.140(2) by failing to pay Claimant all earned overtime wages no later than June 13, 2000, five business days after Claimant quit. In total, Respondent owes Claimant \$4,224.11 in unpaid wages that are due and owing.

4) ORS 652.150 provides:

"If an employer willfully fails to pay any wages or compensation of any employee whose employment ceases, as provided in ORS 652.140 and 652.145, then, as a penalty for such 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; provided, that in no case shall such wages or compensation continue for more than 30 days from the due date; and provided further, the employer may avoid liability for the penalty by showing financial inability to pay the wages or compensation at the time they accrued."

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<sup>14</sup> Respondent's calendar shows that December 7-12 was the first workweek in which Claimant worked more than 40 hours, and that Respondent issued a paycheck covering that workweek on December 15, 1998.

OAR 839-001-0470(1) provides:

"(1) When an employer willfully fails to pay all or part of the wages due and payable to the employee upon termination of employment within the time specified in OAR 839-001-0420, 839-001-0430 and 839-001-0440, the employer shall be subject to the following penalty:

"(a) The wages of the employee shall continue from the date the wages were due and payable until the date the wages are paid or until a legal action is commenced, whichever occurs first;

"(b) The rate at which the employee's wages shall continue shall be the employee's hourly rate of pay times eight (8) hours for each day the wages are unpaid;

"(c) Even if the wages are unpaid for more than 30 days, the maximum penalty shall be no greater than the employee's hourly rate of pay times 8 hours per day times 30 days."

Respondent is liable for \$2,100.00 in civil penalties under ORS 652.150, computed by multiplying Claimant's hourly rate (\$8.75 per hour) x 8 hours per day x 30 days = \$2,100.00, for willfully failing to pay all wages or compensation to Claimant when due as provided in ORS 652.140(2).

5) 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 pay Claimant his earned, unpaid, due and payable wages and the civil penalty wages, plus interest on both sums until paid. ORS 652.332.

## OPINION

### INTRODUCTION

The Agency alleged in its original Order of Determination that Claimant had worked substantial amounts of overtime for which he had not been compensated, and that Respondent owed him \$6,193.96 in unpaid wages and \$1,749.60 in penalty wages. The Agency subsequently recalculated the amount due Claimant by computing Claimant's hourly rate based on a 40-hour workweek and amended its Order of Determination to seek \$10,723.51 in unpaid overtime wages and \$2,100.00 in penalty wages. Both totals were based on the number of hours Claimant alleged that he worked.

### PRIMA FACIE CASE

To establish a prima facie case for wage claims, the Agency must establish the following elements: (1) Respondent employed Claimant; (2) Claimant's agreed upon rate of pay, if it was other than minimum wage; (3) Claimant performed work for which he was not properly compensated; and (4) the amount and extent of work performed by Claimant. *In the Matter of Contractor's Plumbing Service, Inc.*, 20 BOLI 257, 270 (2000).

The first, second, and third elements are undisputed. First, both participants stipulated that Respondent employed Claimant from November 17, 1998, to June 7, 2000. Second, Respondent's payroll records show that Claimant was paid the following salaries: \$1200 per month from November 17, 1998, through April 17, 1999; \$1300 per month from April 18, 1999, through November 27, 1999; \$650 every two weeks from November 28, 1999, through April 1, 2000; and \$700 every two weeks from April 2, 2000, through June 7, 2000. It is also undisputed that this salary was based on a 40-hour workweek. Third, Respondent admitted in his answer that he owed Claimant \$911.25 in due and unpaid overtime wages.

The fourth element, the amount and extent of work performed by Claimant, is the crux of the matter. Both sides presented witness testimony and documents supporting conclusions that differed by \$9,800. The Agency's burden of proof can be met by producing sufficient evidence from which "a just and reasonable inference may be drawn." *In the Matter of Nova Garbush*, 20 BOLI 65, 72 (2000). A claimant's credible testimony may be sufficient evidence. *Id.*

In this case, Respondent maintained a contemporaneous record of the hours worked by the Claimant. Although the format may not have been ideal, it still shows what Respondent told his wife, at the end of each day, concerning

the hours that Claimant worked that day. Based on testimony of the Agency's witnesses, the forum is not convinced that Respondent's record is entirely accurate. However, Claimant's after-the-fact recording of his hours is even less reliable, and Claimant's testimony as to the total number of hours he worked is not credible at all. Consequently, the forum relies on Respondent's calendar, the most reliable record of hours worked by Claimant, to determine the amount and extent of work performed by the Claimant.<sup>15</sup> As noted in Finding of Fact – The Merits 34, the forum has interpreted the notations on that calendar literally, deducting time from Claimant's overall work hours where Respondent has indicated a deduction for a particular day, and not making a deduction for a lunch hour where Respondent has not indicated a deduction. This also takes into account the credible testimony of Claimant and Quan Do that they usually did not take more than 15-20 minutes for a lunch break and took no other breaks during the day.

Claimant was entitled to be paid for all work performed in ex-

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<sup>15</sup> *C.f. In the Matter of Ann L. Swanger*, 19 BOLI 42, 57 (2000), where the forum declined to "speculate or draw inferences about wages owed" based on the claimant's testimony, where that testimony was not credible, even though respondents had failed to create and maintain a record of hours worked by the claimant.

cess of 40 hours per week. ORS 653.261(1), OAR 839-020-0030(1). The forum has converted Claimant's salary to an hourly and overtime rate of pay under the provisions of OAR 839-020-0030(3).<sup>16</sup> Based on Claimant's agreed upon rates of pay, Respondent's record of Claimant's hours worked in Respondent's original calendar, and the forum's interpretation of that record, the forum concludes that Respondent owes Claimant \$4,224.11 in due and unpaid wages.

### **PENALTY WAGES**

An award of penalty wages turns on the issue of willfulness. 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. *Garbush*, 20 BOLI at 72. Respondent, as an employer, had a duty to know the amount of wages due his employees. *Id.* Respondent knew the overtime hours worked by Claimant and wrote them down on a calendar, but believed he did not have to pay Claimant for those overtime hours because Claimant was a salaried employee. Respondent's ignorance or misunderstanding of the law do not exempt him from a determination that he willfully failed to pay overtime. *In the Matter of Burrito*

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<sup>16</sup> See Findings of Fact – The Merits 3, 15, 17, and 19, *supra*.

*Boy, Inc.*, 16 BOLI 1, 19 (1997). There is no evidence that Respondent acted other than voluntarily or as a free agent. The forum concludes that Respondent acted willfully and assesses penalty wages in the amount of \$2,100.00, the amount sought in the amended Order of Determination. This figure is computed by multiplying \$8.75 per hour x 8 hours per day x 30 days, pursuant to ORS 652.150 and OAR 839-001-0470.

**ORDER**

NOW, THEREFORE, as authorized by ORS 652.332 and as payment of the unpaid wages and civil penalty wages owed as a result of his violations of ORS 652.140 and OAR 839-020-0030, the Commissioner of the Bureau of Labor and Industries hereby orders Danny Vong Phuoc Truong 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 trust for Claimant Liem Ngoc Nguyen in the amount of SIX THOUSAND THREE HUNDRED TWENTY FOUR DOLLARS AND ELEVEN CENTS (\$6,324.11), less appropriate lawful deductions, representing \$4,224.11 in gross, earned, unpaid, due, and payable wages and \$2,100.00 in penalty wages, plus interest at the legal rate on the sum of \$4,224.11 from July 1, 2000, until paid and in-

terest at the legal rate on the sum of \$2,100.00 from August 1, 2000, until paid.

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**In the Matter of  
NORTHWEST CIVIL PROCESS  
SERVING, INC.,**

**Case No. 06-01  
Final Order of the Commissioner  
Jack Roberts  
Issued April 13, 2001**

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**SYNOPSIS**

Respondent Northwest Civil Process Serving, Inc. employed Claimant as a process server and failed to pay Claimant minimum wage for all hours Claimant worked, in violation of ORS 652.140. Respondent's failure to pay Claimant the minimum wage was willful and Respondent was ordered to pay civil penalty wages. ORS 653.010; ORS 653.025; ORS 652.140; ORS 652.150; ORS 652.322.

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The above-entitled case came on regularly for hearing before Linda A. Lohr, 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 4, 2001, at the Salem office of the Bureau of Labor and Industries, located at 3865 Wolverine Street NE, Bldg. E-1, Salem, Oregon.

Cynthia L. Domas, an employee of the Agency, represented the Bureau of Labor and Industries ("BOLI" or "the Agency"). John Henry Burlison ("Claimant") was present throughout the hearing and was not represented by counsel. Kevin Lafky, Attorney at Law, represented Northwest Civil Process Serving, Inc. ("Respondent"). Jon Archbold, Respondent's president, was present throughout the hearing as Respondent's corporate representative.

In addition to Claimant, the Agency called Jon Archbold, Respondent's president, and Newell Enos, a Wage and Hour Division compliance specialist, as witnesses.

Respondent called Jon Archbold, Respondent's president, and Mike Riedel, Respondent's former employee, as witnesses.

The forum received as evidence:

- a) Administrative exhibits X-1 through X-23;
- b) Agency exhibits A-1 through A-9 (filed with the Agency's case summary) and A-10 and A-11 (submitted at hearing);
- c) Respondent exhibits R-2 through R-5 (filed with Respondent's case summary) and R-7 (submitted at hearing).

Having fully considered the entire record in this matter, I, Jack Roberts, 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 February 4, 2000, Claimant filed a wage claim form stating Respondent had employed him from November 10 until December 20, 1999, and failed to pay him the minimum wage for all hours worked. Claimant further alleged Respondent failed to pay him agreed upon mileage expenses.

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 May 22, 2000, the Agency served Respondent with an Order of Determination, numbered 00-0593. The Agency alleged Respondent had employed Claimant during the period November 11 through December 15, 1999, at the rate of \$6.50 per hour and that Claimant had worked a total of 97.25 hours. The Agency further alleged Respondent was required to, but did not, pay Claimant mileage expenses at the rate of \$.31 per mile for a total of 1,736 miles. The Agency concluded Respondent owed Claimant \$650.30 in wages,

including mileage expenses, plus interest. The Agency also alleged Respondent's failure to pay was willful and Respondent, therefore, was liable to Claimant for \$1,560.00 as penalty wages, plus interest. 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) Respondent, through counsel, filed a timely answer and request for hearing. In its answer, Respondent denied the allegations and affirmatively alleged a financial "inability to pay the wages or compensation at the time they accrued."

5) On July 31, 2000, the Agency requested a hearing. On August 2, 2000, the Hearings Unit issued a Notice of Hearing stating the hearing would commence at 9:00 a.m. on November 7, 2000. With the Notice of Hearing, the forum included a copy of the Order of Determination, a "SUMMARY OF CONTESTED CASE RIGHTS AND PROCEDURES" and a copy of the forum's contested case hearings rules, OAR 839-050-0000 to 839-050-0440.

6) On August 9, 2000, Respondent's counsel requested the hearing be reset due to a previously scheduled civil trial that conflicted with the November 7 hearing date. The Agency did not object to the request and, on August 16, 2000, the ALJ reset the hearing date to January 4, 2001.

7) On August 16, 2000, the forum issued a case summary order requiring the Agency and Respondent to submit case summaries that included: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a brief statement of the elements of the claim (for the Agency only); a brief statement of any defenses to the claim (for Respondent only); 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 their case summaries by December 20, 2000, and advised them of the possible sanctions for failure to comply with the case summary order. The Agency and Respondent filed timely case summaries.

8) On October 25, 2000, the ALJ assigned was changed from Alan McCullough to Linda A. Lohr.

9) On November 16, 2000, the Agency moved for a discovery order that required Respondent to produce nine categories of documents. The Agency provided a statement indicating the relevance of the documents requested. Respondent filed no response to the Agency's motion. On December 4, 2000, the forum issued an interim order that granted the Agency's motion and required Respondent to produce all of the requested documents to the Agency no later than Monday, December 11, 2000.

10) On November 27, 2000, Respondent moved for a discov-

ery order requiring the Agency to produce four categories of documents. Respondent did not specify the relevance of two of the categories. On November 29, 2000, the Agency filed an objection to Respondent's motion stating the requests in those two particular categories were overly broad and not likely to produce information relevant to Claimant's wage claim.<sup>1</sup> On December 5, 2000, the forum granted Respondent's motion for the two categories of requested documents the Agency did not object to and ordered the Agency to produce the documents to Respondent no later than Monday, December 11, 2000.

11) On December 18, 2000, the Agency filed a motion to strike Respondent's affirmative defense based on Respondent's refusal to comply with the forum's discovery order.

12) On December 21, 2000, the forum issued an interim order denying the Agency's motion to strike Respondent's affirmative defense ruling that the appropriate sanction for failing to comply with a discovery order is the ALJ's re-

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<sup>1</sup> The Agency's objection filed on November 29, 2000, though part of the original record, was not initially marked as an administrative exhibit and, therefore, not admitted into the record with the other administrative exhibits when the hearing commenced on January 4, 2001. On the ALJ's own motion, the exhibit was subsequently marked as administrative exhibit X-23 and admitted into the record.

fusal to admit evidence that has not been disclosed in response to a discovery order, pursuant to OAR 839-050-0200(11). After the hearing commenced, Respondent withdrew its affirmative defense.

13) At the start of hearing, pursuant to ORS 183.415(7), 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.

14) During the hearing, Respondent offered as evidence documents related to the employment of Respondent employee, Mike Riedel, marked as R-1 for identification and a document prepared by Claimant that summarized Claimant's wage calculations, marked as R-6 for identification. The ALJ excluded R-1 as irrelevant and R-6 as unduly repetitious. After preliminary questioning, the ALJ also excluded Mike Riedel's testimony because Riedel had no direct knowledge of the matters pertaining to Claimant's wage claim. Furthermore, from the offer of proof,<sup>2</sup> the ALJ concluded she would not violate her duty to conduct a full and fair inquiry by excluding the proffered testimony.

15) On February 20, 2001, the ALJ issued a proposed order that notified the participants they were entitled to file exceptions to

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<sup>2</sup> As the offer of proof, Respondent's counsel summarized the matters Riedel was expected to address in his testimony.

the proposed order. Respondent filed timely exceptions which are addressed in the opinion section of this Final Order.

**FINDINGS OF FACT – THE MERITS**

1) At all times material herein, Respondent was an Oregon corporation employing one or more individuals to serve legal documents upon individuals and business entities.

2) At all times material herein, Jon Archbold was Respondent’s corporate president and Claimant’s supervisor. Respondent’s principal place of business was located in Salem, Oregon.

3) Sometime prior to November 10, 1999, Respondent placed a work order with the Oregon Employment Department seeking individuals to work as process servers in the Multnomah, Clackamas, and Washington County area. The Employment Department posted the job as follows:

“REQ: VALID DL, INSURANCE & VEHICLE (BFOQ). GOOD COMMUNICATION, READING & WRITING SKILLS, KNOWLEDGE OF CLACKAMAS/MULTNOMAH/WASHINGTON [sic] COUNTIES. JOB: SERVE LEGAL PAPERS TO BUSINESSES & INDIVIDUALS AT THEIR WORK OR RESIDENCE. 20-30 HRS/WK. PAY: \$7.50–10 PER DELIVERY; USUALLY WILL DELIVER 150-200 PAPERS/MONTH. SERVING

PAPERS IN PORTLAND METRO AREA. EMPLOYER GUARANTEES MIN. WAGE, REQUIRED STATEMENT IF NO WAGE GIVEN.”

Under “Additional Requirements” Respondent indicated the job required “Day Shift Swing Shift Non-commercial Drivers License.”

4) After seeing the Employment Department job posting, Claimant applied for employment with Respondent and was interviewed by Archbold, who hired Claimant as a process server on November 10, 1999. Claimant’s first day of work was November 11, 1999.

5) Respondent and Claimant agreed Claimant would receive \$10.00 for every legal document Claimant actually served. Although not told directly by Archbold, Claimant believed he would be paid for any returned document if he attempted service at least three times.

6) On November 10, 1999, Complainant signed an employment agreement that stated, in part:

“The employee shall be responsible for serving and delivering legal documents to individuals, corporations, or firms and agrees to perform these duties expeditiously and professionally. \* \* \* The duties shall be rendered at Employer’s direction and Employee may be directed to perform at such place or places, which will include, but is not limited to all counties

throughout the state of Oregon, and at such times as the needs of the Employer may from time-to-time dictate.”

7) Claimant had no prior experience as a process server. When Claimant was hired, Archbold advised Claimant of various methods of serving documents expeditiously. Claimant was on his own as far as determining when and how documents were served.

8) To perform his job duties, Claimant was required to provide and drive his own car. Driving was an indispensable part of Claimant’s job duties. Claimant understood and agreed that under the employment agreement he was not only to use his own vehicle but he was also to “pay for all gas and repairs and maintain a valid drivers [*sic*] license and insurance while employed by Employer.”

9) Claimant worked exclusively out of his own home located in Milwaukie, Oregon. Archbold mailed packets of legal documents to Claimant about once a week from Respondent’s principal place of business in Salem, Oregon. Each packet contained 20 - 40 legal documents ready for service. Each legal document was accompanied by a “return of service” to be processed by Claimant after the document was served. Claimant was expected to adhere to Respondent’s written policies and procedures set forth, in part, as follows:

“When you receive your work, each document will be accom-

panied by a RETURN OF SERVICE. The return will be filled in with the name, address, date and other vital service information. You will fill in date and time of service, how it was served (personally, substitute service, or office-service), and where it was served if the address is different from that originally printed on the return. You will also need to sign it. Be sure to print hard so that it goes through all five copies.

“Except for garnishments, service on all other papers should be attempted AT LEAST three times, during various times of the day and evening. ALL attempts must be noted on the green copy of the Return, along with any other information you might obtain. Any problems, address or vehicle information, physical descriptions, etc. should be written on the green slip. The more information the better. If a defendant has moved, indicate who has told you this (new resident, neighbor, manager, etc.) and attempt to get a forwarding address or phone number. If you need to drop-serve a paper, record the incident along with a physical description of the person you served. Take the time to document every attempt, any difficult situations, or any new information. \* \* \*

”After serving the paper, the return of service should be returned to the office within 24

hours (excluding holidays and weekends).”

Claimant followed Respondent’s written policies and procedures for serving and returning documents.

10) Claimant’s preparations for serving documents began at home. Claimant mapped out a route using a “Thomas Guide” and used the address furthest from his home as the midpoint for his route. He usually attempted to serve between six and ten documents each way between his home and the midpoint address. He tried to serve the documents in a “loop” that started from his home and ended at his home. The number of miles Claimant drove each workday varied. Where feasible, Claimant served documents on businesses during the day and on individuals in the evening and on weekends in accordance with Respondent’s initial advice. Claimant’s preparatory activities prior to leaving his home each workday took up to an hour. He did some of the required paperwork when he returned home or the next morning. He packed up and mailed to Respondent undelivered documents and returns of service in accordance with Respondent’s policies. He did not keep a record of his time spent in preparatory or concluding activities and did not include that time in his wage claim.

11) When Claimant started working for Respondent, Claimant’s wife created a computer spreadsheet detailing each document Claimant was assigned to serve, the date, day of the week,

and time each document was served or service was attempted, the hours and mileage for each document’s service and attempted service, and postage costs for the returns of service. Columns divided each category and each document was referred to by the name of the individual or business to be served.

12) Claimant recorded his hours and mileage during each workday on a notepad. At the end of his workday, or the following morning, Claimant transferred the information from his notepad to the computer spreadsheet.

13) Respondent did not require Claimant to turn in a time sheet and kept no record of Claimant’s hours worked. Respondent tracked the documents Claimant was assigned on a computer spreadsheet titled “Papers Issued, by Server” that included the date the documents were “received,”<sup>3</sup> the “case number,” the “debtor’s name,” and the “date & time served.” Respondent’s spreadsheet for Claimant for the month ending November 30, 1999, lists approximately 118 “debtors” and the date and time 27 of the “debtors” were served. The spreadsheet also shows the amount earned by Claimant for 27 “papers served” as \$270. For the month ending December 31, 1999, Respondent’s spreadsheet for Claimant lists 56 “debtors” and the date and time 20 of the “debt-

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<sup>3</sup> There was no testimony describing who received the documents on the listed dates.

ors" were served. That spreadsheet shows the amount Claimant earned for 20 "papers served" as \$200. Most, if not all, "debtors" named in Respondent's spreadsheets for November and December, correspond directly with the names listed on Claimant's spreadsheet. The dates and times of service of the 47 documents with completed service are exactly the same as the dates and times recorded by Claimant.

14) When Claimant was hired he was given a form on Respondent's letterhead captioned "Business Mileage Per Employee and Hours Worked 1999." The form required employees to certify "that the above mileage is the actual business mileage I drove during the respective months, as indicated by my initials. I acknowledge that this will be initialed each month prior to my receiving my payroll check and/or mileage reimbursement each month and that the employer is not responsible for its accuracy."

15) Throughout Claimant's employment, Respondent paid its employees on the 10<sup>th</sup> of each month for the previous month of work.

16) Each pay period, Claimant received two checks from Respondent. One check was written on Respondent's "payroll" account, and included some, but not all, of the standard payroll deductions. The other check, written on Respondent's "operating" account, was intended as payment for Claimant's auto expenses and there were no deductions noted.

Respondent recorded the amounts Claimant was paid out of each account in separate ledgers. One ledger was titled "auto expenses." The other ledger was called, informally, a "control sheet for payroll."

17) Between November 11 and November 30, 1999, Claimant worked 61.5 hours. Based on the minimum wage rate of \$6.50 per hour, Claimant earned \$399.75 for hours worked in November. On or about December 10, 1999, Respondent paid Claimant wages of \$135.00, less certain payroll deductions. Respondent also paid Claimant \$185 for November auto expenses. Both amounts were recorded on the control sheet and auto expense ledger, respectively.

18) On December 11, 1999, Claimant gave Respondent written notice that he was quitting his employment with Respondent effective December 20, 1999. In his notice Claimant noted he was only making "between \$4.00 and \$5.00 per hour." Claimant gave his notice following a telephone conversation with Respondent whereby Claimant expressed his dissatisfaction with the amount he received in his paycheck. Respondent advised Claimant during their telephone discussion that Claimant would not be paid for documents he attempted but failed to serve, even if Claimant had made three attempts to serve a document.

19) Between December 1 and December 20, 1999, Claimant worked 35.75 hours. The last day Claimant attempted to serve

documents was December 15, 1999. Based on the minimum wage rate of \$6.50 per hour, Claimant earned \$232.38 for hours worked in December. On or about January 10, 2000, Respondent paid Claimant \$100, less certain payroll deductions, for Claimant's work in December. Respondent also paid Claimant \$100 for December auto expenses. Those amounts were recorded on Respondent's control sheet and auto expense ledger, respectively.

20) On Respondent's fourth quarter 1999 tax report filed with the Employment Department, Archbold certified, on behalf of Respondent, that Claimant's total subject wages were \$135 for the quarter. On Respondent's first quarter 2000 tax report, Archbold certified that Claimant's total subject wages were \$100 for that quarter. Archbold did not report the hours worked by Respondent's employees, including Claimant, on the reports submitted to the Employment Department. However, hours for each listed employee were handwritten on a copy of the 1999 fourth quarterly report Respondent submitted as an exhibit at hearing. On the copy there was a handwritten notation that Claimant had worked six hours.

21) Agency compliance specialist Enos was assigned to investigate Claimant's wage claim. During his investigation, Enos spoke with Archbold, Respondent's president, and memorialized his conversation.

Archbold told Enos he kept no records pertaining to Claimant's hours because he did not think he was required to do so since Claimant was paid on a piece rate basis. Archbold told Enos there was no agreement for mileage reimbursement. Archbold acknowledged he paid Claimant with two checks and that one was for wages and the other for Claimant's auto expenses. Enos' testimony was credible and consistent with the contact report he prepared during the wage claim investigation.

22) Claimant's testimony was generally credible. He testified in a straightforward manner and on key points his testimony was bolstered by his contemporaneous record of hours worked. That record was, in turn, corroborated by Respondent's own records. Claimant's records were detailed and included a significant number of names, dates and times that would have been difficult, if not impossible, to reconstruct after the fact. The forum relied considerably on Claimant's records in making its findings of fact. Regarding the auto expenses, Claimant's testimony is more problematic. Both Claimant and Respondent were curiously reluctant to acknowledge Respondent's payment for auto expenses during Claimant's employment. Both, in fact, denied payment was ever made despite substantial evidence to the contrary. Claimant's testimony on this issue was vague and appeared to be based on genuine confusion about Respondent's reasons for

paying him each pay period with two separate checks. Because there are two checks for each pay period, the forum discounts Claimant's testimony that Respondent did not pay his auto expenses. The forum, however, has credited Claimant's contemporaneous record in its entirety.<sup>4</sup>

23) Archbold's testimony was contradicted on several key points by prior inconsistent statements, including documentary evidence he created. He testified that all money Respondent paid to Claimant was for wages, despite his own paperwork showing half the money paid to Claimant was by a separate check written on Respondent's "operating" account. During the wage claim investigation, Archbold acknowledged that the second check paid out of that account each pay period was for Claimant's auto expenses. Moreover, on three separate occasions he stated three different amounts were paid to Claimant. In a letter to compliance specialist, Enos, during the investigation, Archbold claimed Claimant was paid \$520 for "about 27 or 28" hours of work. In the "Employer Response" form Archbold submitted during the investigation, Archbold claimed Claimant was paid \$320 for 18 hours in November and 14.10 hours in December. He then certified to the Employment Department, on behalf of Respondent, that Claimant was paid a total of \$235 for his work in No-

vember and December. None of those amounts match Respondent's spreadsheets for Claimant showing Respondent's calculation that Claimant earned \$470 for 47 "papers served." In addition, Archbold identified the Agency's copy of the original 1999 fourth quarter tax report as the one he certified to the Employment Department as "true and accurate and [filed] under penalty of false swearing." The original, filed with the Employment Department, did not list the hours worked by each employee. By contrast, the copy Respondent offered as evidence during the hearing showed Archbold's handwritten entries of hours purportedly worked by each listed employee, including a notation that Claimant worked six hours in December. To compound the problem, Archbold's entry for Claimant on the altered document contradicts his previous statement to the Agency that Claimant worked 14.10 hours in December. Accordingly, the forum has given no weight to Respondent's testimony where it conflicts with other credible evidence in the record or his previous statements against interest to the agency compliance specialist. To determine the amount Respondent actually paid to Claimant, the forum relied on the figures Archbold certified to the Employment Department because they were exactly the same as those recorded in Respondent's internal payroll documents maintained during Claimant's employment.

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<sup>4</sup> See *infra* Findings of Fact – The Merits 11 & 12.

**ULTIMATE FINDINGS OF FACT**

1) Respondent at all times material herein was an Oregon corporation doing business in the state of Oregon and engaged the personal services of one or more employees in the operation of that business.

2) Respondent employed Claimant between November 10 through December 20, 1999, as a process server.

3) Respondent and Claimant agreed Claimant would be paid \$10.00 for every document Claimant served on an individual or business entity.

4) The state minimum wage during 1999 was \$6.50 per hour.

5) Claimant notified Respondent in writing, on December 11, 1999, of his intent to quit his employment with Respondent, effective December 20, 1999.

6) Claimant worked 97.25 hours between November 10 and December 20, 1999. At the minimum wage of \$6.50 per hour, Claimant earned \$632.13 in wages.

7) Respondent owes Claimant \$397.13, which represents \$632.13 wages earned, minus \$235 in wages paid to Claimant by Respondent.

8) Respondent willfully failed to pay Claimant the \$397.13 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) Civil penalty wages, computed pursuant to ORS 652.150, equal \$1,560.

**CONCLUSIONS OF LAW**

1) ORS 653.010 provides, in pertinent part:

“ \* \* \* \* \*

“(3) ‘Employ’ includes to suffer or permit to work \* \* \*.

“(4) ‘Employer’ means any person who employs another person \* \* \*.

“ \* \* \* \* \*

“(12) ‘Work time’ includes both time worked and time of authorized attendance.”

Respondent employed Claimant by suffering or permitting him to work for Respondent as a process server.

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) ORS 653.025 requires that:

“ \* \* \* for each hour of work time that the employee is gainfully employed, no employer shall employ or agree to employ any employee at wages computed at a rate lower than:

“ \* \* \* \* \*

“(3) For the calendar years after December 31, 1998, \$6.50.”

Respondent was prohibited from employing or agreeing to employ Claimant at a wage rate less than

\$6.50 per hour for each hour of work time. Respondent paid Claimant less than that rate, in violation of ORS 653.025.

4) ORS 652.140(2) provides:

“When an employee who does not have a contract for a definite period quits employment, all wages earned and unpaid at the time of quitting become due and payable immediately if the employee has given to the employer not less than 48 hours’ notice, excluding Saturdays, Sundays and holidays, of intention to quit employment. \* \* \* ”

Claimant quit his employment after giving Respondent more than 48 hours notice of his intent to quit employment. Respondent violated ORS 652.140(2) by failing to pay Claimant immediately all wages earned and unpaid when Claimant quit his employment on December 20, 2000. Those wages amount to \$397.13.

5) ORS 652.150 provides:

“If an employer willfully fails to pay any wages or compensation of any employee whose employment ceases, as provided in ORS 652.140 and 652.145, then, as a penalty for such nonpayment, the wages or compensation of such employee shall continue from the due date thereof at the same rate until paid or until action therefor is commenced; provided, that in no case shall such wages or compensation continue for more than 30 days from the due date; and pro-

vided further, the employer may avoid liability for the penalty by showing a financial inability to pay the wages or compensation at the time they accrued.”

Respondent is liable for \$1,560 in civil penalties under ORS 652.150 for willfully failing to pay all wages or compensation to Claimant when due as provided in ORS 652.140(2).

6) 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 Claimant his earned, unpaid, due and payable wages and the civil penalty wages, plus interest on both sums until paid. ORS 652.332.

### OPINION

A preponderance of the credible evidence on the whole record establishes Respondent employed Claimant during the wage claim period and willfully failed to pay Claimant all wages earned and payable, when due.

### MINIMUM WAGE

In its case summary filed prior to hearing, Respondent generally defended its position by stating that Claimant “is not entitled to a ‘minimum wage’ under the facts and circumstances of this case.” However, in its answer and at hearing, Respondent did not assert and the forum does not find any exemption or exclusion from the coverage of the Minimum

Wage Law, ORS 653.010 to 653.261, or the Wage and Hour Laws, ORS chapter 652, for Respondent or Claimant. Respondent had the duty to raise such an exemption or exclusion as an affirmative defense in its answer and present evidence to support its defense. Respondent did not do so and, as such, has waived the defense. *In the Matter of Sunnyside Enterprises of Oregon, Inc.*, 14 BOLI 170 (1995); OAR 839-050-0130(2).

ORS 652.025 prohibits employers from paying their non-exempt workers at a rate less than \$6.50 per hour for each hour of work time. ORS 653.055(1) provides that:

“[a]ny employer who pays an employee less than the [minimum wage] is liable to the employee affected:

“(a) For the full amount of the wages, less any amount actually paid to the employee by the employer, \* \* \* and,

“(b) For civil penalties provided in ORS 652.150.”

ORS 653.055(2) states:

“[a]ny agreement between an employee and an employer to work at less than the [minimum wage] is no defense to an action under subsection (1) of this section.”

Credible evidence based on the whole record establishes Respondent agreed to pay Claimant at a rate that amounts to less than \$6.50 per hour. Respondent’s

apparent reliance on the agreement to pay Claimant at a piece rate as a defense in this proceeding is misplaced. While Respondent is free to pay its employees at any rate and by any method, including a piece rate method, the agreed rate or method of compensating an employee must not result in an employee receiving less than the minimum wage for all hours worked. Here, Respondent’s agreement to pay Claimant at a piece rate, irrespective of the hours Claimant actually worked, provides no defense to Claimant’s claim for minimum wages and civil penalties.

#### **HOURS WORKED**

ORS 653.045 requires Respondent to keep and maintain proper records of wages, hours and other conditions and practices of employment. Where the forum concludes an employee performed work for which he or she was not properly compensated, it becomes the employer’s burden to produce all appropriate records to prove the precise hours and wages involved. Where the employer produces no records, the Commissioner may rely on evidence produced by the Agency “to show the amount and extent of the employee’s work as a matter of just and reasonable inference and then may award damages to the employee, even though the result be only approximate.” *In the Matter of Diran Barber*, 16 BOLI 190 (1997), quoting *Anderson v. Mt. Clemens Pottery Co.*, 328 US 680 (1946).

Here, Respondent kept no record of the days or hours Claimant worked. This forum has previously accepted, and will accept, the credible testimony of a claimant as sufficient evidence to prove work was performed and from which to draw an inference of the extent of that work. *In the Matter of Graciela Vargas*, 16 BOLI 246 (1998). Claimant's testimony was credible as to the amount and extent of the work he performed. In addition, Claimant kept a contemporaneous record of the hours he worked and the miles he drove during the course of his employment. That record also included a reasonably accurate account of the papers he was assigned to serve with the dates he attempted service and the dates and times he accomplished service consistent with Respondent records produced at hearing. The forum concludes, therefore, that Claimant performed work for which he was improperly compensated and the forum may rely on the evidence Claimant produced showing the hours he worked as a matter of just and reasonable inference.

Respondent, on the other hand, produced no persuasive evidence to "negative the reasonableness of the inference to be drawn from the [Claimant's] evidence." *Id.* at 255, quoting *Mt. Clemens Pottery Co.*, 328 US at 687-88. The records Respondent did produce only served to corroborate the amount and extent of Claimant's work recorded contemporaneously by Claimant.

The forum finds Claimant performed 97.25 hours of work for Respondent. He was entitled to receive at least the statutory minimum wage rate of \$6.50 per hour, for a total of \$632.13. Respondent paid a total of \$235 in wages. Respondent owes Claimant \$397.13 in unpaid wages.

### WORK TIME

Respondent contended at hearing that Claimant was not entitled to wages for time spent commuting to and from work.

OAR 839-020-0045 provides in pertinent part:

"(1) Home to work in an ordinary situation: An employee who travels from home before his/her regular workday and returns to his/her home at the end of the workday is engaged in ordinary home to work travel which is a normal incident of employment, whether he/she works at a fixed location or at different job sites. Normal travel from home to work is not work time.

" \* \* \* \* \*

"(3) Travel time that is all in a day's work: Time spent by an employee in travel as part of his/her principal activity must be counted as hours worked. \*  
\* \*"

In this case, Claimant did not travel from home "before" his regular workday. Claimant's workday began at home with preparatory activities that were an integral part of the principal activity for which he was hired –

servicing legal documents on various individuals and businesses in a tri-county area. Claimant's workday ended at home where Claimant finished the paperwork required by Respondent's written and verbal policies. See OAR 839-020-0043. Claimant's travel time started after his workday began and finished before his workday ended, thus, all of Claimant's travel time is compensable as travel "all in a day's work." Because Claimant did not keep a record of how much time he spent on preparatory and concluding activities, and did not include those hours in his wage claim, the forum has not credited Claimant's time spent on those activities as hours worked for wage calculation purposes. The forum has only considered the fact that Claimant necessarily spent some time each workday engaged in those activities in determining the extent to which Claimant's travel time is compensable.

Respondent's argument at hearing that Claimant did not use his time efficiently when attempting to serve documents is without merit. Respondent never assigned specific hours or days of the week for serving documents. Claimant's principal activity was travel and he was free to plan his various routes for the day without Respondent's input. There is no credible evidence in the record to substantiate Claimant traveled more miles than reasonably necessary to serve documents in the tri-county area to which he was assigned. Even if he did travel routes that were less expeditious

than others, Respondent "suffered or permitted" Claimant to expend an indeterminate amount of time traveling from place to place to serve documents. Work time is all time an employee is required or permitted to be on duty or at a prescribed place or places. ORS 653.010(12). All of Claimant's time spent driving and attempting to serve legal documents on individuals and businesses is compensable work time.

#### **MILEAGE EXPENSES**

Under Oregon law the Commissioner has the authority to enforce wage claims which are defined in ORS 652.320(9) as "an employee's claim \* \* \* for compensation for the employee's own personal services." It has long been the policy of the Bureau of Labor and Industries that unpaid job-related expenses can be included in a wage claim if there has been an explicit agreement between the parties that the employer would pay for such expenses or if the employer in fact does pay other such expenses. *In the Matter of Jack Crum Ranches, Inc.*, 14 BOLI 258 (1995); *In the Matter of Sylvia Montes*, 11 BOLI 268 (1993); *In the Matter of All Season Insulation Company, Inc.*, 2 BOLI 264 (1982).

In this case, Respondent and Claimant agree there was no explicit agreement that Respondent reimburse Claimant for his mileage expenses. A preponderance of the credible evidence, however, demonstrates clearly Respondent did in fact pay such expenses each pay period. Documentary

evidence, including Respondent's payroll documents produced at hearing, shows Respondent paid Claimant \$185 for "auto expenses" for the pay period ending November 30, 1999, and \$100 for "auto expenses" for the pay period ending December 31, 1999. Contrary to his testimony at hearing, Respondent's president, Jon Archbold, told the Agency compliance specialist during the investigation that he gave Claimant two checks each pay period, a paycheck and one intended as reimbursement for auto expenses. Moreover, the wages Claimant received from Respondent's "payroll" account, separate from and in addition to the auto expenses, are exactly what Respondent certified to the Employment Department as Claimant's "total subject wages" for the pay periods at issue. The forum, therefore, concludes Respondent reimbursed Claimant for auto expenses notwithstanding Respondent's - and Claimant's - protests to the contrary.

The Agency claimed Claimant was entitled to a mileage rate of \$.31 per mile as reimbursement for a total of 1,736 miles. Despite the payments made to Claimant, reimbursable expenses are governed by explicit agreement. As this forum has pointed out previously, the employer is free to set the terms and conditions of an expense reimbursement, and an employee may accept or reject those terms. *In the Matter of Central Pacific Freight Lines*, 7 BOLI 272 (1989). Here, the evidence shows there was a tacit agree-

ment, but no agreed rate. Because the Agency has failed to show a specific agreement, the forum is not authorized to award Claimant additional reimbursement for auto expenses.<sup>5</sup>

### PENALTY WAGES

An award of penalty wages turns on the issue of willfulness. 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).

Respondent, as an employer, had a duty to know the amount of wages due to its employee. *McGinnis v. Keen*, 189 Or 445, 221 P2d 907 (1950); *In the Matter of Jack Coke*, 3 BOLI 238 (1983). Respondent asserted that Claimant was not entitled to the minimum wage "under the facts and circumstances in this case." The facts and law prove otherwise. Respondent's failure to apprehend the correct application of the law and Respondent's actions based on this incorrect application do not exempt Respondent from a determination that it willfully failed to pay wages

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<sup>5</sup> Had there been a notation on the auto expense checks showing a basis, e.g., 800 miles @ \$.31 per mile, the forum could have inferred an explicit agreement to pay the auto expenses at that rate.

earned and due. *In the Matter of Locating, Inc.*, 14 BOLI 97 (1994), *aff'd without opinion, Locating, Inc. v. Deforest*, 139 Or App 600, 911 P2d 1289 (1996); *In the Matter of Mario Pedroza*, 13 BOLI 220 (1994). Respondent admits it was not paying Claimant the minimum wage and the evidence shows the failure to pay the minimum wage was intentional. From these facts, the forum infers Respondent voluntarily and as a free agent failed to pay Claimant all of the wages he earned between November 11 through December 20, 1999. Respondent acted willfully and is liable for penalty wages under ORS 652.150.

Claimant gave Respondent more than 48 hours notice of his intent to quit his employment. His wages were due and payable on December 20, 1999. See ORS 652.140. At hearing, Respondent withdrew its defense of inability to pay the wages owed Claimant. Penalty wages, therefore, are assessed and calculated in accordance with ORS 652.150 in the amount of \$1,560. This figure is computed by multiplying \$6.50 per hour by 8 hours per day multiplied by 30 days. See ORS 652.150 and OAR 839-001-0470.

#### **RESPONDENT'S EXCEPTIONS**

Respondent excepts to certain factual findings, ultimate factual findings, and the associated conclusions of law and opinion in the proposed order as they relate to Claimant's work time and Respondent's payment of mileage expenses.

#### **A. Work Time Exception**

Respondent takes exception to Proposed Finding of Fact – The Merits 7 on the ground the evidence does not support the finding that “Claimant was on his own.” The finding states, “Claimant was on his own as far as determining when and how documents were served” and is based on Respondent's testimony.

Respondent also excepts to the Proposed Ultimate Findings of Fact 6-8 arguing Claimant “spent his time in an unreasonable and unproductive fashion” and the ALJ erred by not permitting testimony from an employee who could have testified to what was “reasonable for a normal process server.” Respondent merely reiterates his argument at hearing. The work time issue was adequately covered in the opinion and Respondent's exceptions on that point are denied.

#### **B. Auto Expenses Exception**

Respondent excepts to those portions of Proposed Findings of Fact – The Merits 17 and 19 that relate to the payment of auto expenses on the ground the existing employment agreement controls whether or not Respondent paid those expenses. To the contrary, Respondent's actions determine whether he paid the expenses. The documentary evidence along with Respondent's previous acknowledgement to the Agency established conclusively that he did in fact reimburse Claimant for

auto expenses. Respondent has not otherwise explained why he would characterize some of Claimant's "wages" as reimbursement for auto expenses. Instead, the forum properly relied on Respondent's certified quarterly tax reports as credible evidence of the wages paid during Claimant's employment period.

### **C. Claimant's credibility**

Respondent excepted to that portion of Proposed Finding of Fact – The Merits 22 that states Claimant's testimony was "generally credible." Respondent did not otherwise assert specific challenges to the finding. The assessment of Claimant's credibility is supported by substantial evidence in the record and Respondent's exception is denied.

### **ORDER**

NOW, THEREFORE, as authorized by ORS 652.332, and as payment of the unpaid wages, Respondent **Northwest Civil Process Serving, Inc.**, is hereby ordered 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 trust for Claimant John Henry Burlison, in the amount of ONE THOUSAND NINE HUNDRED AND FIFTY SEVEN DOLLARS AND THIRTEEN CENTS (\$1,957.13), less appropriate lawful deductions, representing \$397.13 in gross earned, unpaid, due and payable

wages and \$1,560 in penalty wages, plus interest at the legal rate on the sum of \$397.13 from December 20, 1999, until paid and interest at the legal rate on the sum of \$1,560 from January 20, 2000, until paid.

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### **In the Matter of**

**BRUCE D. HUHTA and Teresa  
G. Huhta,**

**Case No. 59-00**

**Final Order of the Commis-  
sioner Jack Roberts**

**Issued May 25, 2001**

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### **SYNOPSIS**

Respondent Bruce D. Huhta, as corporate president of a corporation previously adjudged by the agency to be liable for intentionally failing to pay four workers the prevailing wage rate on a public works contract, knew the amount of the applicable prevailing wage and was responsible for the corporation's failure to pay the prevailing wage. Respondent Bruce D. Huhta was held not eligible for public works contracts for three years pursuant to ORS 279.361(1) and (2). ORS 279.350, 279.361; OAR 839-016-0035, 839-016-0085.

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The above-entitled case came on regularly for hearing before Linda A. Lohr, 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 March 27, 2001, in the 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"). Bruce D. Huhta and Teresa G. Huhta ("Respondents"), after being duly notified of the time and place of this hearing, failed to appear in person or through counsel.

The Agency called as witnesses: Kristie Patton, licensing renewal manager, Construction Contractor's Board; Melissa Marks, former Wage and Hour Division compliance specialist; Barry Stenlund, corporate officer, Woodburn Construction Co., Inc.; Floyd Crouch, project manager, Woodburn Construction Co., Inc.; and Ramona Christensen, Washington Department of Labor and Industries.

The forum received as evidence:

a) Administrative exhibits X-1 through X-9;

b) Agency exhibits A-1 through A-29 (filed with the Agency's case summary) and A-30 (submitted at hearing).

Having fully considered the entire record in this matter, I, Jack Roberts, 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 29, 2000, the Agency issued a Notice of Intent to Place on List of Ineligibles and to Assess Civil Penalties ("Notice") naming as Respondents: Black Hawk, Inc. dba Columbia Contracting, Bruce D. Huhta, Teresa G. Huhta, Steven W. Francis, and Kylemac. The Notice was properly served on all of the Respondents. The Notice alleged that, in violation of ORS 279.350(1), Respondents intentionally failed to pay the prevailing wage rate to four workers who performed manual labor on a Beaverton School District public works project known as the Scholls Ferry Project, causing the prime contractor, Woodburn Construction Co., Inc., to pay \$10,529.62 in wages to Respondents' employees. The Notice further alleged Respondents filed inaccurate and incomplete certified payroll reports in violation of ORS 279.354 and failed to maintain records required under OAR 839-0016-0025(2).

2) Respondents Black Hawk, Inc. dba Columbia Contracting, Steven W. Francis, and Kylemac each failed to file a written answer and request for hearing as re-

quired by the Notice. On September 26, 2000, the Agency served each with a Notice of Intent to Issue Final Order By Default. The Agency received no response. On November 16, 2000, the Agency issued a Final Order (On Default) finding Respondents Black Hawk, Inc. dba Columbia Contracting, Steven W. Francis, and Kylemac had violated the provisions of ORS chapter 279 charged in the Notice. Those Respondents were found ineligible to receive any contract or subcontract for public works for a period of three years from the date of publication of their names on the list of ineligible and Black Hawk, Inc. dba Columbia Contracting was assessed \$50,000 in civil penalties.<sup>1</sup>

3) Bruce D. Huhta and Teresa G. Huhta filed timely answers to the Notice. In his answer, Bruce D. Huhta admitted he operated Black Hawk, Inc. dba Columbia Contracting, denied all other allegations in the Notice, and asserted he never had a subcontract agreement with anyone and the employees were "coerced and claimed to be on site in order to collect [a] 'windfall' when [they] were actually working 300 miles away in another state." In her answer, Teresa G. Huhta denied all allegations and denied ever being

a corporate officer in the "corporation or company."

4) On November 29, 2000, the Agency requested a hearing.

5) On December 5, 2000, the Agency moved to amend the caption on the Notice to delete those named Respondents who were no longer parties to the Agency's action. The forum granted the Agency's motion on December 7, 2000.

6) On December 7, 2000, the forum issued to Bruce D. Huhta and Teresa G. Huhta ("Respondents") and the Agency a Notice of Hearing setting forth March 27, 2001, in Portland, Oregon, as the time and place of the hearing in this matter. The hearing notice included a notice of Contested Case Rights and Procedures containing the information required by ORS 183.413 and a complete copy of the Agency's administrative rules regarding the contested case process. It was mailed to both Respondents c/o PO Box 352, Longview, Washington 98632, the address provided by Respondents in their answers to the Notice. In the hearing notice, Respondents were advised: "If you cannot participate in the scheduled hearing at the time set, you must notify the Hearings Unit IMMEDIATELY and request a postponement." The Hearings Unit did not receive any notification from Respondents indicating they could not or would not appear at the scheduled hearing.

7) On January 12, 2001, the forum issued a case summary or-

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<sup>1</sup> Respondents Black Hawk, Inc. dba Columbia Contracting, Steven W. Francis, and Kylemac never requested nor were they ever granted relief from default.

der requiring the Agency and Respondents to submit case summaries that included: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; a brief statement of the elements of the claim (for the Agency only); a brief statement of any defenses to the claim (for Respondents only); and a statement of any agreed or stipulated facts. The forum ordered the participants to submit their case summaries by March 16, 2001, and advised them of the possible sanctions for failure to comply with the case summary order. The Agency filed a timely case summary and four subsequent addenda to its case summary. The Hearings Unit did not receive a case summary from either Respondent.

8) Respondents did not appear at the time and place set for hearing and no one appeared on their behalf. Respondents had not notified the forum they would not be appearing at the hearing. Pursuant to OAR 839-050-0330(2), the ALJ waited 30 minutes past the time set for hearing. When Respondents failed to appear, the ALJ found Respondents to be in default and commenced the hearing.

9) Pursuant to ORS 183.415(7), the ALJ advised the Agency of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

10) The ALJ issued a proposed order on April 17, 2001,

that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. Neither the Agency nor Respondents filed exceptions.

#### **FINDINGS OF FACT – THE MERITS**

1) At all times material herein, Respondents were corporate officers of Black Hawk, Inc., a corporation operating under the assumed business name, Columbia Contracting (“the company”). Bruce D. Huhta (“Respondent B. Huhta”) was the corporate president with the authority to obtain and administer contracts on behalf of the corporation. Teresa G. Huhta (“Respondent T. Huhta”) was the corporate secretary and bookkeeper.

2) On November 16, 2000, the Commissioner issued a Final Order (On Default) adjudging the company liable for violations of ORS 279.350 and 279.354. The company was placed on the Commissioner’s list of those ineligible to receive public works contracts for a period of three years and assessed a \$50,000 civil penalty for prevailing wage violations. The company did not seek relief from default nor did it seek judicial review of the Final Order (On Default).

3) At all times material herein, Respondent B. Huhta appeared as corporate president and Respondent T. Huhta appeared as corporate secretary on the company’s Washington and Oregon construction contractor’s licenses.

Both used the PO Box 352, Longview, Washington 98632 mailing address for business correspondence.

4) At all times material herein, Woodburn Construction Co., Inc. ("WCC") was the prime contractor on the New Beaverton Elementary School – Scholls Ferry Site public works contract, known as the Scholls Ferry Project. The contract amount exceeded \$25,000 and was not regulated under the Davis-Bacon Act.

5) On May 22, 1998, WCC awarded the company a painting subcontract on the Scholls Ferry Project. The company, under the direction of Respondent B. Huhta, began work on the project in March 1999. The Agency's "Prevailing Wage Rates for Public Works Contracts in Oregon" booklet, effective February 15, 1998, showed the prevailing wage rate for painters was \$19.28 per hour (base rate) and \$3.40 per hour (fringe benefit), for a total of \$22.68 per hour. The overtime rate was \$32.32 per hour. The company's employees performed manual work on the Scholls Ferry Project from around March 24 until about August 20, 1999.

6) By letter dated June 24, 1999, Barry Stenlund, WCC's corporate vice-president, advised Respondent B. Huhta that: "We have interviewed your employees and have documentation, which indicates that they are not being paid prevailing wage." Stenlund's letter requested Respondent B. Huhta to provide to WCC "certified wage reports for all work per-

formed at the site, a list of all employees who have worked on the project, time cards for each of the employees listed, payroll documentation (pay stubs, check registers, etc.) to verify wages paid, and original lien waivers from each employee."

7) Respondent B. Huhta provided WCC with certified wage reports for four weeks that classified the employees as painters and, by his signature on the reports, certified the employees had been paid the prevailing wage of \$22.68 per hour, including fringe benefits.

8) On July 15, 1999, Stenlund responded with another letter stating, in part:

"Thank you for sending the wage certificates for the following weeks: Week ending: 3-27; 4-3; 4-10 and 6-26. Upon review with our job superintendent it appears that you have had employees on the job many more days and hours than these certificates indicate.

"Also, we have had a few interviews with some of your employees and they have indicated you have not been paying the prevailing wage.

" \* \* \* \* \*

"A copy of my letter dated June 24, 1999 is enclosed for your review. As of this date you have not provided one single item I have required before I will release monies.

"You may rest assured Woodburn Construction Co. will do all within its power to protect itself from your employees and suppliers. They have 120 days from their last day of work to make a claim. \* \* \*

"We look forward to your cooperation.

"Sincerely,

"Barry E. Stenlund, Vice President"

9) In September 1999, Agency compliance specialist Melissa Marks was assigned to investigate the company's failure to pay prevailing wages to workers on the Scholls Ferry Project. She mailed letters to Respondent B. Huhta c/o PO Box 352, Longview, Washington, on September 21 and 28, October 11, 13, 25, and 26, November 4, and December 3, 1999, requesting the company's payroll records and other documents relevant to her investigation. During that time, she spoke with Respondent B. Huhta several times by telephone and he repeatedly promised to provide her with the requested information. On October 4 and 12, and November 2, 9, and 12, 1999, Respondent B. Huhta faxed some information to Marks that was not completely responsive to her previous requests.

10) Based on records maintained by WCC and some of the employees, Marks estimated the amount of wages owed to Jose Chavez (\$4,000), Eron Martinez (\$4,500), Chris Taylor (\$382.50), and Robert Wheeler (\$1,647.12).

On behalf of the Agency, she filed a Notice of Claim against WCC's surety bond based on her estimate of the wages owed.

11) On December 23, 1999, WCC provided a check to the Agency in the amount of \$10,529.62 as payment in full for the wages owed to the company's employees.

12) On December 30, 1999, Stenlund memorialized a conversation he had with Respondent B. Huhta regarding WCC's wage payment:

"This morning at about 10:30 a.m. I received a phone call from Bruce asking why I have made a payment to BOLI in the amount of \$10,529.62. I stated that BOLI had sent notification to our bonding company and I was protecting [us] from this claim.

"He stated that it was stupid of me to make that payment. He had purposely not provided the payroll information to BOLI so the time would pass and he could avoid paying any more monies. I asked why he had not contacted me so I was aware of his plan. I reminded him that BOLI was seeking relief from our bond because he was not providing the information to document payment.

"I reminded him that he had not responded to my July letter asking for documentation concerning payroll and that his continued lack of professional behavior on the job indicated to me that he had no desire to

meet his contractual obligations.

“ \* \* \* \* \* ”

13) At all times material herein, Respondent T. Huhta was a 10% shareholder in the company and Respondent B. Huhta's wife. In December 1998, the company, through Respondent B. Huhta, represented to the Washington Department of Labor and Industries that Respondent T. Huhta spent 100% of her time devoted to the company's business.

#### **ULTIMATE FINDINGS OF FACT**

1) At all times material, Respondents were corporate officers of Black Hawk, Inc., a Washington corporation doing business in the state of Oregon under the assumed business name, Columbia Contracting. Respondent Bruce D. Huhta was the corporate president and Respondent Teresa G. Huhta was the corporate secretary.

2) Respondents' company bid on and received a subcontract to perform painting work on the New Beaverton Elementary School Project – Scholls Ferry Site.

3) The company performed work on the project and, through Respondent Bruce D. Huhta, paid four of its workers at wage rates less than the applicable prevailing wage, causing the prime contractor, Woodburn Construction Co., Inc., to pay \$10,529.62 in unpaid wages to the company's employees. Respondent Bruce D. Huhta knew the amount of the applicable

prevailing wage and was responsible for the failure to pay prevailing wages on the project.

4) Respondent Teresa G. Huhta was not responsible for the failure to pay the prevailing wage rate.

5) Respondent Bruce D. Huhta intentionally failed to pay the prevailing rate of wages to four workers on a public works project.

#### **CONCLUSIONS OF LAW**

1) Respondents are corporate officers of a company that employed workers to perform work on a public works project and are subject to the provisions of ORS 279.348 to 279.363. The Commissioner of the Bureau of Labor and Industries has jurisdiction over the subject matter.

2) ORS 279.350(1) provides in 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.”

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.”

Respondent Bruce D. Huhta violated ORS 279.350(1) by failing to pay the prevailing rate of wage to four workers employed upon a public works project.

3) ORS 279.361 provides, in part:

“(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 \* \* \* subcontractor intentionally failed or refused to pay the prevailing rate of wage to workers employed upon public works, \* \* \* the \* \* \* subcontractor \* \* \* shall be ineligible for a period not to exceed three years from the date of publication of the name of the \* \* \* subcontractor on the ineligible list as provided by this section to receive any contract or subcontract for public works.

”(2) When the contractor or subcontractor is a corporation, the provisions of subsection (1) of this section shall apply to any corporate officer or corporate agent who is responsible for the failure or refusal to pay or post the prevailing rate of wage or the failure to pay to a subcontractor’s employees amounts required by ORS 279.350 that are paid by the contractor on the subcontractor’s behalf.”

OAR 839-016-0085 provides, in part:

“(1) When the Commissioner, in accordance with the Administrative Procedures Act,

determines that a \* \* \* subcontractor has intentionally failed or refused to pay the prevailing rate of wages to workers employed upon public works, \* \* \* the \* \* \* subcontractor \* \* \* shall be ineligible to receive any contract or subcontract for public works for a period not to exceed three (3) years.

”(2) When the contractor or subcontractor is a corporation, the provisions of subsection (1) of this rule shall apply to any corporate officer or corporate agent who is responsible for the failure or refusal to pay or post the prevailing wage rates.

“(3) As used in section (2) of this rule, any corporate officer or corporate agent responsible for the failure to pay or post the prevailing wage rates include, but are not limited to the following individuals when the individuals knew or should have known the amount of the applicable prevailing wages or that such wages must be posted:

“(a) The corporate president;

“ \* \* \* \* \*

“(c) The corporate secretary \* \* \*.”

Respondent Bruce D. Huhta, the company’s corporate president, knew the Scholls Ferry Project was a public work and required the payment of prevailing wages to the company employees. He also knew the amount of the applicable prevailing wage.

Accordingly, ORS 279.361(1) applies to Respondent Bruce D. Huhta and he shall be ineligible for a period not to exceed three years from the date of publication of their names on the ineligible list to receive any contract or subcontract for public works.

4) Pursuant to ORS 279.361, and based on the facts set forth herein, the Commissioner has the authority to place the name of Respondent Bruce D. Huhta and any firm, corporation, partnership, or association in which he has a financial interest, on the list of persons who are ineligible to receive any contract or subcontract for public works for a period not to exceed three years from the date of publication of his name on that list. Under the facts and circumstances in this record, the Commissioner's placement of Respondent Bruce D. Huhta's name on the list for a period of three years is appropriate.

#### OPINION

#### DEFAULT

Neither of the Respondents appeared at the hearing in this matter nor did counsel appear on their behalf. As a result, Respondents were found by the forum to be in default pursuant to OAR 839-050-0330. The Agency, therefore, needed only to establish a prima facie case on the record to support the allegations in its charging document as they pertained to each Respondent. *In the Matter of Sealing Technology, Inc.*, 11 BOLI 241 (1993). Respondents' only contribution to the

record was their respective answers filed with their request for hearing. Where default occurs, the forum may give some weight to unsworn assertions contained in an answer unless other credible evidence controverts them. If a respondent is found not to be credible the forum need not give any weight to the assertions, even if they are uncontroverted. *In the Matter of Keith Testerman*, 20 BOLI 112, 127 (2000). Having considered all of the evidence in the record, the forum concludes the Agency presented a prima facie case that was not contradicted or overcome by the assertions in Respondents' answers.

By Final Order (On Default), issued November 16, 2000, Respondents' company, Black Hawk, Inc. dba Columbia Contracting has already been adjudged to be liable for intentionally failing to pay four workers the prevailing wage rate on a public works project. In the same Order, the Commissioner also found the prime contractor, WCC, paid the unpaid prevailing wages. The Commissioner assessed \$50,000 in civil penalties against the company and placed it on the list of those ineligible to receive public works contracts or subcontracts. The only remaining issue is whether Respondents are individually responsible as corporate officers of the company for its failure to pay four workers the prevailing wage and, thus, also subject to being placed on the list of ineligibles.

**RESPONDENT BRUCE D. HUHTA**

Pursuant to ORS 279.361(1), a corporate officer who is responsible for a corporation's failure to pay the prevailing wage to workers shall also be ineligible for up to three years to receive any public works contracts or subcontracts. Respondent B. Huhta, who was president of the company at times material, is responsible if he "knew or should have known the amount of the applicable prevailing wages." OAR 839-016-0085(3). Here, the Agency established Respondent B. Huhta actually knew the amount of the applicable prevailing wages.

Credible evidence in the record shows Respondent B. Huhta administered a painting subcontract on behalf of the company on the Scholls Ferry Project between March and September of 1999. He demonstrated his awareness that the project was a public work and that he had to pay the prevailing wages when he certified the wage reports described in Finding of Fact – The Merits 7 and provided them to the prime contractor, WCC. By his signature on the wage reports, he represented that 1) he was the self described "manager" of the company for the Scholls Ferry Project, 2) the workers were classified as painters, and 3) the workers were purportedly paid the applicable prevailing wage rate of \$22.68 per hour, including fringe benefits. This forum has long acknowledged the presumption that a person is familiar with the con-

tents of any document bearing his or her signature. *Sealing Technology*, 11 BOLI at 251, citing *Broad v. Kelly's Olympian Co.*, 156 Or 216 (1937). From the certified wage reports, the forum infers Respondent B. Huhta was aware the company employed painters and knew the applicable prevailing wage rate for that classification. There is also credible evidence in the record showing that the workers were not paid the amounts certified by Respondent B. Huhta and were, in fact, never paid the prevailing wage rate for any of the manual labor they performed during the course of the project. Moreover, Respondent B. Huhta chastised the prime contractor's vice-president, Barry Stenlund, for having paid the workers' unpaid wages, telling Stenlund he was "stupid" to have made the payment and that he purposely did not provide the Agency investigator with payroll records to avoid having to pay more money to his workers. From these facts, the forum infers the company's failure to pay the prevailing wage rate was intentional and Respondent B. Huhta was responsible for this failure.

Accordingly, pursuant to ORS 279.361(2) and OAR 839-016-0085(3), Respondent B. Huhta is ineligible for a period of up to three years from the date of publication of his name on the ineligible list to receive any public works contract or subcontract. Based on the facts in this record, the forum finds it appropriate to make Respondent B. Huhta ineligible for a period of three years.

**RESPONDENT TERESA G. HUHTA**

Respondent T. Huhta is also subject to ORS 279.361(2) and OAR 839-016-0085(3). As the company's corporate secretary, she would be ineligible for up to three years to receive any public works contracts or subcontracts if she knew or should have known the amount of the applicable prevailing wages. Contrary to her denial that she was ever a corporate officer of the "corporation or company," the evidence is conclusive that Respondent T. Huhta was the company's corporate secretary during times material.

The evidence, however, falls short of establishing Respondent T. Huhta knew or should have known the applicable prevailing wage on the Scholls Ferry Project. To show that knowledge or constructive knowledge, there must be some evidence showing she had awareness of the actual subcontract and that it was a public work. Although evidence establishes she was Respondent B. Huhta's wife, the company's bookkeeper, and appeared as a corporate officer on the company's Washington and Oregon construction contractor's licenses, there is a dearth of evidence connecting her in any way to the project at issue. While the corporate minutes of the company's April 1998 annual meeting of stockholders clearly spell out Respondent B. Huhta's authority as president to "enter into contracts to perform work or services on behalf of the corporation," includ-

ing the authority to "obtain and/or to secure loans," there is no similar specific delegation of authority or duties of any kind to the corporate secretary. Respondent T. Huhta's signature does not appear on the certified wage reports and there is no documentary or testimonial evidence that she prepared or signed payroll checks on the project or any other project involving the company.<sup>2</sup> Evidence shows all of WCC's contacts with the company were through Respondent B. Huhta, and despite testimony that Respondent T. Huhta was the company bookkeeper, it was Respondent B. Huhta who prepared the few records provided to the Agency during the investigation. Absent evidence that Respondent T. Huhta was more than a mere figurehead during times material, the forum will not infer she was cognizant of all subcontracts involving the company, and, in particular, the project at issue.

The record does not establish Respondent T. Huhta knew or should have known the amount of

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<sup>2</sup> Cf. *In the Matter of Sealing Technology, Inc.*, 11 BOLI 241 (1993) (finding that respondent's corporate secretary knew or should have known the amount of the applicable prevailing wage based on facts demonstrating the corporate secretary did all of the payroll for respondent, personally recorded in respondent's payroll records prevailing wage "bonuses" paid out on the project at issue, and prepared all the payroll reports from the home she shared with her husband, respondent's corporate president).

the applicable prevailing wage on the Scholls Ferry Project. Accordingly, the forum finds she is not responsible for the company's failure to pay four workers the applicable prevailing wages.

#### ORDER

NOW, THEREFORE, as authorized by ORS 279.361, it is hereby ordered that **Bruce D. Huhta** or any firm, partnership, corporation, or association in which Bruce D. Huhta has a financial interest, shall be ineligible to receive any contract or subcontract for public works for a period of three years from the date of publication of his name on the list of those ineligible to receive such contracts maintained and published by the Commissioner of the Bureau of Labor and Industries.

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**In the Matter of**

**FJORD, INC.,**

**Case No. 104-00**

**Final Order of the Commissioner Jack Roberts**

**Issued May 9, 2001**

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#### SYNOPSIS

The Nordic Group, LLC, was a manufacturer of sporting apparel doing business in Hubbard, Oregon, and Vancouver, Washington. Nordic went out of business on January 6, 2000. At that time, 93

employees were owed wages for 18 days and filed wage claims. The commissioner made a determination that the claims were valid and caused \$73,699.06 to be paid to the 93 claimants from the Wage Security Fund. On January 31, 2000, Respondent commenced business operations at Nordic's Hubbard plant. The commissioner determined that Respondent was a "successor" employer and "purchaser" under ORS 652.310(1) and ordered Respondent to repay the wage Security Fund \$73,699.06, as well as a 25% penalty of \$18,424.77. ORS 652.140(1), ORS 652.310(1), ORS 652.414.

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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 November 7, 2000, in Hearings Room #1004 of the State Office Building, 800 NE Oregon Street, 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 Caroline R. Guest, attorney at law. Norman Dversdal, Respondent's president, was present throughout the hearing to assist Respondent's case, as permitted by OAR 839-050-0110(3).

The Agency called as witnesses: Norman Dversdal, Betty

Kissinger, Respondent's office manager; and Michael Wells, Wage & Hour Division Compliance Specialist.

Respondent called as witnesses: Norman Dversdal; Peter Yazzolino, Respondent's plant manager; Brent Cleveland, managing director of The Nordic Group, LLC (by telephone); and Conrad Myers, a "turnaround" consultant, who was called as an expert witness.

The forum received into evidence:

a) Administrative exhibits X-1 through X-9 (submitted or generated prior to hearing) and administrative exhibits X-10 through X-23 (submitted or generated after the hearing);

b) Agency exhibits A-1 through A-5 and A-7 through A-17 (submitted prior to hearing), A-18 and A-19 (submitted at hearing). Exhibit A-20 was offered but not received;

c) Respondent exhibits R-1 through R-11 (submitted prior to hearing).

Having fully considered the entire record in this matter, I, Jack Roberts, 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 28, 2000, the Agency issued Order of Determination No. 00-0360 in which it alleged the following:

(a) Ninety-four (94) separate wage claimants filed wage claims with the Agency<sup>1</sup> and assigned those claims to the Agency, alleging that they were all employed in Oregon between December 18, 1999, and January 8, 2000, by Fjord, Inc., an Oregon corporation ("employer"), as a successor to the business of The Nordic Group, LLC dba Nordic Enterprises, and that they performed work, labor and services for the employer and were paid all sums due and owing except the sum of \$73,699.06, which is due and owing along with interest.

(b) Pursuant to ORS 652.414, the Agency determined that the wage claimants were entitled to receive payment from the Wage Security Fund ("Fund") in the sum of \$73,699.06.

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<sup>1</sup> The wage claimants, number of unpaid hours, hourly wage, and total sums alleged due and owing to them, are listed in Appendix A to this proposed order. The wage claimants, their unpaid hours, hourly wage, and total unpaid wages were identically listed in Exhibit A attached to the Order of Determination. Although the Order of Determination alleges 94 wage claimants filed wage claims, Exhibit A attached to the Order of Determination only lists 93 wage claimants by name.

(c) The wage claimants received payment in the amount of \$73,699.06 from the Fund.

(d) The Commissioner of the Bureau of Labor and Industries is entitled by ORS 652.414(2) 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, which amount is \$18,424.77, along with interest at the legal rate per annum from March 1, 2000, until paid.

2) On April 17, 2000, Respondent, through counsel, filed an answer and request for hearing. Respondent denied that it employed the employees listed in the Order of Determination during the time period of December 18, 1999, to January 8, 2000, and that it was a liable successor to The Nordic Group, LLC dba Nordic Enterprises. Respondent also raised the following affirmative defenses:

a) The Order of Determination failed to state a claim for which relief may be granted;

b) Imposition of liability upon Respondent is unconstitutional;

c) Imposition of liability on Respondent in this situation is fundamentally unfair and inequitable;

d) Imposition of liability on Respondent in this situation is contrary to public policy.

3) On June 19, 2000, the Agency filed a "BOLI Request for Hearing" with the forum.

4) On July 7, 2000, the Hearings Unit issued a Notice of Hearing to Respondent and the Agency stating the time and place of the hearing as November 7, 2000, at 9:00 a.m., at the Hearings Room, 10<sup>th</sup> Floor, State Office Building, 800 NE Oregon Street, 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, and a copy of the forum's contested case hearings rules, OAR 839-050-000 to 839-050-0440.

5) On October 3, 2000, the Agency moved to postpone the hearing based on the reassignment of the case to another case presenter, the new case presenter's caseload, and the amount of time required to prepare the case because of the sheer number of wage claimants.

6) On October 4, 2000, Respondent filed objections to the Agency's motion to postpone. Respondent argued that the Agency had already had seven months to prepare its case and stated that Respondent was prepared to stipulate to the validity of the 93 underlying wage claims, leaving Respondent's successor liability as the only issue at hearing.

7) On October 9, 2000, the ALJ issued an interim order denying the Agency's motion for postponement, basing the ruling on Respondent's statement that it

was prepared to stipulate to the validity of the 93 underlying wage claims. The order stated the ALJ would reconsider the Agency's motion if Respondent declined to enter into this stipulation.

8) On October 9, 2000, the forum ordered the Agency and Respondent 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; a brief statement of the elements of the claim (for the Agency only); a brief statement of any defenses to the claim (for Respondent only); 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 no later than October 27, 2000, and notified them of the possible sanctions for failure to comply with the case summary order.

9) The Agency and Respondent both filed their case summaries, with attached exhibits, on October 27, 2000.

10) At the outset 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.

11) Prior to opening statements, Respondent and the Agency agreed that the following exhibits were the same: A-12 and R-3, A-13 and R-5, A-14 and R-6, and A-17 and R-4.

12) Prior to opening statements, the Agency moved to amend the Order of Determination to add the word "claimants" immediately after the word "wage" at the end of the first line of paragraph III. Respondent did not object, and the amendment was granted.

13) Prior to opening statements, Respondent withdrew its second affirmative defense of unconstitutionality.

14) Prior to opening statements, Respondent stipulated that "Fjord, Inc." and "Fjord, Ltd." are the same company.

15) During the hearing, Respondent moved to amend its answer to include a defense stated in its case summary, namely that "Respondent is facially excluded from the definition of 'employer' pursuant to ORS 652.310(b), in that respondent is a 'person[]otherwise falling under the definition of employers so far as the times or amounts of their payments are regulated by laws of the United States.'" The Agency objected, arguing this was an affirmative defense that Respondent had waived by omitting it from its answer. The ALJ stated he would rule on the motion in the proposed order, and allowed Respondent to present testimony by Norman Dversdal, over the Agency's objection, as an offer of proof in support of this defense. The Agency's objection to Respondent's offer of proof is sustained, for reasons stated in the Opinion.

16) At the conclusion of the hearing, the ALJ directed the participants to submit closing arguments in writing, and to submit briefs on the issue of whether or not Respondent is a successor to The Nordic Group, LLC, dba Nordic Enterprises. The ALJ ordered that the submissions be filed by November 21, 2000.

17) On November 13, 2000, the ALJ held a post-hearing conference with Mr. Gerstenfeld and Ms. Guest, during which Ms. Guest was asked to state Respondent's theory as to why Respondent is facially excluded from the definition of "employer" under ORS 652.310(1)(b). Ms. Guest stated that the defense is based on the fact that the FLSA is a law of the United States that regulates the amounts of money paid to employees, and Respondent is regulated by the FLSA. Mr. Gerstenfeld responded that the Agency did not require a continuance to present more evidence to meet Respondent's defense, but requested additional time to prepare the Agency's closing argument and obtain a brief from the Agency's counsel. The ALJ set a new filing deadline of December 4, 2000, for submitting closing arguments and briefs and directed the participants to address the following issues in their briefs:

1) Whether Respondent's defense that it is excluded from the definition of employer under ORS 652.310(1)(b) is an affirmative defense;

2) The merits of that defense; and

3) Whether or not Respondent is a successor to The Nordic Group, LLC or Nordic Enterprises.

18) On November 17, 2000, Respondent filed a motion to obtain a copy of the audiotapes from the hearing. That same day, the ALJ granted Respondent's motion, stating that the Agency was also entitled to a copy of the tapes if it so desired.

19) On November 17, 2000, the Agency requested a copy of the hearing audiotapes.

20) The Hearings Unit made copies of the hearing audiotapes available to both participants. Respondent and the Agency both picked up copies on November 21.

21) On December 1, 2000, Respondent filed its post-hearing brief and closing argument.

22) On December 4, 2000, the Agency case presenter filed the Agency's closing argument.

23) On December 4, 2000, Stephanie Andrus, assistant attorney general and the Agency's counsel, requested an extension of time until December 8, 2000, to file the Agency's brief. Respondent did not object, so long as Ms. Andrus agreed not to look at Respondent's brief and closing argument, which had already been filed, before she filed the Agency's brief. The ALJ granted the request and extended the deadline until December 8. In the

interim order, the ALJ ordered Ms. Andrus not to look at Respondent's brief and closing argument, or to receive communications from anyone else regarding the contents of Respondent's brief and closing argument prior to filing her brief.

24) On December 8, 2000, Ms. Andrus filed the Agency's brief.

25) On March 20, 2001, 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. Norman Dversdal filed exceptions on Respondent's behalf. The forum has not considered those exceptions for reasons stated in the Opinion. The Agency did not file exceptions.

#### **FINDINGS OF FACT – THE MERITS**

1) Norman Dversdal started Nordic Enterprises, Ltd., ("NEL") in 1972. Dversdal was NEL's sole shareholder, as well as its president and manager, from its inception until its sale in 1999.

2) Throughout its existence, NEL's business consisted of sewing various products, including sports apparel and equipment, as a "CMT" manufacturer.<sup>2</sup> Exam-

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<sup>2</sup> Dversdal testified that "CMT" is an industry acronym for "cut, make, and trim," and that NEL, like other CMT manufacturers, only provided the thread, sewing machines, and labor for the products it manufactured. Its customers provided the fabric, sun-

ples of the products produced by NEL were swimsuits for Jantzen, day packs for Jansport, and goose down coats for Eddie Bauer.

3) From 1972 until 1998, NEL operated one manufacturing facility, located at 2860 "J" Street in Hubbard, Oregon. In 1998, NEL purchased and began operating another manufacturing facility in Vancouver, Washington.

4) A substantial amount of the sewing and embroidery equipment used by NEL at the Hubbard facility was personally leased to Dversdal by Allco Enterprises, Inc., and Beacon Funding.

5) NEL's telephone and fax numbers at the Hubbard facility were 503-982-3130 and 503-982-1814, respectively. NEL's mailing address was P.O. Box 448, Hubbard, Oregon.

6) Elizabeth "Betty" Kissinger was hired as NEL's office manager in 1988. Peter Yazzolino was hired as NEL's production manager in 1998.

7) In 1999, Dversdal decided to retire and sell NEL. Dversdal used The Piper Group, a group that buys and sells businesses for a fee, to locate a buyer. The Piper Group located The Nordic Group, LLC ("Nordic"), an Oregon limited liability company, as a potential buyer.

8) Nordic's principal owner and managing director was Brent Cleaveland. Nordic had no other

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dries, findings, elastic and labels for the goods to be sewn.

directors or officers. Dversdal had never met Cleaveland before putting NEL up for sale.

9) After negotiations, Cleaveland agreed to buy NEL. Dversdal and Cleaveland signed an "Agreement for Sale and Purchase of Business Assets" ("Agreement") on April 30, 1999.

10) In the Agreement, Dversdal and NEL agreed to sell to Nordic assets in NEL's Vancouver and Hubbard facilities that included the following:

a) All equipment, rolling stock, tools, furniture, and fixtures of every nature, kind and description;

b) NEL's inventory of supplies owned by NEL, excluding inventory used in the ordinary course of business of NEL's business prior to closing;

c) All rights, benefits and interest under all leases of real property used or held in connection with NEL's business [including the Vancouver and Hubbard manufacturing facilities], and all leasehold improvements and fixtures relating to the business;

d) NEL's work in process;

e) All of NEL's rights under manufacturing orders and contracts for manufacture to which NEL was a party;

f) The name Nordic Enterprises, Ltd., NEL's phone numbers, NEL's goodwill, and NEL's and Dversdal's interest in the names Western Trails,

Oregon Expressions and Cascade Casuals; and Dversdal's personal business goodwill, including but not limited to Dversdal's manufacturing techniques, marketing programs, customer relations, vendor relations, and supplier relations, established by Dversdal during his career;

g) All books, records and other data relating to NEL's business, including, without limitation, customer lists and records, formulations, technology and proprietary information, patterns, samples, manufacturing processes, digitized images (to the extent of NEL and Dversdal's interest therein), production reports and records, equipment logs, operating guides and manuals, sales and marketing information, correspondence and other similar documents and records;

h) All permits, licenses, consents, authorizations and approvals held or used in connection with NEL's business from all federal, state, local or foreign governmental or regulatory authorities, or industrial bodies, to the extent they were transferable.

11) The Agreement excluded from sale NEL and Dversdal's rights to the name "Body Gear," NEL's accounts receivable, cash, notes receivable, prepaid accounts, NEL's minute and stock record books, ledgers and books of original entry and

any other assets not listed under Finding of Fact – The Merits 10.

12) In the Agreement, NEL agreed to terminate all of its employees as of the closing date and to pay each employee all wages, commissions, and accrued vacation pay earned up to the time of termination, including overtime pay.

13) In the Agreement, Nordic assumed responsibility for all of NEL's post closing obligations involving leases and other contracts. This included promissory notes to Jantzen, Inc., and Cascade West on which Dversdal was personally liable.

14) In the Agreement, Nordic agreed to pay NEL specified amounts for equipment, leasehold improvements, furniture and fixtures, supplies, an agreement not to compete, and work in process. Nordic also agreed to pay Dversdal specified amounts for equipment, furniture and fixtures, an agreement not to compete, and goodwill.

15) Nordic obtained financing for its purchase of NEL from Pacific Continental Bank ("PCB"). One of the financing terms gave PCB a primary security interest in the equipment being transferred from NEL to Nordic. Dversdal retained a secondary security interest in this equipment. NEL retained a security interest that was subordinate to Dversdal's.

16) NEL and Nordic both intended that there would be "continuity of enterprise" and that Nordic would continue operating

the same business that NEL had operated.

17) Nordic took over NEL's assets and operations in June 1999. At that time, NEL had approximately 325 employees at its Hubbard and Vancouver plants. 100-150 of these employees worked at the Hubbard plant. NEL ceased to exist, except for tax purposes, and Dversdal changed NEL's name to Fjord, Ltd. ("Fjord"). Fjord, Ltd. is an Oregon corporation. Nordic thereafter conducted "essentially the same business" that NEL had conducted.

18) After the sale of NEL, Kissinger continued working as office manager for Nordic. She worked at the Hubbard plant, but was responsible for both the Hubbard and Vancouver plants. 60% of her work was related to the Vancouver plant. Yazzolino continued working for Nordic as production manager of the Hubbard plant.

19) After Nordic began operations, Dversdal continued as the lessee of the Vancouver and Hubbard plants and the equipment leased from Allco and Beacon and subleased them to Nordic. This was because Nordic was unable to take over the leases as anticipated.

20) After the sale of NEL, Dversdal continued working for Nordic under the terms of an employment agreement that required him to work 20 hours per week for 24 months in exchange for payment of \$1,000 per month.

Dversdal had his own office at Nordic. His primary work consisted of bringing in work and maintaining good relationships with vendors. Dversdal was not paid after November 1999, but continued going to work. He did little actual work for Nordic after November 1999.

21) Nordic's Hubbard physical location, mailing address, telephone and FAX number were the same NEL had used. Nordic used MCI as its long distance telephone carrier.

22) During Nordic's operation of NEL's former business, its personnel structure consisted of the following:

1. Brent Cleaveland, president, B. Kissinger, officer manager, K. Roberts and K. Milliron, office assistants (Vancouver and Hubbard plants);

2. Hubbard plant: P. Yazolino, factory manager; G. Veenker and J. Kunz, engineers; T. Iliboi, mechanic; S. Hilgers, ship/rec supervisor; P. Lim, cutting supervisor; B. Brenden, and R. Moreno, sewing supervisors; L. Olivares, training supervisor; J. Tornero, warehouse; final dept.; cutters; sewers; and layup;

3. Vancouver plant: R. Bradstreet, factory manager; J. Thompson, engineer; R. Thompson, R. Kilde and L. Warrenbours, mechanics; S. Purviance, ship/rec supervisor; J. Berry and C. Woods, cutting supervisors; G. Larson, M. Miesbauer, C. Larson, and R.

Whitlock, sewing supervisors; warehouse; cutters; layup, and sewers.

23) In 1999, Nordic's Hubbard plant had gross sales of \$1,701,543.56. Nordic's Vancouver plant had gross sales of \$1,436,861.41. Three of Nordic's customers were Nike, Incorporated, Hanna Anderson, and Solstice. In both plants, those three customers accounted for \$688,807.92 in gross sales, or 22 per cent of Nordic's total gross sales. In the Hubbard plant, those three customers accounted for \$476,997.40 in gross sales, or 28 per cent of the Hubbard plant's total gross sales.

24) Nordic's Vancouver and Hubbard plants had 42 other customers besides Nike, Hanna Anderson, and Solstice.

25) On January 6, 2000, Nordic ceased operations. Dversdal did not participate in making the decision to cease Nordic's operation and only learned on January 6 that Nordic would be ceasing operations on that same day. Cleaveland took the paychecks for all Nordic employees with him when he left work on January 6

26) On January 6, 2000, Nordic owed wages to employees for 18 days work. At that time, Dversdal was aware that these wages were owed.

27) On January 14, 2000, Nordic filed a voluntary petition under Chapter 11 of the Bankruptcy Code.

28) The 93 persons listed on Appendix A of this Order were employed by Nordic and, on January 6, 2000, were owed, but not paid, the wages listed in the column entitled "TOTAL UNPAID WAGES" in Appendix A. After Nordic ceased business operations, those 93 persons filed wage claims and the commissioner determined that the wage claims were valid. Subsequently, the wages listed in the column entitled "TOTAL UNPAID WAGES" in Appendix A were paid to the persons listed out of the Wage Security Fund pursuant to ORS 652.414(1) and the administrative rules adopted thereunder.

29) Nordic had 450-500 employees when it ceased operations. 110-115 of these persons were employed at the Hubbard plant.

30) When Nordic ceased business operations, it had unfulfilled contracts with customers that included work in process. Among these customers was Hanna Anderson.

31) When Nordic ceased business operations, it had 821 pieces of equipment in its Vancouver plant and about 250 pieces of equipment in its Hubbard plant.

32) In the three weeks after Nordic ceased operations, all of Nordic's customers, with the exception of Hanna Anderson, picked up their work in process. Dversdal facilitated this process at the Hubbard and Vancouver plants by directing the customers to former employees of Nordic,

primarily supervisors, who were then hired by the customers to categorize and mark their work in bags and send it back to the customer.

33) As a result of Nordic's bankruptcy filing, Dversdal assumed approximately \$1.1 million in personal indebtedness, most of which had been assumed by Nordic when Nordic purchased NEL's assets. This included liability for leases on the Vancouver and Hubbard plant buildings, leases with Allco and Beacon for equipment, and promissory notes to Jantzen, Incorporated and Cascade West.

34) When Nordic ceased business operations, Dversdal called a meeting of Respondent's Board of Directors and asked for advice about going back into business. At that time, Dversdal's personal assets consisted of \$500,000 in an IRA in stocks and bonds. After the meeting and against the Board's advice, Dversdal decided to go back into business as Fjord at Nordic's Hubbard facility. At that time, Dversdal was not aware that Respondent might be liable to pay the wages still due and owing to Nordic's employees.

35) At the time Respondent began operating the Hubbard facility, Respondent had no borrowing power. Dversdal had already borrowed \$300,000 for operating capital, with his house as collateral, and at that time could not have borrowed \$100,000 to pay the wages owed by Nordic.

36) In January 2000, Kissinger registered Fjord with the Oregon Employment Department and Department of Revenue. Based on Kissinger's representation that Fjord was a new company, the State of Oregon assigned a 3.0 percent unemployment tax rate to Respondent instead of the 1.5 percent unemployment tax rate assessed against Nordic. In contrast, Nordic had been assigned the same 1.5 percent unemployment tax rate that NEL had.

37) On January 31, 2000, Respondent hired its first employees. At the end of its first payroll period, February 12, 2000, Respondent employed eleven persons. All but one had previously been employed by Nordic or NEL.

38) As of February 1, 2000, Respondent's personnel structure consisted of the following: N. Dversdal, president; cutter; sewers; layup and assembly.

39) On February 2, 2000, Nordic, Dversdal, PCB, and Respondent filed a "Stipulated Emergency Motion for Interim Approval of Lease Agreement" with the bankruptcy court. The motion sought the court's approval for Respondent to lease the equipment in the Hubbard facility from Nordic for \$6,000 per month. The court issued an interim order granting the motion on February 20, 2000, that provided that Respondent would pay Nordic \$6,000 per month directly for use of equipment at the Hubbard facility. The order specified that some

of the equipment was subject to the Allco and Beacon leases and that Dversdal would make payments directly to Allco and Beacon in the amounts and at the rates specified in the original leases originally entered into between Dversdal, Allco, and Beacon. The order specified that Respondent would complete the work in process from Hanna Anderson and the final payment from Anderson would be split equally between Respondent and Nordic. On February 24, 2000, the court issued a final order approving this lease agreement. Respondent leased the equipment for two months, making payments to the bankruptcy trustee. On March 10, 2000, Dversdal, on behalf of Respondent, sent a check in the amount of \$6,000 for lease of equipment and a check for \$4,981.50, representing 50% of the total received from Hanna Anderson, to the bankruptcy trustee.

40) At the end of March, the bankruptcy court cancelled the lease agreement between Respondent and Nordic after Respondent made two \$6,000 lease payments. That same day, Nordic's bankruptcy was converted from a Chapter 11 to a Chapter 7 proceeding. At that time, Nordic abandoned its assets. Subsequently, PCB took possession of the equipment in which it had a security interest, including equipment at the Hubbard facility.

41) Dversdal negotiated with PCB for certain equipment at the Hubbard facility that had been

used by Nordic to operate its business and, in June 2000, Respondent purchased that equipment at the Hubbard facility from PCB for \$177,500. This purchase included at least four pieces of sewing equipment that had been used at Nordic's Hubbard plant.<sup>3</sup> The majority of this equipment had previously been transferred from NEL to Nordic. Respondent only wanted to purchase 170 machines in the Hubbard plant, but PCB insisted that Respondent purchase all 250 machines. As of the date of hearing, Respondent was not using 70 of those machines. Respondent uses this equipment to operate its business, along with equipment leased from Allco and Beacon that was used by NEL and Nordic.

42) Respondent did not pay any outstanding debts of Brent Cleaveland or Nordic.

43) Dversdal is the sole owner of Fjord, Ltd.

44) As of November 7, 2000, Respondent had 80-90 employees.

45) As of October 25, 2000, 81 persons employed by Respondent at some time between January 31, 2000, and October 25, 2000, had been previously employed by Nordic. 68 of these persons were employed by Nordic within 60 days of January 6,

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<sup>3</sup> Juki machines with serial numbers of OXAO7495, VG06267, VF05408, and a Singer machine with serial number PC21498.

2000.<sup>4</sup> 13 others were employed at some time during Nordic's operation.<sup>5</sup> Respondent employed 143 persons in total between January 31, 2000, and October 25, 2000.

46) Respondent uses the same CMT manufacturing techniques used by NEL and Nordic.

47) Respondent uses AT&T as a long distance carrier.

48) Respondent has received no benefit from any credit established by Nordic.

49) Respondent has received no other work from Hanna Anderson since completing Nordic's work in process.

50) From February 1 through October 13, 2000, Re-

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<sup>4</sup> The forum draws this conclusion from the fact that the Wage Security Fund paid back wages to 68 persons who were employed by Nordic and Respondent, and ORS 652.414 only pays "wages earned within 60 days before the date of the cessation of business." ORS 652.414(1)(b).

<sup>5</sup> The forum draws this inference based on the fact that these thirteen persons appear on Respondent's lists showing persons who worked for Nordic and Respondent, but they were not paid from the Wage Security Fund, indicating they did not earn wages from Nordic in Nordic's last few weeks of operation. These 13 persons are Virginia Cabrera de Gasca, Francisco Cortez, Lucia Espinoza, Imelda Giron Mora, Elena Gokk, Esperanza Hernandez de Perez, Carmen Ibarra, Lyudmila Levko, Yadira Reyes, Esperanza Rosas, Ivan Rud, Rosa Varela, and Ibeth Veles.

spondent had gross sales of \$1,648,529.38. \$1,443,619.58, or 88 per cent of this total, represented sales to Nike, Incorporated, Solstice, and Hanna Anderson. Respondent did not do business with Nordic's remaining 42 former customers.

51) Nike Corporation had been NEL's customer since 1977. Nike continued as Nordic's customer. There was no Nike work in progress at either the Vancouver or Hubbard plant at the time Nordic declared bankruptcy, as all of Nike's business was done between the months of April and August. After Nordic declared bankruptcy, Nike agreed to send more work to Respondent, so long as Brent Cleaveland and Nordic weren't associated with Respondent. Between February 1 and March 14, 2000, Respondent billed Nike a total of \$17,975.68 for work performed during that period of time.

52) After Nordic filed for bankruptcy, the assets of its Vancouver plant were sold at auction for a total of \$455,000.

53) After January 6, 2000, Kissinger performed various administrative and personnel functions for Nordic on an unpaid basis, including determining the hours worked by Nordic's employees for which they had not been paid, mailing W-2 forms to employees, and completing paperwork for NAFTA relief, which entailed compiling sales records and projections. After January 6, 2000, Kissinger also began doing some "volunteer" work for Re-

spondent before going to work fulltime for Respondent as office manager/handling payroll and personnel on June 5, 2000. Respondent paid Kissinger a bonus, from which taxes were taken, for this "volunteer" work after she went to work fulltime for Respondent.

54) Peter Yazzolino was hired by NEL in 1998 as plant manager. He continued to occupy that position for Nordic in the Hubbard plant. He performed "volunteer" work for Dversdal after Nordic's bankruptcy, including helping Dversdal determine if going back into business was feasible, helping prepare W-2s, completing paperwork for NAFTA relief, and answering the phone at the Hubbard plant. He was hired by Respondent on June 5, 2000, as plant manager. After his hire, he received a bonus from Respondent for his work in helping start up Respondent. At the time of the hearing, he was plant manager for Respondent and a member of Respondent's board of directors.

55) On February 12, 2000, Kissinger ran a payroll report for Respondent, using the same format she used while employed by Nordic.<sup>6</sup> The report listed 11 employees. All but one, William Simon, had been employed by Nordic. The report listed each employee's "number," which was a sequential number assigned to

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<sup>6</sup> In fact, the payroll report was titled "The Nordic Group, LLC - Payroll Register 2/12/00."

each employee at the time of his or her hire at NEL, Nordic, or Respondent. Persons who had worked for NEL, Nordic, or both were reassigned their original employee number at the time they were hired by Respondent. New employees hired by Respondent were assigned sequentially larger employee numbers. Simon's number was 3082.

56) On October 25, 2000, Kissinger prepared a list of Respondent's employees. The report was titled "The Nordic Group, LLC – Employee Listing 10/25/00." The report listed 143 employees, with 103 assigned numbers lower than 3082. 81 had worked for Nordic.

57) Respondent uses the same two computer systems that Nordic used. As of the date of the hearing, the business name on Respondent's "internal" forms still read "Nordic Group, LLC." Correspondence to customers, including invoices, and paychecks have the name "Fjord, LTD" imprinted on them.

58) Except for the equipment purchased from PCB, the Hubbard physical plant and equipment used by Respondent is personally owned or leased by Dversdal and subleased to Respondent. The equipment leased from Allco and Beacon is the same equipment used by NEL and Nordic at their Hubbard plant.

59) Respondent's board of directors includes Norman Dversdal, Jon Dversdal, Peter Yazzolino, and Don Linville. Its

officers are Norman Dversdal, president, and Betty Kissinger, secretary. None of these persons were on the board of directors or officers of Nordic.

60) Nordic's Hubbard engineers were Gary Veenker and Judy Kunz. Respondent's engineer is Judy Kunz, who was hired by Respondent on June 5, 2000. Veenker was also hired by Respondent on August 1, 2000.<sup>7</sup> There is no credible evidence in the record identifying Respondent's training supervisor.<sup>8</sup> However, Nordic's training supervisor at Hubbard, Luisa Olivares, was hired by Respondent on August 14, 2000. There is no credible evidence in the record identifying Respondent's sewing superintendent.<sup>9</sup> However, Nordic's sewing supervisors at Hubbard - B. Brenden, R. Moreno, and B. Padron, were all hired by

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<sup>7</sup> There is no evidence in the record as to the job Veenker was hired to perform at Respondent.

<sup>8</sup> Yazzolino testified that Respondent's training supervisor is Shirley Stone; however, there is no listing for anyone with the last name of Stone or the first name of Shirley in Respondent's list of employees contained in Exhibit R-4.

<sup>9</sup> Yazzolino testified that Respondent's sewing superintendent is Shirley Stone; however, there is no listing for anyone with the last name of Stone or the first name of Shirley in Respondent's list of employees contained in Exhibit R-4.

Respondent on June 5, 2000.<sup>10</sup> Nordic's release auditor at Hubbard was Juanita Gonzales. Respondent's release auditor is Mary Meyers, a former employee of Nordic who was hired by Fjord on March 13, 2000. Gonzales was hired by Respondent on August 21, 2000.<sup>11</sup> Phil Lim, Nordic's cutting supervisor at Hubbard, was hired by Respondent on June 5, 2000.<sup>12</sup> Sheri Hilgers, Nordic's shipping/receiving supervisor at Hubbard, was hired by Respondent on June 5, 2000.<sup>13</sup>

61) In Respondent's offer of proof made in support of its proffered ORS 652.310(1)(b) affirmative defense, Dversdal testified that Respondent ships its product to Australia, to 26 colleges and 11 NFL teams, shipping products to 26-30 states in all.

62) Betty Kissinger was a reluctant witness who had a long employment history with Norman Dversdal at the time of the hearing and was one of Respondent's corporate officers. Her testimony was slanted in Respondent's favor, as demonstrated by the contrast between her testimony and documentary evidence that she prepared. For example, she testified that Respondent's mailing

address was P.O. Box 248, whereas her current business card and Respondent's letterhead list Respondent's mailing address as P.O. Box 448, the same as NEL and Nordic. She testified that only 67 of the persons listed on Respondent's employee list had worked for NEL or Nordic, whereas employee numbers revealed that 103 employees of Respondent had worked for NEL or Nordic. Her memory was also suspect in that she was unable to recall the bonus amount paid to her by Respondent only 4-5 months earlier. The forum has credited her testimony only where it was uncontradicted or supported by other credible evidence.

63) Peter Yazzolino was Respondent's plant manager at the time of the hearing and a corporate officer. Like Kissinger, he worked as a volunteer to help Dversdal get Respondent's business operation going. His testimony was diminished by his inability to explain the scope of two documents he should have understood from his position as plant manager – Nordic's list of customers and why Nordic's Hubbard plant produced a higher gross volume of sales than the Vancouver plant. He also testified that Shirley Stone was a current supervisor for Respondent, whereas Stone's name does not appear on Kissinger's list of Respondent employees. The forum has credited his testimony only where it was uncontradicted or supported by other credible evidence.

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<sup>10</sup> There is no evidence in the record as to the jobs these individuals were hired to perform at Respondent.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

64) The forum has not relied on the testimony of Conrad Meyers because of the forum's determination that it is irrelevant.<sup>14</sup>

65) The forum has credited the testimony of Norman Dversdal, Brent Cleaveland, and Michael Wells in their entirety.

#### **ULTIMATE FINDINGS OF FACT**

1) During all times material herein, The Nordic Group, LLC, was an Oregon limited liability corporation doing business that engaged the personal services of one or more employees in the state of Oregon. Nordic was a "CMT" manufacturer of sports apparel and equipment that operated manufacturing plants in Hubbard, Oregon and Vancouver, Washington. Nordic subleased the plant buildings and real estate from Norman Dversdal and subleased the majority of equipment it used from Dversdal. About 25 percent of Nordic's employees worked at the Hubbard plant and about 25 percent of Nordic's pieces of equipment were located at the Hubbard plant. 54 percent of Nordic's gross sales were generated from the Hubbard plant, and its administrative headquarters was located at the Hubbard plant.

2) Nordic ceased business operations on January 6, 2000. At that time, Nordic owed the wages listed in the column entitled "TO-

TAL UNPAID WAGES" in Appendix A to this Order to the 93 persons listed in Appendix A.

3) After Nordic ceased business operations, those 93 persons filed wage claims and the commissioner determined that the wage claims were valid. Subsequently, the wages listed in the column entitled "TOTAL UNPAID WAGES" in Appendix A were paid to the persons listed out of the Wage Security Fund pursuant to ORS 652.414(1) and the administrative rules adopted thereunder. The total amount of wages paid out from the Fund was \$73,699.06.

4) On January 31, 2000, Fjord, Ltd. began manufacturing operations in Hubbard, Oregon, in Nordic's former plant, using the same equipment Nordic had used at that plant. Prior to that time, Dversdal, Respondent's president; Kissinger, Nordic's personnel manager; and Yazzolino, Nordic's Hubbard factory manager, were engaged in start-up operations for Respondent, the latter two as "volunteers." Dversdal, Respondent's president, had worked for Nordic under a private employment contract. Respondent's initial customers were Hanna Anderson and Nike Corp., both of whom had been customers of Nordic. Respondent initially employed 11 persons, 10 of who had been employees of Nordic or its predecessor, NEL.

5) In June 2000, Respondent purchased \$177,500 worth of equipment from Pacific Continental Bank that had been used by

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<sup>14</sup> The relevance of Meyers' testimony hinges on whether the forum utilizes the *Steinbach* test for determining if Respondent is a successor employer. The forum has rejected that test.

Nordic to operate its Hubbard plant. At the time of the hearing, Respondent was using 170 of the 250 machines purchased from PCB to operate its Hubbard plant, along with equipment subleased from Dversdal that had also been subleased to Nordic by Dversdal. Respondent subleases its Hubbard plant from Dversdal, who had also subleased the Hubbard plant to Nordic.

6) 81 of the 143 persons employed by Respondent between January 31, 2000, and October 25, 2000, had also been employed by Nordic.

7) Respondent uses the same "CMT" manufacturing techniques as Nordic and uses equipment that was used by Nordic and manufactures the same type of product.

8) Respondent uses the same two computer systems as Nordic. Respondent has the same phone number, mailing address, and personnel numbering system as Nordic.

9) Respondent employs Yaz-zolino, Nordic's Hubbard factory manager, as its factory manager, and Kissinger, Nordic's personnel manager, as personnel manager.

#### **CONCLUSIONS OF LAW**

1) During all times material herein, Nordic was an employer and the 93 wage claimants listed in Appendix A to this Order were employees subject to the provisions of ORS 652.110 to 652.200 and 652.310 to 652.414. During

all times material herein, Nordic employed all 93 claimants.

2) ORS 652.310(1) provides:

"As used in ORS 652.310 to 652.414, unless the context requires otherwise:

"(1) 'Employer' means any person who in this state, directly or through an agent, engages personal services of one or more employees and includes any producer-promoter, and any successor to the business of any employer, or any lessee or purchaser of any employer's business property for the continuance of the same business, so far as such employer has not paid employees in full. 'Employer' includes 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 but does not include:

"(a) The United States.

"(b) Trustees and assignees in bankruptcy or insolvency, and receivers, whether appointed by federal or state courts, and persons otherwise falling under the definition of employers so far as the times or amounts of their payments to employees are regulated by laws of the United States, or regulations or orders made in pursuance thereof."

Respondent Fjord is a "successor to the business" of Nordic and a

“purchaser” of Nordic’s “business property for the continuance of the same business” within the meaning of ORS 652.310(1) and, as an employer, is subject to the provisions of ORS 652.110 to 652.200 and 652.310 to 652.414.

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

4) ORS 652.140(1) provides:

“(1) Whenever an employer discharges an employee or where such employment is terminated by mutual agreement, all wages earned and unpaid at the time of such discharge or termination shall become due and payable not later than the end of the first business day after the discharge or termination.”

Nordic violated ORS 652.140 by failing to pay the 93 wage claimants listed in Appendix A all wages earned and unpaid not later than the end of the business day on January 6, 2000, the date the wage claimants were terminated.

5) Respondent, as a successor to the business of Nordic and a purchaser of Nordic’s business property for the continuance of the same business pursuant to ORS 652.310(1), is liable for Nordic’s failure to pay the 93 wage claimants listed in Appendix A.

6) ORS 652.414 provides, in pertinent part:

“Notwithstanding any other provision of law:

(1) When an employee files a wage claim under this chapter for wages earned and unpaid, and the Commissioner of the Bureau of Labor and Industries determines that the employer against whom the claim was filed has ceased doing business and is without sufficient assets to pay the wage claim and the wage claim cannot otherwise be fully and promptly paid, the commissioner, after determining that the claim is valid, shall pay the claimant, to the extent provided in subsection (2) of this section:

“(a) The unpaid amount of wages earned within 60 days before the date of the cessation of business; or

“(b) If the claimant filed a wage claim before the cessation of business, the unpaid amount of wages earned within 60 days before the last day the claimant was employed.

“(2) The commissioner shall pay the unpaid amount of wages earned as provided in subsection (1) of this section only to the extent of \$4,000 from such funds as may be available pursuant to ORS 652.409 (2).

“(3) The commissioner may commence an appropriate action, suit or proceeding to recover from the employer, or other persons or property liable for the unpaid wages, amounts paid from the Wage Security

Fund under subsection (1) of this section. In addition to costs and disbursements, the commissioner is entitled to recover reasonable attorney fees at trial and on appeal, together with a penalty of 25 percent of the amount of wages paid from the Wage Security Fund or \$200, whichever amount is the greater. All amounts recovered by the commissioner under this subsection and subsection (4) of this section are appropriated continuously to the commissioner to carry out the provisions of this section.”

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 may recover from Respondent the \$73,699.06 paid to the 93 wage claimants from the Wage Security Fund and sought in the Order of Determination, along with a penalty of \$18,424.77 assessed on that sum, plus interest until paid. ORS 652.332, ORS 652.414(2).

## OPINION

### INTRODUCTION

NEL, a CMT manufacturer, sold its business operation in 1999 to Nordic. Nordic then commenced CMT manufacturing operations. On January 6, 2000, Nordic closed its doors and ceased business operations. At that time, \$73,699.06 in wages was due to 93 separate employees. Those wages were subsequently paid by funds from

the Wage Security Fund, which is administered by BOLI. On January 31, 2000, Respondent began CMT manufacturing operations in Nordic’s former Hubbard facility, and was still conducting CMT manufacturing operations there at the time of the hearing. In this action, BOLI seeks to recover the funds paid out of the Wage Security Fund, plus a 25% penalty, from Respondent. The question presented is whether Respondent is an “employer” from whom the commissioner is entitled to recover these funds pursuant to ORS 652.414.

### RESPONDENT’S PROPOSED AMENDMENT

At hearing, Respondent moved to amend its answer to include a defense that “Respondent is facially excluded from the definition of ‘employer’ pursuant to ORS 652.310(1)(b), in that respondent is a ‘person[] otherwise falling under the definition of employers so far as the times or amounts of their payments [to employees] are regulated by laws of the United States.” The Agency objected on the grounds that this was an affirmative defense that had been waived by virtue of Respondent’s failure to raise it in the answer. The ALJ reserved ruling on the motion until the proposed order and allowed Respondent to present testimony by Norman Dversdal as an offer of proof in support of this defense. After hearing, Respondent and the Agency’s counsel both submitted briefs on this issue.

In support of its motion, Respondent argues that the defense is not an affirmative defense and could not be waived. In the alternative, Respondent argues that even if the forum finds the defense to be an affirmative one, the forum should grant the amendment based on the fact that Respondent's proposed amendment did not prejudice the Agency.

**RESPONDENT'S ORS  
652.310(1)(B) DEFENSE IS AN  
AFFIRMATIVE DEFENSE**

Respondent contends the ORS 652.410(1)(b) defense raised in its proposed amendment is not an affirmative defense because it simply rebuts the element of the Agency's prima facie case requiring the Agency to prove that Respondent is an "employer." Because ORS 652.310 does not specifically state whether or not subsection (1)(b) constitutes an affirmative defense, the forum must interpret the statutory language.

ORS 652.310(1) defines "employer" in the following words:

"(1) 'Employer' means any person who in this state, directly or through an agent, engages personal services of one or more employees \* \* \*, and any successor to the business of any employer, or any lessee or purchaser of any employer's business property for the continuance of the same business, so far as such employer has not paid employees in full. 'Employer'

includes 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 but does not include."

"(a) The United States.

"(b) Trustees and assignees in bankruptcy or insolvency, and receivers, whether appointed by federal or state courts, and persons otherwise falling under the definition of employers so far as the times or amounts of their payments to employees are regulated by laws of the United States, or regulations or orders made in pursuance thereof."

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). 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. *Id.*

The first sentence of paragraph (1) contains the statute's general definition of "employer"

and describes the range of actions that qualify a person or entity as an “employer.” It is this definition the Agency must allege. Respondent falls within to establish the “employer” element of its prima facie case. The second sentence does not add to that definition, but merely clarifies that “the State of Oregon \* \* \* and any of their instrumentalities organized and existing under law or charter” are included in the definition contained in the first sentence. In short, every “necessary ingredient of [the] definition” of employer is contained in the first sentence of paragraph (1). *Cf. State v. Vasquez-Rubio*, 323 Or 275, 279 (1996) (quoting *State v. Schriber*, 185 Or 615, 631) (quoting *State v. Tamler & Polly*, 19 Or 528, 530-31 (1890)).

The definition relied on by Respondent is contained in a subsequent paragraph, qualified by the limiting phrase - “but does not include” - set out at the end of paragraph (1). This limiting phrase indicates that subsections (a) and (b) are intended as exceptions to the definition of “employer.” As exceptions, they constitute an affirmative defense that must be pleaded and proved by Respondent.<sup>15</sup>

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<sup>15</sup> *Cf. State v. Vasquez-Rubio*, 323 Or 275, 281 (1996) (“the legislature can provide for a defense or affirmative defense by using words of limitation such as ‘except that,’ ‘however,’ or ‘provided that.’”); *In the Matter of Graciela Vargas*, 16 BOLI 246, 256 (1998) (exception in ORS 652.150, which states “provided further, the

### **AFFIRMATIVE DEFENSES MUST BE RAISED IN THE ANSWER**

OAR 839-050-0130 and OAR 839-050-0140 are the procedural rules relevant to these issues. OAR 839-050-0130 governs responsive pleading and provides, in pertinent part:

“(2) Except for good cause shown to the administrative law judge, factual matters alleged in the charging document, and not denied in the answer, shall be deemed admitted by the party. The failure of the party to raise an affirmative defense in the answer shall be deemed a waiver of such defense. Any new facts or defenses alleged in the answer shall be deemed denied by the Agency. Evidence shall not be taken at the contested case hearing on any factual or legal issue not raised in the charging document or the answer as originally filed or as amended pursuant to OAR 839-050-0140.

This rule unambiguously states that affirmative defenses are waived unless raised in the answer. It goes on to state that no evidence shall be taken in support of any legal issue, which would include Respondent’s proffered affirmative defense, except pursuant to amendment. Therefore, the

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employer may avoid liability for the penalty by showing financial inability to pay the wages or compensation at the time they accrued” is an affirmative defense.)

forum must conclude that Respondent has waived its defense unless Respondent's motion to amend is granted.

#### **AMENDMENTS AT HEARING.**

Where a party moves to amend its answer at hearing to include an affirmative defense not previously raised, OAR 839-050-0140(2) defines the parameters within which the motion may be granted. Those rules provide:

“(a) After commencement of the hearing, issues not raised in the pleadings may be raised and evidence presented on such issues, provided there is express or implied consent of the participants. Consent will be implied where there is no objection to the introduction of such issues and evidence or where the participants address the issues. Any participant raising new issues must move the administrative law judge to amend its pleading to conform to the evidence and to reflect issues presented. The administrative law judge may address and rule upon such issues in the Proposed Order.

“(b) If evidence is objected to at hearing on the grounds that it is not within the issues raised by the pleadings, the administrative law judge may allow the pleadings to be amended to conform to the evidence presented. The administrative law judge shall allow the amendment where the participant seeking to amend its pleading shows good cause for not hav-

ing included the new matter in its pleading prior to hearing and the objecting participant fails to satisfy the administrative law judge that it would be substantially prejudiced by the admission of such evidence. The administrative law judge may grant a continuance to enable the objecting participant to meet such evidence.

“(c) Charging documents and answers may be amended as provided in paragraphs (a) and (b) of this rule. Permissible amendments to charging documents include, but are not limited to: additions to or deletions of charges; changes to theories of liability; and increases or decreases to the damages, penalties, or other remedies sought. Permissible amendments to answers include, but are not limited to, additions to or deletions of affirmative defenses.”

Respondent contends it falls within the exclusionary language of ORS 652.310(1)(b) solely because it is regulated by the Fair Labor Standards Act (“FLSA”). During her examination of Norman Dversdal, Respondent's counsel asked Dversdal – “Is Fjord engaged in interstate commerce?” Dversdal answered “yes.” The Agency did not object. As a result, subsection (2)(a) applies. Respondent's engagement in interstate commerce brings it within the regulatory coverage of the FLSA. 29 U.S.C. § 201, *et seq.* Based on the Agency's failure to object, the forum must find implied

consent by the participants to the admission of evidence showing that Respondent is engaged in interstate commerce. However, this does not end the analysis. In order to grant Respondent's motion, the forum must determine that the proposed amendment conforms to the evidence. In this case it does not, for the reason that simply being an FLSA-regulated employer is not a defense under ORS 652.310(1)(b).<sup>16</sup> Consequently, the forum denies Respondent's motion to amend its answer. The forum also sustains the Agency's objection to Dversdal's testimony presented as an offer of proof showing the extent of Respondent's engagement in interstate commerce on the basis that it is irrelevant.

**AN FLSA-REGULATED EMPLOYER IS NOT PER SE A "PERSON" UNDER ORS 652.310(1)(b).**

As stated earlier, Respondent argues that it falls within the meaning of "persons otherwise falling under the definition of employers so far as the times or amounts of their payments to employees are regulated by laws of the United States, or regulations or orders made in pursuance thereof" solely because of its FLSA-regulated status. ORS 652.310(1)(b). If so, then the "implied consent" provision of OAR 839-050-0140(2)(a) would lead the forum to grant Respondent's

motion to amend on the basis that the amended pleading would conform to evidence presented by Respondent. For reasons that follow, the forum disagrees with Respondent's argument.

The forum must begin its analysis of the statutory language with an examination of the text and context of ORS 652.310(1)(b). *PGE*, 317 Or at 610. The text itself is the starting point for interpretation and the best evidence of the legislature's intent. *Id.* The context of the statutory provision, which includes other provisions of the same statute and other related statutes, is also relevant to this analysis. *Id.*, at 611.

The forum first examines the specific text of the statutory provision. The text's critical words are "times or amounts." Because neither word is modified or defined anywhere in the statute or related statutes, and both are words of common usage, their plain, natural and ordinary meaning must be ascribed to them. *Id.* In its statutory context, the meaning of "times" is "a point or period when something occurs \* \* \*; an appointed, fixed, or customary moment \* \* \* for something to happen." *Webster's Third New International Dictionary*, 72 (unabridged ed 1985). In other words, "times" here means a set time of interval when wages must be paid. In its statutory context, the ordinary meaning of "amounts" is "the total number or quantity: AGGREGATE (the ~ of the fine is doubled) :SUM, NUMBER (add

<sup>16</sup> See discussion in next section of this Opinion, *infra*.

the same ~ to each column) (the ~ of the policy is 10,000 dollars)." *Id.* at 2394. This unmistakably refers to a specific sum.

Respondent argues that its coverage by the FLSA's minimum wage and overtime provisions means the "times" and "amounts" of its payments to employees are regulated by federal law. Respondent is incorrect on both counts. First, the FLSA does not regulate the "times" of payment to employees. Second, in this context, "amounts" refers to a specific dollar amount. The FLSA requires payment of a minimum wage of \$5.15 per hour. 29 U.S.C. § 206(1). It also requires that hours worked over 40 in a workweek be paid at time and a half. 29 U.S.C. § 207(1). These provisions do not establish specific "amounts" of payments to employees; rather, they only construct a floor below which wages for FLSA-covered employers may not sink. Furthermore, there is no evidence in this case that any of Respondent's workers were paid minimum wage and, even if they were, Respondent would be subject to the Oregon minimum wage, which is higher than the federal minimum wage. 29 U.S.C. §218(1)(a).

The context of ORS 652.310(1)(b), which includes other provisions of that statute and other related statutes, makes it even more clear that Respondent's FLSA coverage does not bring it within the definition of "persons \* \* \*" in ORS 652.310(1)(b).

First, the affirmative defense relied on by Respondent is placed in the same sentence, and immediately follows, two other categories of narrowly defined persons, "[T]rustees and assignees," and "receivers." These two categories both involve circumstances where another court is currently exercising jurisdiction over the assets of the "employer" entity from whom unpaid wages are sought. This placement tends to indicate that Respondent's affirmative defense was intended to encompass a narrow group of persons, rather than the broad group urged by Respondent.

Second, Oregon's minimum wage law requires payment of \$6.50 per hour, as compared to the FLSA's \$5.15 per hour. ORS 653.025, 29 U.S.C. § 206(1). The FLSA requires that, if state minimum wage is higher than FLSA minimum wage, employees must be paid the higher amount. 29 U.S.C. § 218(1)(a).<sup>17</sup> The current version of ORS 653.025 was enacted in 1997, long after ORS 652.310(1)(b) and 29 U.S.C. § 218(1)(a) went into effect. This statutory scheme is not indicative of a legislative intent to excuse FLSA-regulated employers from paying Oregon's minimum wage, the result urged by Respondent.

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<sup>17</sup> The specific FLSA language is: ""No provision of this Act \* \* \* or of any order thereunder shall excuse noncompliance with any Federal or State law \* \* \* establishing a minimum wage higher than the minimum wage established under this Act \* \* \*."

In fact, the FLSA prohibits this result. *Id.*

Third, five different statutes contained in Oregon's wage and hour laws, which include child labor, specifically state when the FLSA should impact enforcement of Oregon's wage and hour laws.<sup>18</sup> This shows that the legislature knows how to say when the FLSA should have an impact on enforcement of Oregon's wage and hour laws. Mention of the FLSA is conspicuously absent in ORS 652.310(1)(b).

The narrow scope of other entities mentioned in ORS 652.310(1)(b), the irreconcilable conflict between Oregon's minimum wage law and the FLSA under the result urged by Respondent, and the absence of any

mention of the FLSA in the statute leads the forum to conclude that the legislature did not intend mere fact of FLSA regulation to bring an otherwise covered employer within the exclusion contained in ORS 652.310(1)(b).

This conclusion is bolstered by the existence of at least two other laws of the United States that fall within the precise definition of "persons" in ORS 652.310(1)(b). Those laws are the Davis-Bacon Act, 40 U.S.C. § 276a,<sup>19</sup> and the

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<sup>18</sup> See ORS 653.035(3) (prohibiting employers from including any amount received by employees as tips in determining the amount of minimum wage required to be paid); ORS 653.307(1) (rules governing total hours a minor can work shall not be more restrictive than requirements of FLSA); ORS 653.355 (Oregon law regulating children aged 9-11 in berry picking shall not apply to employers exempt from the child labor provisions of FLSA); ORS 653.370(5)(a)(A) (commissioner may not impose a civil penalty for child labor violations on an employer who has paid a civil penalty to USDOL for violation of child labor provisions of FLSA); ORS 653.370(5)(b)(A) (commissioner shall refund any civil penalty if the person from whom the penalty is collected who has paid a civil penalty to USDOL for violation of child labor provisions of FLSA).

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<sup>19</sup> The Davis-Bacon Act provides, in part: "(a) The advertised specifications for every contract in excess of \$ 2,000 to which the United States or the District of Columbia is a party, for construction \* \* \* of public buildings or public works of the United States or the District of Columbia within the geographical limits of the States of the Union or the District of Columbia, and which requires or involves the employment of mechanics and/or laborers shall contain a provision stating the minimum wages to be paid various classes of laborers and mechanics which shall be based upon the wages that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the city, town, village, or other civil subdivision of the State in which the work is to be performed, or in the District of Columbia if the work is to be performed there; and every contract based upon these specifications shall contain a stipulation that the contractor or his subcontractor shall pay all mechanics and laborers employed directly upon the site of the work, unconditionally and not less often than once a week, and without subsequent deduction or

Service Contract Act, 41 U.S.C. § 351.<sup>20</sup> By reference to a determi-

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rebate on any account, the full amounts accrued at time of payment, computed at wage rates not less than those stated in the advertised specifications \* \* \*.”

<sup>20</sup> The Service Contract Act provides, in part: “(a) Every contract (and any bid specification therefor) entered into by the United States or the District of Columbia in excess of \$ 2,500, except as provided in section 7 of this Act [41 USCS § 356], whether negotiated or advertised, the principal purpose of which is to furnish services in the United States through the use of service employees, shall contain the following:

(1) A provision specifying the minimum monetary wages to be paid the various classes of service employees in the performance of the contract or any subcontract thereunder, as determined by the Secretary, or his authorized representative, in accordance with prevailing rates for such employees in the locality, or, where a collective-bargaining agreement covers any such service employees, in accordance with the rates for such employees provided for in such agreement, including prospective wage increases provided for in such agreement as a result of arm's-length negotiations. In no case shall such wages be lower than the minimum specified in subsection (b).

(2) A provision specifying the fringe benefits to be furnished the various classes of service employees, engaged in the performance of the contract or any subcontract thereunder, as determined by the Secretary or his authorized representative to be prevailing for such employees in the locality, or, where a collective-bargaining agreement cov-

nation by the Secretary of Labor of the prevailing wage rate, the Davis-Bacon Act sets out the specific dollar amount of wages that must be paid by covered employers. It also requires that those wages must be paid at least once a week. Significantly, ORS Chapter 279, which regulates public contracts and purchasing, exempts projects regulated under the Davis-Bacon Act from the prevailing wage requirements of ORS 279.348 to 279.380.<sup>21</sup> The Service Contract Act likewise requires covered employers to pay either a specific prevailing wage rate determined by the Secretary of Labor or the specific rates provided in a relevant collective bargaining agreement, although it does not regulate the intervals at which those wages must be paid. It is these laws that the definition of “persons \* \* \*” in ORS 652.310(1)(b) was intended to compass, not every employer regulated by the FLSA.

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ers any such service employees, to be provided for in such agreement, including prospective fringe benefit increases provided for in such agreement as a result of arm's-length negotiations. \* \* \*”

<sup>21</sup> ORS 279.357 reads, in part: “(1) ORS 279.348 to 279.380 [requiring payment of the prevailing wage rate as determined by the Commissioner of the Bureau of Labor and Industries to workers on public works projects in Oregon, among other things] do not apply to: \* \* \* (b) Projects regulated under the Davis-Bacon Act (40 U.S.C. 276a).”

As Respondent succinctly states in its brief, where the meaning of the ORS 652.310(1)(b) provision can be determined from its text and context, the statutory interpretation ends and neither legislative history nor maxims of statutory construction are properly reached. The forum has determined that the text and context of ORS 652.310(1)(b) does not exclude Respondent from the definition of “employer” under ORS 652.310(1) and goes no farther in its analysis of ORS 652.310(1)(b).

**RESPONDENT IS AN “EMPLOYER” UNDER ORS 652.310.**

There is no dispute to the validity of the underlying wage claims in this matter, that the Wage Security Fund paid out \$73,699.06 to reimburse the wage claimants, or that Nordic was the wage claimants’ employer. Respondent’s potential liability in this matter depends on whether it is a “successor to the business” of Nordic or a “lessee or purchaser” of Nordic’s “business property for the continuance of the same business.” ORS 652.310(1). These are separate tests. Before continuing, the forum notes that the analysis for determining whether a person is an “employer” either as a “successor” or “lessee or purchaser” is same for wage claim and Wage Security Fund recovery cases.<sup>22</sup>

**A Respondent is a successor to the business of Nordic.**

The test used by this forum in determining whether Respondent is a “successor to the business” of Nordic is whether Respondent conducts essentially the same business as Nordic did. The elements to look for include: the name or identity of the business; its location; the lapse of time between the previous operation and the new operation; the same or substantially the same work force employed; the same product is manufactured or the same service is offered; and, the same machinery, equipment, or methods of production are used. Not every element needs to be present for an employer to be a successor; the facts must be considered together. *In the Matter of Catalogfinder, Inc.*, 18 BOLI 242, 256 (1999) (citing *In the Matter of Tire Liquidators*, 10 BOLI 84, 93 (1991)). The relevant facts are as follows.

1. Did the name or identity of the business change?

The name of the business changed from The Nordic Group, LLC, to Fjord, Ltd. In some ways the identity changed, and in some ways it stayed the same. Respondent kept the same phone number and mailing address, the same computer systems and personnel numbering system as Nordic. Respondent also main-

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<sup>22</sup> This is based on the fact that the definition of “employer” with regard to both wage claims and Wage Security

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Fund recovery is contained in the same language in ORS 652.310.

tains its equipment and physical plant by the same means as Nordic, through a sublease from Dversdal. However, Nordic was identified with Brent Cleaveland, and Respondent has no identification with Cleaveland. In fact, Nike, the company with whom Respondent had by far its largest amount of sales in 2000, told Dversdal that it would not do business with Respondent if Cleaveland and Nordic were in any way associated with Respondent. In addition, Nordic and Respondent share no corporate officers or directors, Respondent has a different long distance carrier than Nordic, and Respondent was assigned a higher unemployment tax rate than Nordic. In short, while several important elements associated with Nordic's identity changed when Respondent commenced operations, other critical elements stayed the same. As a result, this element is neither indicative of successorship or the absence of successorship.

2. Did the location of the business change?

Nordic operated manufacturing plants in Hubbard, Oregon, and Vancouver, Washington. Although the Vancouver plant employed more persons and used three times as much equipment, fifty-four percent of Nordic's gross sales were generated by the Hubbard plant. Nordic's administrative headquarters were also located at the Hubbard plant. Respondent operates the same manufacturing plant in Hubbard, but does not have and has never

had any interest in the Vancouver plant. The forum concludes that the primary location of the business did not change, but Respondent did not continue to operate Nordic's second plant, located in Washington. These facts indicate successorship.<sup>23</sup>

3. What was the lapse in time, if any, between the previous and new operation?

Nordic ceased operations on January 6, 2000. Respondent officially commenced manufacturing operations on January 31, 2000. Between January 6, 2000, and January 31, 2000, Dversdal, Yaz-zolino, and Kissinger were engaged in work at the Hubbard plant that involved wrap-up operations for Nordic and start-up operations for Respondent. This relatively brief lapse in time indicates successorship.

4. Does Respondent employ the same or substantially the same work force as Nordic?

Respondent's first payroll period ended on February 12, 2000. During that period, Respondent employed eleven persons, 10 of whom had been employed by Nordic at the time it ceased operations.<sup>24</sup> This does not include

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<sup>23</sup> If Respondent was conducting its manufacturing operations in a physical plant different from those used by Nordic, the forum would reach the opposite conclusion.

<sup>24</sup> The forum draws this inference from the fact that 10 of the 11 em-

Dversdal, Yazzolino, and Kissinger. Dversdal, Respondent's president and sole shareholder, was actively involved in running Respondent from its inception. He also worked for Nordic, working under an employment contract. Yazzolino and Kissinger, who had been employed by Nordic as production manager and office manager, respectively, worked as "volunteers" for Respondent from Respondent's start-up period until they officially went on the payroll on June 5, 2000.<sup>25</sup> Between January 31, 2000, and October 25, 2000, Respondent employed a total of 144

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employees received payments from the Wage Security Fund.

<sup>25</sup> "Volunteer" is a legal misnomer. Under Oregon law, the definition of "volunteers" in the employment setting is limited to person who perform "voluntary or donated services \* \* \* for no compensation or without expectation or contemplation of compensation as the adequate consideration for the services performed for a public employer \* \* \* or a religious, charitable, educational, public service or similar nonprofit corporation, organization or institution for community service, religious or humanitarian reasons or for services performed by general or public assistance recipients as part of any work training program administered under the state or federal assistance laws." ORS 653.010(3). Yazzolino's and Kissinger's work for Respondent does not fall within any of these categories, and both were eventually compensated for their work. Consequently, the forum considers both to have been employed by Respondent for purposes of the "successor" analysis.

persons, with a maximum of about 90 at any one time. At least 103 of those persons had previously been employed by NEL or Nordic, not counting Dversdal. A minimum of 81 had worked for Nordic, 68 who were employed by Nordic in the last few weeks of its business operations. At least eleven of these persons – Judy Kunz, Gary Veenker, Luisa Olivares, B. Brenden, R. Moreno, B. Padron, Juanita Gonzales, Phil Lim, Sheri Hilgers, Peter Yazzolino, and Betty Kissinger – were employed as managers at Nordic's Hubbard plant. Fjord's release auditor, Mary Meyers, was also an employee of Nordic. The forum concludes that there is a substantial similarity between the workforces employed by Nordic and Respondent, indicating successorship.

5. Does Respondent manufacture the same product or offer the same service as Nordic?

Respondent, like Nordic, manufactures sporting apparel and equipment for its clients. Although the specific product may differ due to client specifications, Respondent produces the same general type of product as Nordic and offers exactly the same service – CMT manufacturing. This indicates successorship.

6. Does Respondent use the same machinery, equipment, or methods of production as Nordic?

Respondent, as a CMT manufacturer, uses the same method of

production as Nordic. It uses the same machinery and equipment that Nordic used in its Hubbard plant, and at least four pieces of equipment that Nordic used in its Vancouver plant. At the time of the hearing, Respondent also owned, but did not use, approximately 70 pieces of equipment that Nordic had used in its Hubbard plant.<sup>26</sup> This indicates successorship.

Before deciding whether these facts make Respondent a successor employer or a “lessee or purchaser” under ORS 652.310(1), the forum reviews previous final orders involving these issues to put this case in perspective.

The first case where this issue was raised before the forum was *In the Matter of Anita’s Flowers & Boutique*, 6 BOLI 258 (1987). In that case, respondent Anita Peterson owned and operated a boutique called the Flower Shop, which she sold to Evans on June 15, 1985. Evans then operated the business until October 15, 1985, during which time she employed Lewis for about three months. On or about October 15, 1985, Evans abandoned the Flower Shop. At that time, she owed Lewis \$820.40 in unpaid wages and mileage reimbursement and had not paid the purchase price for the Flower Shop to Peterson. On October 15, 1985, Peterson regained possession of the Flower Shop and

reopened it for business within four days. Peterson continued operating the business under the same name and at the same location, and thereafter conducted essentially the same business as Evans had during her possession of it. Peterson used the same suppliers and serviced the same market with the same product as Evans had, but did not employ any employees who had been employed by Evans. *Id.* at 264-65. Peterson argued that “only a purchaser, who can protect himself against unpaid wages, can be a successor, and that a repossessing seller, who has no opportunity to so protect himself, should not be a successor.” *Id.* at 265. The forum disagreed, concluding that the definition of a “successor” employer under ORS 652.310(1) was not limited to “the ‘purchaser’ type of successor” and was “broad enough to encompass the facts presented.” *Id.* at 269. The forum then applied a six-element test taken from *N.L.R.B. v. Jefferies Lithograph Co.*, 752 F.2d 459 (9th Cir 1985), and determined that Peterson was a “successor” employer who was liable for Lewis’s unpaid wages. *Id.* at 267-68. The forum did not consider the issue of whether Peterson was a “lessee or purchaser.”

The second case where a successor issue arose was *In the Matter of Tire Liquidators*, 10 BOLI 84 (1991). In *Tire Liquidators*, respondent Stephen Brown owned and operated a business called Rainier Tire & Auto Center. In October 1988, Brown sold the

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<sup>26</sup> See Finding of Fact 41-The Merits, *supra*.

business, along with his inventory, fixtures, equipment, other assets including goodwill, and a covenant not to compete, to Performance Tires, which assumed respondent's business name and thereafter did business as Rainier Tire & Auto Center at the same address. Brown kept a security interest in the equipment, fixtures, and inventory to secure payment of the purchase price. Brown terminated his employees when the sale closed. Performance then hired most of Brown's employees. On May 31, 1989, Performance ceased doing business at the Rainier Tire. Six wage claimants were not paid wages and were paid from the Wage Security Fund. Brown took the business back the day after Performance closed and on June 19, 1989, opened a business called Tire Liquidators at the same address. When Brown opened Tire Liquidators, all six employees had been employees of Performance when it closed. Tire Liquidators used much of the same equipment as Performance and offered many of the same products and services. Tire Liquidators used different bookkeeping practices than Performance, did not assume any of Performance's contractual obligations, and sold different brands of tires. The forum again used the *Jefferies* test relied on in *Anita's Flowers* to determine whether or not respondent Brown was a successor to Performance and concluded that Brown was a successor because he "conducted essentially the same business as [his] predecessor, Performance

Tires, conducted." *Id.* at 93-94. Respondent argued that he could not be a successor employer under ORS 652.310 because he never purchased any assets or succeeded in any interest of Performance, and never intended to succeed to any interest or assume any of Performance's obligations. *Id.* at 94. The forum rejected this argument, holding that no sale of assets is required for one who succeeds to the business of an employer to become a successor employer under ORS 652.310, reasoning that the statute's alternate definition of an employer as a "lessee or purchaser" indicated that a "successor" did not have to be a "lessee or purchaser" of the predecessor's assets. *Id.* Finally, the forum noted that where "the seller of a business regains possession of it when a buyer walks away, and the seller then continues to operate essentially the same business – the seller's intention to avoid the liabilities of the buyer will carry little weight with regard to the issue of successorship" for the reason that "a buyer and a seller of a business are in a position, as they negotiate the terms of their contract, to protect themselves from unforeseen events rising from their deal." In contrast, "[E]mployees cannot protect themselves." *Id.* at 95.

*In the Matter of Gerald Brown*, 14 BOLI 154 (1995), was the next successor case decided by the forum. In that case, Brown, an individual owner, following the employment of two claimants, transferred real property and business assets to Life Aware-

ness Centers International (“LACI”), a corporation, in exchange for a promise to pay \$50,000 at some later time. LACI then continued to operate the same business, under the same name, at the same location, using the same equipment, and providing the same services as the business previously operated by Brown. The forum found that LACI conducted essentially the same business that Brown had conducted and, as a matter of law, under the test used in *Anita’s* and *Tire Liquidators*, LACI was a “successor” within the meaning of ORS 652.310(1). *Id.* at 166-67. Significantly, the forum noted that “[T]he purpose for the application of the successor doctrine in the wage claim context is, foremost, protection of employees.” The forum did not reach the issue of whether LACI was a “lessee or purchaser” under ORS 652.310(1).

*In the Matter of Susan Palmer*, 15 BOLI 226 (1997), was the next case to come along. Oregon 101 Services, Inc. (“101”), an Oregon corporation, was a business that contracted with airline companies at the Portland International Airport to deliver lost luggage and baggage to its owners in Oregon and southwest Washington. 101 did conducted business under the assumed business name (“ABN”) of Sea Breeze Delivery. Respondent Palmer was 101’s corporate secretary and the authorized representative for the ABN registration. On February 16, 1996, 101 was involuntarily dissolved by the state Corporation

Division. Before and after February 16, 1996, Palmer operated the same business and held herself out as the owner and operator, using the same assumed business name, at the same location, using substantially the same workforce, providing the same service, and with substantially the same equipment. There was no lapse in time between the operation of 101’s business and Palmer’s business. *Id.* at 228-29. Two of the three wage claimants were employed before and after February 16, 1996. *Id.* at 229. Applying the *Anita’s* test, the commissioner concluded that respondent Palmer conducted essentially the same business as her predecessor, 101, and that, as a matter of law, Palmer was a “successor” within the meaning of ORS 652.310(1). *Id.* at 234. The forum did not consider the issue of whether Palmer was a “lessee or purchaser” under ORS 652.310(1).

In 1999, the forum decided *In the Matter of Catalogfinder, Inc.*, 18 BOLI 242 (1999). In that case, 15 wage claimants were employed by Intelligent Catalogs, Inc. (“ICI”) and quit en masse on March 30, 1998, in response to not being paid wages due and owing. On May 1, 1998, ICI ceased doing business, and respondent Catalogfinder commenced operations. Catalogfinder maintained the same physical location and website<sup>27</sup> as ICI, offered the same

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<sup>27</sup> The website location was significant because ICI and Catalogfinder conducted all their business over the internet.

service and used the same equipment and methods for offering that service as ICI, and had the same corporate president and person in charge as ICI. There was no lapse in time between ICI's cessation of doing business and Catalogfinder's beginning of operations. The only change was in the workforce, due to the mass resignation of ICI's employees. *Id.* at 256. The 15 wage claimants filed wage claims and received payment of their wages from the Wage Security Fund. *Id.* at 251. Subsequently, the Agency issued an Order of Determination against ICI and Catalogfinder seeking repayment of the Wage Security Fund payout, plus a 25 percent penalty, against ICI and Catalogfinder. Based on the facts stated above, forum concluded that Catalogfinder was a "successor" employer under ORS 652.310(1) and ordered Catalogfinder to repay the Wage Security Fund the amount paid out by the Fund, plus a 25 percent penalty. The forum also concluded that Catalogfinder was a "lessee" under ORS 652.310(1) based on the fact that Catalogfinder assumed ICI's leases for equipment which "represented the guts of ICI's business, without which it would have been unable to do business." *Id.* at 256.

The final case in which successorship under ORS 652.310 was an issue lends no additional guidance, as the respondent admitted he was a successor employer. *In the Matter of Sabas Gonzalez*, 19 BOLI 1 (1999).

Respondent argues that the forum has historically applied the wrong test to determine successorship, and that the proper test is an equitable balancing test set out in *Steinbach v. Hubbard*, 51 F3d 843, 846 (9<sup>th</sup> Cir 1995). Alternatively, Respondent argues that it is not a successor under the *Anita's* test relied on by the forum. *Anita's Flower Shop*, 6 BOLI at 267-68. The forum disagrees with Respondent on both counts.

*Steinbach* was an FLSA wage claims case. In *Steinbach*, the 9<sup>th</sup> Circuit was faced with a question of first impression – does successorship exist under the FLSA? *Steinbach*, 51 F3d at 844. The court concluded that it did, and announced a test composed of three primary considerations, plus several equitable principles to be balanced. The three primary considerations were whether the subsequent employer was "a bona fide successor" who had "notice of the potential liability," and "the extent to which the predecessor is able to provide adequate relief directly." *Id.* at 846. The first equitable principle was the policies underlying the FLSA which could "best be effectuated by seeing to it that violations are remedied in as many cases as possible. The second was the public's "substantial interest in the free transfer of capital and the reorganization of unprofitable businesses." *Id.* The third was fairness. *Id.* at 847.

Where Oregon wage and hour law is silent, the forum has sought guidance in the past from federal

court cases interpreting the FLSA. See, e.g. *In the Matter of Frances Bristow*, 16 BOLI 28, 37 (1997) (commissioner adopted the “economic reality” test used by federal courts when applying the FLSA to determine whether a wage claimant was an employee or independent contractor); *In the Matter of Burrito Boy*, 16 BOLI 1, 8-9 (1997) (forum has long followed policies derived from *Anderson v. Mt. Clemens Pottery Co.*, 328 US 680 (1946) regarding burden and method of proving hours worked by wage claimant). Oregon wage and hour law is not silent in this case. Unlike the FLSA, which contains no statutory directive that unpaid wage liabilities may be passed on to successor employers, ORS 652.310(1) specifically provides for successor liability. Consequently, *Steinbach* is not controlling, and the forum relies on the test used in the line of cases beginning with *Anita’s* and ending at *Gonzalez*. That test does not take into consideration whether Respondent had prior notice of the potential liability or the public’s “substantial interest in the free transfer of capital and the reorganization of unprofitable businesses.” It also does not contain an exception for cases in which the business property was leased or purchased during the pendency of a bankruptcy proceeding, or any circumstances affecting the bargaining power of the parties.

*Anita’s* (composition of work force), *Tire Liquidators* (some different services and a different

name), and *Catalogfinder* (composition of work force) each had one element that did not indicate successorship. In this case, five of the six elements of the successor test are indicative of successorship, with the sixth - name or identity - being neutral. Based on Agency precedent and the facts of this case, the forum concludes that Respondent conducts essentially the same business that Nordic conducted and is a “successor to the business” of Nordic under ORS 652.310(1).

**B Respondent is a “purchaser,” but not a “lessee” of the “business property” of Nordic “for the continuance of the same business.”**

The Agency also seeks to hold Respondent liable under the “lessee or purchaser” definition of “employer” in ORS 652.310(1). Prior BOLI orders lend little guidance in determining whether Respondent meets this definition, and the forum begins its analysis with an examination of the text and context the relevant statute. *PGE*, 317 Or at 610. That language defines “employer” as “any lessee or purchaser of any employer’s business property for the continuance of the same business \* \* \*.” There are two distinct parts to the definition – the transaction that must occur and the purpose for the transaction. Restated, a person must lease or purchase an employer’s business property for the purpose of continuing the

same business to fit within this definition. A mere repossession of a business by a prior owner, without new acquisition of assets, would not qualify as a lease or purchase, although it would likely meet the "successor" definition in ORS 652.310.<sup>28</sup> A person does not have to lease or purchase *all* of an employer's business property so long as the business property is leased or purchased for the purpose of continuing the same business.

The first question is whether there was a lease or purchase. The facts show that Respondent purchased a substantial portion of Nordic's Hubbard assets from PCB for \$177,500. This purchase brings Respondent within the statutory definition of "purchaser." The facts also show that Respondent acquired the Norco lease for the Hubbard plant and the Allco and Beacon leases for Hubbard equipment. Even though both of these leases were actually subleases, as Dversdal personally leased this property, then subleased it to both Nordic and Respondent, the term "lessee" is broad enough to include a sublessee.<sup>29</sup> However, the term

"property" denotes ownership.<sup>30</sup> Because the leased property was never owned by Nordic, the forum concludes that Respondent was not a "lessee" of Nordic's "business property," and is excluded from the statutory definition of "lessee."

The second question is whether Respondent's purchase and lease was for the "continuation of the same business." Respondent argues that because Respondent's business is not identical to Nordic's, it cannot meet the statutory requirement of being the "same business," as opposed to a "substantially similar business." Respondent misreads the statute. The word "same" must be interpreted as a modifier of the word "business" in the larger context of the statute. ORS 653.310(1) sets out two distinct categories of employers who may be liable to pay wage claims. The first category is the person for whom the claimant actually worked. The second category involves successors, lessees, and purchasers, all persons who did

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personal property under a lease." *Id.* at 914.

<sup>30</sup> In this context, property is defined as "2a: something that is or may be owned or possessed: WEALTH, GOODS \* \* \* b: the exclusive right to possess, enjoy, and dispose of a thing: a valuable right or interest primarily a source or element of wealth: OWNERSHIP \* \* \* c: something to which a person has legal title \* \* \*." *Webster's Third New International Dictionary*, 1818 (unabridged ed 1985).

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<sup>28</sup> See, e.g., *In the Matter of Anita's Flowers & Boutique*, 6 BOLI 258, 267-68 (1987); *In the Matter of Tire Liquidators*, 10 BOLI 84, 93-94 (1991).

<sup>29</sup> A "sublessee" is "3<sup>rd</sup> party who receives by lease some or all of the leased property from a lessee." *Black's Law Dictionary*, 1439 (Seventh ed 1999). A "lessee" is "one who has a possessory interest in real or

not employ the claimant, but inherit liability based on the legislative policy expressed in the statutory language of protecting employees. *Brown*, 14 BOLI at 167. If the legislature intended that a business must remain identical, this phrase would be meaningless, as mere change of ownership alone, which must occur before a person can become a “lessee” or “purchaser,” prevents a business from being identical to its predecessor. Therefore, the forum concludes that the term “same business” in this context does not mean an identical business in every respect, but instead means a business “of like nature or identity \* \* \*.” *Webster’s*, 2007. The question remains, however – what is a business of “of like nature or identity?” Based on statutory context and the legislative policy of protecting employees, the forum concludes that the test for determining if a business is a “successor” employer is the most appropriate test for determining if a purchaser has purchased another employer’s property for “the continuance of the same business.” That test is whether the purchaser “conducts essentially the same business.” *Anita’s*, 6 BOLI at 267-68. In this case, the forum has already determined that Respondent is a “successor employer” to Nordic. Consequently, Respondent is also liable to repay the Wage Security Fund as a “purchaser” of Nordic.

### **RESPONDENT’S REMAINING AFFIRMATIVE DEFENSES**

In its answer, Respondent raised the four affirmative defenses set out in Finding of Fact – Procedural 2. During the hearing, Respondent withdrew its defense of unconstitutionality. The other three defenses are: (1) failure to state a claim upon which relief can be granted; (2) imposition of liability on Respondent in this situation is fundamentally unfair and inequitable; and (3) imposition of liability on Respondent in this situation is contrary to public policy. The first defense is negated by a preponderance of the evidence supporting the Agency’s prima facie case.<sup>31</sup> The second and third defenses do not apply in this case based on the forum’s rejection of the *Steinbach* test for determining whether Respondent is a “successor” employer.

### **RESPONDENT’S ORS 79.5040(4) DEFENSE**

Respondent contends that the language of ORS 79.5040(4) prevents it from being held liable as a

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<sup>31</sup> The Agency’s prima facie case here consists of the following elements: (1) Nordic was an Oregon employer that did not pay all wages due and owing to 93 claimants earned within 60 days before the date that Nordic ceased doing business; (2) The Commissioner made a determination that the 93 claimants’ wage claims were valid; (3) Respondent is a “successor” employer under ORS 652.310(1); (4) Respondent is a “purchaser” of Nordic’s “business property for the continuance of the same business.”

successor or purchaser. That language reads as follows:

“(4) When collateral is disposed of by a secured party after default, the disposition transfers to a purchaser for value all of the debtor’s rights therein, discharges the security interest under which it is made and any security interest or lien subordinate thereto. The purchaser takes free of all such rights and interests even though the secured party fails to comply with the requirements of ORS 79.5010 to 79.5070 or of any judicial proceedings.”

In this case, the secured party is PCB, the purchaser is Respondent, and the debtor is Nordic. Respondent’s argument is that “because Fjord purchased the assets pursuant to an ORS 79.5050(4) sale, [Fjord] purchased the goods free and clear of all liens, including any WSF liability that purports to arise from the purchase of the assets.” The WSF lien Respondent refers to is created by statutory language in ORS 652.414(4).<sup>32</sup>

The forum rejects this defense on two grounds. First, because it is an affirmative defense that was

not raised in Respondent’s answer. In the alternative, even if it is not an affirmative defense, it does not relieve Respondent from liability.

An affirmative defense is “a defendant’s assertion raising new facts and arguments that, if true, will defeat the plaintiff’s or prosecution’s claim, even if all the allegations in the complaint are true.” *Black’s Law Dictionary*, 430 (Seventh ed 1999). In this case, Respondent’s ORS 79.5050(4) defense does not defeat any of the elements of the Agency’s prima facie case. Instead, it raises a legal argument that would relieve an ORS 652.310 “successor” or “purchaser” from liability. Consequently, it must be pleaded as an affirmative defense. By not raising this issue in the answer or amending the answer, Respondent waived the defense. OAR 839-050-0130. Raising it in the case summary did not cure this deficiency.

Even if Respondent had not waived this defense, it would not escape liability as an ORS 652.310 “successor” and “purchaser.” If applied, the effect of ORS 79.5040(4) in this case would be to discharge PCB’s security interest in the \$177,500 worth of assets Respondent purchased from PCB and any ORS 652.414(4) lien that the Agency had or might have had on those specific assets. It would not discharge Respondent’s liability to repay the Wage Security Fund.

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<sup>32</sup> In pertinent part, the statute reads as follows: “(4) The commissioner has a lien on the personal property of the employer for the benefit of the fund when the claim is paid under subsection (1) of this section for the amount so paid and the penalty referred to in subsection (3) of this section.”

**RESPONDENT'S EXCEPTIONS**

Respondent's exceptions were filed by Norman Dversdal, Respondent's president. Respondent is a corporation, and OAR 839-050-0110(1) requires that corporations must be represented "either by counsel \* \* \* or by an authorized representative \* \* \*". OAR 839-050-0110(3) further requires that a person who seeks to appear as an authorized representative must first "file a letter authorizing the person to appear on behalf of the party." Respondent was represented by counsel from the time the answer and request for hearing was filed until submission of post-hearing briefs and closing argument. The forum has not received any letter authorizing Norman Dversdal to appear on behalf of Respondent. As a result, although exceptions were timely filed, Dversdal lacks standing to file exceptions on Respondent's behalf and the forum will not consider his exceptions.

A certified check payable to the Bureau of Labor and Industries in the amount of NINETY TWO THOUSAND ONE HUNDRED TWENTY THREE DOLLARS AND EIGHTY THREE CENTS DOLLARS (\$92,123.83), representing \$73,699.06 paid out of the Wage Security Fund to the 93 wage claimants listed in Appendix A and \$18,424.77 as a 25 percent penalty on the sum of \$73,699.06, plus interest at the legal rate on the sum of \$73,699.06 from February 1, 2000, until paid and interest at the legal rate on the sum of \$18,424.77 from March 1, 2000, until paid.

**ORDER**

NOW, THEREFORE, as authorized by ORS 652.332 and ORS 652.414 and as payment of the unpaid wages and penalty assessed as a result of The Nordic Group, LLC's violations of ORS 652.140(1), the Commissioner of the Bureau of Labor and Industries hereby orders **FJORD, INC. and FJORD, LTD.** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232-2162, the following:

**APPENDIX A**

<b>NAME</b>	<b>UNPAID HOURS</b>	<b>HOURLY WAGE</b>	<b>TOTAL UN-PAID WAGES</b>
<b>Aguirre, Maria</b>	<b>100.33</b>	<b>\$6.70</b>	<b>\$675.85</b>
<b>Alfaro, Jesus</b>	<b>104</b>	<b>\$7.01</b>	<b>\$729.04</b>
<b>Alfaro, Roberto</b>	<b>22</b>	<b>\$14.66</b>	<b>\$322.52</b>
<b>Anaya, Carolina</b>	<b>111.5</b>	<b>\$7.51</b>	<b>\$837.37</b>
<b>Andrade, Rosa</b>	<b>106</b>	<b>\$6.50</b>	<b>\$689.00</b>
<b>Angel, Ana</b>	<b>99</b>	<b>\$6.50</b>	<b>\$643.50</b>
<b>Bogarin, Sara</b>	<b>79.08</b>	<b>\$7.15</b>	<b>\$533.52</b>
<b>Bravo, Emelia</b>	<b>113</b>	<b>\$6.50</b>	<b>\$734.50</b>
<b>Berden, Be Thi</b>	<b>85.75</b>	<b>\$14.00</b>	<b>\$1,200.00</b>
<b>Cervantes, Manuela</b>	<b>56</b>	<b>\$6.50</b>	<b>\$364.00</b>
<b>Christiansen, Ellen</b>	<b>113</b>	<b>\$6.50</b>	<b>\$734.50</b>
<b>Cortes, Olgalilia</b>	<b>57</b>	<b>\$6.50</b>	<b>\$370.50</b>
<b>Cortez, Yurina</b>	<b>104</b>	<b>\$6.72</b>	<b>\$693.60</b>
<b>Cruz, Lucina</b>	<b>113</b>	<b>\$6.50</b>	<b>\$734.50</b>
<b>Cuevas-Tarula, Arcelia</b>	<b>107</b>	<b>\$6.94</b>	<b>\$730.70</b>
<b>De Cisneros, Fransica</b>	<b>89</b>	<b>\$6.50</b>	<b>\$578.50</b>
<b>Erofeeff, Ustina</b>	<b>80</b>	<b>\$7.01</b>	<b>\$560.80</b>
<b>Erofeeff, Julie</b>	<b>113</b>	<b>\$7.55</b>	<b>\$850.70</b>
<b>Esparza, Margarita</b>	<b>120</b>	<b>\$6.52</b>	<b>\$781.20</b>
<b>Figueroa, Ofelia</b>	<b>57</b>	<b>\$6.50</b>	<b>\$370.50</b>
<b>Gonzalez, Maria</b>	<b>103.75</b>	<b>\$6.50</b>	<b>\$674.38</b>
<b>Gonzalez, Edna</b>	<b>113</b>	<b>\$6.50</b>	<b>\$734.50</b>
<b>Gonzalez, Juanita</b>	<b>80</b>	<b>\$8.51</b>	<b>\$680.80</b>
<b>Grindinar, Natalya</b>	<b>113</b>	<b>\$6.50</b>	<b>\$734.50</b>
<b>Grindinar, Nina</b>	<b>95</b>	<b>\$6.50</b>	<b>\$617.50</b>

<b>Grindinar, Svetlana</b>	<b>80</b>	<b>\$6.50</b>	<b>\$520.00</b>
<b>Hall, Deborah</b>	<b>113</b>	<b>\$10.25</b>	<b>\$1,158.25</b>
<b>Hernandez, Josefina</b>	<b>103</b>	<b>\$6.84</b>	<b>\$712.67</b>
<b>Hilgers, Sheri</b>	<b>113</b>	<b>\$13.65</b>	<b>\$1,542.45</b>
<b>Hing, Chan</b>	<b>57</b>	<b>\$6.50</b>	<b>\$370.50</b>
<b>Inzhirova, Svetlana</b>	<b>111.5</b>	<b>\$6.50</b>	<b>\$724.75</b>
<b>Kenagy, Melissa</b>	<b>83.13</b>	<b>\$6.50</b>	<b>\$540.39</b>
<b>Kissinger, Elizabeth</b>	<b>113</b>	<b>\$21.63</b>	<b>\$2,444.19</b>
<b>Kozyreva, Lyudmila</b>	<b>89</b>	<b>\$6.51</b>	<b>\$579.39</b>
<b>Kunz, Judy</b>	<b>113</b>	<b>\$15.35</b>	<b>\$1,734.55</b>
<b>Kuyan, Olga</b>	<b>113</b>	<b>\$8.86</b>	<b>\$1,001.18</b>
<b>Lim, Phil</b>	<b>113</b>	<b>\$15.85</b>	<b>\$1,791.05</b>
<b>Lopez-Aguilar, Juan</b>	<b>113</b>	<b>\$6.53</b>	<b>\$736.15</b>
<b>Lopez-Franco, Carolina</b>	<b>112.5</b>	<b>\$6.54</b>	<b>\$733.85</b>
<b>Lopez-Franco, Griselda</b>	<b>57</b>	<b>\$6.50</b>	<b>\$370.50</b>
<b>Marmolejo, Alejandra</b>	<b>102.5</b>	<b>\$6.75</b>	<b>\$685.85</b>
<b>Martinez, Isela</b>	<b>65.5</b>	<b>\$6.50</b>	<b>\$425.75</b>
<b>Matynnyuk, Marina</b>	<b>89</b>	<b>\$6.50</b>	<b>\$578.50</b>
<b>Mendoza, Susana</b>	<b>014 (sic)</b>	<b>\$6.69</b>	<b>\$691.20</b>
<b>Mendoza, Obdulia</b>	<b>86.5</b>	<b>\$7.45</b>	<b>\$644.00</b>
<b>Meyers, Mary</b>	<b>107</b>	<b>\$10.51</b>	<b>\$1,124.57</b>
<b>Meza, Guadalupe</b>	<b>113</b>	<b>\$7.01</b>	<b>\$792.13</b>
<b>Mares, Lucia</b>	<b>104</b>	<b>\$6.55</b>	<b>\$679.60</b>
<b>Moreno, Rosalba</b>	<b>113</b>	<b>\$10.00</b>	<b>\$1,130.00</b>
<b>Nguyen, Tao</b>	<b>113</b>	<b>\$6.50</b>	<b>\$734.50</b>
<b>Nguyen, Thu</b>	<b>113</b>	<b>\$6.50</b>	<b>\$734.50</b>
<b>Nguyen, Thuy</b>	<b>104</b>	<b>\$6.50</b>	<b>\$676.00</b>
<b>Olivares, Maria</b>	<b>113</b>	<b>\$11.25</b>	<b>\$1,271.25</b>
<b>Onofrash, Yemiliya</b>	<b>43</b>	<b>\$6.50</b>	<b>\$279.50</b>

<b>Ormanzhi, Galina</b>	<b>104</b>	<b>\$6.50</b>	<b>\$676.00</b>
<b>Orozco, Luz</b>	<b>81</b>	<b>\$7.20</b>	<b>\$582.10</b>
<b>Padron, Rebecca</b>	<b>107.75</b>	<b>\$11.00</b>	<b>\$1,185.25</b>
<b>Perez, Martha</b>	<b>113</b>	<b>\$6.50</b>	<b>\$734.50</b>
<b>Pizano, Katerina</b>	<b>42.75</b>	<b>\$13.30</b>	<b>\$568.58</b>
<b>Plukchi, Stephanida</b>	<b>62</b>	<b>\$6.50</b>	<b>\$403.00</b>
<b>Plukchi, Ivan</b>	<b>86</b>	<b>\$6.50</b>	<b>\$559.00</b>
<b>Polanco, Maria</b>	<b>108.25</b>	<b>\$6.50</b>	<b>\$703.63</b>
<b>Quach, Co</b>	<b>113</b>	<b>\$6.50</b>	<b>\$734.50</b>
<b>Ramirez, Doris</b>	<b>110</b>	<b>\$6.85</b>	<b>\$742.60</b>
<b>Ramos, Blanca</b>	<b>113</b>	<b>\$7.14</b>	<b>\$785.70</b>
<b>Ramos-Lopez, Maria</b>	<b>61</b>	<b>\$6.50</b>	<b>\$396.50</b>
<b>Reyes, Leonarda</b>	<b>89</b>	<b>\$6.50</b>	<b>\$578.50</b>
<b>Reyes-Rojas, Eliodora</b>	<b>72</b>	<b>\$6.50</b>	<b>\$468.00</b>
<b>Rivera, Maria</b>	<b>111</b>	<b>\$6.78</b>	<b>\$746.35</b>
<b>Roberts, Karen</b>	<b>118.5</b>	<b>\$12.00</b>	<b>\$1,422.00</b>
<b>Rodriguez, Diana</b>	<b>113</b>	<b>\$6.50</b>	<b>\$734.50</b>
<b>Rodriguez, Margarita</b>	<b>86</b>	<b>\$7.15</b>	<b>\$594.20</b>
<b>Rodriguez, Maria</b>	<b>113</b>	<b>\$6.50</b>	<b>\$734.50</b>
<b>Rodriguez, Maura</b>	<b>113</b>	<b>\$6.50</b>	<b>\$734.50</b>
<b>Rodriguez, Teresa</b>	<b>105</b>	<b>\$6.57</b>	<b>\$687.70</b>
<b>Rosales, Manuela</b>	<b>113</b>	<b>\$6.50</b>	<b>\$734.50</b>
<b>Sanchez, Irene</b>	<b>72</b>	<b>\$6.50</b>	<b>\$468.00</b>
<b>Semenyuk, Aleona</b>	<b>89</b>	<b>\$6.50</b>	<b>\$578.50</b>
<b>Shadrin, Arina</b>	<b>98</b>	<b>\$6.63</b>	<b>\$648.84</b>
<b>Shevchuk, Valentina</b>	<b>113</b>	<b>\$6.50</b>	<b>\$734.50</b>
<b>Songuilay, Emone</b>	<b>113</b>	<b>\$6.59</b>	<b>\$740.77</b>
<b>Spasova, Anna</b>	<b>70.5</b>	<b>\$6.50</b>	<b>\$458.25</b>
<b>Strayer, Kim</b>	<b>104</b>	<b>\$6.50</b>	<b>\$676.00</b>

<b>Tarula, Sara</b>	<b>113</b>	<b>\$7.09</b>	<b>\$796.22</b>
<b>Tornero, Jose</b>	<b>1116 (sic)</b>	<b>\$9.60</b>	<b>\$1,189.63</b>
<b>Tran, Lai</b>	<b>112</b>	<b>\$6.95</b>	<b>\$779.29</b>
<b>Valenzuela, Maria</b>	<b>59</b>	<b>\$6.50</b>	<b>\$383.50</b>
<b>Vallejo, Silveria</b>	<b>56</b>	<b>\$6.50</b>	<b>\$364.00</b>
<b>Veenker, Gary</b>	<b>113</b>	<b>\$25.00</b>	<b>\$2,825.00</b>
<b>Vshivkoff, Anastasia</b>	<b>39</b>	<b>\$6.50</b>	<b>\$253.50</b>
<b>Vu, Thao</b>	<b>112</b>	<b>\$6.94</b>	<b>\$763.20</b>
<b>Yazzolino, Peter</b>	<b>113</b>	<b>\$28.25</b>	<b>\$3,260.05</b>
<b>Salgado, Marisela</b>	<b>105</b>	<b>\$6.50</b>	<b>\$682.50</b>