

**In the Matter of**

**Johnson Builders, Inc. and Laine Johnson**

**Case No. 29-00**

**October 16, 2000**

**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 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>i</sup>

### **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 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>ii</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.

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>iii</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 between 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;
- c) McNie - \$1,120.73;
- d) Larson - \$1,148.00<sup>iv</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.

### **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 statement 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 Conty'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 Conty'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 Conty'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 certification 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 Conty'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>v</sup>

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 being 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 Bureau of Labor and Industries, certifying the hourly rate of wage paid each worker which the contractor or the subcontractor has employed upon

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

"(2) Each certified statement required by subsection (1) of this section shall be delivered or mailed by the contractor or subcontractor to the public contracting agency. \* \* \*"

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;

“\* \* \* \* \*

“(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 procedures Act, may determine that for a period not to exceed three years, a contractor, subcontractor 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 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;

"\* \* \* \* \*

"(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>vi</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) 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>vii</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 repeated violations” and Edgefield Project violations were “first violations,” inasmuch as the Edgefield Project violations occurred *before* the Clatsop Project violations.<sup>viii</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 Edgefield 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>ix</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 Flagging, 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 employees. *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>x</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 prevailing wage rate, the forum finds it appropriate to place Respondent Laine Johnson on the list of ineligibles 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 Proposed 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 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. 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 establishing a violation of OAR 839-016-0025(2).

## **JBI'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>xi</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 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 the 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 violation 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.

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<sup>i</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 classifications in Exhibit A-27 were in effect at the Edgefield Project.

<sup>ii</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.

<sup>iii</sup> See Finding of Fact – The Merits 10, *supra*.

<sup>iv</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.

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<sup>v</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*.

<sup>vi</sup> See, e.g. *In the Matter of Catalogfinder, 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.)

<sup>vii</sup> See footnote 2, *supra*.

<sup>viii</sup> See Finding of Fact – The Merits 24, *supra*.

<sup>ix</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.

<sup>x</sup> See Finding of Fact – The Merits 29, *supra*.

<sup>xi</sup> See Finding of Fact – The Merits 19, *supra*.