

In the Matter of

ARJAE SHEET METAL COMPANY, INC.

Case No. 94-06

Final Order of Commissioner Dan Gardner

Issued March 30, 2007

SYNOPSIS

Respondent failed to complete and return BOLI's 2005 prevailing wage rate survey by the date specified by the Commissioner. After considering aggravating and mitigating circumstances, the forum imposed a \$1,000 civil penalty for Respondent's violation of ORS 279C.815(3). ORS 279C.815; ORS 279C.865; OAR 839-025-0520; OAR 839-025-0530; OAR 839-025-0540.

The above-entitled case came on regularly for hearing before Linda A. Lohr, designated as Administrative Law Judge ("ALJ") by Dan Gardner, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on November 7, 2006, in the W. W. Gregg Hearing Room of the Bureau of Labor and Industries, located at the State Office Building, Suite 1045, 800 NE Oregon Street, Portland, Oregon.

Case Presenter Jeffrey C. Burgess, an employee of the Agency, represented the Bureau of Labor and Industries ("BOLI" or "the Agency"). Ray Brossart, president of Arjae Sheet Metal Company, Inc. ("Respondent"), appeared as Respondent's authorized representative.

The Agency called as witnesses: Leanna Harmon, research analyst for the Workforce and Economic Research Division of the Oregon Employment Department, and Marsha Jossy, administrative specialist in the Prevailing Wage Rate Unit of the BOLI Wage and Hour Division.

Respondent called as witnesses: Tanya Brossart, Respondent's bookkeeper; David Trammel, Respondent's vice president; and Ray Brossart, Respondent's president.

The forum received into evidence:

- a) Administrative exhibits X-1 through X-8 (submitted or generated prior to hearing);
- b) Agency exhibits A-1, A-2, A-5, A-6 (submitted prior to hearing);
- c) Respondent exhibit R-1ⁱ (submitted prior to hearing).

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

FINDINGS OF FACT – PROCEDURAL

1) On March 24, 2006, the Agency issued a Notice of Intent to Assess Civil Penalties ("Notice") alleging Respondent unlawfully failed to complete and return the 2005 Construction Industry Occupational Wage Survey ("wage survey") by September 19, 2005, in violation of ORS 279(C).815(3). The Agency alleged aggravating circumstances and sought a civil penalty of \$1,000 for the single alleged violation. The Notice was served on Respondent by certified mail directed to Respondent's business address at 5510 SE McLoughlin Blvd., Portland, OR 97202. The Notice gave Respondent 20 days to file an answer and make a written request for a contested case hearing.

2) On March 28, 2006, Respondent timely filed an answer through its owner and authorized representative, Ray Brossart. The answer stated in pertinent part:

"We have been in business for 20+ years and have always complied with surveys. We would not and have not intentionally missed filling out a required survey or any type of notice of non-compliance. The only

documentation that we received was this notice of intent to assess civil penalties. This brings me to the conclusion that I should not be fined or penalized for something I had no control over.

"I at this time am contesting the allegations of guilt and request the survey be sent to me so that I may fill it out and return it or if necessary request that a hearing to resolve this issue [sic]. Either I, Ray Brossart [sic] or David Trammel will be representing Arjae Sheet Metal Company, Inc. in this matter.

"In response to allegations [sic].

1. I understand the purpose of the survey but never received the survey.
2. We did perform nonresidential construction work in 2005. We did not receive the survey so we could not complete or return the survey.
3. We did not have ample opportunity to comply since we did not receive this survey so the failure to comply with the law was out of our control. We never have had this violation pointed out to us in any manner either via mail or phone, [sic] it was out of our control to prevent its occurrence."

3) On June 5, 2006, the Agency requested a hearing. On October 5, 2006, the Hearings Unit issued a Notice of Hearing stating that the hearing would commence at 9 a.m. on November 7, 2006. The hearing notice included a copy of the Notice of Intent, a language notice, a Servicemembers Civil Relief Act notification, and copies of the Summary of Contested Case Rights and Procedures and the Contested Case Hearing Rules, OAR 839-050-0000 to 839-050-0440.

4) On October 9, 2006, the forum issued an interim order pertaining to fax filings and timelines, and 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; and any civil penalty calculations (for the Agency only). The forum ordered the participants to submit their case summaries by October 27, 2006, and notified them of the possible sanctions for failure to comply with the case summary order.

5) On October 19, 2006, the forum granted the Agency's motion to extend the time for filing case summaries to October 30, 2006. The Agency and Respondent timely filed case summaries.

6) At the start of hearing, the ALJ orally advised the participants of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

7) At the start of hearing, the Agency made an oral motion to amend the Notice to correct certain citation errors in the Notice. Respondent did not object and the forum granted the Agency's motion.

8) The ALJ issued a proposed order on February 6, 2007, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. Neither the Agency nor Respondent filed exceptions.

FINDINGS OF FACT – THE MERITS

1) At all times material, Respondent was a duly registered Oregon corporation and an employer engaged in residential and non-residential construction. Respondent's principal place of business was 5510 SE McLoughlin Blvd, Portland, OR 97202. Respondent's business address was also its mailing address.

2) At times material, Ray Brossart ("R. Brossart") was Respondent's president and Tanya Brossart ("T. Brossart") was Respondent's bookkeeper.

3) Respondent employed workers who performed nonresidential construction work during 2005.

4) The Workforce and Economic Research Division of the Oregon Employment Department ("Employment Department") contracted with BOLI from 1999 to 2005 to conduct annual wage surveys. The wage surveys are conducted to aid the BOLI Commissioner in the determination of the prevailing wage rates in Oregon. In 2005, as in past years, the BOLI Commissioner used the wage surveys to determine

Oregon's prevailing wage rates. During the course of her official duties as research analyst for the Employment Department, Leanna Harmon participated in the 2005 wage survey.

5) As part of its contract with BOLI, the Employment Department is required to keep and routinely maintain electronic files showing the name of each business entity to which wage survey packets are sent each year, the address where each survey was sent, the date on which each survey was sent, whether each survey was returned and whether it was timely returned, and whether and when reminders were mailed to each business entity.

6) The Employment Department conducts wage surveys by first sending "presurvey" postcards to business entities that have been identified through the Quarterly Census Employment and Wages database, using the North American Industry Classification [Code] System to determine which entities perform construction contracts. The Employment Department also uses information and lists obtained from labor unions and the Oregon Construction Contractor's Board to include in the survey pool. Contractors who participated in the previous year's survey are sent a postcard notifying them that they have been selected to participate in the current wage survey and that the survey packet will follow in the mail. An entity that is identified as one that supplied or made deliveries to construction sites is sent a post card requiring a response to questions about any labor performed during deliveries. All other entities are sent a postcard requiring a response to questions about the nature of the construction work they perform, e.g., whether they perform residential only, nonresidential, or a combination thereof. The postcard questionnaires require a response. Depending on the response to the questions, the Employment Department may or may not mail a wage survey packet to the responding entity. If an entity fails to

respond, the Employment Department sends a wage survey packet to the address or addresses listed for that entity.

7) On July 5, 2005, the Employment Department sent Respondent a presurvey postcard requiring a response. Respondent did not return the postcard. On August 10, 2005, the Employment Department sent Respondent a 2005 wage survey packet that included a pre-addressed, postage paid, envelope for return of the survey. The survey packet also included a notice that its completion and return was required by law and that a violation could result in the assessment of civil penalties. The packet included instructions to complete and return the survey by September 19, 2005. The presurvey postcard and the 2005 wage survey packet were mailed to Respondent's business at 5510 SE McLoughlin Blvd., Portland, OR 97202. Respondent did not return the wage survey by September 19, 2005.

8) On September 26, 2005, the Employment Department sent Respondent a reminder postcard advising that the completed wage survey had not been received, that Respondent was required to complete and return it by law, and that penalties could be imposed. On October 10, 2005, the Employment Department sent Respondent a second wage survey packet, labeled "Final Notice" with a printed warning: "SURVEY PAST DUE * * * Please Respond Immediately" along with the same advisory set forth in the reminder postcard. The reminder postcard and final notice, including the second wage survey packet, were mailed to Respondent's business at 5510 SE McLoughlin Blvd., Portland, OR 97202. Respondent did not respond to the mailings.

9) On February 17, 2006, BOLI, through its Prevailing Wage Rate Unit, sent Respondent a letter that stated, in pertinent part:

"ORS 279C.815 requires you to report information pertaining to wages paid in non-residential construction to the Commissioner as requested in the annual survey. Our records indicate that despite reminders, you failed to return a report for the 2005 [prevailing wage rate survey] by September

19, 2005. Our records also indicate that this may not be the first time you have failed to respond as required. If that is the case, you have violated the law in multiple years.

“Since you have not responded to the survey, it has become necessary to begin the Administrative Process. We will soon serve upon you a Notice of Intent and ultimately a judgment in this matter. You are advised that failure to return this survey or filing fraudulent or incomplete information will result in penalties. We would prefer to resolve this matter prior to taking legal action; however, without your cooperation, this is not possible. You may stop this action by completing and returning the enclosed 2005 [wage survey] by no later than March 3, 2006.

“If you did not perform any non-residential construction within Oregon during the time period covered by this survey, you can satisfy your legal obligation to respond to the survey by answering questions 1 and 2 of the survey as directed, signing it where indicated and returning it in the pre-addressed, postage paid envelope included in the survey booklet.

“If we do not receive a completed survey from you by March 3, 2006, we will assess a civil penalty against you based on your continuing violations. Each day that you do not provide the survey is a separate violation, and each violation can subject you to a civil penalty of up to \$5,000. (ORS 279(C).865 and OAR 839-025-0510).”

The letter was mailed to Respondent’s business at 5510 SE McLoughlin Blvd., Portland, OR 97202, and included a third 2005 wage survey packet. Respondent did not respond to the letter and did not return the completed wage survey by March 3, 2006.

10) On March 24, 2006, the Agency issued a Notice of Intent to Assess Civil Penalties that was sent through the U. S. Postal Service to Respondent at 5510 SE McLoughlin Blvd. Portland, OR 97202. On March 28, 2006, R. Brossart filed an answer denying that it had received the 2005 wage survey packet. On April 6, 2006, the Employment Department received a completed 2005 wage survey from Respondent.

11) In 2005, returned wage surveys were accepted and included in the survey results as late as October 28, 2005. The survey database was then closed to prepare for a rate setting meeting with the BOLI Commissioner and his staff on November 4, 2005. Surveys received after October 28, 2005, were not included in the results of the

survey as published by the Employment Department in January 2006 and not considered by the BOLI Commissioner when setting prevailing wage rates.

12) All of the Employment Department wage survey mailings that were directed to Respondent's address at 5510 SE McLoughlin Blvd., Portland, OR 97202 were sent by first class mail, postage paid, through the U. S. Postal Service. None of the mailings were returned to the Employment Department by the U. S. Postal Service as undeliverable.

13) The BOLI letter, along with the third wage survey packet, was sent on February 17, 2006, to Respondent's address at 5510 SE McLoughlin Blvd., Portland, OR 97202 by first class mail, postage paid, through the U. S. Postal Service. The letter was not returned to BOLI by the U. S. Postal Service as undeliverable.

14) Harmon and Jossy were credible witnesses and the forum credited their testimony in its entirety.

15) R. Brossart's, T. Brossart's, and Trammel's testimony that Respondent did not receive the 2005 wage survey was not credible. First, none of those witnesses explained why Respondent failed to respond to the several other mailings sent in conjunction with the 2005 wage survey. Other than implying that Respondent received no mailings from the Employment Department or BOLI regarding the 2005 wage survey, none of Respondent's witnesses mentioned the other mailings. Curiously, they all contended that Respondent did not receive the 2006 wage survey either, but acknowledged receiving the subsequent reminder postcard to which they "promptly" responded. While it is conceivable that a mailing may have been misdelivered or not delivered at all, the forum finds it inherently improbable that not one of the five 2005 mailings, all properly addressed and mailed separately by two different agencies, was delivered to Respondent's business. Trammel's testimony that there is "not a chance"

that an article placed in the mail will reach its destination was echoed by the Brossarts and further strains their credibility. The forum gave no weight to R. Brossart's, T. Brossart's, or Trammel's testimony that Respondent did not receive a wage survey packet in 2005 and only credited their testimony when it was an admission or corroborated by credible evidence.

ULTIMATE FINDINGS OF FACT

1) Respondent was an Oregon employer and performed non-residential construction work in 2005.

2) The Commissioner, through the Employment Department, conducted a wage survey in 2005 that required persons receiving the surveys to make reports or returns to the Commissioner for the purpose of determining the prevailing wage rates.

3) In 2005, the Employment Department sent a presurvey postcard on July 5; a wage survey packet on August 10; a subsequent reminder notice on September 26; and a final notice and second wage survey packet on October 10 to Respondent's business address via first class mail through the U.S. Post Office. None of the mailings were returned to the Employment Department as undeliverable.

4) Respondent failed to return the completed survey by September 19, 2005, the date specified by the Commissioner.

5) On February 17, 2006, BOLI sent a letter and a third 2005 wage survey packet to Respondent's business address via first class mail through the U.S. Post Office, warning that there would be sanctions for failing to return the 2005 wage survey. Respondent was given additional time until March 3, 2006, to submit the wage survey. The letter was not returned to BOLI as undeliverable.

6) Respondent failed to complete and return the wage survey by March 3, 2006, in accordance with the BOLI letter.

7) Respondent received the Agency's Notice of Intent in March 2006 and subsequently returned the completed survey on April 6, 2006, which was too late to be included in the results of the survey as published by the Employment Department in January 2006. Respondent's survey information was not considered when the Commissioner reviewed the survey data for the setting of the prevailing wage rates.

CONCLUSIONS OF LAW

1) The actions, inaction, and statements of Ray and Tanya Brossart are properly imputed to Respondent.

2) Respondent was a person required to make reports and returns under ORS 279C.815 who violated ORS 279C.815(3) by failing to return the Commissioner's 2005 wage survey by September 19, 2005, the date specified by the Commissioner.

3) The Commissioner is authorized under ORS 279C.865 to assess civil penalties not to exceed \$5,000 for each violation of any provision of ORS 279C.800 to 279C.870 or any rule of the commissioner adopted thereunder and, having considered any aggravating and mitigating circumstances in accordance with OAR 839-025-0520, has exercised his discretion appropriately by imposing a \$1,000 civil penalty for Respondent's single violation of ORS 279C.815(3).

OPINION

2005 PREVAILING WAGE SURVEY VIOLATION

To prove Respondent violated ORS 279(C).815(3), the Agency must establish:

- (1) Respondent is a "person" as defined in ORS 279(C).815(1);
- (2) The Commissioner conducted a survey in 2005 that required persons receiving the surveys to make reports or returns to the Agency for the purpose of determining the prevailing wage rates;
- (3) Respondent received the Commissioner's 2005 survey; and
- (4) Respondent failed to make the required reports or returns within the time prescribed by the Commissioner.

In the Matter of Emmert Industrial Corp., 26 BOLI 284, 289 (2005).

The only disputed element is Respondent's contention that it did not receive the Commissioner's 2005 wage survey.

Respondent acknowledged that all of its business mail is received at the McLoughlin Blvd. location, but denied receiving anything from the Employment Department or BOLI until it received the Agency's Notice of Intent to Assess Civil Penalties. However, the Agency established by a preponderance of credible evidence that the Employment Department and BOLI mailed to Respondent no fewer than five properly addressed items pertaining to the 2005 wage survey, including no fewer than three 2005 wage survey packets, over an eight month period. None of the items were returned to the senders as undeliverable and Respondent proffered no plausible explanation for not receiving even one of the items. Respondent's bare contention that "something in the system hasn't worked," and that the U. S. Postal Service is somehow to blame, was not credible and fails to rebut the legal presumption that "[a] letter duly directed and mailed was received in the regular course of the mail." ORS 40.135(1)(q).

The forum concludes that Respondent received the 2005 wage survey and took no action to respond to the survey until after the Notice of Intent to Assess Civil Penalties issued on March 24, 2006. Respondent failed to make the required reports or returns within the time prescribed by the Commissioner and is liable for civil penalties.

CIVIL PENALTY

Although the commissioner may impose a penalty of up to \$5,000 for Respondent's violation, the Agency proposes \$1,000 as a civil penalty in this case. In determining the appropriate penalty amount, the forum must consider the criteria set forth in OAR 839-016-0520, including any mitigating circumstances presented by Respondent.

While there is no documentary evidence establishing that Respondent has a history of cooperating with wage survey requirements, the Agency did not controvert R. Brossart's statements to that effect or present any evidence of prior violations. Consequently, the forum finds this is Respondent's first violation, a mitigating circumstance that may be weighed against the aggravating circumstances in this case.

First, the forum finds Respondent knew or should have known of the violation. Respondent admits the 2005 wage survey was not timely completed or returned. Respondent's assertion that it did not receive the 2005 wage survey and, by implication, the pre-survey postcard, subsequent reminder cards, the final warning with a second 2005 wage survey mailing from the Employment Department, or the February 17, 2006, warning letter and third wage survey packet from BOLI was not believed. Several of those mailings included the admonishment that completion and return of the wage survey was required by law and that a violation could result in the assessment of civil penalties. The forum concludes therefore that Respondent received the mailings and through selective ignorance or inattention knew it was violating the law when it failed to respond to the 2005 wage survey.

Second, given the number of mailings over an eight month period, Respondent had ample opportunity to comply with the law. Respondent had at least two reminders after the due date passed before the Agency warned that sanctions were imminent, and, even after the Agency's February 17 final warning letter, Respondent remained unresponsive until the Agency issued its notice proposing civil penalties on March 24, 2006. Respondent's bare assertion that it has a history of completing and returning wage surveys in previous years which demonstrates a "pattern of cooperation" does not negate the conclusion, as Respondent suggests, that Respondent had an opportunity to comply and did not do so. The forum does not find it logically credible that Respondent

received the civil penalty notice and not the five previous mailings from two different agencies related to the same matter. Consequently, given Respondent's admission that it had no difficulty completing and returning the wage survey when it received the *fourth* 2005 wage survey packet, the forum concludes that Respondent had ample opportunity and no degree of difficulty to comply with the 2005 wage survey requirement.

Third, while Respondent's violation is not as serious as failing to pay or post the prevailing wage rate, this forum previously has determined that "workers may suffer substantial financial harm if the prevailing wage rates set by the Commissioner do not accurately reflect wages paid in the community because employers who pay their employees well do not return the surveys." *In the Matter of F.R. Custom Builders*, 20 BOLI 102, 111 (2000). Moreover, since the Commissioner is mandated to "make determinations of the prevailing wage rates," the forum infers that the wage surveys, conducted pursuant to ORS 279C.815 (5), are the Commissioner's primary source of "relevant data and information" to ensure that the determinations accurately reflect wages paid in the community. The forum concludes therefore that the relevant data and information are useless if not submitted in time to be considered in the prevailing wage rate calculations. In this case, Respondent's data would have been considered in the 2005 survey because Respondent admitted performing non-residential work during 2005. Consequently, Respondent's non-compliance is serious because it undermines the Commissioner's ability to complete his statutory duty to accurately determine the prevailing wage rates. *In the Matter of Emmert Industrial Corporation*, 26 BOLI 284, 289 (2005).

The forum concludes that under these circumstances, the \$1,000 penalty proposed by the Agency is appropriate.

ORDER

NOW, THEREFORE, as authorized by ORS 279C.865 and as payment of the penalty assessed as a result of Respondent's single violation of ORS 279C.815(3), the Commissioner of the Bureau of Labor and Industries hereby orders **Arjae Sheet Metal Company, Inc.** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, a certified check payable to the Bureau of Labor and Industries in the amount of ONE THOUSAND DOLLARS (\$1,000), plus any interest that accrues at the legal rate on that amount from a date ten days after issuance of the Final Order and the date Respondent complies with the Final Order.

ⁱ Respondent timely submitted a case summary that included certain declarations and a list of witnesses Respondent intended to call at hearing. The case summary included the statement: "The above response will be put into evidence." Although the document was not marked or offered as an exhibit, there was testimony regarding the declarations and the ALJ, on her own motion, has marked the case summary as exhibit R-1 and received it into evidence.