

In the Matter of

CEDAR LANDSCAPE, INC.

**Case No. 59-02
Final Order of Commissioner Jack Roberts
Issued September 13, 2002**

SYNOPSIS

Respondent failed to complete and return BOLI's 2001 prevailing wage rate survey by the date BOLI had specified. The Commissioner imposed a \$350 civil penalty for Respondent's violation of ORS 279.359(2). ORS 279.359, ORS 279.370; OAR 839-016-0520, OAR 839-016-0530, OAR 839-016-0540.

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on August 13, 2002, in Room 1004 of the Portland State Office Building, 800 NE Oregon Street, Portland, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter Peter McSwain, an employee of the Agency. Respondent was represented by Stan Grace, Respondent's authorized representative.

Neither the Agency nor Respondent called any witnesses.

The forum received into evidence:

- a) Administrative exhibits X-1 through X-5 (submitted prior to hearing) and X-6 (submitted at hearing);
- b) Agency exhibits A-1 and A-4 (submitted prior to hearing) and A-2 (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 March 5, 2002, the Agency issued a Notice of Intent to Assess Civil Penalties (“Notice”) in which it alleged that Respondent unlawfully failed to complete and return the 2000 and 2001 Construction Industry Occupational Wage Surveys (“wage survey”) by September 15, 2000, and September 21, 2001, respectively, in violation of ORS 279.359(2). The Agency alleged the violations were aggravated by Respondent’s knowledge or constructive knowledge of the violations, Respondent’s multiple violations and failure to take appropriate action to prevent a recurrence of the violation, the expenditure of significant Agency resources in attempting to obtain compliance, and the seriousness and magnitude of the violations because they affect the Commissioner’s ability to accurately determine the prevailing wage rates and potential skewing of the established rates, which impacts “contractors, subcontractors and employees throughout the state working on public work projects and also on the public agencies and the public fisc.” The Agency sought civil penalties of \$500 for the alleged 2001 wage survey violation and \$250 for the alleged 2000 wage survey violation.

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

3) The Agency’s Notice of Intent was accompanied by a letter from an Agency Compliance Specialist that was one and one-half pages in length and enclosed a 2001 wage survey booklet. It asked Respondent to complete and return the survey by March 29, 2002, and informed Respondent that if the survey was completed and returned by March 29, 2002, then the Agency would not assess any civil penalties for

prior years' violations regarding the wage survey. It also stated that additional civil penalties would be sought "based on your continuing violations" if the Agency did not receive a completed survey from Respondent by March 29, 2002.

4) On April 4, 2002, the Agency mailed a Notice of Intent to Issue Final Order by Default to Respondent that notified Respondent it would be in default unless it filed an Answer and Request for Hearing by April 15, 2002. On April 8, 2002, Respondent filed an answer and request for hearing through S.G. Grace, who stated he was the "owner and registered agent" for Respondent and would be "the contact agent for Cedar Landscape."

5) The Agency filed a request for hearing with the Hearings Unit on April 24, 2002.

6) On June 1, 2001, the Hearings Unit served Respondent with: a) a Notice of Hearing that set the hearing for August 13, 2002; b) a Summary of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case hearing process; and d) a copy of the Notice of Intent.

7) On May 29, 2002, the forum ordered the Agency and Respondent each to submit a case summary including: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; and the elements of the claim, a statement of any agreed or stipulated facts, and any civil penalty calculations (for the Agency only). The forum ordered the participants to submit their case summaries by August 5, 2002, and notified them of the possible sanctions for failure to comply with the case summary order. The forum also enclosed a form to Respondent designed to assist respondents who are not represented by an attorney.

8) On May 29, 2002, the forum ordered Respondent to provide a letter authorizing S. G. Grace to appear as its authorized representative at hearing and stated that the forum would disregard any motions, filings, or other communications from Respondent unless they were through an attorney or authorized representative.

9) The Agency filed its case summary on July 11, 2002.

10) Stan Grace appeared on Respondent's behalf at the hearing. The ALJ required Grace to submit a handwritten statement authorizing him to appear as Respondent's authorized representative before allowing him to participate in the hearing. At the start of the hearing, the ALJ verbally advised the Agency and Respondent of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

11) At hearing, the Agency moved to dismiss its charges related to Respondent's alleged failure to return the 2000 wage survey, and the ALJ granted the motion.

12) On August 26, 2002, the ALJ issued a proposed order that notified the participants that 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 material times, Respondent was an Oregon corporation and contractor based in Sherwood, Oregon and employed workers.

2) The Research and Analysis section of the Employment Department contracted with BOLI in 1998, 1999, and 2000 to conduct wage surveys. The BOLI Commissioner planned to, and did use the survey to aid in the determination of the prevailing wage rates in Oregon.

3) As part of its contract with BOLI, the Employment Department maintained electronic files showing the name of each business contractor to whom wage survey

packets were sent, the address where the packets were sent, whether it was returned, the date the packet was sent for the respective year in which it was sent, whether or not it was timely returned, and when the survey was returned if it was.

4) On August 28, 2001, the Employment Department sent Respondent a wage survey packet addressed to "Cedar Landscape, Inc." at "14145 SW Galbreath Drive, Sherwood, OR 97140" that included a postage paid, pre-addressed envelope for return of the survey. The packet was sent by first class mail and clearly gave notice that its completion and return was required by law and violation could result in the assessment of civil penalties. The packet instructed Respondent to complete and return the survey by September 21, 2001.

5) Reminder cards were sent by first class mail to Respondent at the same address on October 10 and October 20, 2001, indicating that the wage survey had not been received, that Respondent was required to complete and return it by law, and that penalties could be imposed. The second reminder card was also stamped "Final Notice."

6) The Commissioner held a rate setting meeting on November 19, 2001. Wage surveys received after that date were not included in the results of the survey.

7) Respondent received the 2001 wage survey.

8) In 2001, Respondent employed a manager whose function was to ensure all governmental requirements were performed. Between March 5 and April 8, 2002, Stan Grace, Respondent's "owner and registered agent" * * * "learned that [the manager] had not performed his assigned duties and also that many of [Respondent's] vital records were missing." Grace terminated the manager and is hopeful that "the new procedures that I have enacted will prevent future dilemmas." Grace was unaware that

Respondent was late in responding to the 2001 wage survey until he received the Agency's Notice of Intent.

9) Grace completed and returned the 2001 wage survey forms between March 5 and March 29, 2001.

10) Respondent should have known of its failure to timely complete and return the 2001 wage survey.

ULTIMATE FINDINGS OF FACT

1) Respondent is an Oregon employer.

2) The Commissioner conducted a wage survey in 2001 that required persons receiving the surveys to make reports or returns to the Agency for the purpose of determining the prevailing rates of wage.

3) Respondent received the 2001 wage survey packet.

4) Respondent failed to return the completed survey by September 21, 2001, the date specified by the Commissioner. Respondent did not return the completed survey until March 2002, by which time the Commissioner's prevailing wage rate determination based on the 2001 wage survey was already completed.

CONCLUSIONS OF LAW

1) ORS 279.359 provides, in pertinent part:

"(2) A person shall make such reports and returns to the Bureau of Labor and Industries as the commissioner may require to determine the prevailing rates of wage. The reports and returns shall be made upon forms furnished by the bureau and within the time prescribed therefor by the commissioner. The person or an authorized representative of the person shall certify to the accuracy of the reports and returns.

"* * * * *

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

Respondent, an employer, was a person required to make reports and returns under ORS 279.359(2). Respondent's failure to return a completed 2001 wage survey by September 21, 2001, violated ORS 279.359(2).

2) ORS 279.370 provides, in pertinent part:

"(1) In addition to any other penalty provided by law, the Commissioner of the Bureau of Labor and Industries may assess a civil penalty not to exceed \$5,000 for each violation of any provision of ORS 279.348 to 279.380 or any rule of the commissioner adopted pursuant thereto."

OAR 839-016-0520 provides:

"(1) The commissioner shall consider the following mitigating and aggravating circumstances when determining the amount of any civil penalty to be assessed against a contractor, subcontractor or contracting agency and shall cite those the commissioner finds to be applicable:

"(a) The actions of the contractor, subcontractor, or contracting agency in responding to previous violations of statutes and rules.

"(b) Prior violations, if any, of statutes and rules.

"(c) The opportunity and degree of difficulty to comply.

"(d) The magnitude and seriousness of the violation.

"(e) Whether the contractor, subcontractor or contracting agency knew or should have known of the violation.

"(2) It shall be the responsibility of the contractor, subcontractor or contracting agency to provide the commissioner with evidence of any mitigating circumstances set out in subsection (1) of this rule.

"(3) In arriving at the actual amount of the civil penalty, the commissioner shall consider the amount of the underpayment of wages, if any, in violation of any statute or rule.

"(4) Notwithstanding any other section of this rule, the commissioner shall consider all mitigating circumstances presented by the contractor, subcontractor or contracting agency for the purpose of reducing the amount of the civil penalty to be assessed."

OAR 839-016-0530 provides, in pertinent part:

"(1) The commissioner may assess a civil penalty for each violation of any provision of the Prevailing Wage Rate Law (ORS 279.348 to 279.380) and for each violation of any provision of the administrative rules adopted under the Prevailing Wage Rate Law.

"* * * * *

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

“* * * * *

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

OAR 839-016-0540 provides, in pertinent part:

“(1) The civil penalty for any one violation shall not exceed \$5,000. The actual amount of the civil penalty will depend on all the facts and on any mitigating and aggravating circumstances.

“* * * * *

“(5) The civil penalty for all * * * violations [other than violations of ORS 279.350 regarding payment of the prevailing wage] shall be set in accordance with the determinations and considerations referred to in OAR 839-016-0530.”

The imposition of a \$350 civil penalty for Respondent's violation of ORS 279.359(2) is an appropriate exercise of the Commissioner's discretion.

OPINION

THE AGENCY'S PRIMA FACIE CASE

To prove a violation of ORS 279.359(2), the Agency must show that:

- (1) Respondent is a “person,” which includes an “employer;”
- (2) The Commissioner conducted a survey in 2001 that required persons receiving the surveys to make reports or returns to the Agency for the purpose of determining the prevailing rates of wage;
- (3) Respondent received the Commissioner's 2001 survey; and
- (4) Respondent failed to make the required reports or returns within the time prescribed by the Commissioner.

In the Matter of F.R. Custom Builders, 20 BOLI 102, 109-10 (2000).

The Agency alleged all four of these elements in its Notice and Respondent did not deny any of them. Respondent did not deny any of the Agency's allegations in its Answer and they are all deemed admitted. OAR 839-050-0130(2). The only issue remaining is the amount of civil penalties to be assessed.

CIVIL PENALTY

The Agency seeks a \$500 civil penalty for Respondent's single violation of ORS 279.359. In determining the appropriate size of the penalty, the forum must consider the aggravating and mitigating factors set out in OAR 839-016-0520.

A. Aggravating circumstances.

The Agency alleged a number of aggravating circumstances¹ and proved several by a preponderance of the evidence. First, it would have been relatively easy for Respondent to comply with the law by returning the wage survey, and the Agency gave Respondent several opportunities to comply, in the form of reminder notices sent by the Employment Department, before issuing its Notice. Second, because it received those reminder notices from the Agency, Respondent knew or should have known of the violation. Third, the violation is serious, in that the Commissioner would be unable to complete his statutorily mandated duty of determining Oregon's prevailing wage rates if all survey recipients failed to return the wage survey until it was too late to be considered. However, the forum can only speculate as to the magnitude of Respondent's violation, inasmuch as the Agency offered no evidence from which the forum could gauge the extent, if any, to which Respondent's failure to return the 2001 wage survey skewed the Commissioner's determination of the prevailing wage rates. The forum does not consider Respondent's actions with regard to the 2000 survey as an aggravating factor because the Agency's charge that Respondent failed to return the 2000 survey was dismissed.

B. Mitigating circumstances.

Respondent's violation is partially mitigated by two circumstances. First, Respondent has fired the manager who was responsible for Respondent's failure to return the 2001 wage survey. Second, Respondent states it has enacted new

procedures to avoid noncompliance in the future. Although Respondent does not specify what those procedures are, the forum has considered Respondent's representation as mitigation because the Agency did not contest Respondent's assertion.

C. Amount of civil penalty.

The aggravating and mitigating circumstances in this case are similar to those in the case of *In the Matter of Spot Security*, 22 BOLI 170, 175 (2001). The Commissioner assessed a \$350 civil penalty in *Spot* and the forum assesses a \$350 civil penalty in this case.

ORDER

NOW, THEREFORE, as authorized by ORS 279.370 and as payment of the penalty assessed as a result of its violation of ORS 279.359(2), the Commissioner of the Bureau of Labor and Industries hereby orders **Cedar Landscape, Inc.** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232, a certified check payable to the Bureau of Labor and Industries in the amount of THREE HUNDRED AND FIFTY DOLLARS (\$350.00), plus any interest that accrues at the legal rate on that amount from a date ten days after issuance of the Final Order and the date Respondent complies with the Final Order.

ⁱ See Finding of Fact 1 – Procedural, *supra*.