

In the Matter of

DESIGN N MIND, INC.

and

John M. Frost, Jr.

Case No. 09-04

Final Order of Commissioner Dan Gardner

Issued September 16, 2005

SYNOPSIS

The forum found that Respondent Design N Mind, Inc. (“DNM”), a subcontractor, failed to pay four employees the correct prevailing wage rate for the work they performed on a public work and the prime contractor, Select Contracting, Inc. (“Select”), paid the difference between the applicable prevailing wage rates and lower wage rates paid by DNM to its four employees. The forum also concluded that Respondent John M. Frost, Jr., (“Frost”) was responsible for DNM’s failure to pay the correct prevailing wage rate and consequently placed DNM and Frost on the commissioner’s list of contractors or subcontractors ineligible to receive any contract or subcontract for public works for three years. The forum also found DNM liable for \$22,000 in civil penalties for DNM’s failure to pay the correct prevailing wage to four employees, DNM’s having filed six inaccurate payroll records, and DNM’s failure to make requested payroll documents available to the Agency for its inspection. ORS 279.350(1); ORS 279.350(2); ORS 279.354; ORS 279.355(2); ORS 279.270; OAR 839-016-0030; OAR 839-016-0035; OAR 839-016-0050((2)(a)(A); OAR 839-016-0010; OAR 839-016-0085; OAR 839-016-0520; OAR 839-016-0530((3)(e).

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 May 24, 2005, in the W. W. Gregg Hearing Room of the Bureau of Labor and Industries, located at 800 NE Oregon Street, Portland, Oregon.

The Bureau of Labor and Industries (“BOLI” or “the Agency”) was represented by Patrick A. Plaza, an employee of the Agency. Design N Mind, Inc. and John M. Frost, Jr., (“Respondents”) failed to appear for hearing in person or through counsel.

The Agency called the following witnesses: Dylan Morgan, BOLI Wage and Hour compliance specialist and Duane Barrick, Civil Engineering Tech III for the City of Woodburn, Oregon.

The forum received as evidence:

- a) Administrative exhibits X-1 through X-12;
- b) Agency exhibits A-1 through A-27 (filed with the Agency's case summary).

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 August 19, 2004, the Agency issued a Notice of Intent to Place on List of Ineligibles and to Assess Civil Penalties ("Notice") alleging that Respondent Design N Mind, Inc. ("DNM") acted as a tiered subcontractor to the prime contractor, Select Contracting, Inc. ("Select"), on the Woodburn Skate Park public work ("Woodburn Project") conducted by the City of Woodburn, a public agency, between March 3 and May 17, 2003. The Agency further alleged that DNM failed to pay \$12,674.28 in prevailing wages to four employees who performed manual labor on the Woodburn Project, in violation of ORS 279.350, OAR 839-016-0035, and OAR 839-016-0050(2)(a)(A), and proposed to assess \$8,000 as a civil penalty in accordance with ORS 279.370, OAR 839-016-0530(3)(a), and 839-016-0540(3)(a). The Agency further alleged that Respondents DNM and John M. Frost, Jr. ("Frost") filed 11 inaccurate and/or incomplete certified payroll reports between March 2 and May 17, 2003, in violation of ORS 279.354 and OAR 839-016-0010, and proposed to assess \$22,000 against DNM as a civil penalty in accordance with ORS 279.370 and OAR 839-016-0530(3)(e). The Agency further alleged that Respondents failed to provide requested

records to the Agency in violation of ORS 279.355(2) and OAR 839-016-0030, and proposed to assess a \$5,000 civil penalty against DNM in accordance with ORS 279.370 and OAR 839-016-0530(3)(e). The Agency further alleged that Respondents and any firm, corporation, partnership or association in which either of them has a financial interest should be placed on the list of those ineligible to receive contracts or subcontracts for public works ("List of Ineligibles") for a period of three years, pursuant to ORS 279.361 and OAR 839-016-0085, based on DNM's alleged intentional failure to pay wages to workers on the Woodburn Project and Frost's responsibility for that failure to pay. The Agency alleged several aggravating circumstances to support its proposed sanctions.

2) The Agency served the Notice on Respondents on August 19, 2004, by certified mail at 718 NE 16th Court, Gresham, Oregon 97030. The Notice instructed Respondents to make a written request for a contested case hearing within 20 days of the date on which they received the Notice if Respondents wished to exercise their right to a hearing.

3) On September 9, 2004, the Agency issued a Notice of Intent to Issue Final Order by Default that notified Respondents that the Agency planned to issue a Final Order by Default if they did not file an answer and request for hearing by September 20, 2004. The Notice was mailed to Respondents at 718 NE 16th Court, Gresham, Oregon 97030. The Agency subsequently granted Respondents an additional extension until October 1, 2004, to file their answer and request for hearing.

4) Respondents filed an answer and request for hearing by facsimile transmission on October 1, 2004. The answer stated, in pertinent part:

"Re: John M. Frost, Jr. Case # 09-04

"Requesting Hearing

"1 - all employees were paid according to the craft they performed for the majority of their hours for that week

"2 - certified payroll reports were filed by a CPA

"3 - bureaus [*sic*] request for information was via Sharron @ Select Contracting, Inc. All information requested was submitted to Sharron in a timely manner.

"4 – [if] any mistakes were made they were definitely not intentional

"5 - I feel these violations are inaccurate. Prevailing wage information was posted for everyone to see.

"Boli sent me two letters that were copies of what was sent to Select Contracting, Inc.; one stated that they were looking into this matter, the second was stating what the penalties are. Neither letter addressed design n mind, inc. or offer an opportunity for defending our position. It seems appropriate for Select Contracting, Inc. [t]o pay these people seen [*sic*] as they failed to pay their contract with us.

"Your time considering this brief description of our position is much appreciated.

"John M. Frost, Jr.

"Representing John M. Frost, Jr."

5) The Agency filed a request for hearing with the Hearings Unit on January 28, 2005.

6) On February 1, 2005, the Hearings Unit served Respondents with a) a Notice of Hearing that set the hearing for May 17, 2005; 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; d) a copy of the Notice of Intent to Place on List of Ineligibles and to Assess Civil Penalties; and e) a copy of the Servicemembers Civil Relief Act Notification.

7) On February 7, 2005, the Hearings Unit issued an interim order notifying the participants of a change in Administrative Law Judge ("ALJ").

8) On March 31, 2005, the ALJ ordered the Agency and Respondents each to submit a case summary that included: lists of all persons to be called as witnesses;

identification and copies of all documents to be offered into evidence; and a brief statement of the elements of the claim and any civil penalty calculations (for the Agency only). The ALJ ordered the participants to submit their case summaries by May 6, 2005, and notified them of the possible sanctions for failure to comply with the case summary order.

9) On April 28, 2005, the ALJ issued an order changing the hearing date to May 24, 2005, and extending the case summary due date to May 13, 2005.

10) On April 28, 2005, the Agency moved to amend its Notice to reduce the number of certified payroll violations alleged and the amount of civil penalties sought. Respondents did not file a response and the ALJ granted the motion on May 5, 2005.

11) The Agency timely filed a case summary on May 13, 2005.

12) The U. S. Post Office returned all correspondence mailed by the Hearings Unit to DNM as either “not deliverable” or “insufficient address.” The U. S. Post Office did not return the Notice of Hearing mailed by the Hearings Unit to Respondents on February 1, 2005.

13) On May 20, 2005, the Agency filed a second motion to amend its Notice. The Agency sought to “delete the word ‘intentional’ from page 2, line 20, the word ‘intentionally’ from page 3, line 20, and incorporate Exhibit A(b) which identifies four of Respondents’ former employees and the amounts the Agency contends they were underpaid in prevailing wages for work performed on this Public Works.” Respondents did not respond or appear at the hearing and the ALJ granted the motion after the start of hearing on May 24, 2005.

14) On May 24, 2005, at the time set for hearing, Respondents did not appear at the hearing and no one appeared on their behalf. After waiting 30 minutes, the ALJ

declared Respondents to be in default and commenced the hearing, pursuant to OAR 839-050-0330(2).

15) The Agency waived the ALJ's recitation of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

16) The ALJ issued a proposed order on August 4, 2005, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. Neither Respondent nor the Agency filed exceptions.

FINDINGS OF FACT – THE MERITS

1) At all times material herein, DNM was an Oregon corporation operating as a general contractor in Oregon.

2) At all times material herein, John M. Frost, Jr., was DNM's corporate president, corporate secretary, and registered agent.

3) On or about March 28, 2003, the City of Woodburn Public Works Department, a public agency, awarded a public work contract ("Woodburn Project") to Select. When the contract was awarded, DNM was named as a first-tier subcontractor. The federal Davis-Bacon Act did not regulate the contract. The contract amount was \$177,389 and the Woodburn Project was subject to regulation under Oregon's prevailing wage rate laws. The specific rates to be paid workers on the Woodburn Project were those set forth in the July 1, 2002 publication titled "Prevailing Wage Rates for Public Works Contracts in Oregon" ("PWR publication"), published by BOLI.

4) From March 3 to April 14, 2003, DNM employed Rufino May-Ek ("Ek"), Abelardo Salazar Teh ("A. Salazar"), Pociano Salazar Teh ("P. Salazar"), and Reyes de Jesus Salazar Caamal ("R. Salazar") to perform manual labor on the Woodburn Project. Most of their work consisted of building wooden forms, pouring and finishing concrete, and placing reinforced steel. Throughout their employment on the Woodburn Project, Ek, P. and R. Salazar were classified as general laborers on DNM's certified payroll

records. A. Salazar was classified as a carpenter and as a general laborer on the certified payroll records. All were paid the prevailing wage commensurate with the classifications DNM reported on the certified payroll records.

5) Frost supervised DNM's work on the Woodburn Project each day, prepared and signed certified payroll records for the pay periods ending March 8, March 15, March 22, March 29, April 5, and April 12, 2003, and paid Ek, P., R. and A. Salazar with checks that he wrote and signed on DNM's corporate checking account.

6) On or about April 16, 2003, Ek, P., R. and A. Salazar filed prevailing wage complaints and wage claims with BOLI's Wage and Hour Division in which they claimed that DNM had employed them on the Woodburn Project and failed to pay them the prevailing wage rate for the work they performed as carpenters, cement masons, and ironworkers. All four wage claimants assigned to BOLI the alleged unpaid wages, *i.e.*, the difference between what they actually earned if properly classified and what they were paid.

7) After the complaints and claims were filed, the BOLI Wage and Hour Division began an investigation that included contacting Respondents and the contracting agency to collect information pertaining to the Woodburn Project and to determine whether the employees were properly paid.

8) When a worker performs tasks within multiple classifications on a public work, BOLI requires employers to either track the actual hours worked in each classification and pay prevailing wages accordingly or pay the worker for the classification with the highest prevailing wage rate for all hours worked.

9) By letter dated April 17, 2003, BOLI compliance specialist Morgan notified the contracting agency that a complaint had been filed. Morgan requested that the contracting agency fill out a "Contracting Agency Information Form" and return it with

copies of all certified payroll records submitted by the prime contractor on the Woodburn Project. The contracting agency promptly completed and returned the Contracting Agency Information Form on April 22, 2003, and included the requested certified payroll records and the City of Woodburn – First-Tier Subcontractors Disclosure Form.

10) By letter dated April 21, 2003, Morgan notified Frost that a complaint had been filed alleging that Respondents had failed to pay the correct prevailing wage rates for all employees on the Woodburn Project. Morgan requested that Respondents supply to BOLI “any and all time cards, time records and payroll records for all persons who performed work for [Respondents’] company in relation to [the Woodburn Project]. Morgan advised Respondents that the “records must include hours worked each day, rates of pay, wages paid, withholdings made, job descriptions, last known addresses, and phone numbers * * * [and] must also include copies (front and back) of all cancelled checks paid to the employees in relation to [the Woodburn Project and] specific descriptions of the work performed by each worker.” Morgan also requested information pertaining to any hourly fringe rates paid to a third party trust, plan, fund, or program, including copies of cancelled checks showing those payments, if any. Respondents were instructed to provide the information to BOLI no later than May 5, 2003, and were advised that Respondents’ failure to respond “will result in additional enforcement action according to the PWR laws.”

11) On or about May 7, 2003, Frost contacted Morgan by telephone and requested an extension of time to May 12, 2003, to submit the requested records. Morgan allowed the extension. On May 14, 2003, Frost telephoned Morgan and left him a message indicating that he had compiled most of the records except the cancelled checks and was attempting to secure the checks from two different banks. On May 15, 2003, Morgan returned Frost’s call and told him to submit the documents he had in his

possession and forward the cancelled checks “by the end of the month.” Frost did not submit the documents or cancelled checks to Morgan or anyone else at BOLI at any time thereafter.

12) Morgan evaluated the records provided by the contracting agency and interviewed the contracting agency’s on-site engineer, Duane Barrick, who confirmed that all four wage claimants had performed work properly classified as carpenters, cement masons, and ironworkers. From the payroll records that Frost signed and certified, Morgan determined that DNM classified and paid Ek, P. and R. Salazar as laborers between March 2 and April 12, 2003. He also determined that DNM classified and paid A. Salazar as a carpenter for the work he performed between March 2 and March 29, 2003, and classified and paid him as a laborer for the work he performed between March 30 and April 12, 2003. After computing the wages earned and owed each wage claimant using the applicable prevailing wage rate for the work they actually performed, *i.e.*, carpentry, masonry, and ironwork, Morgan determined that DNM owed \$12,674.28 in unpaid prevailing wages.

13) By letter dated July 22, 2003, Morgan notified Select that DNM “has failed to adequately respond to all letters and telephone messages regarding information related to [the Woodburn Project].” The letter also stated in pertinent part:

“The Bureau has determined DNM failed to properly classify the work performed. Each of the claimants in this matter performed significant work in the classifications of Cement Mason, Carpenter and Ironworker. While an employer may pay differing wage rates appropriate to the work performed, the employer must maintain sufficient records to show when the worker worked in each job class. If an employer fails to keep track of the number of hours worked by each employee in each classification, the employer must pay the rate of wage of the classification with the highest rate for all hours worked in that pay period.

“Although DNM has failed to track and compensate the hours of work at the appropriate classification, the claimants have provided an estimate of the allocation the [*sic*] hours worked within the three classifications named above. The claimants’ earnings less wages paid (from records forwarded

to the Bureau by your company} constitute unpaid wages. The Bureau has found wages due in the amount of \$12,674.28.

“The Bureau’s standard procedure at this point is to pursue an amended claim against the prime contractor’s performance bond for the wages and liquidated damages. However, we also offer the prime contractor an opportunity to resolve the matter prior to our filing of the claim against the performance bond. If Select Contracting, Inc. promptly pays the wages due, the Bureau will dismiss the liquidated damages. If you decide to pay these wages, a check for the full amount of wages, \$12,674.28 must be received by the Portland office of the Bureau by no later than August 5, 2003. The bureau will then issue individual checks to the employees who performed work on [the Woodburn Project].”

14) Select responded by letter dated July 28, 2003, and enclosed a check (#8149) for \$12,674.28 “to resolve the wage issue for [the Woodburn Project].”

Thereafter, on BOLI’s behalf, Morgan issued individual checks to the wage claimants as follows: Rufino May Ek, in the amount of \$3,399.73; Reyes de Jesus Salazar Caamal, in the amount of \$3,558.66; Abelardo Salazar Teh, in the amount of \$2,175.30; and Ponciano Salazar Teh, in the amount of \$3,540.59.

15) Morgan and Barrick were credible witnesses. Both had knowledge of key facts and gave straightforward, unbiased testimony. Barrick, an engineer and the contracting agency representative, was present on the Woodburn Project site each day that the wage claimants performed their duties and observed first hand the type of work they performed. He credibly identified each of them and confirmed their status as Respondent DNM’s employees. Moreover, Barrick credibly testified that Respondent Frost regularly worked on the Woodburn Project and appeared to be supervising during that time. Morgan reasonably relied on Barrick’s credible observations and knowledge of the Woodburn Project site to confirm the information he obtained from other sources. The forum has credited Morgan’s and Barrick’s testimony in its entirety.

ULTIMATE FINDINGS OF FACT

1) At times material, DNM was a first-tier subcontractor on the Woodburn Project for the City of Woodburn.

2) At times material, Frost was DNM's corporate president, secretary, and registered agent.

3) Between March 2 and April 12, 2003, DNM employed four workers on the Woodburn Project who performed substantial work in the classifications of Cement Mason, Carpenter, and Ironworker as defined in the July 1, 2002, PWR publication.

4) Between March 2 and April 12, 2003, Frost, on DNM's behalf, submitted payroll records to the contracting agency that he certified were accurate and complete. Each payroll record indicated that he had classified and paid the four workers as Laborers. One of the four was also classified and paid as a Carpenter for a four-week period.

5) On April 16, 2003, the four workers filed complaints and wage claims with the Agency alleging that DNM had misclassified them as laborers and had paid them less than the applicable prevailing wage rate for the work they performed.

6) As a result of the complaints and wage claims, the Agency conducted an investigation that included requesting that DNM submit for inspection all payroll records pertaining to the four workers and the Woodburn Project. Frost, acting on DNM's behalf, negotiated time extensions for submitting the requested records but failed to provide them to the Agency.

7) The four workers were improperly classified as Laborers, performed multiple tasks as Carpenters, Cement Masons, and Ironworkers, and should have been paid the applicable prevailing wage for each classification or the highest applicable prevailing wage for all of their work. The difference between what DNM paid the four workers and the amount they earned at the applicable prevailing wage for the work they performed on the Woodburn Project is \$12, 674.28.

8) Select issued a check to BOLI in the amount of \$12, 674.28 in payment for the wages DNM owed to the four workers.

9) Frost supervised DNM's workers on the Woodburn Project and was responsible for the information provided in DNM's payroll records and signed DNM's payroll checks.

CONCLUSIONS OF LAW

1) DNM was a subcontractor that employed workers upon a public work in Oregon and was subject to the provisions of ORS 279.348 to 279.365.

2) The actions, inaction, statements, and motivations of Frost, DNM's president and owner, are properly imputed to DNM.

3) The Commissioner of the Bureau of Labor and Industries has jurisdiction over Respondents and the subject matter herein. ORS 279.348 to 279.380.

4) DNM failed to pay four of its workers the amounts required under ORS 279.350(1) and Select paid those amounts on DNM's behalf, which subjects DNM to the provisions of ORS 279.361(1).

5) Frost was responsible for DNM's failure to pay the applicable prevailing wage rate to four of DNM's workers on the Woodburn Project that resulted in Select paying the four workers on DNM's behalf, and is subject to the provisions of ORS 279.361(1).

6) Pursuant to ORS 279.361(1) and (2), the Commissioner is required to place Respondents on the list of contractors and subcontractors ineligible to receive any contract or subcontract for public works for a period not to exceed three years from the date of publication of their names on the list ("List of Ineligibles").

7) The Commissioner's decision to place Respondents on the List of Ineligibles for a period of three years based on their violations of ORS 279.350(1) is an appropriate exercise of his discretion. ORS 279.361(1) and (2).

8) DNM filed certified payroll reports for the Woodburn Project that did not accurately set forth the correct classification and pay rate for four of its workers for weeks between March 2 and April 12, 2003, in violation of ORS 279.354.

9) DNM failed to make available for the Agency's inspection requested payroll records that the Agency deemed necessary to determine if the correct prevailing wage rate was paid to four workers on the Woodburn Project, in violation of ORS 279.355(2).

10) Pursuant to ORS 279.370, and in addition to any other penalty provided by law, the Commissioner has the authority to assess civil penalties not to exceed \$5,000 for each violation of any provision of ORS 279.348 to 279.380 or any rule adopted pursuant thereto. Under the facts and circumstances of this record, the Commissioner's imposition of civil penalties for DNM's four violations of ORS 279.350(1), six violations of ORS 279.354, and one violation of ORS 279.355(2) is an appropriate exercise of his authority. ORS 279.370.

OPINION

DEFAULT

Respondents failed to appear at hearing and the forum found them in default pursuant to OAR 839-050-0330. Thus, the Agency needed only to establish a prima facie case on the record to support the allegations in its charging document. *In the Matter of Bruce D. Huhta*, 21 BOLI 249, 257 (2001), citing *In the Matter of Sealing Technology, Inc.*, 11 BOLI 241, 249-50 (1993). Respondents' only contribution to the record was the answer filed with the request for hearing. Although the forum may consider the answer when making factual findings, unsworn and unsubstantiated assertions in the answer are overcome whenever controverted by other credible evidence. *Id.* at 257. Having considered all of the evidence in the record, the forum

concludes the Agency presented a prima facie case that supports all of its allegations and is not controverted or overcome by Respondents' assertions in their answer.

DNM FAILED TO PAY FOUR WORKERS AMOUNTS REQUIRED BY ORS 279.350 AND THE PRIME PAID THOSE AMOUNTS ON DNM'S BEHALF

To establish a prima facie case, the Agency was required to present reliable evidence that (1) the project at issue was a public work, as that term is defined in ORS 279.348(3); (2) DNM was a subcontractor that employed workers on the public work whose duties were manual or physical in nature; (3) DNM failed to pay those workers the amounts required by ORS 279.350; and (4) Select, the prime contractor, paid those workers on DNM's behalf. Elements (1) and (2) are undisputed. The remaining elements are conclusively established by credible evidence in the record.

A. DNM failed to pay the correct prevailing wage rate to four workers as required by ORS 279.350.

Barrick, the contracting agency's representative, credibly testified that he was on the Woodburn Project site almost every day and observed all four workers (Ek, A., P., and R. Salazar) regularly performing carpentry, masonry, and ironwork. The payroll records, certified by DNM president Frost, show that DNM classified and paid one worker as a laborer or carpenter and three other workers as laborers for all of the work they performed on the Woodburn Project between March 2 and April 12, 2003. Respondents did not appear at hearing to refute Barrick's testimony and their unsubstantiated assertion in their answer that "all employees were paid according to the craft they performed for the majority of their hours for that week" does not negate the credible contrary evidence.

B. Select paid the amounts DNM owed to DNM's four workers.

Respondents tacitly acknowledge in their answer that Select paid DNM's workers, stating: "It seems appropriate for Select Contracting, Inc. to pay these people

seen [*sic*] as they failed to pay their contract with us.” This tacit acknowledgement, coupled with Morgan’s testimony and evidence showing that Select provided BOLI with a check in the amount of \$12,674.28 that BOLI distributed amongst the four workers, establishes conclusively that Select paid to the four workers the amount of unpaid prevailing wages owed for work they performed on the Woodburn Project.

DNM FILED INACCURATE OR INCOMPLETE CERTIFIED PAYROLL RECORDS

ORS 279.354(1) provides that every contractor and subcontractor shall file certified payroll statements that “set out accurately and completely the payroll records for the prior week including * * * the worker’s correct classification [and] rate of pay.” See *also* OAR 839-016-0010(1)(providing that a contractor or subcontractor must complete and submit a payroll and certified statement form that “accurately and completely set[s] out the contractor’s or subcontractor’s payroll for each week during which the contractor or subcontractor employs a worker upon a public work.”)

In this case the Agency alleged and evidence shows that the payroll records for the weeks of March 2-8, 2003, March 9-15, 2003, March 16-22, 2003, March 23-29, 2003, March 30 to April 5, 2003, and April 6-12, 2003, failed to include the correct classification and pay rate for Ek, P., R., and A. Salazar. Credible evidence established that the correct classifications for each worker were Cement Mason, Carpenter, and Ironworker, and that each worker should have been paid a higher rate than the amount DNM reported it paid them while misclassifying them as laborers. Thus, the forum concludes that DNM’s payroll records for those periods were inaccurate and incomplete, in violation of ORS 279.354(1).

DNM FAILED TO MAKE AVAILABLE TO THE COMMISSIONER FOR INSPECTION ITS CERTIFIED PAYROLL RECORDS

ORS 279.355(2) provides that:

“Every contractor or subcontractor performing work on public works shall make available to the commissioner for inspection * * * upon request made a reasonable time in advance any payroll or other records in 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 the contractor or subcontractor to workers upon public works.”

See also OAR 839-016-0010(4)(providing that certified payroll statements are “public records” that “must be made available upon request.”)

The Agency alleged and evidence shows that DNM was asked on several occasions to provide its payroll records to the Agency for inspection. Agency compliance specialist Morgan credibly testified that he contacted Respondents through letters and by telephone asking for information related to the investigation. He also testified that, although Frost negotiated several extensions of time with which to provide the records, Frost ultimately failed to provide the requested information. For those reasons, the forum concludes that DNM failed to make its payroll records available for inspection in violation of ORS 279.355(2).

LIST OF INELIGIBLES

Based on the credible evidence in the record, the forum has found that Select paid DNM's four workers wage amounts owed by DNM to those workers and that Frost was responsible for DNM's failure to pay the correct amounts owed to those workers. Under those circumstances, the Commissioner is required to place DNM and Frost on the List of Ineligibles. ORS 279.361(1) and (2). To determine the length of time Respondents' names should remain on the List of Ineligibles, the forum may consider mitigating and aggravating circumstances. *In the Matter of Venus Vincent*, 24 BOLI 155, 167 (2003).

In this case, Respondents did not allege and the forum finds no mitigating circumstances. The Agency, however, alleges that Respondents' violations are

aggravated because they knew or should have known of the violations and avoiding the violations would not have been difficult. Additionally, the Agency alleges that Respondents knew of the requirement to pay the prevailing wage rate for designated classifications, had the information necessary to pay the applicable prevailing wage rate, and failed to pay the applicable prevailing wage rate despite their knowledge. For those reasons, the Agency seeks to place Respondents on the List of Ineligibles for a three-year period.

The credible evidence showing that Frost, DNM's corporate officer, was actively and regularly engaged on the Woodburn Project site, entered and certified all of the information contained within the payroll records, and wrote out the checks payable to DNM's workers on DNM's corporate account, adequately supports the Agency's aggravation claims. Frost's actions and knowledge are properly imputed to DNM and the forum concludes that placing both Respondents on the List of Ineligibles for three years is appropriate under these circumstances.

CIVIL PENALTIES

ORS 279.370 authorizes the commissioner to impose a civil penalty not to exceed \$5,000 for each violation of the prevailing wage rate laws. See *also* OAR 839-016-0540(1). When determining the civil penalty amount, the commissioner must consider the mitigating and aggravating circumstances set forth in OAR 839-016-0520(1). OAR 839-016-0520(1). DNM is responsible for providing the commissioner with evidence of any mitigating circumstances set forth in section (1) of the rule, but has not done so in this case. OAR 839-016-0520(2). Therefore, the forum has considered only the aggravating circumstances to determine the appropriate penalty.

First, the Agency seeks \$2,000 for each of DNM's four alleged violations of ORS 279.350(1). For violations of ORS 279.350(1), which requires payment of the correct

prevailing wage, the minimum civil penalty per violation is \$1,000 or the amount of unpaid wages, whichever is less. OAR 839-016-0540(3)(a). The Agency is seeking more than the minimum civil penalty and, thus, must establish aggravating circumstances to justify the increased amount.

In this case, the Agency presented reliable evidence that establishes DNM knew or should have known of its violations. DNM's president, Frost, knew of and regularly performed work on the subcontract and supervised the workers at the job site, so he knew or should have known the type of work DNM's workers performed each day. He prepared and signed all of the payroll records and must have known the records contained information contrary to his own knowledge of the job site. Moreover, DNM had ample opportunity to avoid the violations by correctly classifying its employees based on the work they were performing. The violations are serious because they resulted in an underpayment to four DNM workers that Select ultimately paid on DNM's behalf. In fact, the violations are so serious that they require placing Respondents on the list of ineligible.

Having considered the evidence presented, the forum concludes that \$2,000 per violation, for a total of \$8,000, is an appropriate civil penalty for DNM's four violations of ORS 279.350(1).

Second, the Agency seeks \$2,000 for each of six violations as a civil penalty for DNM's failure to file complete and accurate certified payroll records on the Woodburn Project, in violation of ORS 279.354. For the same reasons set forth above, the forum finds the Agency established that DNM, through its corporate president, knew or should have known the correct classification and prevailing wage rate for its four workers and despite its knowledge, misclassified and underpaid each. DNM submitted certified payroll records for the pay periods ending March 8, March 15, March 22, March 29,

April 5, and April 12, 2003, that show DNM misclassified and underpaid its four workers as laborers, constituting six separate violations.

The violations are serious because the failure of subcontractors to maintain and provide required records undermines the Agency's ability to ensure that laborers on Oregon public works projects are paid the wages to which they are statutorily entitled. *In the Matter of William George Allmendinger*, 21 BOLI 151, 171-72 (2001).

Having considered the evidence presented, the forum concludes that \$2,000 per violation, for a total of \$12,000, is an appropriate civil penalty for DNM's six violations of ORS 279.350(1).

Third, the Agency seeks a \$5,000 civil penalty for DNM's failure to make requested payroll records available to the Agency during its investigation of the complaints and wage claims filed against Respondents on the Woodburn Project, in violation of ORS 279.355(2). As aggravation, the Agency alleges that DNM's failure to cooperate by providing requested records "made it difficult to make an accurate determination." Additionally, evidence shows that it should not have been difficult for DNM to provide the records the Agency requested because it was legally obligated to make and maintain them. See OAR 839-016-0025. DNM knew or should have known of the request because the Agency's request for records was directed to DNM's president and secretary, Frost, who subsequently asked for and received several extensions of time to provide them to the Agency.

Although the violation is serious because, as previously stated, a subcontractor's failure to provide requested records undermines the Agency's ability to enforce the prevailing wage laws and ensure that workers are properly paid, the forum does not agree that \$5,000 for the single violation is appropriate. The forum imposes that penalty when the violations are widespread and are of considerable magnitude, usually due to

the number of workers affected by the violation. Additionally, in those cases that the forum imposed the maximum penalty, the subcontractor was found to have never filed certified payroll records as required. *See, e.g., In the Matter of Johnson Builders, Inc.*, 21 BOLI 103, 128-29 (2000). In this case, DNM filed certified payroll records each week for the duration of the Woodburn Project and the Agency received those records from the contracting agency and eventually determined the amount of unpaid wages owed to DNM's four workers. However, that fact does not outweigh the aggravating circumstances found in this case and the forum finds that a penalty of \$2,000 is commensurate with the facts in evidence that show DNM had ample opportunity to comply with ORS 279.355(2) and could have done so without undue difficulty, but failed to do so.

ORDER

NOW, THEREFORE, as authorized by ORS 279.361, the Commissioner of the Bureau of Labor and Industries hereby orders that Respondents **Design N Mind, Inc.** and **John M. Frost, Jr.** and 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 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(1), ORS 279.354, and ORS 279.355(2), the Commissioner of the Bureau of Labor and Industries hereby orders **Design N Mind, 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 TWENTY TWO THOUSAND DOLLARS (\$22,000), 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 **Design N Mind, Inc.** complies with the Final Order.