

**In the Matter of**

**EMMERT INDUSTRIAL CORP.**

**Case No. 78-05**

**Final Order of Commissioner Dan Gardner**

**Issued August 30, 2005**

**SYNOPSIS**

Respondent failed to complete and return BOLI's 2004 prevailing wage rate survey by the date the Commissioner specified. The forum imposed a \$500 civil penalty for Respondent's violation of ORS 279.359(2). ORS 279.359; ORS 279.370; OAR 839-025-0530.

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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 June 29, 2005, in the W. W. Gregg hearing room of the Bureau of Labor and Industries, located at 800 NE Oregon Street, Portland, Oregon.

Case Presenter Cynthia L. Domas, an employee of the Agency, represented the Bureau of Labor and Industries ("BOLI" or "the Agency"). Debi Trimm, payroll manager for Emmert Industrial Corp. ("Respondent"), appeared on Respondent's behalf as its authorized representative.

The Agency called Vee Souryamat, BOLI Wage and Hour Division Order Processor, and Debi Trimm, Respondent's authorized representative, as witnesses.

Respondent's authorized representative, Debi Trimm, testified for Respondent.

The forum received into evidence:

a) Administrative exhibits X-1 through X-4 (submitted or generated prior to hearing)<sup>i</sup> and

b) Agency exhibits A-1, A-2, A-3 (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 March 18, 2005, 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 2004 Construction Industry Occupational Wage Survey ("wage survey") by September 17, 2004, in violation of ORS 279.359(2). The Agency alleged aggravating circumstances and sought a civil penalty of \$500 for the single alleged violation. The Notice of Intent gave Respondent 20 days to file an answer and make a written request for a contested case hearing.

2) The Agency served the Notice on Respondent's registered agent, Terry W. Emmert, on or about March 21, 2005, by certified mail.

3) On April 6, 2005, Respondent filed an answer to the Notice through its authorized representative, Debi Trimm.

4) On May 16, 2005, the Agency filed a request for hearing. On May 21, 2005, the Hearings Unit served Respondent with: a) a Notice of Hearing that set the hearing for June 29, 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; and d) a copy of the Notice.

5) On June 13, 2005, the forum issued a case summary order requiring the Agency and Respondent to submit case summaries that included: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into

evidence; and any civil penalty calculations (for the Agency only). The forum ordered the participants to submit their case summaries by June 20, 2005, and notified them of the possible sanctions for failure to comply with the case summary order.

6) The Agency timely filed a case summary. The Hearings Unit did not receive a case summary from Respondent.

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

8) On July 13, 2005, the ALJ issued a proposed order that notified the participants they were entitled to file exceptions to the proposed order. No exceptions were filed.

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

1) At times material, Respondent was an Oregon corporation that employed one or more persons in Oregon.

2) The Workplace and Economic Research Division of the Oregon Employment Department contracted with BOLI each year from 1999 through 2004 to conduct a wage survey. The BOLI Commissioner used the survey results 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 entity to whom wage survey packets were sent, the address where each survey was sent, whether each survey was returned and whether it was timely returned, the date on which each survey was sent, and whether and when reminders were mailed to each business entity.

4) During the week of July 5, 2004, the Employment Department notified Respondent by “presurvey postcard” that it would “soon be sending [Respondent] the survey material.” During the week of August 9, 2004, the Employment Department

mailed a “wage survey packet” to Respondent at 11811 SE Hwy 212, Clackamas, Oregon 97015. The survey packet included a postage paid, preaddressed envelope for the return of the survey. The survey packet also included a notice that its completion and return was required by law and that failure to return the survey could result in penalties, along with instructions to complete and return the survey to the Workforce and Economic Research Division by September 17, 2004.

5) During the week of September 21, 2004, the Employment Department sent Respondent a “reminder card” indicating that the wage survey had not been received, that Respondent was required by law to complete and return it, and that penalties could be imposed.

6) During the week of October 12, 2004, the Employment Department sent Respondent a second wage survey packet that included another reminder that the wage survey had not yet been received, that Respondent was required by law to complete and return it, and that penalties could be imposed. The second packet was labeled “Final Notice.”

7) Despite the September 17, 2004, deadline for returning completed survey forms, returned surveys were accepted and included in the survey results up to and until the time the BOLI Commissioner scheduled a rate setting meeting to review the survey data. Some surveys received as late as November 15, 2004, were included in the survey results. Surveys received after November 15, 2004, and some of the surveys received between September 17 and November 15, 2004, were not included in the results of the survey as published by the Oregon Employment Department in January 2005 and not considered by the BOLI Commissioner when setting prevailing wage rates.

8) By letter dated February 3, 2005, the BOLI Wage and Hour Division, Judgment Unit, notified Respondent that unless it returned the wage survey information by February 21, 2005, BOLI intended to assess a civil penalty against Respondent for its "continuing violations."

9) On March 18, 2005, the Agency issued a Notice of Intent to Assess Civil Penalties ("Notice") against Respondent for its failure to return the 2004 wage survey.

10) On April 6, 2005, Respondent, through its registered agent, Terry W. Emmert, filed a letter authorizing its payroll manager, Debi Trimm, to answer the Notice on Respondent's behalf. Included with the authorization was Trimm's answer to the Notice and the 2004 wage survey information. The answer, dated April 6, 2005, stated in pertinent part:

"We received notice that the Bureau intends to assess civil penalties for failure to return the 2004 Construction Industry Occupational Wage Survey.

"I thought it was voluntary to submit this survey and was not aware that it was required until I received a letter from Vee Souryamat on February 3, 2005. I called her and asked what needed to be filled out and told her I would have [it] in by the due date, which I did, but inadvertently filed the wrong survey. I submitted the survey from U.S. Department of Labor which was also blue and white so I accidentally submitted the wrong survey.

"I spoke with her after I received the Intent to Assess Penalties, and we finally figured out I had submitted the wrong survey. Since my Payroll background was mainly in a manufacturing environment I was not aware of the requirements in returning this information.

"I am submitting the information with this letter in hopes that the fees will be dismissed, and I know that in the future I will be timely in processing the information to the [BOLI]. I hope you will allow me a hearing and let me explain the miscommunication on my part. I have submitted with this a letter from the owner of our company allowing me to response [sic] on behalf of [Respondent]."

11) Respondent has been in business for 30 years and has performed public works contracts in the past. Respondent currently is working on a five-year maintenance public work contract that began in 2000.

### **ULTIMATE FINDINGS OF FACT**

- 1) Respondent is an Oregon employer.
- 2) The commissioner conducted a wage survey in 2004 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 2004 wage survey packet.
- 4) Respondent failed to return the completed survey by September 17, 2004, the date specified by the Commissioner.

### **CONCLUSIONS OF LAW**

- 1) The actions, inaction, and statements of Debi Trimm are properly imputed to Respondent.
- 2) As an Oregon employer, Respondent was a "person" as defined in ORS 279.359(5) required to make reports and returns under ORS 279.359(2) and violated ORS 279.359(2) by failing to return a completed 2004 wage survey by September 17, 2004.
- 3) The Commissioner is authorized under ORS 279.370 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 of the commissioner adopted thereunder and, having considered any mitigating and aggravating factors in accordance with OAR 839-025-0520, has exercised his discretion appropriately by imposing a \$500 civil penalty for Respondent's violation of ORS 279.359(2).

### **OPINION**

#### **PRIMA FACIE CASE**

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

- (1) Respondent is a "person;"

- (2) The commissioner conducted a survey in 2004 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 2004 survey; and
- (4) Respondent failed to make the required reports or returns within the time prescribed by the commissioner.

*In the Matter of Cedar Landscape, Inc.*, 23 BOLI 287, 292 (2002).

The Agency properly alleged and Respondent did not dispute any of the elements and the forum deems them admitted. OAR 839-050-0130(2). The only issue remaining is the appropriate civil penalty.

### **CIVIL PENALTY**

The Agency seeks a \$500 civil penalty for a single violation of ORS 279.359(2). In determining an appropriate penalty, the forum must consider Respondent's history, including prior violations and Respondent's actions in responding to the prior violations, the seriousness of the current violation, and whether Respondent knew it was violating the law. The forum must also consider any mitigating circumstances offered by Respondent. OAR 839-025-0520.

In this case, it would have been relatively easy for Respondent to comply with the law by simply returning the wage survey, and Respondent was given several opportunities to do so. Moreover, evidence shows Respondent knew of the violation before the Agency issued its Notice of Intent because it received at least two reminders beforehand which were disregarded. The violation is serious because the Commissioner would be unable to complete his statutory 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 will not speculate on the magnitude of Respondent's violation when the Agency offers no evidence from which the forum can

gauge the extent to which, if any, Respondent's failure to return the 2004 wage survey skewed the Commissioner's determination of the prevailing wage rates.

The Agency did not allege and there is no evidence that Respondent has previously violated ORS 279.359(2). However, Respondent's assertions that Trimm was inexperienced in prevailing wage rate matters and "accidentally submitted the wrong survey" do not mitigate Respondent's violation. Employers cannot avoid their legal responsibilities by their or their employees' selective ignorance or inattention. *In the Matter of Sealing Technology, Inc.*, 11 BOLI 241, 251 (1993) (citing *In the Matter of Jet Insulation*, 7 BOLI 135, 142 (1988)).

Having considered the aggravating and mitigating circumstances in this case, the forum finds \$500 an appropriate penalty.

#### **ORDER**

NOW, THEREFORE, as authorized by ORS 279.370 and as payment of the penalty assessed as a result of Respondent's violation of ORS 279.359(2), the Commissioner of the Bureau of Labor and Industries hereby orders **Emmert Industrial Corp.** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 800 NE Oregon Street, Portland, Oregon 97232, a certified check payable to the Bureau of Labor and Industries in the amount of FIVE HUNDRED DOLLARS (\$500), plus any interest that accrues at the legal rate on that amount from a date ten days after issuance of the Final Order and the date Respondent complies with the Final Order.

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<sup>i</sup> The original hearing file failed to include the ALJ's case summary order as an administrative exhibit and the ALJ only received administrative exhibits X-1 through X-3 at the start of hearing. Since discovering the omission, the ALJ marked the case summary order as administrative exhibit X-4 and admitted it in the record.