

**In the Matter of**  
**F.R. CUSTOM BUILDERS, INC.**

**Case No. 82-00**

**June 1, 2000**

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**SYNOPSIS**

Respondent failed to return BOLI's 1999 prevailing wage rate survey by the date BOLI had specified. The commissioner imposed a \$500.00 civil penalty for this violation of ORS 279.359(2). ORS 279.359, ORS 279.370, OAR 839-016-0530, OAR 839-016-0540.

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The above-entitled case came on regularly for hearing before Erika L. Hadlock, 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 April 14, 2000, in the conference room of the Oregon Bureau of Labor and Industries, 1250 N.E. 3rd, #B-105, Bend, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by David Gerstenfeld, an employee of the Agency. Respondent was represented by its president and authorized representative, Frank Ring.

The Agency called Frank Ring as its sole witness. Ring also testified on Respondent's behalf. Respondent called no other witnesses.

The forum received into evidence:

- a) Administrative exhibits X-1 to X-10 (generated or filed prior to hearing) and X-11 (generated after hearing).
- b) Agency exhibits A-1 to A-6 (submitted prior to hearing with the Agency's case summary).

c) Respondent exhibits R-1 to R-3 (submitted prior to hearing with Respondent's case summary).

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 January 14, 2000, the Agency issued a Notice of Intent to Assess Civil Penalties in which it alleged that Respondent unlawfully failed to complete and return the 1999 Construction Industry Occupational Wage Survey by September 15, 1999, in violation of ORS 279.359(2). The Agency sought a civil penalty of \$500.00 for the single alleged violation.

2) The Notice of Intent 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 served the Notice of Intent on Respondent's registered agent on or about January 21, 2000.

4) On January 28, 2000, Frank Ring, Respondent's president, sent the Agency a letter that included the following allegations:

"Our company sent the completed survey in September 1999. We received another copy late December stating you hadn't received the original copy. We then sent the second completed survey in early January 2000. We have since received a notice stating we are being penalized for failure to respond. Please relieve us from this penalty as we did respond twice."

5) On February 7, 2000, the Agency sent a letter notifying Respondent that its answer was insufficient because it did not include a request for hearing.

6) On February 14, 2000, the Agency received Respondent's request for hearing, which included a statement authorizing Ring to appear as Respondent's authorized representative.

7) The Agency filed a request for hearing with the Hearings Unit on March 1, 2000, and served it on Respondent.

8) On March 10, 2000, the Hearings Unit served Respondent with: a) a Notice of Hearing that set the hearing for April 14, 2000; b) a Summary of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the Agency's administrative rules regarding the contested case hearing process; and d) a copy of the Notice of Intent.

9) On March 7, 2000, 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 any wage, damages, and penalties calculations (for the Agency only). The forum ordered the participants to submit their case summaries by March 30, 2000, and notified them of the possible sanctions for failure to comply with the case summary order. The forum also provided a form that Respondent could use to prepare a case summary.

10) The Agency filed a motion for partial summary judgment on March 17, 2000. Respondent filed no response to that motion by the deadline set by the ALJ. On March 28, 2000, the ALJ denied the Agency's motion for partial summary judgment in an interim order that stated:

"The Agency alleged in the Notice of Intent to Assess Civil Penalty that Respondent unlawfully failed to complete and return the 1999 Wage Survey by September 15, 1999, as required by ORS 279.359(2). In its answer, Respondent asserted that it 'sent the completed survey in September 1999.'

"The Agency has filed a motion for partial summary judgment on the issue of whether Respondent violated ORS 279.359(2), to which Respondent

has not responded.<sup>1</sup> According to the Agency, Respondent's statement that it 'sent the completed survey in September 1999' is insufficient to create a dispute regarding whether the survey was filed by September 15, because Respondent did not explicitly deny that it failed to return the survey by that date.

"A participant in a BOLI contested case hearing is entitled to summary judgment only if the participant demonstrates that '[n]o genuine issue as to any material fact exists and the participant is entitled to a judgment as a matter of law \* \* \*.' OAR 839-050-0150(4)(B). In reviewing a motion for summary judgment, this forum 'draw[s] all inferences of fact from the record against the participant filing the motion for summary judgment \* \* \* and in favor of the participant opposing the motion \* \* \*.' *In the Matter of Efrain Corona*, 11 BOLI 44, 54 (1992), *aff'd without opinion*, *Corona v. Bureau of Labor and Industries*, 124 Or App 211, 861 P2d 1046 (1993). In considering summary judgment motions, this forum gives some evidentiary weight to unsworn assertions contained in the participants' pleadings and other filings. *Cf. In the Matter of Tina Davidson*, 16 BOLI 141, 148 (1997) (considering contents of the Respondent's answer in making factual findings in a default hearing).

"As noted above, the Agency contends that no material facts remain in dispute because Respondent did not specifically deny that it failed to return the wage survey by September 15, 1999. The forum disagrees. Respondent has asserted that it 'sent the complete survey in September 1999.' Drawing all reasonable inferences in favor of Respondent, the forum finds that the statement leaves open the possibility that Respondent sent the survey before September 15, 1999. That material fact, therefore, remains in dispute.

"In further support of its argument, the Agency points out that in default hearings, 'this forum has found unsworn assertions in an answer overcome whenever they are controverted by other credible evidence on the record.' The Agency argues that the forum should apply that reasoning in this case, to find that Respondent's unsworn assertion that it sent the survey in September 1999 is overcome by Wood's sworn statement that the Agency received no 1999 survey from Respondent until January 21, 2000.

"The difficulty with the Agency's argument is that it relates to the *weighing* of evidence that the forum conducts when ruling in a default situation. In addition, the default analysis involves a determination of whether the 'other \* \* \* evidence on the record' is credible, which also requires an assessment of the weight the evidence will be given. By contrast, in ruling on a summary judgment motion, the forum's role is not to weigh or assess the credibility of the evidence, but to determine whether the moving participant has proved the absence of *any* material dispute -- *i.e.*, that *no* reasonable fact-finder could rule in favor of the other participant. *Cf. Jones v. General Motors Corp.*, 325 Or 404, 414, 939 P2d 608, 614

(1997) ('the court must deny summary judgment if a hypothetical objectively reasonable *factfinder* could resolve a material dispute as to the facts in favor of the adverse party'; emphasis in original). In this case, evidence creating a material dispute exists, in the form of Respondent's statement that it sent the completed survey in September 1999. Because that statement leaves open the possibility -- however slim -- that Respondent could prove that it returned the survey by September 15, 1999, the forum must rule against the Agency's motion for partial summary judgment.

"The Agency's motion for partial summary judgment is **DENIED**."

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<sup>1</sup> The forum does not automatically rule in favor of a participant moving for summary judgment where the other participant fails to file a response, just as it does not automatically rule in favor of the Agency in default cases, but must first consider the record to determine whether the Agency has established a *prima facie* case supporting its claim."

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11) Respondent and the Agency filed timely case summaries. Respondent's case summary did not include a statement certifying that Respondent had served it on the Agency. The ALJ contacted the Agency case presenter, verified that he had received a copy of Respondent's case summary, and issued an order disclosing this *ex parte* contact and reminding Respondent that it was required to include a certificate of service with each document it filed with the Hearings Unit.

12) The Agency filed a supplement to its case summary on April 5, 2000.

13) At the start of the hearing, the ALJ confirmed that Respondent's authorized representative had received the Summary of Contested Case Rights and had no questions about it.

14) Pursuant to ORS 183.415(7), 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.

15) Before the Agency began presenting its case, the participants stipulated to one fact: that the Employment Department received Respondent's completed wage

survey on January 21, 2000. The participants also stipulated to admission of all the exhibits attached to the case summaries.

16) The ALJ issued a proposed order on May 4, 2000, 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 material times, Respondent was a construction contractor based in Redmond, Oregon, and employed workers on construction projects. Respondent was engaged primarily in residential construction during 1999, but also built one non-residential structure that year. That non-residential structure is a small office building that is owned either by Respondent or by Respondent's president, Frank Ring.

2) The Research and Analysis section of the Oregon Employment Department ("Employment Department") contracted with BOLI in 1998 and 1999 to conduct a Construction Industry Occupational Wage Survey ("wage survey"). The BOLI Commissioner planned to, and did, use the survey to aid in the determination of the prevailing wage rates in Oregon.

3) On or about August 16, 1999, the Employment Department sent Respondent a wage survey packet, which included a postage paid envelope for return of the survey. The phrase "FILING DEADLINE: September 15, 1999" was displayed prominently on the front of the survey form. The form asked contractors to "provide wage data for all types of non-residential construction projects," including both "Private" and "Public" construction. A letter included with the survey form notified contractors that "[f]ailure to return a completed survey form [might] result in a monetary fine." The letter also stated that persons who worked only on residential construction during the survey period should "FILL OUT THE FIRM INFORMATION ON THE SURVEY FORM, AND

WRITE IN THE WAGE DATA GRID THAT YOUR FIRM ONLY PERFORMED RESIDENTIAL WORK" and return the survey in the provided envelope.

4) Respondent received the survey packet.

5) Ring testified that his payroll clerk told him that she returned the completed wage survey sometime prior to September 15, 1999. However, Ring also stated that he might have not seen the survey before it was sent and that the clerk could have mailed it in the wrong envelope.

6) By about September 20, 1999, the Employment Department had not received a completed survey from Respondent, so it sent Respondent a "survey past due" post card. The card reminded Respondent that it was required by law to provide the requested information and that filing fraudulent or incomplete information could result in civil penalties.

7) By about October 18, 1999, the Employment Department still had not received a completed survey from Respondent, so it sent Respondent a second "survey past due" card, this time with the words "Final Notice" stamped on it.

8) On December 15, 1999, the Agency sent Respondent a letter stating that it had not received Respondent's 1999 wage survey report. The letter continued:

"Pursuant to ORS 279.359, you are hereby required to provide the information requested on the attached form and return it to this office by December 30, 1999.

"Failure to provide the requested information by this date may result in an audit of your firm's records by a Wage and Hour Compliance Specialist and/or the assessment of a civil penalty.

"If you have any questions regarding this matter, please contact Lois Banahene, Wage and Hour Compliance Leadworker, at (503) 731-4692."

Nancy Ring, Respondent's corporate secretary, received the letter on December 21, 1999.

9) On January 14, 2000, the Agency issued the Notice of Intent to Assess Civil Penalty against Respondent for its failure to return the 1999 wage survey. In a cover letter accompanying the Notice, the Agency stated that it still had not received the completed survey. The letter further stated that if Respondent "fail[ed] to complete and return the 1999 survey, after the initiation of this action, the Bureau [would] move to amend the Notice of Intent to substantially increase the amount of civil penalty."

10) The Employment Department received a completed 1999 wage survey from Respondent on January 21, 2000. It had not received a completed survey from Respondent before that date.

11) The Employment Department and the Agency sent all the above-mentioned documents to Respondent's correct address by first-class or certified mail.

12) From the foregoing facts, the forum infers that Respondent did not return the completed 1999 wage survey at any time prior to January 2000.

13) A single contractor's failure to return the wage survey may adversely affect the accuracy of the Agency's prevailing wage rate determinations.

#### **ULTIMATE FINDINGS OF FACT**

1) Respondent is an Oregon employer.

2) The commissioner conducted a wage survey in 1999 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 1999 wage survey.

4) Respondent failed to return the completed survey by September 15, 1999, the date specified by the commissioner.

5) There is no evidence in the record that Respondent has committed previous violations of the prevailing wage rate laws.

6) Respondent could easily have returned the survey by September 15, 1999, and knew or should have known of its failure to do so.

### **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 was a person required to make reports and returns under ORS 279.359(2).

Respondent's failure to return a completed 1999 wage survey by September 15, 1999, 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 commissioner has exercised his discretion appropriately by imposing a \$500.00 civil penalty for Respondent's violation of ORS 279.359(2).

### **OPINION**

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 1999 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 1999 survey; and
- (4) Respondent failed to make the required reports or returns within the time prescribed by the commissioner.

Ring's testimony that Respondent had employees during 1999 establishes that Respondent was a "person" for purposes of ORS 279.359. The Agency's uncontested evidence establishes that the commissioner conducted a wage survey in 1999 requiring people to return completed survey forms by September 15, 1999. Ring admits that Respondent received the survey form. Thus, the only question at issue is whether Respondent failed to make the required reports or returns by September 15, 1999.

Ring testified that his payroll clerk told him that she returned the survey before September 15, 1999. However, he also testified that he may not have seen the survey before it was mailed and he admitted that his payroll clerk could have sent the survey in the wrong envelope. Moreover, Respondent did not contest the Agency's assertion that it did not receive a completed survey from Respondent until January 21, 2000.

The forum finds Ring's testimony unpersuasive in light of the uncontested evidence that the Employment Department sent the survey to Respondent's correct address, that the survey packet was not returned to the Department as undeliverable, and that the Department did not receive a completed survey until January 21, 2000. From these facts, the forum infers that it is more likely than not that Respondent did not return the survey at any point prior to January 2000. By failing to return a completed survey by September 15, 1999, Respondent violated ORS 279.359(2).

Respondent raised two additional defenses at hearing. First, Respondent argued that the survey required responses only from contractors that performed non-residential construction and that, because Respondent had performed only residential construction in 1999, it was not required to return the survey. That argument fails on both the facts

and the law. First, Respondent did build one commercial structure in 1999, an office building. The fact that Respondent built the office for its own use is immaterial -- the construction still was non-residential. Second, even persons who did only residential construction were required to return the survey form, even though their completed surveys would not include wage data.<sup>1</sup>

Respondent's final argument was that it was not required to complete the survey because it does not do prevailing wage work or pay the prevailing wage. Contrary to Respondent's belief, all persons who received the survey were required to complete it, whether their work was on private contracts, public contracts, or both.<sup>2</sup>

The commissioner may impose a penalty of up to \$5000.00 for Respondent's violation of ORS 279.359(2). In determining the appropriate size of the penalty, the forum must consider the factors set out in OAR 839-016-0520. In this case, two factors weigh in favor of a relatively light penalty. First, there is no evidence that Respondent previously has violated the prevailing wage rate laws. Second, although the accuracy of the Agency's prevailing wage rate determinations depends on receiving completed surveys from all contractors, Respondent's violation is not as serious as violations like failure to pay or post the prevailing rate of wage. On the other hand, 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 before issuing the Notice of Intent. Moreover, because it received warnings from the Agency, Respondent knew or should have known of the violation. Under these circumstances, the forum finds that the \$500.00 penalty proposed by the Agency is appropriate.

Ring's declarations that he supports the Agency's mission do not persuade the forum to lower the penalty. Although Respondent may pay its employees more than the law requires, and may be an excellent employer, that has little relationship to the need

for it to timely return wage surveys. Indeed, 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.

### **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 Respondent **F.R. Custom Builders, 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 FIVE HUNDRED DOLLARS (\$500.00), 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.

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<sup>1</sup> See ORS 279.359(5) (defining "persons" required to respond); Exhibit A-2 at 13 (providing instructions on how persons who performed only residential construction should respond to the survey).

<sup>2</sup> See ORS 279.359(5) (defining "persons" required to respond); Exhibit A-2 at 4 (stating that wage data should be provided for "all types of non-residential construction," including "Public & Private").