

**In the Matter of**  
**THE LANDSCAPE COMPANY OF PORTLAND, LLC**  
**dba**  
**The Landscape Company**

**Case No. 108-01**

**Final Order of the Commissioner Jack Roberts**

**Issued July 19, 2001**

**SYNOPSIS**

Respondent failed to complete and return BOLI's 2000 prevailing wage rate survey by the date BOLI had specified. The commissioner imposed a \$1000 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.

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The above-entitled case came on regularly for hearing before Linda A. Lohr, 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 May 8, 2001, in the hearing room of the Bureau of Labor and Industries, located at 800 NE Oregon Street, Portland, Oregon.

Case Presenter Peter McSwain, an employee of the Agency, represented the Bureau of Labor and Industries ("BOLI" or "the Agency"). Troy B. Clayton, Respondent's authorized representative, did not appear at the time and place set for hearing. Cynthia McNeff, Attorney at Law, appeared at hearing on behalf of The Landscape Company of Portland, LLC, dba The Landscape Company ("Respondent").

The Agency called no witnesses.

Respondent called Jason Castro, a co-owner of Respondent, as its only witness.

The forum received into evidence:

- a) Administrative exhibits X-1 through X-12 (submitted or generated prior to hearing), X-13 and X-14 (submitted after hearing);
- b) Agency exhibits A-1 and A-2 (submitted at hearing)
- c) Respondent exhibit R-1 (submitted after 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 January 9, 2001, the Agency issued a Notice of Intent to Assess Civil Penalties in which it alleged that Respondent unlawfully failed to complete and return the 2000 Construction Industry Occupational Wage Survey (“wage survey”) by September 15, 2000, in violation of ORS 279.359(2). The Agency alleged aggravating circumstances and sought a civil penalty of \$1,500 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 of Intent on Respondent’s agent, Troy B. Clayton, on or about January 18, 2001, by certified mail.

3) On February 20, 2001, Troy B. Clayton sent the Agency two letters, one designating himself as Respondent’s authorized representative, and another that included the following unsworn statement:

“I am responding to a Notice of Intent to Assess Civil Penalties for failure to complete the 2000 Construction Industry Occupational Wage Survey. I understand that penalties have been assessed and that The Landscape Company has been out of compliance since 1998. I would like to request a hearing regarding this matter.

“The Landscape Company has contracted out its Payroll preparation since 1998 and with the understanding was that these types of reports were

being completed. I have had problems with the service in the past for other reasons and have since change [sic] to a new Payroll service.

"I am also better informed about the surveys and importance of them. I have completed and returned the 2000 survey. I will guarantee that all Surveys will be completed and returned in a timely manner in the future.

" \* \* \* \* \* "

4) On March 28, 2001, the Agency filed a request for hearing. On March 30, 2001, the Hearings Unit served Respondent with: a) a Notice of Hearing that set the hearing for May 8, 2001; 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.

5) On April 4, 2001, 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 April 27, 2001, and notified them of the possible sanctions for failure to comply with the case summary order.

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

7) Respondent's authorized representative, Troy B. Clayton, did not appear at the time and place set for hearing. Cynthia McNeff, attorney at law, appeared at hearing on Respondent's behalf.

8) The Agency and Respondent 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.

9) At the close of hearing, the record remained open until 5:00 p.m., May 14, 2001, for Respondent, through its counsel, to submit to the Hearings Unit a Washington County police report.

10) On May 9, 2001, the Agency case presenter submitted a copy of Washington County Sheriff's Office Property-Evidence Report Receipt # 1271 that was faxed to the Agency by Respondent's counsel. The Agency had no objection to the report being admitted into the record and the document was marked and received into the record as Respondent's exhibit R-1.

11) On May 14, 2001, the Agency case presenter submitted for the record a letter he received from Respondent's counsel that included the following statement:

"The Landscape Company, LLC respectfully request [*sic*] abatement assessment [*sic*] due to The Landscape Company, LLC failing to file wage reports as required based on the following:

"1. Troy Clayton was a principle [*sic*] in the LLC and it was his duty to maintain filings required by the various agencies.

"2. Unknown to the others [*sic*] partners, Mr. Clayton was embezzling from the company and failed in his obligations. Due to that, not only is the LLC out of compliance with L & I, but with just about every other agency, both Federal and State. Mr. Clayton hid all notices from the other partners and so they were unable to mend the situation.

"3. Charges have been filed against Mr. Clayton and he is no longer a partner in the company. Unfortunately, the remaining partners are left with a considerable mess to clean up.

"4. But for the negligence and criminal activity of Mr. Clayton, the LLC would not now be left with the damage assessment from L & I.

" \* \* \* \* \* "

In its cover letter, the Agency stipulated that "charges were filed and there is not, as yet, a police report because it is being drafted by Detective Fischer of the Washington County Sheriff's Office."

12) On June 12, 2001, the forum issued an interim order to correct a clerical error and amend the caption to correspond with the Agency's Notice of Intent to Assess Civil Penalties.

13) On June 28, 2001, 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 all material times, Respondent was an Oregon employer. (Exhibits X-5)

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 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 "firm 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) On August 28, 2000, the Employment Department sent Respondent a 2000 wage survey packet that included a postage paid envelope for return of the survey. The survey packet also included a notice that its completion and return was required by law and violation could result in the assessment of civil penalties. The packet included instructions to complete and return the survey by September 15, 2000.

5) Reminder cards were sent to Respondent on September 26 and October 16, 2000, 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) On January 9, 2001, the Agency issued the Notice of Intent to Assess Civil Penalty against Respondent for its failure to return the 2000 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 "[T]he penalty amount is based on the premise that you will be completing the enclosed 2000 survey and returning the completed, accurate form to the Bureau on or before February 2, 2001. If you fail to complete and return the 2000 survey, the Bureau will move to amend the Notice of Intent to substantially increase the amount of civil penalties."

7) The Employment Department received the 2000 wage survey form from Respondent on January 23, 2001.

8) In 1998 and 1999, the Employment Department mailed wage survey packets to Respondent. The Employment Department did not receive completed 1998 and 1999 wage surveys from Respondent as a result of those mailings.

9) In 1998, 1999, and 2000, the Employment Department and the Agency mailed all of the documents related to wage surveys to Respondent's correct address by first-class or certified mail.

10) Respondent's three principals - Jason Castro, Castro's wife, and Troy Clayton - operated the business for about five years. All of the company trucks, equipment, and credit were in Castro's name. Castro handled the physical work and Clayton did the office work and bookkeeping for the business. Standard procedure for dealing with company paperwork was to place incoming bills and other papers in a box and pay creditors only when they became demanding. Castro was aware of the procedure. Clayton left the business in March 2001 leaving bills unpaid and paperwork undone. Before he left, Clayton filed an answer to the Agency's charging document and completed and filed the wage survey. After Clayton left, Castro hired a certified public

accountant to determine any monetary losses the business suffered due to Clayton's departure and to straighten out the company records. In April 2001, Castro filed a police report alleging Clayton absconded with company funds.

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

- 1) Respondent is an Oregon employer.
- 2) The commissioner conducted a wage survey in 2000 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 2000 wage survey packet.
- 4) Respondent failed to return the completed survey by September 15, 2000, the date specified by the commissioner.

#### **CONCLUSIONS OF LAW**

1) The actions, inaction, and statements of Troy Clayton and Jason Castro are properly imputed to Respondent.

2) 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 2000 wage survey by September 15, 2000, violated ORS 279.359(2).

3) 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 \$1000.00 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 2000 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 2000 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). Respondent did not dispute that it was subject to ORS 279.359(2) and that it failed to comply with the requirement to complete and return the 2000 wage survey by September 15, 2000. The only issue, therefore, is the appropriate civil penalty.

### **CIVIL PENALTY**

The Agency seeks a \$1,500 civil penalty for the 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 839-016-0520.

First, although Respondent has no history of prior violations, it admits that in two previous years it neglected to complete and return the wage survey form as required by the Commissioner. Such facts, although outside the scope of the charging document,<sup>i</sup> are aggravating circumstances that may be weighed in determining an appropriate sanction. *In the Matter of Rogelio Loa*, 9 BOLI 139, 146 (1990). In this case, Respondent's acknowledgement of its past failure to comply with the statutory requirement demonstrates knowledge of the violation. The forum does not accept as mitigation Respondent's claim that one principal was ignorant of the other's failure to timely complete and return the 2000 wage survey and that therefore the civil penalty should be abated. While evidence shows Respondent's internal affairs were in disarray, this forum has never given that defense any weight. Employers cannot avoid their legal responsibilities by 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)).

Second, in previous cases this forum has found wage survey violations not as serious as violations involving the failure to pay or post the prevailing wage rate. See *F.R. Custom Builders*, 20 BOLI at 111. However, 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, because it received at least two reminders, Respondent knew of the violation before the Agency issued its Notice of Intent. In previous cases where a Respondent has performed non-residential construction work and untimely submitted the commissioner's wage survey form or not submitted it at all, the forum has imposed a \$500 civil penalty. *In the Matter of Green Planet Landscaping, Inc.*, 21 BOLI 130 (2000); *In the Matter of Schneider Equipment, Inc.*, 21 BOLI 60 (2000); *In the Matter of Martha Morrison*, 20 BOLI 275, 287 (2000);

*F.R.Custom Builders*, 20 BOLI at 111. Having considered the circumstances in this case and other cases in which this forum has imposed penalties for violation of ORS 279.359(2), the forum finds \$1000 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 **The Landscape Company of Portland, LLC** 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 ONE THOUSAND DOLLARS (\$1000.00), 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>i</sup> ORS 183.415 requires formal notice of the "matters asserted or charged." Here, the only matter asserted or charged for which penalties are sought is the 2000 violation.