

In the Matter of
SCHNEIDER EQUIPMENT, INC.

Case No. 72-00

September 14, 2000

SYNOPSIS

Respondent failed to return BOLI's 1998 and 1999 prevailing wage rate surveys by the dates specified. The commissioner imposed a \$500.00 civil penalty for each of Respondent's violations, for a total of \$1,000.00. ORS 279.359, ORS 279.370, OAR 839-016-0520, OAR 839-016-0530, OAR 839-016-0540.

The above-entitled case came on regularly for hearing before Alan McCullough, designated as Administrative Law Judge ("ALJ") by Jack Roberts, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on June 27, 2000, in the conference room of the Oregon Bureau of Labor and Industries, 3865 Wolverine NE, E-1, Salem, 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 vice president and authorized representative, Stephen J. Schneider ("Schneider").

The Agency called Schneider, Respondent's authorized representative, as its only witness. Respondent called Schneider and Michele Darby, Respondent's office manager, as witnesses.

The forum received into evidence:

a) Administrative exhibits X-1 through X-21 (generated or filed prior to hearing).

b) Agency exhibits A-1 to A-3 (submitted prior to hearing with the Agency's case summary).

c) Respondent exhibits R-1 to R-3, R-6,¹ R-7 (submitted prior to hearing with Respondent's case summary), R-14, and R-16 to R-19 (submitted at hearing). Exhibits R-4, R-5, and R-8 were not offered. Exhibits R-9 to R-13 were offered, but not received based on their lack of relevance. Exhibit R-15 was offered but not received based on its lack of foundation or probative value. Respondent's authorized representative was allowed to make verbal offers of proof for all R exhibits that the forum did not receive into evidence.

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 December 20, 1999, the Agency issued a Notice of Intent to Assess Civil Penalties ("Notice") in which it alleged that Respondent received, and unlawfully failed to complete and return: (a) the 1998 Construction Industry Occupational Wage Survey, within two weeks of receipt, as required by the commissioner, in violation of ORS 279.359(2); and (b) the 1999 Construction Industry Occupational Wage Survey by September 15, 1999, as required by the commissioner, also in violation of ORS 279.359(2). The Agency sought a civil penalty of \$500.00 for each alleged violation, for a total of \$1,000.00.

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

3) On December 20, 1999, the Agency sent Respondent a letter that included the following statements:

“As the Notice of Intent to Assess Civil Penalties indicates, the Bureau intends to assess civil penalties against you of \$500 for each survey you failed to return. These penalty amounts are based on the premise that you will be completing the enclosed 1999 survey and returning the completed, accurate form to the Bureau on or before December 31, 1999.

“* * * * *

“If you fail to complete and return the 1999 survey, after your similar failure in 1998 and after initiation of this action, the Bureau will move to amend the Notice of Intent to substantially increase the amount of civil penalties.”

The letter did not enclose a 1999 survey. The Agency did not move at hearing to increase the amount of civil penalties sought in the Notice.

4) The Marion County Sheriff's department, acting on behalf of the Agency, served the Notice on Stephen J. Schneider, Respondent's registered agent, on January 4, 2000, at 10:16 a.m.

5) On January 24, 2000, the Agency sent a Notice of Intent to Issue Final Order by Default notifying Respondent that it had not yet filed an answer or request for hearing, and that a Final Order on Default would be issued if no answer and request for hearing were received by February 3, 2000.

6) On January 24, 2000, Thomas A. Schneider, Respondent's president, sent a letter to Commissioner Roberts protesting the Notice. The letter addressed the allegations raised in the Notice and raised affirmative defenses that included the following:

“The time allotted for submission of wage surveys is totally unreasonable. Statute empowers you to be able to require wage reports from us within a time established by yourself. We doubt that the legislature intended to empower you to impose costly and restrictive requirements on us that are not necessary in order to accomplish the collection of wage data.

“Even the IRS and OR Department of Revenue give a person several months to submit financial data and also the opportunity for an extension beyond that. Why can't BOLI?”

“The Notice was threatening and arrogant, hardly what we believe our government should be or needs to be. In addition, it was significantly flawed * * *.

“[C]oncerns about confidentiality[.]”

The letter also stated that Stephen J. Schneider would be acting as Respondent's authorized representative in this matter.

7) On January 28, 2000, the Agency sent a letter to Respondent stating that its answer was insufficient because it did not include a request for a contested case hearing, and that a Final Order on Default would be executed if a request for contested case hearing was not received by February 7, 2000.

8) On February 4, 2000, Respondent filed a request for a contested case hearing in this matter.

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

10) On March 10, 2000, the Hearings Unit served Respondent with: a) a Notice of Hearing that set the hearing for June 27, 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.

11) On March 14, 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; a brief statement of the elements of the claim and penalty calculations (for the Agency only); a brief statement of any defenses to the claim (for Respondent only); and a statement of any agreed or stipulated facts. The forum ordered the participants to submit their case summaries by June 19, 2000, and notified them of the possible sanctions for failure to

comply with the case summary order. The forum also provided a form for Respondent's use in preparing a case summary.

12) On June 1, 2000, Respondent filed a motion for postponement, alleging that the Agency was also conducting the "Siletz" investigation against Respondent, that the Siletz investigation involved over a million dollars, and that the Siletz investigation should be completed before a hearing was conducted in this matter. Respondent also stated that the ongoing status of the Siletz investigation made it difficult for Respondent to adequately pursue discovery in this matter, and that the existence of the Siletz investigation would bias the forum in this matter.

13) On June 6, 2000, the Agency filed objections to Respondent's motion for postponement, which included an affidavit by the Agency's compliance specialist in charge of the Siletz investigation. Included in the affidavit were statements that it was unlikely the Siletz investigation would be concluded short of a hearing or court trial, and that the Siletz investigation was unrelated to the matter set for hearing.

14) On June 7, 2000, the forum denied Respondent's motion for postponement based on Respondent's failure to establish good cause.

15) On June 9, 2000, Respondent sent a two-page letter to the Agency requesting discovery and sent a copy of that letter to ALJ McCullough.

16) On June 16, Respondent filed a motion to the Hearings Unit asking to forum to issue a *subpoena duces tecum* to Commissioner Roberts requiring him to produce certain documents, or in the alternative, a subpoena to an unnamed Agency employee who could explain the documents, together with a subpoena for Commissioner Roberts to testify at the hearing. The documents sought by Respondent consisted of the following:

"1. List of Contractors, with addresses, or documents which show who were sent, and timely returned Wage Surveys for 1998 and 1999;

- “2. List, or Documents, showing all contractors who received a notice of Intent to Assess Civil Penalties for failure to return said notices;
- “3. List, or Documents, showing the penalties claimed in such Notices and paid by said contractors;
- “4. All textual advice issued by the Bureau on how a contractor should determine proper job classifications for its workers, other than that appearing in OAR Chapter 839, Division 16;
- “5. All mathematical and textual examples of proper methods of calculating Weighted Average overtime, other than those appearing in Appendix D to the Bureau’s document titled: “Prevailing Wage Rate Laws covering the calendar years of 1998, 1999 & 2000;
- “6. All records of phone conversations between [Jack Roberts] and Respondent;
- “7. All records concerning a decision to send out said Surveys in the summers of 1998 and 1999 and setting deadlines for the return of said Surveys;
- “8. All records, of any kind, demonstrating the data, or lack of data, from Respondent affects the Bureau’s ability to accurately determine the prevailing wage rates, or that the lack of data could result in ‘skewing of the established rates.’”

17) On June 19, 2000, the Agency filed objections to Respondent’s motion for discovery and subpoenas.

18) On June 20, 2000, the forum ruled on Respondent’s motion for discovery and subpoenas. The forum denied Respondent’s request for a *subpoena duces tecum* to obtain the documents sought in Respondent’s requests 2-7 based on Respondent’s failure to show that the requests either sought information relevant to the case or that the specific information sought was reasonably likely to produce information generally relevant to the case.

The forum granted Respondent’s requests 1 and 8 and issued a *subpoena duces tecum* to Respondent to serve on Christine Hammond, the Administrator of the Wage & Hour Division, whom the Agency case presenter had named, at the forum’s request, as the custodian of the records sought by Respondent in Respondent’s requests 1 and 8. The forum mailed the *subpoena duces tecum* to Respondent, and informed Respondent

that it was responsible for serving the subpoena and paying applicable witness fees, if any.

The forum treated Respondent's request to obtain the testimony of Commissioner Roberts as a motion for a *subpoena ad testificandum* and denied the request based on Respondent's failure to make a showing that the alleged conversations between Respondent and Commissioner Roberts were in any way related to this hearing.

The forum also treated Respondent's motion to obtain the testimony of an unnamed BOLI employee who could explain the documents sought by Respondent as a motion for a *subpoena ad testificandum*, and denied the request on the basis that it could not issue a *subpoena ad testificandum* to an unnamed individual.

19) The Agency and Respondent timely filed their case summaries, with exhibits, on June 19, 2000.

20) On June 21, 2000, the Agency requested that Respondent make Michele Darby available for cross-examination at the hearing, based on her affidavit that was included in the exhibits accompanying Respondent's case summary.

21) At the start of the hearing, the ALJ confirmed that Respondent had received the Summary of Contested Case Rights and had no questions about it at that time.

22) 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. Several times during the hearing, the ALJ advised Respondent's authorized representative of the procedures governing the conduct of the hearing, including the manner in which objections might be made and matters preserved for appeal.

23) During the hearing, Respondent's authorized representative inquired about calling Commissioner Roberts, who had been listed as a witness on Respondent's case summary, and Christine Hammond, who had not been listed as a witness on Respondent's case summary, as witnesses to testify on Respondent's behalf. The ALJ advised Respondent's authorized representative that he had no authority to compel the testimony of any witness who had not been served with a *subpoena ad testificandum* and did not require Roberts or Hammond to testify as witnesses.

24) The ALJ issued a proposed order on July 26, 2000, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. On August 7, 2000, Respondent timely filed exceptions. Those exceptions are addressed in the Opinion section of this Final Order.

FINDINGS OF FACT – THE MERITS

1) At all material times, Respondent was an Oregon corporation and an employer engaged in the business of the construction of wells, water treatment plants, and irrigation systems in the states of Oregon and Washington.

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

3) On or about September 2, 1998, the Employment Department mailed a form letter to Respondent and a number of other contractors informing them of the upcoming 1998 wage survey and their legal obligation to complete the survey. The form letter included a statement that the survey covered "**all non-residential construction work performed in Oregon during a specified period, including BOTH private**

work and prevailed or public improvement work.” (emphasis in original) This letter, and all other correspondence to Respondent from the Employment Department regarding the 1998 and 1999 wage surveys, were mailed to Respondent’s correct address of 21881 River Rd NE, Saint Paul, OR 97137.

4) On or about September 15, 1998, the Employment Department mailed Respondent a wage survey packet, which included a postage paid envelope for return of the survey. Printed on the cover sheet of the packet was a map of Oregon divided into 14 numbered districts, along with the title “BOLI – Construction Industry Occupational Wage Survey 1998.” The second page was a one-page form letter to construction contractors that included statements that any information provided was confidential, that contractors’ “timely response and cooperation are essential for determining accurate and fair wage rates for Oregon’s contractors and workers,” a request that recipients “**Please return your completed survey form in the enclosed postage-paid envelope within two weeks,**” and the statement that “**Failure to return a completed survey form may result in a monetary fine.**” (emphasis in original) The form asked contractors to provide wage data for all types of non-residential construction projects, including both “prevailing wage and non-prevailing wage work.” An instruction sheet enclosed with the packet included the following statement printed in boldface type:

“RESIDENTIAL CONSTRUCTION

PLEASE NOTE: THIS PREVAILING WAGE SURVEY DOES NOT COVER RESIDENTIAL CONSTRUCTION WORKERS. IF ALL OF YOUR WORK FOR THE SELECTED REPORTING PERIOD WAS DONE ON RESIDENTIAL CONSTRUCTION, PLEASE CHECK ‘RESIDENTIAL ONLY’ IN QUESTION IV ON THE SURVEY FORM, THEN FILL OUT ONLY THE FIRM INFORMATION ON THE FORM, AND RETURN IT TO OUR OFFICE IN THE POSTAGE-PAID ENVELOPE.”

5) On or about October 5, 1998, the Employment Department mailed a reminder card to Respondent and other contractors from whom completed 1998 wage

surveys had not yet been received. On or about October 19, 1998, a second reminder card was sent to Respondent and other contractors from whom completed 1998 wage surveys had not yet been received, with "Final Notice" stamped on its front.

6) Respondent received the 1998 wage survey packet, but did not return it to the Employment Department within a two week period. Respondent never completed and returned the 1998 wage survey packet to the Employment Department or BOLI.

7) Schneider saw the 1998 wage survey packet in October 1998. Respondent decided not to complete and return it because of "the requirement to essentially drop everything and return it within two weeks during peak construction season." Respondent did not subsequently complete and submit the 1998 wage survey for the reason that "[s]ince we could not meet the time requirements imposed by * * * the 1998 * * * survey, and the expressed urgency, we felt submission in the winter months when staff was a little more poised to prepare it would be a useless expenditure of time and talent since it would be several months after the deadlines."

8) On or about June 15, 1999, the Employment Department mailed a preliminary postcard survey to Respondent asking if Respondent, in the past year, "had employed workers on any non-residential construction projects," "has delivered supplies to a construction site," and if "the delivery worker [has] performed work on the construction site." Jere Harrington, Respondent's office manager at that time, signed and dated the postcard "6-22-99" and returned it to the Employment Department. On the postcard, she answered "Yes" to each question.

9) On or about August 18, 1999, the Employment Department mailed a wage survey packet, which included a postage paid envelope for return of the survey, to Respondent and other contractors based on their responses to the preliminary postcard survey. The phrase "FILING DEADLINE: September 15, 1999" was prominently

displayed on the front of the survey form. The packet asked contractors to provide wage data for “all [non-residential] construction work performed for the survey period – both prevailing wage and non-prevailing wage work.” A letter included with the wage survey packet notified contractors that “[f]ailure to return a completed survey form may result in a monetary fine.” (emphasis in original) An instruction sheet enclosed in the wage survey packet included the following statement printed in boldface type:

“RESIDENTIAL CONSTRUCTION

PLEASE NOTE: THIS PREVAILING WAGE SURVEY DOES NOT COVER RESIDENTIAL CONSTRUCTION WORKERS. IF ALL OF YOUR WORK FOR THE SELECTED REPORTING PERIOD WAS DONE ON RESIDENTIAL CONSTRUCTION, PLEASE FILL OUT THE FIRM INFORMATION ON THE SURVEY FORM, AND WRITE IN THE WAGE DATA GRID THAT YOUR FIRM ONLY PERFORMED RESIDENTIAL WORK. RETURN IT TO OUR OFFICE IN THE POSTAGE-PAID ENVELOPE.” (emphasis in original)

10) Respondent received the 1999 wage survey packet before September 15, 1999, and Schneider saw it before September 15, 1999.

11) On or about September 20, 1999, the Employment Department mailed a “Survey Past Due” card to Respondent and other contractors who had been sent a 1999 wage survey but had not yet returned it. On or about October 18, 1999, another “Survey Past Due” card was sent to Respondent with “Final Notice” stamped on it.

12) Respondent decided not to complete and return the 1999 wage survey in 1999 because of “the requirement to essentially drop everything and return it within two weeks during peak construction season.” Respondent did not subsequently complete and submit the 1999 wage survey until after being served with the Notice for the reason that “[s]ince we could not meet the time requirements imposed by * * * the 1999 survey, and the expressed urgency, we felt submission in the winter months when staff was a little more poised to prepare it would be a useless expenditure of time and talent since it would be several months after the deadlines.”

13) Respondent did not ask for an extension of time to complete either the 1998 or 1999 surveys. All 1998 and 1999 wage survey related mailings sent by the Employment Department to Respondent listed phone numbers, including a toll-free number, for employers to call if they had questions about the wage survey form. Respondent did not call these numbers or attempt to contact BOLI about the wage survey forms.

14) Respondent began work on the 1999 wage survey after being served with the Notice on January 4, 2000, completed it on January 7, 2000, and mailed it back to the Employment Department, which received Respondent's survey on January 24, 2000.²

15) In 1998 and 1999, Respondent completed and timely submitted reports on a monthly basis to the Employment Department, each of which took about an hour to prepare.

16) In 1998, Respondent employed workers on non-residential construction projects in Oregon.³

17) In 1999, Respondent employed workers on non-residential construction projects in Oregon.

18) 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 wage surveys in 1998 and 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 1998 and 1999 wage surveys.
- 4) Respondent deliberately failed to complete and return the 1998 survey.

- 5) Respondent deliberately failed to complete and return the 1999 survey in the time period required by the commissioner. Respondent did complete and return the 1999 survey after being served with the Agency's Notice.
- 6) Respondent employed workers on non-residential construction projects in 1998 and 1999.
- 7) Respondent could have completed and returned the 1998 wage survey within two weeks after September 15, 1998.
- 8) Respondent employed construction workers in 1999 on non-residential construction projects.
- 9) Respondent could have completed and returned the 1999 wage survey by September 15, 1999.
- 10) There is no evidence in the record that Respondent has committed other violations of the prevailing wage rate laws.

CONCLUSIONS OF LAW

- 1) ORS 279.359 provides, in pertinent part:

"(1) The Commissioner of the Bureau of Labor and Industries shall determine the prevailing rate of wage for workers in each trade or occupation in each locality under ORS 279.348 at least once a year by means of an independent wage survey * * *.

"(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 failures to return a completed 1998 wage survey within two weeks of

September 15, 1998, and a 1999 wage survey by September 15, 1999, constitute two separate violations of 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 and ORS 279.375 regarding fees to be paid to BOLI by the contractor] shall be set in accordance with the determinations and considerations referred to in OAR 839-016-0530."

The Commissioner of the Bureau of Labor and Industries is authorized to impose civil penalties for the violations found herein, and the commissioner's imposition of the penalties assessed in the Order below is a proper exercise of that authority.

OPINION

DID RESPONDENT VIOLATE ORS 279.359(2) IN 1998 AND 1999?

The Agency alleges that Respondent violated ORS 279.359(2) in 1998 and 1999 and seeks a civil penalty of \$500.00 for each violation. To prove these violations, the Agency must show that:

- (1) Respondent is a "person";
- (2) The commissioner conducted surveys in 1998 and 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 1998 and 1999 surveys; and
- (4) Respondent failed to make the required reports or returns within the time prescribed by the commissioner.

Schneider's admission that Respondent had employees during 1998 and 1999 established that Respondent was a "person" for purposes of ORS 279.359. Schneider's testimony and the affidavit of Mary Wood, the Employment Department's representative who conducted the wage surveys, along with the Agency's supporting documentation in

Exhibit A-3, established that the commissioner conducted wage surveys in 1998 and 1999 requiring persons to return completed wage survey forms. Respondent admitted in its answer, and Schneider testified that Respondent received the 1998 and 1999 wage surveys. Respondent admitted in its answer, and Schneider testified that Respondent never returned the 1998 wage survey and that the 1999 wage survey was not returned until January 2000, well after the September 15, 1999, deadline for submission. Based on this undisputed evidence, the forum concludes that Respondent violated ORS 279.359(2) in 1998 and 1999 as alleged by the Agency.

CIVIL PENALTIES

The commissioner may impose penalties of up to \$5000.00 each for Respondent's violations of ORS 279.359(2). In this case, the Agency seeks \$500 for each violation. In determining the appropriate size of the penalties, the forum must consider the "mitigating and aggravating circumstances" set out in OAR 839-016-0520.⁴ It is Respondent's responsibility to provide the commissioner with evidence of mitigating circumstances. OAR 839-016-0520(2). The forum evaluates the appropriate civil penalties for Respondent's 1998 and 1999 violations under these standards.

A. The 1998 violation.

One mitigating factor, and several aggravating factors are present in this case. The mitigating factor is that there was evidence that Respondent had not previously violated the prevailing wage rate laws. A discussion of the aggravating factors follows. First, Respondent argued that timely completion of the wage survey was extremely difficult, imposing a burden so onerous that Respondent was essentially required to suspend its business operations during peak construction season. However, Respondent did not produce reliable evidence to support this contention. Second, Respondent employed workers on non-residential construction projects in 1998. Mary

Wood's affidavit and a portion of a textbook discussing the evaluation of statistical data that was offered into evidence by the Agency and received without objection established that the absence of Respondent's data could adversely affect the accuracy of the Agency's prevailing wage determination, the whole purpose of the wage survey. Although the magnitude and seriousness of Respondent's violation was not as serious as violations like failure to pay or post the prevailing rate of wage, it was more than nominal. Third, Respondent was well aware that the wage survey had arrived and deliberately chose to ignore it, despite receiving reminders from the Employment Department. The forum finds that a \$500.00 penalty is appropriate under these circumstances.

B. The 1999 Violation.

Except for the fact that Respondent had a previous violation of the prevailing wage rate laws – its failure to complete and return the 1998 wage survey – all the same considerations for determining the amount of civil penalty for Respondent's 1998 violation apply to Respondent's 1999 violation. The forum does not consider Respondent's January, 2000 submission of the 1999 wage survey as a mitigating factor because: (1) it was only submitted after Respondent received the Notice of Intent and the Agency's threat to impose a larger penalty if it was not submitted; and (2) there is no evidence that it was submitted in time for the commissioner to use its data in carrying out his statutory mandate of calculating the prevailing wage rate. ORS 279.359(1). Under these circumstances, the forum assesses the \$500.00 penalty sought by the Agency.

OTHER ISSUES RAISED BY RESPONDENT DURING THE HEARING

Respondent's authorized representative, Stephen Schneider, argued at hearing that other factors existed that should prevent the commissioner from finding that

Respondent had violated the law or that civil penalties should be imposed. The following discussion summarizes those arguments.

A. “Self-Incrimination.”

Respondent argued that the requirement that Respondent complete and return the commissioner’s 1998 and 1999 wage surveys was invalid because it placed Respondent in the position of being “self-incriminating” if it completed and returned the wage surveys. The forum interprets this as a constitutional argument, which an authorized representative is not authorized to make. OAR 839-050-0110(4); OAR 137-003-0008(4). Even if Respondent had properly raised the argument through counsel, the forum would reject it because the privilege against self-incrimination is only applicable in criminal proceedings.⁵

B. No Specific Statutory Cite in Wage Surveys.

Respondent argued that civil penalties could not be assessed because there was no specific statutory cite in the wage surveys authorizing the assessment of civil penalties in any amount for Respondent’s failure to complete and return the 1998 and 1999 wage surveys. Respondent was clearly placed on notice of the law by the unequivocal language on both wage survey forms that completion and submission of the wage surveys is a requirement of “Oregon law” and that “[f]ailure to complete a completed survey form may result in a monetary fine.” (emphasis in original) “A specific statutory cite” of the type described by Respondent is not required by the law.

C. “Lack of Custody or Control” of Wage Surveys by the Agency.

Respondent argued that it should not be required to complete and return the 1998 and 1999 wage surveys because of a “lack of custody or control” by the Agency, as manifested by the Agency’s contract with the Employment Department to gather this information. The forum rejects this defense because ORS 279.359(4) specifically

authorizes the commissioner to enter into contracts with “public or private parties” such as the Employment Department to conduct wage surveys.

D. The Commissioner’s Timelines were Unreasonable.

Respondent argued that the commissioner’s prescribed timelines for completing the wage surveys were unreasonable, given that Respondent and other contractors were required to complete them in a short period of time during peak construction season. In 1998, that prescribed timeline was “two weeks”; in 1999 it was twenty-seven days. The 1998 survey was due at the end of September 1998; the 1999 survey was due on September 15, 1999. According to Schneider’s undisputed testimony, both periods of time fell into Respondent’s peak construction period and made it unreasonable for Respondent to comply.

To resolve this issue, the forum must decide if the commissioner exercised his discretion within the range of discretion delegated to him by law, whether the commissioner’s action followed the procedures prescribed by statute, and whether the substance of the commissioner’s action was reasonable.⁶

In this case, commissioner exercised his discretion in the precise manner required of him by ORS 279.359. He contracted with the Employment Department to conduct wage surveys in 1998 and 1999, utilized the surveys to calculate the prevailing rate of wage, and made the data available to the public in published booklets entitled “Prevailing Wage Rates for Public Works Contracts in Oregon. Respondent argued that the timeline prescribed by the commissioner was unreasonable because it imposed a burden so onerous that Respondent was essentially required to suspend its business operations during peak construction season in order to complete the surveys. There is no reliable evidence to support this argument, and no evidence was presented to establish that the many other contractors in Oregon who were subject to the same

timeline were unable to comply for this reason. Although Respondent could have easily done so, it never contacted BOLI within the timelines that the wage surveys were due to complain about them being unreasonable or to ask for an extension. Based on the above, the forum concludes that the commissioner exercised his discretion in prescribing timelines for completion of the 1998 and 1999 wage surveys in a manner that was reasonable.

RESPONDENT'S EXCEPTIONS

Respondent raised a total of 42 exceptions to the ALJ's Proposed Order. The forum has made two changes in response to Respondent's exceptions, adding the words "at that time" to the end of Procedural Finding of Fact 21, and changing "Schneider Industries, Inc." to "Schneider Equipment, Inc." in the Order in response to exceptions 9 and 41. The remaining 40 exceptions are discussed below.

A. Exceptions 1, 2, 3, 42

These exceptions allege no specific procedural or substantive error and are overruled.

B. Exception 4

Respondent excepts that there is no evidence to support the forum's conclusion that Stephen J. Schneider was served with the Agency's Notice on January 4, 2000. This is incorrect. Exhibit X-1-d is an affidavit from the Marion County Sheriff's office attesting that Schneider was personally served with the Notice at 10:16 a.m. on January 4, 2000.

C. Exception 5

The omissions from Proposed Finding of Fact – Procedural 6 cited by Respondent do not affect Respondent's procedural or substantive rights. The ALJ is not required to cite verbatim all documentary and testimonial evidence put forth in the

pleadings or offered at hearing. Respondent's "confidentiality" and "unreasonableness" defenses put forth in Respondent's answer were both raised at hearing and addressed adequately in the Proposed Order.

D. Exceptions 6-8, 10-12, 14-18, 25-31, 39

These exceptions are argumentative and lack merit. The findings and conclusions referred to in these exceptions are supported by substantial evidence in the record, and the alleged omissions are argumentative or irrelevant. These exceptions are overruled.

E. Exception 13

Respondent excepts that Proposed Finding of Fact – The Merits 7 is incorrect and/or incomplete. The forum disagrees. This finding is based on Respondent's answer and the testimony of Stephen J. Schneider. Respondent's exception is overruled.

F. Exception 19

Respondent excepts that a new finding of fact is required stating that "The wage survey classifications are inconsistent with the published wage determinations." Respondent raised this issue at hearing; however, it is irrelevant to the forum's determination. Respondent's exception is overruled.

G. Exception 20

Respondent excepts that a new finding of fact is required indicating that the wage surveys were required to be completed and submitted during Respondent's peak season. This issue was considered and rejected as lacking merit in the Proposed Opinion in the section entitled "D. The Commissioner's Timelines were Unreasonable." Respondent's exception is overruled.

H. Exceptions 21-23

These exceptions allege that three new findings of fact are required stating that the 1998 and 1999 wage surveys had different completion schedules and that the documents related to the wage surveys did not specifically state the appropriate statutory references. The completion schedules for the 1998 and 1999 wage surveys were specially stated in Proposed Findings of Fact – The Merits 4-11, and citation of specific statutes related to the wage surveys is irrelevant to the forum’s determination. Respondent’s exceptions are overruled.

I. Exception 24

Respondent excepts that the Proposed Order failed to state that Respondent designated Stephen J. Schneider, its vice president, as its authorized representative. These facts are recited in the introductory paragraphs to the Proposed Order and in Proposed Finding of Fact – Procedural 6. Respondent’s exception is overruled.

J. Exceptions 32-34

Respondent excepts that new ultimate findings and conclusions of law are required stating that “Respondent’s actions resulted in no measurable apparent or proven harm,” and that the Agency violated wage survey confidentiality requirements by allowing them to be discussed during the hearing. Respondent’s exceptions are argumentative and inaccurate and are overruled.

K. Exceptions 35-38

These exceptions are argumentative, and the issues they raise were adequately considered in the Proposed Order. Respondent’s exceptions are overruled.

L. Exception 40

Respondent excepts to the Proposed Order’s conclusion that the dates imposed by the commissioner for submission of the 1998 and 1999 wage surveys were

reasonable. This issue was adequately considered in the Proposed Order. Respondent's exception is overruled.

ORDER

NOW, THEREFORE, as authorized by ORS 279.370 and as payment of the penalties assessed as a result of Respondent's two violations of ORS 279.359(2), the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **Schneider Equipment, 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 ONE THOUSAND DOLLARS (\$1,000.00), 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.

¹ R-6 is an affidavit of Michelle Darby, Respondent's office manager since April 12, 1999. Only paragraphs 1-4 and 7 of R-6 were received into evidence.

² Pursuant to Respondent's motion and the confidentiality provision of ORS 279.359(3), Respondent's completed 1999 wage survey, which was offered as Exhibits A-3, pp. 89-92, and R-1, both of which were received into evidence by the forum, has been placed under seal in the original hearings file and is not subject to disclosure under any of the provisions of ORS chapter 192.

³ No specific evidence was presented concerning whether or not Respondent employed workers on non-residential construction projects in Oregon in 1998. However, the forum infers from Respondent's statement that the 1998 survey required Respondent to "essentially drop everything and return it within two weeks during peak construction season" that Respondent employed workers in 1998 on non-residential construction projects. If not, the wage survey only required Respondent to check a box on the survey form, fill out "some firm information," and return the form in the Employment Department's postage-paid envelope, a procedure that would hardly have required Respondent to "essentially drop everything." See Finding of Fact – The Merits 4.

⁴ See also OAR 839-016-0540(1), which provides that "[t]he actual amount of the civil penalty will depend on all the facts and on any mitigating and aggravating circumstances."

⁵ Article I, Section 12 of the Oregon Constitution provides "[n]o person shall be * * * compelled in any criminal proceeding to testify against himself." Amendment V of the U.S. Constitution provides "[n]o person * * * shall be compelled in any criminal case to be a witness against himself[.]"

⁶ See *Hymes v. Keisling*, 327 Or 556, 563 (1998), *reconsideration denied* 329 Or 273 ("The proper sequence in analyzing the legality of action taken by officials who are exercising delegated authority is to determine first whether the officials acted within the scope of their authority and then whether the action that they took followed the procedures prescribed by statute or regulation. * * * The next determination is whether the substance of the action departed from a legal standard expressed or implied in the law being administered." In this case, given the broad delegation of authority contained in the statute, the forum

concludes that ORS 279.359 contains an implication that wage survey respondents should have a "reasonable" time to comply.)