

**In the Matter of**

**WB PAINTING AND DECORATING, INC.,**

**Case No. 69-01**

**Amended Final Order of the Commissioner Jack Roberts**

**Issued July 13, 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 \$750 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 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 April 24, 2001, in the 10<sup>th</sup> floor hearings room, State Office Building, 800 NE Oregon, Portland, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Peter McSwain, case presenter, an employee of the Agency. WB Painting & Decorating, Inc. ("Respondent") did not appear at the hearing.

The Agency called Mary Wood, Oregon Employment Department ("Employment Department") project leader, as its only witness.

The forum received into evidence:

- a) Administrative exhibits X-1 through X-5 (submitted or generated prior to hearing);
- b) Agency exhibit A-1 (submitted prior to 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 Amended 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 the violation was aggravated by Respondent’s failure to complete the 1998 wage survey as required by law, and by the effect Respondent’s failure to complete the survey had on the commissioner’s ability to accurately determine the prevailing wage rates, including potential skewing of the established rates. The Agency sought a civil penalty of \$1,000 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 agent, Jody Van Damme, on or about January 10, 2001, by certified mail.

4) On January 10, 2001, Michael Bratcher, Respondent’s vice president, sent the Agency a letter that included the following unsworn statements:

“I am responding by denying this information as our firm did indeed complete and submit this survey back on August 23, 2000. This survey was photo copied (sic) and kept in our Boli file. This is my timely written answer to your request and I am re submitting (sic) a photo copy (sic) of the survey which was originally submitted back in August. According to your instructions, I am also requesting a hearing on my receipt of this notice and authorizing, Jody Van Damme, who completed this survey, to

appear as W.B. Painting and Decorating, Inc. representative at all stages of the hearing.”

Bratcher enclosed a copy of a completed 2000 wage survey for the week of August 9, 2000. It bore the purported signature of “Jody Van Damme” and a handwritten date of “8/23/2000” next to the signature.

5) The Agency filed a request for hearing with the Hearings Unit on March 27, 2001.

6) On March 28, 2001, the Hearings Unit served Respondent with: a) a Notice of Hearing that set the hearing for April 24, 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.

7) On March 30, 2001, 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 civil penalty calculations (for the Agency only). The forum ordered the participants to submit their case summaries by April 16, 2001, 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.

8) The Agency filed a case summary on April 10, 2001, and a supplemental case summary on April 16, 2001. Respondent did not file a case summary.

9) Respondent did not appear at the time set for hearing and nobody appeared on Respondent's behalf. No one had notified the forum that Respondent would not be appearing at the hearing. Pursuant to OAR 839-050-0330(2), the ALJ waited thirty minutes past the time set for hearing. When no one had appeared on

Respondent's behalf, the ALJ declared Respondent to be in default and commenced the hearing.

10) Pursuant to ORS 183.415(7), the ALJ verbally advised the Agency of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

11) On May 21, 2001, the ALJ issued a proposed order that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. On May 22, 2001, the Agency filed exceptions to the proposed order. Those exceptions are discussed in the Opinion section of this Amended Final Order.

12) On June 29, 2001, the Commissioner issued a Final Order. This Amended Final Order corrects the figure "\$500.00" where it appears on page 8, line 23 of the Final Order to "\$750.00," the civil penalty actually assessed in the Final Order.

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

1) At all material times, Respondent was a construction contractor based in Gresham, Oregon and employed workers on construction projects. Respondent engaged in non-residential construction during 2000.

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 planned to, and did use the survey 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 contractor to whom wage survey packets were sent, the address where the packets were sent, whether it was returned, the date the packet was sent for the respective year in which it was sent, whether or not it was timely returned, and when the survey was returned if it was.

4) On September 8, 1998, the Employment Department sent Respondent a wage survey packet, which included a postage paid envelope for return of the survey. The packet clearly gave notice that its completion and return was required by law and violation could result in the assessment of civil penalties. The packet instructed Respondent to complete and return the survey within two weeks of receiving it.

5) Respondent did not complete and return the 1998 wage survey packet.

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

7) 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 that "[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."

8) The Employment Department received a completed 2000 wage survey packet from Respondent on January 17, 2001. That survey form listed multiple workers

who were paid prevailing wage rate on non-residential construction jobs during the week of August 9, 2000. By this time, data received from 2000 wage survey packets had already been processed and Respondent's data could not be used in the commissioner's determination of prevailing wage rates.

9) In the year 2000, the Employment Department sent out all wage survey packets on August 28, 2000. It received no requests from any construction contractor, including Respondent, to receive the packet before that date.

10) The Employment Department received a completed 2000 wage survey from Respondent on January 17, 2001. 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) Respondent knew or should have known of its failure to timely complete and return the 2000 wage survey.

#### **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. Respondent did not return the completed survey until January 17, 2001, by which time the commissioner's prevailing wage rate determination based on the 2000 wage survey was already completed.

#### **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 2000 wage survey by September 15, 2000, 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 \$750.00 civil penalty for Respondent's violation of ORS 279.359(2).

## **OPINION**

### **DEFAULT**

Respondent failed to appear at hearing and was held in default pursuant to OAR 839-050-0330. When a respondent defaults, the Agency must establish a prima facie case to support the allegations of the charging document. *In the Matter of Vision Graphics and Publishing, Inc., 16 BOLI 124, 136 (1997)*. The Agency met that burden in this case, as discussed *infra*.

## THE AGENCY'S 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). The completed 2000 wage survey form that was submitted by Respondent on January 17, 2001, establishes that Respondent had employees during 2000 and 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 2000 requiring people to return completed survey forms by September 15, 2000. Respondent's failure to deny that it received the forms constitutes an admission that Respondent received the forms. OAR 839-050-0130(2). Respondent's actual submission of the forms cements this conclusion. The only question at issue is whether Respondent failed to make the required reports or returns by September 15, 2000.

In Respondent's answer, Respondent's vice president Bratcher asserts that Respondent completed and returned the 2000 wage survey forms on August 23, 2000. Bratcher enclosed a completed copy of those forms bearing the purported signature of "Jody Van Damme" and a handwritten date of "8/23/2000" next to the signature. In a default situation, the forum may give some weight to unsworn assertions contained in a respondent's answer. Such assertions are overcome whenever they are controverted by other credible evidence. *In the Matter of Jack Mongeon*, 6 BOLI 194, 200 (1987). The Agency rebutted Respondent's assertion by providing credible testimony from Mary Wood of the Employment Department, an affidavit from James Lee, a research analyst

in the Employment Department, and a print-out of records routinely maintained by the Employment Department establishing that no wage survey forms were mailed out prior to August 28, 2000, and that Respondent's wage survey was received on January 17, 2001. This evidence is sufficient to overcome Respondent's unsworn assertion that it returned completed 2000 wage survey forms on August 23, 2000. By failing to return a completed survey by September 15, 2000, Respondent violated ORS 279.359(2).

### **CIVIL PENALTY**

The Commissioner may impose a penalty of up to \$5,000 for Respondent's violation of ORS 279.359(2). In this case, the Agency seeks a \$1,000 civil penalty. In determining the appropriate size of the penalty, the forum must consider the factors set out in OAR 839-016-0520. In this case, there are several aggravating circumstances alleged and proved by the Agency. First, Respondent also failed to complete and return the survey in 1998. See *In the Matter of Rogelio Loa*, 9 BOLI 139, 146 (1990). Second, 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. Third, because it received warnings from the Agency and because of the 1998 mailing, Respondent knew or should have known of the violation. There are no mitigating factors. The forum does not consider Respondent's eventual submission of the 2000 wage survey forms as a mitigating factor for the reason that the submission came too late to be included in the data used in the Commissioner's prevailing wage rate determinations.

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 Agency sought a \$500 civil penalty for each violation and did not allege any prior failures to complete and return the Commissioner's wage survey as

aggravating circumstances. With one exception,<sup>i</sup> in each of those cases the forum imposed the sought-after \$500 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. In this case, the Agency seeks \$1,000 for one violation and has alleged Respondent's failure to complete and return the Commissioner's 1998 wage survey as an aggravating circumstance, rather than seeking a separate penalty for it. Under these circumstances, the forum finds that a \$750 civil penalty is appropriate.

### **THE AGENCY'S EXCEPTIONS**

In its exceptions, the Agency raised several issues.

First, that the ALJ's conclusion that the 1999 wage survey was received on time was erroneous. In response, the forum has deleted its finding of fact related to that survey and has not relied on it as an aggravating or mitigating factor.

Second, the Agency asserted that the statement in James Lee's affidavit that the 2000 survey "was to be used \* \* \* to aid in the determination of the prevailing wage rates in Oregon and was, in fact, used for such a purpose" carries with it the unavoidable conclusion that failure to submit the survey "could result in skewing of the established rates." In prior wage survey cases before this forum, the Agency introduced evidence that the absence of a single contractor's data could adversely affect the accuracy of the Agency's prevailing wage determination. *See, e.g., Schneider*, 21 BOLI at 73. In this case, no such evidence was presented. In its absence, the forum declines to take what amounts to official notice of the conclusion sought by the Agency.

Third, the Agency contends that the submission of a completed survey by Respondent with a false date is an aggravating factor. Because this was not alleged as

an aggravating factor in the Agency's Notice of Intent, the forum will not consider it as an aggravating factor.<sup>ii</sup>

The Agency's fourth, fifth, and sixth exceptions provide different reasons why the forum should increase the \$500 civil penalty proposed in the proposed order. In response to those exceptions, the forum has increased its civil penalty assessment to \$750.

### **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 **WB Painting and Decorating, 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 SEVEN HUNDRED AND FIFTY DOLLARS (\$750.00), plus any interest that accrues at the legal rate on that amount from a date ten days after issuance of the Amended Final Order and the date Respondent complies with the Amended Final Order.

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<sup>i</sup> See *In the Matter of Martha Morrison*, 20 BOLI 275, 286 (2000) (\$250 penalty imposed for contractor's 1998 violation where she employed no construction workers in 1998 and her failure to return the 1998 wage survey would have had no impact on the accuracy of the Agency's prevailing wage rate determination.)

<sup>ii</sup> Respondent had not yet submitted its survey at the time the Notice of Intent was issued.