

In the Matter of

M. CARMONA PAINTING, INC.

Case No. 98-01

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 \$500 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.

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 April 26, 2001, in the hearing room of the Bureau of Labor and Industries, located at 800 NE Oregon Street, Portland, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by Peter McSwain, case presenter, an employee of the Agency. M. Carmona Painting, Inc. ("Respondent") after being duly notified of the time and place of this hearing, failed to appear for hearing through an authorized representative or counsel.

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 exhibits A-1 (submitted prior to hearing) and A-2 (submitted at 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 the violation was aggravated by Respondent’s failure to complete the 1998 and 1999 wage surveys 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 and the potential skewing of the established rates. The Agency 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, Miguel Carmona, on or about January 20, 2001, by certified mail.

3) On February 5, 2001, Miguel Carmona, Respondent’s president and authorized representative, sent the Agency a letter that included the following unsworn statements:

“I am writing in response to your Notice of Intent to Assess Civil Penalties, a copy of which is attached. The Construction Industry Occupational Wage Survey 2000 (2000 Survey) has subsequently been responded to – first to you by fax & also by mail.

“Your Notice indicates that we have the right to request a hearing on this matter. This letter is my request for such a hearing.

“In answer to the charge, my response is simply that I thought it was not necessary. In the past, I had called the Bureau when I received the Survey & was told that it didn’t apply to my company, since we only do residential work. In filling out the survey this year, the ‘compliance’ consisted of returning the form, stating that it didn’t apply to me. While I understand the importance of the information you are attempting to gather, it does not pertain to my business. Isn’t there a way of establishing a list of commercial contractors, in order to avoid these kinds of misunderstandings?”

“In answer to the ‘aggravating factors,’ the fact is that I responded by phone & was told by a bureau employee that the survey didn’t apply to residential contractors who don’t do any commercial work.”

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 April 26, 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 March 30, 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 16, 2001, and notified them of the possible sanctions for failure to comply with the case summary order. The forum also provided Respondent with a form to use for preparing its case summary.

6) The Agency filed a timely case summary. Respondent did not file a case summary.

7) On April 13, 2001, the ALJ assigned was changed from Alan McCullough to Linda Lohr.

8) Respondent did not appear at the time and place set for hearing and no one appeared on its behalf. Respondent had not notified the forum it would not be appearing at the hearing. Pursuant to OAR 839-050-0330(2), the ALJ waited 30 minutes past the time set for hearing. When Respondent failed to appear, the ALJ found Respondent to be in default and commenced the hearing.

9) 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.

10) On May 21, 2001, the ALJ issued a proposed order that notified the participants they were entitled to file exceptions to the proposed order. The Agency filed timely exceptions which are addressed in the opinion section of this Final Order.

FINDINGS OF FACT – THE MERITS

1) At all material times, Respondent was an Oregon employer who engaged in “residential work” 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 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 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 gave notice that failure to return a completed survey form could result in civil

penalties. The packet instructed Respondent to complete and return the survey within two weeks of receiving it. The Employment Department did not receive from Respondent a completed 1998 wage survey packet.

5) In 1999 and 2000, before sending the wage survey packets, the Employment Department sent selected business entities a postcard to determine if they had contracted to do any non-residential construction work during the preceding year. This "prescreening" was not done in 1998. The Employment Division did not mail the wage survey packets to those who sent back the postcard indicating they performed only residential construction during 2000. For those entities that responded affirmatively or failed to respond, the Employment Division mailed a wage survey packet to the addresses listed for the entity.

6) The Employment Department mailed the 1999 wage survey packet to Respondent on August 13, 1999. Respondent was instructed to complete and return the survey by September 15, 1999. Reminder cards were sent to Respondent on September 24 and October 14, 1999, 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 Employment Department did not receive from Respondent a completed 1999 wage survey packet.

7) 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 failure to return a completed survey form could result in a monetary fine of up to \$5,000. The packet included instructions to complete and return the survey by September 15, 2000. The instructions refer firms who do residential construction only to page four of the survey packet where it states:

“PLEASE NOTE: THIS SURVEY DOES NOT COVER RESIDENTIAL CONSTRUCTION WORKERS. If all of your work for the survey period was done on residential construction, please answer NO to Question 2 on the cover survey, then return the survey to our office in the postage paid envelope.”ⁱ (Emphasis added)

The wage survey form twice directs firms who do not employ workers at a non-residential construction site thusly: “Do not complete the wage data form which is only for non-residential construction data.” Those firms are directed to sign the cover form and return it in the postage paid envelope.

8) 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.” Respondent’s president and authorized representative, Miguel Carmona, did not believe the wage survey pertained to his business and Respondent did not complete and return the survey packet.

9) 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.”

10) The Employment Department received the 2000 wage survey form from Respondent on February 6, 2001. Carmona returned the form on behalf of Respondent and stated on the form that the survey did not apply to his business.

11) The Employment Department and the Agency mailed all of the documents, including the 1998 and 1999 wage survey packets, to Respondent's correct address by first-class or certified mail.

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) 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 \$500.00 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 Agency alleged Respondent was an employer in 2000 and Respondent did not deny the allegation in its answer. OAR 839-050-0130 provides in part:

“(2) Except for good cause shown to the administrative law judge, factual matters alleged in the charging document, and not denied in the answer, shall be deemed admitted by the party. * * * ”

The forum concludes, therefore, that Respondent had employees during 2000 and 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 does not deny receiving the survey and, in fact, admits to eventually returning the 2000 survey, which the Employment Department received on February 6, 2001, well past the time prescribed by the Commissioner. By failing to return the survey by September 15, 2000, Respondent violated ORS 279.259(2).

In Respondent's answer, its president and authorized representative states he understood from a past telephone conversation with a "bureau employee" that the survey did not pertain to those who only perform residential work. Respondent's unsworn and uncorroborated assertion is controverted by other credible evidence on the record and, consequently, is given no weight by this forum. Although the wage survey form makes it very clear the survey does not cover residential construction workers, those firms who did only residential construction during the wage survey period and did not respond to the prescreening were still required to sign and return the survey cover form.ⁱⁱ Respondent's defense fails and the only issue is the appropriate civil penalty.

CIVIL PENALTY

In this case, the Agency seeks a \$1,500 civil penalty and alleges several aggravating circumstances. 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. Evidence shows the Employment Department sent Respondent wage surveys in 1998 and 1999 and the forum infers from the evidence in the record that Respondent received them. The Employment Department did not receive completed surveys from Respondent for either

year. There is no evidence the Agency ever investigated or cited Respondent for wage survey violations in 1998 or 1999, and the facts giving rise to those violations are outside the substantive allegation in the charging document.ⁱⁱⁱ However, because they show Respondent knew or should have known of the violation, they constitute aggravating circumstances that may be weighed in determining an appropriate penalty. *In the Matter of Rogelio Loa*, 9 BOLI 139, 146 (1990). In this case, the forum gives some weight to those circumstances, but is mindful that Respondent's lackadaisical attitude toward returning the survey may have been inadvertently aided by the Agency because Respondent was never held accountable for its failure to return the 1998 and 1999 surveys. While not a defense to its inaction during the 2000 survey, Respondent's characterization of its failure to return the wage survey as a "misunderstanding" is not wholly unreasonable and has some support in the record.

The Agency further argues that the accuracy of the commissioner's prevailing wage determinations depends on receiving completed surveys from all contractors and a contractor's failure to comply could result in skewing the established rates. Here, however, Respondent performed only residential work and the Agency did not offer evidence to show how Respondent, who was not required to provide any data for the survey, could adversely affect the accuracy of the commissioner's prevailing wage rate determinations by not signing and returning the wage survey form. Additionally, even if Respondent had been a commercial contractor required to complete the entire survey, this forum has found the violation not as serious as violations involving the failure to pay or post the prevailing wage rates. *F.R. Custom Builders*, 20 BOLI at 111. In previous cases where a respondent has performed non-residential construction work and untimely submitted the 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 102 (2000). In a previous case where a respondent performed residential construction only and failed to return a completed wage survey form, the forum imposed a \$250 penalty. *Martha Morrison*, 20 BOLI at 286. In this case, Respondent would never have received the wage survey packet had it signed and returned the initial post card designed to screen out those who were not subject to the survey and, thus, could have avoided the violation altogether. Respondent did not do so and, as a consequence, violated the law. 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 a \$500 penalty appropriate.

AGENCY'S EXCEPTIONS

The Agency filed extensive exceptions challenging the forum's evaluation of the aggravating and mitigating circumstances in this case. Fundamentally, the Agency argues that the penalties the forum assessed lack sufficient strength to ensure future compliance. While this case does not involve a willful act of defiance as the Agency suggests, there is merit to the Agency's argument regarding the inadequacy of the civil penalty. The forum has modified its opinion to clarify its reasoning with respect to the Agency's exceptions and has increased Respondent's civil penalty liability to more accurately reflect the seriousness of the violation.

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 **M. Carmona Painting, 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.

ⁱ On the cover survey, “Question 2” is directed to those who did not employ an hourly worker at a non-residential construction site and asks whether the firm did any residential construction during the survey period in Oregon. If the answer is “YES” to Question 2, the firm is directed to “sign and return this form in the postage paid envelope. Do not complete the wage data form which is only for non-residential data.” Those who answer “NO” to that question are instructed to proceed to “Question 3” which is directed to firms that did no construction work in Oregon during the survey period and those firms are asked to answer additional questions not relevant to firms whose work during the survey period was limited to residential construction. The forum notes the instructions are misleading and could be quite confusing for those firms who, though not required to complete the wage data form because their work is residential only, are diligent in attempting to follow the instructions that pertain to them.

ⁱⁱ See ORS 279.359(5) (defining “persons” required to respond) and Findings of Fact – the Merits 7 (referring to the wage survey packet, which on page four provides instructions on how persons performing only residential construction should respond to the survey).

ⁱⁱⁱ 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.