

In the Matter of

HARNEY ROCK & PAVING CO.

Case No. 92-01

Final Order of the Commissioner Jack Roberts

Issued September 21, 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.

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 August 7, 2001, in Room 1004 of the Portland State Office Building, 800 NE Oregon Street, Portland, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter Peter McSwain, an employee of the Agency. Respondent was represented by Troy Hooker, Respondent's designated authorized representative, who participated in the hearing via speakerphone.

The Agency called as witnesses: Susan Wooley, BOLI Wage & Hour Division compliance specialist.

Respondent called as witnesses: Troy Hooker, Respondent's vice president; Deborah Smith, Respondent's payroll clerk; and James Lee, a research analyst employed at the Oregon Employment Department.

The forum received into evidence:

- a) Administrative exhibits X-1 through X-8 (submitted or generated prior to hearing);
- b) Agency exhibits A-1 (submitted prior to hearing); A-2 and A-3 (submitted at hearing);
- c) Respondent exhibits R-1 and R-2 (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 Order.

FINDINGS OF FACT – PROCEDURAL

1) On January 9, 2001, the Agency issued a Notice of Intent to Assess Civil Penalties (“Notice”) 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, by its seriousness and magnitude, 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 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) On February 8, 2001, Respondent filed an answer and request for hearing, alleging that it did not receive a copy of the 2000 wage survey until January 2001. Respondent’s answer was filed on company letterhead that listed Respondent’s address as “P.O. Box 800, Hines, Oregon 97738.” Respondent’s answer was filed by

Troy Hooker, Respondent's vice president, who stated that he would represent Respondent as its authorized representative unless the case went to hearing, in which case Mark Kemp, attorney at law, would represent Respondent.

4) The Agency mailed its Notice to Respondent at "PO Box 1300, Hines, OR 97738."

5) The Agency filed a request for hearing with the Hearings Unit on May 1, 2001.

6) On June 1, 2001, the Hearings Unit served Respondent with: a) a Notice of Hearing that set the hearing for August 7, 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. These documents were mailed to Respondent at "PO Box 1300, Hines, OR 97738" and "PO Box 800, Hines, OR 97738."

7) On July 6, 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 July 30, 2001, and notified them of the possible sanctions for failure to comply with the case summary order. The forum mailed the order to Peter McSwain and Mark Kemp, attorney at law.

8) The Agency filed its case summary on July 17, 2001.

9) On July 28, 2001, Troy Hooker, Respondent's authorized representative, filed a motion for a hearing by telephone.

10) On August 1, 2001, the ALJ conducted a pre-hearing conference with Mr. McSwain and Mr. Hooker. The Agency did not object to Respondent's motion for a telephone hearing and the ALJ granted it.

11) During the pre-hearing conference, Mr. Hooker stated that Mr. Kemp had not forwarded the case summary order to him and he had not seen it. On August 1, the ALJ faxed a copy of the case summary order to Mr. Hooker, along with a form designed to assist non-attorneys in filing a case summary, and confirmed that Mr. Hooker had received it.

12) On August 2, 2001, the ALJ issued an interim order confirming: (a) the previous day's ruling on Respondent's motion for a telephone hearing; (b) that Mr. Hooker, not Mr. Kemp, would be representing Respondent at the hearing; and (c) the ALJ's requirement that Respondent's case summary be faxed directly to the ALJ and Mr. McSwain, no later than August 6, 2001. The ALJ faxed the order to Respondent and Mr. McSwain. On August 3, 2001, the ALJ telephoned Respondent's office and confirmed that the interim order had been received.

13) On August 3, 2001, Respondent filed its case summary by fax.

14) At the start of the hearing, the ALJ verbally advised the Agency and Respondent of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

15) On August 23, 2001, the ALJ issued a proposed order that notified the participants that 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 corporation and construction contractor based in Hines, Oregon and employed workers on construction

projects involving crushed rock, road construction, and asphalt paving. 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 addressed to "Harney Rock and Paving" at "PO Box 800, Hines, OR 97738" that 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's mailing address from 1998 to the time of the hearing was "P.O. Box 800, Hines, OR 97738."

6) Respondent failed to complete and return the 1998 wage survey packet.

7) The Employment Department sent a 1999 wage survey packet to Respondent at "P.O. Box 800, Hines, OR 97738" on August 13, 1999. Respondent completed and returned it on September 2, 1999.

8) On August 28, 2000, the Employment Department sent Respondent a 2000 wage survey packet addressed to "Harney Rock and Paving" at "PO Box 800,

Hines, OR 97738” that 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 at the same address 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.”

8) The Employment Department received a completed 2000 wage survey packet from Respondent on January 18, 2001.

9) The Employment Department sent all the above-mentioned documents to Respondent by first-class mail.

10) The Agency enclosed a copy of a 2000 wage survey form with the Notice it sent Respondent. Respondent completed and returned it to the Employment Department, which received Respondent’s 2000 wage survey form on January 18, 2001.

11) Wage surveys received after November 21, 2000, were not included in the results of the survey as published by the Employment Department in January 2001 and not considered when the Commissioner reviewed the survey data for the setting of prevailing wage rates.

12) “PO Box 1300, Hines, OR 97338” is the mailing address of Dan Hooker, Respondent’s president and registered agent.

13) Respondent employs up to 75 persons, including 6-7 persons who work in its office, during its busy season.

14) 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 18, 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 imposition of a \$750.00 civil penalty for Respondent's violation of ORS 279.359(2) is an appropriate exercise of the Commissioner's discretion.

OPINION

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).

A. Respondent was a “person” in the year 2000.

The testimony of Hooker and Smith established that Respondent was an employer in 2000, and therefore a “person” under the provisions of ORS 279.359.

B. The Commissioner conducted a wage survey in 2000.

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.

C. Respondent received the Commissioner's 2000 survey.

The third element of the Agency's prima facie case – whether Respondent received the 2000 survey – is contested by Respondent. Respondent contends that it

first received the 2000 survey when it received the Agency's Notice on January 11, 2001. In support of this contention, Respondent offered testimony by Troy Hooker that he had "no recollection" or "record" of receiving the 2000 survey before January 2001, Dan Hooker's affidavit that he had "no recollection" or "record" of receiving the 2000 survey before January 2001, and Deborah Smith's testimony that she could find no "record" of receiving the 2000 survey before January 2001. The Hookers testified that they are the individuals who receive and open Respondent's mail and that Smith is the person to whom the wage survey would have been given for completion.

On the other side, the Agency offered evidence consisting of a printout from the Employment Department's computer files and a supporting affidavit showing that wage surveys were sent by first class mail to Respondent in 1998, 1999, and 2000 at "P.O. Box 800, Hines, OR 97738," that this was Respondent's correct mailing address, and that Respondent received and timely returned the survey in 1999.

To resolve this issue, the forum takes guidance from the Oregon Rules of Evidence,ⁱ specifically ORE 311(1)(q). This rule creates the following presumption:

"A letter duly directed and mailed was received in the regular course of the mail."

A presumption is a rule of law requiring that once a basic fact is established the forum must find a certain presumed fact, in the absence of evidence rebutting that presumed act.ⁱⁱ In this case, credible evidence establishes that the 1998, 1999, and 2000 wage surveys were sent by first class mail to Respondent's correct mailing address. Pursuant to ORE 311(1)(q), this creates a rebuttable presumption that Respondent received the wage surveys and reminder notices sent by the Employment Department to that address. Respondent attempted to rebut this evidence through testimony as to the lack of "recollection" by Respondent's corporate officers who received Respondent's mail and the lack of a "record." If Respondent had not returned the 1999 wage survey and

provided credible evidence that their mail service was somehow disrupted in 1998 and 2000, or if Respondent had successfully attacked the credibility of James Lee and the Employment Department's records, the result might be different. As it stands, the forum concludes that the testimony offered by Respondent is legally insufficient to overcome the presumption that Respondent received the wage surveys and reminder notices.

D. Respondent failed to return the 2000 wage survey within the time prescribed by the Commissioner.

Undisputed evidence establishes that the Employment Department did not receive Respondent's completed 2000 wage survey until January 18, 2001, well after it could be of any use in determining the relevant appropriate prevailing wage rates. This evidence satisfies the fourth element of the Agency's prima facie case.

CIVIL PENALTY

In this case, the Agency seeks a \$1,000 civil penalty. In determining the appropriate size of the penalty, the forum must consider the aggravating and mitigating factors set out in OAR 839-016-0520.

A. Aggravating circumstances.

The Agency alleged and proved several aggravating circumstances. First, the forum infers from the evidence in the record that Respondent received and failed to return the 1998 wage survey. Although the Agency alleged that Respondent's failure to return the 1998 wage survey should be given additional weight as an aggravation because it was a prior violation, the forum declines to give it this weight because there is no evidence that the Agency ever investigated or cited Respondent for its failure to return the 1998 wage survey and the facts giving rise to that violation are outside the substantive allegation in the Notice. See *In the Matter of M. Carmona Painting, Inc.*, 22 BOLI __ (2001), n. 3. However, because it shows Respondent knew or should have known of the violation, Respondent's failure to return the 1998 wage survey constitutes

an aggravating circumstance that may be weighed in determining an appropriate penalty. *Id.* at _____. 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, in the form of reminder notices sent by the Employment Department, before issuing its Notice. Third, because it received those reminder notices from the Agency, Respondent knew or should have known of the violation. Finally, the violation is serious, in that the Commissioner would be unable to complete his statutorily mandated duty of determining Oregon's prevailing wage rates if all survey recipients failed to return the wage survey until it was too late to be considered. Respondent's data, if timely submitted, would have been included in the data used to set prevailing wage rates. However, the forum can only speculate as to the magnitude of Respondent's violation, inasmuch as the Agency offered no evidence from which the forum could gauge the extent to which Respondent's failure to return the 2000 wage survey skewed the Commissioner's determination of the prevailing wage rates.ⁱⁱⁱ

B. Mitigating circumstances.

There are no mitigating circumstances. 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. See *In the Matter of WB Painting & Decorating, Inc.*, 22 BOLI __ (2001).

C. Amount of civil penalty.

In *WB Painting & Decorating*, the respondent performed non-residential construction work in the period of time covered by the relevant wage survey and untimely submitted the Commissioner's wage survey form, failed to complete and return the Commissioner's 1998 wage survey, and presented no credible evidence of

mitigating factors. The Commissioner assessed a civil penalty of \$750. Based on the similarity of the *WB Painting* to this case, the forum finds that \$750 is an appropriate civil penalty.

ORDER

NOW, THEREFORE, as authorized by ORS 279.370 and as payment of the penalty assessed as a result of its violation of ORS 279.359(2), the Commissioner of the Bureau of Labor and Industries hereby orders **Harney Rock & Paving Co.** 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 Final Order and the date Respondent complies with the Final Order.

ⁱ See, e.g., *In the Matter of Dan Cyr Enterprises*, 11 BOLI 172, 177 (1993) (the forum took judicial notice of ORE 609, which permits the receipt of evidence of conviction of certain crimes for the purpose of attacking the credibility of a witness.)

ⁱⁱ LAIRD C. KIRKPATRICK, OREGON EVIDENCE 88 (3d ed. 1996).

ⁱⁱⁱ The Agency elicited testimony from Troy Hooker that Respondent's absence from the survey would be a "small" and an "appreciable" factor." However, because there was no evidence that Hooker had any awareness of the statistical significance of Respondent's absence from the survey, the forum declines to rely on this testimony to determine the magnitude of the violation vis-à-vis "skewing" the Commissioner's determination of the prevailing wage rates.