In the Matter of

LANDCO ENTERPRISES, INC.

Case No. 96-01

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 May 8, 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. LandCo Enterprises, Inc. ("Respondent") after being duly notified of the time and place of this hearing, failed to appear for hearing through authorized representative or counsel.

The Agency called no witnesses.

The forum received into evidence:

a) Administrative exhibits X-1 through X-12 (submitted or generated prior to hearing);

b) Agency exhibits A-1 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 aggravating circumstances and sought a civil penalty of $1,000 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, Wendel Belknap, on or about January 10, 2001, by certified mail.

3) On February 12, 2001, Cari Herber, Respondent's office manager/ treasurer and authorized representative, sent the Agency a letter that included the following unsworn statement:

> "I received your notice of intent to assess civil penalties in regard to the BOLI survey. This was the first notification that I received that you did not receive my 2000 survey. Upon notification I immediately recompleted the survey and mailed it in. I would like to contest these fines for these reasons. I have complied and sent in my 2000 survey (twice now). I do not feel that I should receive penalties when I completed the survey and mailed it in a timely fashion and was unaware that you did not receive it. * * * "

4) On March 28, 2001, the Agency filed a request for hearing. On March 30, 2001, the Hearings Unit served Respondent with: a) a Notice of Hearing that set the hearing for May 8, 2001; b) a Summary of Contested Case Rights and Procedures containing the information required by ORS 183.413; c) a complete copy of the

Agency's administrative rules regarding the contested case hearing process; and d) a copy of the Notice of Intent.

5) On April 4, 2001, the forum issued a case summary order requiring the Agency and Respondent to submit case summaries that included: lists of all persons to be called as witnesses; identification and copies of all documents to be offered into evidence; and any civil penalty calculations (for the Agency only). The forum ordered the participants to submit their case summaries by April 27, 2001, and notified them of the possible sanctions for failure to comply with the case summary order.

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

7) Respondent 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.

8) The Agency waived the ALJ's recitation of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

9) On June 28, 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. No exceptions were filed.

FINDINGS OF FACT – THE MERITS

1) At all material times, Respondent was an Oregon employer.

2) The Research and Analysis section of the Employment Department contracted with BOLI in 1998, 1999, and 2000 to conduct wage surveys. The BOLI Commissioner used the survey results to aid in the determination of the prevailing wage rates in Oregon.

3) As part of its contract with BOLI, the Employment Department maintained electronic files showing the “firm name” of each business entity to whom wage survey packets were sent, the address where each survey was sent, whether each survey was returned and whether it was timely returned, the date on which each survey was sent, and whether and when reminders were mailed to each business entity.

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

5) Reminder cards were sent to Respondent on September 26 and October 16, 2000, indicating that the wage survey had not been received, that Respondent was required to complete and return it by law, and that penalties could be imposed. The second reminder card was also stamped “Final Notice.”

6) On January 9, 2001, the Agency issued the Notice of Intent to Assess Civil Penalty against Respondent for its failure to return the 2000 wage survey. In a cover letter accompanying the Notice, the Agency stated that it still had not received the completed survey. The letter further stated “[T]he penalty amount is based on the premise that you will be completing the enclosed 2000 survey and returning the completed, accurate form to the Bureau on or before February 2, 2001. If you fail to complete and return the 2000 survey, the Bureau will move to amend the Notice of Intent to substantially increase the amount of civil penalties."

7) The Employment Department received the completed 2000 wage survey form from Respondent on January 18, 2001 and depicted the submission as “late” in its electronic record.

8) In 1999, the Employment Department mailed a wage survey packet to Respondent. On December 17, 1999, Respondent completed and returned the 1999 wage survey form after the Employment Department sent two reminders in September and October 1999. Respondent's 1999 submission was not described as "late" in the Employment Department's electronic file.

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:
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> "(a) The actions of the contractor, subcontractor, or contracting agency in responding to previous violations of statutes and rules.
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> "(b) Prior violations, if any, of statutes and rules.
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> "(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:
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> "* * * * *
>
> “(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*.

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. 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, claims in its answer to have returned it “twice.”

The Employment Department records show the survey was returned on January 18, 2001, well past the time prescribed by the Commissioner. In its answer, Respondent contended it returned the survey timely and that the Agency’s notice was the first Respondent knew the survey had not been received. Where a respondent fails to appear at hearing and its total contribution to the record is a request for hearing and an answer that contains only unsworn and unsubstantiated assertions, those assertions are overcome wherever they are contradicted by other credible evidence in the record. *In the Matter of Tina Davidson,* 16 BOLI 141, 148 (1997). Respondent did not appear at hearing to defend its position and credible evidence in the record controverts Respondent’s unsworn, uncorroborated statement. By failing to return the survey by September 15, 2000, Respondent violated ORS 279.259(2). The only issue, therefore, is the appropriate civil penalty.

CIVIL PENALTY

The Agency seeks a $1,000 civil penalty for the single violation of ORS 279.359(2). In determining an appropriate penalty, the forum must consider Respondent’s history, including prior violations and Respondent’s actions in responding to the prior violations, the seriousness of the current violation, and whether Respondent knew it was violating the law. The forum must also consider any mitigating circumstances offered by Respondent. OAR 839-016-0520.

Two factors favor a somewhat lighter penalty in this case. First, there is no evidence Respondent has previously violated the prevailing wage rate laws. Evidence shows the Employment Department sent Respondent a wage survey packet in 1999 and received the completed survey from Respondent after sending the October 1999 reminder. There is no evidence the Agency investigated or cited Respondent for untimely return of the 1999 survey. In fact, evidence shows the Employment Department did not even consider Respondent's submission officially late.[i] Absent evidence that the September 15 deadline for submission in 1999 was strictly enforced, the forum declines to consider Respondent's 1999 wage survey response, submitted after an October reminder, as an aggravating circumstance. Second, in previous cases this forum has found wage survey violations not as serious as violations involving the failure to pay or post the prevailing wage rate. *See F.R.Custom Builders*, 20 BOLI at 111. However, it would have been relatively easy for Respondent to comply with the law by simply returning the wage survey, and Respondent was given several opportunities to comply. Moreover, because it received at least two reminders, Respondent knew of the violation before the Agency issued its Notice of Intent. In previous cases where a Respondent has performed non-residential construction work and untimely submitted the commissioner's wage survey form or not submitted it at all, the forum has imposed a $500 civil penalty. *In the Matter of Green Planet Landscaping, Inc*., 21 BOLI 130 (2000); *In the Matter of Schneider Equipment, Inc*., 21 BOLI 60 (2000); *In the Matter of Martha Morrison*, 20 BOLI 275, 287 (2000); *F.R.Custom Builders*, 20 BOLI at 111. Having considered the circumstances in this case and other cases in which this forum has imposed penalties for violation of ORS 279.359(2), the forum finds $500 an appropriate penalty.

ORDER

NOW, THEREFORE, as authorized by ORS 279.370 and as payment of the penalty assessed as a result of Respondent's violation of ORS 279.359(2), the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **LandCo Enterprises, 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.

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[i] The Employment Department's electronic file (*See* Findings of Fact – The Merits 3, 7 & 8) submitted by the Agency specifically notes Respondent's 2000 submission as having been submitted "late" but does not so designate the 1999 submission.