

**In the Matter of**  
**MARTHA MORRISON dba American Temporary Personnel**

**Case No. 84-00**

**August 28, 2000**

**SYNOPSIS**

Respondent failed to return BOLI's 1998 and 1999 prevailing wage rate surveys by the dates specified. The commissioner imposed a \$250.00 civil penalty for Respondent's 1998 violation and a \$500.00 civil penalty for Respondent's 1999 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 June 12, 2000, at the Medford office of the Bureau of Labor and Industries, located at 700 East Main, Suite 105, Medford, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by David Gerstenfeld, an employee of the Agency, who participated via speakerphone. Respondent Martha Morrison ("Respondent") was present throughout the hearing and was not represented by counsel.

The Agency called no witnesses. Martha Morrison called herself as Respondent's sole witness.

The forum received into evidence:

a) Administrative exhibits X-1 through X-7 (generated or filed prior to hearing).

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

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.

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

3) The Agency served the Notice on Respondent on January 4, 2000.

4) On January 24, 2000, the Agency sent a Notice of Intent to Issue Final Order by Default to Respondent notifying her that she 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.

5) On January 31, 2000, Respondent filed a letter with the Agency requesting a hearing.

6) On February 8, 2000, the Agency sent a letter to Respondent notifying her that her request for hearing was insufficient because it did not contain an answer, and that a Final Order on Default would be issued if the Agency did not receive an answer by February 18, 2000.

7) On February 18, 2000, the Agency received Respondent's answer. In her answer, Respondent stated that her company "inadvertently failed to compete (sic) and return the 1998 Survey within two weeks as required," and that her company also "inadvertently failed to complete and return the 1999 Survey by September 15, 1999, as required."

8) The Agency filed a request for hearing with the Hearings Unit on February 29, 2000, and served it on Respondent.

9) On March 10, 2000, the Hearings Unit served Respondent with: a) a Notice of Hearing that set the hearing for June 12, 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.

10) 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 1, 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.

11) The Agency filed a motion for partial summary judgment on March 17, 2000. Respondent filed no response to that motion. On April 6, 2000, the ALJ granted the Agency's motion for partial summary judgment in an interim order that stated:

**“Introduction**

“This is a proceeding in which the Agency seeks to assess \$1,000 in civil penalties against Respondent based on Respondent’s two alleged violations of ORS 279.359(2).

**“The Agency’s Motion**

“On March 17, 2000, the Agency filed a motion for partial summary judgment on the issue of ‘whether Respondent violated ORS 279.359(2) by failing to make required reports and returns to the Commissioner in 1998 and 1999.’ The Agency asserted that, based on the pleadings, there is no genuine issue of any material fact and the Agency is entitled to judgment as a matter of law. Respondent has not filed a response to the Agency’s motion, and the time period for filing a responsive pleading has elapsed. OAR 839-050-0150.

**“Standard For Summary Judgment**

“A motion for summary judgment may be granted where no genuine issue as to any material fact exists and a participant is entitled to a judgment as a matter of law, as to all or any part of the proceedings. OAR 839-050-0150(4)(B). The evidentiary burden on the participants in a motion for summary judgment is as follows:

’The moving party has the burden of showing that there are no genuine issues of material fact and that he or she is entitled to judgment as a matter of law. The record on summary judgment is viewed in the light most favorable to the party opposing the motion. *This is true even as to those issues upon which the opposing party would have the trial burden.*’ *Jones v. General Motors Corp.*, 325 Or 404, 420 (1997) (quoting *Seeborg v. General Motors Corporation*, 284 Or 695, 699 (1978) (emphasis added by Jones court).

**“The Issue**

“The allegations in the Agency’s Notice of Intent that are relevant to the present motion can be summarized as follows:

“(a) In 1998 and 1999, the commissioner, consistent with ORS 279.359(1), established a survey to collect data for use in determining the prevailing rate of wage for workers in trades or occupations in the localities designated in ORS 279.348;

“(b) The 1998 survey included forms that survey recipients, including Respondent, were required to complete and return within two weeks of receiving the 1998 survey;

“(c) The 1999 survey included forms that survey recipients, including Respondent, were required to complete and return by September 15, 1999; and

“(d) Respondent received the forms but never completed or returned them.

“The Agency alleged that these facts, if proven, establish two violations of ORS 279.359(2) by Respondent. 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 each year by means of an independent wage survey and make this information available at least twice each year. The commissioner may amend the rate at any time.

’(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 rate 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.’

“To prevail on its motion, the Agency must show:

“(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.

**“Was Respondent a ‘person’ at times material?”**

“ORS 279.359(5) defines ‘person’ as including ‘any employer, labor organization or any official representative of an employee or employer association.’ In Respondent’s answer, she refers to herself as the ‘owner’ who hired employees during times material. Based on her admission that she was an ‘employer,’ the forum concludes that Respondent was a ‘person’ within the meaning of ORS 279.359(5).

**“Did the commissioner conduct surveys in 1998 and 1999 that required persons receiving the surveys to make reports or returns to the Agency that were for the purpose of determining the prevailing rates of wage?”**

“In its Notice of Intent, the Agency alleged that the commissioner conducted surveys in 1998 and 1999 that required persons receiving the surveys to make reports or returns to the Agency that were for the purpose of determining the prevailing rates of wage. In her answer, Respondent did not deny this allegation. Consequently, the forum deems this allegation to be admitted. OAR 839-050-0130(2).

**“Did Respondent receive the commissioner’s 1998 and 1999 surveys?”**

“In its Notice of Intent, the Agency alleged that Respondent received both surveys. In her answer, Respondent did not deny receipt of the commissioner’s surveys in 1998 and 1999, with their enclosed reports or returns. OAR 839-050-0130(2) provides that ‘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.’ Respondent has not made a showing of good cause. Consequently, the Agency’s allegation that Respondent received the commissioner’s surveys is deemed admitted.

**“Did Respondent fail to make the required reports or returns within the time prescribed by the commissioner?”**

“In its Notice of Intent, the Agency alleged that the 1998 survey sent to Respondent included reports or returns that Respondent was required to complete and return within two weeks of receiving the survey. In her answer, Respondent admitted her failure to ‘complete<sup>1</sup> and return the 1998 Survey within two weeks as required.’ The Agency alleged that the 1999 survey sent to Respondent included reports or returns that Respondent was required to complete and return by September 15, 1999. In her answer, Respondent admitted her failure to ‘complete and return the 1999 Survey by September 15, 1999 as required.’ The Agency has demonstrated that there is no genuine dispute regarding the fact that Respondent failed to make the required reports or return them within the required period of time.

**“Conclusion**

“Based on the specificity of the Agency’s pleadings and the admissions in Respondent’s answer, the forum concludes that there is no genuine issue of any material facts necessary to establish Respondent’s 1998 and 1999 violations of ORS 279.359(2). Consequently, the Agency is entitled to judgment as a matter of law regarding these two alleged violations.

“The Agency’s motion for partial summary judgment is **GRANTED.**”

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

13) On June 8, 2000, the ALJ received a telephone message from Mr. Gerstenfeld indicating the possible need for a postponement in a case set for hearing in Medford on June 13 due to a family emergency. The ALJ contacted Mr. Gerstenfeld, who indicated he did not plan to seek a postponement in this case, that he planned to represent the Agency via speakerphone and would not produce any witnesses or offer any exhibits other than those attached to the case summary, and that he would conduct cross-examination over the telephone. That same morning, the ALJ called Respondent's office. Respondent was unavailable, so the ALJ conveyed Mr. Gerstenfeld's message to Respondent's husband, James Morrison. Pursuant to OAR 839-050-0310, the ALJ issued a written disclosure of these communications to the Agency and Respondent.

14) 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.

15) 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.

16) During the hearing, Respondent sought to call her husband as a witness. The Agency objected on the basis that Respondent had not submitted a case summary listing witnesses she intended to call, and that the Agency would be prejudiced by its inability to prepare for cross-examination of Mr. Morrison. Respondent was unable to articulate a satisfactory reason for not submitting a case summary. After determining that excluding Mr. Morrison's testimony would not violate the duty to conduct a full and fair inquiry under ORS 183.415(10), the ALJ excluded him from testifying.

17) The ALJ issued a proposed order on July 24, 2000, 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 employer who operated American Temporary Personnel, a temporary employment agency, in Medford, Oregon. Respondent primarily employs mill and clerical workers.

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 stated 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)

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 bold typeface:

**“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 mailed 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.

7) Respondent did not employ any construction workers in 1998.

8) On or about August 18, 1999, the Employment Department mailed a wage survey packet to Respondent, which included a postage paid envelope for return of the 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 bold typeface:

**"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."**

9) 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 mailed to Respondent with "Final Notice" stamped on it.

10) Respondent received the 1999 wage survey packet, but did not return it to the Employment Department.

11) The Employment Department mailed the 1998 and 1999 wage survey packets and all other notices related to those wage surveys to Respondent at PO Box 1484, Medford, Oregon 97501, the mailing address printed on Respondent's letterhead.

12) The 1998 and 1999 wage survey packets were received by Respondent at Respondent's office and set aside by Respondent's bookkeeper/controller. Respondent did not become personally aware of their existence until after receipt of the Agency's Notice, when Respondent's current bookkeeper, at Respondent's direction, searched for and located both wage survey packets in a large pile of unopened mail. Previously, Respondent had delegated the responsibility of informing Respondent of mailings such as the wage survey packet to her bookkeeper/controller.

13) In 1999, Respondent employed two workers who performed non-residential construction work. The total non-residential construction work performed by these workers was 45 hours.

14) Respondent's bookkeeper/controller who failed to inform Respondent of receipt of the 1998 wage survey packet left Respondent's employ in August 1999. Respondent subsequently employed an interim bookkeeper/controller for two months to take care of payroll, followed by a bookkeeper who quit on December 3, 1999, after having given 3 ½ days notice.

15) 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 failed to return either survey.
- 5) There is no evidence in the record that Respondent has committed other violations of the prevailing wage rate laws.
- 6) Respondent employed no construction workers in 1998.
- 7) Respondent could easily have returned the 1998 wage survey, and should have known of her failure to do so.
- 8) Respondent employed construction workers in 1999 on non-residential construction projects.
- 9) Respondent could have easily returned the 1999 wage survey, and should have known of her failure to do so.

## 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 completed 1998 and 1999 wage surveys 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 Proposed Order below is a proper exercise of that authority.

## **OPINION**

The Agency alleges that Respondent violated ORS 279.359(2) in 1998 and 1999. The forum granted the Agency's motion for partial summary judgment with regard to whether or not the violations occurred. The only issue is the amount of civil penalties to be assessed against Respondent.

The commissioner may impose penalties of up to \$5000.00 each for Respondent's violations of ORS 279.359(2). In determining the appropriate size of the penalties, the forum must consider the factors set out in OAR 839-016-0520.

With regard to Respondent's 1998 violation, two factors weigh in favor of a relatively light penalty. First, there is no evidence that Respondent violated the prevailing wage rate laws prior to 1998. Second, even if Respondent had completed and returned the 1998 survey in a timely manner, it would have had no impact on the accuracy of the Agency's prevailing wage rate determinations for the reason that Respondent employed no construction workers in 1998. However, this lack of impact does not excuse Respondent's failure to comply with the law, something Respondent could have easily done by checking the appropriate box and providing some information about her firm before returning the wage survey. Respondent was sent two reminders of her failure to comply and still failed to return the wage survey. Based on her company's receipt of the wage survey packet and subsequent reminders from the Agency, Respondent knew or should have known of the violation, and Respondent's delegation of authority to her bookkeeper to open Respondent's mail does not relieve Respondent of that burden. Under these circumstances, the forum finds that the \$250.00 is an appropriate civil penalty.

Respondent's 1999 violation is more serious. First, it was Respondent's second violation. Second, Respondent had the same opportunity to comply as in 1998, and again failed to do so, even after receiving reminder notices in 1998 and 1999. Third,

given the fact that Respondent only employed two construction workers in 1999 for a total of 45 reportable hours, it would have been relatively simple for Respondent to complete the wage survey and return it. Fourth, Respondent employed construction workers in 1999 whose wages would have been included in the commissioner's calculation of prevailing wage rates in the Medford area and would have potentially affected those rates. Consequently, Respondent's failure to complete and return the 1999 wage survey was of greater magnitude and seriousness than Respondent's 1998 violation. Finally, Respondent should have known of the violation and her lack of contemporaneous personal knowledge, based on her delegation of authority to her bookkeepers, does not excuse her lack of knowledge. Under these circumstances, the forum finds that the \$500.00 sought by the Agency is an appropriate civil penalty.

#### **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 **Martha Morrison** 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.

---

<sup>1</sup> In the context of the Notice of Intent, Respondent's answer, and the sentence in which it appears, the forum infers that Respondent intended this word to be "complete."