

**In the Matter of**

**WILDFANG, INC.,**

**Case No. 109-06**

**Final Order of Commissioner Dan Gardner**

**Issued August 25, 2006**

**SYNOPSIS**

Respondent failed to complete and return BOLI's 2005 prevailing wage rate survey by the date the Commissioner had specified. After considering any aggravating and mitigating circumstances, the Commissioner imposed a \$1,000 civil penalty for Respondent's violation of ORS 279C.815(3). ORS 279C.815; ORS 279C.865; OAR 839-025-0520; OAR 839-025-0530; OAR 839-025-0540.

---

The above-entitled case came on regularly for hearing before Linda A. Lohr, designated as Administrative Law Judge ("ALJ") by Dan Gardner, Commissioner of the Bureau of Labor and Industries for the State of Oregon. The hearing was held on July 26, 2006, in the Bureau of Labor and Industries conference room, located at 3865 Wolverine Drive NE, Bldg. E-1, Salem, Oregon.

Case Presenter Cynthia L. Domas, an employee of the Agency, represented the Bureau of Labor and Industries ("BOLI" or "the Agency"). Ginny Essman, Vice President of Operations for Wildfang, Inc. ("Respondent"), appeared as Respondent's authorized representative.

The Agency called as witnesses: Leanna Harmon, research analyst in the Workforce and Economic Research Division of the Oregon Employment Department, and Marsha Jossey, administrative specialist in the Prevailing Wage Rate Unit of the BOLI Wage and Hour Division.

Respondent called its authorized representative, Ginny Essman, as a witness.

The forum received into evidence:

- a) Administrative exhibits X-1 through X-8 (submitted or generated prior to hearing);
- b) Agency exhibits A-1 through A-6 (submitted prior to hearing);
- c) Respondent exhibits R-1 through R-4 (submitted prior to hearing).

Having fully considered the entire record in this matter, I, Dan Gardner, 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 March 24, 2006, the Agency issued a Notice of Intent to Assess Civil Penalties (“Notice”) alleging Respondent unlawfully failed to complete and return the 2005 Construction Industry Occupational Wage Survey (“wage survey”) by September 19, 2005, in violation of ORS 279(C).815(3). The Agency alleged aggravating circumstances and sought a civil penalty of \$1,000 for the single alleged violation. The Notice gave Respondent 20 days to file an answer and make a written request for a contested case hearing.

2) The Agency served Respondent with the Notice on or about March 27, 2006, by certified mail.

3) On April 11, 2006, Respondent timely filed an answer through its authorized representative, Ginny Essman. In its answer, Respondent denied it failed to complete and return the 2005 wage survey by the September 19 due date and requested a hearing.

4) On June 5, 2006, the Agency requested a hearing. On June 6, 2006, the Hearings Unit issued a Notice of Hearing stating that the hearing would commence at 10 a.m. on July 26, 2006. The hearing notice included a copy of the Notice of Intent, a language notice, a Servicemembers Civil Relief Act notification, and copies of the

Summary of Contested Case Rights and Procedures and the Contested Case Hearing Rules, OAR 839-050-0000 to 839-050-0440.

5) On June 15, 2006, 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 July 14, 2006, and notified them of the possible sanctions for failure to comply with the case summary order.

6) The Agency and Respondent timely filed case summaries.

7) Prior to hearing, the Agency filed a motion to amend the Notice to correct scrivener's errors. Respondent did not file a response in opposition to the motion and the forum granted the Agency's motion.

8) Before the hearing began, the ALJ verbally advised the participants of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

9) The ALJ issued a proposed order on August 3, 2006, that notified the participants they were entitled to file exceptions to the proposed order within ten days of its issuance. Neither the Agency nor Respondent filed exceptions.

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

1) At all material times, Respondent was a duly registered Oregon corporation engaged in construction. Respondent employed approximately 22 persons in Oregon. Respondent's principal place of business was located at 3725 Kashmir Way SE, Salem, Oregon, and its mailing address was PO Box 12125, Salem, Oregon 97309.

2) At all times material, Ginny Essman was Respondent's vice president of operations. Essman also was responsible for preparing payroll, tracking accounts

payable and receivable, hiring and firing personnel, and handling contract matters. Essman has worked for Respondent since 1989.

3) The Workforce and Economic Research Division of the Oregon Employment Department (“Employment Department”) contracted with BOLI each year from 1999 to 2005 to conduct wage surveys. The purpose of the wage surveys is to aid the BOLI Commissioner in the determination of the prevailing wage rates in Oregon. In 2005, as in past years, the BOLI Commissioner used the wage surveys to determine Oregon’s prevailing wage rates.

4) As part of its contract with BOLI, the Employment Department routinely maintains electronic files showing the name and “survey ID” number of each business entity to whom wage survey packets are sent each year, 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.

5) The Employment Department conducts wage surveys by first sending “presurvey” postcards to business entities that have been identified through the Quarterly Census Employment and Wages (“QCEW”) database, using the North American Industry Classification [Code] System (“NAICS”) to determine which entities perform construction contracts. Contractors who participated in the previous year’s survey are sent a postcard notifying them that they have been selected to participate in the current wage survey and that the survey packet will follow in the mail. An entity that is identified as one that supplied or made deliveries to construction sites is sent a post card requiring a response to questions about any labor performed during deliveries. All other entities are sent a postcard requiring a response to questions about the nature of the construction work they perform, e.g., whether they perform residential only, non-

residential, or a combination thereof. The postcard questionnaires require a response. Depending on the response to the questions, the Employment Department may or may not mail a wage survey packet to the responding entity. If an entity fails to respond, the Employment Department sends a wage survey packet to the address or addresses listed for that entity.

6) On July 5, 2005, the Employment Department sent Respondent a presurvey postcard requiring a response. Respondent did not return the postcard. On August 10, 2005, the Employment Department sent Respondent a 2005 wage survey packet that included a pre-addressed, 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 19, 2005. Respondent's corporate vice president received the 2005 wage survey packet that was mailed to Respondent's mailing address: PO Box 12125, Salem, Oregon 97309.

7) On September 26, 2005, the Employment Department sent Respondent a reminder postcard advising that the completed wage survey had not been received, that Respondent was required to complete and return it by law, and that penalties could be imposed. On October 10, 2005, the Employment Department sent Respondent a second wage survey packet, labeled "Final Notice" with a printed warning: "SURVEY PAST DUE \* \* \* Please Respond Immediately" along with the same advisory set forth in the reminder postcard. Respondent did not respond.

8) On February 17, 2006, the Agency, through its Prevailing Wage Rate Unit, sent Respondent a letter that stated, in pertinent part:

"Our records indicate that despite reminders, you failed to return a report for the 2005 [prevailing wage rate survey] by September 19, 2005. Our records also indicate that this may not be the first time you have failed to

respond as required. If that is the case, you have violated the law in multiple years.

“Since you have not responded to the survey, it has become necessary to begin the Administrative Process. We will soon serve upon you a Notice of Intent and ultimately a judgment in this matter. You are advised that failure to return this survey or filing fraudulent or incomplete information will result in penalties. We would prefer to resolve this matter prior to taking legal action; however, without your cooperation, this is not possible. You may stop this action by completing and returning the enclosed 2005 [wage survey] by no later than March 3, 2006.

“If you did not perform any non-residential construction within Oregon during the time period covered by this survey, you can satisfy your legal obligation to respond to the survey by answering questions 1 and 2 of the survey as directed, signing it where indicated and returning it in the pre-addressed, postage paid envelope included in the survey booklet.

“If we do not receive a completed survey from you by March 3, 2006, we will assess a civil penalty against you based on your continuing violations. Each day that you do not provide the survey is a separate violation, and each violation can subject you to a civil penalty of up to \$5,000. (ORS 279(C).865 and OAR 839-025-0510).”

The letter was mailed to Respondent’s mailing address and a copy sent to Respondent’s business location. Respondent received the letters on or about February 21, 2006, but did not respond.

9) After Respondent was served with the Notice of Intent to Assess Civil Penalties on or about March 27, 2006, Respondent’s vice president contacted the Agency and the Employment Department and offered to send the completed wage survey by facsimile transmission. On March 29, 2006, the Employment Department received a completed wage survey from Respondent.

10) On the Wage Data Form of the 2005 wage survey, Respondent identified the week it employed “the greatest amount of non-owner hours at non-residential construction sites between September 1, 2005, and August 31, 2005” and listed seven workers, their wage rate region, skill level, number of hours they worked during that week, and their basic hourly rate.

11) In 2004, the Employment Department mailed a presurvey postcard and, later, a wage survey packet to Respondent at the mailing address listed in its database: PO Box 12125, Salem, Oregon 97309. The completed wage survey was due by September 17, 2004. Thereafter, the Employment Department mailed a reminder postcard to Respondent on September 21, 2004. During the week of October 12, 2004, the Employment Department mailed a second wage survey packet along with a final reminder to complete and return the wage survey packet that was past due. Respondent received the 2004 wage survey. The Employment Department did not receive a completed 2004 wage survey from Respondent by the September 17 due date.

12) Returned wage surveys were accepted and included in the survey results as late as October 28, 2005. The survey database was then closed to prepare for a rate setting meeting with the BOLI Commissioner and his staff on November 4, 2005. Surveys received after October 28, 2005, were not included in the results of the survey as published by the Oregon Employment Department in January 2006 and not considered by the BOLI Commissioner when setting prevailing wage rates.

13) Harmon and Jossey were credible witnesses and the forum credited their testimony in its entirety.

14) Ginny Essman's testimony that Respondent timely submitted the 2005 wage survey was self serving, not supported by credible evidence, and was contradicted by credible evidence establishing that the Employment Department did not receive Respondent's completed wage survey until March 29, 2006. The forum gave no weight to Essman's testimony concerning when Respondent mailed the 2005 wage survey.

### **ULTIMATE FINDINGS OF FACT**

- 1) Respondent was an Oregon employer in 2005.
- 2) The Commissioner conducted a wage survey in 2005 that required persons receiving the surveys to make reports or returns to the Agency for the purpose of determining the prevailing wage rates.
- 3) Respondent received the 2005 wage survey packet.
- 4) Respondent failed to return the completed survey by September 19, 2005, the date specified by the Commissioner.
- 5) Respondent received the 2004 wage survey packet and did not return the completed survey by September 17, 2004, the date specified by the Commissioner.

### **CONCLUSIONS OF LAW**

- 1) The actions, inaction, and statements of Ginny Essman are properly imputed to Respondent.
- 2) Respondent was a person required to make reports and returns under ORS 279C.815 who violated ORS 279C.815(3) by failing to return the Commissioner's 2005 wage survey by September 19, 2005.
- 3) The Commissioner is authorized under ORS 279C.865 to assess civil penalties not to exceed \$5,000 for each violation of any provision of ORS 279C.800 to 279C.870 or any rule of the commissioner adopted thereunder and, having considered any aggravating and mitigating circumstances in accordance with OAR 839-025-0520, has exercised his discretion appropriately by imposing a \$1,000 civil penalty for Respondent's single violation of ORS 279C.815(3).

### **OPINION**

#### **2005 PREVAILING WAGE SURVEY VIOLATION**

To prove Respondent violated ORS 279(C).815(3), the Agency must establish:

- (1) Respondent is a "person" as defined in ORS 279(C).815(1);

- (2) The commissioner conducted a survey in 2005 that required persons receiving the surveys to make reports or returns to the Agency for the purpose of determining the prevailing wage rates;
- (3) Respondent received the commissioner's 2005 survey; and
- (4) Respondent failed to make the required reports or returns within the time prescribed by the commissioner.

*In the Matter of Emmert Industrial Corp.*, 26 BOLI 284, 289 (2005).

The first three elements are not in dispute. The only issue is whether Respondent failed to complete and return the 2005 wage survey within the time prescribed by the Commissioner.

The undisputed facts are threefold: 1) Respondent received the 2005 wage survey; 2) Respondent was required to complete and return the survey by September 19, 2005; 3) the Employment Department received the completed wage survey from Respondent on March 29, 2006. Essman provided no proof that she completed and returned the wage survey before the required due date as Respondent's answer contended. On the other hand, credible evidence established that the Employment Department has no record of having received anything from Respondent until it received the completed wage survey on March 29, 2006. Moreover, Essman admitted she had no contact with the Employment Department or the Agency until March 28 or 29, 2006. Credible evidence shows the Employment Department sent Respondent a postcard on September 26, 2005 that stated in bold lettering, "Survey Past Due Please Respond" and on October 10, 2005 sent a "final reminder" and another survey booklet that stated in bold lettering, "Survey Past Due Please Respond Immediately." Essman gave no explanation for why she did not make inquiry about those "reminders" if she believed she had already sent the completed wage survey to the Employment Department.

Additionally, evidence shows the Agency sent Respondent a letter on February 17, 2006, warning Respondent that if the Agency did not receive the completed survey by March 3, 2006, a civil penalty would be assessed for a continuing violation of ORS

279C.815. Essman's contention that she mailed the completed survey "for the second time" on March 2, 2006, is not supported by credible evidence.<sup>i</sup> Instead, a preponderance of credible evidence shows that Essman took no action to respond to the survey until after the Notice of Intent to Assess Civil Penalties issued on March 24, 2006. The Agency proved Respondent failed to make the required reports or returns within the time prescribed by the Commissioner and Respondent is liable for civil penalties.

## **CIVIL PENALTY**

The Agency seeks \$1,000 as a civil penalty for Respondent's violation of ORS 279(C).815(2). In determining the appropriate penalty amount, the forum must consider Respondent's history, including prior violations, if any, and Respondent's actions in responding to the prior violations, the opportunity and degree of difficulty to comply, the magnitude and seriousness of the current violation, and whether Respondent knew it was violating the law. The forum must also consider all mitigating circumstances presented by Respondent. OAR 839-016-0520.

### **A. Aggravating Circumstances**

First, the Agency alleged and credible evidence established that Respondent failed to complete and return the 2004 wage survey by the September 17, 2004, due date as required by the Commissioner. Essman admitted at hearing that Respondent had received the previous year's survey, but equivocated about whether the 2004 survey was completed and returned by the due date established by the Commissioner. However, Employment Department records unequivocally demonstrated that Respondent neglected to complete and return the 2004 wage survey form as required. Credible evidence showed that several reminders were sent to Respondent in 2004, and Respondent failed to respond. That historical fact, although outside the scope of

the charging document,<sup>ii</sup> is an aggravating circumstance that may be weighed in determining an appropriate penalty. *In the Matter of The Landscape Company of Portland*, 22 BOLI 77 (2001). In this case, Respondent's past failure to return the required survey demonstrates Respondent's knowledge of the violation and that Respondent does not take its legal obligation seriously.

Second, the 2005 wage survey was mailed to Respondent well over a month before the required due date giving Respondent ample opportunity to comply with the law. Moreover, Respondent had at least two reminders after the due date passed before the Agency warned that sanctions were imminent, and, even after the Agency's February 17 final warning letter, Respondent remained unresponsive until the Notice of Intent to Assess Civil Penalties issued on March 24, 2006. Also, Respondent presented no credible evidence that it had difficulty complying with the law. In fact, Respondent introduced evidence that shows it would have been relatively easy for Respondent to have timely submitted the wage survey. According to the responses to the questions in the completed wage survey Respondent submitted on March 29, 2006, Respondent had seven employees who performed "the greatest amount of non-owner hours at non-residential construction sites" during Respondent's "peak week" between September 1, 2004, and August 31, 2005. Since it is required by law to maintain payroll records for its employees, Respondent should have had little difficulty acquiring and providing the requested information. Based on the credible evidence herein, the forum concludes that Respondent had ample opportunity and a minimal degree of difficulty to comply with the prevailing wage rate laws.

Third, while this forum previously has held that wage survey violations are not as serious as violations involving the failure to pay or post the prevailing wage rate, the forum also has determined that "workers may suffer substantial financial harm if the

prevailing wage rates set by the Commissioner do not accurately reflect wages paid in the community because employers who pay their employees well do not return the surveys.” *F.R.Custom Builders*, 20 BOLI 102, 111 (2000). Moreover, since the Commissioner is mandated to “make determinations of the prevailing wage rates,” the forum infers that the wage surveys, conducted pursuant to ORS 279C.815 (5), are the Commissioner’s primary source of “relevant data and information” to ensure that the determinations accurately reflect wages paid in the community. The forum also infers that the relevant data and information are less useful if not submitted in time to be considered in the prevailing wage rate calculations. In this case, Respondent’s data would have been considered in the 2005 survey because the evidence shows Respondent was performing non-residential work during 2005. Consequently, Respondent’s non-compliance is serious because it undermines the Commissioner’s ability to complete his statutory duty to accurately determine the prevailing wage rates. See *In the Matter of Emmert Industrial Corporation*, 26 BOLI 284, 289 (2005).

**B. Mitigating Circumstances**

Respondent presented no mitigating circumstances for the forum to consider. Essman’s claim that she submitted the wage survey before it was due on September 19, 2005, was contradicted by other credible evidence, including evidence that the Employment Department received Respondent’s completed survey well over six months past the date designated by the Commissioner.

**C. Civil Penalty Amount**

Although the Commissioner may impose a penalty of up to \$5,000 for Respondent’s violation, the Agency has already mitigated Respondent’s violation by seeking \$1,000 as a civil penalty. Having considered the aggravating circumstances, the forum assesses a \$1,000 civil penalty.

## ORDER

NOW, THEREFORE, as authorized by ORS 279C.865 and as payment of the penalty assessed as a result of Respondent's single violation of ORS 279C.815(3), the Commissioner of the Bureau of Labor and Industries hereby orders **Wildfang, Inc.** to deliver to the Fiscal Services Office of the Bureau of Labor and Industries, 1045 State Office Building, 800 NE Oregon Street, Portland, Oregon 97232-2180, a certified check payable to the Bureau of Labor and Industries in the amount of ONE THOUSAND DOLLARS (\$1,000.00), 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>i</sup> Essman presented a copy of an envelope postmarked March 2, 2006, that she admitted was stamped with Respondent's postage meter. She did not say when she delivered the envelope to a US Post Office and there is no other postmark that shows when the envelope was mailed from a US Post Office.

<sup>ii</sup> 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 2005 violation.