

**In the Matter of**

**STORM KING CONSTRUCTION, INC.,**

**Case No. 99-05**

**Final Order of Commissioner Dan Gardner**

**Issued September 16, 2005**

**SYNOPSIS**

Respondent failed to complete and return BOLI's 2001 and 2002 prevailing wage rate survey and returned BOLI's 2004 prevailing wage rate survey six months after the filing deadline. The Agency proved aggravating circumstances and there were no mitigating circumstances. The Commissioner imposed a \$250 civil penalty for each of Respondent's 2001 and 2002 violations and a \$500 civil penalty for Respondent's 2004 violation. ORS 279.359, ORS 279.370; OAR 839-016-0500, OAR 839-016-0520.

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The above-entitled case came on regularly for hearing before Alan McCullough, 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 August 4, 2005, at the Salem office of the Bureau of Labor and Industries, located at 3865 Wolverine St. N.E., Building E-1, Salem, Oregon.

The Bureau of Labor and Industries ("BOLI" or "the Agency") was represented by case presenter Cynthia L. Domas, an employee of the Agency. Respondent was represented by Richard Werst, Respondent's president and authorized representative. Mr. Werst took part in the hearing via telephone and the ALJ and case presenter were present at BOLI's Salem's office during the hearing.

The Agency called Denise Ofarrell, an employee of the Oregon Employment Department, and Vee Souryamat, a BOLI employee, as witnesses. Respondent called Richard Werst as its only witness.

The forum received into evidence:

a) Administrative exhibits X-1 through X-7 (submitted or generated prior to hearing);

b) Agency exhibits A-1 through A-3 (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 18, 2005, the Agency issued a Notice of Intent to Assess Civil Penalties (“Notice”) in which it alleged that: (a) Respondent, an employer that performed nonresidential construction work in 2001, received and failed to complete and return the 2001 Construction Industry Occupational Wage Survey (“2001 Survey”) in violation of ORS 279.359(2); (b) Respondent, an employer that performed nonresidential construction work in 2002, received and failed to complete and return the 2002 Construction Industry Occupational Wage Survey (“2002 Survey”) in violation of ORS 279.359(2); and (c) Respondent, an employer that performed nonresidential construction work in 2004, received and failed to complete and return the 2004 Construction Industry Occupational Wage Survey (“2004 Survey”) by September 17, 2004, in violation of ORS 279.359(2). The Agency alleged the violations were aggravated in that Respondent knew, or should have known of these violations and had more than ample opportunity to comply with the law, Respondent’s failure to take appropriate action to remedy its violation after having its violation pointed out, the Agency’s expenditure of significant resources trying to obtain Respondent’s compliance with the law, and the seriousness and great magnitude of the violation, as shown by its affect on the Commissioner’s ability to accurately determine the prevailing wage rates and the possible skewing of the established rates. The Agency sought civil penalties of

\$250 for the alleged 2001 Survey violation, \$250 for the alleged 2002 Survey violation, and \$500 for the alleged 2004 Survey violation.

2) On March 24, 2005, Respondent's president, Richard Werst, filed an answer and request for hearing in which Respondent alleged, among other things:

"[i]f any material was mailed to us from your agency it was not in a form to where I would be able to tell it from junk mail. \* \* \* Our company builds pole buildings, farm buildings, garages, shops, etc. I have filled out your questioner [sic] in the past & nothing in it applies to us. \* \* \* I can not believe that you were [sic] fine us for not filling our [sic] surveys that have nothing to do with us. If the survey was on prevailing wage, we contacted [sic] no buildings in which prevailing wages were required in 2003 or 2004, therefore the survey does not apply to us."

3) On April 22, 2005, Respondent filed a letter authorizing Richard Werst to act as its authorized representative.

4) The Agency filed a request for a telephonic hearing with the Hearings Unit on July 5, 2005.

5) On July 5, 2005, the Hearings Unit issued a Notice of Hearing to Respondent and the Agency stating the time and place of the hearing as August 4, 2005, at 9:30 a.m., at BOLI's Salem office located at 3865 Wolverine St. NE, Bldg. E-1, Salem, Oregon. Together with the Notice of Hearing, the forum sent a copy of the Order of Determination, a document entitled "Summary of Contested Case Rights and Procedures" containing the information required by ORS 183.413, a Servicemembers Civil Relief Act (SCRA) Notification, and a copy of the forum's contested case hearings rules, OAR 839-050-000 to 839-050-0440.

6) On July 7, 2005, the forum ordered the Agency and Respondent each to submit a case summary by July 26, 2005, and notified them of the possible sanctions for failure to comply with the case summary order.

7) Respondent filed its case summary on July 11, 2005.

8) The Agency filed its case summary on July 26, 2005.

9) 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.

10) During the hearing, Respondent moved that the Agency's charges regarding the Commissioner's 2001 and 2002 wage surveys be dismissed for two reasons. First, Respondent asserted it was unfair for the Agency to wait so long after the alleged violations before assessing civil penalties. Second, Respondent argued that the charges should be dismissed because the Agency had not sent contemporaneous "registered letters" to Respondent regarding the 2001 and 2002 violations. Both arguments fail. The Agency is not bound by a statute of limitations in this matter and there is no requirement that a "registered letter" be sent to Respondent as a precursor to issuing a charging document. Respondent's motion is **DENIED**.

11) On August 29, 2005, the ALJ issues 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) In 2001, 2002, and 2004, Respondent was an Oregon employer based in Tillamook, Oregon that employed workers to perform nonresidential construction projects including pole buildings, farm buildings, garages and shops. At all times material herein, Respondent's mailing address has been 15555 Trask River Rd., Tillamook, OR 97141.

2) Richard Werst is Respondent's corporate president and is responsible for Respondent's payroll, bill paying, bidding, selling, drawing, some building, and responding to Respondent's mail.

3) The Commissioner of BOLI, consistent with ORS 279.359(1), established a survey entitled Construction Industry Occupational Wage Survey ("wage survey") in

2001, 2002, and 2004 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.

4) The Workforce and Economic Research Division of the Employment Department contracted with BOLI each year from 1999 to 2004 to conduct a Construction Industry Occupational Wage Survey (“wage survey”). The wage survey was to be used by the Commissioner of BOLI to aid in the determination of the prevailing wage rates in Oregon and was, in fact, used for such a purpose in those years. The Employment Department conducted its survey by mailing the wage survey forms to employers.

5) In 2001 and 2002, the Employment Department conducted its wage survey by first sending business entities a questionnaire to determine if they had contracted to do any nonresidential construction work during the preceding year. Employers who responded affirmatively or failed to respond were mailed a wage survey packet.

6) The Employment Department mailed a wage survey packet to Respondent in 2001 and 2002. In 2001, the Commissioner required employers to complete and return the wage survey by September 21, 2001. In 2002, the Commissioner required employers to complete and return the wage survey by September 20, 2002. Respondent received both wage surveys but failed to complete and return them. Both years, the Employment Department sent: (1) a reminder card to Respondent indicating that the wage survey had not been received, that Respondent was required by law to complete and return it, and that penalties could be imposed for failure to comply; and (2) a second survey packet labeled “Final Notice.”

7) In the week of July 5, 2004, the Employment Department sent a notice to Respondent at 15555 Trask River Road, Tillamook, OR 97141 stating that Respondent

would receive a wage survey booklet in the mail in late August 2004 that sought information about non-residential work performed by Respondent from “September 1, 2003 through August 31, 2004.” The Employment Department mailed the Commissioner’s 2004 wage survey to Respondent during the week of August 9, 2004 at the same address in a postage paid envelope. The words “**FILING DEADLINE: September 17, 2004**” were conspicuously printed on the cover of the survey, and the survey booklet clearly gave notice that its completion and return was required by law and violation could result in the assessment of a civil penalty of up to \$5,000. Respondent did not return the wage survey.

8) In the week of September 21, 2004, the Employment Department sent a reminder card to Respondent stating that Respondent’s wage survey had not been received, that Respondent was required by law to complete and return it, and that civil penalties could be imposed if Respondent failed to complete and return it.

9) In the week of October 12, 2004, the Employment Department sent another 2004 wage survey to Respondent with an additional notice on the cover that stated:

“FINAL NOTICE  
Survey Past Due  
Oregon law requires that you respond (ORS 279.359)”

10) Some surveys received as late as November 15, 2004, were included in survey data the Commissioner used to set prevailing wage rates. Surveys received after that date were not included in the results of the survey published by the Employment Department in January 2005 and not considered when the Commissioner reviewed the survey data for the setting of the prevailing wage rates.

11) Werst was sick with the flu during October 2004 and there was no one else at Respondent’s business to handle paperwork like BOLI’s wage survey.

12) On February 3, 2005, BOLI sent a letter to Respondent at 15555 Trask River Road, Tillamook, OR 97141 that included the following statements:

“ORS 279.359 requires you to report information pertaining to wages paid in non-residential construction to the Commissioner as requested in the annual survey. Our records indicate that despite reminders, you failed to return a report for the 2004 Construction Industry Occupational Wage Survey by September 17, 2004. Our records also indicate that this may not be the first time you have failed to respond as required.

“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 2004 Occupational Wage Survey by no later than February 21, 2005.

“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 February 21, 2005, we will assess a civil penalty against you based on your continuing violations. \* \* \*”

13) Respondent returned the 2004 wage survey and the Employment Department received it on April 5, 2005.

14) Respondent currently employs 8-9 persons.

15) Werst does not believe that Respondent is legally obligated to complete the Commissioner’s wage surveys because Respondent does no prevailing wage rate work.

16) Souryamat and Werst were both credible witnesses.

#### **ULTIMATE FINDINGS OF FACT**

1) In 2001, 2002, and 2004, Respondent was an Oregon employer based in Tillamook, Oregon that employed workers to perform nonresidential construction projects.

2) The Commissioner of BOLI, consistent with ORS 279.359(1), established and conducted a wage survey in 2001, 2002, and 2004 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.

3) The Oregon Employment Department, acting as BOLI's agent, mailed a wage survey packet to Respondent in 2001, 2002, and 2004. Respondent received, but did not return, the 2001 and 2002 wage survey packets. Respondent returned the 2004 wage survey packet and it was received by the Employment Department on April 5, 2005.

### **CONCLUSIONS OF LAW**

1) At all times material herein, Respondent was a person required to make reports and returns under ORS 279.359(2). ORS 279.359(5)

2) Respondent's failure to complete and return the Commissioner's wage surveys in 2001 and 2002 constitutes two violations of ORS 279.359(2). Respondent's failure to complete and return the Commissioner's 2004 wage survey by September 17, 2004 constitutes a single violation of ORS 279.359(2).

3) The Commissioner has the authority to assess a civil penalty for violations of ORS 279.359. The imposition of \$1,000 civil penalties for Respondent's three violations of ORS 279.359(2) is an appropriate exercise of the Commissioner's discretion.

### **OPINION**

#### **INTRODUCTION**

The Agency alleged that Respondent violated ORS 279.359(2) in 2001, 2002, and 2004. 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 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 survey; and
- (4) Respondent failed to make the required reports or returns within the time prescribed by the Commissioner.

*In the Matter of Cedar Landscape, Inc.*, 23 BOLI 287, 292 (2002).

**A. Respondent was a "person" in the years 2001, 2002, and 2004.**

Under ORS 279.359(5), a "person" includes an employer. The Agency alleged in its Notice that Respondent was an employer in 2001, 2002, and 2004. Respondent did not deny that allegation in its answer and presented no evidence to the contrary. OAR 839-050-0130(2) provides that "factual matters alleged in the charging document and not denied in the answer will be deemed admitted by the party." Respondent's failure to deny the Agency's allegations that it was an employer in 2001, 2002, and 2004 constitutes an admission that satisfies the first element of the Agency's case.

**B. The Commissioner conducted wage surveys in 2001, 2002, and 2004.**

The Agency submitted an affidavit by Denise Ofarrell, an employee of the Employment Department, that established that BOLI contracted with the Employment Department from 1999 to 2004 to conduct Construction Industry Occupational Wage Surveys and that those surveys were in fact conducted. Respondent produced no evidence to the contrary. This proves the second element of the Agency's case.

**C. Respondent received the Commissioner's 2001, 2002, and 2004 wage surveys.**

The Agency alleged in its Notice of Intent that Respondent received the Commissioner's wage survey in 2001, 2002, and 2004. Respondent did not deny the allegations concerning receipt of the 2001 and 2002 wage surveys in its answer and those allegations are deemed admitted. OAR 839-050-0130(2). Respondent's president, while not denying outright that he received the 2004 wage survey, intimated

that it came in a form that was indistinguishable from “junk mail.” The Agency provided evidence consisting of a printout from the Employment Department’s computer files and a supporting affidavit from Ofarrell showing that wage surveys were sent by first class mail to Respondent in 2004 at “15555 Trask River Road, Tillamook, OR 97141, and at hearing Werst testified that this has always been Respondent’s address.

To resolve this issue, the forum takes guidance from the Oregon Rules of Evidence, 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 fact.<sup>1</sup> In this case, credible evidence establishes that the 2004 wage survey was 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 did not specifically deny receiving the wage survey, and the Employment Department’s electronic records show that the Employment Department in fact received Respondent’s 2004 wage survey on April 5, 2005. Based on this evidence, the forum concludes that Respondent received the 2004 wage survey.

**D. Respondent failed to return the 2001, 2002, and 2004 wage surveys within the time prescribed by the Commissioner.**

The Agency alleged that Respondent never completed and returned the 2001 and 2002 wage surveys. Respondent did not deny those allegations in its answer and they are deemed admitted. Testimony by Respondent and the Employment Department’s electronic records established that the Employment Department received Respondent’s 2004 wage survey on April 5, 2005, but the Agency provided no evidence as to whether or not it was completed. Werst testified that he filled out the 2004 wage

survey and returned it, but also acknowledged he did not return it by September 17, 2004. This evidence establishes that Respondent did not timely submit the 2004 wage survey and satisfies the final element of the Agency's case.

## **CIVIL PENALTY**

In this case, the Agency seeks a \$250 civil penalty for each of Respondent's 2001 and 2002 wage survey violations and a \$500 civil penalty for Respondent's 2004 wage survey violation. 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, Respondent knew, or should have known, of its violations. The forum has concluded that Respondent received the 2001, 2002, and 2004 wage surveys, as well as information accompanying those surveys stating that Respondent was required by law to complete and return the surveys. OAR 839-016-0500 provides that "[a] person acts knowingly if the person has the means to be informed but elects not to do so." Accordingly, Werst's argument that the wage surveys were indistinguishable from "junk mail" and his implied failure to read the mail from BOLI is not a defense to the Agency's allegation that Respondent knowingly failed to return the 2001 and 2002 wage surveys and knowingly failed to return the 2004 survey in time to have it considered. The forum has previously decided that Werst's belief that ORS 279.359(2) does not apply to Respondent is not a defense to the Agency's charge that Respondent knew or should have known of the violation. *In the Matter of Elisha, Inc.*, 25 BOLI 125, 158 (2004), *appeal pending*.

Second, BOLI had to expend extra resources to try to obtain Respondent's compliance with the law. The Employment Department, which was under contract with

BOLI, had to send reminder notes and a second wage survey packet to Respondent in 2001, 2002, and 2004, and BOLI itself sent a letter to Respondent on February 3, 2005, in an attempt to gain Respondent's compliance before issuing its Notice.

Third, Respondent's violations are serious, in that the Commissioner would be unable to complete his statutorily required duty of determining Oregon's prevailing wage rates if all survey recipients did not return the wage surveys or only returned them after it was too late to consider them. Respondent's data, if timely submitted, would have been included in the data used to set prevailing wage rates. However, the Agency offered insufficient evidence for the forum to determine whether or not Respondent's three violations resulted in a skewing of the established prevailing wage rates.

Fourth, Respondent had ample opportunity to comply with the law, receiving multiple reminders of its obligation to comply in 2001, 2002, and 2004.

**B. Mitigating circumstances.**

There are no mitigating circumstances. Although Werst credibly testified that his serious illness in October 2004 affected his ability to perform Respondent's administrative tasks, the deadline for submission of the 2004 wage survey was September 17, 2004, by which time Werst already had five weeks to complete and return the survey. Significantly, Werst did not testify that he would have submitted the 2004 wage survey in October 2004, had he not become ill. The forum views Respondent's "junk mail" defense and Werst's mistaken belief that Respondent was not required to complete and return the wage surveys as excuses to avoid compliance with the law and not as mitigating circumstances

**C. Amount of civil penalty.**

In prior wage survey cases, the Commissioner has assessed civil penalties ranging from \$350 to \$1,000 for single violations of ORS 279.359(2).<sup>ii</sup> The Agency

alleged, and the forum has concluded that Respondent committed three violations of ORS 279.359(2). There are several aggravating circumstances and no mitigating circumstances. The amount of civil penalties sought by the Agency is amply supported by the facts in this case and by prior final orders of the Commissioner. The forum assesses a \$250 civil penalty for Respondent's 2001 violation, a \$250 civil penalty for Respondent's 2002 violation, and a \$500 civil penalty for Respondent's 2004 violation, for a total of \$1,000.

### ORDER

NOW, THEREFORE, as authorized by ORS 279.370, and as payment of the civil penalties assessed as a result of its three violations of ORS 279.359(2), the Commissioner of the Bureau of Labor and Industries hereby orders **Storm King Construction, 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), 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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<sup>i</sup> LAIRD C. KIRKPATRICK, OREGON EVIDENCE Article III-12 (4th ed. 2002).

<sup>ii</sup> See, e.g., *In the Matter of Cedar Landscape, Inc.*, 23 BOLI 287, 293-94 (2002) (\$350 assessed for a single violation when aggravating and mitigating circumstances were present); *In the Matter of The Landscape Company of Portland, LLC*, 22 BOLI 69, 76-77 (2001) (\$1,000 assessed when only aggravating circumstances were present, including two prior violations).