

In the Matter of
KEITH TESTERMAN, dba TESTERMAN MASONRY

Case No. 43-00

June 1, 2000

SYNOPSIS

Respondent, a subcontractor on a project subject to Oregon's prevailing wage rate laws, intentionally failed to pay three employees the wages they were due under those laws. Respondent also filed three inaccurate and incomplete certified payroll reports. The commissioner imposed penalties totaling \$6000.00 for these six violations of the prevailing wage rate laws. The commissioner also ordered that Respondent and any firm, corporation, partnership or association in which Respondent has a financial interest, be placed on the list of those ineligible to receive public works contracts or subcontracts for a period of three years. ORS 279.350, ORS 279.354, ORS 279.361, ORS 279.370, OAR 839-016-0010, OAR 839-016-0035, OAR 839-016-0085, 839-016-0090, OAR 839-016-0520, OAR 839-016-0530, OAR 839-016-0540.

The above-entitled case came on regularly for hearing before Erika L. Hadlock, 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 April

12, 2000, in the conference room of the Oregon Bureau of Labor and Industries, 1250 N.E. 3rd, #B-105, Bend, Oregon.

The Bureau of Labor and Industries (“BOLI” or “the Agency”) was represented by David Gerstenfeld, an employee of the Agency. Respondent did not appear at the hearing.

The Agency called BOLI compliance specialist Rhoda Briggs and Keeton-King Construction, Inc., employee Carl Adkins as its witnesses.

The forum received into evidence:

a) Administrative exhibits X-1 to X-19 (generated or filed prior to hearing) and X-20 (generated after the hearing).

b) Agency exhibits A-1 through A-17 (submitted prior to hearing with the Agency's case summary) and A-18 and A-19 (submitted during the 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 November 23, 1999, the Agency issued a Notice of Intent to Place on List of Ineligibles and to Assess Civil Penalties in which it made the following charges against Respondent:

a) Between approximately August 10 and 23, 1997, Respondent provided manual labor on a public works project subject to regulation under Oregon's prevailing wage rate laws and intentionally failed to pay \$2711.91 in prevailing wages to three employees, in violation of ORS 279.350 and OAR 839-016-0035.

- b) Respondent filed three inaccurate and incomplete certified payroll reports covering the periods August 10 through 16, August 17 through 23 and August 24 through 30, 1997, in violation of ORS 279.354 and OAR 839-016-0010.

The Agency sought a \$1000.00 civil penalty for each of the six alleged violations. The Agency also asked that Respondent and any firm, corporation, partnership or association in which he had a financial interest be placed on the list of those ineligible to receive contracts or subcontracts for public works for a period of three years.

- 2) The Notice of Intent instructed Respondent that he was required to make a written request for a contested case hearing within 20 days of the date on which he received the Notice, if he wished to exercise his right to a hearing.

- 3) The Agency served the Notice of Intent on Respondent on or about November 30, 1999, together with a document providing information on how to respond to a notice of intent.

- 4) Respondent mailed a request for hearing on December 1, 1999, which the Agency received on December 6. In that request, Respondent alleged that he had filed for bankruptcy in April 1998 and "was discharged in October, 1998."

- 5) On December 7, 1999, Agency case presenter Gerstenfeld sent a letter notifying Respondent that his request for hearing did not constitute an answer. Gerstenfeld stated that if Respondent did not file an answer including an admission or denial of each alleged fact by December 20, 1999, a final order on default would be issued. Gerstenfeld sent another letter on December 21, 1999, informing Respondent that a final order on default would be issued unless the Agency received an answer by December 30, 1999.

6) The Agency received an answer from Respondent on December 30, 1999. In his answer, Respondent admitted that he was a subcontractor on the "6 Workbay OMS Shop" in La Grande, Oregon, and that the 6 Workbay OMS Shop project was a public works project conducted by the Oregon Military Department that consisted of construction, reconstruction and/or major renovation. Respondent also admitted that the 6 Workbay OMS project was not regulated under the federal Davis-Bacon Act, cost more than \$25,000.00, and was subject to regulation under Oregon's prevailing wage rate laws. Respondent denied the alleged violations.

7) The Agency filed a request for hearing with the Hearings Unit on January 5, 2000, and served that request on Respondent the same day.

8) On January 12, 2000, the Hearings Unit served Respondent with: a) a Notice of Hearing that set the hearing for April 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.

9) On January 31, 2000, the Agency moved for a discovery order requiring Respondent to produce six categories of documents. Respondent filed no objections to the Agency's motion, and the ALJ issued an order requiring Respondent to produce all requested documents.

10) On February 3, 2000, the Agency's Legal Policy Advisor sent Respondent a copy of the Agency's recently amended administrative rules for contested case proceedings.

11) On March 7, 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; and any wage,

damages, and penalties calculations (for the Agency only). The forum ordered the participants to submit their case summaries by March 30, 2000, and notified them of the possible sanctions for failure to comply with the case summary order. The forum also provided a form that Respondent could use to prepare a case summary.

12) Each of the above-described letters from the Agency and the Hearings Unit to Respondent, including the Notice of Hearing, were sent to Respondent at 1940 NE Sams Loop #4, Bend, Oregon 97701, except the Notice of Intent, which was served on Respondent at the Deschutes County Sheriff's Office.

13) On or about March 16, 2000, the Hearings Unit received notice from the United States Postal Service that Respondent's address had changed to 20641 Mary Way, Bend, Oregon 97701-8519. The ALJ issued an order on March 17, 2000, requiring Respondent to provide the Hearings Unit and the Agency with his correct mailing address by March 24, 2000. The order was sent to both of Respondent's addresses (Sams Loop and Mary Way). The Hearings Unit never received any notification from Respondent regarding his correct mailing address.

14) The Agency filed a timely case summary on March 30, 2000. Respondent did not file a case summary.

15) Respondent did not appear at the time set for hearing and nobody appeared on his behalf. Respondent had not notified the forum that he would not be appearing at the hearing. Pursuant to OAR 839-050-0330(2), the ALJ waited thirty minutes past the time set for hearing. When Respondent still did not appear, the ALJ declared Respondent to be in default and commenced the hearing.

16) Pursuant to ORS 183.415(7), the ALJ verbally advised the Agency of the issues to be addressed, the matters to be proved, and the procedures governing the conduct of the hearing.

17) The ALJ issued a proposed order on May 4, 2000, 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) In August 1996, the Oregon Military Department's "6 Workbay OMS Shop" project in La Grande, Oregon ("the Project") was advertised for bid. The Project was a public works project, was not regulated under the federal Davis-Bacon Act, cost in excess of \$25,000.00, and was subject to regulation under Oregon's prevailing wage rate laws. Because the Project was first bid in August 1996, the Agency's July 1996 prevailing wage rate book set forth the prevailing wage rates that were to be paid on the project.

2) Keeton-King Construction, Inc., was the general contractor on the Project. Respondent was a subcontractor of Keeton-King and performed masonry work on the Project. Carl Adkins was Keeton-King's payroll clerk at material times and dealt with Respondent's certified payroll reports.

3) Steve Schroeder, Michael Lovato, and Peter Aragon all were employees of Respondent and worked as tenders to masons on the Project during the summer of 1997. The applicable prevailing wage rate for tenders to masons was \$18.09 per hour plus \$5.60 per hour for fringe benefits, for a total of \$23.69 per hour.

4) Carl Gonzalez was Respondent's foreman on the Project and kept records of the hours Respondent's employees worked. Respondent employed several other people on the Project, including Dave Hartsfield.

5) On September 12, 1997, Schroeder filed a wage claim with the Agency claiming that Respondent failed to pay him wages for the period August 11 through 26, 1997. Rhoda Briggs, a BOLI compliance specialist, was assigned to investigate that claim.

6) In his wage claim, Schroeder alleged that Respondent owed him several hundred dollars he earned working both on the Project and on a project for Albertson's that was not governed by the prevailing wage rate laws. Schroeder also completed a complaint form on which he indicated more specifically that Respondent had not paid him wages for five hours of overtime work he had performed on the Project. Schroeder stated that Respondent had said he would pay Schroeder in cash for those hours, but never did.

7) On September 29, 1997, Aragon and Lovato filed wage claims in which each asserted that Respondent had failed to pay him \$1156.31 in wages he earned for over 40 hours he worked from August 17 through 23, 1997.

8) Briggs met with the three employees soon after they filed their claims against Respondent. Aragon provided documents supporting his claim, including a pay stub for the week of August 11 through 16, 1997. That pay stub stated that Aragon worked a total of 40 hours. Aragon asserted that he actually had worked 47 hours that week and told Briggs that Respondent had paid him in cash for the seven hours of overtime that were not recorded on the pay stub. Aragon did not claim that Respondent had underpaid him for the work he performed during the week of August 11 through 16.

9) Lovato also provided documents supporting his claim, including a pay stub for the week of August 11 through 16, 1997.¹ That pay stub stated that Lovato had worked a total of 40 hours. Lovato asserted that he actually had worked 47 hours that week and told Briggs that Respondent had paid him in cash for the seven hours of overtime that were not recorded on the paystub. Lovato did not claim that Respondent had underpaid him for the week of August 11 through 16.

10) Briggs concluded that Lovato's and Aragon's claims were credible, in part because they could have denied that Respondent paid them cash for the overtime they worked between August 11 and 16, but did not.

11) Briggs contacted Respondent, who said that he had paid Schroeder, Aragon and Lovato the wages they were due. Briggs asked Respondent to provide documents supporting that assertion, including canceled paychecks. Respondent gave Briggs some documents, but they did not relate to the three workers. Briggs never heard from Respondent again.

12) Briggs calculated that Respondent owed Aragon \$1229.79, owed Lovato \$1229.79,² and owed Schroeder \$252.33 in unpaid wages for work they had performed on the Project.

13) For the reasons set forth in Findings of Fact – the Merits 23 and 24, *infra*, the forum finds credible the claims of Aragon, Schroeder, and Lovato that Respondent failed to pay their wages. The forum concludes that Respondent failed to pay Aragon, Lovato, and Schroeder the prevailing rate of wage for all the hours they worked on the Project, as calculated by Briggs.

14) On December 1, 1997, the Agency filed a notice of claim against the bond posted by Keeton-King for these wages and additional wages the Agency then believed Respondent may not have paid other employees on the Project.³ Briggs sent a copy of the notice of claim to Respondent.

15) On January 8, 1998, Briggs sent Respondent a letter asking him to provide the Agency with paychecks for the wages due Schroeder, Aragon and Lovato. She stated that if Respondent failed to supply the paychecks by January 18, 1998, “we will request payment from the prime contractor, Keeton-King Construction, Inc.” In that

letter, Briggs also informed Respondent of the possibility that he could be placed on the list of ineligible. Respondent did not respond to the letter.

16) The forum infers that Respondent's failure to pay the prevailing wage rate to Schroeder, Lovato and Aragon was intentional. Had Respondent inadvertently failed to pay the wages, he could have responded to Briggs' inquiries by making belated payments. Instead, Respondent responded by providing irrelevant documents, then ignoring Briggs' attempts at communication. Moreover, nothing in the record suggests that Respondent's failure to pay the wages was a mere oversight or the result of an innocent bookkeeping error.

17) On February 3, 1998, Briggs notified Keeton-King that the Agency's attempts to collect the unpaid wages from Respondent had been unsuccessful. Briggs asked that Keeton-King pay the wages.

18) Adkins, Keeton-King's payroll clerk, believed the workers' claims that Respondent had not paid them, in part because Keeton-King had received informal complaints that Respondent was not paying all wages due his employees. Consequently, Keeton-King supplied the Agency with paychecks for Schroeder, Aragon, and Lovato covering all of the wages Respondent had failed to pay them for their work on the Project. The Agency forwarded those checks to the three workers.

19) Respondent never reimbursed Keeton-King for the wages Keeton-King paid Schroeder, Aragon and Lovato on Respondent's behalf. Keeton-King suffered a financial loss as a result of paying the wages because it previously had advanced money to Respondent to pay his employees. In effect, Keeton-King paid twice for the three workers' services.

20) During the Agency's investigation of the prevailing wage claims, Keeton-King supplied Briggs with three certified payroll reports ("CPRs") Respondent had given

the contractor for work his employees performed on the Project. Respondent's CPR for the week of August 10 through 16, 1997, reports the total amount of money deducted from each employee's wages, but does not describe the nature of those deductions as required by BOLI's Form WH-38, the payroll/certified statement form. In addition, this CPR states that only 13 of Respondent's employees worked on the Project during the week of August 10 through 16. Gonzalez's records, which the forum finds more reliable than Respondent's,⁴ state that 14 employees worked on the Project that week, including Hartsfield, who is not mentioned on the CPR.

21) Respondent's CPR for the week of August 17 through 23, 1997, states that Respondent paid Aragon and Lovato for the work they performed on the Project that week. In fact, Respondent did not pay Aragon and Lovato for that work.⁵ In addition, the CPR does not describe the nature of the deductions taken from employee's wages.

22) Respondent's CPR for the week of August 24 through August 30, 1997, does not specify the trade classification for one of the employees listed, John Zarr. In addition, the CPR does not describe the nature of the deductions taken from employees' wages.

23) The forum finds the wage claims of Aragon and Lovato to be credible. Aragon and Lovato both stated they had worked 47 hours during the week of August 11 through 16, 1997. The records of foreman Gonzalez confirm that the two employees did work several hours of overtime that week.⁶ Aragon and Lovato easily could have claimed that Respondent never paid them for those overtime hours, but did not. In addition, Aragon's and Lovato's claims regarding the hours they worked during the week of August 18 through 22 – for which they were not paid – roughly match the hours recorded by Gonzalez.

24) The forum finds Schroeder's wage claim to be credible. Schroeder claimed he was not paid for five hours of overtime he worked during the week of August 11 through 16, 1997. Gonzalez's records for that week confirm that claim, stating that Schroeder worked 45.5 hours, in contrast with Respondent's pay-stub, which states that Schroeder worked only 40 hours.

25) The forum gives little weight to Respondent's records and the unsworn assertions in his answer except where his statements are consistent with other credible evidence. The forum has several reasons for finding Respondent not to be credible. First, the pay stubs Respondent issued to Aragon and Lovato falsely state that they worked only 40 hours during the week of August 10 through 16, 1997. Second, Respondent has a 1994 felony conviction for tampering with drug records by knowingly uttering a forged prescription for a controlled substance. Finally, Respondent's assertion that he paid Aragon, Schroeder and Lovato in full is undercut by his failure to provide the Agency with any payroll records or canceled checks supporting that claim.

26) The forum finds Gonzalez's records of hours worked by the employees to be reliable because they generally correspond to the claims made by the three unpaid employees.

27) The testimony of witnesses Briggs and Adkins was credible.

28) Respondent's failure to pay all wages due on the Project was not the first time he had run afoul of Oregon's prevailing wage rate laws. In February 1996, Briggs investigated Respondent and concluded that he had failed to pay the prevailing wage rate on a public works project, had failed to pay overtime, and had failed to post the prevailing wage rates in a conspicuous and accessible place. Briggs sent Respondent a warning letter that stated:

"The Prevailing Wage Rate Law * * * allows the Commissioner of the Bureau of Labor and Industries to place contractors or subcontractors who

intentionally fail or refuse to pay the prevailing wage rate on a list of persons ineligible to receive public works contracts * * *. Persons on this list may not receive a contract or subcontract for a public work for up to three years.

“This will advise you that the Bureau of Labor and Industries will consider taking action to place Keith E. Testerman, Authorized Rep. and Registrant, Testerman Masonry and any business in which you have a financial interest on the list of Ineligibles should you or your company be found to have failed or refused to pay the prevailing wage rate in the future.”

The forum has no reason to disbelieve Briggs’ uncontroverted conclusion that Respondent failed to pay and post the prevailing wage and finds that Respondent did commit those previous violations.

ULTIMATE FINDINGS OF FACT

1) The Project was a construction, reconstruction or major renovation project carried out by the Oregon Military Department, a public agency, to serve the public interest. The Project was not regulated under the federal Davis-Bacon Act and had a cost of more than \$25,000.00.

2) Respondent was a subcontractor on the Project.

3) Schroeder, Aragon and Lovato worked on the Project as Respondent’s employees. Respondent failed to pay Schroeder \$252.33 in wages he earned for five hours of overtime work he performed on the Project. Respondent failed to pay Aragon and Lovato \$1229.79 in wages each of them earned for a week of work they performed on the Project.

4) Respondent’s failure to pay Schroeder, Aragon and Lovato at the prevailing wage rate for each hour of work they performed on the Project was intentional. It would not have been difficult for Respondent to pay the employees all wages they were owed.

5) As a result of Respondent’s failure to pay the prevailing wage rate to Schroeder, Aragon and Lovato for all the hours they worked on the Project, Keeton-King

paid those wages on Respondent's behalf. Keeton-King suffered a financial loss because of Respondent's failure to pay the prevailing rate of wage.

6) Respondent submitted three CPRs for the Project. The CPR for the week of August 10 through 16, 1997, did not include a report of the hours that Hartsfield worked that week. The CPR also failed to describe the nature of the deductions made from the employees' wages.

7) The CPR for the week of August 17 through 23, 1997, falsely stated that Respondent had paid Aragon and Lovato the wages they earned that week. The CPR also failed to describe the nature of the deductions made from the employees' wages.

8) The CPR for the week of August 24 through 30, 1997, did not specify the trade classification for one of Respondent's employees on the Project. The CPR also failed to describe the nature of the deductions made from the employees' wages.

9) Respondent knew or should have known of the inaccuracies and omissions in the CPRs. It would not have been difficult for Respondent to file accurate and complete CPRs.

10) Respondent previously committed violations of Oregon's prevailing wage rate laws by failing to pay the prevailing wage and failing to post the prevailing wage rates.

CONCLUSIONS OF LAW

1) ORS 279.348(3) provides:

"Public works' includes, but is not limited to, roads, highways, buildings, structures and improvements of all types, the construction, reconstruction, major renovation or painting of which is carried on or contracted for by any public agency to serve the public interest but does not include the reconstruction or renovation of privately owned property which is leased by a public agency."

See *also* OAR 839-016-0004(17) (similar). ORS 279.348(5) provides:

"Public agency' means the State of Oregon or any political subdivision thereof or any county, city, district, authority, public corporation or entity

and any of their instrumentalities organized and existing under law or charter.”

See also OAR 839-016-0004(16) (same). The Project was a public works project.

2) ORS 279.357 provides, in pertinent part:

“(1) ORS 279.348 to 279.380 do not apply to:

“(a) Projects for which the contract price does not exceed \$25,000.

“(b) Projects regulated under the Davis-Bacon Act (40 U.S.C. 276a). * *

The Project did not fall within the exemptions created by ORS 279.357.

3) ORS 279.350 provides, in pertinent part:

“(1) The hourly rate of wage to be paid by any contractor or subcontractor to workers upon all public works shall be not less than the prevailing rate of wage for an hour’s work in the same trade or occupation in the locality where such labor is performed. The obligation of a contractor or subcontractor to pay the prevailing rate of wage may be discharged by making the payments in cash, by the making of contributions of a type referred to in ORS 279.348(4)(a), or by the assumption of an enforceable commitment to bear the costs of a plan or program of a type referred to in ORS 279.348(4)(b), or any combination thereof, where the aggregate of any such payments, contributions and costs is not less than the prevailing rate of wage.”

OAR 839-016-0035 provides, in pertinent part:

“(1) Every contractor or subcontractor employing workers on a public works project shall pay to such workers no less than the prevailing rate of wage for each trade or occupation, as determined by the Commissioner, in which the workers are employed.

“(2) Every person paid by a contractor or subcontractor in any manner for the person’s labor in the construction, reconstruction, major renovation or painting of a public work is employed and must receive no less than the prevailing rate of wage, regardless of any contractual relationship alleged to exist. Thus, for example, if partners are themselves performing the duties of a worker, the partners must receive no less than the prevailing rate of wage for the hours they are so engaged.”

Respondent was required to pay the prevailing rate of wage to all workers he employed on the Project. Respondent committed three violations of ORS 279.350 and OAR 839-016-0035 by failing to pay Schroeder, Aragon and Lovato the prevailing wage rate for each hour they worked on the Project.

4) ORS 279.354(1) provides:

“The contractor or the contractor’s surety and every subcontractor or the subcontractor’s surety shall file certified statements with the public contracting agency in writing in form prescribed by the Commissioner of the Bureau of Labor and Industries, certifying the hourly rate of wage paid each worker which the contractor or the subcontractor has employed upon such public work, and further certifying that no worker employed upon such public work has been paid less than the prevailing rate of wage or less than the minimum hourly rate of wage specified in the contract, which certificate and statement shall be verified by the oath of the contractor or the contractor’s surety or subcontractor or the subcontractor’s surety that the contractor or subcontractor has read such statement and certificate and knows the contents thereof and that the same is true to the contractor or subcontractor’s knowledge. The certified statements shall set out accurately and completely the payroll records for the prior week including the name and address of each worker, the worker’s correct classification, rate of pay, daily and weekly number of hours worked, deductions made and actual wages paid.”

OAR 839-016-0010 provides, in pertinent part:

“(1) The form required by ORS 279.354 shall be known as the Payroll and Certified Statement, Form WH-38. The Form WH-38 shall accurately and completely set out the contractors or subcontractor’s payroll for the work week immediately preceding the submission of the form to the public contracting agency by the contractor or subcontractor.”

The three CPRs Respondent filed all were incomplete because they did not describe the nature of the deductions taken from employees’ wages. In addition, the CPR for August 10 through 16, 1997, inaccurately stated that only 13 employees had worked on the Project, omitting Hartsfield’s hours. The CPR for August 17 through 23 inaccurately stated that Respondent had paid Aragon and Lovato the wages they earned that week. The CPR for August 24 through 30 was incomplete because it did not specify one employee’s trade classification. Respondent committed three violations of ORS 279.354 and OAR 839-016-0010 by submitting these three inaccurate and incomplete CPRs.

5) 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.

“(2) Civil penalties may be assessed against any contractor, subcontractor or contracting agency regulated under the Prevailing Wage Rate Law and are in addition to, not in lieu of, any other penalty prescribed by law.

“(3) The commissioner may assess a civil penalty against a contractor or subcontractor for any of the following violations:

“(a) Failure to pay the prevailing rate of wage in violation of ORS 279.350;

“* * * * *

“(e) Filing inaccurate or incomplete certified statements in violation of ORS 279.354[.]”

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.

“(2) For purposes of this rule “repeated violations” means violations of a provision of law or rule which has been violated on more than one project within two years of the date of the most recent violation.

“(3) Notwithstanding any other section of this rule, when the commissioner determines to assess a civil penalty for a violation of ORS 279.350 regarding the payment of the prevailing rate of wage, the minimum civil penalty shall be calculated as follows:

“(a) An equal amount of the unpaid wages or \$1,000, whichever is less, for the first violation;

“(b) Two times the amount of the unpaid wages or \$3,000, whichever is less, for the first repeated violation;

“(c) Three times the amount of the unpaid wages or \$5,000, whichever is less, for second and subsequent repeated violations.

“* * * * *

“(5) The civil penalty for all other violations shall be set in accordance with the determinations and considerations referred to in OAR 839-016-0530.

“(6) The civil penalties set out in this rule shall be in addition to any other penalty assessed or imposed by law or rule.”

The commissioner’s imposition of a \$1000.00 civil penalty for each of Respondent’s six violations of Oregon’s prevailing wage rate laws is an appropriate exercise of the commissioner’s discretion.

6) ORS 279.361 provides, in pertinent part:

“(1) When the Commissioner of the Bureau of Labor and Industries, in accordance with the provisions of ORS 183.310 to 183.550, determines that a contractor or subcontractor has intentionally failed or refused to pay the prevailing rate of wage to workers employed upon public works, a subcontractor has failed to pay to its employees amounts required by ORS 279.350 and the contractor has paid those amounts on the subcontractor’s behalf, or a contractor or subcontractor has intentionally failed or refused to post the prevailing wage rates as required by ORS 279.350(4), the contractor, subcontractor or any firm, corporation, partnership or

association in which the contractor or subcontractor has a financial interest shall be ineligible for a period not to exceed three years from the date of publication of the name of the contractor or subcontractor on the ineligible list as provided in this section to receive any contract or subcontract for public works. The commissioner shall maintain a written list of the names of those contractors and subcontractors determined to be ineligible under this section and the period of time for which they are ineligible. A copy of the list shall be published, furnished upon request and made available to contracting agencies.”

OAR 839-016-0085 provides, in pertinent part:

“(1) Under the following circumstances, the commissioner, in accordance with the Administrative Procedures Act, may determine that for a period not to exceed three years, a contractor, subcontractor or any firm, limited liability company, corporation, partnership or association in which the contractor or subcontractor has a financial interest is ineligible to receive any contract or subcontract for a public work:

“(a) The contractor or subcontractor has intentionally failed or refused to pay the prevailing rate of wage to workers employed on public works as required by ORS 279.350;

“(b) The subcontractor has failed to pay its employees the prevailing rate of wage required by ORS 279.350 and the contractor has paid the employees on the subcontractor’s behalf[.]

“* * * * *

“(4) The Wage and Hour Division shall maintain a written list of the names of those contractors, subcontractors and other persons who are ineligible to receive public works contracts and subcontracts. The list shall contain the name of contractors, subcontractors and other persons, and the name of any firms, corporations, partnerships or associations in which the contractor, subcontractor or other persons have a financial interest. Except as provided in OAR 839-016-0095, such names will remain on the list for a period of three (3) years from the date such names were first published on the list.”

OAR 839-016-0090 provides, in pertinent part:

“(1) The name of the contractor, subcontractor or other persons and the names of any firm, corporation, partnership or association in which the contractor or subcontractor has a financial interest whom the Commissioner has determined to be ineligible to receive public works contracts shall be published on a list of persons ineligible to receive such contracts or subcontracts.

“(2) The list of persons ineligible to receive contracts or subcontracts on public works shall be known as the List of Ineligibles.”

Respondent intentionally failed to pay the prevailing wage rate to Schroeder, Aragon and Lovato for all the work they did on the Project. In addition, because of Respondent's failure to pay the prevailing wage rate to these employees, Keeton-King, the general contractor on the Project, paid those wages on Respondent's behalf. For both of these reasons, the commissioner must place Respondent on the List of Ineligibles for a period not to exceed three years. The commissioner's decision to place Respondent on the list for the entire three-year period is an appropriate exercise of his discretion.

OPINION

DEFAULT

Respondent failed to appear at hearing and the forum held him 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 Belanger General Contracting*, 19 BOLI 17, 25 (1999). The Agency met that burden in this case, as discussed *infra*.

FAILURE TO PAY THE PREVAILING RATE OF WAGE

A. The violations

To establish a violation of ORS 279.350(1), which requires payment of the prevailing rate of wage on public works contracts, the Agency must prove:

- 1) The project at issue was a public work, as that term is defined in ORS 279.348(3);
- 2) The respondent was a contractor or subcontractor that employed workers on the public works project whose duties were manual or physical in nature⁷;
- 3) The respondent failed to pay those workers at least the prevailing rate of wage for each hour worked on the project.

In this case, only the third element is in dispute.

The Agency met its burden of proving that Respondent failed to pay Schroeder for several hours of overtime work he performed on the Project and failed to pay Aragon and Lovato for a full week of work they did on the Project. For the reasons set forth in Findings of Fact -- the Merits 23 and 24, *supra*, the forum finds credible the workers' assertions that Respondent failed to pay them all the wages they were due. The forum's conclusion is bolstered by Respondent's failure to provide compliance specialist Briggs with any documentation supporting his claim that he paid the workers in full. This evidence is sufficient to establish a prima facie case that Respondent committed three violations of ORS 279.350(1) by failing to pay Schroeder, Aragon and Lovato the prevailing rate of wage for each hour they worked on the Project.

In his answer, Respondent asserted as a defense that he had declared bankruptcy in April 1998 and "was discharged in October, 1998." In a default situation, the forum may give some weight to unsworn assertions contained in the respondent's answer. *In the Matter of Leslie Elmer DeHart*, 18 BOLI 199, 206 (1999). Such assertions are overcome whenever they are controverted by other credible evidence. *Id.* Moreover, the forum need not give any weight to the assertions, even if they are uncontroverted, if it finds that the respondent is not credible.

Here, the forum gives no weight to Respondent's declaration that he declared bankruptcy and "was discharged" because it finds Respondent's claims not to be credible. First, Respondent issued pay stubs falsely stating that Lovato and Aragon worked only 40 hours the week of August 10, 1997, even though he knew they had worked additional hours, as demonstrated by the fact that he paid them in cash for that overtime work. Second, Respondent was convicted of a felony involving forgery only three years before the events at issue. Because the forum is not persuaded that Respondent "was discharged" in bankruptcy, it need not decide whether a

subcontractor's bankruptcy would have any bearing on the commissioner's ability to assess a civil penalty against it for violations of the prevailing wage rate laws.

B. Civil Penalties

The commissioner may impose a civil penalty up to \$5000.00 for each violation of the prevailing wage rate laws. OAR 839-016-0540(1). For violations of ORS 279.350(1), which requires payment of the prevailing wage, the minimum civil penalty is \$1000.00 or the amount of unpaid wages, whichever is less. OAR 839-016-0540(3). In this case, the Agency seeks a \$1000.00 penalty for each of Respondent's three violations of ORS 279.350(1).

Respondent failed to pay Aragon and Lovato each \$1229.79 in prevailing wages he owed them for their work on the Project. For those two violations of ORS 279.350(1), the minimum penalty is \$1000.00, which is what the Agency seeks. In accordance with the Agency's request and OAR 839-016-0540(3), the forum imposes a \$1000.00 civil penalty for each of these two violations of ORS 279.350(1).

Respondent failed to pay Schroeder only \$252.33 in prevailing wages, which means that the minimum civil penalty for his third violation of ORS 279.350(1) is \$252.33. The Agency, however, seeks a \$1000.00 civil penalty based on Respondent's prior violations of the prevailing wage rate laws, the fact that it would have been simple for Respondent to comply with the law by paying all wages due, the fact that workers went unpaid for a period of time and Keeton-King suffered a financial loss from paying the workers on Respondent's behalf, and the fact that the Agency gave Respondent an opportunity to rectify his error by paying the missing wages. For all of these reasons, the forum agrees with the Agency that a \$1000.00 penalty is appropriate for Respondent's third violation of ORS 279.350(1).

FILING INACCURATE AND INCOMPLETE CPRs

The Agency submitted convincing evidence that Respondent filed three CPRs that did not include all required information and, in one case, falsely certified that Aragon and Lovato had been paid all the wages they earned.⁸ By submitting these three incomplete and inaccurate CPRs, Respondent committed three violations of ORS 279.354(1), which requires the reports to "set out accurately and completely the payroll records for the prior week including the name and address of each worker, the worker's correct classification, rate of pay, daily and weekly number of hours worked, deductions made and actual wages paid."

The Agency seeks a \$1000.00 civil penalty for each of these violations. The forum agrees that \$1000.00 per violation is appropriate for three reasons. First, the Agency previously had warned Respondent about other violations of the prevailing wage rate laws. Second, it would not have been difficult for Respondent to complete the CPR forms accurately. Third, each CPR contained a relatively serious misstatement or omission: the CPR for August 10 through 16 did not report the wages paid to one employee, depriving the Agency of the ability to determine whether that employee was paid at the prevailing rate; the CPR for August 17 through 23 included a false statement that Respondent had paid the wages earned by Lovato and Aragon that week; and the CPR for August 24 through 30 did not specify the trade classification for one worker, which deprived the Agency of the ability to determine whether Respondent had paid that employee at the correct rate. For all of these reasons, the forum imposes a \$1000.00 penalty for each of Respondent's three violations of ORS 279.354(1).

PLACEMENT ON THE LIST OF INELIGIBLES

When the commissioner determines that a contractor or subcontractor has intentionally failed to pay the prevailing rate of wage, the commissioner must place the

contractor or subcontractor and any firm, corporation, partnership or association in which the contractor or subcontractor has an interest on the list of those ineligible to receive public works contracts or subcontracts (the "List of Ineligibles") for a period not to exceed three years. ORS 279.361(1); *In the Matter of Southern Oregon Flagging*, 18 BOLI 138, 169 (1999). The commissioner must also place on the List of Ineligibles any subcontractor that has failed to pay the prevailing rate of wage, whether or not that failure was intentional, if the contractor has paid the wages on the subcontractor's behalf. ORS 279.361(1).

In this case, Respondent must be placed on the List of Ineligibles for both of these reasons. First, based on the credible testimony of both Briggs and Adkins, the forum has found that Keeton-King paid the wages due Schroeder, Aragon and Lovato on Respondent's behalf. Second, the forum has found that Respondent's failure to pay the prevailing wages was intentional.⁹

Although the commissioner must place a contractor or subcontractor who commits such violations on the List of Ineligibles for a period not to exceed three years, he may consider mitigating factors in determining whether the debarment should last less than the entire three-year period. *See Southern Oregon Flagging*, 18 BOLI at 169. In this case, there are no mitigating factors. Respondent has previously violated the prevailing wage rate laws, the current violations were blatant and not the result of some misunderstanding between Respondent and the Agency, Respondent did not cooperate with the Agency's investigation, and Respondent made no attempt to rectify the underpayment of wages.¹⁰ Under these circumstances, the forum finds it appropriate to place Respondent and any firm, corporation, partnership or association in which he has an interest on the List of Ineligibles for the entire three years permitted by law.

ORDER

NOW, THEREFORE, as authorized by ORS 279.370 and as payment of the penalty assessed as a result of Respondent's violations of ORS 279.350, ORS 279.354, OAR 839-016-0010 and OAR 839-016-0035, the Commissioner of the Bureau of Labor and Industries hereby orders Respondent **Keith Testerman dba Testerman Masonry** 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 SIX THOUSAND DOLLARS (\$6000.00), plus any interest that accrues at the legal rate on that amount from a date ten days after issuance of the Final Order in this case and the date Respondent complies with the Final Order.

FURTHERMORE, as authorized by ORS 279.361, the Commissioner of the Bureau of Labor and Industries hereby orders that Respondent **Keith Testerman dba Testerman Masonry** and any firm, corporation, partnership or association in which he has an interest shall be ineligible to receive any contract or subcontract for public work for a period of three years from the date of publication of his name on the list of those ineligible to receive such contracts maintained and published by the Commissioner of the Bureau of Labor and Industries.

¹ Lovato's pay stub got washed and some numbers on it became unreadable. Lovato wrote the numbers back in before giving the pay stub to Briggs. The forum has no reason to believe that Lovato's notations are inaccurate.

² Briggs' calculation sheet actually shows that Respondent owed Lovato \$1229.80, but her communications with Respondent and Keeton-King all state the amount owed as \$1229.79, consistent with the amount owed Aragon.

³ Briggs later sent a letter to each of Respondent's other employees on the Project asking them to contact her if they had not been fully paid. None of those employees responded, so the Agency concluded that Respondent owed back wages only to Schroeder, Lovato, and Aragon.

⁴ See Findings of Fact – the Merits 25 and 26, *infra*.

⁵ See Findings of Fact – the Merits 5-7, 12 and 13, *supra*.

⁶ Gonzalez's records show hours worked for seven employees identified by first and last names, which do not include Aragon or Lovato. The records also show hours worked by seven employees identified only by their first names, including a "Mike," whom the forum infers is Michael Lovato, and a "Pete," whom the forum infers is Peter Aragon. Gonzalez's records state that Mike and Pete worked only six hours of overtime each, not seven, as Aragon and Lovato asserted in their wage claims. The forum does not regard this one-hour discrepancy as significant – the important fact is that the employees freely admitted they had been paid for the overtime, when they easily could have claimed that Respondent owed them wages for those hours.

⁷ The Agency's administrative rules limit coverage of the prevailing wage rate laws to workers "whose duties are manual or physical in nature (including those workers who use tools or who are performing the work of a trade), as distinguished from mental, professional or managerial." OAR 839-016-0004(27). See also OAR 839-016-0035(3) (regarding workers whose time is divided between manual/physical and mental/managerial duties).

⁸ See Findings of Fact -- the Merits 20-22, *supra*.

⁹ See Finding of Fact -- the Merits 16, *supra*.

¹⁰ Compare *Southern Oregon Flagging*, 18 BOLI 138, 163 (1999) (debarment period limited to one month where the respondent cooperated with the Agency throughout its investigation, the respondent attempted to comply with the law, and the underpayment of prevailing wages resulted from implementation of a fringe benefits plan that three agencies, including BOLI, had approved).