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Board of Alien Labor Certification Appeals
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BALCA Case No.: 2014-PWD-00010
ETA Case No.: P-400-14021-697832

In the Matter of:

GOPHER STATE EXPOSITIONS, INC.,
Employer

Center Director: William K. Rabung
National Prevailing Wage Center

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For the Certifying Officer

Before: **COLLEEN A. GERAGHTY**
Administrative Law Judge

DECISION AND ORDER
AFFIRMING PREVAILING WAGE DETERMINATION

This matter arises from the Employer’s appeal pursuant to 20 C.F.R. § 655.11(e)¹ of the Employment and Training Administration, Office of Foreign Labor Certification, National Prevailing Wage Center’s (“NPWC”) prevailing wage determination for the position of “Mobile Entertainment Worker.”

BACKGROUND

On January 21, 2014, the Employer filed an ETA Form 9141 Application for Prevailing Wage Determination. (AF 22, 25).² The Employer seeks a Prevailing Wage Determination (“PWD”) to support an application for H-2B temporary labor certification for the position of “Mobile Entertainment Worker.” (AF 22-23). The Employer requested in the ETA Form 9141 that the PWD be based on the “Wage Survey of Mobile Entertainment Employers” published by the Outdoor Amusement Business Association (“OABS”) and the Small Business Workforce Alliance (“SBWA”) on December 1, 2013, which the Employer attached to its application. (AF 23, 34-45).

The NPWC issued a PWD on February 19, 2014, assigning a prevailing wage of \$9.55 per hour for a Mobile Entertainment Worker at the place of employment identified in Section E.c. 4 & 5 of the ETA Form 9141.³ (AF 25). The prevailing wage was based on the SOC (O*NET/OES) occupational title of Amusement and Recreation Attendants with an occupational code of 39-3091. (AF 25). The NPWC rejected the wage survey provided by the Employer because it “[did] not include any indication of the number [of] workers being paid at any particular rate; therefore the rate presented is not a weighted average of wages paid to workers but the un-weighted average of wage rates.” (AF 25). The NPWC also found that the survey “did not consider wages for workers performing the same duties at stationary locations such as

¹ All citations to 20 C.F.R. Part 655, Subpart A refer to the Final Rule promulgated in 2008 (“2008 Rule”), 73 Fed. Reg. 78020 (Dec. 19, 2008), as amended by the Interim Final Rule (“2013 IFR”) promulgated in 2013, 78 Fed. Reg. 24047 (Apr. 24, 2013), since the Department has postponed its implementation of the Final Rules promulgated in January 2011, 76 Fed. Reg. 3452 (Jan. 19, 2011) (“2011 Wage Rule”) and February 2012, 77 Fed. Reg. 10038 (Feb. 21, 2012) (“2012 Rule”). See 79 Fed. Reg. 11450,11453 (Mar. 5, 2014) (announcing that until such time as the Department finalizes a new wage methodology, the current wage methodology contained in 20 C.F.R. § 655.10(b), as set by the 2013 IFR, will remain unchanged and continue in effect); 78 Fed. Reg. 53643 (Aug. 30, 2013) (indefinitely delaying effective date of 2011 amendment); *Bayou Lawn & Landscape Services v. Solis*, Case 3:12-cv-00183-MCR-CJK, Order at 8 (ND FL Apr. 26, 2012) (enjoining DOL from implementing or enforcing the 2012 Rule), affirmed by *Bayou Lawn & Landscape Services v. Secretary of Labor*, 713 F.3d 1080 (11th Cir. 2013); 77 Fed. Reg. 28764 (May 16, 2012) (announcing “the continuing effectiveness of the 2008 H-2B Rule until such time as further judicial or other action suspends or otherwise nullifies the order in the Bayou II litigation”).

² In this decision, AF is an abbreviation for Appeal File.

³ Employer indicated in Section E.c.7 that the job is performed at multiple worksites and attached as an addendum to the ETA Form 9141 a list of the additional worksites involved. (AF 24, 27). Accordingly, the NPWC in its determination attached an addendum listing wage determinations for each additional worksite identified by the Employer, with wages ranging from \$8.86 to \$9.55 per hour. (AF 25, 28-29).

amusement parks, resorts and other entertainment venues.” (AF 25). The NPWC instead relied on the Occupational Employment Statistics (“OES”) wage data in determining the prevailing wage. (AF 25).

On March 20, 2014, the Employer filed a Request for Redetermination with the NPWC. (AF 20-21). The Employer argued that the NPWC failed to provide citation to any requirement that a survey must “provide a weighted average of wages paid to workers” or that a survey must present the number of workers associated with a wage rate in order to be valid. (AF 20-21). The Employer stated that the survey methodology and the individual survey reports for specific locations indicated the “arithmetic mean” wage, and the average wage for each location was based on a survey of various mobile entertainment employers’ entry level wage rate paid to mobile entertainment workers. (AF 20-21). The Employer additionally contested the NPWC finding that the survey did not consider wages for workers performing the same duties at stationary locations. (AF 21). The Employer stated that mobile entertainment workers’ duties differ from those performed by workers at stationary locations,⁴ and therefore should be considered apart from workers at stationary locations. (AF 21). The Employer alleged that it included a cross-industry representation from a variety of employers of mobile entertainment workers. (AF 21).

On April 18, 2014, the NPWC affirmed its initial wage determination. (AF 17-18). The NPWC rejected the Employer’s survey because it was restricted to employers in the mobile entertainment industry and failed to include employers who have similar workers performing the same duties at non-mobile sites. (AF 17). The NPWC stated that pursuant to the Department of Labor’s (“DOL”) Prevailing Wage Determination Policy Guidance issued in November 2009 (“PWD Guidance”), factors relating to the nature of the employer are not relevant to determining the prevailing wage for an occupation, and because the survey was restricted to only mobile employers, it does not represent all employers. (AF 17). The NPWC additionally rejected the survey because it did not provide the total number of workers represented from each employer, and the average wage rate was only based on employers’ average entry-level wage, rather than a weighted average which accounts for the number of total workers. (AF 17). The NPWC referred to the PWD Guidance requirements that an employer-provided survey contain wage data collected from at least 30 workers and that the prevailing wage determination be based on the “arithmetic mean (weighted average) of wages for workers that are similarly employed in the area of intended employment.” (AF 17).

On April 19, 2014, the Employer appealed to the NPWC Center Director, renewing its arguments made in its prior request for redetermination. (AF 14-16). The Center Director (“CD”) issued his decision on May 20, 2014, affirming the rejection of the Employer’s wage survey for the same reasons provided in the NPWC’s redetermination letter. (AF 2-3). The CD provided an amended PWD to reflect an updated validity period and Item F.4a was corrected to accurately reflect a wage level of “N/A” for the OES mean wage. (AF 3, 5).

⁴ The Employer stated that mobile entertainment workers are required to continually travel thousands of miles in a season, and their duties involve assembling and disassembling rides and attractions on a weekly basis. (AF 21).

On June 16, 2014, the Employer requested BALCA review, alleging that the PWD, Redetermination, and CD's decision conflict with the DOL's regulations and Guidance, and are "arbitrary, capricious and contrary to law in rejecting the employer's wage survey." (AF 1). On July 2, 2014, the CD forwarded the case to BALCA pursuant to 20 C.F.R. § 655.11. In the transmittal letter, the CD reiterated that the employer-provided survey was not acceptable as it did not provide the total number of workers represented from each employer, did not provide a weighted average wage, and was not a cross-industry sample as required by the PWD Guidance.

On July 14, 2014, I issued a Notice of Docketing and Order Setting Briefing Schedule. On July 18, 2014, the Employer filed an unopposed Motion for Extension of Time to File Briefs, which I granted. On July 25, 2014, the Employer and the CD filed appellate briefs ("Er. Br." and "CD Br." respectively). The Employer argued in its brief that according to the PWD Guidance, the survey's wage rate is not required to be a weighted average and the use of a median wage is allowed. The Employer also asserted that the occupation involved in this matter is that of Mobile Entertainment Worker, which necessarily excludes workers at stationary locations, and therefore the survey did not need to include stationary employers in its survey sample. Lastly, the Employer argued that the survey is not required to include a minimum of 30 employees, but even if it was required, the survey clearly met that threshold. The CD in its brief urged affirmance of the PWD, alleging that the Employer's survey failed to provide either a weighted mean wage or a median wage paid to workers, as required by the PWD Guidance. (CD Br. 2). The CD also argued that despite Employer's contention, a great majority of the duties identified for mobile entertainment workers are the same as those for non-mobile amusement and recreation attendants, and thus the survey should have included all amusement and recreation attendants rather than just mobile workers. (CD Br. 3).

DISCUSSION

Standard of Review

The Board applies an abuse of discretion standard to the Center Director's decision on an employer's appeal of a prevailing wage determination. *See Emory University*, 2011-PWD-00001/2, slip op. at 6-7 (Feb. 27, 2012); *RP Consultants, Inc. d/b/a Net Matrix Solutions*, 2009-JSW-00001 (June 30, 2010). Accordingly, we will review the Center Director's decision in this case to determine whether it was consistent with the applicable regulations and was a reasonable exercise of that discretion. *See RP Consultants*, slip op. at 10.

Regulations and Guidelines

In order to apply for H-2B temporary labor certification, the regulations provide that an employer must request a PWD from the NPWC. 20 C.F.R. § 655.10(a). In general, if the job opportunity is not covered by a collective bargaining agreement, the prevailing wage is the arithmetic mean of the wages of workers similarly employed in the area of intended employment, as determined by the Bureau of Labor Statistics' Occupational Employment Statistics Survey ("OES"), unless the employer provides an acceptable survey under Section 655.10(f) of the regulations. 20 C.F.R. § 655.10(b)(2).

If an employer chooses to submit its own wage survey to the NPWC for consideration, according to Section 655.10(f)(2), the Employer must:

[P]rovide specific information about the survey methodology, including such items as sample size and source, sample selection procedures, and survey job descriptions, to allow a determination of the adequacy of the data provided and validity of the statistical methodology used in conducting the survey in accordance with guidance issued by the OFLC national office.

The DOL's 2009 Prevailing Wage Determination Policy Guidance ("PWD Guidance") outlines the criteria for employer-provided surveys.⁵ (AF 52-87). The PWD Guidance requires that "[t]he wage data must have been collected across industries that employ workers in the occupation." (AF 66, 86). Factors relating to the nature of the employer, such as whether the employer is public or private, for profit or nonprofit, large or small, charitable, a religious institution, a job contractor, or a struggling or prosperous firm, are not relevant to determining the prevailing wage for an occupation; the relevant factors are the job, the geographic locality of the job, and the level of skill required to perform independently on the job. (AF 67).

The PWD Guidance additionally states that the prevailing wage determination "should be based on the arithmetic mean (weighted average) of wages for workers that are similarly employed in the area of intended employment." (AF 66, 86). The PWD Guidance directs employers to decide "how many employers must be contacted to produce usable wage results from at least three employers and at least 30 workers." (AF 86). The Guidance states "30 workers is the minimum acceptable sample; for most occupations there should be wage data for many more workers." (AF 86).

The DOL's Prevailing Wage Frequently Asked Questions ("FAQs") also address the criteria for use of an employer-provided survey. Specifically, the FAQs state an employer must provide information on the methodology used in the survey, including how the sample size was determined, how the participants were selected, the number of employers surveyed for the occupation in the area, and the number of wage value responses (employees) for the occupation in the area.⁶

Whether the Center Director Abused His Discretion in Affirming the NPWC's Rejection of the Employer-Provided Survey

The Employer provided to the NPWC a "Wage Survey of Mobile Entertainment Employers" published by the Outdoor Amusement Business Association ("OABA") and the Small Business Workforce Alliance ("SBWA"), to establish the prevailing wage for the job

⁵ *Employment and Training Administration, Prevailing Wage Determination Policy Guidance, Nonagricultural Immigration Programs, Revised November 2009 ("2009 PWD Guidance")*, http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_11_2009.pdf (last visited July 14, 2014).

⁶ National Prevailing Wage and Helpdesk Center, *Prevailing Wage Frequently Asked Questions*, March 2010 ("PWD FAQs"), PDF at 4, http://www.foreignlaborcert.doleta.gov/pdf/NPWHC_Guidance_Revised_03_2010.pdf (last visited July 14, 2014).

opportunity of “Mobile Entertainment Worker.” (AF 32-45). The survey’s employer sample was drawn from the membership lists of the OABA, the SBWA and vendor directories of county, state and regional Fair Boards or Associations. (AF 32). The sample size consisted of 355 employers in the mobile entertainment industry, and 160 employers responded to the survey. (AF 32). The 160 employers that responded to the survey employed from 1 to 290 mobile entertainment workers, and cumulatively employed more than 5,300 mobile entertainment workers throughout the United States. (AF 32).

The Employer attached individual Metropolitan Statistical Areas (“MSA”) Wage Survey Summary Reports (“Summary Reports”) for each of the eight worksites involved in the PWD application. (AF 32). Each Summary Report used the entry level wage rate for each employer to determine an arithmetic mean hourly wage⁷ for the location. (AF 34-45). The Summary Reports did not indicate the number of employees for each employer. (AF 34-45).

The CD rejected the Employer’s survey because it did not indicate the total number of employees for each employer in the sample, citing as legal support the PWD Guidance requirements that a survey sample include at least 30 employees, and that the wage rate be a weighted average wage paid to workers. I find there is sufficient information to establish that each Summary Report contained the minimum 30 employees, as each report included more than 30 employers.⁸ (AF 32-45). However, without information on the number of employees for each employer surveyed, it is impossible to determine a weighted average based on the number of workers. The Employer does not dispute that it relied on the employers’ entry-level wage rate without accounting for the number of employees per employer in calculating the average wage.

The PWD Guidance instructs workers to provide an arithmetic mean (weighted average) of wages for workers in the occupation. (AF 86). The PWD Guidance provides the following instructions for calculating a weighted average wage:

Prepare a summary table of the data collected. There should be columns for the employer, number of workers, the wage rate, and the product of multiplying the number of workers times the wage rate. There should be a row for each employer that responded to the survey. Add the data in the column showing the number of workers to get the total number of workers. Add the data in the column showing the product of the workers times wage rate. Calculate the weighed mean by dividing the total product by the total number of workers.

(AF 86). The Employer argues that the PWD Guidance does not mandate a weighted arithmetic mean wage rate, and that a survey’s median wage can be used as an alternative. The Employer refers to the section of the PWD Guidance that states:

The prevailing wage determination should be based on the arithmetic mean (weighted average) of wages for workers that are similarly employed in the area

⁷ Although the surveys referred to the “median average hourly wage,” the wage in fact is a mean wage.

⁸ Additionally, the survey stated that the 160 employers that responded to the survey employed from 1 to 290 mobile entertainment workers.

of intended employment. If the survey provides a median wage of workers similarly employed in the area of intended employment and does not provide an arithmetic mean, the median wage shall be used as the basis for making a prevailing wage determination.

(AF 66); *see also* 20 C.F.R. § 655.10(b)(2),(4).

Although the PWD Guidance and the regulations indicate that a median wage in an employer-provided survey can be used to determine the prevailing wage, the employer-provided survey here does not contain a median wage. Despite Employer's new argument on appeal that the Summary Reports contain permissible median wage rates, the Employer originally argued in its request for redetermination that the surveys contained an "arithmetic mean" wage of the employers' entry level wages for mobile entertainment workers. (AF 20-21). Although the wage is referred to as the "median average hourly wage," in the individual Summary Reports, upon review of the actual data, the wage provided is in fact an un-weighted arithmetic mean wage. Thus, as the Summary Reports did not contain a median wage, the Employer should have used a weighted arithmetic mean of wages pursuant to the PWD Guidance. The mean wages calculated in the Summary Reports were not weighted based on the number of workers as required by the PWD Guidance, and therefore the CD properly rejected the survey.

I further find that the Employer's survey was not collected across the industries that employ workers in the occupation as required by the PWD Guidance. (AF 86). The Employer incorrectly asserts that the "occupation" in this matter is that of a Mobile Entertainment Worker. (Er. Br. 9-10). However, a Mobile Entertainment Worker is the specific job identified in the application, and does not represent the more general occupation involved. As stated in the ETA Form 9141, the occupational title involved herein is "Amusement and Recreation Attendants." (AF 23, 25). The occupation of Amusement and Recreation Attendants is not limited to mobile entertainment employers, but also covers employers located at stationary facilities, such as amusement parks or resorts. Accordingly, the survey should not have been limited to mobile employers. As stated in the PWD Guidance, the nature of employer, such as whether it is mobile or stationary, is irrelevant in determining the prevailing wage for an occupation, and the only relevant factors are the job, geographic locality of the job, and the level of skill required to perform the job. (AF 2-3, 17, 67).

The Employer argues the required skills for workers at stationary locations, such as amusement parks or resorts, are not the same as those for mobile entertainment workers. (AF 21; Er. Br. 10). Only wages from "similarly employed" workers need to be considered in determining the prevailing wage, and in order to be "similarly employed," the jobs must involve a substantially similar level of skills. *See* 20 C.F.R. § 655.10(c)(1); *Hathaway Children's Services*, 1991-INA-00388 at 6. I find that the skills for mobile entertainment workers are substantially the same as entertainment workers at stationary locations. The only difference in duties identified by the Employer between mobile entertainment workers and workers at stationary locations is the assembly, disassembly, and transportation of rides and attractions; all other duties and skills are the same. (AF 16, 23, 46-48; Er. Br. 10; CD Br. 3). According to the O*Net Summary Report for Amusement and Recreation Attendants, work activities and duties for the occupation include "Handling and Moving Objects," and "Performing General Physical

Activities,” and assembly/disassembly/transportation fall under this broad umbrella. (AF 48). Furthermore, the regulations do not require comparable jobs to have the same exact skills, but rather “substantially similar” skill levels. 20 C.F.R. § 655.10(c)(1). Accordingly, I do not find that wages for mobile entertainment workers should be considered separate and apart from wages for similar workers at stationary locations.

Based on the foregoing, I hold that the CD did not abuse his discretion in affirming the NPWC’s rejection of the Employer’s provided survey because the survey did not provide a weighted mean wage and the survey was not conducted across industries as required by the PWD Guidance.

ORDER

IT IS ORDERED that the prevailing wage determination made by the National Prevailing Wage Center is hereby **AFFIRMED**.

SO ORDERED.

For the Board:

COLLEEN A. GERAGHTY
Administrative Law Judge