

U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 08 August 2014

BALCA Case No.: 2014-PWD-00008
ETA Case No.: P-400-14004-114203

In the Matter of

WADE SHOWS, INCORPORATED,
Employer

and

BALCA Case No.: 2014-PWD-00009
ETA Case No.: P-400-14016-803301

In the Matter of

REITHOFFER SHOWS, INCORPORATED,
Employer

Center Director: William K. Rabung
National Prevailing Wage Center

Appearances: Leon R. Sequeira, Esquire
Prospect, Kentucky
For the Employers

Jonathan Waxman, Associate Solicitor
Jonathan R. Hammer, Attorney
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, DC
For the Certifying Officer

Before: **CLEMENT J. KENNINGTON**
Administrative Law Judge

DECISION AND ORDER
AFFIRMING PREVAILING WAGE DETERMINATION

This matter arises from appeals by Wade Shows, Inc. and Reithoffer Shows, Inc., 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 (“PWD”), for the position of “Mobile Entertainment Worker.”

BACKGROUND

The H-2B non-immigrant program permits employers to hire foreign workers to perform temporary non-agricultural work within the United States on a one-time occurrence, seasonal, peakload, or intermittent basis, as defined by the Department of Homeland Security. *See* 8 U.S.C. § 1101(a)(15)(H)(ii)(b). An employer seeking to use this program must apply for and obtain a temporary labor certification from the Department of Labor (“DOL” or the “Department”). 8 C.F.R. § 214.2(h)(6)(iii)(A) 20 C.F.R. § 655.6(b).

On January 5, 2014, Wade Shows, Inc. (Wade), based in Spring Hill, Florida, filed an ETA Form 9141 *Application for Prevailing Wage Determination* for the position of Mobile Entertainment Worker pursuant to its request for temporary labor certification under the H-2B program. (Wade AF 29-43).² On January 16, 2014, Reithoffer Shows, Inc. (Reithoffer), based in Gibsonton, Texas, filed an ETA Form 9141 *Application for Prevailing Wage Determination* for the position of Mobile Entertainment Worker pursuant to its request for temporary labor certification under the H-2B program. (Reithoffer AF 29-43). The contact representative for

¹ *See Gopher State Expositions, Inc.*, 2014-PWD-10, slip op. at fn. 1 (Aug. 1, 2014): “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.

both Wade and Reithoffer (collectively “Employers”) is JKJ Workforce Agency of Rio Hondo, Texas. (Wade AF 29; Reithoffer AF 29).

In Section E.c of the ETA Form 9141 and an addendum to each application, Wade identified 40 worksites and Reithoffer identified 39 worksites for Mobile Entertainment Workers³. (Wade AF 6; Reithoffer AF 6). Employers submitted a private wage survey from the Outdoor Amusement Business Association and Small Business Workforce Alliance containing the survey methodology and metropolitan statistical area (MSA) wage summary reports from each location sought by Employers for the PWD. (Wade AF 46-81; Reithoffer AF 46-93). The survey included 160 respondents that employ 5,300 mobile entertainment workers, ranging from 1 to 290 workers per employer. Each report specified the number of employers surveyed in the geographic area and the actual wage paid to entry-level employees in the position of Mobile Entertainment Worker. Wage rates were presented as an “arithmetic mean hourly rate.” (Wade AF 46, Reithoffer AF 46).

On February 10, 2014, the NPWC issued the original PWD for each of the 40 worksites listed by Wade. The Certifying Officer (CO) concluded that survey provided by Wade was not acceptable. Specifically, the survey methodology, which was limited to mobile entertainment workers, did not consider wages for workers “similarly employed” at fixed sites. (Wade AF 32). The NPWC also cited the survey’s lack of a weighted average of wages paid to workers in that the survey provided only an average rate by each employer, and the number of workers per employer is not presented in association with any wage rate. (*Id.*)

Therefore, the NPWC assigned an “OES” wage (Bureau of Labor Statistics’ Occupational Employment Statistics wage) based on the SOC (O*NET/OES) occupational title “Amusement and Recreation Attendants” for each geographic location listed by Wade.⁴ (Wade AF 32, 36-43; Reithoffer AF 32, 36-43; 94-99). The OES wages ranged from a low of \$8.09 per hour for the Colbert-Florence-Muscle Shoals, Alabama MSA to a high of \$11.83 in Pettis – Central Missouri Nonmetropolitan Area. (Wade AF 39, 41).

Similarly, on February 19, 2014, the NPWC issued the original PWD for each of the 39 worksites listed by Reithoffer and assigned the OES wage. (Reithoffer AF 32). The NPWC determined that the survey was not acceptable, because “[t]he survey documents provided do 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 an unweighted average of wage rates.” (Reithoffer AF 32). Also, “the survey did not consider wages for workers performing the same duties at stationary locations such as amusement parks, resorts and other entertainment venues.” (Reithoffer AF 32). The OES wages ranged from a low of \$8.22 per hour in the Wood – Parkersburg-Marietta-Vienna, OH-WV MSA to a high of \$12.92 in the

³ The position of Mobile Entertainment Worker entails tasks associated with the operation of mobile amusement rides and attractions, including fun houses, food concessions, game concessions, novelty concessions, circus tents and seating. (Wade AF 6, 30; Reithoffer AF 6, 30).

⁴ See *May 2012 Metropolitan and Nonmetropolitan Area Occupational Employment and Wage Estimates*, Bureau of Labor Statistics – United States Department of Labor, available at: <http://www.bls.gov/oes/2012/may/oessrcma.htm#S> (last visited July 29, 2014). The Standard Occupation Code for “Amusement and Recreation Attendants” is 39-3091.

Jefferson, Clinton, and Montgomery – Capital/Northern New York Nonmetropolitan Areas. (Reithoffer AF 38-39, 41).

On March 12, 2014 (Wade) and March 21, 2014 (Reithoffer), Employers entered a Request for Redetermination. According to Employers, the survey methodology and individual survey reports for specific locations indicate the average wage or “arithmetic mean” wage for the location based on a survey of various mobile entertainment employers regarding the entry-level wage rate they pay to mobile entertainment employees. (Wade AF 27-28; Reithoffer AF 27-28). Employers argued that the Department provided no citation to any requirement stating that a survey must provide a weighted average of wages paid to workers, nor to any requirement that a survey must present the number of workers associated with a wage rate, in order to be valid. (Wade AF 27-28; Reithoffer AF 27-28). Employers also argued that mobile entertainment workers, who “travel thousands of miles in a season” and continually assemble and disassemble rides and attractions, are not “similarly situated” and have much different duties than workers at stationary amusement parks, resorts, and other entertainment venues. (Wade AF 27-28; Reithoffer AF 27-28). Employers’ survey, they continued, included cross-industry representation from employers of mobile entertainment workers; stationary locations, by definition, do not employ mobile workers. (Wade AF 28; Reithoffer AF 28).

On April 11, 2014 (Wade) and April 18, 2014 (Reithoffer), the NPWC upheld the initial wage determination for several reasons. First, the survey methodology of Employers’ survey attests that the sample is limited to employers only in the mobile entertainment industry. (Wade AF 24-25; Reithoffer 24-25). The NPWC cited the ETA’s National Prevailing Wage Determination Policy Guidance (Guidance), which states that “factors relating to the nature of the employer, such as whether the employer is public or private, for profit or non-profit, 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 under the regulations” at 20 C.F.R. §§ 655.10 and 656.40. (Wade AF 24, 103; Reithoffer 24, 115). Also pursuant to the Guidance, the survey “does not present an arithmetic mean (weighted average) of wages for workers that are similarly employed in the area of intended employment.” (Wade AF 24, 102; Reithoffer 24, 114). Furthermore, the CO found that the survey’s statistical universe and sample size must contain wage data collected from a sample of at least three employers and at least 30 workers in order to produce accurate arithmetic mean wage data result for all levels of occupation in the area of intended employment. (Wade AF 24; Reithoffer 24).

On April 19, 2014, Employers requested review by the Center Director (CD), citing the grounds in the prior request for a redetermination. (Wade AF 20-23; Reithoffer AF 20-23). On May 20, 2014, the Center Director expanded on the previous findings of the NPWC and affirmed the initial PWD for Employers.

On June 16, 2014, Employers requested review by the Board of Alien Labor Certification Appeals (BALCA), pursuant to 20 C.F.R. § 655.11(e). On July 1, 2014, the Center Director sent the Appeal File to the Office of Administrative Law Judges for the PWD Appeal. The Center Director enclosed a memorandum reiterating his position and reasons for upholding the NPWC’s initial wage determination.

On July 10, 2014, I received the Appeal File and issued a Notice of Docketing. Also on July 10, 2014, BALCA consolidated the referred cases, Wade (ETA Case No. P-400-14004-114203) and Reithoffer (ETA Case No. P-400-14016-803301), for purposes of administrative review, pursuant to 29 C.F.R. § 18.11. On July 16, 2014, Employers filed on unopposed request to extend the time to submit their brief, and I issued an Order Extending Time Regarding Briefing Schedule.

On July 25, 2014, Employers filed a brief in support of their position. Employers argued that the survey meets the applicable standards in the Department's regulations and guidance, and that the NPWC's initial PWD, Redetermination, the Center Director Review and the Center Director's Memorandum rejecting the survey are contrary to Department regulations and/or are unreasonable interpretations of the regulations and guidance, and thus violate the Administrative Procedures Act, 5 U.S.C. § 551 *et seq.* (Emp. Br., p. 2). Employers contended that the Department's claim that the survey contains an "average of averages" is incorrect. (Emp. Br., pp. 8-9). Employers argued that the survey contains cross-industry representation and there is no requirement to include wages of different types of workers at stationary locations. Each individual survey report refers "to the occupation (job) of Mobile Entertainment Worker" and "properly includes entry level wage paid by employers who employ workers in the occupation of Mobile Entertainment Worker." (Emp. Br., pp. 9-10). Employers also disputed the so-called "requirement" of a sample size of a minimum of 30 workers and three employers, and that the information appeared in Appendix F of the Guidance under the heading "Suggested Survey Methodology." (Emp. Br., pp. 9-10). Hence, the word "suggested" indicates that it is permissive, not mandatory. (*Id.*)

Also on July 25, 2014, the CD filed a brief in support of his position that the initial PWD should be affirmed. The CD stated that the Guidance is explicit in that the survey results must be based on the wages of workers, and since the survey does not provide a weighted average, it was properly rejected. (CD br., p. 2). The CD also repeated his contention that the survey did not contain cross industry data as required by the Guidance. (*Id.*)

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); *Gopher State Expositions, Inc.*, 2014-PWD-10, slip op. at 4 (Aug. 1, 2014). 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 Guidance

The Code of Federal Regulations explains the mechanism for employers to provide information through a survey as part of the determination of the prevailing wage for temporary labor certification purposes.⁵ Under 20 C.F.R. § 655.10(f), “the employer must provide 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 the validity of the statistical methodology used in conducting the survey in accordance with the guidance issued by the OFLC [Office of Foreign Labor Certification] national office.”

The Office of Foreign Labor Certification Data Center provides a publicly available edition of the ETA’s Prevailing Wage Determination Policy Guidance (Guidance).⁶ The Guidance, published in 2009, contains a section entitled “Criteria for Employer-Provided Surveys” and, in its Appendix F, a “Check Sheet for Employer-Provided Wage Surveys.”⁷

The main section of the Guidance states that “factors relating to the nature of the employer, such as whether the employer is public or private, for profit or non-profit, 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 under the regulations” at 20 C.F.R. §§ 655.10. (Wade AF 103; Reithoffer 115). The “relevant factors” are 1) “the job,” 2) “the geographic locality of the job,” and 3) “the level of skill required to perform independently on the job.” (*Id.*). Also, “similarly employed” is defined as jobs requiring substantially similar levels of skills, and it references the Code of Federal Regulations definition of “similarly employed” which is, in relevant part, as having “substantially comparable jobs in the occupational category in the area of intended employment.” (Wade AF 102; Reithoffer AF 114); 20 C.F.R. § 655.10(b)(4). Also, “[t]he wage data must have been collected across industries that employ workers in the occupation.” (Wade AF 102; Reithoffer AF 114).

Appendix F provides a checklist for employer-provided surveys.⁸ Pages 1 and 2 of Appendix F contain the following, in relevant part, under the section “Surveys Must Meet the Following Criteria”:

- **Cross Industry Wage Data – The wage data must have been collected across industries that employ workers in the occupation.**⁹

⁵ The interim final rule issued by the Department permits the use of employer-provided surveys in lieu of wages provided by other sources, and thus did not revise or amend 20 C.F.R. 10 (b)(4) and (f) of the 2008 rule. 78 Fed. Reg. 24047, 24055-56 (Apr. 24, 2013).

⁶ *Prevailing Wage Determination Policy Guidance*, Employment and Training Administration, available at: http://www.flcdcenter.com/download/NPWHC_Guidance_Revised_11_2009.pdf (last visited Aug. 7, 2014) (hereinafter *Guidance*).

⁷ See also *id.* at 14 and Appx. F, p. 1.

⁸ *Id.* at Appx F., pp. 1-2. The Appeal File in both Wade and Reithoffer is missing page 2 of Appendix F.

⁹ The OES website provides publicly available definitions that differentiate key concepts such as “industry” and “occupation” and “industry-specific estimates” and “cross-industry estimates,” which can be used as a reference. *Occupational Employment and Wage Estimates, Frequently Asked Questions*, Bureau of Labor Statistics – United States Department of Labor, available at: http://www.bls.gov/oes/oes_ques.htm (last visited August 1, 2014). An “**industry**” is “a group of establishments that produce similar products or provide similar services.” An

- The survey should produce an arithmetic mean (weighted average) of wages for workers in the appropriate occupational classification in the area of intended employment. If a mean is not available, the median can be used.
- The survey must identify a statistically valid methodology that was used to collect the data.

Appendix F provides a “Suggested Survey Methodology” containing actions which should be taken to conduct a valid wage survey, along with the following, in relevant part:

Decide how many employers must be contacted to produce usable wage results from at least three employers and at least 30 workers. Results for 30 workers is the minimum acceptable sample; for most occupations there should be wage data for many more workers.¹⁰

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

First, the Center Director is correct that Employers’ survey did not contain cross industry data, in that the survey pool is incomplete. The CD identified the example of a translator to illustrate this point:

[T]he determination of the survey pool for a translator would not depend on whether the translator was working for a science company or a law firm; it would depend on whether the two jobs are substantially comparable.

(CD Br., pp. 2-3).

Here, the survey used by Wade and Reithoffer included only employers of mobile amusement and recreation attendants rather than all amusement workers and recreation attendants, including stationary workers. Specifically, the survey identified the “[c]ross industry representation of respondents” as including “Carnival Companies, Independent Ride Operators, Food Concessions Operators, Game Concession Operators, Circus Companies and Novelty Concession Operators.” (Emp. Br., p. 11). Employers’ explanation of the distinction rests primarily on 1) the travel requirements and 2) the assembly and disassembly of rides and attractions as part of the process; thus, mobile entertainment workers are not in the same “occupation” as other amusement and recreation attendants. (Emp. Br., pp. 10-11; CD Br., pp. 2-3).

“**occupation**” is a set of activities or tasks that employees are paid to perform....**Employees that perform essentially the same tasks are in the same occupation, whether or not they are in the same industry.**” “Industry-specific estimates” are calculated with data collected from establishments in **one particular industry**. “Cross-industry estimates” are calculated with data collected from establishments in **all the industries** for which a particular occupation is reported. *Id.* (emphasis added).

¹⁰ *Guidance*, Appx F., p. 2.

However, in Section E.a.5 of ETA Form 9141 requesting the PWD, Employers give the following job description:

Perform tasks associated with the operation of mobile amusement rides and attractions, including fun houses, food concessions, game concessions, novelty concessions, circus tents and seating. Tasks may include preparation, set up and tear down, operations, routine maintenance and safety checks; assisting, serving, and monitoring patrons; collecting tickets or monies for sales of food, game novelties or admissions; stock food, game and novelty supplies; clean and maintain attractions; drive vehicle among work site, living site and local commercial establishments.

(Wade AF 6, Reithoffer AF 6).

Employers mentioned the fact that travel is required in Section E.a.6 of ETA Form 9141 and in an addendum to the application, and indicated that mobile entertainment employers operate in several states in a season in the cover page to the survey. (Wade AF 6, 46; Reithoffer AF 6, 46). Yet Employers do not meet the burden of showing how the set up and break down of attractions and travel dramatically change the nature of the job opportunity such that the two positions are not part of the same occupation, and that the non-mobile operators should not be included in a cross-industry survey, especially in light of the job description they provided in Section E.a.5 of ETA Form 9141. (Wade AF 82-87; Reithoffer AF 94-99)

Second, the survey's methodology results in an un-weighted mean, which is insufficient under Regulations and Guidelines for employer-provided surveys. Employers' statements in the responses indicate that they misunderstood the Guidance and the corresponding regulations, 20 C.F.R. §§ 655.10(b)(2) and (4). For instance, in explaining the survey methodology, Employers referred to "average (median) hourly wage calculated from the range of actual wages reported by the employers." (Emp. Br., p. 4). Also, according to Employers, at the bottom of each table of employers and wages is a designation of the "average" of all the actual wage rates presented, "which is the median," and that each individual report contains "the average hourly wage and corresponds with the average (median) wage rate calculated at the bottom of the table." (*Id.* at p. 9). The Guidance, as Employers point out, does allow for the provision of the median wage of workers in lieu of the arithmetic mean if the arithmetic mean is not included in the survey documents. Some of the wages in the individual reports are listed as "average median"; others are referred to as "average."¹¹ Based upon the actual

¹¹ The Department of Labor provides publicly available sources that define key terms such as "mean" and "median" in an occupational context for employers to reference. *Occupational Employment and Wage Estimates, Frequently Asked Questions*, Bureau of Labor Statistics – United States Department of Labor, available at: http://www.bls.gov/oes/oes_ques.htm (last visited August 1, 2014). Also, the Occupational Outlook Handbook provided by BLS provides a simplified definition of concepts such as "mean" and "median": ("**Mean**: the mathematical average of a set of numbers, calculated by adding the numbers and dividing the total by the number of numbers summed; see *Average*. ... **Average**: the quantity calculated by adding a set of numbers and dividing the resulting sum by the quantity of numbers summed; see *Mean*. ... **Median**: the middle number in an ordered list of numbers."). *BLS Information – Glossary*, Bureau of Labor Statistics – United States Department of Labor, available at: <http://www.bls.gov/bls/glossary.htm> (last visited Aug. 1, 2014).

survey methodology, it appears that wages provided are based upon the “average” or un-weighted mean, not the median.¹²

Indeed, the survey contains sufficient information to establish that the individual reports contained at least 30 workers, as each report contained at least 27 employers with between 1 and 290 workers. *See also Gopher State Expositions, Inc.*, 2014-PWD-10, slip op. at p. 6 (Aug. 1, 2014). Yet the survey’s methodology results in the wages of an employer with one worker being accorded the same weight as an employer with 290 workers. Thus, the wages of a small outlier would have an inordinate impact on survey results. (CD Br., p. 2). The survey does not identify how many employees each employer surveyed actually employed, only that the number was between 1 and 290. Hence, the survey “does not present an arithmetic mean (weighted average) of wages for workers that are similarly employed” in the areas of intended employment. (Wade AF 102; Reithoffer 114).

Based on the foregoing, I find that the Center Director did not abuse his discretion in upholding the NPWC’s rejection of the employer-provided survey because the survey did not contain wage data collected across industries that employ workers in the occupation and the survey did not provided a weighted mean wage.

ORDER

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

SO ORDERED.

For the Board:

CLEMENT J. KENNINGTON
ADMINISTRATIVE LAW JUDGE

¹² I sampled the individual report of the West Central Pennsylvania Nonmetropolitan Area, which surveyed 39 employers. The entry-level wage rates were added up for a total of 324.12, and then divided by 39 for 8.311 or \$8.31, which Reithoffer presented as the “Median Average.” (Reithoffer AF 71). *See also* CD Br., fn. 4.