

**STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS**

In the Matter of the Request for Review of
Total Service

Case No. 05-0129-PWH

From the Notice of Withhold issued by:
Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR

INTRODUCTION

Affected Contractor Total Service, Inc. ("Total Service") requested review of a Civil Wage and Penalty Assessment ("Assessment") issued by the Division of Labor Standards Enforcement ("Division") with respect to the Little Theatre Demolition Project, Orange County Fair, 32d District Agricultural Association, State of California. A hearing on the merits was held on March 3 and May 19, 2006, in Long Beach, California, before appointed Hearing Officer Ann F. MacMurray. Total Service appeared through Mr. Walter Schuster, and the Division appeared through Bruce McManus, together with Deputy Labor Commissioner Ken Madu. The parties presented evidence and arguments, and the case was submitted for decision on May 19, 2005. For the reasons set forth below, the Director dismisses in part and modifies in part the Assessment.

PROCEDURAL HISTORY

This case arises out of a public works contract between Total Service and the Orange County Fair & Exposition Center, 32d District Agricultural Association, State of California ("Ag District"). The contract called for Total Service to demolish and remove the Little Theatre building and all spoils directly related to the demolition ("Project"). Five salvage workers filed complaints with the Division asserting that Total Service had not paid them the correct prevailing wage.

Following an investigation, the Division issued the Assessment on June 1, 2005, based on its determination that Total Service failed to pay the prevailing wage rate to five workers engaged in salvaging and recycling building material, in violation of Labor Code section 1774.¹ The Assessment also determined that Total Service failed to provide certified payroll records ("CPRs") in violation of section 1776(g) for both these salvage workers and for the workers who did the actual demolition.² The Total Service workers who performed demolition were not included in the wage portion of the Assessment, however.

The Division determined that Total Service was liable for \$6,863.10 in back wages for the salvage workers, \$1,350.00 in penalties under sections 1775(a), and \$50.00 in overtime penalties under section 1813. The potential amount of liquidated damages under section 1742.1(a) amounted to \$6,863.10. The Division also determined that section 1776(g) penalties were due in the amount of \$19,250.00 for failure to provide CPR's.³ The Assessment totaled \$34,376.20.⁴

In its defense, Total Service asserted that, based on the representations of the Ag District, the Project was not a public work and thus not subject to the payment of prevailing wages nor subject to CPR submissions. Total Service also asserted that the five salvage workers, for which it was assessed unpaid wages, were not Total Service employees, but rather independent salvage workers who salvaged lumber for resale in Mexico.

On August 26, 2005, at the first prehearing conference, the Division made clear that it was aware that the unpaid wage Assessment was limited to the salvage workers and did not include Total Service's own demolition employees. The Division gave no indication at either conference that it would seek to amend the Assessment on any basis.

¹ All statutory references are to the Labor Code unless otherwise specified.

² The request for CPRs included "...all workers who were employed by Total Service on the above identified public works job" While that request did not delineate categories of workers, the Division's position is that the request for all workers included the salvage workers as well as Total Service employees.

³ The Penalty Review Form set the penalty formula at \$25.00 per day for 11 workers for 70 days, from March 8, 2005 through June 1, 2005. These workers included the salvage workers as well as Total Service employees.

⁴ The parties stipulated that the Assessment was timely served, the request for review was timely filed, that the enforcing agency made its evidence available and that no back wages had been paid. The parties waived the ninety days within which to hold the hearing.

On March 3, 2006, the first day of the hearing on the merits, the Division first mentioned its intent to move to amend the Assessment to add unpaid prevailing wages and penalties for Total Service's own demolition employees, in an unspecified amount, depending on the evidence, as well as to increase the penalties for failure to provide CPRs. Total Service objected to this late amendment as it was not prepared to go forward on an amended Assessment. At the conclusion of the parties' presentation of evidence on March 3, the Division did move to amend the Assessment to include prevailing wages and penalties for eight Total Service demolition employees, although it continued to fail to specify the amount of unpaid wages, and to increase the amount of penalties for failing to provide CPRs from the date of the Assessment, June 1, 2005, through the hearing date, March 3, 2006. The Division's motions were denied as untimely.

FACTS

Total Service proposed the following scope of work:⁵

- A. Demo and remove existing "Little Theatre" building, including all walls, partitions, flooring, ceiling, paneling, and stucco material.
- B. Demo and remove 6,672 square feet of existing on-site Asphalt Parking Area located directly adjacent to the "Little Theatre."
- C. Removal and disposal of all spoils directly related to the Demolition.

The Ag District accepted this proposal on December 13, 2004.

The Division offered testimony through Madu. He testified that the five complaining workers reported that they performed demolition clean-up work at the Project. Madu took worker statements, reducing them to signed declarations, and obtained calendar information regarding the workers' best estimates of their dates and hours worked. Four of the five workers worked eight hours per day for five days (including one Saturday). The fifth worker reported working the same five days plus two additional days of 10 and 13 hours respectively. For all work performed, each worker was paid between \$100.00 and \$300.00 total.

⁵ A later change order, dated January 20, 2005, was on a standard State of California contract/Delegation Purchase Order form.

Madu obtained documents from the Ag District including Total Service's Quotation Requests, a Change Order, as well as the Contract Purchase Order. The Ag District representative also told Madu that the Ag District did not know the Project was a public work.

Madu spoke with Total Service, which claimed that, based on the representations of the Ag District, the work was not a prevailing wage job. Total Service also claimed that the complaining workers were independent salvage workers and not its employees. Total Service provided the Division with a list of Total Service's demolition employees along with the gross and net wages paid, as well as a list of the dates and hours worked by its own employees and the salvage workers.⁶

Madu classified these workers as demolition laborers entitled to a straight-time prevailing wage rate of \$33.00 per hour and an overtime rate of \$43.30 per hour. Laborer and Related Classifications, Determination: SC-23-102-2-2004-1. For hours worked, Madu testified that he used the workers' calendar information because Total Service did not provide CPRs despite a request for the "... time and payroll records of all workers who were employed by Total Service on the above identified public works job" Madu calculated the amount of prevailing wages due, less \$980.00 received by the workers, which totaled \$6,863.10 in back wages.

The Division presented Madu's testimony and submitted the penalty review form approved by the Senior Deputy Labor Commissioner in support of its assessment. The section 1775 penalties were assessed at \$50.00 per day per worker for 27 days for totaling \$1,350.00; the section 1813 penalties were assessed at \$25.00 for two violations totaling \$50.00;⁷ and the 1776(g) penalties were assessed at \$25.00 per day for 70 days for 11 workers which totaled \$19,250.00 for the failure to provide CPRs.

The Division next presented testimony of the salvage workers and called Jaime Castro as its first witness. Castro testified that his business is salvaging lumber for sale to a truck driver, who, in turn, transports the lumber to Mexico. He and others gather at a

⁶ The record is not clear when and to whom Total Service provided this listing, but it was in the Division's possession at least by July 11, 2005, as it was appended to Total Service's Request for Review transmitted from the Deputy Labor Commissioner.

⁷ Inexplicably, the Division only cited for two of the potential seven overtime violations.

day-laborer location seeking salvage work. When work was slow, Castro contacted companies offering his salvage services. Total Service was one of the companies he solicited. When Total Service needed these services for the Little Theater Demolition Project, it called him. As was his practice, Castro then called his friend, Nicolas Cota, and together they gathered other day-laborers who, for the last 15 years, have assisted them in salvage work. Castro testified that he or perhaps Cota made the arrangements with the truck driver.

Castro and the salvage crew sorted through the remains of the Little Theater building and loaded only the lumber that the crew deemed reusable onto the truck. The truck driver paid for the lumber. None of the salvage workers demolished the building, operated any of the heavy equipment, nor did they drive or refuel the vehicles.

Castro promised the workers \$100.00 per day, plus gas, derived from selling the salvaged lumber to the truck driver. When the lumber did not generate the money Castro anticipated, and Castro could not pay the workers what he had promised, he called Total Service for money to pay the workers. Castro believed sufficient money to pay the workers would come from selling the lumber to the truck driver; but he thought Total Service would make up any shortfall because it was Total Service's job to remove the material from the job-site. No one at Total Service, however, said they would make up any payroll shortfall.

Castro worked on the Project for seven days salvaging material. He worked eight-hour days on January 27, 28, 29, 31, and February 1, 2005. He worked 10 and 13 hours respectively on February 2 and 3, 2005. His 15 hours of overtime included eight hours on Saturday, January 29, and seven hours on February 2 and 3.⁸ He received \$100.00 for the entire Project. When asked whether anyone from Total Service told the salvage workers how to perform their work, Castro testified that no one directed their work because he and this group of men have worked together for 15 years and knows each other and the job.

⁸ The two overtime violations cited were for Castro's work on February 2 and 3. No overtime violations were charged for the Saturday work performed by the other four workers.

Cota testified that he has worked prior salvage jobs. He gets paid by selling the salvage material to truck drivers from Mexico. Castro called him to help salvage the lumber from this demolition project. Cota worked five eight-hour days on January 27, 28, 29, 31, and February 1, 2005. Since January 29 was a Saturday, he accrued eight hours of overtime. Cota received a total of \$200.00 from Castro for the entire job, despite being promised \$100.00 per day.

Pedro Vega testified that Castro hired him and drove him to the job site. He worked five eight-hour days on January 27, 28, 29, 31, and February 1, 2005, for which he was paid a total of \$280.00. Since January 29 was a Saturday, he accrued eight hours of overtime. He did not know how, when, or by whom he would be paid, but Castro told him he would be paid \$100.00 per day.

Guillermo Labrada testified that Castro came to the day-laborer location and gathered workers for this Project. He has worked prior salvage jobs with Castro. On this Project, he worked five eight-hour days on January 27, 28, 29, 31, and February 1, 2005, for which Cota paid him \$300.00. Since January 29 was a Saturday, he accrued eight hours of overtime.

Fidel Chabes testified that Castro told him that he would be paid \$100.00 per day. He worked five eight-hour days gathering lumber and cleaning up on January 27, 28, 29, 31, and February 1, 2005, for which he was paid a total of \$100.00. Since January 29 was a Saturday, he accrued eight hours of overtime.

Brian Litman testified that he was an employee of Total Service who operated heavy equipment on the Project. He kept track of worker sign-in on his daily logs for the purpose of the morning safety meetings. Litman did not tell the salvage workers how or where to move the salvaged lumber. On one occasion, Scott Hammond, President of Total Service, told Litman to accept payment by the truck driver for distribution to the salvage workers because Castro was not present. Hammond said this was pursuant to a conversation he had with Castro. Litman accepted the money from the truck driver on Castro's behalf and gave the money to one worker for distribution to the remaining salvage workers.

Dena Heathman serves as the Chief Administrative Officer for the Ag District. She oversees the facilities department, human resources and finance. She testified that the Ag District, which is a part of the Department of Food and Agriculture, is an agency of the State of California. The purpose of the Ag District is to promote agricultural education and to hold and manage properties for fairs and agricultural programs. Heathman first learned about the Project during a department budget and planning session. She has signed purchase orders similar to the one that paid for the Project. Heathman testified that the Ag District's only source of funds are those internally generated, so that the money used for the Project would have been the Ag District's general operating funds; the Ag District receives no general fund money from the State.

Vince Staskewicz, the Ag District's Supervisor of Maintenance, negotiated the Project's terms of work with Total Service. He testified that he told the Total Service representative that this job was not a public work and therefore was not subject to payment of prevailing wage job. Staskewicz stated that he mistakenly believed it was not a prevailing wage job because his own work crew dismantled the infrastructure, and Total Service was only required to demolish the building and remove the remaining material.

Hammond testified that Total Service is involved in demolition work and erecting storm water fencing for pollution control. Total Service has union and non-union jobs. It hires directly from the union when working on public works projects. Prevailing wage work constitutes approximately 10 to 15 percent of its work.

Hammond testified that Staskewicz called Total Service for a quotation request on the Project, and that Total Service representative, Aaron Adams, told him that this was not a prevailing wage job. The quotation submitted by Total Service did not include prevailing wage rates or a CPR requirement because it had relied on the Ag District's representation that this was not a prevailing wage job.

Hammond testified that Castro contacted him about available salvage work. Hammond offered Castro salvage opportunities on any of three available demolition jobs. Castro selected the Little Theater Demolition Project so he could resell the lumber. Total Service otherwise would have crushed up the lumber along with the other debris and

trucked it to the dump since its contract with the Ag District called for removal and disposal of all spoils related to the demolition.

Hammond reported that all of Total Service's demolition projects have salvageable material.⁹ Sometimes Total Service pays to have the salvage removed to a dump, and other times a salvage crew pays Total Service for the opportunity to remove salvage for resale. These salvage workers make their living from selling the salvage. In this case, Hammond allowed the salvage workers to remove the material without cost to either party. The salvage workers sold the lumber to a truck driver who transported the material to Mexico for reuse. Hammond testified that he expected the salvage from the Project to generate enough profit for Castro that Total Service would receive money from the salvage crew.

Hammond testified that the salvage workers were not Total Service employees, and that Total Service did not promise to pay, nor did it pay, for any of the salvage work. Total Service did not direct the salvage work because the workers are knowledgeable and will leave the job site if they are directed.

Hammond stated that Madu asked Total Service to supply CPRs. Since Hammond believed the project was not a prevailing wage job, Total Service had no CPRs. Total Service did submit a list of its eight demolition workers employed on the job, their gross and net wages paid, as well as a list of all workers, including the salvage workers, reflecting the dates and hours worked.

The Division and Total Service entered into a Stipulation of Facts that stated in pertinent part: "...that portion of the materials which the claimants...removed from the job site in question were salvageable materials and were sold to truck drivers to be taken to Mexico where the materials would be reused and that said materials were not hauled to an outside disposal location."

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⁹ Hammond testified that there is a statewide requirement to recycle 70 percent of building material. However, this appears to be a goal rather than a requirement that becomes implicitly part of this particular construction contract.

DISCUSSION

Sections 1720 *et seq.* sets forth a scheme for determining and requiring the payment of prevailing wages to workers employed on public works construction projects.

The overall purpose of the prevailing wage law ... is to benefit and protect employees on public works projects. This general objective subsumes within it a number of specific goals: to protect employees from standard wages that might be paid if contractors could recruit labor from distant cheap-labor areas; to permit union contractors to compete with nonunion contractors; to benefit the public through the superior efficiency of well-paid employees; and to compensate nonpublic employees with higher wages for the absence of job security and employment benefits enjoyed by public employees.

Lusardi Construction Co. v. Aubry (1992) 1 Cal.4th 976, 987 [citations omitted].

The Division enforces prevailing wage requirements not only for the benefit of workers but also "to protect employers who comply with the law from those who attempt to gain competitive advantage at the expense of their workers by failing to comply with minimum labor standards." Lab. Code, § 90.5(a). The duty to pay prevailing wages is statutory and cannot be negated by contractual language or the subjective understandings of the contracting parties. *Lusardi, supra*, 1 Cal.4th at 987-988.

Section 1775(a) requires that contractors and subcontractors pay the difference to workers who were paid less than the prevailing rate, and pay a penalty to the state. Imposition of a penalty is mandatory, but the amount is determined by consideration of three factors: the good faith of the contractor in making the mistake, the contractor's prompt correction when the mistake is identified, and the history of prior violations by the contractor. Section 1742.1(a) provides for the imposition of liquidated damages, essentially a doubling of the unpaid wages, if those wages are not paid within sixty days following service of a Civil Wage and Penalty Assessment under section 1741 unless waived by the Director.

When the Division determines that a violation of the prevailing wage law has occurred, a written Civil Wage and Penalty Assessment is issued pursuant to section 1741. An affected contractor or subcontractor may appeal the Assessment and request a hearing before an impartial hearing officer by filing a Request for Review under section 1742(a).

Section 1742(b) provides in part that “[t]he contractor or subcontractor shall have the burden of proving that the basis for the civil wage and penalty assessment is incorrect.” The hearing is to be held conducted in accordance with the procedural regulations contained in California Code of Regulations, title 8, sections 17201, *et seq.*¹⁰

1. The Division’s Motion To Amend The Assessment To Include Total Service Demolition Employees And To Increase The Penalties For Failure To Provide Certified Payroll Records Is Denied As Untimely.

Rule 26(a) provides, in pertinent part, as follows:

(a) Upon motion to the appointed hearing officer, an Enforcing Agency may dismiss or amend an Assessment as follows:

* * *

(3) For good cause, an Assessment...may be amended to revise or increase any claim for wages, damages, or penalties based upon a recomputation or the discovery of new evidence subsequent to the issuance of the original Assessment....

The Division first made known its intent to amend the Assessment “depending on the evidence” in discussions just prior to the start of the hearing on March 3, 2006. At the close of evidence on the first day of hearing, the Division moved to amend the Assessment to add unpaid wages and penalties for Total Service’s own demolition employees, in amounts unspecified, and to increase section 1776(g) penalties for failing to provide CPRs, assessed at the rate of \$25.00 per worker per day, through the date of the hearing.

The Division knew as early as August 26, 2005, that the Assessment was based only on the salvage workers and did not include Total Service demolition employees. Furthermore, the Division had in its possession at least by July 11, 2005, the list of Total Service demolition employees, their gross/net wages paid as well as the dates and hours worked; yet the Division did nothing with that information until the day of the hearing. Discovery of this new evidence sometime in July 2005 might have provided the Division with the right to seek amendment of the Assessment at that time, but not seven months after first coming into possession of this information, on the day of the hearing. Any

¹⁰ Individual sections within these prevailing wage hearing regulations are referred to as “Rules” using only their last two digits.

good cause to amend is more than offset by the prejudice to the contractor (who has the burden of proof) by seeking an amendment in an unspecified amount at the eleventh hour. Similarly, the Division's unreasonable delay in seeking to amend the Assessment for section 1776(g) penalties does not demonstrate good cause to amend.

The Division's motion to amend is, therefore, denied in its entirety.

2. The Salvage Workers Are Not Entitled To Be Paid Prevailing Wages On Either Of Two Possible Grounds.

A. Public Works Coverage Under Section 1720(a)(1).

There are two primary statutory bases upon which a worker may be entitled to prevailing wages. The first involves a determination that the worker is performing public work under section 1720(a)(1), which defines that phrase as "[c]onstruction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds..." The work performed by the salvage workers here is not public work. Sorting through a debris pile and selecting material to recycle is not "[c]onstruction, alteration, demolition, installation, or repair work." Nor does the loading of the selected materials onto a truck after they have become your property fall within the enumerated types of work that constitute public work under section 1720(a)(1).

B. Public Works Coverage Under Sections 1772, 1774.

The salvage workers might be entitled to prevailing wages under a second statutory basis. Under section 1772, "[w]orkers employed by contractors or subcontractors in the execution of any contract for public works are deemed to be employed upon public work." Similarly, under section 1774, contractors and subcontractors shall pay not less than the specified prevailing wage to all workers employed in the execution of the public works contract. In this analysis, the first question to be answered is whether there is an underlying public work project pursuant to the definition contained in section 1720(a)(1).

The Project was demolition, an enumerated type of public work, performed under a contract between Total Services and the Ag District. The Project was funded by monies generated by the Ag District from its participation in fairs, and other agricultural pro-

grams.¹¹ The Ag District is, by statute, a state institution. Food & Agr. Code, § 3953; *see also* Food & Agr. Code, § 3802 [defining an association as a district agricultural association] and Food & Agr. Code, § 3884 [stating that the 32d District Agricultural Association is comprised of Orange County]. “[P]aid for in whole or in part out of public funds” includes the payment of money by the state or political subdivision directly to the public works contractor. Lab. Code, § 1720(b) (1). Department of Industrial Relations (“DIR”) regulations define public funds as including “... state, local and/or federal monies.” Cal. Code Regs., tit. 8, § 16000. Government expenditures are public funds without regard to whether the money was acquired through an entity’s power of taxation or by some other means. Therefore, the monies paid by the Ag District to Total Service were public funds. Despite the Ag District’s misrepresentation to the contrary, the Project was a public work. *See, Lusardi, supra.*¹²

Having determined that the Project was a public work, the question is whether the salvage workers performed work “in the execution of the public work contract” such that they are entitled to the payment of prevailing wages.

Here, Castro was in the business of salvage on other projects and hired his own crew. He had no contract with the District. The crew had no involvement in the demolition, was not required to take anything away at all and was not guaranteed any payment for their work by the District or by Total Service.¹³ Total Service had no direction or control over where the salvage went. It had no direction or control over the crew beyond what was required to keep crews going about their distinct business out of each other’s way. The crew was therefore not part of the integrated process of demolition that qualifies for coverage under sections 1772 or 1774 any more than truckers who merely deliver

¹¹ Food and Agriculture Code section 4001 provides: Any money which is received by any association, other than from the sale of real property or pursuant to a lease, easement, or agreement for the extraction of oil or gas from lands owned or controlled by it, shall be retained and used by the association for its: (a) General use and purposes; (b) Maintenance; (c) Membership in livestock registry associations and fair associations; (d) Support and operation; (e) Acquisition, installation, maintenance, and operation of recreational and cultural facilities at its fairgrounds.

¹² The Director makes no finding whether the Ag District is therefore liable for any unpaid wages and penalties ordered paid by Total Service. Lab. Code, §§ 1726(c), 1781.

¹³ No claim was before the hearing officer as to the rights between the workers and Mr. Castro, as this is a prevailing wage enforcement proceeding as to Total Service.

and do not "immediately incorporate." *O.G. Sansone Co. v. Department of Transportation*, 55 Cal.App.3d 434, 443-44 (1976). As such, no prevailing wages are due the salvage crew.

3. Total Service Is Not Liable For Penalties Under Labor Code Sections 1775 And 1813 Nor For Liquidated Damages.

There being no prevailing wages due under this decision. Penalties under sections 1775 and 1813 only apply to the failure to pay prevailing wages. Since no prevailing wages are due, there can be no penalties; penalties under sections 1775 and 1813 accordingly are dismissed.

Similarly, liquidated damages under section 1742.1(a) are only awarded for unpaid prevailing wages. For the same reason, liquidated damages are not awarded.

4. Total Service Is Liable For Penalties For Failure To Provide Certified Payroll Records For Its Own Demolition Employees.

Labor Code section 1776(g) provides in pertinent part:

The contractor or subcontractor has 10 days in which to comply subsequent to receipt of a written notice requesting [certified payroll] records.... In the event that the contractor or subcontractor fails to comply within the 10-day period, he or she shall, as a penalty to the state ..., forfeit twenty-five dollars (\$25) for each calendar day, or portion thereof, for each worker, until strict compliance is effectuated

The Division sent a Request for Certified Payroll Records requesting certified copies of time and payroll information for *all workers who were employed* by Total Service on the Little Theatre Demolition Project from the beginning to completion of the project. The Division assessed its penalty based on eleven workers¹⁴ at \$25.00 per day for 70 days, from March 8 through June 1, 2005.

Total Service did not provide any CPRs due to the Ag District's contract representative's affirmative representation that the work was not a public work subject to the payment of prevailing wages. As noted above, however, this is no defense. *Lusardi, su-*

¹⁴ The record is not clear how the Division set the number of workers at eleven since there were eight Total Service's employees in addition to the five salvage workers.

*pra.*¹⁵ The statutory requirement to submit CPRs, when properly requested by the Division, can not be negated by agreement or misunderstanding. *Id.*

The demolition work was a public work subject to the payment of prevailing wages. Total Service admittedly did not prepare or provide CPRs. Thus, Total Service is liable for failing to provide CPRs for its employees. Even if the salvage workers had been doing covered work, Total Service's CPRs only have to include them if they were Total Service's employees.¹⁶

The question whether someone is an employee or an independent contractor is controlled by the Supreme Court's decision in *S.G. Borello v. Department of Industrial Relations* (1989) 48 Cal.3d 341. The court looked to multiple factors (including who supplies the equipment, and what is common in the industry) but placed the greatest reliance on the exercise of control over the manner and means of accomplishing the result. *Id.* at 350.¹⁷ Here, there are no factors that persuasively creates an employment relationship. The evidence shows that the salvage workers solicited the work from Total Service. They operated independently, unsupervised by Total Service, and supplied their own equipment. Under the *Borello* test, therefore, they were not Total Service employees.

Similarly, the salvage crew did not become employees under the test set out in Labor Code section 2750.5, as the Division argues. For section 2750.5 to apply, the asserted employee must be performing work that requires a license from the Contractors State License Board (CSLB). The Division argues that such a license is required for the

¹⁵ The conclusion that there is no defense does not address any rights that Total Service may have under Labor Code 1726(c), 1781, or rights with sources outside the labor code for indemnification.

¹⁶ While the question of employment is necessary for the determination of penalties under section 1776(g), resolving the employment question is not necessary to determine Total Service's liability for prevailing wages and overtime penalties, as this liability is joint and several, Lab. Code, § 1743, but none are due.

¹⁷ "Thus, we have noted that "[s]trong evidence in support of an employment relationship is the right to discharge at will, without cause. Additional factors have been derived principally from the Restatement Second of Agency. These include (a) whether the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee." *Borello, supra* at 35-351 (citations omitted).

salvage and removal of the material. This is incorrect. A CSLB license is required for demolition work. The C-21 license Hammond possesses allows "[a] building moving/demolition contractor raises, lowers, cribs, underpins, demolishes and moves or removes structures, including their foundations." Cal. Code Regs., tit. 16, § 832.21. There is no license requirement for the work performed.

The Director does not have discretion to modify the penalty amount or otherwise reduce it unless he determines that fewer workers were employed by Total Service. Here, Total Service has proven it only had eight workers on the Project. The penalty for failing to provide CPRs for the total Service demolition workers is therefore modified to \$14,000.00 (8 workers x \$25.00 x 70 days).

FINDINGS

1. Total Service filed a timely Request for Review from a Civil Wage and Penalty Assessment issued by the Division of Labor Standards Enforcement.
2. DLSE failed to seek to amend the Assessment in a timely fashion.
3. The demolition work that formed the basis of the contract between the 32d District Agricultural Association and Total Service was a public work subject to the payment of prevailing rate of wages to the workers employed in the execution of the demolition work.
4. The Assessment was not based on the demolition work performed by Total Service employees, but was based on the salvage work performed by Castro and his crew.
5. The salvage work was not an independent public work subject to the payment of prevailing rate of wages to the workers employed in the execution of this work.
6. The salvage work was not work performed in the execution of a public work contract. Therefore, no prevailing wages are due the salvage workers.
7. No penalties are due pursuant to sections 1775 and 1813.
8. No liquidated damages are due under section 1742.1(a).

9. Total Service failed to provide CPRs for its eight demolition employees and is, therefore, liable for section 1776(g) penalties for 70 days for a modified amount of \$14,000.00.

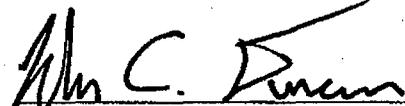
11. The amount found due in the Assessment is modified by the decision as follows:

Wages	\$0.00
Penalties under Labor Code section 1775	\$0.00
Penalties under Labor Code section 1813	\$0.00
Liquidated Damages under Labor Code section 1742.1	\$0.00
Penalties under Labor Code section 1776(g)	\$14,000.00

ORDER

The Civil Wage and Penalty Assessment is modified in part and dismissed in part based on the above Findings. The Hearing Officer shall issue a Notice of Findings that shall be served with this Decision on the parties.

Dated: 9/21/07



John C. Duncan, Director
Department of Industrial Relations