

**STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS**

In the Matter of the Request for Review of

DenBoer Engineering & Construction, Inc. Case No. 06-0145-PWH

From the Notice of Withhold issued by:

Division of Labor Standards Enforcement

**DECISION OF THE DIRECTOR
(Corrected)**

INTRODUCTION

DenBoer Engineering & Construction, Inc. ("DenBoer"), requested review from a Civil Wage and Penalty Assessment ("CWPA") dated August 6, 2006, issued by the Division of Labor Standards Enforcement ("DLSE") regarding the Perris Desalter Wells Rainwater Facilities (Phase I), for the Eastern Municipal Water District in Riverside County ("Project"). Based on DLSE's amended audit of DenBoer's records, DLSE determined that one worker, David L. Alvarez, Jr. ("Alvarez"), was owed wages of \$1,816.65.¹ DLSE also assessed penalties pursuant to Labor Code section 1775 in the amount of \$1,180.00; penalties pursuant to Labor Code section 1813 in the amount of \$125.00 and Training Fund underpayment at \$264.00.

The Hearing on the Merits occurred December 14, 2006, before hearing officer, Christine Harwell. DLSE was represented by Bruce McManus, Esq., and Doug DenBoer, president of DenBoer, appeared without counsel on its behalf. Now, for the reasons set forth below, the Director issues this decision affirming the Amended Assessment.

¹ DLSE's initial CWPA determined that David L. Alvarez, Jr. should have been paid as a Carpenter (rather than a Laborer) for the pay period November 20, 2004, through April 23, 2005. In DLSE's motion to amend, it determined that Alvarez had actually worked a mixture of classifications on the Project.

SUMMARY OF THE EVIDENCE

Alvarez kept a personal calendar of his work in which he listed the hours worked, the foreman's name and a daily descriptive log of the work he performed. He has done this for 27 years, and it is his practice to complete it daily. He wrote down the hours he worked for DenBoer, the job he performed each day including his characterizations of the work performed daily. He stated he was hired by DenBoer as a cement mason/form setter. This list shows that Alvarez worked the number of hours in each type of work. The Assessment relies entirely on a list prepared by Alvarez of the days and hours he worked on the Project:

Type of Work	Hours Performed
Labor Group (unspecified)	168 hours
Group 2	49.5 hours
Group 4	115 hours
Form Setter/Carpenter	125.5 hours
Carpenter	34 hours
Concrete Finisher	101.5 hours
Total:	593.5 hours

DenBoer's records of which locations Alvarez worked each day are consistent with Alvarez's list, and DenBoer agreed in a settlement letter he submitted as an exhibit that sometimes Alvarez worked as a Laborer group 2, or 4² or as a carpenter.

DenBoer testified that he had told Alvarez that he did not need carpenters but that there was need for laborers to attend to the journeymen. He stated that he was convinced that Alvarez knew all along that he would work as a laborer, and in fact, during the project, Alvarez had been laid off twice and he came back twice during the project, he never complained about being paid as a laborer. DenBoer introduced time sheets filled

² DenBoer also described work Alvarez performed as a Cement Mason.

out by the superintendent with descriptions of work done on the various days. The plans he introduced demonstrated that there was little, if any, carpentry, because most of the work was concrete flatwork. He also introduced a statement from the superintendent, Kelly Hebenton that stated that the work Alvarez performed did not require the skills of a carpenter. Hebenton, however, was not produced to testify.

DenBoer also referred to the Prevailing Wage Determination for Laborers (DenBoer's Exhibit H is the same as DLSE's Exhibit 6). The Laborer Group 1 classification group was the type of the work he believes that Alvarez was assigned to perform on the Project. DenBoer also introduced two letters from project superintendent Hebenton and Exhibit K from Michael Dea of Laborers International Union #1184 that opined that Alvarez performed only Laborer work.

DenBoer's information about the work performed by Alvarez came from his discussions with the superintendent, Hebenton, who would complete and fax-in the time sheets at the end of each day.

Alvarez testified that he worked with Alfredo Lopez, a carpenter, who would set the forms for sidewalks and raised pads; sometimes Alvarez would dig trenches. He would also "line-out" the pad locations with lasers and hubs; he would set the lines for the forms and prepare snap elevation lines. He stated that he worked mostly with Lopez as well as Rich Elmore. Alvarez stated he observed that Kelly Hebenton was at one job site (site 85) and that Hebenton "would come-by only sporadically" to the other three sites. Alvarez worked on site 85 for two and a half to three weeks, and Hebenton rarely appeared. When Hebenton worked at site 85, he dug the footing for the wall. Hebenton also gave tasks to workers; he required that Alvarez pour and finish the concrete, which is not subject to the Laborers category of Prevailing Wage Determinations, but it is the work of a Cement Mason. Alvarez "gave the elevations and set the forms" and he also built or installed some of the slab forms; he explained that he had to reinforce the forms for the pump base because they were flimsy and that this could cause problems by coming apart.

DISCUSSION

Labor Code section 1720³ and following set forth a scheme for determining and requiring the payment of prevailing wages to workers employed on public works construction projects. "The overall purposed of prevailing wage law is to protect and benefit employees on public works projects." *Lusardi Construction Co. v. Aubry* (1992) 1 Cal. 4th 976, 985.

DLSE enforces the statutory 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." (§ 90.5(a); see *Lusardi, supra*, 1 Cal. 4th at 985.) The statutory system was established for the following purposes:

...The overall purpose of the prevailing wage law, as noted earlier, 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 substandard 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, supra, 1 Cal. 4th at 987.

After inquiry of workers and review of the contractor's records, including the CPR's, DLSE will issue a CWPA which is served on all parties. An affected contractor or subcontractor may appeal the CWPA by filing a Request for Review under Labor Code section 1742. Subsection (b) of section 1742 provides in part that "the contractor or subcontractor shall have the burden of proving that the basis for the civil wage and penalty assessment is incorrect."

Unpaid Wages: DenBoer has not proven that the Amended Assessments based on Alvarez's journal is incorrect. The evidence does not support DenBoer's assertion that the superintendent, Heberton, had a firm knowledge of what grade of work Alvarez performed. Further, DenBoer was not present on the project, and he relies on

³ All unspecified sections refer to the Labor Code.

Hebenton, who, himself, was not regularly present where or when Alvarez was working. Finally, no one other than Alvarez with personal knowledge of what Alvarez actually did each day testified. There is insufficient evidence to controvert Alvarez who was present and who recorded what he did on each day.

DenBoer concedes that. Alvarez performed a mixture of classifications and admits he was paid the lowest rate of Laborer 1 for all of the work. Based on the testimony and general agreement of all the parties that performed a mixture of various classifications, DenBoer's payment to him of Laborer 1 wages for all the work is a violation of the prevailing wage laws because doing so does not accomplish the goals described in *Lusardi, supra*.

Training Fund Underpayments: As described above, Section 1775 (a) mandates penalties for the failure to pay "the prevailing wage rates as determined by the director for the work or craft in which the worker is employed. ..." The proper prevailing wage rate includes "Other employer payments included in per diem wages pursuant to Section 1773.1. ..." Section 1773.1 includes in the definition of per diem wages "Apprenticeship or other training programs authorized by section 3093, so long as the cost of training is reasonably related to the amount of contributions." Labor Code, section 1773.1 (6). Thus, training fund contributions are part of the required prevailing wages. DenBoer did not pay the proper prevailing rate for Alvarez' work on the project and in doing so, failed to pay the training fund assessments required by the classification(s) for which Alvarez is now found to have performed. Hence, the unpaid training assessments are required to be paid by DenBoer.

Penalties for Unpaid Wages: Since DenBoer did not pay Alvarez the prevailing wage rates for all the work he performed, penalties are appropriate pursuant to section 1775(a), which provides in relevant part as follows:

- (1) The contractor and any subcontractor under the contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than fifty dollars (\$50) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rates as determined by the director for the work or craft in which the worker is employed for any public

work done under the contract by the contractor or, except as provided in subdivision (b), by any subcontractor under the contractor.

(2)(A) The amount of the penalty shall be determined by the Labor Commissioner based on consideration of both of the following:

(i) Whether the failure of the contractor or subcontractor to pay the correct rate of per diem wages was a good faith mistake and, if so, the error was promptly and voluntarily corrected when brought to the attention of the contractor or subcontractor.

(ii) Whether the contractor or subcontractor has a prior record of failing to meet its prevailing wage obligations.

* * *

(D) The determination of the Labor Commissioner as to the amount of the penalty shall be reviewable only for abuse of discretion.”

Abuse of discretion is established if the Labor Commissioner “has not proceeded in the manner required by law, the [determination] is not supported by the findings, or the findings are not supported by the evidence.” Code of Civil Procedure section 1094.5(b). In reviewing for abuse of discretion, however, the Director is not free to substitute his own judgment “because in [his] own evaluation of the circumstances the punishment appears to be too harsh.” *Pegues v. Civil Service Commission*, 67 Cal.App.4th 95 at 107 (1998).

DLSE reduced the rate for each penalty from the maximum (\$50.00 per violation) to \$20.00 per violation in its Amended Assessment. It reduced the number of penalty assessments to the days (or parts of days) that prevailing wage violations actually occurred. The reduction is supported by the evidence taken at the Hearing and DenBoer has not demonstrated any abuse of discretion.

Overtime Wages Penalties: Section 1815 requires the payment of one and a half times the applicable prevailing wage rate for work over 8 hours in a day. Section 1813 requires the payment of a \$25.00 penalty for each day a worker is required to work in violation of section 1815.

DenBoer violated Section 1815 by paying less than the required prevailing wage rate for Alvarez's 5⁴ overtime hours. Alvarez was paid overtime for these 5 hours but it was at the wrong, Laborer, rate and the failure to pay the proper overtime rate for these hours is a distinct failure by DenBoer. Unlike Labor Code section 1775, however, section 1813 does not give the Labor Commissioner any discretion to reduce the amount of the penalty, nor does it give the Director any authority to limit or waive the penalty. *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564 (1982) [court without discretion to limit wage penalty under Jones Act even though total penalty was grossly disproportionate to wages owed].

Liquidated damages: Section 1742.1 (a) provides for the imposition of liquidated damages, essentially a doubling of the unpaid wages, upon the failure to pay the back wages due within sixty days following service of a civil wage and penalty assessment under Labor Code section 1741. Section 1742.1 (a) provides in pertinent part as follows:

After 60 days following the service of a civil wage and penalty assessment under Section 1741 ..., the affected contractor, subcontractor, and surety ... shall be liable for liquidated damages in an amount equal to the wages, or portion thereof that still remain unpaid. If the assessment or notice subsequently is overturned or modified after administrative or judicial review, liquidated damages shall be payable only on the wages found to be due and unpaid. If the contractor or subcontractor demonstrates to the satisfaction of the director that he or she had substantial grounds for believing the assessment or notice to be in error, the director shall waive payment of the liquidated damages.

Rule 51(b) [Cal.Code Reg... tit. 8, section 17251(b)] states as follows:

To demonstrate "substantial grounds for believing the Assessment ... to be in error," the Affected Contractor or Subcontractor must establish (1) that it had a reasonable subjective belief that the Assessment ... was in error; (2) that there is an objective basis in law and fact for the claimed error; and (3) that the claimed error is one that would have substantially reduced or eliminated any duty to pay additional wages under the Assessment...

When DenBoer filed its request for review, it was to dispute an Assessment that attributed all of Alvarez' time to the highest classification of Carpenter. DLSE retracted this position on the day set for Hearing through its amendment and relied for the first time on a mixed rate. It did so after receiving additional information from Alvarez

⁴ Alvarez worked .5 hours as a Laborer 1 and was paid correctly for that overtime.

himself with no explanation why this information was not previously available. DLSE's analysis for relying on the mixed rate was the same as DenBoer used in his settlement letter to DLSE.

While DenBoer has not established that the initial CWPA was in error, this is not the CWPA that was subject to the hearing, and DenBoer never had the 60 day opportunity allowed in section 1742.1 to decide to pay the CWPA based on the new theory of a mixed rate. Because DenBoer was not given an adequate opportunity to pay or contest the CWPA based on a mixed rate, it should not be subject to liquidated damages.

FINDINGS

1. Affected DenBoer, Inc. filed a timely Request for Review from a Civil Wage and Penalty Assessment issued by the Division of Labor Standards Enforcement.
2. DenBoer's employee Daniel L. Alvarez, Jr. was entitled to be paid the applicable prevailing wage rate for Laborer Group 2 for 32 hours and 1.5 hours overtime; Laborer Group 4 for 163 hours; Cement Mason for 134 hours and 2 hours overtime, and as a Carpenter for 114 hours and 1.5 hours overtime for the days of work covered by the Division's audit and Assessment. Alvarez was properly paid as a Group 1 Laborer for 143.5 hours, and .5 hours overtime by DenBoer.
3. DenBoer is liable for the training fund contributions and wage differentials found due in the Assessment to be due on underpaid work of Alvarez for the hours set forth in item 2 above.
4. The net amount of wages due under the Assessment is \$1,816.65 [wages] plus \$141.99 [training funds] for a total of \$1,958.64.
5. The record establishes only 59 violations under Labor Code section 1775 rather than 82 as determined in the original Assessment. The Division did not abuse its discretion in setting the penalty for these violations at the rate of \$20.00 per violation, and consequently DenBoer is liable for the total remaining penalties of \$1,800.00.
6. DenBoer is liable for penalties for not paying 5 hours of overtime at the correct

prevailing rate pursuant to Labor Code section 1813 at \$25.00 per violation in the amount of \$125.00.

7. Liquidated damages are waived in this case.

8. The amount found due in the Assessment as modified and affirmed by this Decision is as follows:

Wages Due:	\$ 1,816.65
Training Fund contribution deficiency	\$ 141.99
Penalties under Labor Code section 1775 (a)	\$ 1,180.00
Penalties under Labor Code section 1813	\$ 125.00
TOTAL:	<u>\$ 3,263.64</u>

ORDER

Therefore, DenBoer's Request For Review is Denied, and the Civil Wage and Penalty Assessment is affirmed as modified as set forth in the foregoing findings. The Hearing Officer shall issue a Notice of the Findings which shall be served with the Decision on the parties.

Dated: March 14, 2008



John C. Duncan
Director of Industrial Relations