

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Truxell & Valentino Landscape Development, Inc.

Case No. 07-0171-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement.

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected contractor Truxell & Valentino Landscape Development, Inc. (“Truxell”) filed a timely request for review from a civil wage and penalty assessment (“Assessment”) issued by the Division of Labor Standards Enforcement (“Division”) with respect to work performed on the Clovis West High School Site and Landscape Improvements project (“Project”). A hearing on the merits was held in Fresno on November 28 and 29, 2007, before hearing officer John Cumming. Daniel Cravens appeared for Truxell, and Ramon Yuen-Garcia appeared for the Division.

The primary issues in this case are whether Truxell properly used Landscape Tradesmen pay rates from General Prevailing Wage Rate Determination FRE-2006-1 for the project’s cement work, and whether Truxell paid all of the fringe benefits due for other landscaping work. Because, as more fully explained below and subject to noted exceptions, the employees performing cement work were entitled to the prevailing wage rate for Cement Masons under General Prevailing Wage Rate Determination NC-023-203-1-2005-1, and Truxell did not pay all of the fringe benefits due to its other landscape workers, the Director of Industrial Relations modifies and affirms the Assessment except for the determination of penalties under Labor Code section 1775,¹ which is reversed and remanded to the Division.

FACTS

On June 16, 2006, Truxell entered into a contract with the Clovis Unified School District

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

to construct site and landscape improvements on the campus of an existing high school. Approximately one-third of the work involved demolition, including grading and removal of trees, another third involved the installation of a new irrigation system and the planting of trees, shrubs, and turf, and the remaining third involved cement work. The cement work included the construction of curbing, sidewalks, seating walls, mowstrips, concrete stairs, and disabled ramps, and the installation of bollards.²

The Scope of Work provisions for Cement Masons under Wage Determination NC-023-203-1-2005-1 provisions describe that work as follows:

. . . Cement Masons work shall include but shall not be limited to all the following construction work:

- (1) All building construction, including but not limited to erection, alteration, repair, modification, demolition, addition, or improvement in whole or in part of any building structure.
- (2) All heavy highway and engineering construction, including but not limited to the construction, improvement modifications and demolition of all or part of any streets and highways (including sidewalks, curbs and gutters), bridges, viaducts, railroads, tunnels, airports, water supply, irrigation, flood control and drainage systems, . . .

Subject to the foregoing . . . the work to be performed by Cement Masons' [sic] shall include but not be limited to the following, when tools of the Cement Masons' trade are used or required:

Setting screeds, screed pins, curb forms and curb and gutter forms, rodding, spreading and tamping concrete, curb application of curing compounds, applying topping (wet or dry) colors or grits; using Darby and push floats, hand troweling and hand floating; marking edging, brooming or brushing, using base cover or step tools; chipping, and stoning, patching or sacking; dry packing; spreading and finishing gypsum, operating mechanical finishers (concrete) . . . ; grinding machines, troweling machines, floating machines, powered concrete saws; finishing of epoxy and resin materials, bush hammering and exposed finishes for architectural work.

The Scope of Work provisions for the Landscape Tradesman classifications under Wage Determination FRE-2006-1 describe that work as follows:

The Landscape industry is described as follows: Decorative landscaping such as decoration walls, pools, ponds, fountains, reflection units, low voltage lighting

² "Bollards" are removable cement posts installed on walkways to control motor vehicle access.

displays, hand grade landscape areas, tractor grade landscape areas, finish rake landscape areas, spread top soil, build mounds, trench for irrigation manual or power, layout for irrigation backfill trenches, asphalt, plant shrubs, trees, vines, set boulders, seed lawns, lay sod, use ground covers such as gravel, and any other landscapeable ground covers, installation of header boards and cement mowing edges, soil preparation such as wood shavings, fertilizers . . . , top dress ground cover areas with bark of any wood residual . . . , watering of plants and all clearing and clean up prior to and after landscaping.

* * *³

Truxell is a landscape contracting and design firm that has been in business since 1979 and holds a C-27 specialty landscaping contractor's license.⁴ Truxell is an experienced public works contractor as well as a signatory contractor under the Landscape Agreement with Local Union 355 of the United Association of Journeyman and Apprentices of the Plumbing and Pipe-fitting Industry of the United States and Canada, AFL-CIO. ("Local 355".) Truxell has a regular work crew of ten to fifteen employees who belong to Local 355. For larger projects, Truxell hires additional temporary workers who are not required to join Local 355.

For this Project, Truxell hired an experienced supervisor and seven other workers to perform the cement work. Truxell classified and paid these cement workers as Landscape Tradesmen and Landscape Assistant Journeymen, at total straight-time hourly rates ranging from \$14.00 to \$25.00 per hour. Because these workers were not members of Local 355, Truxell paid the fringe benefits portion of the prevailing wage directly to the workers. For the other Project work Truxell used its regular crew and provided fringe benefits through payments to Local 355.

Misclassification

With regard to specific terms contained in the Landscape scope of work, the Project's architect, Richard Vaillancour, testified that landscaping design can include "pedestrian paving"

³ The provisions go on to define ten categories of work or work limitations, several of which relate to irrigation systems and piping, and also including residential swimming pools and the installation of playground equipment.

⁴ The work covered by a C-27 license is described in California Code of Regulations, title 16, §832.27, as follows:

A landscape contractor constructs, maintains, repairs, installs, or subcontracts the development of landscape systems and facilities for public and private gardens and other areas which are designed to aesthetically, architecturally, horticulturally, or functionally improve the grounds within or surrounding a structure or a tract or plot of land. In connection therewith, a landscape contractor prepares and grades plots and areas of land for the installation of any architectural, horticultural and decorative treatment or arrangement.

that is sometimes made of concrete. He described “decoration walls” as items used “to define space and create sight elements within a design” and which “can function for merely aesthetic value or to provide places for people to congregate at.” In addition, Local 355 Business Manager Dennis Soares testified that “landscapeable ground cover” can include “some concrete work, some brick”

The record establishes that the cement work done on the Project included specific processes described in the Cement Mason scope of work provisions (including floating and sacking and patching). The testimony, photographs of the completed work, and the Project blueprints (which were a significant source of objective information for the hearing officer) show that the cement work was performed predominantly, if not exclusively, in areas designed for extensive student use for walking or sitting. The work includes sidewalk areas, three and a half inches thick and ranging from widths as narrow as five feet to an open section in the front of the campus which appears to be over 100 feet in width and 150 feet in length, and seating walls, which were low and wide enough for students to sit down. The cement work intersects with other landscaping primarily as retaining walls, sometime with bench seating, for raised planted areas located adjacent to buildings or in rectangles or circles within the open paved areas. The walls incorporated decorative elements to make them aesthetically pleasing, but this appears to be secondary to their functional purpose. The breadth of the open space and presence of bollards also shows that some of these areas are designed for vehicular access when necessary.

The record establishes that four of the affected workers spent a total of 72 hours on the construction of mowstrips, which are specifically included in the Landscape scope of work. These 72 hours are based on the hearing officer’s careful review of the blueprints and the square footage involved in the mowstrips. Truxell’s reconstruction, based on its employees’ memories, certified payroll records, and work schedules, further buttresses this conclusion. Finally, the 72 hours represents approximately 2% of the hours of work on the Project and correspond to the approximate percentage of work in the blueprints that the mowstrips represent.

Fringe Benefit Payments:

Truxell’s certified payroll records do not reflect fringe benefit payments, other than vacation pay, made by Truxell to Local 355 on behalf of Truxell’s regular crew members. Monthly

Employer's Report of Contributions forms that Truxell prepared and submitted to the Local 355 Trust Funds along with its payments, however, establish that Truxell made, and is entitled to credit for, additional fringe benefit payments for work performed on the Project. The evidence shows, and the Division acknowledges, that \$2,002.81 of additional credits are due to Truxell for those payments. Truxell claimed payment of \$7,189.52 more in fringe benefits than had been credited by the Division. The record shows, however, that Truxell's calculation was inflated by numerous errors, including claiming credit for hours and payments not reflected on the contribution reports, or that exceeded the number of hours reported and paid for with the reports.

Wage Assessment, Penalties, and Liquidated Damages

The Division determined that the cement workers should have been compensated as cement masons at a total straight-time rate of \$40.91 per hour.⁵ The Division also determined that Truxell had not fully compensated most of its regular crew members for the fringe benefit portion of the prevailing wage. The Assessment determined that Truxell was liable for \$91,606.26 in back wages, nearly ninety percent of which was attributable to the misclassification of the cement workers. The Assessment also determined that Truxell is liable for \$41,450.00 in penalties under section 1775 (based on 823 violations assessed at the maximum statutory rate of \$50 per violation) and \$9,225.00 in penalties under section 1813 (based on 369 overtime violations assessed at the statutory rate of \$25 per violation). The Division's Senior Deputy Tracy Mauldin set the section 1775 penalties at the maximum rate of \$50 per violation based strictly on the belief that Truxell had knowledge and was willful in its use of the landscape classifications for the cement work. The Division acknowledged that Truxell had no prior record of complaints or violations but apparently did not factor that into the penalty, nor did the Division provide Truxell with notice or any opportunity to submit mitigating evidence prior to issuing the Assessment. Because none of the back wages were paid within sixty days following service of the Assessment, Truxell's potential liability includes an additional \$91,606.26 in liquidated damages under section 1742.1(b).

⁵ The Division also determined that one of Truxell's regular crew members should have been compensated as a Landscape Group II Operating Engineer for 35 hours of work. Truxell offered no specific dispute to this finding.

DISCUSSION

Sections 1720 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 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 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 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.” (§ 90.5(a), and see *Lusardi, supra.*)

Section 1775(a) requires, among other things, that contractors and subcontractors pay the difference to workers who received less than the prevailing rate, and section 1775(a) also prescribes penalties for failing to pay the prevailing rate. 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 the service of a civil wage and penalty assessment.

When the Division determines that a violation of the prevailing wage laws has occurred, a written civil wage and penalty assessment is issued pursuant to section 1741. An affected contractor or subcontractor may appeal that assessment by filing a Request for Review under section 1742. In that appeal the contractor or subcontractor “ha[s] the burden of proving that the basis for the civil wage and penalty assessment is incorrect.” (§ 1742(b).)

Truxell is Liable for the Assessed Back Wages Subject to Two Modifications

The prevailing rate of pay for a given craft, classification, or type of work is determined by the Director of Industrial Relations in accordance with the standards set forth in section 1773. The Director determines these rates and publishes general wage determinations to inform all in-

interested parties and the public of the applicable wage rates for the “craft, classification and type of work” that might be employed in public works. (§ 1773.) Contractors and subcontractors are deemed to have constructive notice of the applicable prevailing wage rates. (*Division of Labor Standards Enforcement v. Ericsson Information Systems* (1990) 221 Cal.App.3d 114, 125.) The applicable prevailing wage rates are the ones in effect on the date the public works contract is advertised for bid. (*See* § 1773.2 and *Ericsson, supra.*)

Section 1773.4 and related regulations set forth procedures through which any prospective bidder, labor representative, or awarding body may petition the Director to review the applicable prevailing wage rates for a project, within 20 days after the advertisement for bids. (*See Hoffman v. Pedley School District* (1962) 210 Cal.App.2d 72 [rate challenge by union representative subject to procedure and time limit prescribed by section 1773.4].) In the absence of a timely petition under section 1773.4, contractors and subcontractors are bound to pay the prevailing rate of pay applicable to the work performed, as determined and published by the Director, as of the bid advertisement date. [*Sheet Metal Workers Intern. Ass’n, Local Union No. 104 v. Rea* (2007) 153 Cal.App.4th 1071, 1084-1085.]

Truxell contends that the Landscape tradesmen classifications are applicable to the cement work done on the Project, because Truxell is a union landscape contractor and was performing what was primarily a landscaping project designed by a landscape architect. Because the Landscape trade can incorporate cement into items such as walkways and decorative walls, Truxell reads those terms expansively to embrace all of the cement work on this Project. Truxell asserts that the reference to “heavy highway and engineering construction” in the second paragraph of the Cement Masons’ scope of work makes that classification inappropriate for landscape projects. Relying on *Sheet Metal Workers, supra*, Truxell argues that its choice of classification must be accepted if the work could fall under the scope of work of either the Landscape or Cement Mason classification.

Truxell’s reliance on *Sheet Metal Workers* is misplaced, however, because the Landscape scope of work provisions quoted above do not *expressly* cover the bulk of the cement work that Truxell performed. Nor can they be read as impliedly authorizing the use of Landscape Tradesmen classifications for such work without divorcing “decoration walls” and “ground cover” from

their context as specific items included within the general definition of “decorative landscaping.”

Rather, as argued by the Division, the work explicitly fell within the ambit of the Cement Masons’ scope of work, in that it included items such as sidewalks and gutters and specific work processes that are enumerated therein. The work also was far more appurtenant to building construction than to the landscaping of grounds, in that it created or repaired plazas, seating areas, and sidewalks adjacent to school buildings.

Though Truxell is an experienced landscape contractor and considered this work to be within the scope of its landscape contractor license, it did not use its own regular crew to perform the cement work. Rather Truxell hired a separate crew comprised largely of experienced cement workers to perform that work. By its own action, Truxell should have been on notice of the need to classify and compensate those workers as Cement Masons.

Truxell is, however, entitled to a reduction for the construction of the two mowstrips which do explicitly fall under the Landscape scope of work provisions (where they are referred to as “cement mowing edges”). Accordingly, the back wages due under the Assessment are reduced by the amount of \$1,367.52 for this work, and the corresponding number of violations under section 1775 is reduced by nine.⁶

As discussed above, the record supports finding that Truxell is entitled to credit for \$2,002.81 in fringe benefit payments made on behalf of the affected workers. Since the record further shows that the affected workers were still underpaid after applying these credits, there is no corresponding reduction in violations.

With these two modifications, the total wages remaining due under the Assessment, as

⁶ The specific reductions are calculated as follows based on a comparison of Truxell’s reconstruction and the Division’s audit records.

| <u>Employee</u> | <u>Reduction formula (Cement Mason Rate - Landscape Rate x hours)</u> | = | <u>Wage Assessment</u> | <u>Reductions in Violations</u> |
|-----------------|---|--------|------------------------|---------------------------------|
| Camargo | \$40.91 - \$22.00 x 32 hours [4 days] | = | \$ 605.12 | 4 |
| Carmena | \$40.91 - \$22.00 x 16 hours [2 days] | = | \$ 302.56 | 2 |
| Mendez | \$40.91 - \$25.00 x 16 hours [2 days] | = | \$ 244.56 | 2 |
| Santiesteban | \$40.91 - \$14.00 x 8 hours [1 day] | = | <u>\$ 215.28</u> | <u>1</u> |
| | | Totals | \$1,367.52 | 9 |

modified and affirmed by this Decision is \$88,235.87.

The Penalties Assessed under Section 1775 Must be Remanded for Reconsideration by the Division.

Section 1775(a) provides in relevant part as follows:

“(1) 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

“(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 . . . 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

“(ii) Whether the contractor . . . 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 §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* (1998) 67 Cal.App.4th 95 at 107. Nevertheless, “[t]he scope of discretion always resides in the particular law being applied[;] . . . Action that transgresses the confines of the applicable principles of law is outside the scope of discretion and [therefore] an ‘abuse’ of discretion.” *City of Sacramento v. Drew* (1989) 207 Cal.App.3d 1287 at 1297.

Section 1775(a)(2)(A) requires the Division to consider two factors in determining the penalty amount, but the Senior Deputy Labor Commissioner quite clearly stated that she only considered one of the factors in assessing penalties against Truxell. It is undisputed that Truxell

has an extensive history of public works contracting with no prior record of violations. While the absence of a prior record of violations does not absolutely preclude the imposition of maximum penalties, the Division still must consider that history and be able articulate why maximum penalties are warranted notwithstanding that history. Its failure to do so constitutes an abuse of its discretion under section 1775(a).

Because the discretion to set penalties is vested in the Labor Commissioner rather than the Director, the section 1775 penalty assessment must be remanded for reconsideration and re-determination in light of this decision. The Division shall have additional time to issue and serve a new penalty assessment under section 1775 as set forth in the Order below. Should it do so, Truxell shall have the right to request review in accordance with section 1742, and may request such review directly with the Hearing Officer, who shall retain jurisdiction for this purpose.

The Penalties Assessed under Section 1813 Is Affirmed.

Section 1813 provides for the assessment of a penalty in the amount of twenty-five dollars (\$25) for each worker is employed in excess of eight hours in a single calendar day or forty hours in a calendar without being paid the required prevailing overtime rate. Failure to pay the required overtime rate constitutes a distinct prevailing wage violation, and unlike the penalties assessed under section 1775, the Division has no discretion to vary the amount of section 1813 penalties assessed for each overtime violation.

There is no dispute that Truxell's workers worked a substantial amount of overtime, and Truxell offers no defense to this penalty assessment separate and apart from its position on the merits. In light of the finding that Truxell underpaid its workers, these penalties must be affirmed.

Truxell is Liable for Liquidated Damages.

At the time of these proceedings, section 1742.1(a) provided 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 pay-

able 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, §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

In accordance with the statute, Truxell is liable for liquidated damages only on the wages found due in the Assessment as modified by this Decision, or a total of \$ 88,235.87. Since those wages remain unpaid, an equivalent amount of liquidated damages must be awarded unless Truxell demonstrated substantial grounds for believing the Assessment to be in error.

The evidence shows that Truxell had a reasonable subjective belief that the Assessment was in error, and that the claimed classification error would have eliminated most of Truxell’s liability for back wages, thereby meeting the first and third tests of Rule 51(b). However, Truxell failed to establish that it had an objective basis in law and fact for classifying its cement workers as Landscape Tradesmen. In the final analysis, Truxell understood that the cement work required the services of experienced cement workers, that is, cement masons, and the facts could not be stretched to fit its arguments on why that work should be regarded as part of the landscape trade. In addition, Truxell now has been fully credited for all fringe benefit payments it has established were made for Project work. Accordingly, there are no grounds for waiving liquidated damages on the modified wage assessment.

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FINDINGS

1. Affected contractor Truxell & Valentino Landscape Development, Inc. filed a timely Request for Review from a Civil Wage and Penalty Assessment issued by the Division of Labor Standards Enforcement with respect to the Clovis West High School Site and Landscape Improvements Project.

2. Truxell's cement workers were entitled to be paid the applicable prevailing wage rates for cement workers for the days of work covered by the Division's audit and Assessment, with the exception of 72 total hours of work devoted by four employees to the construction of mowstrips, for which Truxell is entitled to a credit of \$1,367.52 against the assessed wages.

3. Truxell is entitled to an additional credit of \$2,002.81 against the assessed wages for fringe benefit payments made on behalf of its regular crew members, but otherwise is liable for all other wages determined to be due to those employees.

4. In light of Findings Nos. 2 and 3 above, the net amount of wages due under the Assessment is \$88,235.87.

5. In light of Findings Nos. 2 and 3 above, the record establishes only 814 violations under section 1775 rather than 823 as determined in the Assessment. The Division abused its discretion in determining the amount of penalties assessed per violation, and consequently the section 1775 penalty assessment must be vacated and remanded for redetermination in light of appropriate factors and the other findings set forth and discussed in the body of this Decision.

6. Truxell is liable for \$9,225.00 in penalties under section 1813 based on 369 over-time violations assessed at the statutory rate of \$25 per violation.

7. In light of Finding No. 4 above, the potential liquidated damages due under the Assessment is reduced to \$88,235.87. No part of the back wages found due in the Assessment as modified by Finding No. 4 has been paid, and Truxell has not demonstrated that it had substantial grounds for believing the Assessment to be in error. Accordingly, Truxell is liable for liquidated damages in the amount of \$88,235.87 under section 1742.1(a).

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

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|---|---------------------|
| Wages Due: | \$ 88,235.87* |
| Penalties under section 1775(a) | <i>remanded</i> |
| Penalties under section 1813 | \$ 9,225.00 |
| Liquidated Damages under section 1742.1 | <u>\$ 88,235.87</u> |
| TOTAL | \$185,696.74 |

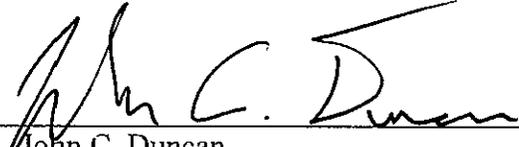
*In addition, interest is due and shall continue to accrue on all unpaid wages as provided in section 1741(b).

ORDER

The Civil Wage and Penalty Assessment is modified and affirmed as set forth in the above Findings. The Hearing Officer shall issue a Notice of Findings which shall be served with this Decision on the parties.

The Division shall have thirty (30) days from the date of service of this Decision to issue and serve a new penalty assessment under section 1775(a). Should the Division issue a new penalty assessment, Truxell shall have the right to request review in accordance with section 1742, and may request such review directly with the Hearing Officer, who shall retain jurisdiction for this purpose.

Dated: 2/11/09



John C. Duncan
Director of Industrial Relations