

STATE OF CALIFORNIA  
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

**Telstar Instruments, Inc.**

Case No. 07-0233-PWH

From a Civil Wage and Penalty Assessment issued by:

**Division of Labor Standards Enforcement**

**DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS**

This is the third decision in the above matter. The first decision found that the affected contractor had failed to pay the correct prevailing wage; the matter was remanded for a redetermination of penalties. The second decision again remanded for a redetermination of penalties after the Director ruled that it abused its discretion in assessing penalties under Labor Code section 1775 at \$40.00 per violation.<sup>1</sup> The Division of Labor Standards Enforcement (“DLSE”) issued a second Redetermination of Penalties Pursuant to Order on Remand at the rate of \$30 per violation, a \$20 reduction from the original assessment of \$50 per violation, and determined that \$6,750.00 in statutory penalties was due. Affected subcontractor Telstar Instruments, Inc. (“Telstar”) again requested review. A telephonic prehearing conference was held on April 17, 2009, before Hearing Officer Nathan D. Schmidt. June Johnsen, Telstar’s General Manager, appeared for Telstar, and Ramon Yuen-Garcia appeared for DLSE. The parties stipulated that there was no new evidence and agreed to submit the matter on written briefing without a further Hearing on the Merits. The sole issue to be decided is whether DLSE again abused its discretion in assessing section 1775 penalties at the rate of \$30 per violation. In this Decision, the Director finds that Telstar has failed to establish an abuse of discretion by DLSE. The Second Redetermination is therefore affirmed.

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<sup>1</sup> All further statutory references are to the California Labor Code, unless otherwise indicated.

## SUMMARY OF FACTS

The original Director's Decision on the merits issued on May 13, 2008 ("First Decision") found that Telstar had underpaid the travel and subsistence pay due to its workers on the City of Chowchilla Wastewater Treatment Plant Renovation ("Project") in the amount of \$10,735.03, constituting 225 violations of Telstar's prevailing wage obligations. The First Decision found that the assessment of section 1775 penalties at the maximum rate of \$50.00 per violation could not be sustained based on the factors cited by DLSE and that DLSE had therefore abused its discretion. Specifically, the First Decision found that Telstar failed to pay prevailing wages through a good faith mistake that was not completely corrected voluntarily. The First Decision vacated the penalty assessment and remanded that issue to DLSE for redetermination of the penalties "in light of the appropriate factors and the other findings in this Decision."

DLSE issued the First Redetermination on May 22, 2008, reducing the penalty amount to \$40.00 per violation, stating, in pertinent part, that the Redetermination was "based on the facts that the failure to pay travel and subsistence compensation was **not** a good faith mistake" and that "[a]lthough the Director's Decision found that the evidence does not establish any previous violations, Telstar . . . was aware that the same travel and subsistence provision involved herein, were [*sic*] applicable to some of the other public works projects it had worked on." (Emphasis added.)

DLSE contended that Telstar's failure to follow the plain language of the applicable travel and subsistence provisions was deliberate and supported a determination of bad faith in the First Redetermination. Telstar, on the contrary, argued that the First Decision's finding of a good faith mistake on its part entitled it to a complete waiver of section 1775 penalties.

The Director's second Decision in this matter, issued on February 19, 2009 ("Second Decision"), found that DLSE had again abused its discretion by using the incorrect legal standard and factual basis to assess penalties at the rate of \$40 per violation. Abuse of discretion existed because:

(1) DLSE's reassessment was based on the erroneous interpretation that no penalty can be assessed under section 1775 where the failure was in good faith.

(2) DLSE expressly ignored the First Decision's findings that Telstar had made a good faith mistake that was only partially corrected.

(3) DLSE continued to set the penalty amount based on a history of violations that the Director had already found did not exist.

The issue of section 1775 penalties was again remanded to DLSE for redetermination. The Second Decision instructed that:

In doing one more redetermination, DLSE shall not claim the failure to pay was not in good faith nor that there is a history of prior violations. Instead, as has already been determined, DLSE shall redetermine the penalty amount based solely on the Telstar's less than complete prompt and voluntary correction of its failure to pay prevailing wages.

[Second Decision, page 5.]

DLSE issued the Second Redetermination on March 13, 2009, reducing the penalty amount to \$30.00 per violation, stating, in pertinent part, that the reassessment of section 1775 penalties at the rate of \$30.00 per violation was made "in accordance with all the facts and statements set forth in the Director's Decisions issued on May 13, 2008 and February 19, 2009, . . . and the criteria set forth in Labor Code section 1775."

## DISCUSSION

Section 1775, subdivision (a) states in relevant part:

(1) The contractor and any subcontractor . . . **shall**, as a penalty . . . **forfeit** not more than fifty dollars (\$50) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rates . . . .

(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.

(B)(i) The penalty **may not be less than ten dollars (\$10) . . . unless the failure** of the . . . 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 . . . subcontractor.

(Emphasis added)

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* (1998) 67 Cal.App.4th 95, 107.) A contractor or subcontractor has the same burden of proof with respect to the penalty determination as to the wage Assessment. (Rule 50(c) [Cal. Code Reg. tit. 8 §17250(c)].)

DLSE’s Second Redetermination states that reassessment of section 1775 penalties at the rate of \$30.00 per violation was made “in accordance with all the facts and statements set forth in the Director’s Decisions issued on May 13, 2008 and February 19, 2009, . . . and the criteria set forth in Labor Code section 1775.” The burden is on Telstar to prove that DLSE abused its discretion in reassessing the penalty amount under section 1775 at the rate of \$30.00 per violation. Telstar’s defense against the penalty award, tied to its arguments on the merits, is that its failure to pay the correct travel and subsistence pay to its workers on the Project was a good faith mistake and that, as a matter of law, section 1775 penalties should therefore be waived. Telstar continues to misinterpret the section 1775 standard. The failure to pay prevailing wages **alone** triggers section 1775 penalties. (§ 1775, subd. (a)(1).) Good faith, prompt correction, and prior history are factors that may mitigate the maximum penalty in a given case. Therefore, Telstar’s argument is not supported by the statute.

Section 1775, subdivision (a)(2) grants the Labor Commissioner the discretion to mitigate the statutory maximum penalty per day in light of prescribed factors, one of which is good faith mistake, but it does not mandate mitigation in all cases. The Director is not free to substitute his own judgment. Telstar has not introduced evidence of abuse of discretion by DLSE nor shown

an abuse of discretion. Accordingly, the reassessment of penalties at the rate of \$30.00 per violation is affirmed.

### FINDINGS

1. Affected subcontractor Telstar Sheet Metal, Inc. filed a timely Request for Review of the Redetermination of Penalties Pursuant to Order on Remand issued by DLSE on remand from the Director's Decision in this matter of February 19, 2009.

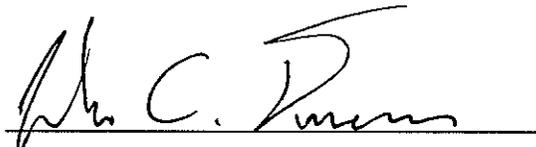
2. Telstar's underpayment of travel and subsistence payments owed to its workers on the Project constitutes 225 violations of its prevailing wage obligations that justify the imposition of penalties under section 1775, subdivision (a).

3. The DLSE did not abuse its discretion in setting section 1775, subdivision (a) penalties at the rate of \$30 per violation, and the resulting total penalty of \$6,750.00 is affirmed.

### ORDER

The Redetermination of Penalties Pursuant to Order on Remand is affirmed. The Hearing Officer shall issue a Notice of Findings which shall be served with this Decision on the parties.

Dated: 7/2/09



John C. Duncan  
Director of Industrial Relations