

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Seal Electric, Inc.

Case No. 11-0097-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected subcontractor Seal Electric, Inc. (Seal Electric) submitted a timely request for review of the Civil Wage and Penalty Assessment (Assessment) issued by the Division of Labor Standards Enforcement (DLSE) with respect to the El Camino High School Field Improvement Project (Project) in San Diego County. The Assessment determined that \$58,143.91 in unpaid prevailing wages and statutory penalties was due. A Hearing on the Merits was conducted on October 31, 2011, in Los Angeles, California, before Hearing Officer Makiko I. Meyers. Dennis B. Cook appeared for Seal Electric and David D. Cross appeared for DLSE. The case was submitted, after post-hearing briefing, on February 27, 2012.¹

The issues for decision are:

- Whether the Assessment correctly reclassified some of the hours worked by the Seal Electric employees from Streetlighting, Traffic Signals, Underground Systems Journeyman Technician (Underground Technician) to Inside Wireman, Technician (Inside Wireman).
- Whether DLSE abused its discretion in assessing penalties under Labor Code

¹ The parties submitted trial briefs on November 18, 2011. Along with its trial brief, Seal Electric requested administrative notice of two relevant scopes of work which had not been introduced at the trial. Because they are public records relevant to this matter, these documents are admitted over the objection of DLSE. The Hearing Officer gave DLSE an opportunity to address these newly admitted exhibits but DLSE did not file a supplemental brief.

section 1775² at the maximum rate of \$50.00 per violation.

- Whether Seal Electric failed to pay the required prevailing wage rates for overtime work and is therefore liable for penalties under section 1813.
- Whether liquidated damages should be waived.

The Director finds that Seal Electric has disproven the basis of the Assessment. Therefore, the Director issues this Decision dismissing the Assessment in full.

FACTS

The facts of the case are undisputed.

The Oceanside Unified School District advertised the Project for bid on November 19, 2009, and awarded the contract to Jaynes Corporations of America (Jayne). Jayne subcontracted with Seal Electric on February 2, 2010, to furnish and install all electrical work needed for the Project. Seal Electric's employees worked on the Project from approximately February 2010 through September 2010.

Applicable Prevailing Wage Determinations (PWDs):

The following applicable PWDs and scopes of work were in effect on the bid advertisement date:

SDI-2009-2 (General PWD for San Diego County) which provides that the prevailing hourly wage rates for Inside Wireman, the classification used in the Assessment, are \$49.24 (including fringe benefits and training fund contribution) for regular time and \$68.11 (including fringe benefits and training fund contribution) for overtime and that the prevailing hourly wage rates for Underground Technician, Grade 1, the wage rate paid by Seal for the work in issue, are \$34.70 (including fringe benefits and training fund contribution) for regular time and \$48.61 (including fringe benefits and training fund contribution) for overtime.

Scope of Work for Inside Wireman (SDI-2009-2-61-569-2) which provides that the Inside Wireman prevailing wage rates are applicable when the work involves "the

² All further statutory references are to the California Labor Code, unless otherwise indicated.

installation, operation, maintenance and repair of all electrical wiring and electrical equipment used in the construction, alteration and repair of buildings, structures, bridges, street and highway work, subways, shafts, dams, river and harbor work, airports, mines, all electrical raceways for electrical wires and cables.”

Scope of Work for Underground Technician (SDI-2009-2-61-569-16) which provides that the Underground Technician prevailing wage rates are applicable when the work involves “STREET LIGHTING; TRAFFIC SIGNALS; AND UNDERGROUND SYSTEMS IN STREETS AND/OR ESTABLISHED EASEMENT AND/OR OUTSIDE OF BUILDING” (emphasis in the original). The Underground Technician Scope of Work also includes work “in established easements and all work outside of buildings, necessary for the installation of all types of underground ducts or raceway used as enclosures for electrical conductors, whether power, control or communications” and “all work in connection with the installation of streetlights, traffic signals, and traffic control cameras and related work.”

Work Performed

The Project involved improvement and renovation of the athletic field at the El Camino High School. Seal Electric was an electric subcontractor and was to furnish and install all electrical work needed for the Project. Seal Electric installed junction boxes and transformers and ran conduits and wire throughout the field, inside and outside the building. The work outside the building involved digging trenches to run conduits, running conduits and wires, and covering the conduits with dirt.

Several buildings (newly erected and renovated), such as concession stands, bathrooms, ticket booth, and press box, existed on the field. Seal Electric paid its workers wages using the Inside Wireman rates when they performed work within the foundation of these buildings. Seal Electric also paid its workers wages using the Inside Wireman rates when the work was done in connection with the transformers. However, when they performed work outside the building, such running underground conduits and wires, Seal Electric paid its workers wages based on the Underground Technician rates.

The Assessment:

DLSE served the Assessment on April 5, 2011. The Assessment found that Seal Electric erroneously classified some of its workers as Underground Technician rather than Inside Wireman. Thus, DLSE converted all hours reported as Underground Technician in the Certified Payroll Records (CPRs) to Inside Wireman rates and assessed Seal Electric the difference between the Underground Technician rates and Inside Wireman rates. The Assessment found a total of \$30,118.91 in underpaid prevailing wages. Penalties were assessed under section 1775 in the amount of \$50.00 per violation for 553 violations, totaling \$27,650.00. DLSE determined that the maximum penalty was warranted by its finding that the Scope of Work for Underground Technician did not cover the work performed in the Project. In addition, penalties were assessed under section 1813 for 15 overtime violations, at the statutory rate of \$25.00 per violation, totaling \$375.00.

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. Specifically:

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] *(Lusardi)*.) DLSE 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, subd. (a), and *Lusardi, supra.*)

Section 1775, subdivision (a) requires, among other things, that contractors and subcontractors pay the difference to workers who were paid less than the prevailing wage rate, and prescribes penalties for failing to pay the prevailing wage rate. Section 1742.1, subdivision (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.

When DLSE 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 the Assessment by filing a Request for Review under section 1742. Subdivision (b) of section 1742 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.”

Seal Electric Was Not Required To Pay The Prevailing Rate For Inside Wireman For The Work Subject To The Assessment.

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. It is the rate paid to the majority of workers; if there is no single rate payable to the majority of workers, it is the single rate paid to most workers (the modal rate). On occasion, the modal rate may be determined with reference to collective bargaining agreements, rates determined for federal public works projects, or a survey of rates paid in the labor market area. (§§ 1773, 1773.9, and *California Slurry Seal Association v. Department of Industrial Relations* (2002) 98 Cal.App.4th 651.) The Director determines these rates and publishes general wage determinations, such as SDI-2009-2, to inform all 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 (*Ericsson*).)

The current case involves a pure question of statutory interpretation. When statutes are interpreted, the words are given ordinary and everyday meaning. (*Halbert's*

Lumber, Inc. v. Lucky Stores, Inc 91992) 6 Cal.App. 4th 1233.) Furthermore, the words of the statute must be construed in context, keeping in mind the statutory purpose. (*Dyna-Med, Inc. v. Fair Employment & Housing Com* (1987) 43 Cal.3d 1379. The construction must be fair and reasonable with due regard for the ordinary meaning of the language used and the objective sought to be accomplished. (*Kaiser Steel Corp. v. County of Solano* (1979) 90 Cal.App.3d 662) “Moreover, it is equally well settled that fundamental rules of statutory construction require ascertainment of the legislative intent ‘so as to effectuate the purpose of the law [and] ‘every statute should be construed with reference to the whole system of law of which it is a part so that all may be harmonized and have effect.’” (*Id.*)

DLSE argues that since the Underground Technician Scope of Work is entitled “streetlighting, traffic signals, underground systems ... technician ...,” only electrical work performed in connection with streetlights or traffic signals falls under the Underground Technician classification and any other kind of outside electrical work must be classified as Inside Wireman work. DLSE’s argument is contrary to the plain meaning of the Underground Technician Scope of Work which covers not only “STREET LIGHTING” and “TRAFFIC SIGNALS” but also includes “UNDERGROUND SYSTEMS IN STREETS AND/OR ESTABLISHED EASEMENT AND/OR OUTSIDE OF BUILDING.” It further states that Underground Technician rates apply to work “in established easements and all work outside of buildings, necessary for the installation of all types of underground ducts or raceway used as enclosures for electrical conductors, whether power, control or communications.” This scope clearly includes the electrical work in issue, which was performed underground in connection with an outside athletic field and outside of any buildings or structures.

On the other hand, the Scope of Work for Inside Wireman is limited to “the installation, operation, maintenance, and repair of all electrical wiring and electrical equipment used in the *construction, alteration and repair of buildings, structures, bridges, street and highway work, subways, shafts, dams, river and harbor work, airports, mines ...* (emphasis added).” The disputed work, performed solely in connection with an outside athletic field, does not constitute the installation, operation, maintenance

or repair of electrical wiring or electrical equipment "used in the construction, alteration and repair" of buildings or any of the enumerated structures. Consequently, the work subject to the Assessment is not covered by the Inside Wireman Scope of Work.

I therefore find that Seal Electric properly paid its workers for the disputed work based on the applicable Underground Technician rates and find no prevailing wage violations. Accordingly, the Assessment is dismissed in full.

All Other Issues Are Moot

In light of the determination above, all other issues are moot and need not be decided.

FINDINGS

1. Affected subcontractor Seal Electric, Inc. filed a timely Request for Review of the Civil Wage and Penalty Assessment issued by DLSE with respect to the Project.
2. Seal Electric correctly classified and paid its workers for work done outside of the building at the applicable Underground Technician rates.
3. In light of Finding 2, above, Seal Electric properly paid its employees on the Project.
4. All other issues are moot.

ORDER

The Civil Wage and Penalty Assessment is dismissed 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.

Dated: 5/8/2012



Christine Baker
Director of Industrial Relations