

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Weeger Bros. Inc.

Case No. 12-0152-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected contractor Weeger Bros. Inc. (Weeger) submitted a timely request for review of a Civil Wage and Penalty Assessment (Assessment) issued by Division of Labor Standards Enforcement (DLSE) with respect to the Judges Parking Garage project (Project) in the City of Norwalk. The Assessment determined that \$14,987.20 in unpaid prevailing wages, training fund contributions and statutory penalties was due. A Hearing on the Merits was conducted on December 7, 2012, in Los Angeles, California, before Hearing Officer Makiko I. Meyers. Mark Weeger appeared via telephone for Weeger and David L. Bell appeared for DLSE.

The issues for decision are:

- Whether the Assessment correctly found that Weeger's subcontractor, Senel Construction Engineering (Senel), failed to pay the affected workers any of the required prevailing wages for the hours they worked on the Project.
- Whether Weeger is jointly and severally liable with Senel for any unpaid wages found owing on the Project.
- Whether DLSE abused its discretion in assessing penalties under Labor Code

section 1775¹ at the maximum rate of \$50.00 per violation.

- Whether Weeger is jointly and severally liable with Senel for penalties assessed under section 1775 for violations by Senel.
- Whether Weeger has demonstrated substantial grounds for appealing the Assessment, entitling it to a waiver of liquidated damages.

The Director finds that Weeger has failed to carry its burden of proving that the basis of the Assessment was incorrect. Therefore, the Director issues this Decision affirming the Assessment in full.

FACTS

The City of Norwalk advertised the Project for bid on May 4, 2010, and awarded the contract to Weeger. Weeger subcontracted with Senel to do carpentry work on the Project. Three Senel employees worked on the Project from approximately January 11 through February 22, 2011.

Carpenter and Related Trades for Southern California (SC-23-31-2-2009-1) was the applicable Prevailing Wage Determination (PWD) in effect on the bid advertisement date. This PWD covered the work performed by Senel workers on the Project. During the relevant time frame, the applicable prevailing wage rate for carpenter was \$48.43 per hour, including fringe benefits, plus \$0.42 per hour in training fund contributions.

DLSE served the Assessment on April 27, 2012. The Assessment found that Senel failed to pay its workers any of the required prevailing wages for their work on the Project. The Assessment found a total of \$13,172.96 in underpaid prevailing wages and \$114.24 in unpaid training fund contributions. Penalties were assessed under section 1775 in the maximum amount of \$50.00 per violation for 34 violations, totaling \$1,700.00. DLSE determined that penalties under section 1775 at the maximum rate of \$50.00 per violation were warranted by its findings that Senel had a history of prior prevailing wage violations and that Senel had paid no wages to its workers for their work

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

on this project. The Assessment also found that Weeger was jointly and severally liable for the unpaid wages as the prime contractor for the Project.

The facts are essentially undisputed. Yoon-mi Jo, the DLSE Deputy Labor Commissioner who investigated this matter, spoke with two of Senel's workers: Rodrigo Ronquillo and Semih Senel (S. Senel). Ronquillo submitted a list of the hours he claimed to have worked on the Project to Jo via facsimile and stated that he did not get paid for any of those hours. Ronquillo told Jo that he worked at least two additional days on the Project that were not listed, but that he could not remember the dates and had only listed the days of work that he could remember the details of. Ronquillo also told Jo that he, S. Senel and Fatih Senel (F. Senel), the company's owner, all used tools and performed carpentry work together on the Project. S. Senel did not provide Jo with a time sheet or list of specific days worked, but, like Ronquillo, he stated that he had not been paid for any of the work he had performed on the Project. Senel provided DLSE with uncertified copies of its Certified Payroll Records (CPRs) for the Project. Senel's CPRs report that three workers (Ronquillo, S. Senel, and F. Senel) performed carpentry work on the Project for eight hours per day on various dates between January 11 and February 22, 2012. Jo testified that she had relied on Senel's CPRs to determine the hours worked on the Project by S. Senel and F. Senel. To determine the hours worked on the Project by Ronquillo, Jo relied both on Senel's CPRs and the list of days and hours worked provided by Ronquillo.

Jo testified that DLSE had determined that the maximum rate of \$50.00 per violation was appropriate for penalties assessed under section 1775, because Senel had a record of several prevailing wage violations, including cases finding nonpayment of prevailing wages which were ultimately paid by prime contractors.

Weeger did not submit any documentary evidence to disprove the basis of the Assessment. Weeger argues that F. Senel, as owner of the Senel Construction, should not be entitled to prevailing wages. Weeger did not, however, submit any testimony or evidence to contradict Ronquillo's statement that F. Senel had performed carpentry work on the Project. Weeger also argues that there are discrepancies between the hours DLSE found each Senel worker to have worked on the Project and the hours recorded on

Weeger's inspection reports. Weeger did not, however, submit any of those inspection reports into evidence. Moreover, Weeger admitted that its inspection reports only recorded the number of workers that had worked on the Project each day. Weeger's inspection reports did not record the names of the workers or the number of hours worked by each worker.

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.”

Section 1771 requires that all workers on a public work receive at least the general prevailing “per diem wage.” There are three components to the prevailing wage: the basic hourly rate, fringe benefit payments, and a contribution to the California Apprenticeship Council or an approved apprenticeship training fund. (§ 1773.1.) The first two components (also known as the total prevailing wage) must be paid to the worker or on the worker’s behalf and for his benefit. An employer cannot pay a worker less than the basic hourly rate; the balance must be paid either to the worker as wages or may be offset by credit for “employer payments” authorized by section 1773.1, such as to a union trust fund or apprenticeship program training fund.

Employers on public works must keep accurate payroll records that reflect, among other things, the work classification, hours worked, and actual per diem wages² paid for each employee. (§ 1776, subd. (a).) This is consistent with the requirements for employers of construction workers in general, who are required to keep accurate records of the hour’s employee’s work and the pay they receive. (Cal. Code Regs., tit. 8, § 11160, subd. 6.)

Weeger Did Not Meet Its Burden of Proving That The Basis For The Assessment Is In Error And Weeger is Jointly and Severally Liable With Senel For The Assessed Unpaid Wages.

At the hearing, DLSE had the initial burden to produce prima facie evidence for the Assessment. DLSE met this burden by eliciting credible testimony from Jo and by moving its documentary exhibits into evidence.

With DLSE having met its initial burden to establish prima facie support for the Assessment, the burden of proving the Assessment to be in error fell to Weeger. Weeger did not meet this burden of proof.

The Assessment and supporting documents establish that \$13,172.96 in prevailing wages and \$114.24 in training fund contributions went unpaid by Senel. Weeger presented no substantial evidence to contradict DLSE’s findings of non-payment or to establish that

² The term “per diem wages” as defined in section 1773.1, subdivision (a) includes, but it not limited to, payments for health and welfare, pension, vacation, and training, all of which were required by the pertinent prevailing wage determination in this case.

the assessed unpaid wages were incorrect. Weeger's unsupported assertions that F. Senel was not entitled to prevailing wages for his work because he owned the company and that Senel's payroll records did not match up with Weeger's inspection reports are insufficient to undermine the evidence supporting the Assessment. Specifically, Weeger failed to submit cancelled checks or any other form of documentary evidence to show either that any wages had been paid to Senel workers or that the required training funds had been paid to an approved apprenticeship program.

The weight of the evidence produced in this case supports DLSE's finding that Senel failed to pay its workers any wages for their work on the Project and failed to make the required training funds contributions for that work. Section 1743 (a) provides that "[t]he contractor and subcontractor shall be jointly and severally liable for all amounts due ..." Weeger is therefore jointly and severally liable with Senel for the assessed unpaid wages.

DLSE's Penalty Assessment Under Section 1775 Is Appropriate.

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

(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.

(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.

(ii) The penalty may not be less than twenty dollars (\$20) . . . if the . . . subcontractor has been assessed penalties within the previous three years for failing to meet its prevailing wage obligations on a separate contract, unless those penalties were subsequently withdrawn or overturned.

(iii) The penalty may not be less than thirty dollars (\$30) . . . if the Labor Commissioner determines that the violation was willful, as defined in subdivision (c) of Section 1777.1.^[3]

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 Civ. Proc. § 1094.5, subd. (b).) In reviewing for abuse of discretion, however, the Director is not free to substitute her own judgment “because in her 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. Specifically, “the Affected Contractor or Subcontractor shall have the burden of proving that the Labor Commissioner abused his or her discretion in determining that a penalty was due or in determining the amount of the penalty.” (Rule 50(c) [Cal. Code Regs., tit. 8, §17250, subd. (c)].)

Here, the undisputed evidence shows that Senel had a history of assessments for non-payment of prevailing wages and that Senel failed to pay the affected workers for their work on the Project. The Director is not free to substitute her own judgment. Weeger has not shown an abuse of discretion and the assessment of penalties at maximum rate of \$50.00 per violation is affirmed.

Weeger And Senel Are Jointly And Severally Liable For The Penalties Assessed Under Section 1775.

The affected contractor and subcontractor are jointly and severally liable for

³ Section 1777.1, subdivision (c) defines a willful violation as one in which “the contractor or subcontractor knew or reasonably should have known of his or her obligations under the public works law and deliberately fails or refuses to comply with its provisions.”

penalties assessed under section 1775 unless the contractor can prove both that it had no knowledge of its subcontractor's prevailing wage violations and that it has satisfied the following four requirements:

(1) The contract executed between the contractor and the subcontractor for the performance of work on the public works project shall include a copy of the provisions of Sections 1771, 1775, 1776, 1777.5, 1813, and 1815.

(2) The contractor shall monitor the payment of the specified general prevailing rate of per diem wages by the subcontractor to the employees, by periodic review of the certified payroll records of the subcontractor.

(3) Upon becoming aware of the failure of the subcontractor to pay his or her workers the specified prevailing rate of wages, the contractor shall diligently take corrective action to halt or rectify the failure, including, but not limited to, retaining sufficient funds due the subcontractor for work performed on the public works project.

(4) Prior to making final payment to the subcontractor for work performed on the public works project, the contractor shall obtain an affidavit signed under penalty of perjury from the subcontractor that the subcontractor has paid the specified general prevailing rate of per diem wages to his or her employees on the public works project and any amounts due pursuant to Section 1813.

(§1775, subd. (b).)

Here, Weeger neither argued nor presented any evidence to establish that it complied with the four requirements of section 1775, subdivision (b). Consequently, Weeger remains jointly and severally liable for the penalties assessed against Senel under section 1775.

Weeger Is Liable For Liquidated Damages.

Section 1742.1, subdivision (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 . . . 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.

Additionally, if the contractor or subcontractor demonstrates to the satisfaction of the director that he or she had substantial grounds for appealing the assessment . . . with respect to a portion of the unpaid wages covered by the assessment . . . , the director may exercise his or her discretion to waive payment of the liquidated damages with respect to that portion of the unpaid wages.

Absent waiver by the Director, Weeger is liable for liquidated damages in an amount equal to any wages that remained unpaid sixty days following service of the Assessment. Here, Weeger has not shown that it had substantial grounds for appealing the assessment and thus has not demonstrated grounds for waiver of liquidated damages under section 1742.1, subdivision (a). Because the assessed unpaid wages remain due and owing more than 60 days after service of the Assessment, Senel and Weeger are liable for liquidated damages in an amount equal to the unpaid wages.

FINDINGS

1. Affected contractor Weeger Bros. Inc. filed a timely Request for Review of the Civil Wage and Penalty Assessment issued by DLSE with respect to the Project.

2. Weeger's subcontractor Senel Construction failed to pay any wages to its three workers who performed carpentry work on the Project.

3. In light of Finding 2 above, Senel underpaid its employees on the Project in the aggregate amount of \$13,172.96 in unpaid prevailing wages.

4. Senel failed to make the required training fund contributions for its workers on the Project, resulting in underpayment of \$114.24.

5. DLSE did not abuse its discretion in setting section 1775, subdivision (a) penalties at the maximum rate of \$50.00 per violation, and the resulting total penalty of \$1,700.00, for 34 violations, is affirmed.

6. The unpaid wages found due in Finding 3, above, remained due and owing more than sixty days following the issuance of the Assessment and there are insufficient grounds to waive payment of liquidated damages on those unpaid wages. Senel and Weeger are therefore liable for liquidated damages under section 1742.1, subdivision (a)

in the amount of \$13,172.96.

7. Weeger is jointly and severally liable for the wages, penalties, and liquidated damages found owing in Findings 3 through 6, above.

8. The amounts found remaining due in the Assessment as affirmed by this Decision are as follows:

Wages Due:	\$13,172.96
Training Fund Contributions Due:	\$114.24
Penalties under section 1775, subdivision (a):	\$1,700.00
Liquidated Damages:	\$13,172.96
TOTAL:	\$28,160.16

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

ORDER

The Civil Wage and Penalty Assessment is 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.

Dated: 7/21/2014



Christine Baker
Director of Industrial Relations