

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

RMV Construction, Inc.

Case No. 14-0050-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected contractor RMV Construction, Inc. (RMV) requested review of a Civil Wage and Penalty Assessment (Assessment) issued by the Division of Labor Standards Enforcement (DLSE) with respect to the work of improvement known as the West Alvarado Street Sidewalk Improvement #5734 (Project) performed for the County of San Diego (County) in the County of San Diego. The Assessment determined that \$9,797.18 in unpaid prevailing wages and training funds, \$13,425.00 in Labor Code sections 1775 and 1813 statutory penalties, and \$36,000.00 in Labor Code section 1776 penalties were due.¹ RMV did not deposit the Assessment amount for unpaid wages with the Department of Industrial Relations (DIR) pursuant to section 1742.1, subdivision (b).

Pursuant to written notice, a Hearing on the Merits was held on December 4, 2014, in Los Angeles, California, before Hearing Officer Richard T. Hsuch. Max Norris appeared for DLSE. There was no appearance for RMV, which likewise did not appear for the two noticed Prehearing Conferences.

The issues for decision are:

- Whether the Assessment correctly found that RMV failed to report and pay the required prevailing wages for all straight time and overtime worked on the Project by its workers;

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

- Whether DLSE abused its discretion in assessing penalties under Section 1775 at the rate of \$200.00 per violation;
- Whether RMV failed to pay the required prevailing wage rate for overtime work and therefore liable for penalty under Section 1813;
- Whether RMV has demonstrated substantial grounds for appealing the Assessment, entitling it to a waiver of liquidated damages under section 1742.1; and
- Whether RMV failed to timely submit certified payroll records and is therefore liable for penalties under section 1776.

Since RMV failed to appear at the Hearing on the Merits, the Hearing Officer proceeded with the hearing in RMV's absence under California Code of Regulations, title 8, section 17246, subdivision (a). The Director finds that RMV has failed to carry its burden of proving that the basis of the Assessment was incorrect. RMV has also failed to carry its burden of proving grounds for waiver of liquidated damages. Based on the un rebutted evidence showing that RMV failed to pay the required prevailing wages, the Director affirms the Assessment.

Facts

Failure to Appear: RMV's Request for Review was filed on or about October 25, 2013. RMV's mailing address on file is 3562 Summit Trail Ct., Carlsbad, CA 92010. This is one of the two addresses where the Assessment was served. The other address where the Assessment was served is 4079 Huerfano Ave., #118, San Diego, CA 92117, the address that the Contractors State License Board and the California Secretary of State have on file for RMV. RMV's Request for Review, however, listed the Summit Trail Ct. address as its address. This is also the address used by RMV in communicating with DLSE in connection with its Request for Review.

Notices of Prehearing Conference (Notice) were mailed to RMV at 3562 Summit Trail Ct., Carlsbad, CA 92010, thus giving RMV notice that the hearing officer would be conducting a telephonic prehearing conference on the date stated in each Notice. On October 20, 2014, RMV failed to appear for the first Prehearing Conference. On October 30, 2014, RMV again failed to appear for the continued Prehearing Conference. On each occasion, the Hearing Officer called RMV's phone number on file, (619) 517-5837, but each call went to the voice mail. RMV

provided no other telephone number where it could be reached. A Hearing on the Merits was then set for December 4, 2014 but RMV did not appear at the Hearing on the Merits.

The Hearing Officer then proceeded to conduct the Hearing on the Merits pursuant to the Notice for the purpose of formulating a recommended decision as warranted by the evidence pursuant to California Code of Regulations, title 8, section 17246, subdivision (a). DLSE's evidentiary exhibits were admitted into evidence without objections and the matter was submitted on the evidentiary record based on the testimony of DLSE's Deputy Labor Commissioner, Lance Grucela (Grucela).

Assessment: The facts stated below are based on Exhibits 1 through 25 and 27-31 submitted by DLSE, including the Assessment and other documents in the Hearing Officer's file.

RMV was the primary contractor on the Project. Eleven workers performed work for RMV under the contract between January 2, 2013 and March 27, 2013. The applicable prevailing wage determinations in effect on the bid advertisement date are: (1) SD-23-63-3-2012-1 (Operating Engineering), with the applicable job classification being Group 4; (2) SD-23-261-3-2012-2 (Teamster), with the applicable job classification being Group 2; (3) SD-23-203-3-2012-1 (Cement Mason), with the applicable job classification being Engineering Construction, which contains a predetermined pay rate increase that went into effect before the beginning of work on the Project; (4) SD-23-31-4-2012-1 (Carpenter), with the applicable job classification being Bridge Carpenter (highway work) in Engineering Construction; and (5) SD-23-102-3-2012-1 (Laborer) in Construction [Fence Erector-House Mover], with the applicable job classification in Group 2.

Based on RMV's certified payroll records (CPRs) and interviews with employees, the Assessment found that RMV failed to pay the required prevailing wages to seven workers identified in the audit summary by one or more of the following: (1) underreporting hours worked; (2) misclassifying workers; and (3) under payment of prevailing wages. The Assessment found a total of \$9,797.18 in unpaid prevailing wages, \$13,425.00 in section 1775 and 1813 statutory penalties (\$200.00 per violation for sixty-seven violations under section 1775 and one violation under Section 1813), and \$36,000.00 in section 1776 penalties.

Deputy Labor Commissioner Grucela testified as to the preparation of the Assessment and the supporting audit worksheets. He identified RMV's CPRs and the applicable prevailing wage determinations and apprentice wage rates. Grucela further testified that the Assessment was properly served on RMV on August 30, 2013. RMV then submitted a timely request for review on or about October 23, 2013, and DLSE provided RMV with a reasonable opportunity to review DLSE's evidence.

Certified Payroll Records: The facts stated below are based on Exhibits 7 and 8 submitted by DLSE and other documents in the Hearing Officer's file.

By certified and first class mail deposited on July 9, 2013, DLSE sent a Request for Certified Payroll Records (Request) to RMV at 4079 Herfano Ave., #118, San Diego, CA 92117. The Request asked for copies of time and payroll information for all workers employed by RMV on the Project. The Request specified that failure to provide the CPRs within 10 days of receipt of the request would subject RMV to a penalty of \$100.00 per calendar day or portion thereof for each worker until the records are received, citing section 1776, subdivision (h). The certified mail was not claimed but the first class mail had not been returned. On August 15, 2013, DLSE served by both first class and certified mail a Second Request for CPRs on RMV at the same address. This Second Request sought the following: "CPRs, cancelled checks, itemized wage statements as given to employees, Time cards/time sheets, fringe benefit statements, proof of fringe benefits payment, cash register, General ledger." There is a signed United States Postal Service return receipt indicating RMV's receipt of the Second Request. Grucela testified that DLSE did not receive any CPRs from RMV prior to issuing the Assessment. The Assessment imposes a \$100.00 per calendar day per worker penalty on the basis of 12 workers for 30 days for a total of \$36,000.00. DLSE determined the 30 day period by counting the number of days from July 15, 2013 (date of receipt of the Request) to August 30, 2013 (the date of the Assessment) for a total of 45 days, minus 15 days (the 10-day statutory period allowed for a response to the Request and five days for service by mail). DLSE determined the number of affected workers based on records produced by the County.

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. 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). See, too *Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976.)

Section 1775, subdivision (a) requires, among other things, that contractors and subcontractors pay the difference to workers who received less than the prevailing rate and also prescribes penalties for failing to pay the prevailing rate. Section 1742.1, subdivision (a) provides for the imposition of liquidated damages, essentially a doubling of unpaid wages, if those wages are not paid within sixty days following the service of a civil wage and penalty assessment.

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 may appeal that assessment by filing a request for review under section 1742. Subdivision (b) of section 1742 provides, among other things, that a hearing on the request for review “shall be commenced within 90 days” and that the contractor shall be provided with an opportunity to review evidence that DLSE intends to utilize at the hearing. At the hearing the contractor “shall have the burden of proving that the basis for the civil wage and penalty assessment is incorrect.” (§ 1742, subd. (b).) If the contractor “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.” (§ 1742.1, subd. (a).) As well, DLSE’s determination “as to the amount of the penalty shall be reviewable only for abuse of discretion.” (§ 1775, subd. (a)(2)(D).)

Additionally, employers on public works must keep accurate payroll records, recording, among other things, the work classification, straight time and overtime hours worked and actual per diem wages paid for each employee. (§ 1776, subd. (a).) This is consistent with the

requirements for construction employers in general, who are required to keep accurate records of the hours employees work and the pay they receive. (Cal. Code Regs., tit. 8, § 11160, subd. 6.)

Section 1776, subdivision (h) provides that:

(a) Each contractor and subcontractor shall keep accurate payroll records, showing the name, address, social security number, work classification, straight time and overtime hours worked each day and week, and the actual per diem wages paid to each journeyman, apprentice, worker, or other employee employed by him or her in connection with the public work. Each payroll record shall contain or be verified by a written declaration that it is made under penalty of perjury, stating both of the following:

(1) The information contained in the payroll record is true and correct.

(2) The employer has complied with the requirements of Sections 1771, 1811, and 1815 for any work performed by his or her employees on the public works project.

(b) The payroll records enumerated under subdivision (a) shall be certified and shall be available for inspection at all reasonable hours at the principal office of the contractor on the following basis:

(1) A certified copy of an employee's payroll record shall be made available for inspection or furnished to the employee or his or her authorized representative on request.

(2) A certified copy of all payroll records enumerated in subdivision (a) shall be made available for inspection or furnished upon request to a representative of the body awarding the contract, the Division of Labor Standards Enforcement, and the Division of Apprenticeship Standards of the Department of Industrial Relations.

* * *

(h) In the event that the contractor or subcontractor fails to comply within the 10-day period, he or she shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit one hundred dollars (\$100) for each calendar day, or portion thereof, for each worker, until strict compliance is effectuated.

In this case, the record established the basis for the Assessment. DLSE presented evidence that the Assessment was properly served on RMV and that DLSE provided RMV with a reasonable opportunity to review the evidence to be used at the hearing. DLSE presented

evidence that seven of the workers, at times, performed work in the classifications of Teamster, Cement Mason, Operating Engineer, Carpenter, and Laborer. DLSE presented evidence that RMV did not pay the seven affected workers for all hours worked, including overtime. DLSE presented further evidence that RMV had previous prevailing wage violations.

With regard to RMV's failure to provide CPRs upon request, DLSE showed that RMV was served with the Request via first class mail. For service of a request for CPRs, the applicable regulation does not prescribe any particular type of service. Instead, it states that the request "shall be in any form and/or method which will assure and evidence receipt thereof." (Cal. Code. Regs., tit. 8, § 16400, subd. (d).) DLSE's documented mailing constituted effective service of the Request on RMV and there is evidence showing the receipt of the Request by RMV. This conclusion is supported by the fact that RMV has not denied timely receipt of the Request.

Accordingly, DLSE's evidence constitutes prima facie support for the Assessment. RMV, in turn, presented no evidence to disprove the basis for, or accuracy of, the Assessment or to show it had substantial grounds for believing the Assessment was in error to support a waiver of liquidated damages under section 1742.1, subdivision (a). Liquidated damages are therefore affirmed in an amount equal to the unpaid wages.

FINDINGS AND ORDER

1. Affected contractor RMV Construction, Inc. filed a timely Request for Review from a Civil Wage and Penalty Assessment issued by the Division of Labor Standards Enforcement.
2. RMV Construction, Inc. underpaid seven employees on the Project in the aggregate amount of \$9,797.18
3. Penalties under section 1775 are due in the amount of \$13,400.00 for 67 violations at the rate of \$200.00 per violation.
4. Penalties under section 1813 are due in the amount of \$25.00 at the rate of \$25.00 per calendar day for one affected employee.
5. Liquidated damages are due in the amount of \$9,797.18 and are not subject to waiver under section 1742.1, subdivision (a).

6. On July 9, 2013, DLSE served RMV Construction, Inc. with a request for certified payroll records, to be produced to DLSE within 10 days from the receipt of the request, or be subject to penalties under section 1776, subdivision (h) in the amount of \$100.00 per calendar day or portion thereof for each worker until the records were received. The request was received on or about July 15, 2013, by RMV at the address RMV used for mailing purposes.

7. RMV Construction Inc. failed to timely submit certified payroll records pursuant to the DLSE request, as required by section 1776.

8. DLSE properly assessed penalties against RMV Construction, Inc. under section 1776, subdivision (h) for its failure to provide certified payroll records to DLSE within 10 days of July 15, 2013.

9. In light of the findings above, RMV Construction, Inc. is liable for penalties under section 1776, subdivision (h) in the total amount of \$36,000.00.

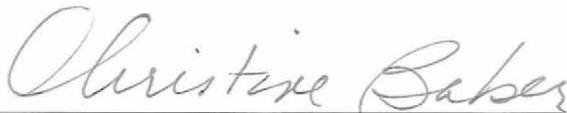
The amounts found due in the Assessment affirmed by this Decision are as follows:

Wages:	\$ 9,797.18
Penalties under section 1775, subdivision (a):	\$ 13,400.00
Penalties under section 1813:	\$25.00
Liquidated damages:	\$ 9,797.18
Penalties under section 1776, subdivision (h)	\$36,000.00
TOTAL	\$69,019.36

Interest shall accrue on unpaid wages in accordance with section 1741, subdivision (b).

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: 3/13/2015


Christine Baker
Director of Industrial Relations