

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Montez Glass, Inc.

Case No. 16-0241-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

After a petition for writ of administrative mandamus (Petition) by Montez Glass, Inc. (Montez Glass), the Superior Court remanded the case to the Director of Industrial Relations (Director) to issue a decision clarifying the bases for her Decision of March 3, 2017 (Previous Decision) and addressing the liquidated damages issue in light of the clarified bases. This Decision issues in response to the Superior Court's remand.

Montez Glass submitted a request for review of a Civil Wage and Penalty Assessment (Assessment) made by the Division of Labor Standards Enforcement (DLSE) with respect to glazier work on a project titled the San Jose Downtown Health Center in Santa Clara County (Project). The Director's Previous Decision on the merits of this case affirmed in part and modified in part the Assessment that DLSE had amended downward on the first date of hearing. The Previous Decision found that Montez Glass was liable for \$207,235.69 in unpaid prevailing wages, \$80,395.00 in statutory penalties, and \$207,235.69 in liquidated damages.

In its Petition, Montez Glass raised the issues of travel pay, DLSE's mileage/time calculation, the applicable free zone and liquidated damages. While the Superior Court remanded the issue of travel pay, Montez Glass did not persuade the Superior Court to overrule or remand either on the issue of DLSE's mileage/time calculations¹ or on the issue of

¹ The Superior Court's tentative ruling later adopted in its Judgment, suggests in a footnote that the parties may want to clarify the street addresses DLSE used to calculate travel distances at a hearing. In that the reference to a hearing appears to anticipate oral argument before the Court, not a hearing

the applicable free zone. Accordingly, discussion of the amount of the mileage/time calculation and the applicable free zone remain unchanged from the Previous Decision and are adopted and incorporated herein.

Based on instructions from the Superior Court, the Director amends the Previous Decision to clarify that her basis for awarding unpaid prevailing wages and imposing a penalty rests exclusively on the determination that the office space located in Santa Clara did not constitute a bona fide shop for purposes of the Glazier Prevailing Wage Determination (Glazier PWD) for Santa Clara County (STC-2012-1). However, the Director also recognizes that the lack of a controlling definition of shop in the applicable prevailing wage rate determination may have caused Montez Glass uncertainty and therefore waives liquidated damages awarded in the Previous Decision. Therefore, the Director affirms and modifies the Assessment in the same amounts as the Previous Decision, less liquidated damages.

Accordingly, the Director finds that while the workers employed by Montez Glass were entitled to compensation for travel time and mileage, Montez Glass did not correctly compensate its workers for travel time and mileage. Also, the Director had previously adjusted the amount of unpaid wages for a variety of factors: for workers who carpoled, for workers who DLSE erroneously identified as working on this Project, and for a worker who Montez Glass provided a company vehicle and hotel accommodations near the jobsite. Those adjustments remain unchanged, as do the penalties under Labor Code sections 1775 and 1813.²

DISCUSSION

1. Montez Glass Underpaid Wages for Travel Time and Mileage.

The per diem wages include travel and subsistence payments. (§ 1773.1, subd. (a).) The Director shall ascertain and consider the prevailing rate for the craft in the locality by reference to the applicable collective bargaining agreement. (§ 1773.) By the Glazier PWD,

before the Director, the Superior Court's ruling does not suggest the need for another Hearing on the Merits. Instead, the ruling indicates that DLSE reasonably calculated travel distances. Also, because the parties previously submitted the case and no party has requested another Hearing on the Merits, the hearing officer holds no further hearing.

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

the Director adopted sections of the glazier union collective bargaining agreement for travel and subsistence payments to apply to glaziers working in Santa Clara County. The Glazier PWD provided for payment of travel time and mileage from the point of dispatch in excess of 25 miles. The Glazier PWD Travel and Subsistence Provisions contain, in relevant part, the following:

Regular employees of the Employers located in . . . Santa Clara . . . who are required to jobsite report more than twenty-five (25) miles from the point of dispatch (employee's home or individual Employer's shop) as determined by the individual Employer, shall receive Wages and Benefits for all time spent traveling beyond twenty-five (25) miles from the point of dispatch

The Glazier PWD, the California Labor Code, and California case law provide no definition for an "Employer's shop." The applicable collective bargaining agreement from which the Glazier PWD is drawn contains a definition of employer's shop³, however, it per se is not controlling because only the portions of the collective bargaining agreement that are included in the Glazier PWD govern the analysis.

Absent a controlling definition of shop in the rate determination, we evaluate the plain meaning of the phrase "individual Employer's shop" as it appears in the Glazier PWD. A "plain meaning" approach does not preclude consideration whether the literal meaning of language comports with the purpose of the rate determination. (Cf. *In re Social Services Payment Cases* (2008) 166 Cal.App.4th 1249, 1264 [considering the purposes of a statute when applying its plain meaning].) In our context, if an employer could designate any space as an "Employer's shop" without regard to the bona fide nature of the choice, the apparent purpose of the Glazier PWD and section 1720 et seq. to compensate workers required to travel beyond a designated distance to a jobsite would be subverted and employees could be deprived of a portion of their statutorily protected prevailing wages.

Tony Montez, president of Montez Glass, testified that he rented space in Santa Clara County from Top Gun Industrial Finishing (Top Gun) for \$200 a month. The Superior Court noted that \$200 a month "appears extremely low for Santa Clara County or almost anywhere in California." Such a low rate for a space purportedly operating as a shop in Santa Clara

³ This definition of Employer's shop arose at the Hearing on the Merits during the testimony of John Willis Hughes, Jr. given on behalf of DLSE and DLSE later quoted the definition in its post-trial brief.

County markedly decreases the probability that Montez Glass operated a bona fide shop within Top Gun's facilities for purposes of the Glazier PWD.

Tony Montez testified that his company stored inventory at the Top Gun location. The storage of inventory is one indicator that the owner of the space uses it as a shop. The only inventory at Top Gun related to Montez Glass, however, was the window frames and panels that Top Gun painted for the Project.⁴ In that regard, the president of Top Gun testified that Montez Glass only delivered window frames to Top Gun so that Top Gun could paint them. Consequently, we cannot accept Tony Montez's contention that "inventory storage" at Top Gun showed the space there was a "shop" within the meaning of the Glazier PWD.

Another hallmark of a bona fide shop would be a location where employees interact with bosses and administrators. Yet, Tony Montez's brother was the only Montez Glass employee who visited the rental space. He confirmed that no other employees went to the rental space because there was "no need for them to go there." Four employees testified that they not had heard of a Montez Glass shop in Santa Clara, nor had they even known of Top Gun, with the exception of one employee who knew it as a separate business. Further, these same employees testified that deliveries to the Project of equipment and inventory came from Montez Glass's main shop in Sacramento; they obtained their paychecks from a trailer on the jobsite; and they stored their tools on the jobsite. The president of Top Gun knew of no Montez Glass personnel visiting the Top Gun location other than Tony Montez. The testimony from both parties made it clear that Montez Glass employees had no relationship to the space at Santa Clara.

Moreover, the Montez Glass administrative assistant and vice president who oversaw administrative tasks worked exclusively from the Sacramento shop. The Santa Clara office did not generate communications to employees, and all paychecks and written administrative communications came from Sacramento.

Persons working in a bona fide shop ought to generate enough business activity so that others can identify it as a location from which the contractor does business. DLSE called as a witness a business representative from the regional glazier union, who had also previously dispatched apprentices to Montez Glass. This union representative had no knowledge of

⁴ Top Gun's business involved painting structural elements for the architectural industry such as window frames and panels.

Montez Glass opening a shop in Santa Clara. At DLSE's request, he interviewed employees of Top Gun, who reportedly were unaware that Montez Glass rented space within the warehouse.

Similarly, business activity in a bona fide shop would reflect work in the particular trade. The union representative took photographs of Montez Glass's rented space at Top Gun. His photographs depict a barebones space enclosed by wooden walls within a warehouse. Tony Montez testified that by the date of the photographs, Montez Glass's projects in the South Bay had finished and that Montez Glass decided not to continue working on jobs in the South Bay. However, that does not explain why long-term employees of Top Gun never saw any business activity by Montez Glass in the warehouse. That is, the interviews and photographs together lent an impression of a space suited for no more than a computer hookup for Tony Montez.

Summarized, the following characteristics of the Top Gun rental space preclude any finding that this was a bona fide "Employer's shop" under a plain meaning interpretation:

- No employees visited the rental space, with the exception of the owner's brother;
- No employees received communications from the rental space for purposes of the Project;
- No employees knew of the rental space, with the exception of the owner's brother;
- No employees kept jobsite equipment for the Project at the rental space;
- No employees of Top Gun knew of Montez Glass's presence;
- A union representative who dispatched apprentices to Montez Glass was unaware of Montez Glass's rental space;
- No inventory for the Project was stored at the rental space;
- No administrative support staff worked from the rental space; and
- The monthly rental payment for the space was extremely low.

Based on all this evidence, the Director finds that Montez Glass could not designate the Santa Clara space as the point of dispatch under the Glazier PWD because, from a common sense perspective, the rental lacked the characteristics of an operating, bona fide shop for purposes of the Glazier PWD, and accordingly, the decision to designate it as the point of dispatch served only to artificially deprive workers of their entitlement to travel time wages.

2. **The Director Finds Substantial Grounds For Appeal of the Assessment for Unpaid Wages and Therefore Waives Liquidated Damages.**

Under the former version of the statute on liquidated damages that applies to this matter, a contractor is liable for liquidated damages in an amount equal to any wages that remained unpaid sixty days following service of the Assessment, unless it “demonstrates to the satisfaction of the director that [it] had substantial grounds for appealing the assessment . . . with respect to a portion of the unpaid wages covered by the assessment . . .” and the Director exercises her discretion to waive liquidated damages with respect to that portion of unpaid wages. (Former § 1742.1, subd. (a).) Entitlement to a waiver of liquidated damages by the Director therefore corresponds to the strength of a contractor’s position on the merits.

In this case, Montez Glass had substantial grounds for appealing the Assessment as to wages DLSE contended were owed to Mathew Montez, Andrew Montez, Paulo Azevedo, Tedarly Mason, and Kelly Montez, wages found not due for the reasons given in the Previous Decision.. Additionally, Montez Glass had substantial grounds for appealing the Assessment as to mileage expended by those workers in a carpool, a point accepted by DLSE as reflected in an amended audit it issued during these proceedings.

The statutory test whether substantial grounds for appealing the Assessment, however, is not linked to those matters for which no wages are due. Rather under section 1742.1, subdivision (a), the proper focus is whether Montez Glass had substantial grounds for appealing the Assessment for portions of the Assessment that the Director is upholding. In this case, the unpaid wages consist of the amounts for those workers found to be owed travel time. Montez Glass argues against the Assessment mainly by claiming it had designated its space the Top Gun shop in Santa Clara as the point of dispatch under the Glazier PWD. That argument has been rejected, as explained above. Still, the ultimate findings on unpaid travel time wages do not answer the inquiry as to whether Montez Glass had substantial grounds for its argument. Tony Montez argued that the Santa Clara space was a bona fide shop because Montez Glass rented space at Top Gun so that he could perform computer work related to the Project while he was traveling. Montez Glass urges a finding that the space was a shop within the meaning of the Glazier PWD based on the definition of an “Employer’s shop” as it appears in the glazier’s collective bargaining agreement, but outside the Glazier PWD. Toward that

end, Tony Montez cited the inventory, a telephone, electric power, and toilet facilities at Top Gun to support its claim. As stated above, this definition is not applicable to Montez Glass. Nevertheless, even if it were, consideration of the complete definition (i.e., "a permanent office where regular business is conducted") would dictate an unfavorable finding for Montez Glass as the Santa Clara space was not a permanent office. However, the fact that there is no controlling definition of "Employer's shop" and the fact that some elements at Top Gun (i.e. telephone, electric power and toilet facilities) appear in the collective bargaining agreement's definition of "Employer's shop" lends some weight to an argument that Montez Glass had substantial grounds to appeal. As the definition may have not been readily available from a reliable source, the argument that the space constituted an "Employer's shop" within the meaning of the Glazier PWD was colorable. Additionally, the fact that Montez Glass could have sought a determination from the union representative, as testified to by the union representative, was not persuasive without proving that Montez Glass knew of such an option. DLSE did not demonstrate that Montez Glass knew that it could have obtained this type of opinion from the union, and simply chose to remain uninformed.

As directed by the Superior Court, the Director has reconsidered whether to waive liquidated damages. The Director finds that Montez Glass had substantial grounds for appealing the portion of the unpaid wage presently owed by Montez Glass, and accordingly, Montez Glass is not liable for liquidated damages.

FINDINGS AND ORDER

1. Affected subcontractor, Montez Glass, Inc. timely requested review of a Civil Wage and Penalty Assessment issued by the Division of Labor Standards Enforcement.
2. Affected contractor Montez Glass, Inc. failed to pay all its workers the required prevailing wages for travel time and mileage. Montez Glass underpaid its workers \$207,235.69. The wages due reflect deductions for those workers the Director has removed from the Civil Wage and Penalty Assessment because they worked on a different project. The total also reflects removal of another worker from the Civil Wage and Penalty Assessment because Montez Glass provided a company vehicle, hotel accommodations and paid travel time. Additionally, the wages due reflect the savings in travel costs provided by those workers who carpoled.

3. Penalties under section 1775, subdivision (a) are set at \$40.00 per violation for 2,008 violations, which total \$80,320.00.
4. Penalties under section 1813 are due of \$75.00 for three instances of a failure to pay the proper overtime rate.
5. Montez Glass, Inc. is not liable for liquidated damages on the Project under section 1742.1, subdivision (a) because it has substantial grounds for appealing the unpaid wages.
6. Montez Glass, Inc. did not violate section 1777.5.
7. The amounts found due against Montez Glass, Inc. and as affirmed herein are as follows:

Wages Due:	\$207,235.69
Penalties under section 1775, subdivision (a):	\$80,320.00
Penalties under section 1813:	\$75.00
TOTAL:	<u>\$287,630.69</u>

The Civil Wage and Penalty Assessment as amended at the hearing is affirmed in part and denied part in 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: 2/2/2018



Christine Baker
Director of Industrial Relations