

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Worthington Construction, Inc.

Case No.: **16-0465-PWH**

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION AND ORDER OF DIRECTOR OF INDUSTRIAL RELATIONS

Affected subcontractor Worthington Construction, Inc. (Worthington) submitted a request for review of a Civil Wage and Penalty Assessment (Assessment) issued by the Division of Labor Standards Enforcement (DLSE) with respect to work carried out by Worthington on the construction of Fire Station No. 5 in Bonsall, San Diego County, California (Project). The Assessment determined that \$85,863.56 in unpaid prevailing wages and statutory penalties under Labor Code sections 1775 and 1777.7 statutory penalties are due.¹

At the first and only Prehearing Conference held in this matter, Worthington stipulated that the work subject to the Assessment was performed on a public work, required the employment of apprentices, and required the payment of prevailing wages. The parties also informed the Hearing Officer that there was no dispute as to any factual issues, and that the only legal issue was the correct classification of Pedro Refugio, a worker employed by Worthington on the Project. The parties agreed to submit this sole issue to the Director based on an agreed-upon set of facts. The parties also agreed that, if the Director were to find that Worthington's classification of Pedro Refugio was in error, all other issues would be moot. It was also agreed that the matter would be returned to the Hearing Officer's calendar for another Prehearing Conference after the Director's classification ruling. Accordingly, the Hearing Officer specified that the sole issue presented would be one of classification, and that the matter would be submitted for decision, following receipt of briefing, without a Hearing on the Merits. In a Minute Order summarizing the Prehearing Conference, the Hearing Officer confirmed these agreements, and specified the issue to be determined.

¹ All further section references are to the California Labor Code unless otherwise specified.

Subsequently, for purposes of briefing, Worthington submitted a “Motion for Reclassification of Worker Pedro Refugio in the Civil Wage and Penalty Assessment and Finding That Respondent Complied With Labor Code section 1777.5; and Declaration of Dale Worthington.” DLSE filed a legal memorandum in opposition, as well as the Declaration of Deputy Labor Commissioner Kari Anderson. Worthington then filed a reply brief, along with Declarations of Dale Worthington and Pedro Refugio.

The issue thus presented, on the papers and in lieu of a full Hearing on the Merits, was as follows: Was Worthington’s employee Pedro Refugio, as the operator of a Bobcat 331 Excavator, properly classified by Worthington as a Landscape/Irrigation Laborer/Tender for his work on the Project, or was DLSE correct in reclassifying Pedro Refugio as a Landscape Operating Engineer? The matter was deemed submitted as of May 10, 2017.

For the reasons set forth below, the Director of Industrial Relations finds that Pedro Refugio’s use of a Bobcat 331 Excavator to dig trenches and compact soil constitutes the operation of heavy machinery, and comes within the scope of work for Landscape Operating Engineer. Worthington failed to carry its burden of proving the basis for the Assessment was incorrect as to the issue submitted. (See Cal. Code Regs., tit. 8, § 17250, subd. (b).) Accordingly, the Director issues this Decision finding that the Assessment properly determined that Pedro Refugio should have been classified and paid as a Landscape Operating Engineer.

Facts

Pedro Refugio was employed by Worthington to perform landscaping work on the Project. According to DLSE’s Public Works Audit Worksheet, Refugio worked a total of 548 hours on the Project.² While the Project was underway, he was classified and paid by Worthington in accordance with the prevailing wage determination for Landscape/Irrigation Laborer/Tender, SD-102-X-14-2014-1 (Landscape/Irrigation Laborer/Tender PWD), for all of his hours worked.³ On an inspection visit to the Project site, Deputy Labor Commissioner Kari Anderson spoke with Refugio and observed him digging trenches and compacting dirt while

² The parties provided the Hearing Officer with information as to the aggregate hours worked but not the number of days Pedro Refugio was employed on the Project.

³ The Landscape/Irrigation Laborer/Tender PWD specifies \$28.80 per hour for basic straight-time work, \$17.32 per hour in fringe benefits, and \$0.64 per hour in training fund contributions. Pursuant to California Code of Regulations, title 8, section 17245, official notice is taken of the Landscape/Irrigation Laborer/Tender PWD.

operating a Bobcat 331 machine. The Bobcat 331 Excavator is a vehicle on dual articulated metal tracks and is equipped with a boom, a bucket, and a blade. It carries an enclosed cab where the operator sits and operates the controls.⁴

Based on this site inspection, Anderson reclassified Refugio as a Landscape Operating Engineer for the purposes of her prevailing wage audit of Worthington and the preparation of the Assessment. The reclassification under the Landscape Operating Engineer prevailing wage determination, SC-63-12-33-2014-2 (Landscape Operating Engineer PWD) applied to all 548 hours that Refugio was reported to have worked on the Project.⁵ The prevailing hourly wage rate under the Landscape Operating Engineer classification is higher than the corresponding hourly wage rate under the Landscape/Irrigation Laborer/Tender classification.⁶ Consequently, the Assessment alleges that Refugio was underpaid wages in the amount of \$31,263.56, exclusive of penalties and underpaid training fund contributions.

DLSE's reclassification of Refugio also affected the proper classification of other Worthington employees on the Project who worked in conjunction with Refugio, because it changed the ratio of Tenders to Laborers under the Landscape/Irrigation Laborer/Tender PWD.⁷ In addition, DLSE's reclassification impacted Worthington's legal duty to request apprentices and to notify applicable apprenticeship training committees for the classifications to be used on the Project. This, in turn, affected the number of Worthington's alleged violations of the apprenticeship requirements, and the calculation of the dollar amount of those penalties under section 1777.7, subdivision (a)(1).

The Applicable Scopes of Work.

Classification disputes involve an examination of the two or more prevailing wage determinations that may arguably apply to any particular worker and the type of work performed

⁴ DLSE Exhibit No. 1 consists of photographs of the Bobcat 331 Excavator being used on the Project site, as well as a diagram taken from the Bobcat repair manual.

⁵ DLSE Exhibit No. 7.

⁶ The Operating Engineer PWD specifies \$31.26 per hour for basic straight-time work, \$21.75 per hour in fringe benefits, and \$0.80 per hour in training fund contributions.

⁷ The Tender sub-classification allows a much lower basic hourly rate than Laborer. The required Tender to Laborer ratio is set by the scope of work provision for the Landscape/Irrigation Laborer/Tender PWD, Article III, paragraph C and varies according to the number of Tenders, Laborers, and apprentices on the job.

by that worker. Such disputes may also require a review of any scope of work provisions that may accompany those prevailing wage determinations.

In this case, DLSE advocated for the application of the Landscape Operating Engineer classification to the work carried out by Refugio as he operated the Bobcat 331 Excavator. The Landscape Operating Engineer PWD itself describes the kind of equipment the operation of which is covered by the Landscape Operating Engineer classification. The list includes “Rubber-tired & Track Earthmoving Equipment” as well as “Trencher -31 horsepower and up.”⁸

Worthington advocated for the application of the Landscape/Irrigation Laborer/Tender PWD to Refugio’s work as an operator of the Bobcat 331. Worthington’s position was based on the advisory scope of work provisions for the Landscape/Irrigation Laborer/Tender PWD in San Diego County. These provisions were excerpted from the Laborer’s 2008-2012 Master Landscape Agreement (MLA) between the Southern California District Council of Laborers and Valley Crest Landscape Development, Inc. In Article III, paragraph A of the rate determination, “Work Covered,” the provisions define the “landscape industry” as inclusive of trenching work and the “operation of any equipment . . . for the installation of landscaping and irrigation.” Under subparagraph 8 of Article III, paragraph A, the work covered includes: “The operation of all landscape/irrigation equipment and landscape/irrigation trucks, including the driving of vehicular equipment”

Both sides cite to the “Notice Regarding Advisory Scope of Work for the Southern California and San Diego Landscape/Irrigation Laborer/Tender’s General Prevailing Wage Determinations,” issued March 4, 2011 (Notice). The Notice lists certain classifications and types of work that: have not been published or recognized by the Department of Industrial Relations in the August 22, 2010, issuance of the Southern California and San Diego Landscape/Irrigation Laborers/Tender general determinations . . . and continuing with any subsequent . . . general determinations until superseded by the Director. The rates associated with these unrecognized classifications and types of work **SHALL NOT** be applied or used on public works projects for the associated type of work.

(Notice, Landscape/Irrigation Laborer/Tender PWD, Scope of Work Provisions, p 2, emphasis in original.) The Notice goes on to state, in pertinent part:

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⁸ The Bobcat 331 Excavator involved here runs on tracks rather than wheels; it is unclear as to whether its engine is rated at 31 horsepower or higher.

The following classifications and types of work have *not* been adopted for public works projects . . .

Classifications

- Landscape/Irrigation Equipment Operator
- Landscape/Irrigation Truck Driver

Types of Work

- The operation of horizontal directional drills, including operation of drill and electronic tracking device (locator) and related work.
- Installation and cutting of pavers and paving stones.
- Operation of pilot trucks.
- *The operation of all landscape/irrigation equipment and landscape/irrigation trucks.

(Notice, Landscape/Irrigation Laborer/Tender PWD, Scope of Work Provisions, p. 2, emphasis added)⁹ Also, The asterisk in the final bullet point of the Notice refers to a footnote, which states:

* This shall include all of the classifications listed in the prevailing wage determinations for Landscape Operating Engineer (SC-63-12-33), Operating Engineers (SC-23-63-2 and SD-23-63-3), and Teamster (SC-23-261-2 and SD-23-261-3) in all the Southern California counties, including San Diego County.

Discussion

The California Prevailing Wage Law (CPWL), set forth at Labor Code sections 1720 et seq., requires the payment of prevailing wages to workers employed on public works construction projects. The purpose of the CPWL was summarized by the California Supreme Court in one case as follows:

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

⁹ Worthington Exhibit A and DLSE Exhibit No. 8.

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 see *Lusardi, supra*, at p. 985.)

Section 1775, subdivision (a), of the CPWL requires, among other provisions, 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 the 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 may appeal that assessment by filing a request for review under section 1742. The request for review is transmitted to the Director of the Department of Industrial Relations, who assigns an impartial hearing officer to conduct a hearing in the matter as necessary. (§ 1742, subd. (b).) At the hearing, DLSE has the initial burden of producing evidence that “provides prima facie support for the Assessment” (Cal. Code Regs. tit. 8, § 17250, subd. (a).) When that burden is met, “the Affected Contractor or Subcontractor has the burden of proving that the basis for the Civil Wage and Penalty Assessment ... is incorrect.” (Cal. Code Regs. tit. 8, § 17250, subd. (b); accord, § 1742, subd. (b).) At the conclusion of the hearing process, the Director issues a written decision affirming, modifying or dismissing the assessment. (§ 1742, subd. (b).)

The Director of the Department of Industrial Relations (Department) determines the prevailing wage rates that must be paid to workers employed on public works projects. (§§ 1773, 1773.9; Cal. Code. Regs., tit. 8, § 16200.) The Department maintains a website where the current prevailing wage determinations are available to the public. 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.4th 114, 125.) Public works contractors look to the Department's website for the particular prevailing wage rates in effect at the time of the bid advertisement date for the public works project. Most of the prevailing wage determinations are adopted from collective bargaining agreements negotiated between labor unions and construction contractors, provided the wage rates in those agreements have been determined to be prevailing in a given locality for a given craft or classification of workers. (*Vector Resources, Inc. v. Baker* (2015) 237 Cal.App.4th 46, 51 (*Vector Resources*).

For nearly all of the issued prevailing wage determinations on the Department's website, the Department also posts specific provisions of the collective bargaining agreements on topics such as work rules, holidays, shift rates, travel and subsistence, and scopes of work. Not every single provision of a collective bargaining agreement is imported into a prevailing wage determination. The particular terms of the collective bargaining agreements that are excerpted and posted by the Department establish the requirements of a prevailing wage determination and its application, as determined by the Director. The rates and the related scopes of work inform all interested parties and the public of the applicable wage rates for the "craft, classification, and type of work" that might be employed on public works. (§ 1773.) The Department provides guidance on how to understand and interpret the prevailing wage determinations in various factual settings by posting occasional "Notice[s]" on its website. Such Notices constitute regulations having the force and effect of law. (See *Vector Resources, supra*, 237 Cal.App.4th at p. 56.)

The Proper Classification of Pedro Refugio.

DLSE issued the Assessment on the grounds that, based on the type of work he was performing on the Project, Refugio should have been classified as a Landscape Operating Engineer, not a Landscape/Irrigation Laborer/Tender. On first impression of the scope of work for the Landscape/Irrigation Laborer/Tender PWD, the broad language excerpted from the MLA at Article III, paragraph A, subparagraph 8, covering "the operation of all landscape/irrigation equipment," lends support to Worthington's original classification of Refugio. These provisions, however, must be understood and applied in conjunction with the Department's Notice concerning these provisions, referenced above.

Worthington erroneously contended that the Department's excerpted provisions from the MLA define the scope of work for the Landscape/Irrigation Laborer/Tender classification. In reality, however, the MLA only defines the scopes and types of work for landscaping projects *directly involving* the two signatories: Valley Crest Landscape Development, Inc. and the Southern California District Council of Laborers. As to the scopes of work applied and enforced by the Department on public works projects involving *all* covered contractors and workers, *some* of the terms excerpted from the MLA have been adopted by the Director as prevailing, and some of the terms have not. This is where the Notice comes in.

The purpose of the Notice was to inform the regulated public that the posted excerpts from the MLA include "unrecognized classifications and types of work" that are *not* adopted as prevailing, and therefore are not to be used on public works projects. The Notice then goes on to specify the two classifications and four types of work that have *not* been adopted as prevailing, despite having been described in the scope of work provisions excerpted from the MLA. According to the Notice, the Department does not recognize the classifications of Landscape/Irrigation Equipment Operator or Landscape /Irrigation Truck Driver. Similarly, the Department does not recognize the operation of landscape/irrigation equipment and trucks as a discrete type of work that would fall into either of those two unrecognized classifications. Instead, per the Notice's footnote, work involving the operation of landscape/irrigation equipment and trucks would come within the existing classifications for Landscape Operating Engineer, Operating Engineer, or Teamster. The Notice was plainly not intended to nullify these three widely used classifications for every landscaping and irrigation public works project throughout all of Southern California, contrary to argument advanced by Worthington.

In contrast, the Landscape Operating Engineer PWD specifically references the operation of trenchers and track earthmoving equipment on its face. Based on the record as a whole, DLSE correctly concluded that Pedro Refugio's operation of the Bobcat 331 Excavator to dig trenches and compact dirt on the Project falls squarely within the scope of work for the Landscape Operating Engineer classification.

Other Issues Raised by the Parties.

Although the parties had informed the Hearing Officer in the initial Pre-Hearing Conference that the classification issue was the only issue presented, that there were no factual

disputes, and that resolution of the classification issue on the papers would moot all other issues, and notwithstanding the Hearing Officer's specification in the Minute Order as to the sole issue submitted for decision, the parties nevertheless subsequently raised various other issues in their briefing. These additional issues included, for example, whether Worthington had timely requested dispatch of apprentices, or employed apprentices in the required 1:5 apprentice to journeyman ratio, and if not, the number of violations that had occurred and the penalties that would be due.

None of these issues, however, were identified by the parties as requiring resolution in the pre-hearing conference process; indeed, as noted, the parties expressly represented and agreed that only one issue was in dispute and required resolution in the hearing process, and this was confirmed in a Minute Order issued by the Hearing Officer. The Hearing Officer has the authority to define the issues for hearing, and it is the purpose of the pre-hearing process, and the responsibility of the parties, to identify the issues presented. (See Cal. Code Regs., tit. 8, § 17205.) Here, the only issue identified by the parties in the pre-hearing process and properly submitted to the Hearing Officer was the proper classification of Refugio. That issue is resolved as addressed above.

This matter will be remanded to the Hearing Officer for an additional Prehearing Conference. The parties should be prepared to discuss whether all other issues have been rendered moot by this Decision, or to identify those issues that remain in dispute, if any. If disputed issues remain, a Hearing on the Merits should be scheduled forthwith.

Based on the foregoing, the Director makes the following Finding and Order:

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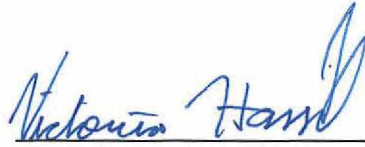
FINDING

DLSE properly reclassified Pedro Refugio for his work operating the Bobcat 331 Excavator on the Project, and the prevailing wage rate specified in Landscape Operating Engineer prevailing wage determination SC-63-12-33-2014-2 applies to such work.

ORDER

This case is hereby remanded to the Hearing Officer for further proceedings consistent with this Decision.

Dated: April 29, 2019



Victoria Hassid, Chief Deputy Director
Department of Industrial Relations¹⁰

¹⁰ See Gov. Code § 7, 11200.4.