STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Brown Construction, Inc. Case No. 10-0278-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

ORDER DENYING RECONSIDERATION

Affected contractor Brown Construction, Inc. (Brown) seeks reconsideration of the Decision of the Acting Director issued on June 22, 2011 (Decision). Brown has two grounds on which to challenge the determination not to exercise discretion and waive liquidated damages on the training fund portion of the assessment. Based on my review of Brown's and DLSE's arguments, and the relevant parts of the record, I deny reconsideration for the following reasons.

Labor Code section 1742.1,[1] subdivision (a) imposes liquidated damages in an amount equal to the assessed wages that remain unpaid 60 days after service of the assessment. Brown argues that the failure to pay training fund contributions are not subject to a liquidated damage award because they are not paid to workers and thus are not "wages." Brown's proffered definition of "wages" under section 1742.1, however, fails to take into account that the assessment described in section 1741 is for violations of Chapter 1 of Part 7 of the Labor Code. Wages in this chapter are defined as "per diem wages" in section 1773.1, include training fund contributions. Brown has shown no justification for a different definition of wages under section 1742.1, which is in the same chapter.

Brown also argues that its achievement of a nearly 92 percent reduction of the total assessment is justification for a full waiver of liquidated damages. To prevail, Brown has to show

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[1] All further references are to the Labor Code unless otherwise specified.

that not waiving liquidated damages was an abuse of discretion. Section 1742.1 does not require that the Director look only at the overall success of the contractor. Rather, this section focuses the inquiry on "a portion of the unpaid wages covered by the assessment" to determine whether the affected contractor qualifies for a discretionary waiver of that portion of the unpaid wages. The Acting Director exercised her discretion in favor of waiving liquidated damages on the basic wage portion of the assessment because Brown had achieved a substantial reduction of the unpaid basic prevailing wages, over 99 percent. The Decision did not do the same for the training fund contribution portion, however, since the record showed that Brown reduced the amount of unpaid training funds by less than 15 percent. Brown showed no justification for failure to pay the training fund contributions, thus the Decision found that Brown had not established substantial grounds for appealing the training fund portion of the assessment.

Accordingly, Brown's request for reconsideration is denied.

Dated: 7/4/2011

Christine Baker

Christine Baker
Acting Director of Industrial Relations

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DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Brown Construction, Inc. Case No. 10-0278-PWH

From a Civil Wage and Penalty Assessment issued by:

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DECISION OF THE ACTING DIRECTOR OF INDUSTRIAL RELATIONS

Affected contractor Brown Construction, Inc. (Brown) submitted a timely request for review of a Civil Wage and Penalty Assessment (Assessment) issued by the Division of Labor Standards Enforcement ("DLSE") with respect to work performed by its subcontractor, Cayler Company, Inc. (Cayler) on the U.C. Davis Tercero South Student Housing Phase II project (Project) in Yolo County. The Assessment determined that $173,967.27 in unpaid prevailing wages and statutory penalties was due. Cayler did not request review of the Assessment. A Hearing on the Merits occurred on April 15, 2011, in Sacramento, California, before Hearing Officer Nathan D. Schmidt. Ronald W. Brown appeared for Brown and Ramon Yuen-Garcia appeared for DLSE. At the hearing, the parties stipulated to the amount of unpaid prevailing wages, including training fund contributions.

The issues for decision are:

- Whether Brown is jointly and severally liable with Cayler for penalties assessed under Labor Code section 1775[1] for violations by Cayler.
- Whether Brown has demonstrated substantial grounds for appealing the assessment, entitling it to a waiver of liquidated damages.

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

The Acting Director finds that Brown has carried its burden of proving that the basis of the Assessment was incorrect as to all except $183.44 of the assessed unpaid wages and $13,984.73 of the assessed unpaid training fund contributions, for which credit is allowed in this amount. The Acting Director also finds that Brown has established that it is entitled to relief from penalties under section 1775, subdivision (b) and thus is not liable for the penalties assessed against Cayler under section 1775. Brown has proven the existence of grounds for a partial waiver of liquidated damages. Therefore, the Acting Director issues this Decision modifying the Assessment.

FACTS

The Regents of the University of California (University) published an Advertisement For Bids for the Project on June 15, 2007, and awarded the contract to Brown effective May 4, 2009. Brown subcontracted with Cayler on May 27, 2009, to furnish and install the plumbing for the Project. Brown's subcontract with Cayler contained the full text of sections 1771, 1775, 1776, 1777.5, 1813 and 1815 as required by section 1775, subdivision (b)(1). Cayler's employees worked on the Project from approximately June 19, 2009, through May 12, 2010. Cayler went out of business and abandoned the Project before the completion of its subcontract. The remaining plumbing work was completed by Brown workers.

There is no dispute that the applicable prevailing wage rate for all work subject to the Assessment is the Residential Plumber rate under prevailing wage determination ("PWD") S-2008-844. Throughout the Assessment period, the Residential Plumber prevailing wage rate included a training fund contribution of $0.95 per hour.

DLSE served the Assessment on September 16, 2010. The Assessment found that Cayler failed to pay the required prevailing wages to 56 affected workers for straight time, overtime and weekend work on the Project, employed a worker as an apprentice who was not registered with the Division of Apprenticeship Standards, and failed to make the required training fund contributions for any of the affected workers. The Assessment found a total of $54,355.76 in underpaid prevailing wages and $15,836.51 in unpaid training fund contributions. Penalties were assessed under section 1775 in the amount of $50.00 per violation for 2,071 violations, totaling

$103,550.00. DLSE determined that the maximum penalty of $50.00 per violation was warranted because Cayler's final paychecks to three of the affected workers had been returned for insufficient funds (those checks subsequently cleared on redeposit); and Cayler had failed to pay training fund contributions. Cayler had no record of prior prevailing wage violations. On these facts, DLSE determined that Cayler's underpayments did not constitute a good faith mistake and did not mitigate penalties. In addition, penalties were assessed under section 1813 for 9 overtime violations, at the statutory rate of $25.00 per violation, totaling $225.00.

Brown subpoenaed Cayler's bank records and provided the necessary documentation that Cayler had in fact paid all but one of the affected workers at least the required prevailing wage rate for their work on the Project. The one exception, Salvador Barajas, had been underpaid in the amount of $183.44 for three days of work on the Project in January 2010. Brown issued a check to DLSE for the outstanding unpaid wages owed to Barajas on March 15, 2011. Brown also proved that Cayler paid $1,762.95 in training fund contributions attributable to the Project for the months of June through September 2009, for Cayler's work on the Project.[2] Brown paid the outstanding unpaid training funds in full on or about March 15, 2011. Accordingly, DLSE stipulated during the hearing that the unpaid prevailing wage liability was reduced from $54,355.76 to $183.44, a reduction of 99.66 percent. In addition DLSE stipulated that the training fund liability was only $13,984.73, and that there were no penalties for failure to pay overtime wages under section 1813. DLSE further stipulated that no unpaid wages or training funds remained due at the time of hearing.

Brown's Oversight of Cayler: Cayler submitted timely CPRs for every week its workers performed work on the Project. Connie Judkins, Brown's project administrator, reviewed Cayler's CPRs for the Project approximately every two weeks. For each CPR that she reviewed, Judkins checked for discrepancies in the classification, rate of pay, hours worked and training fund contributions reported for each worker. Judkins also reviewed the Project superintendent's

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[2] Cayler's bank records document that it made additional payments to the same training fund in May and June 2010, but Brown could not establish that those payments were attributable to the Project and has not sought credit for them.

daily reports. Cayler's CPRs for the Project show no discrepancies that would reasonably have led Judkins to suspect any underpayment of prevailing wages by Cayler.

On May 6, 2010, Brown's management became aware of a rumor from one of Cayler's suppliers that Cayler was in financial difficulty and might go out of business. Brown issued payroll checks that were payable jointly to Cayler and each affected worker reported on Cayler's CPRs for the pay periods ending May 5 and May 12, 2010, to insure that Cayler's workers continued to receive the required prevailing wages for their work. "JOINT CHECK TWO OR MORE ENDORSEMENTS REQUIRED" was printed in bold type on the face of each of these checks. Cayler abandoned the Project after May 12, 2010. Because Cayler abandoned the Project, Brown was unable to obtain a final affidavit from Cayler certifying payment of prevailing wages on the Project. Brown made no final payment to Cayler for its work on the Project.

Unbeknownst to Brown, Cayler deposited the joint checks into its own account and issued its own payroll checks to its workers for the May 5 and May 12 pay periods. On June 2, 2010, three former Cayler workers filed complaints with DLSE stating that their final payroll checks from Cayler had been returned for non-sufficient funds. Brown conducted a prompt investigation after being informed of the workers' complaints. The three returned checks were subsequently redeposited and cleared the bank.

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." (Section 90.5, subdivision (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 rate, and 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 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."

At the hearing, the parties stipulated to the amount of unpaid prevailing wages and training fund contributions as a result of the documentation Brown subpoenaed and presented. Brown has therefore carried its burden of proving that the basis of the Assessment was incorrect as to all except $183.44 of the assessed unpaid wages and $13,984.73 of the assessed unpaid training fund contributions. Brown paid those amounts in full in advance of the hearing. The only issues remaining for decision are Brown's liability for penalties under section 1775, subdivision (a) and liquidated damages under section 1742.1, subdivision (a).

Brown Is Not Jointly Or Severally Liable For Penalties Assessed Against Cayler Under Section 1775.

Brown seeks to avoid joint and several liability for section 1775 penalties imposed as a result of Cayler's prevailing wage violations. A contractor is jointly and severally liable with a

subcontractor for penalties assessed under section 1775 unless the contractor proves the elements enumerated in section 1775, subdivision (b). A contractor may avoid liability for section 1775 penalties assessed against its subcontractor if it proves that it had no knowledge that underpayments were occurring and fully complied with four specified 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.
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> (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.
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> (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.
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> (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.

The language, "unless the prime contractor fails to comply with all of the following requirements," means that the burden is on the contractor to show that it did in fact satisfy all four requirements. The failure to satisfy any one of the enumerated requirements will deny the contractor relief under this section. Brown has satisfied all of the requirements of section 1775, subdivision (b) with regard to its oversight of Cayler's work on the Project.

First, there is no evidence that Brown knew of Cayler's small underpayment of prevailing wages to one worker. Nor is there any evidence that Brown knew or should have known of Cayler's failure to pay training fund contributions. DLSE contends that Brown's knowledge that Cayler was having financial difficulty late in the Project and Brown's decision to issue joint payroll checks to Cayler and its workers on that basis constitutes knowledge of underpayments by Cayler. DLSE further contends that Cayler's reporting of training fund contributions on its

CPRs created an affirmative duty on the part of Brown to confirm that those contributions had actually been made. DLSE's arguments are not compelling. By issuing joint payroll checks immediately upon learning that Cayler might be having financial difficulty for the express purpose of avoiding underpayment to Cayler workers, Brown had every reason to believe that Cayler's workers were being properly paid. With regard to training fund contributions, Brown's duty to monitor Cayler's payment of the required per diem wages under section 1775, subdivision (b) required only "periodic review of the certified payroll records of the subcontractor." The statute does not require further confirmation of payment when a subcontractor's CPRs appear correct on their face. Brown complied with this requirement. Consequently, the record supports a finding that Brown did not have knowledge that any underpayments had occurred prior to Cayler's abandonment of the Project.

Brown has also shown that it complied with three of the four requirements of section 1775, subdivision (b) and that compliance with the fourth was impossible under the circumstances: (1) the required statutory provisions were included in Brown's subcontract; (2) Brown monitored Cayler's CPRs, which exhibit no discrepancies that would reasonably have led Brown to suspect any underpayment by Cayler; and (3) immediately upon becoming aware that Cayler might be in financial difficulty, Brown took action to insure that Cayler's workers continued to receive the required prevailing wages for their work. It was impossible for Brown to obtain the required affidavit after Cayler abandoned the Project. Brown did not make a final payment to Cayler.

Brown is entitled to relief from penalties under section 1775, subdivision (b) because it has established that it complied with three of the four requirements, and compliance with the fourth requirement was not possible under the circumstances. Consequently, Brown is not liable for the penalties assessed against Cayler under section 1775. Since Cayler did not seek review, all other issues concerning penalties under section 1775 are therefore moot.

Brown Has Established A Sufficient Basis For A Partial Waiver Of 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.
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> 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.

In accordance with the statute, Brown would be liable for liquidated damages on any wages that remained unpaid sixty days following service of the Assessment. Section 1742.1 provides that the inquiry whether to waive liquidated damages has to be as to "a portion . . . that still remain unpaid." Here, there are two different classes of wages subject to the Assessment, each of which needs to be judged separately. Entitlement to a waiver of liquidated damages in this case is closely tied to Brown's position on the merits and specifically whether it had "substantial grounds for appealing the assessment . . . with respect to a portion of the unpaid wages covered by the assessment." Though Brown has fully paid the underpaid prevailing wages and training funds found to be owed by Cayler, it is undisputed that those payments were not made within 60 days following service of the Assessment.

Here, Brown's appeal resulted in it demonstrating to DLSE's satisfaction that in fact Caylor had paid its workers virtually all of the hourly wages to which they were entitled. During the review process, Brown was able to obtain records that reduced the Assessment of hourly wages by more than 99 percent. The achievement of such a substantial reduction of the assessed unpaid hourly wages shows that Brown had substantial grounds for appealing the Assessment with respect to that portion of the unpaid wages. Brown's liability for liquidated damages is therefore waived as to the $183.44 in unpaid hourly wages.

Brown has not, however, established that it had substantial grounds for appealing the Assessment with regard to the assessed unpaid training funds. Although Brown was able to document that some training funds were paid by Cayler, resulting in a reduction of the assessed unpaid training funds by 12 percent, Brown did not do so within 60 days after service of the Assess-

ment. Brown also did not present any evidence why it had a good reason to appeal the training fund portion of the Assessment with regard to the amount that remained owing. There is insufficient basis therefore to exercise discretion and waive this portion of the liquidated damages. Brown therefore remains liable with Cayler for liquidated damages on that portion of the assessed unpaid wages in the amount of $13,984.73.

FINDINGS

1. Affected contractor Brown Construction, Inc. filed a timely Request for Review of the Civil Wage and Penalty Assessment issued by DLSE with respect to the work of Brown's subcontractor, Cayler Company, Inc. on the Project.

2. Brown has carried its burden of proving that the basis of the Assessment was incorrect as to all except $183.44 of the assessed unpaid wages and $13,984.73 of the assessed unpaid training fund contributions owed by Cayler. Brown paid those amounts in full in advance of the hearing and has no further liability for unpaid wages.

3. Brown has demonstrated that it is entitled to relief from penalties under section 1775, subdivision (b) and is not liable for the penalties assessed upon Cayler under section 1775, subdivision (a).

4. The unpaid wages remained due and owing more than sixty days following issuance of the Notice. As discussed above, Brown has established sufficient grounds to justify waiver of payment of liquidated damages under section 1742.1, subdivision (a) as to the unpaid hourly wages. Brown has not established sufficient grounds for waiver of liquidated damages under section 1742.1, subdivision (a) as to the unpaid training funds and is therefore liable with Cayler for liquidated damages in the amount of $13,984.73.

The Civil Wage and Penalty Assessment is modified 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: 6/20/2011

Christine Baker
Acting Director of Industrial Relations