

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

S T I, Inc. Trucking and Materials

Case No. 13-0506-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected contractor S T I, Inc. Trucking and Materials (STI) 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 Newport Road Turn Pocket to Haun Road Turn Pocket Newport Road Westbound (Project) performed for the City of Menifee (City) in the County of Riverside.¹ The Assessment determined that \$8,912.12 in unpaid prevailing wages and training funds, \$14,540.00 in Labor Code sections 1775 and 1813 statutory penalties, and \$147,000 in Labor Code section 1776 penalties were due.² STI 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 October 17, 2014, in Los Angeles, California, before Hearing Officer Richard T. Hsueh. David Bell appeared for DLSE. There was no appearance for STI, which likewise did not appear for the three noticed Prehearing Conferences. STI's telephone number on file was inoperable and STI provided no other telephone number.

¹ STI's surety, Allegheny Casualty Company, also filed a Request for Review in Case No. 13-0596-PWH. Allegheny Casualty Company subsequently dismissed its Request for Review after reaching a settlement with DLSE. DLSE stated during the Hearing on the Merits that Allegheny Casualty Company has paid \$8,912.00 in wages owed thus entitling STI to an offset in that amount.

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

The issues for decision are:

- Whether the Assessment correctly found that STI failed to report and pay the required prevailing wages for all straight time and overtime worked on the Project by its workers;
- Whether the Assessment correctly found that STI failed to contribute to the applicable training funds for its workers on the Project;
- Whether STI has demonstrated substantial grounds for appealing the Assessment, entitling it to a waiver of liquidated damages under section 1742.1;
- Whether STI failed to timely submit certified payroll records and is therefore liable for penalties under section 1776.

Since STI failed to appear at the Hearing on the Merits, the Hearing Officer proceeded with the hearing in STI's absence under California Code of Regulations, title 8, section 17246, subdivision (a). The Director finds that STI has failed to carry its burden of proving that the basis of the Assessment was incorrect. STI has also failed to carry its burden of proving grounds for waiver of liquidated damages. Since DLSE proceeded at the Hearing on the Merits based on an amended audit that lowered the amount of the Assessment, the Director affirms the Assessment in part and modifies the Assessment in part.

Facts

Failure to Appear: STI's Request for Review was filed by its counsel, Thomas P. Brown IV, Esq., of Brown & Gitt Law Group, LLP. The matter was first set for Prehearing Conference (Conference) on May 12, 2014. On May 12, 2014, Brown advised the Hearing Officer before the commencement of the Conference that STI was in bankruptcy, that his firm no longer represented STI and that he would not be making any appearance for STI. The Conference was continued to June 13, 2014, for DLSE to confirm STI's bankruptcy.

STI's mailing address on file is 18791 Van Buren Blvd. #E, Riverside, CA 92508. This is the address where the Assessment was served. On May 27, 2014, June 19, 2014, and July 21, 2014, notices of prehearing conference (Notice) were mailed to STI at that address, giving STI notice that the hearing officer would be conducting a telephonic prehearing conference on the date stated in each Notice. On June 13, 2014, STI again failed to appear at the continued Conference and there was still no written confirmation regarding the status of STI's bankruptcy.

The Conference was continued to July 21, 2014. On July 21, 2014, STI again failed to appear at the Conference. DLSE advised the Hearing Officer that it is in the process of obtaining written confirmation regarding the dismissal of STI's bankruptcy. The Conference was again continued to August 15, 2014.

Prior to the August 15th Conference, DLSE filed with the Hearing Officer a copy of the U.S. Bankruptcy Court's Order, dated May 29, 2014, dismissing STI's Chapter 11 case. On August 15, 2014, STI again failed to appear for the Conference. The Hearing Officer called STI's phone number on file, (951) 780-5500, but was informed that the number had been disconnected. The Hearing Officer found an alternate number of (909) 208-6026 for STI on the internet but was unable to leave any message. A Hearing on the Merits was then set for October 17, 2014. On October 17, 2014, STI 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, Kristina Abadjian (Abadjian).

Assessment: The facts stated below are based on Exhibits 1 through 30 submitted by DLSE, including the Assessment and other documents in the Hearing Officer's file.

STI was the primary contractor on the Project. Fifteen workers performed work for STI under the contract between November 13, 2012 and May 7, 2013. The applicable prevailing wage determinations in effect on the bid advertisement date are: (1) SC-23-203-2-2012-1 (Cement Mason), which contains a predetermined pay rate increase that went into effect before the beginning of work on the Project; (2) SC-23-102-2-2011-1 (Laborer and Related Classification), with the applicable job classification being Laborer Group 1; (3) SC-23-63-2-2011-2 (Operating Engineer), with the applicable job classification being Operating Engineer Group 1, which contains a predetermined pay rate increase that went into effect before the beginning of work on the Project; (4) General Prevailing Wage Apprentice Rates (Cement

Mason), with the applicable classification being Period 1; and (5) General Prevailing Wage Apprentice Rates (Laborer), with the applicable classification being Period 1.

Based on STI's certified payroll records (CPRs) and interviews with employees, the Assessment found that STI failed to pay the required prevailing wages to ten workers employed on the Project and failed to pay the required training funds for fifteen workers. The Assessment found a total of \$8,912.12 in unpaid prevailing wages and training funds, \$14,240.00 in sections 1775 and 1813 statutory penalties in the amount of \$80 per violation for 178 violations, and \$147,000 in section 1776 penalties.³

Abadjian testified that she prepared the Assessment and the supporting audit worksheets, initially determining that \$8,449.44 in unpaid prevailing wages were owed to ten workers on STI's contract with City. She identified STI's CPRs and the applicable prevailing wage determinations and apprentice wage rates. Abadjian further testified that the Assessment was properly served on STI on September 23, 2013. STI then submitted a timely request for review on October 2, 2013, and DLSE provided STI with a reasonable opportunity to review DLSE's evidence. Abadjian testified that she later prepared an amended audit and determined that STI had only failed to pay the required prevailing wages to eight workers employed on the Project (instead of ten) but still failed to pay the required training funds for fifteen workers. The Assessment, as modified by the revised audit, found a total of \$8,753.21 in unpaid prevailing wages and training fund contributions, \$7,760 in section 1775 statutory penalties in the amount of \$80 per violation for 97 violations, \$225 in section 1831 statutory penalties in the amount of \$25 per violation for 9 violations, and \$147,000 in section 1776 penalties.

Certified Payroll Records: The facts stated below are based on Exhibits 4 and 29 submitted by DLSE and other documents in the Hearing Officer's file.

By certified mail deposited on June 7, 2013, DLSE sent a Request for Certified Payroll Records (Request) to STI at its address of record, 18791 Van Buren Blvd. #E, Riverside, CA

³ DLSE subsequently performed an amended audit and proceeded at the Hearing on the Merits based on the Amended Audit. The Amended Audit determined that \$8,753.21 in unpaid prevailing wages and training funds and \$7,985.00 in sections 1775 and 1813 statutory penalties were due. The Amended Audit did not change the \$147,000 in section 1776 penalties.

92508. The Request asked for copies of time and payroll information for all workers employed by STI on the Project, including health and welfare, pension, vacation/holiday, and training plan contributions. The Request specified that failure to provide the CPRs within 10 days of receipt of the request would subject STI 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). A signed United States Postal Service return receipt indicated STI's receipt of the Request on June 10, 2013. Abadjian testified that she did not receive any CPRs from STI prior to issuing the Assessment. The Assessment imposes a \$100 per calendar day per worker penalty on the basis of 15 workers for 98 days. DLSE determined the 98 day period by counting the number of days from June 10, 2013 (date of receipt of the Request) to September 26, 2013 (the date of the Penalty Review by the Senior Deputy Labor Commissioner Ken Madu), minus 10 days for the 10-day statutory period allowed for a response to the Request. DLSE determined the number of affected workers based on records produced by the City.

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 STI and that DLSE provided STI with a reasonable opportunity to review the evidence to be used at the hearing. DLSE presented evidence that eight of the workers, at times, performed work in the classifications of Laborer, Cement Mason, Operating Engineer, Cement Mason Apprentice, and Laborer Apprentice, thus requiring application of the Laborer, Operating Engineer, Cement Mason and applicable Apprentice prevailing wage determinations. DLSE presented evidence that STI did not pay the eight affected workers for all hours worked, including overtime. DLSE presented evidence that STI failed to make the required contribution to the applicable training funds for fifteen workers that worked on the Project. DLSE presented further evidence that STI had previous prevailing wage violations.

With regard to STI's failure to provide CPRs upon request, DLSE showed that STI was served with the Request via certified mail to the Van Burden address. 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).) The Van Buren address is the same used for service of the Assessment. STI has not provided any alternate address that it used at the time or anytime thereafter. DLSE's documented mailing constituted effective service of

the Request on STI and there is evidence showing the receipt of the Request by STI. This conclusion is supported by the fact that STI has not denied timely receipt of the Request and in fact submitted some CPRs to Abadjian on September 25, 2013, albeit for the wrong Project.

Accordingly, DLSE's evidence constitutes prima facie support for the Assessment. STI, 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). Because DLSE proceeded in the hearing based on an amended audit that lowered the amount of the Assessment, the Assessment is modified in part as to the prevailing wages owed and the section 1775 and 1813 statutory penalties assessed, and affirmed as to the unpaid training fund contributions and 1776 penalties. Liquidated damages are affirmed in an amount equal to the unpaid wages.

FINDINGS AND ORDER

1. Affected contractor S T I, Inc. Trucking and Materials filed a timely Request for Review from a Civil Wage and Penalty Assessment issued by the Division of Labor Standards Enforcement.

2. S T I, Inc. Trucking and Materials underpaid eight employees on the Project in the aggregate amount of \$8,290.53.

3. Penalties under section 1775 are due in the amount of \$7,760.00 for 97 violations at the rate of \$80.00 per violation.

4. Penalties under section 1813 are due in the amount of \$225 for at the rate of \$25.00 per calendar day for four affected employees.

5. S T I, Inc. Trucking and Materials did not make the required contributions to the applicable training funds for fifteen employees on the Project in the aggregate amount of \$462.68.

6. Liquidated damages are due in the amount of \$8,290.53 and are not subject to waiver under section 1742.1, subdivision (a).

7. On June 7, 2013, DLSE served S T I, Inc. Trucking and Materials 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 June 10, 2013, by STI at the address STI uses for mailing purposes.

8. S T I, Inc. Trucking and Materials failed to timely submit certified payroll records pursuant to the DLSE request, as required by section 1776.

9. DLSE properly assessed penalties against S T I, Inc. Trucking and Materials under section 1776, subdivision (h) for its failure to provide certified payroll records to DLSE within 10 days of June 10, 2013.

10. In light of the findings above, S T I, Inc. Trucking and Materials is liable for penalties under section 1776, subdivision (h) in the total amount of \$147,000.00.


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

Wages:	\$ 8,290.53
Training Fund:	\$462.68
Penalties under section 1775, subdivision (a):	\$ 7,760.00
Penalties under section 1813:	\$225.00
Liquidated damages:	\$ 8,290.53
Penalties under section 1776, subdivision (h)	\$147,000.00
TOTAL	\$172,028.74

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

The Civil Wage and Penalty Assessment is modified and 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: 12/23/2014



Christine Baker
Director of Industrial Relations