

STATE OF CALIFORNIA  
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

**Don Martinez, dba Alpha 1 Construction**

Case No. 15-0258-PWH

From a Civil Wage and Penalty Assessment issue by:

**Division of Labor Standards Enforcement**

**DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS**

Affected contractor, Don Martinez, dba Alpha 1 Construction (Martinez) submitted a request for review of a Civil Wage and Penalty Assessment (Assessment) issued by the Division of Labor Standards Enforcement (DLSE) on May 22, 2015, with respect to work performed by Martinez on the Campus Improvement – Street Improvements – Lower Fire Service Road project (Project), for the Los Angeles Community College District, in Los Angeles County. The Assessment determined that \$209,790.08 was due in unpaid prevailing wages and statutory penalties. The Assessment was subsequently amended downward to reflect that \$110,081.27 was due in unpaid prevailing wages and statutory penalties. A Hearing on the Merits occurred in Los Angeles, California on May 25, 2016, before Hearing Officer Steven A. McGinty. David D. Cross (Cross) appeared for DLSE. There was no appearance for Martinez. The matter was submitted for decision on May 25, 2016.

The issues for decision are as follows:

- Were the correct prevailing wage classifications used in the audit?
- Were the hours worked as listed in the audit correct?
- Were the mathematical calculations as set forth in the Assessment correct?
- Were the wages paid to the workers listed correctly in the certified payroll records?

- Were all hours worked on the project listed on the certified payroll records?
- Were all workers classified correctly on the certified payroll records?
- Were all required training fund contributions paid to an approved plan or fund?
- Did Martinez provide contract award information to the applicable apprenticeship committees within ten days of the date of the execution of the contract?
- Did Martinez request dispatch of apprentices for all employed crafts?
- Did Martinez employ a sufficient number of registered apprentices on the project?
- Is Martinez liable for penalties under Labor Code sections 1775, 1813, and 1777.7?<sup>1</sup>

As Martinez failed to appear, the Hearing Officer proceeded with the hearing in Martinez's absence under California Code of Regulations, title 8, section 17246, subdivision (a) (hereafter Rule 246).<sup>2</sup> The Director finds that Martinez failed to carry his burden of proving that the bases for the Assessment were incorrect. Based upon the un rebutted evidence submitted at the hearing showing that Martinez failed to pay the required prevailing wages and failed to submit contract award information, request dispatch of apprentices, and employ sufficient apprentices, the Director affirms the Assessment and finds that Martinez is liable for statutory penalties.<sup>3</sup>

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<sup>1</sup> All further statutory references are to the Labor Code.

<sup>2</sup> For ease of reference, all further citations to the prevailing wage hearing regulations contained in the California Code of Regulations, title 8, section 17201 et seq. are referred to as "Rules" using only their last 3 digits, unless otherwise specified.

<sup>3</sup> Prior to the start of the hearing, the surety, American Safety Casualty Insurance Company, resolved all matters with DLSE accept for the payment of statutory penalties.

## FACTS

**Failure to Appear.** Martinez's address on file is 20232 State Road, Cerritos, CA 90703. A prehearing conference was set by notice for September 21, 2015, at 2:00 p.m. The Hearing Officer attempted to contact Don Martinez at the telephone numbers provided on the Request for Review for the Cerritos and Las Vegas offices. Neither number was a working number. Prior to the scheduled prehearing conference, the Hearing Officer was not contacted by Martinez and provided with another number at which he could be contacted. The Hearing Officer continued the prehearing conference to October 19, 2015, at 9:00 a.m. and issued Minutes in which he ordered Martinez to comply with Rule 209 subdivision (d) by providing the Hearing Officer and the parties his current address and telephone number at which he could be reached for all purposes. The Minutes also included the following notice:

### **NOTICE TO THE REQUESTING PARTY, DON MARTINEZ:**

**Your rights may be adversely affected by your failure to appear and contest the Civil Wage and Penalty Assessment issued against you. The Hearing Officer is authorized under Rule 246 to proceed with the hearing in the absence of a Party and may recommend whatever decision is warranted by the available evidence, including any lawful inference that can be drawn by an absence of proof by the non-appearing Party.**

Thereafter, on October 1, 2015, Martinez contacted the Hearing Officer's secretary and provided a new telephone number (562-762-5678) at which he could be reached.

Subsequently, on October 19, 2015, a telephonic prehearing conference was held in which Martinez participated. At the request of the parties, the matter was continued to December 14, 2015, at 11:00 a.m. for a further telephonic prehearing conference so that the parties could have an opportunity to engage in settlement discussions. On December 14, 2015, the Hearing Officer attempted to telephone Martinez for the scheduled prehearing conference but Martinez failed to answer the call. Following the prehearing conference, the Hearing Officer issued Minutes ordering the matter be set for a hearing on the merits on March 4, 2016, at 11:00 a.m. and ordering the parties to submit exhibit lists, witness lists, and a joint list of issues to be determined prior to the scheduled hearing. The Minutes included the exact

same notice to Martinez as set forth above warning him that his rights may be adversely affected by his failure to appear.

On February 11, 2016, Martinez wrote a letter to the Hearing Officer, sent by email to his secretary, requesting that the hearing on the merits set for March 4, 2016, be continued. The DLSE had filed a motion to amend the assessment downward and the parties were still engaging in settlement discussions. The request was granted and an Order issued continuing the hearing on the merits to May 25, 2016.

On May 4 and May 11, 2016, Martinez provided the Hearing Officer, via email to his secretary, an exhibit list and a witness list respectively for the hearing on the merits. On or about May 18, 2016, the DLSE provided the Hearing Officer with a list of issues to be determined and indicated that it had sent its proposed Joint Statement of Issues to Martinez but had not received a response.

**Assessment.** DLSE filed a Motion to Amend the Assessment downward on February 9, 2016. There having been no objection, the Motion was granted. The amended Assessment indicated underpayment of wages in the amount of \$56,990.18; failure to pay training fund contributions of \$2,811.09; section 1775 penalties of \$41,040; section 1813 penalties of \$300.00; and, section 1777.7 penalties of \$8,940.00.

At the hearing on the merits, Martinez did not appear. DLSE submitted evidentiary exhibits 1-31 which were admitted into evidence without objection. Deputy Labor Commissioner Yoon-mi Jo was called as a witness by DLSE. Jo testified as to the preparation of the Assessment, supporting audit worksheets and penalty reviews. She testified regarding her investigation and identified the Notice to Bidders dated August 14, 2013, applicable prevailing wage determinations, the misclassification of workers and the proper classification of workers, and the failure to list an employee on the certified payroll records and pay overtime. Jo testified that she relied upon certified payroll records prepared by Martinez, pay stubs, employee questionnaires, and employee interviews and including affidavits/ declarations. She testified that workers were on the project for the period December 2, 2013, through May 1, 2014, (for 151 days), that no notice of contract award information was

provided to applicable apprenticeship committees, and that no apprentices were employed in five of six classifications on the project. Jo further testified that the Notice of Completion was filed on September 8, 2014, and that the Assessment was properly served on Martinez on May 22, 2015, who thereafter submitted a timely request for review on July 17, 2015. She also testified that DLSE provided Martinez with notice of an opportunity to review DLSE's evidence.

The amended Assessment found that Martinez failed to pay the required prevailing wages to the affected workers identified in the audit summary, failed to make training fund contributions, and assessed section 1775 penalties in the amount of \$60.00 per violation for 684 violations, and section 1813 penalties in the amount of \$25.00 per violation for 12 violations.<sup>4</sup> Jo testified that prior to the hearing she agreed to remove one worker, Barney Ordonez, from the list of workers on the audit who were owed wages. As a result of removing Ordonez, the penalties of \$240.00 for four violations associated with his alleged underpayment were likewise subtracted from the total amount of section 1775 penalties due. Thus, the resulting penalties owed were \$40,800 for section 1775 violations and \$300.00 for section 1813 violations. In addition, section 1777.7 penalties were assessed at \$60.00 per day for 149 days of the Project for a total of \$8,940.00.

## 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); *Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 985.)

Section 1775, subdivision (a) requires, among other things, that contractors and

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<sup>4</sup> It appears DLSE reduced the rate of section 1775 penalties from \$120.00 per violation as indicated in the initial audit summary and the 1775 penalty review exhibit to \$60.00 per violation in the amended Assessment and audit summary.

subcontractors pay the difference to workers who were paid less than the prevailing rate, and section 1775, subdivision (a) also prescribes penalties for failing to pay the prevailing rate. Section 1813 prescribes a fixed penalty of \$25.00 for each instance of failure to pay the prevailing overtime rate when due. Employers on public works must keep accurate payroll records, recoding among other things, the work classification, straight time and overtime hours worked, and actual per diem wages paid for each employee. (§ 1776.)

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. The assessment must be served within 18 months of the filing of a valid notice of completion. 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.”

**1. Martinez Failed to Pay the Required Prevailing Wage Rates and Was Properly Assessed Penalties.**

In this case, the record established the basis for the Assessment. DLSE presented evidence that the Assessment was timely served on May 22, 2015, within 9 months of the filing of the Notice of Completion on September 8, 2014, that it was properly served, and that Martinez filed a timely request for review. Further, that DLSE provided Martinez with an opportunity to review the evidence to be used at the hearing. DLSE presented evidence that affected workers were underpaid prevailing wages and as well as misclassified and not paid overtime wages. DLSE used two prevailing wage determinations (Laborer SC-23-102-2-2013-1 and Operating Engineer SC-23-63-2-2014-1) that were not in effect on the date the Notice to Bidders was issued on August 14, 2013. Pursuant to Rule 245 (Cal. Code of Regs., tit. 8, § 17254, subd. (a)), the Hearing Officer took judicial notice of the correct prevailing wage determinations (PWDs) (Laborer SC-23-102-2-2012-1 and Operating Engineer SC-23-63-2-2012-1) (Laborer PWD and Operating Engineer PWD) and determined the small difference in hourly rates did not alter the DLSE determination that Martinez failed significantly to pay the correct prevailing wage for those classifications and the four other classifications used on the project: iron worker; inside wireman; cement mason; and,

teamster; the four PWDs used by DLSE for those four classifications were in effect on the date of the Notice to Bidders. Thus, the penalties imposed for failure to pay correct prevailing wages and overtime were appropriate.

**2. Martinez Failed to Notify Apprenticeship Committees and Failed to Employ Apprentices in the Proper Ratio.**

Sections 1777.5 through 1777.7 set forth the statutory requirements governing the employment of apprentices on public works projects. These requirements are further addressed in regulations promulgated by the California Apprenticeship Council. California Code of Regulations, title 8, section 227 provides that the regulations “shall govern all actions pursuant to ... Labor Code Sections 1777.5 and 1777.7.”

Section 1777.5, subdivision (e) states in part:

Prior to commencing work on a contract for public works, every contractor shall submit contract award information to an applicable apprenticeship program that can supply apprentices to the site of the public work.

Section 1777.5 and the applicable regulations require the hiring of apprentices to perform one hour of work for every five hours of work performed by journeymen in the applicable craft or trade (unless the contractor is exempt, which is inapplicable to the facts of this case).

When DLSE determines that a violation of the apprenticeship laws has occurred, an assessment or determination is issued pursuant to section 1777.7. In the review of a determination as to the 1:5 ratio requirement, “... the affected contractor, subcontractor, or responsible officer shall have the burden of providing evidence of compliance with Section 1777.5.” (§ 1777.7, subd. (c)(2)(B).)

In this case, the record established the basis for the imposition of penalties for apprenticeship violations. DLSE presented evidence that Martinez failed to provide contract award information for applicable apprentice committees in six crafts - laborer, operating engineer, cement mason, iron worker, electrician, and teamster - and failed to employ any apprentices for five of the six crafts, having only employed cement mason apprentices during the time that journeymen were employed on the project between December 2, 2013, and May 1, 2014.

Accordingly, DLSE's evidence constitutes prima facie support for the Assessment. Martinez, in turn, presented no evidence to disprove the bases for, or accuracy of, the Assessment, nor has Martinez shown an abuse of discretion in DLSE's determination of the amount of penalties under section 1775 and 1777.7. The Assessment is, therefore, affirmed.

### FINDINGS

1. The Project was a public work subject to the payment of prevailing wages and the employment of apprentices.
2. The Civil Wage and Penalty Assessment was timely served by DLSE in accordance with section 1741.
3. Affected contractor Don Martinez, dba Alpha 1 Construction, filed a timely Request for Review of the Civil Wage and Penalty Assessment issued by DLSE with respect to the Project.
4. The workers listed in the audit performed work in Los Angeles County during the pendency of the Project and were entitled to be paid the journeyman rate for that work in their respective crafts.
5. Martinez underpaid prevailing wages to his employees on the Project.
6. Martinez failed to pay training fund contributions for his employees on the Project.
7. DLSE did not abuse its discretion in setting section 1775 penalties at the rate of \$60.00 per violation, and the resulting total penalty of \$40,800.00, as modified for 680 violations, is affirmed.
8. Penalties under section 1813 at the rate of \$25.00 per violation are due for 12 violations on the Project, for a total of \$300.00 in penalties.
9. Martinez failed to provide contract award information to applicable apprenticeship committees for the crafts of laborer, operating engineer, cement mason, ironworker, electrician, and teamster.
10. Martinez employed journeymen in the crafts of laborer, operating engineer, ironworker, electrician, and teamster, but failed to employ any apprentices in those five crafts.



11. DLSE did not abuse its discretion in setting section 1777.7 penalties at the rate of \$60.00 per violation are due for 149 days that journeymen worked on the Project, for a total of \$8,940.00 in penalties.

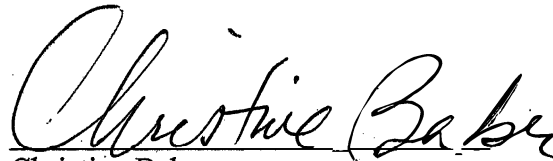
12. The amount found remaining due in the Assessment is modified and affirmed by this Decision are as follows:

Penalties under section 1775(a):	\$40,800.00
Penalties under section 1813:	\$300.00
Penalties under section 1777.7:	\$8,940.00
<b>TOTAL</b>	<b>\$50,040.00</b>

### ORDER

The Civil Wage and Penalty Assessment is affirmed in part and modified in part 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: 5/11/2017



Christine Baker  
Director of Industrial Relations