

STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

In the matter of the Request for Review of:

S W Allen Construction Inc

Case No. **11-0107-PWH**

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE ACTING DIRECTOR

INTRODUCTION

Affected contractor S W Allen Construction Inc. (S W Allen) on April 26, 2011, submitted a Request for Review of a Civil Wage and Penalty Assessment (Assessment) served by the Division of Labor Standards Enforcement (DLSE) on February 18, 2011. The appointed Hearing Officer, A. Roger Jeanson, served on June 16, 2011, an Order to Show Cause (OSC) why the Request for Review should not be dismissed as untimely under Labor Code section 1742, subdivision (a)¹, which requires that a request for review be transmitted to the Labor Commissioner within 60 days after service of the Assessment. S W Allen did not submit a written response. For the reasons below, I find that the time limit is mandatory and jurisdictional. Accordingly, the Request for Review must be dismissed.

FACTS

DLSE issued the Assessment against S W Allen on February 18, 2011, arising out of work performed by a subcontractor of S W Allen, G P Mechanical, on the Portola/Loyalton New Branch Courthouse Project for the Judicial Council of California. DLSE served the Assessment that same date by mail. S W Allen transmitted its Request for Review to the Labor Commissioner on April 26, 2011, 66 days after service of the Assessment.²

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

² G P Mechanical was also named in the Assessment and served by DLSE on February 18, 2011. G P Mechanical did not file a request for review.

On June 16, 2011, the Hearing Officer issued the OSC, stating in relevant part:

The initial question that must be resolved is whether the Request for Review was timely filed under Labor Code section 1742(a), which requires that a request for review be transmitted to the Labor Commissioner within 60 days after service of the assessment. The record reflects that the assessment was served by mail on Requesting Party on February 18, 2011. The Request for Review is dated April 26, 2011, more than 60 days after service of the assessment. In the Request for Review, Requesting Party states, "We realize the 60 days were up last week but we were misled by the Subcontractor."

Based on the foregoing, Requesting Party shall have to and including **July 27, 2011**, in which to show good cause, in writing, why its Request for Review should not be dismissed as untimely. Enforcing Agency shall on or before **July 27, 2011**, submit in writing its position on whether the Request for Review should be dismissed as untimely. Any response filed by either party shall be served on the other party. The parties will have to and including **August 8, 2011**, in which to file a written reply, at which time the issue will be taken under submission.

DLSE timely filed a brief arguing that the Request for Review should be dismissed as untimely. S W Allen filed neither a response to the OSC nor a reply to DLSE's brief.

FINDINGS

Section 1742, subdivision (a) provides that an affected contractor or subcontractor may request review of a civil wage and penalty assessment within 60 days of service of the assessment.³ If no hearing is requested within this period, "the assessment shall become final." (*Id.*) Rule 22(a) [Cal. Code Regs, tit. 8, § 17222(a)] restates the 60-day filing requirement and expressly provides that "Failure to request review within 60 days shall result in the Assessment ... becoming final and not subject to further review under these Rules."

The Assessment became final on April 25, 2011, the 65th day after it was served. This was the last day on which S W Allen could have timely requested review. S W Allen did not transmit its Request for Review until the next day, April 26, 2011. Under section 1742, subdivision (a) and Rule 22, the Acting Director is without jurisdiction to proceed on the

³ Since section 1741, subdivision (a) requires that service of the assessment be completed by mail "pursuant to Section 1013 of the Code of Civil Procedure," the time extension rules of Code of Civil Procedure section 1013 are also taken into account, thus giving an in-state contractor or subcontractor 65 days from the date of mailing of the assessment to file a request for review. *See* Rule 03(a) [Cal. Code Regs., tit. 8, §17203(a).]

untimely Request for Review.⁴ (See *Pressler v. Donald L. Bren Co.* (1982) 32 Cal.3d 831; *Division of Labor Standards Enforcement v. Davis Moreno Construction, Inc.*, *supra*, 193 Cal.App.4th 560.)

ORDER

1. S W Allen did not timely request review of a February 18, 2011, Civil Wage and Penalty Assessment issued by the Labor Commissioner.
2. The Assessment became a final order on April 25, 2011.
3. The Acting Director has no jurisdiction to proceed on the untimely Request for Review filed by S W Allen.

S W Allen Construction, Inc.'s Request for Review is dismissed. The Hearing Officer shall issue a Notice of Findings which shall be served with this Decision on the parties.

Dated: 8/18, 2011



Christine Baker
Acting Director of Industrial Relations

⁴ While S W Allen did not respond to the OSC, it stated in its Request for Review that it had been "misled by the Subcontractor." Even if true, this would not constitute a basis for the failure to file a request for review within the 60-day filing requirement of section 1742, subdivision (a). (*Division of Labor Standards Enforcement v. Davis Moreno Construction, Inc.* (2011) 193 Cal.App.4th 560.)