

STATE OF CALIFORNIA  
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

**William Williams, an individual dba  
American Construction Engineers,**

Case No. 17-0278-PWH

From a Civil Wage and Penalty Assessment issued by:

**Division of Labor Standards Enforcement.**

**DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS**

Affected prime contractor William Frederick Williams, an individual dba American Construction Engineers (Williams) requested review of a Civil Wage and Penalty Assessment (Assessment) issued by the Division of Labor Standards Enforcement (DLSE) with respect to the Witter Ranch Park Water Mister Project (Project) performed for the City of Sacramento (Sacramento). The Assessment, initially served on July 10, 2017, determined that \$53,161.82 in unpaid prevailing wages and statutory penalties were due. These included penalties against Williams under Labor Code sections 1775 and 1813.<sup>1</sup> Williams requested review of the Assessment on August 8, 2017.

A duly-noticed Hearing on the Merits was held on November 13, 2018, in Sacramento, California before Hearing Officer Gayle Oshima. At the Hearing, David Cross appeared as counsel for DLSE. Neither Williams nor a representative for Williams appeared. DLSE Deputy Labor Commissioner Thuy Pham testified in support of the Assessment.

The issues presented for decision are:

- Did DLSE use the correct prevailing wage classifications in the audit?
- Did Williams pay the required travel and subsistence?
- Did DLSE correctly list the hours worked in the audit?

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<sup>1</sup> All subsequent references to sections are to the Labor Code, unless otherwise specified.

- Were the mathematical calculations as set forth in the Assessment correct?
- Did the certified payroll records (CPRs) correctly list wages paid to workers, hours worked, identity of workers, and classification of workers?
- Did Williams become liable for penalties under section 1775, and did DLSE apply the correct penalty rates?
- Did Williams become liable for liquidated damages?

For the reasons set forth below, the Director of Industrial Relations finds that DLSE carried its initial burden of presenting evidence at the Hearing that provided prima facie support for the Assessment and that Williams failed to carry his burden of proving the basis for the Assessment was incorrect. (See Cal. Code Regs., tit. 8, § 17250, subds. (a), (b).) Accordingly, the Director issues this Decision affirming the Assessment.

## **FACTS**

### Failure to Appear:

On August 8, 2017, Williams requested review of the Assessment. Notice of a Prehearing Conference was sent to Williams at the email address and physical address he provided. All subsequent notices were sent to those addresses. At the initial Prehearing Conference, Cross for DLSE appeared by telephone, but Williams did not appear. The Hearing Officer continued the Prehearing Conference to secure Williams' participation. At the next Prehearing Conference, Cross and Mark Aronson appeared as counsel for Contractors Bonding and Insurance Company, surety for Williams, and Williams again did not appear. At the duly-noticed Hearing on the Merits on November 13, 2018, no representative for Williams appeared, nor did a representative for the surety.

The Hearing Officer proceeded to conduct the Hearing on the Merits as noticed and scheduled for the purpose of formulating a recommended decision as warranted by

the evidence. (See Cal. Code Regs., tit. 8, § 17246, subd. (a) [“Upon the failure of any Party to appear at a duly noticed hearing, the Hearing Officer may proceed in that Party’s absence and may recommend whatever decision is warranted by the available evidence, including any lawful inferences that can be drawn from an absence of proof by the non-appearing Party”].) DLSE Exhibit Numbers 1-12 were admitted into evidence without objection and the matter was submitted for decision.

### The Assessment.

On April 22, 2015, Sacramento advertised an invitation to accept bids for the Project. On May 12, 2015, Williams, as the general contractor, was awarded the contract. The Project consisted of demolition, site grading, cement work, installation of water and sewer pipes and water misters, and landscaping. Twelve workers performed work on the Project and workers were on the job site from August 15, 2015, through October 24, 2015. Sacramento recorded a Notice of Completion on January 11, 2016.

The trades employed on the Project were Laborer, Area 2, Groups 2 and 3; Plumber, Landscape Pipefitter; and Cement Mason. For each of the trades, DLSE submitted the applicable prevailing wage determinations (PWDs)<sup>2</sup> in effect as of the job bid advertisement date.

The evidence establishes that Williams failed to pay his workers the prevailing wage rates of \$40,081.82 as required by the Landscape Pipefitter, Cement Mason, and Laborer PWDs. At the Hearing, Pham testified that Williams failed to pay the full straight-time prevailing wages and travel and subsistence per diem amounts owed to Williams’ workers on the Project. The DLSE Penalty Review (DLSE Exhibit No. 5) indicated that no proof of wage payments was submitted by Williams. Based on that lack of proof, DLSE’s audit gave no credit for any wages having been made. Pham

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<sup>2</sup> DLSE submitted the following PWDs: SAC-2015-1 for Plumber, Landscape Pipefitter (Landscape Pipefitter PWD); NC-23-203-1A-2015-1 for Cement Mason (Cement Mason PWD); and NC-23-102-1-2015-1 for Laborer, Area 2, Groups 2 and 3 (Laborer PWD). DLSE also submitted the travel and subsistence scope of work for Landscape Pipefitter.

further testified that, to arrive at the unpaid wage amount found due in the Assessment, DLSE applied the dates and hours worked as listed on the CPRs, and calculated the unpaid wages using the rates in effect according to the applicable PWDs. Additional hours were added to DLSE's audit for one worker, Robert Crum, who had stated in a DLSE interview that he worked on the Project for three days, with no pay. DLSE also determined that Landscape Pipefitters who traveled 50 miles or more to the jobsite from the main office or field office of the employer were entitled to travel and subsistence payments pursuant to the Landscape Pipefitter PWD, and those payments had not been made. The Assessment found the underpayment of wages occurred over 109 instances for the 12 workers. As a penalty under section 1775, DLSE assessed \$13,080.00, calculated at the rate of \$120.00 per violation. Pham also testified that although the DLSE investigator recommended a penalty rate of \$200.00 per violation, DLSE Senior Deputy Ken Madu mitigated the rate to \$120.00 per violation.

## **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 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 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*, at p. 985.)

Section 1775, subdivision (a), requires that contractors and subcontractors pay the difference to workers who received less than the prevailing wage rate. Section 1775, subdivision (a) also prescribes penalties for failing to pay the prevailing wage rate. The prevailing rate of per diem wage includes travel pay, subsistence pay, and training fund contributions pursuant to section 1773.1. Section 1775, subdivision (a) (2), grants the Labor Commissioner the discretion to mitigate the statutory maximum penalty per day in light of prescribed factors.

When DLSE determines that a violation of the prevailing wage laws has occurred, it may issue a written civil wage and penalty assessment pursuant to section 1741. An affected contractor may appeal that assessment by filing a request for review. (§ 1742.) The request for review is transmitted to the Director, 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 presenting 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).)

#### Williams Failed to Pay the Required Prevailing Wages.

In this case, DLSE presented prima facie evidence that Williams underpaid his workers on the Project in the aggregate sum of \$40,081.82 by failing to make the travel and subsistence payments required by the applicable PWDs, under reporting of number of hours, and failing to pay the prevailing wage rates required by the PWDs.

Having failed to appear, Williams presented no evidence to carry his burden to disprove the basis for, or the accuracy of, this determination. Therefore, Williams is liable for unpaid prevailing wages in the aggregate sum of \$40,081.82. (Cal. Code Regs., tit. 8, § 17250, subd. (a).)

DLSE's Penalty Assessment Under Section 1775 Is Affirmed.

Section 1775, subdivision (a)(1) states:

The contractor ... shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than two hundred dollars (\$200) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by the contractor....

Section 1775, subdivision (a)(2)(D), provides that the Labor Commissioner's determination as to the amount of the penalty shall be reviewable only for an abuse of discretion. Abuse of discretion is established if the "agency's nonadjudicatory action ... is inconsistent with the statute, arbitrary, capricious, unlawful or contrary to public policy." (*Pipe Trades v. Aubry* (1996) 41 Cal.App.4th 1457, 1466.) In reviewing for abuse of discretion, however, the Director is not free to substitute his or her own judgment "because in [his or her] own evaluation of the circumstances the punishment appears to be too harsh." (*Pegues v. Civil Service Commission* (1998) 67 Cal.App.4th 95, 107.)

DLSE presented prima facie evidence that Williams failed to pay the required prevailing wages on 109 worker-days, and DLSE's selection of the \$120.00 penalty rate is not an abuse of discretion. Williams presented no evidence to carry his burden to disprove the basis for, or the accuracy of, this determination.

Accordingly, Williams is liable for penalties under section 1775 in the sum of \$13,080.00, calculated at the \$120.00 penalty rate for a total of 109 worker-days during which the prevailing rate was not paid.

Williams Is Liable for Liquidated Damages.

Section 1742.1, subdivision (a), provides for the imposition of liquidated damages on the contractor, essentially a doubling of the unpaid wages. It provides in part:

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.

The statutory scheme regarding liquidated damages, as applicable to this case, provides contractors two alternative means to avert liability for liquidated damages (in addition to prevailing on the case, or settling the case with DLSE and DLSE agreeing to waive liquidated damages). These two alternative means required the contractor to make key decisions within 60 days of the service of the civil wage penalty assessment upon the contractor.

Under section 1742.1, subdivision (a), the contractor has 60 days to decide whether to pay to the workers all or a portion of the wages assessed in the civil wage penalty assessment, and thereby avoid liability for liquidated damages on the amount of wages so paid.

Under section 1742.1, subdivision (b), a contractor could entirely avert liability for liquidated damages if, within 60 days from issuance of the civil wage penalty assessment, the contractor deposited with DIR the full amount of the assessment of unpaid wages, including all statutory penalties.<sup>3</sup>

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<sup>3</sup> Prior to June 27, 2017, section 1742.1 provided a third means to avert liability for liquidated damages: the Director had discretionary ability to waive liquidated damages under certain circumstances. On June 27, 2017, before issuance of the Assessment, the Director's discretionary ability to waive liquidated damages was deleted from section 1742.1 by legislative amendment. (Stats. 2017, ch. 28, §16 [Sen. Bill No. 96].) Accordingly, the Director has no such discretionary ability in this case.

In this case, no evidence shows Williams paid any back wages to the workers in response to the Assessment or deposited with DIR the assessed wages and statutory penalties. Accordingly, Williams is liable for liquidated damages in the amount of the underpaid prevailing wages, \$40,081.82.

Based on the foregoing, the Director makes the following findings:

### **FINDINGS AND ORDER**

1. William Frederick Williams, an individual doing business as American Construction Engineers, underpaid his workers \$40,081.82 in prevailing wages.
2. Penalties under section 1775 are due from William Frederick Williams, an individual doing business as American Construction Engineers, in the amount of \$13,080.00 for 109 violations at the rate of \$120.00 per violation.
3. Because none of the unpaid wages were paid within 60 days after service of the Assessment, liquidated damages are due from William Frederick Williams, an individual doing business as American Construction Engineers, in the full amount of the unpaid wages, \$40,081.82.
4. The amounts found due from William Frederick Williams, an individual doing business as American Construction Engineers, in the Assessment as affirmed by this Decision are as follows:

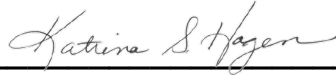
Wages Due:	\$40,081.82
Penalties under section 1775, subdivision (a):	\$13,080.00
Liquidated damages:	\$40,081.82
<b>TOTAL:</b>	<b>\$93,242.64</b>

In addition, interest is due from William Frederick Williams, an individual doing business as American Construction Engineers, and shall accrue on unpaid wages in accordance with section 1741, subdivision (b).



The Civil Wage and Penalty Assessment is affirmed. The Hearing Officer shall issue a Notice of Findings, which shall be served with this Decision on the parties.

Dated: 5/11/20



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Katrina S. Hagen  
Director, Department of Industrial Relations