

STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Kevin Sullivan Heating & Air, Inc.

Case No. 18-0563-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF DIRECTOR OF INDUSTRIAL RELATIONS

Affected subcontractor, Kevin Sullivan Heating & Air, Inc. (Sullivan Heating), requested review of a Civil Wage and Penalty Assessment (Assessment) issued by the Division of Labor Standards Enforcement (DLSE) on January 19, 2018, with respect to work performed on project 111080—District Center Seismic Improvements (Project) for the Contra Costa Water District (District). The Assessment determined that Sullivan Heating is liable for \$19,450.96 in unpaid wages, \$310.00 in unpaid training fund contributions, and \$2,160.00 in penalties pursuant to Labor Code section 1775 at \$80.00 per day.¹ The parties stipulated that the Assessment was timely and that Sullivan Heating timely filed its Request for Review. The Request for Review contends that Sullivan Heating does not owe any unpaid wages or penalties because the audit was based on inaccurate inspector reports that do not accurately report the number of Sullivan Heating employees that worked on the Project as compared to the number indicated on Sullivan Heating's certified payroll records (CPRs).

A Hearing on the Merits was held on January 17, 2019, in Oakland, California, before Hearing Officer Dan Gildor. Evan Adams appeared as counsel for DLSE, and Rodney A. Marraccini appeared as counsel for Sullivan Heating. Robert David Stalf, a District employee who authored the inspector reports on which the Assessment was based, and Deputy Labor Commissioner Kay Tsen testified for DLSE; Kevin Sullivan,

¹ All further section references are to the California Labor Code, unless otherwise specified.

Sullivan Heating owner and CEO, testified for Sullivan Heating. Three Sullivan Heating employees, John Conneley, Thomas Messner, and Chris Blatter, also testified for Sullivan Heating. The matter was submitted on February 1, 2019, after Sullivan Heating submitted a post-hearing brief and the time lapsed for DLSE to file any responsive post-hearing brief.

The issues for decision are:

- Is Sullivan Heating liable for \$19,450.96 in unpaid prevailing wages?
- Does Sullivan Heating owe \$310.00 in training fund contributions?
- Is Sullivan Heating liable for \$2,160.00 in penalties pursuant to section 1775 at a rate of \$80.00 per day?

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, but Sullivan Heating thereafter carried its burden of proving that the basis for the Assessment was incorrect. (See Cal. Code Regs., tit. 8, § 17250, subs. (a), (b).) Accordingly, the Director issues this Decision dismissing the Assessment.

Facts

The Project arises out of a public works contract (the Subcontract) for Sullivan Heating to remove existing HVAC equipment and reinstall new equipment during the seismic renovation of the District's headquarters in Concord, California. The District issued the Invitation for Bids on November 5, 2014. The Project involved two contracts entered into by the District: one issued to Thompson Builders Corporation (Thompson Builders) to renovate and seismically improve the District's headquarters (the Contract), and a separate time and materials contract issued to a company called GSE. Though Sullivan Heating performed as a subcontractor under both contracts, DLSE did not audit or investigate the work Sullivan performed under the GSE contract. The Assessment only relates to work performed under the Subcontract between Thompson Builders and Sullivan.

On December 9, 2016, Sheet Metal Worker Union Local 104 (Local 104) filed with DLSE a complaint alleging that Sullivan Heating underreported the hours its employees worked on the Project. The complaint was based on a comparison between Sullivan Heating's CPRs and the "Daily Construction Reports" (Daily Reports) authored by District employee Staff.

The Assessment.

Local 104's complaint was assigned to Deputy Labor Commissioner Tsen. As she testified at the Hearing on the Merits, Tsen requested CPRs from Sullivan Heating shortly after the complaint was docketed. She also requested inspection reports from the District, which produced the Daily Reports admitted at the Hearing as DLSE Exhibit Number 2. After receiving the CPRs, Tsen compared the CPRs against the Daily Reports and noted some disparities. The Daily Reports identified a greater number of Sullivan Heating employees on site than were indicated on the CPRs over a total of 17 days. Tsen testified that she asked Sullivan Heating about these discrepancies and that Sullivan Heating thereafter submitted a modified set of CPRs that resolved some, but not all, of the discrepancies.² These modified CPRs were not certified, leading Tsen to disregard them in their entirety. Having obtained no further information to demonstrate that the CPRs were accurate notwithstanding the Daily Reports, Tsen issued the Assessment for two unidentified workers who appear to be accounted for in the Daily Reports but are not accounted for in the initial CPRs. The Assessment assumes that both of these unidentified workers were classified in the craft of Sheet Metal worker, with one performing a total of 136 hours of work between June 28, 2015, and April 24, 2016, and the other performing 80 hours of work between August 2, 2015, and February 14, 2016. The Assessment also assumes that Sullivan Heating did not pay these workers any wages. Accordingly, DLSE assessed \$19,450.96 in unpaid prevailing wages, \$1,160.00 in section 1775 penalties, and \$310.00 in unpaid training fund contributions based on the 216 hours DLSE attributed to the two unidentified workers.

² For instance, the discrepancy between the Daily Reports and CPRs can be accounted for by considering work performed pursuant to the GSE contract on at least three days: September 24, 2015, September 25, 2015, and September 29, 2015.

When questioned at the Hearing, however, Tsen admitted that the Daily Reports contain internal discrepancies—identifying a certain number of Sullivan Heating employees in the “Crew on Site” section of the reports but identifying a different number of employees in the “Summary of Construction Activities” section. She also admitted that in such instances where the reports were internally inconsistent, she adopted the higher of the two reported numbers as the number of Sullivan Heating employees working on site for purposes of the Assessment in order to err on the “safe” side and be more protective of workers. And even though Stalf, at times, distinguished in the Daily Reports between work performed under the GSE contract as opposed to work performed under the Thompson Builders Subcontract, Tsen never accounted for that distinction in the Assessment and instead attributed the work as if employees were always working under the Thompson Builders Subcontract. In general, Tsen favored the Daily Reports over the CPRs because the reports included a tremendous amount of detail—much more detail than Tsen had become accustomed to from her work in other investigations. Accordingly, she trusted that the Daily Reports would be accurate and adopted them wholesale without any significant critical review. Tsen testified that although she mailed out questionnaires to the workers in the CPRs, she received no response. The record, therefore, is devoid of any employee complaints, time sheets, personal calendars or diaries that could potentially substantiate the numbers reflected in the Daily Reports. The complaint that Local 104 sent to DLSE was based solely on the Daily Reports.

Finally, Tsen testified that she never interviewed Stalf or required that he explain the inaccuracies within his reports. She did, however, speak with James Larot—the project manager for the District—who informed her that she should not rely on Stalf’s reports as an accurate representation of the number of workers on-site on any particular day. Though hearsay, Larot’s statement is corroborated by the testimony of Stalf himself, who testified at the Hearing that the purpose of the Daily Reports is to report progress on the Project—the work done on a given day—not the number of workers onsite. On cross-examination, Stalf admitted that some of the Daily Reports were internally inconsistent and explained that he used the previous day’s report as a template for each report and that he sometimes forgot to update all the sections, inadvertently carrying content from the

previous day into the following day's report. Stalf also testified that he created the reports from memory the following day, if not later. Stalf admitted that he determined the identity of the workers' employer not through familiarity or any identification or uniform, but by deducing the employer association from the work being performed.

The accuracy of the Daily Reports was also put into question by Sullivan, who testified that at various times during the Project, he did not employ the number of people who were qualified to perform the tasks that Stalf identified in his report. This was corroborated by Conneley, who testified that there were only two individuals (including himself) who worked for Sullivan Heating who could perform the kind of pipefitting tasks that Stalf stated Sullivan Heating employees performed on October 22, 2015, even though Stalf reported four employees. Blatter and Messner both testified to the same effect—that they were not present on a day when Stalf reported a Sullivan Heating employee performing tasks that only they could perform. This testimony was supported by Blatter's and Messner's contemporaneous time cards, which were submitted and accepted into evidence, and which showed that they worked elsewhere for the entire day. Finally, Sullivan testified that when the CPRs were initially produced, the Sullivan Heating employee in charge of producing them—Elly Hoffhine—overlooked the fact that Sullivan Heating employees worked on the Project through two contracts, the Subcontract with Thompson Builders and the time and materials contract awarded to GSE. After Tsen inquired regarding the discrepancies between the CPRs and Daily Reports, Hoffhine realized the error and modified the CPRs to include the work performed under the GSE contract.

Discussion

The California Prevailing Wage Law (CPWL), Labor Code section 1720, et seq., requires the payment of prevailing wages to workers employed on public works construction 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 (a); see *Lusardi*, at p. 985.)

Section 1775, subdivision (a), requires, among other provisions, that contractors and subcontractors pay the difference to workers who were paid less than the prevailing rate, and also prescribes penalties for failing to pay the prevailing rate. Section 1775, subdivision (a)(2), grants the Labor Commissioner the discretion to mitigate the statutory maximum penalty per day in light of prescribed factors.

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 60 days following service of a civil wage and penalty assessment under section 1741. Under section 1742.1, subdivision (b), a contractor may entirely avert liability for liquidated damages if, within 60 days from issuance of the assessment (the CWPA), the contractor deposits into escrow with the Department of Industrial Relations the full amount of the assessment of unpaid wages, plus the statutory penalties under sections 1775.

Employers on public works must keep accurate payroll records, recording, among other information, 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.)

When an employer fails to maintain accurate time records, a claim for unpaid wages may be based on credible estimates from other sources sufficient to allow the

decision maker to determine the amount by a just and reasonable inference from the evidence as a whole. In such cases, the employer has the burden to come forward with evidence of the precise amount of work performed to rebut the reasonable estimate. (See, e.g., *Furry v. E. Bay Publ'g, LLC* (2019) 30 Cal. App. 5th 1072, 1079 [“[A]n employee has carried out his burden if he proves that he has in fact performed work for which he was improperly compensated and if he produces sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. The burden then shifts to the employer to come forward with evidence of the precise amount of work performed or with evidence to negative the reasonableness of the inference to be drawn from the employee’s evidence. If the employer fails to produce such evidence, the court may then award damages to the employee, even though the result be only approximate”], citing *Anderson v. Mt. Clemens Pottery Co.* (1945) 328 U.S. 680, 687–688, 66 S.Ct. 1187; see also *Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721, 726-727; *In re Gooden Construction Corp.* (U.S. Dept. of Labor Wage Appeals Board 1986) 28 WH Cases 45 (BNA) [applying same rule to prevailing wage claims under the federal Davis-Bacon Act, 40 U.S.C. §§ 3141 et seq.].) This burden is consistent with an affected contractor’s burden under section 1742 to prove that the basis for an Assessment is incorrect.

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 under section 1742. The request for review is transmitted to the Director of the Department of Industrial Relations, 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 producing 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).)

In the present case, although the parties stipulated to a set of issues for decision, specifically, whether Sullivan Heating is liable for unpaid wages, unpaid training fund contributions, and penalties under section 1775, the case turns on a threshold question. That question is whether the Daily Reports that Stalf authored are reliable evidence of the work performed by Sullivan Heating employees over and above the hours of work reflected on the CPRs. This inquiry is central given that the Assessment is not based on any other documentation, such as employee time cards or work calendars. Because DLSE based the Assessment solely on the additional work hours reflected in the Daily Reports over and above the hours reflected in the CPRs, the Assessment essentially stands or falls on the reliability of those reports. If the Daily Reports are not reliable, then the basis for the underpaid prevailing wages and section 1775 penalties in the Assessment is removed and the Assessment must be dismissed.

As noted above, the discrepancies between the CPRs and Stalf's Daily Reports are the only evidence from which it could potentially be inferred that Sullivan Heating's record-keeping was incomplete.³ As Stalf himself made clear, those reports do not constitute credible evidence of the hours worked by Sullivan Heating's employees. The purpose of the reports was not to provide a headcount. In fact, Stalf testified that subsequent to his work on the Project, he had stopped reporting headcounts in his daily construction reports because headcounts are not integral to the reports. According to Stalf's testimony, the headcounts were solely a vestige of his prior employment with the City of San Francisco. Moreover, Stalf constructed the reports from memory and he "cut and pasted" from his previous reports, introducing errors and internal inconsistencies in the process. Finally, the Daily Reports in some instances reflected the impossible—a worker being in two places at the same time. While it may have been reasonable for Tsen to initially rely on the Daily Reports as a basis for inquiring into Sullivan Heating's compliance, the Daily Reports, without more, do not provide credible evidence of the hours of work Sullivan Heating employees actually performed on this Project sufficient

³ The fact that Sullivan Heating subsequently modified its CPRs was adequately explained as a result of Sullivan Heating performing work on the Project through two contracts.

to enable a trier of fact to determine the amount of work performed by a just and reasonable inference from the record as a whole. (See *Furry, supra*, 30 Cal. App. 5th at p. 1079; *Anderson, supra*, 328 U.S. at pp. 687-688; *Hernandez, supra*, 199 Cal.App.3d at pp. 726-27.)

Moreover, the only testimony from workers confirmed that the hours reported in the CPRs, not those contained in the Daily Reports, were accurate. Given that there is no other evidence in the record that Sullivan Heating underreported the hours its employees worked on the Project, the record is insufficient to support the Assessment.

Based on the foregoing, and the Hearing Officer's overall assessment of the evidence submitted at the Hearing, this Decision concludes that while DLSE carried its initial burden of presenting evidence at the Hearing that provided prima facie support for the Assessment, Sullivan Heating thereafter carried its burden of proving that the basis for the Assessment was incorrect. (See Cal. Code Regs., tit. 8, § 17250, subs. (a), (b).) In light of the foregoing analysis and conclusions, all other issues in this matter are moot.

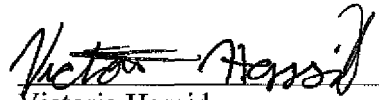
Based on the foregoing, the Director makes the following findings:

FINDINGS AND ORDER

1. Kevin Sullivan Heating & Air, Inc. paid its employees at the prevailing wage rates for all hours worked on the Project and no unpaid prevailing wages are due.
2. All other issues are moot.

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

Dated: July 10, 2019


Victoria Hassid
Chief Deputy Director
Department of Industrial Relations⁴

⁴ See Government Code sections 7, 11200.4.