

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Peace of Mind Constructions, Inc.

Case No. 13-0058-PWH

From an Assessment issued by:

[DLSE No. 40-31231/557]

Division of Labor Standards Enforcement.

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected Subcontractor Peace of Mind Constructions, Inc., (PMC), requested review of a Civil Wage and Penalty Assessment issued by the Division of Labor Standards Enforcement (DLSE) with respect to the San Juan Hills High School 30 Meter Pool / Support Buildings project (Project) performed for the Capistrano Unified School District in Orange County. The Assessment determined that \$22,132.99 in unpaid prevailing wages and statutory penalties were due. The matter was set for a hearing on the merits before Hearing Officer John J. Korbol on October 28, 2013 at the Department of Industrial Relations, Office of the Director – Legal Unit, in Los Angeles, California. Written notice of the time and place of the hearing was served on August 29, 2013, on all parties, including on PMC at its last known address and on PMC's legal counsel, Gregory W. Patterson. As of September 16, 2013, Mr. Patterson withdrew as counsel for PMC due to a breakdown in communications with his client.

At the Hearing, DLSE appeared through attorney Max D. Norris. PMC did not appear. Now, based on un rebutted evidence showing that PMC underpaid its workers by misclassifying its workers and underreporting the number of hours worked on the Project, the Director affirms the Assessment.

Facts

At the Hearing, DLSE offered documentation supporting the Assessment in the form of Exhibits 1, 2, 4, 7, 8, 9, and 21 through 27; all of these were admitted into evidence. Deputy

Labor Commissioner Jeffrey Pich testified that he relied primarily on complaints and information obtained from PMC workers Obiel Rios, Jose Valdez, Jose Zendejas, Leonel Arce, Rafael Lopez Castro, and Martin Gonzalez to conclude that PMC's certified payroll records were inaccurate, and to ascertain the actual hours worked by these workers and their correct classification.¹ Deputy Pich determined that the actual tasks performed by PMC's workers justified having them reclassified as either brick tenders or brick masons rather than cement masons. He compared the wages and benefits actually paid to the workers by PMC with the amount of wages and benefits that should have been paid had PMC properly classified those workers and reported all hours worked, including overtime hours. Deputy Pich determined what additional wages were due based on the requirements of the respective prevailing wage determinations that cover brick tenders and brick masons in Orange County on the date the Project was announced for bids. He also testified that these additional wages remained unpaid more than sixty days following service of the Assessment.

DLSE assessed \$3,950.00 in penalties under Labor Code section 1775² at the rate of \$50.00 per violation (based on 79 violations) for failure to pay the applicable prevailing wages. Deputy Labor Commissioner Pich further testified about the penalty review undertaken by Senior Deputy Labor Commissioner Lorna Espiritu and why the factors set forth in Labor Code section 1775(a) were applied to set penalties at the maximum rate of \$50 per violation. DLSE also assessed \$550.00 in penalties under section 1813 at the rate of \$25.00 per violation (based on 22 violations) for failure to pay overtime rates.

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 "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 Construction Co. v. Aubry* (1992) 1 Cal.4th 976.)

¹ PMC classified all of its workers as cement masons on its certified payroll records.

² All further statutory references are to the California Labor Code.

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 section 1813 prescribes a fixed penalty of \$25.00 for each instance of failure to pay the prevailing overtime rate when due. 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 sixty days following the service of a civil wage and penalty assessment.³

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 or subcontractor may appeal that assessment by filing a Request for Review under section 1742. Subdivision (b) of section 1742 provides, among other things, that the contractor should be provided with an opportunity to review the evidence that DLSE intends to utilize at the hearing, and that the contractor “shall have the burden of proving that the basis for the civil wage and penalty assessment is incorrect.”

In this case, the record establishes the basis for the Assessment through the unrebutted documentary evidence produced by DLSE and the oral testimony of DLSE’s witness, Jeffrey Pich. PMC has presented no evidence to disprove the basis for the Assessment or to support waiver of liquidated damages under section 1742.1, subdivision (a). Accordingly, the Assessment is affirmed in its entirety.

FINDINGS AND ORDER

1. Affected subcontractor Peace of Mind Constructions, Inc. filed a timely Request for Review from a Civil Wage and Penalty Assessment issued by the Division of Labor Standards Enforcement.
2. DLSE established prima facie support for the Assessment’s determination that \$17,632.99 in unpaid wages are due.
3. Penalties under section 1775 are due in the amount of \$3,950.00 for 79 violations.

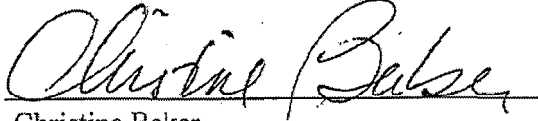
³ With certain exceptions not pertinent here.

4. Penalties under section 1813 are due in the amount of \$550.00 for 22 violations.
5. Liquidated damages are due in the amount of \$17,632.99, and are not subject to waiver under section 1742.1, subdivision (a).
6. The amounts found due in the Assessment and affirmed by this Decision are as follows:

Back Wages Due:	\$ 17,632.99
Penalties under Labor Code §§ 1775 and 1813	\$ 4,500.00
Liquidated Damages under Labor Code §1742.1	<u>\$ 17,632.99</u>
TOTAL	\$ 39,765.98

Interest shall accrue on all unpaid wages in accordance with section 1741, subdivision (b). The Hearing Officer shall issue a Notice of Findings which shall be served together with this Decision on the parties.

Dated: 7/21/2014


Christine Baker
Director of Industrial Relations