

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Desert Concepts Construction, Inc.

Case No. 15-0212-PWH

From a Determination of Civil Penalty issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

INTRODUCTION

Desert Concepts Construction, Inc. (Desert), the contractor on the Heber Dunes State Vehicular Recreation Area – Initial Improvements Project #C328001 (Project) in Imperial County, submitted a Request for Review of the Determination of Civil Penalty (Determination) issued by the Division of Labor Standards Enforcement (DLSE) arising from Desert’s work on the Project. DLSE applied for an Order to Show Cause (OSC) why Desert’s Request for Review of the Determination should not be dismissed as untimely. The appointed Hearing Officer, Howard Wien, granted DLSE’s application and issued the OSC. Desert responded by filing a brief in opposition to dismissal, with a supporting declaration of Gilbert M. Rosas. DLSE filed a reply brief.¹

For the reasons below, this decision finds that the time limit for requesting review is jurisdictional and accordingly that Desert’s untimely Request for Review of the Determination must be dismissed.

¹ Desert’s Request for Review in this case 15-0212-PWH solely addresses the Determination designated by DLSE as case number 44-40458-404-DCP. However, Desert’s brief opposing dismissal also refers to a Civil Wage and Penalty Assessment (Assessment) that DLSE served upon Desert on or about September 22, 2014, designated by DLSE’s case number 44-40457-404. Desert’s brief requests that this decision address the Assessment in addition to the Determination. Desert’s brief does not state that Desert ever filed a Request for Review of the Assessment, and there is no record of any such Request for Review in this case. Absent a Request for Review, the Assessment became final 60 days after service on Desert. (Lab. Code, § 1742, subd. (a).) Accordingly, Desert’s references to the Assessment in its brief are irrelevant to – and shall not be addressed by – this decision.

FACTS

On September 22, 2014, DLSE issued the Determination against Desert based upon Desert's failure to comply with the provisions of Labor Code section 1777.5² on hiring apprentices for the Project and submitting Division of Apprenticeship Standards Forms 140 and 142 to apprenticeship committees. Desert's Request for Review of the Determination was dated June 4, 2015, the mailing envelope was postmarked June 15, 2015, and the Request for Review was received by DLSE on June 19, 2015.

On July 22, 2015, the office of the Hearing Officer served upon the parties a notice that the prehearing conference in this case would be held on August 17, 2015. On August 6, 2015, DLSE served and filed its Application for Order to Show Cause Why Request for Review Should Not be Dismissed as Untimely (Application for OSC).³ In the prehearing conference on August 17, 2015, Desert's representative stated that he had received and reviewed DLSE's Application for OSC. The Hearing Officer heard oral argument from the parties' representatives on whether the Application for OSC should be granted or denied. The Hearing Officer then granted the Application for OSC and issued an order to show cause why the Request for Review of the Determination should not be dismissed as untimely. The Hearing Officer further ordered that any such showing by Desert shall be presented by written brief filed and served no later than September 3, 2015, and DLSE's reply brief, if any, shall be filed and served no later than September 8, 2015. Subsequently, Desert timely filed and served its Opposition brief (with the supporting declaration of Gilbert M. Rosas), and DLSE timely filed and served its Reply brief. No party, nor the Hearing Officer, requested an oral hearing, so the matter stood submitted.

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

³ Although DLSE's application stated that it was made pursuant to California Code of Regulations, title 8, section 17227, subdivision (a), it was actually made pursuant to California Code of Regulations, title 8, section 232.27, subdivision (a) pertaining to determinations of civil penalty.

DISCUSSION

The provisions of section 1777.7, subdivision (c)(1), in effect in 2014 (the year the Determination was issued) provided that an affected contractor or subcontractor may request review of a determination of civil penalty within 60 days of service of the determination.⁴ This section clearly stated: "If no hearing is requested within 60 days after service of the determination, the determination shall become final." (§ 1777.7, subd. (c)(1).)⁵ California Code of Regulations, title 8, section 232.27 similarly gave the Director authority to dismiss a request for review that was untimely under section 1777.7, subdivision (c)(1).

Therefore under section 1777.7, subdivision (c)(1), Desert was required to serve its Request for Review no later than November 26, 2014, i.e., 65 days after the Determination was served by mail on September 22, 2014. The postmark on Desert's envelope transmitting its Request for Review was dated June 15, 2015. This was 200 days past the November 26, 2014 deadline.⁶ Accordingly, the Determination became final on November 26, 2014. Under the plain language of section 1777.7, subdivision (c)(1), the Director was without jurisdiction to proceed on Desert's untimely Request for Review. (See *Pressler v. Donald L. Bren Co.* (1982) 32 Cal.3d 831, 836-837.) Where a statute sets out a duty and a consequence for the failure to act in conformity, that statute

⁴ Since California Code of Regulations, title 8, section 232.20, subd. (a) required that service of the determination be completed by mail "pursuant to the requirements of Code of Civil Procedure section 1013," the time extension rules of Code of Civil Procedure section 1013 were taken into account, thus giving an in-state contractor or subcontractor 65 days from the date of mailing of the determination to file a request for review. Accord, California Code of Regulations, title 8, section 232.03, subd. (c).

⁵ California Code of Regulations, title 8, section 232.22 restates the filing requirement but provides that "Failure to request review within 30 days shall result in the Determination becoming final and not subject to further review under these Rules." However, the Determination contains a statement entitled "Notice of Right to Obtain Review-Formal Hearing" admonishing the affected contractor and subcontractor to file its request for review within 60 days after service of the Determination. Since Desert's Request for Review of the Determination was more than 65 days after service of the Determination, it is unnecessary to address the discrepancy between the 60-day requirement in section 1777.7 and the 30-day requirement in California Code of Regulations, title 8, section 232.22.

⁶ In its Opposition, Desert contends that it submitted its Request for Review on or about June 4, 2015 – which is the date stated in the Request for Review (not the postmark on the mailing envelope). Even using this earlier date, the Request for Review was submitted 189 days past the November 26, 2014 deadline.

is said to be "mandatory." (*California Correctional and Peace Officers Association v. State Personnel Board* (1995) 10 Cal. 4th 1133, 1145). (See also *Progressive Concrete, Inc. v. Parker* (2006) 136 Cal. App. 4th 540, 546-548.)

In its Opposition, Desert contends that under the regulations, a hearing officer may exercise discretion to reserve the timeliness issue for further consideration and determination in connection with the hearing on the merits.⁷ This would permit Desert to present its evidence on the merits of case. The Opposition brief, and the supporting Declaration of Gilbert M. Rosas, present several points that Desert wishes to establish by evidence in a hearing on the merits. Desert argues that a hearing on the merits is therefore justified despite the untimeliness of its Request for Review. However, the facts establishing the untimeliness of the Request for Review are undisputed, and the law of section 1777.7, subdivision (c)(1), is unambiguous: the Determination became final on November 26, 2014. Accordingly, no purpose would be served by conducting a hearing on the merits.

Desert's Opposition also cites Code of Civil Procedure section 473. Desert's argument appears to be based upon alleged excusable neglect in its activities that gave rise to the Determination, rather than excusable neglect in failing to timely file its Request for Review. Either way, the citation to Code of Civil Procedure section 473 is unavailing to Desert. While Code of Civil Procedure section 473 authorizes a trial court to set aside an entry of default or judgment on the basis of "mistake, inadvertence, surprise, or excusable neglect," neither the Labor Code nor its implementing regulations provide the Director with any authority to excuse an affected contractor or subcontractor from its failure to timely request review, regardless of grounds.⁸ To the contrary, the plain language of section 1777.7, subdivision (c)(1), unequivocally provides that if there is a failure to timely request review within 60 days after service of the determination, "...

⁷ Desert cites California Code of Regulations, title 8, section 17227 on this point. For determinations of civil penalty – such as the Determination at issue in this case – the applicable regulation is California Code of Regulations, title 8, section 232.27, which is materially identical to the regulation cited by Desert.

⁸ As was held in *Pressler, supra*, 32 Cal.3d at p. 837, involving a section 98.2 administrative case, "[a] late filing may not be excused on the grounds of mistake, inadvertence or excusable neglect."

the determination shall become final.” When interpreting statutes, the inquiry begins with the plain, commonsense meaning of the language used by the Legislature. If the language is unambiguous, the plain meaning controls. (*Voices of the Wetlands v. State Water Resources Control Bd.* (2011) 52 Cal. 4th 499, 519.)

It should be noted that Desert was placed on notice regarding the consequences of failure to timely request review of the Determination. Specifically, page 2 of the Determination stated in relevant part, in bold print:

Failure by a contractor, subcontractor, or responsible officer to submit a timely Request for Review will result in a final order which shall be binding on the contractor, subcontractor, or responsible officer. Labor Code section 1777.7(c)(1).

(Emphasis in original.)

Had Desert timely filed its Request for Review, it would have forestalled the finality of the Determination and would have vested the Director with jurisdiction to conduct a hearing. Since the time has passed, however, there is no jurisdiction to proceed because the Determination became final on November 26, 2014 – 200 days before Desert submitted its Request for Review. (§ 1777.7, subd. (c)(1).) Because this time limit is mandatory and jurisdictional by statute, Desert’s late filing cannot be excused even if Desert had presented grounds for mistake, inadvertence, surprise or excusable neglect.

FINDINGS

1. Desert did not timely request review of the September 22, 2014 Determination.
2. The Determination became a final order on November 26, 2014.
3. The Director has no jurisdiction to proceed on Desert’s untimely Request for Review of the Determination.

ORDER

Desert Concepts Construction, Inc.'s Request for Review in Case No. 15-0212-PWH is dismissed as untimely as set forth in the foregoing findings. The Hearing Officer shall issue a Notice of Findings that shall be served with this Decision on the parties.

Dated: 2/10/2014



Christine Baker
Director of Industrial Relations