

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

**Aghapy Group, Inc., dba
Aghapy Construction, Inc.**

Case No.: **16-0412-PWH**

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement.

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected contractor Aghapy Group, Inc. dba Aghapy Construction, Inc. (Aghapy) requested review of a Civil Wage and Penalty Assessment (Assessment) issued on September 20, 2016, by the Division of Labor Standards Enforcement (DLSE) with respect to the Piñon Hills Park Expansion Project (Project) for the Phelan Piñon Hills Community Services District (District) in San Bernardino County. The Assessment determined that \$79,386.71 was due in unpaid prevailing wages and statutory penalties under Labor Code sections 1775, 1813, and 1777.7.¹ Aghapy did not deposit the full Assessment amount of unpaid wages and penalties with the Department of Industrial Relations pursuant to section 1742.1, subdivision (b).

Pursuant to notice dated November 29, 2017, a Hearing on the Merits was scheduled to commence on March 20, 2018. After continuances, a duly noticed telephonic Hearing on the Merits was held on May 11, 2018, before Hearing Officer Douglas P. Elliott. Lance A. Grucela appeared as counsel for DLSE. Aghapy did not appear.

At the Hearing, DLSE moved to amend the Assessment to decrease the apprenticeship penalties under section 1777.7 downward to \$16,000.00. There being no prejudice to Aghapy, the Hearing Officer granted DLSE's motion.

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

The issues for decision are:

- Whether the Assessment was timely served by DLSE in accordance with sections 1741 and 1741.1.
- Whether the affected contractor, Aghapy, filed a timely Request for Review of the Assessment issued by DLSE with respect to the Project.
- Whether all required training fund contributions were paid to an approved fund.
- Whether Aghapy is liable for penalties under section 1775 and whether the Labor Commissioner abused her discretion in setting 1775 penalties at the rate of \$120.00 per violation.
- Whether Aghapy is liable for penalties under section 1813 for overtime pay.
- Whether Aghapy is liable for penalties under section 1777.7 and whether the Labor Commissioner abused her discretion in setting 1777.7 penalties at the rate of \$250.00 per violation.
- Whether Aghapy is 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 Aghapy failed to carry its burden of proving the basis for the Assessment was incorrect. (See Cal. Code Regs., tit. 8, § 17250, subds. (a), (b).) Therefore, the Director issues this Decision affirming the Assessment, as amended.

Facts

Timeliness of Assessment.

On February 1, 2017, Aghapy filed a Motion for Dismissal of Assessment (Motion) and DLSE submitted an opposition to the Motion on February 16, 2017. On August 25, 2017, pursuant to Title 8, California Code of Regulations section 17227, subdivision (c), the Hearing Officer found that the Assessment was timely on the basis that the limitations period had been tolled pursuant to section 1741.1(b). The Hearing Officer denied Aghapy's Motion and ordered that the matter proceed to a Hearing on the Merits.

Failure to Appear.

Aghapy's Request for Review was filed on or about October 31, 2016. Aghapy failed to appear at a duly-noticed Prehearing Conference held in this matter on July 31, 2017. The Prehearing Conference was continued to September 8, 2017, at which time Aghapy's managing officer, Michael Michael, appeared for Aghapy and a date for a Hearing on the Merits was set. Aghapy again failed to appear at a duly-noticed final Prehearing Conference on January 22, 2017, and subsequently also failed to appear at the duly-noticed Hearing on the Merits.

The Hearing Officer proceeded to conduct the Hearing on the Merits for the purpose of formulating a recommended decision as warranted by the evidence pursuant to California Code of Regulations, title 8, section 17246(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's Exhibits Number 1-25 were admitted into evidence without objection and the matter was submitted on the evidentiary record based on the testimony of DLSE Deputy Labor Commissioner Lori Rivera.

The Assessment.

On or about October 17, 2013, the District issued a Notice for Request for Proposal for the Project. On December 19, 2013, the District and Aghapy entered into an agreement under which Aghapy agreed to conduct specified work for \$118,935.00 (Contract). Eleven workers performed work for Aghapy under the Contract at various times between January 22, 2014, and March 25, 2014. DLSE presented evidence that the following prevailing wage determinations, in effect on the date of the Notice for Request for Proposal applied to the Project: SC-32-31-20-2012-1, Fence Builder (Carpenter PWD); SC-23-63-2-2013-1, Operating Engineer (Operating Engineer PWD); SC-23-102-2-2013-1, Laborer and related classifications (Laborer PWD); SC-23-203-2-2013-1, Cement Mason (Cement Mason PWD); and C-20-X-1-2013-2, Ironworker (Ironworker PWD).

Deputy Labor Commissioner Rivera testified regarding the facts and conclusions of her investigation, the preparation of the Assessment, and the supporting audit worksheets. She

identified the certified payroll records (CPRs) received from Aghapy, information received from workers, and applicable prevailing wage determinations. She explained that Aghapy had misclassified the affected workers in various respects, and she identified the proper job classifications required for the work that had actually been performed. Rivera also testified that Aghapy failed to pay the required prevailing wages to ten workers identified in the DLSE audit summary, failed to report all hours worked, failed to make required fringe benefit contributions, failed to make required training fund contributions, failed to pay required overtime rates, and failed to pay required travel and subsistence payments. DLSE also presented evidence through Rivera that Aghapy failed to provide the required contract award information to all applicable apprenticeship committees in four crafts: Laborer, Operating Engineer, Cement Mason, and Ironworker. DLSE also presented evidence that Aghapy failed to request apprentices from the applicable apprenticeship committees, and failed to employ any apprentices at all on the Project. Finally, DLSE presented evidence that Aghapy knowingly committed a second or subsequent violation of section 1777.5 within a three-year period, and that the violation resulted in apprenticeship training not being provided.

Based on its investigation, DLSE's Assessment found a total of \$5,606.90 in unpaid prevailing wages; \$299.81 in unpaid training fund contributions; \$7,080.00 in penalties under section 1775, at the rate of \$120.00 per violation for 59 instances of failure to pay the applicable prevailing wages; \$650.00 in penalties under section 1813, at the rate of \$25.00 per violation for 26 instances of failure to pay the applicable overtime rates; and \$65,750.00 in penalties under section 1777.7, at the rate of \$250.00 per violation for 263 violations of the apprenticeship requirements.²

Rivera further testified that the Assessment was properly served on Aghapy on September 20, 2016. She testified that despite the written request DLSE provided to the District on March 30, 2015, the District had failed to provide DLSE with a copy of the notice of completion until January 21, 2016. She testified that she relied on the information appearing in the notice of completion setting a deadline to issue the Assessment, taking into account the

² As noted above, the amount of penalties under section 1777.7 was revised downward to \$16,000.00 pursuant to motion by DLSE.

tolling provision of section 1741.1, subdivision (b), as the information in the notice of completion appeared to be valid on its face and was confirmed by the District's written response provided to DLSE on January 21, 2016. The notice of completion was the only document the District provided to DLSE which evidenced the Project's acceptance on a particular date. Aghapy then filed a timely request for review on or about October 31, 2016, and DLSE provided Aghapy with a reasonable opportunity to review DLSE's evidence.

Discussion

The California Prevailing Wage Law (CWPL), set forth at Labor Code sections 1720 et seq., sets forth a scheme for determining and requiring the payment of prevailing wages to workers employed on public works projects. The purpose of the Prevailing Wage Law 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 both for the benefit of workers and “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); see *Lusardi* at p. 985.)

Section 1775, subdivision (a), of the CPWL requires, among other provisions, that contractors and subcontractors pay the difference to workers who were paid less than the prevailing wage rate, and prescribes penalties for failing to pay the prevailing wage rate. Section 1742.1, subdivision (a) provides for the imposition of liquidated damages, essentially a doubling

of the unpaid wages, if the wages are not paid within sixty days following service of a civil wage and penalty assessment under section 1741.³

Section 1813 requires that workers are compensated for overtime pay pursuant to section 1815 when they work in excess of 8 hours per day or more than 40 hours during a calendar week, and imposes a penalty of \$25.00 per day per worker for each violation. Unlike section 1775 above, section 1813 neither gives DLSE any discretion to reduce the amount of the penalty nor gives the Director any authority to limit or waive the penalty.

In general, and unless an exemption applies, section 1777.5 and the applicable regulations require the hiring of apprentices to perform one hour of work for every five hours of work performed by journeymen in the applicable craft or trade. (See Cal. Code Regs, tit. 8, § 230.1, subd. (a).) Prior to commencing work on a contract for public works, every contractor must submit contract award information to applicable apprenticeship programs that can supply apprentices to the project. (§ 1777.5, subd. (e).) The Division of Apprenticeship Standards (DAS) has prepared a form, DAS 140, that a contractor may use to submit contract award information to an applicable apprenticeship committee (Cal. Code Regs, tit. 8, §230, subd. (a).)

A contractor does not violate the requirement to employ apprentices in the 1:5 ratio if it has properly requested the dispatch of apprentices and no apprenticeship committee in the geographic area of the public works project dispatches apprentices during the pendency of the project, provided the contractor made the request in enough time to meet the required ratio. (§ 230.1, subd. (a).) DAS has prepared another form, DAS 142, that a contractor may use to request dispatch of apprentices from apprenticeship committees. Thus, the contractor is required to both notify apprenticeship programs of upcoming opportunities and to request dispatch of apprentices.

When DLSE determines that a violation of the prevailing wage laws has occurred, it may

³ On June 27, 2017, the Director's discretionary waiver power was deleted by legislative amendment from section 1742.1. (Stats. 2017, ch 28, § 16 (Sen. Bill 96)). Legislative enactments, however, are to be construed prospectively rather than retroactively, unless the legislature expresses its intent otherwise. (*Elsner v. Uveges* (2004) 34 Cal.4th 915, 936.) Here, there was no expression of legislative intent that SB 96 apply retroactively to pending cases. (Accord, *Kizer v. Hannah* (1989) 48 Cal.3d 1, 7 "A statute is retroactive if it substantially changes the legal effect of past events.") Accordingly, the prior version of section 1742.1 in effect on the date the Assessment was issued in this matter, will be applied.

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 this case, the record establishes the basis for the amended Assessment. DLSE presented evidence at the Hearing on the Merits supporting all elements of the amended Assessment, and Aghapy presented no evidence at the Hearing and, therefore, failed to disprove the basis for the amended Assessment. (Cal. Code Regs. tit. 8, § 17250, subd. (b); § 1742, subd. (b).) Moreover, failing to appear, Aghapy presented no substantial grounds for appealing the Assessment that would justify the waiver of liquidated damages.

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

FINDINGS AND ORDER

1. The Assessment was timely served by DLSE in accordance with Labor Code sections 1741 and 1741.1.
2. Affected contractor Aghapy Group, Inc. dba Aghapy Construction, Inc. filed a timely Request for Review of the Assessment issued by DLSE with respect to the Project.
3. The workers listed in the audit performed work in San Bernardino County during the pendency of the Project and were entitled to be paid the journeyman rate for that work in their respective crafts.

4. Aghapy Group, Inc. dba Aghapy Construction, Inc. underpaid prevailing wages to its employees on the Project in the aggregate amount of \$5,606.90.

5. Aghapy Group, Inc. dba Aghapy Construction, Inc. failed to pay training fund contributions for its employees on the Project in the aggregate amount of \$299.81.

6. The Labor Commissioner did not abuse her discretion in setting Labor Code section 1775 penalties at a rate of \$120.00 per violation, and the resulting total penalty of \$7,080.00 for 59 violations is affirmed.

7. Penalties under Labor Code section 1813 at the rate of \$25.00 per violation are due for 26 violations of the Project, for a total of \$650.00 in penalties.

8. Aghapy Group, Inc. dba Aghapy Construction, Inc. knowingly violated Labor Code section 1777.5 by failing to provide contract award information to all applicable apprenticeship committees in four crafts: Laborer, Operating Engineer, Cement Mason, and Ironworker.

9. Aghapy Group, Inc. dba Aghapy Construction, Inc. knowingly violated Labor Code section 1777.5 by employing journeymen in the crafts of Laborer, Operating Engineer, Cement Mason, and Ironworker, but failing to employ any apprentices in those crafts.

10. The Labor Commissioner did not abuse her discretion in setting section penalties at a rate of \$250.00 per violation, and Aghapy Group, Inc. dba Aghapy Construction, Inc. is liable for an aggregate penalty under Labor Code section 1777.7 in the sum of \$16,000.00, computed at \$250.00 per day for the 64 days between January 21, 2014, and March 25, 2014.

11. Aghapy Group, Inc. dba Aghapy Construction, Inc. is liable for liquidated damages in the amount of \$5,606.90.

12. The amounts found due in the Assessment affirmed by this Decision are as follows:

Wages:	\$5,606.90
Training fund contributions:	\$299.81

Penalties under section 1775, subdivision (a):	\$7,080.00
Penalties under section 1813:	\$650.00
Penalties under section 1777.7:	\$16,000.00
Liquidated damages:	\$5,606.90
TOTAL:	\$35,243.61

In addition, interest is due from Aghapy Group, Inc. dba Aghapy Construction, Inc. and shall accrue on unpaid wages in accordance with Labor Code section 1741, subdivision (b).

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

Dated: April 24, 2019



Victoria Hassid
 Chief Deputy Director
 Department of Industrial Relations⁴

⁴ See Government Code sections 7, 11200.4.