STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

D7 Roofing Services, Inc. and
Deacon Corp.

Case Nos.: 17-0226-PWH
17-0229-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 Deacon Corp. (Deacon) and subcontractor D7 Roofing Services, Inc. (D7 Roofing) submitted timely requests for review of a Civil Wage and Penalty Assessment (Assessment). The Division of Labor Standards Enforcement (DLSE) issued the Assessment on April 21, 2017, with respect to roofing work performed for awarding body CHHP, L.P. on the Hayward Affordable Housing Units Project (Project) located in the County of Alameda. The Assessment determined that Deacon and D7 Roofing owed $26,703.45 in unpaid prevailing wages, $44,160.00 in penalties under Labor Code section 1775, and $275.00 in penalties under Labor Code section 1813.[1]

The Hearing on the Merits took place in Sacramento, California before Hearing Officer Gayle T. Oshima on February 22, 2018. Deborah Wilder appeared for both Deacon and D7 Roofing (collectively, Requesting Parties). David Cross appeared for DLSE. Jerry McClain, Deputy Labor Commissioner, and Christopher Kim, Senior Deputy Labor Commissioner, testified for DLSE; Neil Lendzion, D7 Roofing's superintendent, and Amy White, D7 Roofing Chief Financial Officer, testified for Requesting Parties.

At the Hearing, the Hearing Officer granted DLSE's written motion of February 8, 2018, to amend the Assessment downward. The Amended Assessment imposed $19,819.04

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

in unpaid prevailing wages, $43,600.00 in penalties under section 1775, and $275.00 in penalties under section 1813.

At the Hearing, the parties stipulated to the following issues for decision:

- Were all workers paid correctly for required travel time and expenses?
- Was the required overtime rate paid for all overtime hours worked?
- Is D7 Roofing Services, Inc. liable for penalties under section 1775?
- Is D7 Roofing Services, Inc. liable for penalties under section 1813?
- Are Deacon Corporation and D7 Roofing Services, Inc. liable for liquidated damages?

The parties also stipulated that prime contractor, Deacon, met the safe harbor requirements of section 1775, subdivision (b) as to prime contractor liability for penalties for underpayment of prevailing wages by a subcontractor.[2]

After the parties submitted post-hearing briefing on March 19, 2018, and April 9, 2018, the matter was submitted for decision.

The core issue in this case is whether, within the meaning of the applicable prevailing wage determination, D7 Roofing's "shop" was a regular, established place of business that was in actual existence and operating at least one hundred twenty (120) days from the beginning of a job. If the shop met the wage determination's definition of "shop," and the job site fell within the free zone of a forty-five (45) mile radius from the shop, D7 Roofing would not be liable to reimburse workers for their travel expenses to the job site. If the shop was not a regular, established shop, or if the job site was not within the free zone, the reimbursement obligation for travel expenses would apply.

For the reasons set forth below, the Director finds that Requesting Parties have carried their burden of proving the basis for the Amended Assessment was incorrect in that the shop in question qualified as a regular, established place of business, and the job site was within the free zone from that site, such that D7 Roofing was not liable to reimburse employees for

[2] DLSE also stipulated that Deacon is not liable for penalties assessed against D7 Roofing under section 1813. At the Hearing, however, D7 Roofing showed that the subject worker had been paid overtime wages owed and on that basis DLSE withdrew its overtime claim.

travel expense. (See Cal. Code Regs., tit. 8, § 17250, subds. (a), (b).) Accordingly, the Director of Industrial Relations issues this Decision dismissing the Amended Assessment in its entirety.

FACTS

The Project was advertised for bid on December 3, 2015. The awarding body selected Deacon as prime contractor; Deacon in turn subcontracted the roofing work to D7 Roofing. Located in Hayward, California, the Project involved the rehabilitation of existing affordable family housing. Derived from the collective bargaining agreement between the Associated Roofing Contractors of Bay Area Counties and Local Union No. 81 of the United Union of Roofers, Waterproofers and Allied Workers, the applicable prevailing wage determination as of the bid advertisement date was Roofer, Alameda County 2015-2 ("Roofer PWD," DLSE Exhibit Nos. 12 and 13).

The Roofer PWD scope of work governs employee entitlement to travel time payable at applicable straight time and overtime wage rates, travel expense reimbursement, and mileage allowance.[3] The Roofer PWD provides a "free zone" measured by a forty-five (45) mile radius from the "Individual Employer's shop" to the job site. With certain exceptions not at issue in the Assessment, if the job site is located within the free zone, no travel time, travel expense reimbursement, or mileage allowance is required to be paid to the employee. (Roofer PWD, Article XII, §§ 1, 3(a).) For travel beyond the free zone, the employer is required to pay the employee thirty-six dollars ($36.00) per day as travel expenses.[4] (Roofer PWD, Article XII, § 3(b).) Alternatively, instead of the daily travel expense payment, and at the employer's option, the employer may choose to pay actual time wages to employees for travel beyond the radius of the free zone to and from the job site. (Roofer PWD, Article XII, § 3(c).)

Further, the Roofer PWD provides a definition of an employer's "shop," as follows:

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[3] The Assessment implicated only the travel expense reimbursement required under the Roofer PWD, not travel time wages or the mileage allowance provisions.

[4] Under predetermined increases under the Roofer PWD, the reimbursement rate for travel expenses beyond the free zone increased from $34.00 to $36.00 per day by the date of the Project.

> For purpose of clarification, a shop shall be defined as a regular established place of business in which roofing materials are regularly stored and from which workmen and equipment are dispatched. Any Individual Employer establishing an additional shop or shops must have them in actual existence and operating one hundred twenty (120) days before a job-site is started for the purposes of this ARTICLE.
>
> ...For any Individual Employer with an established shop located in Alameda or Contra Costa Counties and doing work within Alameda or Contra Costa Counties, the Employer shall use his/her established shop as defined in Section 4(a) for purposes of this ARTICLE.

(Roofer PWD, Article XII, § 4(a) and (b)(i).)

The Project began on March 15, 2016. As reported in the certified payroll records, D7 Roofing began its roofing work on May 16, 2016. According to the Notice of Completion, the work on the Project was completed on February 27, 2017, and the Notice of Completion was recorded on March 9, 2017.

D7 Roofing's main office is located in Sacramento, California. D7 Roofing established a shop by leasing property on the following dates and at the following locations:

Date of Lease	**Address**
March 20, 2012 to July 2, 2013	7083 Commerce Circle, Pleasanton
July 3, 2013 to June 30, 2016	2134 Rheem Dr., Pleasanton
July 1, 2016 to Present	35 Rickenbacker Circle, Livermore

Deputy Labor Commissioner McClain prepared the Assessment and Amended Assessment against D7 Roofing and Deacon. McClain testified at the Hearing on the Merits that, based upon a complaint lodged by David Miller of the Bay Area Roofers Labor Management Trust relating to alleged travel and subsistence violations and training fund contribution violations, he undertook an investigation of D7 Roofing. He discovered violations of underpayment of wages resulting from a failure to pay travel expenses. McClain testified his Internet research for addresses of D7 Roofing disclosed that its office was in Sacramento and that businesses other than D7 Roofing were located at the Pleasanton and Livermore addresses. Shortly before the Assessment was issued, Miller reported to McClain that a company called Power Team Washing was located at the Livermore location. McClain

also testified that because the lease for the shop in Livermore began on July 1, 2016, the Livermore shop did not exist 120 days prior to the start of the Project within the meaning of the Roofer PWD. Based on that conclusion, McClain calculated travel expenses from D7 Roofing's Sacramento office, not from the Livermore shop.[5]

D7 Roofing Chief Financial Officer White testified that D7 Roofing did, in fact, have a regular, established business first at each of the Pleasanton locations, and later at the Livermore location. She identified the leases for each location, and explained that the owner of the building had leased part of the space to D7 Roofing and the other part to the owner's daughter, who ran the Power Team Washing business that Miller reported to DLSE. White testified that D7 Roofing treated the Pleasanton and Livermore locations as one continuous, regular place of business since 2012. White also testified that the D7 Roofing considers its Sacramento office as the headquarters where staff performs management and administrative duties for both the Sacramento office and the other shop. She testified that while some Northern California roofing jobs were dispatched from the Sacramento office, Bay Area roofing jobs, including those performed on the Project, were dispatched from the Pleasanton shop and, later, the Livermore shop. White further testified that D7 Roofing dispatched apprentices from the Sacramento office. For this Project, apprentices were dispatched from Sacramento.

D7 Roofing's superintendent Lendzion testified that he scheduled projects from his office in the D7 Roofing shop, first at the Pleasanton locations, and later at the Livermore location. None of those shop locations overlapped with each other, in that on the same day the second Pleasanton shop closed at the end of its lease, the Livermore shop opened under a new lease. Lendzion testified that in connection with the move to Livermore, D7 Roofing had fewer workers and did not need as large a space as it had in Pleasanton. Lendzion also testified that D7 Roofing stored equipment and roofing materials at the Pleasanton and Livermore shops, and that he utilized the Livermore shop as his office from which he dispatched workers to job sites, including the one for the Project, and provided wage checks for foremen to distribute. He also testified that D7 Roofing used the leased offices with

[5] The parties agreed that the Project was located within the forty-five (45) mile radius free zone from the Livermore shop, and was only about five (5) miles away from the prior Pleasanton shop.

accompanying yards and parking lots, at both the Pleasanton and Livermore shops, for regularly parking trucks and keeping other larger equipment on the premises.

DISCUSSION

Labor Code section 1720, et seq. (the California "Prevailing Wage Law") sets forth a scheme for determining and requiring the payment of prevailing wages to workers employed on public works construction projects. The purpose of these provisions has been summarized 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 the prevailing wage requirements for the benefit of not only 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 985.)

Subdivision (a) of section 1775, requires, among other provisions, that contractors and subcontractors pay the difference to workers who received less than the prevailing rate; section 1775, subdivision (a) also prescribes penalties for failing to pay the prevailing rate. Section 1742.1, subdivision (a), provides for the imposition of liquidated damages, if those wages are not paid within sixty days following the service of a civil wage and penalty assessment under section 1741.

When DLSE determines that a violation of the prevailing wage laws has occurred, including with respect to any violation of the apprenticeship and/or certified payroll records requirements, a written civil wage and penalty assessment is issued pursuant to section 1741. An affected contractor may appeal that assessment by filing a request for review under section

1742. DLSE has the initial burden of providing evidence that "provides prima facie support for the Assessment ...." (Cal. Code Regs., tit. 8, § 17250, subd. (a).) When that initial 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).)

No Travel Expense Reimbursements Are Due.

Under the Prevailing Wage Law, per diem wages include payments by the employer for travel and subsistence. (§ 1773.1, subd. (a).) In determining the wage rate, the Director of Industrial Relations considers the prevailing rate for the craft in the locality by referencing applicable collective bargaining agreements. (§ 1773.)

The applicable prevailing wage determination here, the Roofer PWD, specifies that there is a free zone, measured by a forty-five (45) mile radius from the employer's shop, wherein no travel time or expense reimbursement is required to be paid the employee. (Roofer PWD, Article XII, § 3.) It is undisputed that the Project falls within this free zone whether measured from the Pleasanton shop or the Livermore shop.

DLSE issued the Assessment on the grounds and with the apparent belief that the Pleasanton and Livermore locations did not qualify as "shops" for D7 Roofing under the provisions of the Roofer PWD. The evidence at the Hearing, however, demonstrated otherwise. The testimony of D7 Roofing's superintendent, buttressed by copies of the relevant leases and photographs, demonstrates that D7 Roofing workers were dispatched from, and materials, trucks, and equipment were regularly stored at, the Livermore shop. Post-hearing, and in light of the evidence, DLSE does not contend otherwise.[6] The two Pleasanton shops and the Livermore shop together constituted "a regular established place of business in which roofing materials are regularly stored" and from which workers and equipment were dispatched, within the meaning of "additional shop" as contained in the first

[6] DLSE does point out that apprentices were dispatched from D7 Roofing's Sacramento headquarters and that the Sacramento address was listed on CPRs and worker paychecks. The Roofer PWD, however, does not require all workers be dispatched from an established additional shop, and it does not prevent some administrative work being conducted away from an additional shop. It suffices that an additional shop is a "regular established place of business in which roofing materials are regularly stored and from which workmen and equipment are dispatched." (Roofer PWD, Article XII, § 4(a).) The D7 Roofing Livermore shop meets those criteria.

sentence in Article XII, section 4(a) of the Roofers PWD."

The second sentence of Article XII, section 4(a) of the Roofer PWD provides that "Any Individual Employer establishing an additional shop or shops must have them in actual existence and operating one hundred twenty (120) days before a job-site is started ...." Here, although D7 Roofing's present Livermore shop was not leased until after the Project began, the prior Pleasanton shop, leased from July 3, 2013 to June 30, 2016, clearly qualifies under this provision, and the Livermore shop, leased shortly after the Project began, was only five miles from the prior location in Pleasanton. As such, the evidence showed that D7 Roofing conducted regular business in the Bay Area from the Pleasanton and Livermore locations, storing roofing materials there and dispatching employees and equipment from the shop. Further, as noted, the Project was well within the 45-mile radius free zone from both the Pleasanton and Livermore shops.

As the Pleasanton location closed simultaneously with the opening of the Livermore location, the Livermore shop cannot properly be viewed as the establishment of an "additional shop" within the meaning of the second sentence of section 4(a) of the Roofer PWD. D7 Roofing may have moved the Pleasanton shop to Livermore, but that does not mean it established an "additional shop" when it moved. The 120-day restriction for establishing an "additional shop" in the Roofer PWD prevents an employer from establishing a sham or temporary shop for the purpose of manipulating the free zone perimeter and evading the travel time and expense requirements contained in the Roofer PWD. The Livermore shop, however, was not shown to be a sham or temporary shop given the regular and continued use D7 Roofing has made of the shop. Since D7 Roofing had established a regular place of business in Pleasanton, which was in actual existence and operating over 120 days before the Project began, despite the fact that on July 1, 2016, D7 Roofing moved it to Livermore, D7 Roofing's location in Livermore qualified as a "shop" within the meaning of section 4(a) of the Roofer PWD.

As D7 Roofing's shop at Livermore was a regular, established place of business that was in actual existence and operating at least 120 days from the beginning of the Project, D7 Roofing is not liable for the travel expense reimbursement under the Roofing PWD.

All Other Issues Are Moot.

In light of the determination made above, all other issues arising under the Assessment are moot and need not be addressed, in that the alleged penalties under section 1775 are premised on the alleged underpayment of travel expense reimbursements.

FINDINGS

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

1. Affected prime contractor Deacon Corp., and affected subcontractor, D7 Roofing, Inc. timely requested review of a Civil Wage and Penalty Assessment issued by the Division of Labor Standards Enforcement with respect to the work performed on the Hayward Affordable Housing Project in Hayward, California.

2. The Assessment was issued timely.

3. D7 Roofing, Inc. and Deacon Corp. are not liable for travel expense reimbursements for the Project.

4. All other issues are moot.

ORDER

The Amended Civil Wage and Penalty Assessment is dismissed in full as set forth in the above Findings. The Hearing Officer shall issue a Notice of Findings which shall be served with this Decision on the Parties.

Dated: 11/9/18

André Schoorl
Acting Director of Industrial Relations