STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Alpha Plumbing & Mechanical, Inc. Case No. 12-0003-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected contractor Alpha Plumbing & Mechanical, Inc. (Alpha), requested review of a Civil Wage and Penalty Assessment (Assessment) issued by the Division of Labor Standards Enforcement (DLSE) with respect to the work of improvement known as the Santa Maria Court Clerk's Building (Project) performed for the County of Santa Barbara, Capital Projects Group, in Santa Maria, Santa Barbara County. The Assessment determined that $5,500.00 in statutory penalties was due. A hearing on the merits was held on April 13, 2012, in Los Angeles, California, before Hearing Officer John J. Korbol. David D. Cross appeared for DLSE. Rachel Farmer, DLSE Deputy Labor Commissioner, testified in person. Daniel Gooley appeared and testified for Alpha as its General Manager.

The issue for decision is whether DLSE properly assessed penalties against Alpha pursuant to Labor Code section 1776, subdivision (g)[1] for Alpha's failure to timely furnish certified payroll records (CPRs) to DLSE after receipt of DLSE's request for copies of the CPRs.

The Director of Industrial Relations finds that Alpha failed to meet its burden of proving it should not be assessed a penalty under subdivision (g) for failing timely to furnish the records to DLSE. However, DLSE incorrectly calculated the penalty. Accordingly, this Decision reduces the assessment from $5,500.00 to $4,800.00. Therefore, this Decision affirms but modifies the Assessment.

FACTS

Alpha entered into a subcontract with the prime contractor, Vernon Edwards Constructors, Inc., to install or build certain mechanical, heating, and plumbing components of the Project. In the course of investigating complaints that Alpha was failing to list workers on its CPRs, Farmer mailed to Alpha by certified mail a Request for Certified Payroll Records (Request). The Request asked that Alpha submit CPRs to DLSE for all workers employed on the Project, stated that it was a formal request authorized by section 1776, and provided that failure to produce the records to DLSE within 10 "working days after receipt of the Request" would subject Alpha to a penalty of $25.00 per day for each worker until the records were received. The Request was delivered to and signed by a representative of Alpha on August 29, 2011.[2]

On September 6, 2011, Gooley reached Farmer by telephone. Both Farmer and Gooley testified that the content of their telephonic discussion covered the Request, the Project, and a few other cases involving Alpha that were currently under review by another DLSE Deputy Labor Commissioner, Sherry Gentry. The substance of that discussion is disputed by Farmer and Gooley; each has a different and contradictory version.

Farmer testified that she customarily kept notes of her telephone calls with contractors in her case file; Farmer's notes from this case file were admitted into evidence. In pertinent part, Farmer's notes state that a file had been set up, that Gooley confirmed receipt of the Request, and that Farmer advised Gooley "we would need CPR's from start to finish." Farmer's notes also reflect that she provided Gooley with her e-mail address and that Gooley "stated he would start gathering CPR's." Farmer denied that Gooley asked for an extension of time within which to comply with the Request and further stated that she was without authority to grant such a request if one had been made.

Gooley testified that he was told by Farmer during the September 6, 2011, phone call that Farmer did not yet have a case file and that when she did, she would generate a second request

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[1] All further statutory references are to the California Labor Code unless otherwise specified. References to "subdivision (g)" are to section 1776, subdivision (g).

[2] Gooley testified that the postal receipt appears to have been signed by his sister. In any event, Alpha's receipt of the Request as of August 29, 2011, is not in dispute.

for CPRs. Moreover, Farmer allegedly agreed that Gooley could provide CPRs in response to the second, future request.

A second request for CPRs was never generated, and ultimately it was the prime contractor, not Alpha, who served DLSE with the Alpha's CPRs as of November 1, 2011. Because Farmer had not previously been provided these records by Alpha, she prepared the Assessment on the same date. It assessed a $5,500.00 penalty against Alpha under subdivision (g) for failure to furnish the CPRs. Farmer testified that she calculated the Assessment based on the daily employment of four workers, at $25.00 per day per worker for the period commencing September 7, 2011.[3] The Assessment states in part "Pursuant to Labor Code Section 1776 (g), the contractor shall forfeit $25.00 for each calendar day for each worker until compliance is effectuated ... ."

Alpha submitted its request for review dated November 30, 2011. The document is signed by Gooley, and one ground for his objection to the Assessment states:

> Originally spoke with the deputy about this case on the date of acknowledgement about what was required and needed. Deputy explained she did not have the case file could not help me until she received the case file. She said additionally a request would be sent out from here (*sic*) office and to disregard the current request because she did not have the case file and could not help me out with it.

This was the first and only instance where Gooley put in writing his version of the substance of his single telephone call with Farmer nearly two months previously. Gooley conceded that he had not contemporaneously summarized or confirmed his understanding of the outcome of his telephone discussion with Farmer that he could defer the production of Alpha's CPRs in writing, by e-mail or by letter.

DISCUSSION

Section 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 investigates and enforces prevailing wage requirements not only for the benefit of workers but

[3] The time period covered by the Assessment was apparently drafted to be open-ended. However, at the Hearing on the Merits, DLSE stipulated that it would not seek additional penalties against Alpha beyond October 31, 2011, the day before the prime contractor furnished DLSE with Alpha's CPRs. Accordingly, the Assessment covers a 55-day period running from September 7, 2011, up to and including October 31, 2011.

also "to ensure employees are not required or permitted to work under substandard conditions ... 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), and *see Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 985.)

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 may appeal that assessment by filing a Request for Review under section 1742. Subdivision (b) of section 1742 provides in part that "The contractor or subcontractor shall have the burden of proving that the basis for the civil wage and penalty assessment is incorrect."

Each contractor and subcontractor employing workers on a public works project is required to maintain payroll records pursuant to section 1776 and to furnish CPRs upon request to DLSE. Failure to provide such records to DLSE within 10 days of written notice subjects the contractor or subcontractor to statutory penalties. (Subd. (g).)

Section 1776 provides in relevant part as follows:

> (a) Each contractor and subcontractor shall keep accurate payroll records, showing the name, address, social security number, work classification, straight and overtime hours worked each day and week, and the actual per diem wages paid to each journeyman, apprentice, worker, or other employee employed by him or her in connection with the public work. ...
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> * * *
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> (b) The payroll records enumerated under subdivision (a) shall be certified and shall be available for inspection at all reasonable hours at the principal office of the contractor on the following basis:
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> * * *
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> (2) A certified copy of all payroll records enumerated in subdivision (a) shall be made available for inspection or furnished upon request to a representative of the body awarding the contract, the Division of Labor Standards Enforcement, and the Division of Apprenticeship Standards of the Department of Industrial Relations.
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> * * *
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> (g) The contractor or subcontractor has 10 days on which to comply subsequent to receipt of a written notice requesting the records enumerated in subdivision (a). In the event that the contractor or subcontractor fails to comply

> within the 10-day period, he or she *shall*, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25) for each calendar day, or portion thereof, for each worker, until *strict compliance* is effectuated. ... (Italics added.)

Section 1776 does not give DLSE any discretion to reduce the amount of the penalty, nor does it give the Director any authority to limit or waive the penalty. Instead, the Legislature has clearly provided that if a contractor fails to provide CPRs when requested, a penalty is mandatory until the payroll records are forthcoming, i.e., until there is "strict compliance" with DLSE's request that the records be furnished to it.

At the Hearing on the Merits, Gooley reiterated Alpha's stance as stated in the request for review: he was informed by Farmer that Alpha could disregard the Request pending Farmer's preparation of a second later request for CPRs, a request that was never generated. In essence, Alpha's defense is that DLSE should be equitably estopped from pursuing section 1776 penalties by virtue of the fact that Alpha was induced to rely on a misrepresentation by Farmer.

The elements of the defense of equitable estoppel are: (1) a representation or concealment of material facts (2) made with actual or virtual knowledge of the facts (3) to a party that is actually and permissibly ignorant of the truth (4) with the intention that the ignorant party act on it, and (5) that party was induced to act on it. If any one of these elements is missing there can be no estoppel. (13 Witkin, Summary of Cal. Law (10th ed. 2005) Equity, § 191, pp. 527-528.)

Alpha bears the burden of establishing the defense by a preponderance of the evidence.[4] At the Hearing on the Merits, both Farmer and Gooley testified credibly. The issue of whether Farmer told Gooley to disregard the Request and whether this alleged statement constituted a misrepresentation must be decided by looking at other evidence in the record. Farmer's notes constitute the only other evidence in the record bearing on this issue, and those notes corroborate Farmer's oral testimony. The notes reflect that, contrary to Gooley's assertion, Farmer did possess a file on this matter when she conversed with Gooley on September 6, 2011. The notes also corroborate Farmer's recollection that she did not tell Gooley to ignore the Request, but

[4] Under Rule 50, Alpha has the burden of proving that the Assessment is incorrect, and "the quantum of proof required to establish the existence or non-existence of any fact shall be by a preponderance of the evidence". (Cal. Code Regs., tit. 8, § 17250, subd. (b) and (d)).

reiterated DLSE's need to obtain Alpha's CPRs. Accordingly, based on the preponderance of the evidence, Alpha has not met its burden of presenting evidence to establish the alleged misrepresentation by Farmer on behalf of DLSE, and the defense of equitable estoppel fails.

Subdivision (g) provides contractors and subcontractors 10 days to comply with a written notice to provide DLSE with CPRs. It further provides that penalties "shall" be paid for each calendar day, or portion thereof, until the request is complied with; i.e. the imposition of penalties for failure to comply is mandatory. Accordingly, DLSE properly assessed penalties against Alpha for its failure to furnish the CPRs within the time permitted.

However, DLSE has not properly calculated the dollar amount of the penalties based on the time it gave Alpha to comply per the terms of the Request. California Code of Regulations, title 8, section 16000 provides that "days unless otherwise specified means calendar days." Here, DLSE's Request "otherwise specified" that the time within which Alpha had to furnish CPRs was 10 "working days" rather than calendar days, and this is the time period that will apply in this case.[5] Because Monday, September 5, 2011, was a State Holiday and there were two intervening weekends, the last working day for Alpha to respond to the Request without penalty was Tuesday, September 13, 2011. Penalties could not start to run until the following day, September 14, 2011. DLSE incorrectly assessed penalties beginning September 7, 2011. Thus, the assessed penalties are correctly calculated for the period September 14, 2011, through October 31, 2011, amounting to 48 days of non-compliance at $25.00 per day for four workers for a total penalty assessment of $4,800.00 rather than $5,500.00.

FINDINGS AND ORDER

1. Affected subcontractor Alpha Plumbing & Mechanical, Inc. filed a timely Request for Review from a Civil Wage and Penalty Assessment issued by the Division of Labor Standards Enforcement.

[5] A "working day" is defined in the regulations as "any day that is not a Saturday, Sunday, or State holiday ... ." (Cal. Code Regs., tit. 8, § 17202, subd. (o).)

2. Alpha provided workers to a public works project, the Santa Maria Court Clerk's building, pursuant to construction contract with the prime contractor, Vernon Edwards Constructors, Inc.

3. Alpha was required to accurately keep and certify payroll records for workers employed on the Project pursuant to the provisions of section 1776.

4. On August 26, 2011, DLSE mailed to Alpha a Request for Certified Payroll Records. The Request was received by an employee or representative of Alpha on August 29, 2011. The Request required Alpha to produce certified copies of its payroll records to DLSE for all workers employed on the Project within 10 working days of receipt of the Request or be subject to penalties under subdivision (g) of $25.00 per calendar day or portion thereof for each worker until the records were received.

5. Alpha's payroll records were received by DLSE from the prime contractor on November 1, 2011.

6. Alpha failed to meet its burden that it was not subject to penalties under section 1776, subdivision (g).

7. DLSE properly assessed penalties against Alpha under section 1776, subdivision (g) for its failure to provide the payroll records to DLSE within 10 working days of August 29, 2011. However, DLSE incorrectly calculated the penalties by assessing penalties beginning September 7, 2011. Because September 5, 2011, was the Labor Day holiday, September 13, 2011, was the tenth working day after receipt of the Request thus the last day on which Alpha could comply without penalty.

8. In light of Finding 7, above, Alpha is liable for penalties under section 1776, subdivision (g) in the total amount of $4,800.00.

The Civil Wage and Penalty Assessment is modified and affirmed 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: 5/25/2012

Christine Baker
Director of Industrial Relations