

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

United GLI, Inc.

Case No. 15-0390-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement.

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected contractor United GLI, Inc. (“GLI”) submitted a timely request for review of a Civil Wage and Penalty Assessment (“Assessment”) issued by the Division of Labor Standards Enforcement (“DLSE”) with respect to work performed by GLI on the construction of the West Shores High School Athletic Field Improvement Project (“Project”) in Imperial County. The Assessment determined that \$10,246.40 in unpaid prevailing wages and statutory penalties was due. A Hearing on the Merits occurred on May 6, 2016, in Los Angeles, California, before Hearing Officer Douglas P. Elliott. Tony J. Cunzio appeared for GLI and Abdel Nassar appeared for DLSE.

The issues for decision are:

- Whether the Assessment was timely served.
- Whether the Assessment correctly found that GLI misclassified worker Jose Bernal.
- Whether the Assessment correctly found that GLI failed to pay worker Jose Bernal the applicable prevailing wage for all hours worked.
- Whether GLI is liable for penalties under Labor Code section 1775.¹
- Whether GLI is liable for penalties under section 1813.

¹ All further statutory references are to the California Labor Code, unless otherwise indicated.

- Whether GLI is liable for liquidated damages under section 1742.1.

In this Decision, the Director finds that GLI has proven by a preponderance of evidence that it correctly classified Jose Bernal and paid him the applicable prevailing wage for all hours worked. Accordingly, no unpaid wages are due and GLI is not liable for penalties under section 1775 or section 1813, or for liquidated damages under section 1742.1. Therefore, the Director of Industrial Relations issues this decision dismissing the Assessment.

FACTS

The Coachella Valley Unified School District (“District”) published a Notice Inviting Bids for the Project on or about June 4, 2013, and awarded the contract to Tri-Star Contracting II, Inc. (“Tri-Star”) in August 2013. Tri-Star subcontracted with GLI in January 2014 to perform all of the landscaping and irrigation system installation for the Project. GLI’s work on the Project included, among other things, installation of irrigation pipes and valves, planting of trees, and installation of stone walkways. GLI’s employees worked on the Project from approximately March 10, 2014, through September 19, 2014.

The applicable prevailing wage determination (“PWD”) in effect when the Project was bid is: Landscape/Irrigation Laborer/Tender for Southern California (SC-102-X-14-2013-2). That PWD set the rates used in the Assessment for all landscape/irrigation work at issue.

On March 4, 2011, the Department of Industrial Relations (“DIR”) issued a Scope of Work Provision relevant to the above determination. That Provision incorporated language from the Landscape Agreement between the Southern California District Council of Laborers and the Southern California Contractors Association, providing in pertinent part:

A. Work covered by this Agreement includes all work in the landscape industry, defined as follows: Decorative landscaping, such as decorative walls, pools, ponds, reflecting units, lighting displays low voltage, handgrade landscaped areas, tractor grade landscaped areas, finish rake landscape areas, spread top soil, build mounds, trench for irrigation manual or power, layout for irrigation, backfill trenches, asphalt, plant shrubs, trees (including removal, relocation and trimming of trees on construction projects), vines, set boulders, seed lawns, lay sod; hydro seed; use ground covers such as flatted plant materials, rock rip rap, colored rock, crushed rock, pea gravel, and any other landscapable

ground covers; installation of header boards and cement mowing edges; soil preparation such as wood shavings, fertilizers, organic, chemical or synthetic; top dress ground cover areas with bark or any wood residual or other specified top dressing, operation of any equipment, as directed by the Contractor, for the installation of landscaping and irrigation work.

In addition to the above paragraph, the work covered by this Agreement shall include but not be limited to:

1. All work involved in the distribution, laying, and installation of landscaping irrigation pipe, the installation of low voltage automatic irrigation and lawn sprinkler systems, including but not limited to, the installation of automatic controllers, valves, sensors, master control panels, display boards, junction boxes and conductors including all components thereof.
2. Installation of valve boxes, thrust blocks, both precast and poured in place, pipe hangers and supports incidental to the installation of the entire piping system.

...

C. The following conditions apply to the use of the Tenders classification for Landscape/Irrigation work:

1. Tenders may only perform the following work on landscape/irrigation projects:

Assisting the Landscape Laborer with wire installation, unloading of materials, distribution of pipe, stacking of sprinkler heads and risers, the setting of valve boxes and thrust block, both precast and poured in place, cleaning and backfilling trenches with a shovel, cleanup and watering during construction and all other landscaping, planting and all work involved in laying and installation of landscape irrigation systems. ...

DLSE issued the Assessment on September 23, 2015. The Assessment found that GLI had misclassified one worker as a Landscape Tender while he was actually performing the work of a Landscape Laborer, and that GLI therefore failed to pay that worker the correct prevailing wage. The Assessment found a total of \$6,741.40 in unpaid prevailing wages for hours worked between August 5, 2014, and September 12, 2014. Penalties were assessed under section 1775 at the rate of \$120.00 per violation. A penalty was assessed under section 1813 at \$25.00 for a single day.

Classification And Payment Of Jose Bernal: DLSE's investigation was triggered by a complaint from worker Jose Bernal ("Bernal") submitted by the Center for Contract Compliance. In that complaint, Bernal alleged that he had not been properly paid for work performed as a Landscape Laborer, and described the work as "placing and setting rocks in mortar."

DLSE's assigned Industrial Relations Representative, Karen Betancur, obtained a completed Employee Questionnaire from Bernal dated January 7, 2015. In that document Bernal stated that his job title was "Construction Work," described the work he performed as "attaching stone with cement," and listed the tools used as "trowel, hammer, level." He stated that he was paid \$16.06 per hour for straight time and \$18.00 per hour for overtime. Betancur subsequently obtained a sworn declaration from Bernal dated August 6, 2015. In the declaration he again described the work performed: "I worked sticking/attaching stone with cement. I used a trowel a hammer a level." For tools and equipment on the job, he again listed "a trowel, a hammer and a level." He stated that his job title was "Landscape Laborer." Bernal additionally declared: "Francisco and Rigoberto did the same job as I did , and they earned 46 dollar per hours [sic] and I was paid 16.06 an hour as an assistant but I was not an assistant I would do the same job they did—attaching rock."

Betancur sent questionnaires to the other GLI employees on the Project, but received no responses. She did not interview any employees other than Bernal. GLI submitted Certified Payroll Records ("CPRs") but did not provide additional information. The CPRs indicate that Bernal was employed as a Landscape/Irrigation Tender on the Project from August 5 through September 12, 2014.

At the Hearing on the Merits, Bernal testified that he has worked in the construction industry for fifteen to twenty years, and has done landscaping, roofing, framing and cement work. He stated that he began working for GLI in June or July of 2014, and that he worked on the Project around then. After being shown his declaration, he clarified that he had worked on the Project from August 5 through September 12, 2014. He stated that his duties were to attach stones and adhere them with cement, and that he worked eight or nine hours per day doing nothing but this. He worked with several other employees. One would make the mix, another would transport it in a wheelbarrow, and he and three other workers attached the stones. Other workers on the Project laid pipe and dug holes for trees. Bernal denied assisting any other workers on the Project, reiterating that "my job was attaching the stone." He stated that he was assisted by Francisco, whose surname he did not know. (He stated it was not Francisco Cinco, so his reference was apparently to Francisco Sanchez, who is listed as a Tender in the CPRs.)

Bernal said that Francisco Sanchez used a wheelbarrow to transport stone.

Bernal identified a photograph as showing him at work on the Project and stated that it was taken by Francisco (Sanchez) at his request. The photo appears to show Bernal kneeling by a stone walkway under construction, with his right hand on a paving stone. On cross-examination, Bernal acknowledged that while on the job, he was required to wear a GLI shirt bearing the company logo. He does not appear to be wearing such a shirt in the photo.

Bernal testified that after working on the Project, he worked for GLI on a golf course in Borrego Springs from September until January. His work there consisted of attaching and connecting pipe. He was paid \$12.00 per hour for that job.

GLI's witnesses painted a somewhat different picture. Rigoberto Sanchez testified that he had worked for GLI for the past four years, and had done work for them prior to that. He was classified as a Laborer on the Project, and had a Tender assisting him. He would do whatever work he was assigned, and his jobs would sometimes change from one week to another. Sanchez worked on the irrigation system, positioning boxes where the water pump goes. Bernal assisted him, cleaning the ditches and covering them up. Sanchez also installed rock, and sometimes Bernal assisted him: "Sometimes he would help me as well, just carrying the water, sponges. He would clean the--small, slight things." He was on the job before Bernal started. He did not observe Bernal laying rock and did not consider Bernal to be a skilled worker.

Coseme Lopez testified that he has worked for GLI for about eight years, and has about twenty years of experience in golf course landscaping and irrigation. He worked on the Project as a heavy equipment operator and assisted the supervisor. Lopez remembered working with Bernal and observed him cleaning ditches, putting down valve boxes and sometimes taking water to other workers. Many times they worked in close proximity all day. He sometimes had to tell Bernal what to do. When he would level out the soil, sometimes he would have to tell Bernal where to place the valve boxes, because he did not have the experience to know where they should go to be level with the ground around them. Lopez never observed Bernal placing stone or working with stone, but he did see him bringing water to the workers.

Jesus ("Jesse") Hernandez testified that he has worked for GLI for ten years, and has

worked in the landscaping and irrigation business for 33 years. He was the supervisor for the Project, and was responsible for making sure things were installed properly and the Project was within budget. He supervised Bernal, assigned his tasks and observed his work on a daily basis. Bernal would clean out the irrigation trenches, a Laborer would glue the pipe together, and Bernal would follow behind him covering up the hole. Hernandez testified that he did not at any time assign Bernal to lay rock. Bernal was hired as a helper, and Hernandez did not know if he was skilled at laying rock. Rigoberto Sanchez performed that work, and Bernal was his helper.

On cross-examination, Hernandez testified in detail about the different work assignments he would give Laborers and Tenders. He knew most of the Laborers from working with them in the past. When it came to planting trees, he would have the Laborer do the planting, making sure the hole was the proper depth. The Tender would then fill the hole. He would not have a helper dig the hole, because if it was not the proper depth it would have to be redone. Similarly, he would not have a Tender glue irrigation pipe, because if he did it wrong it had to be redone. For this work, Bernal cleaned out loose dirt, Rigoberto Sanchez glued the pipe, and Bernal came behind him and covered it up.

With regard to the rock work on the Project, Hernandez testified on cross-examination that the Laborers applied slurry and set the rocks at the right depth. After the cement set up a bit, they got sponges and wiped off the top so it would not have concrete residue. After a couple of rocks, they would squeeze out the sponge in the bucket. The water would have to be changed frequently. The tenders got fresh water and cleaned the sponges. Bernal dumped out the water, replaced it, and cleaned sponges. He did not observe Bernal wiping rocks. He assigned Rigoberto Sanchez to do the wiping, and if he had seen Bernal do it, he would have told him to stop and have Sanchez do it.

Penalties Under Sections 1775 and 1813: At the conclusion of her investigation, Betancur submitted a Labor Code Section 1775 Penalty Review, in which she recommended section 1775 penalties be assessed at the rate of \$200.00 per violation. The reviewing Senior Deputy Labor Commissioner mitigated this penalty to \$120.00 per violation.

Betancur testified that she found one overtime violation, and therefore assessed a \$25.00

penalty under section 1813 for a single violation. Betancur based this penalty on a finding that Bernal was paid overtime for working on Saturday, August 16, 2014, but was not paid at the correct rate for Landscape/Irrigation Laborer.

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.

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).)

The Division enforces prevailing wage requirements not only for the benefit of 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(a), and *see Lusardi, supra*, at p. 985.)

Section 1775(a) requires, among other things, that contractors and subcontractors pay the difference to workers who received less than the prevailing rate, and section 1775(a) also prescribes penalties for failing to pay the prevailing rate. Section 1742.1(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.

When the Division 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. In that appeal the contractor or subcontractor "ha[s] the burden of proving that the basis for the civil wage and penalty assessment is incorrect." (§ 1742(b).)

The Assessment Was Timely.

In their Joint Statement of Issues submitted prior to the Hearing, the parties listed as an issue: Was the Civil Wage and Penalty Assessment timely served? However, in the same statement, DLSE asserted that it “served the ... Assessment on September 23, 2015, within 18 months after the Project was accepted as completed on November 21, 2014.” Likewise, GLI stated: “To our knowledge the DLSE served the ... Assessment within 18 months after the Project was completed.” No evidence to the contrary was presented at the Hearing. Accordingly, the Assessment was timely served under section 1741.

United GLI Did Not Misclassify Worker Jose Bernal, Nor Did It Fail To Pay Him The Applicable Prevailing Wage For All Hours Worked.

GLI has carried its burden of proof with respect to Bernal’s classification and payment. Bernal’s story remained consistent from his initial complaint to his DLSE questionnaire and declaration to his hearing testimony: He attached rock with cement, eight hours a day, five days a week, for six weeks—and performed no other tasks. He used a trowel, a hammer and a level—and no other tools. However, the only evidence offered to corroborate Bernal’s description of his work is the photograph he testified was taken at the Project site. Bernal did not state exactly when the photo was taken, and the fact that he is not seen wearing a required GLI shirt raises substantial doubts as to whether he was actually working on the Project at the time.

More problematic for DLSE’s case is that every other percipient witness contradicted Bernal’s testimony. Bernal’s supervisor and co-workers gave accounts that were consistent with each other and fundamentally inconsistent with Bernal’s. Bernal claimed that he was employed full-time on the Project laying paving stones; each of GLI’s witnesses testified that they observed Bernal assisting with irrigation work and also helping the Laborers laying stone, but not laying the stone himself. The GLI witnesses also testified to varied tasks they performed on the Project from day to day and week to week. Their testimony is more credible in this regard than Bernal’s, and is consistent with Hernandez’s testimony that he assigned work according to the needs of the Project and what he knew about the capabilities of the workers. It is implausible that he would assign varied tasks to workers who had been with GLI for years, but would assign a new worker unfamiliar to him to do nothing but the skilled task of laying stones.

DLSE cross-examined Hernandez in some detail about whether he was aware that Bernal was wiping stones while working with Sanchez, and whether he had assigned that task to Bernal. Hernandez testified that he did not assign him that task, and would not because he did not know if Bernal had the experience to do it properly. He said that if Bernal had wiped stones, it was without his knowledge, and if he had known about it he would have told him to stop. Taken together, the testimony of Hernandez, Sanchez and Lopez establishes that Bernal assisted Landscape/Irrigation Laborers and did "cleanup and watering during construction" within the scope of work of a Tender under the applicable PWD. Significantly, Bernal himself never claimed to have wiped the stones, nor did he say he used sponges.

Taken as a whole, the evidence does not support a finding that Bernal was incorrectly classified or paid. To the contrary, GLI has proven by a preponderance of evidence that Bernal was correctly classified as a Landscape/Irrigation Tender and correctly paid as such.

GLI Is Not Liable For Penalties Under Section 1775.

Section 1775, subdivision (a) states in relevant part:

- (1) The contractor and any subcontractor under the contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than two hundred dollars (\$200) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by the contractor or, except as provided in subdivision (b), by any subcontractor under the contractor.

Since the evidence does not support a finding that GLI paid Bernal less than the applicable prevailing wage on any day, it has no liability for penalties under section 1775.

GLI Is Not Liable For Overtime Penalties Under Section 1813.

Section 1813 states as follows:

The contractor or any subcontractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars (\$25.00) for each worker employed in the execution of the contract by the ... contractor ... for each calendar day during which the worker is required or

permitted to work more than 8 hours in any one calendar day and 40 hours in any one calendar week in violation of the provisions of this article. ...

DLSE assessed GLI a \$25.00 for a single overtime violation, for work by Bernal done on Saturday, August 16, 2014. Betancur assessed the penalty because the overtime pay received by Bernal was not at the correct rate for Landscape/Irrigation Laborer. Since Bernal was not performing Landscape/Irrigation Laborer work, he was not entitled to overtime at that rate. Accordingly GLI is not liable for the section 1813 penalty.

GLI Is Not Liable For Liquidated Damages Under Section 1742.1.

At all times relevant to this Decision, section 1742.1, subdivision (a) provided in pertinent part as follows:

(a) After 60 days following the service of a civil wage and penalty assessment under Section 1741 or a notice of withholding under subdivision (a) of Section 1771.6, the affected contractor, subcontractor, and surety on a bond or bonds issued to secure the payment of wages covered by the assessment or notice shall be liable for liquidated damages in an amount equal to the wages, or portion thereof, that still remain unpaid. If the assessment or notice subsequently is overturned or modified after administrative or judicial review, liquidated damages shall be payable only on the wages found to be due and unpaid.

Because this Decision overturns the Assessment and no wages are found to be due and unpaid, GLI has no liability for liquidated damages.

FINDINGS

1. Affected subcontractor United GLI, Inc. filed a timely Request for Review of the Civil Wage and Penalty Assessment issued by DLSE with respect to the Project. The Assessment was timely served.
2. United GLI, Inc. correctly classified Jose Bernal as a Landscape/Irrigation Tender, and paid him the applicable prevailing wage for all hours worked on the Project.
3. United GLI, Inc. is not liable for penalties under Labor Code section 1775.
4. United GLI, Inc. is not liable for penalties under Labor Code section 1813.

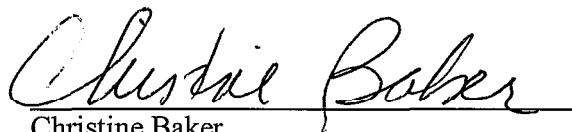
5. United GLI, Inc. is not liable for liquidated damages under Labor Code section 1742.1.

6. The record fails to establish any violation of prevailing wage requirements by United GLI, Inc. Accordingly, the Assessment must be dismissed.

ORDER

The Civil Wage and Penalty Assessment is dismissed. The Hearing Officer shall issue a Notice of Findings which shall be served with this Decision on the parties.

Dated: 8/19/2016



Christine Baker
Director of Industrial Relations