

STATE OF CALIFORNIA  
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Nu-Glass System, Inc.

Case No: 19-0321-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

**DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS**

Affected subcontractor Nu-Glass System, Inc. (Nu-Glass) submitted a timely Request for Review of the Civil Wage and Penalty Assessment issued on May 17, 2019, by the Division of Labor Standards Enforcement (DLSE). The Assessment was issued with respect to work on the Mule Creek State Prison buildings (Project) in Amador County. The Assessment determined that \$71,026.07 in unpaid prevailing wages and training fund contributions, and \$21,305.00 in penalties under Labor Code sections 1775 and 1813 were due.<sup>1</sup> The unpaid wages were fully paid by the surety company for the prime contractor, Hensel Phelps Parent 1, Inc. (Hensel Phelps), leaving the matter of penalties to be paid by Nu-Glass to be resolved.

A Hearing on the Merits was duly noticed and conducted on October 29, 2019, in Sacramento, California, before Hearing Officer Michael R. Drayton. David Cross appeared as counsel for DLSE. There was no appearance by or on behalf of Nu-Glass. The September 30, 2019 notice of the Hearing notified Nu-Glass of the consequences of failure to appear.

At the Hearing, the DLSE investigator, Deputy Labor Commissioner II Jerry McClain, testified in support of the Assessment. The matter was submitted for decision upon conclusion of the hearing.

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<sup>1</sup> All subsequent section references are to the California Labor Code, unless otherwise specified.

The issues for decision are:

- Is Nu-Glass liable for penalties under section 1775, and did DLSE properly assess such penalties?
- Is Nu-Glass liable for penalties under section 1813, and did DLSE properly assess such penalties?

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, as amended. (See Cal. Code Regs., tit. 8, § 17250, subd. (a).) This evidence stood un rebutted, as no representative appeared for Nu-Glass. Accordingly, the Director issues this Decision affirming the Assessment, as amended.

## **FACTS**

### Failure to Appear.

The Request for Review of the Assessment was filed by Nu-Glass CEO Calvin Craig. Prior to the Hearing on the Merits, the Hearing Officer conducted one noticed prehearing conference. No one appeared for Nu-Glass in that prehearing conference.

On October 29, 2019, no representative of Nu-Glass appeared at the duly noticed Hearing on the Merits. The Hearing Officer proceeded to conduct the Hearing as noticed and scheduled in order to formulate a recommended decision as warranted by the evidence. (See Cal. Code Regs., tit. 8, § 17246, subd. (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”].) At the Hearing, DLSE Exhibit Numbers 1 through 16 were admitted into evidence without objection.

### The Project.

The Project entailed construction at the Mule Creek State Prison in Ione, California. The California Department of Corrections and Rehabilitation (CDCR)

advertised for bids on the Project on January 15, 2013. Hensel Phelps was awarded the contract on February 19, 2014. Hensel Phelps subcontracted with Nu-Glass to perform part of the work on the Project, as documented by the Nu-Glass certified payroll records (CPRs). A total of 11 workers were employed by Nu-Glass on the Project.

#### The Assessment.

McClain testified that he opened an investigation into the Project based on a complaint that none of 11 Nu-Glass workers on the Project had been properly classified and paid prevailing wages. To evaluate whether the workers were properly classified and paid, McClain reviewed the Nu-Glass CPRs, which classified the workers solely by the number "47212." McClain testified that this number does not relate to any job classification recognized by the Department of Industrial Relations. McClain examined the Nu-Glass CPRs and reviewed apprenticeship information from the Division of Apprenticeship Standards (DAS) for all of the Nu-Glass workers on the Project. With the DAS information on the workers, McClain determined in which trade each worker had been trained and whether each worker was an apprentice at the time of the Project. McClain determined that of these workers, seven had completed their apprenticeships as Glaziers and three had not completed their Glazier apprenticeships. Also at the time of the Project, one worker had completed his apprenticeship as a Pointer, Cleaner, Caulker, and Waterproofer, a subtrade of the Bricklayer-Blocklayer classification. McClain further noted that the subcontractor's name, Nu-Glass System, Inc., indicates that it contracts to perform the work of Glaziers, and, based on his research, he discovered that Nu-Glass held a C-17 Glazier license issued by the Contractors State License Board.

Armed with that information McClain determined that the workers fell within the scope of work for the crafts of Glazier and Pointer, Cleaner, Caulker, and Waterproofer. The prevailing wage determination (PWD) and scope of work in effect on the bid advertisement date for these crafts are embodied in the PWD denominated AMA-2012-2 for Amador County, which covers Glaziers (Glazier PWD), and the subtrade Pointer,

Cleaner, Caulker, and Waterproofers of the Bricklayer-Blocklayer classification (Pointer PWD). The total hourly prevailing wage rate for the Glazier PWD is \$53.50, and the total hourly prevailing wage rate for the Pointer PWD is \$51.70. Using the hours of work as listed on the CPRs, and giving credit to Nu-Glass for payments that the CPRs represented had been made to the workers, McLain determined the amount of unpaid wages and the number of days each worker was underpaid the required prevailing wages.

The Assessment found that the workers employed by Nu-Glass had been misclassified and underpaid (including training funds unpaid) in the collective amount of \$71,026.07, which McLain testified was paid in full by the surety on the Project. The Assessment found penalties under section 1775 were due in the amount of \$17,880.00, calculated at the minimum rate of \$40.00 per day for each of the 447 days that workers were underpaid prevailing wages. The Assessment also found penalties under section 1813 were due in the sum of \$3,425.00, calculated at the rate of \$25.00 for each of the 137 days on which workers were not correctly paid overtime.

## **DISCUSSION**

The California Prevailing Wage Law (CPWL), set forth at Labor Code sections 1720 et seq., requires the payment of prevailing wages to workers employed on public works projects. The purpose of the CPWL 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 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, subd. (a) and see *Lusardi*, at p. 985.)

Section 1775, subdivision (a), requires that contractors and subcontractors pay the difference to workers paid less than the prevailing rate and also prescribes penalties for failing to pay the prevailing rate. The prevailing rate of per diem wage includes travel pay, subsistence pay, and training fund contributions pursuant to section 1773.1. Section 1775, subdivision (a)(2), grants the Labor Commissioner the discretion to mitigate the statutory maximum penalty per day in light of prescribed factors.

When DLSE determines that a violation of the prevailing wage laws has occurred, a written civil wage and penalty assessment may be issued 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).)

Nu-Glass Failed to Meet Its Burden of Proving That the Basis for the Assessment Is Incorrect.

The evidence shows that Nu-Glass applied non-existent classifications for its workers on the Project. After investigating the type of work being performed and using

the hours listed on the CPRs, DLSE reclassified the workers according to the Glazier and Pointer PWDs. DLSE calculated the unpaid wages for the 11 workers, giving credit for wages that Nu-Glass had paid according to the CPRs. The record as a whole provides prima facie support for the Assessment's finding that Nu-Glass workers were misclassified and paid less than the applicable prevailing wage rate. (Cal. Code Regs. tit. 8, § 17250, subd. (a).) Nu-Glass chose not to appear on at the duly noticed Hearing and did not take the opportunity to put on its own case. Consequently, Nu-Glass did not carry its burden of proving that the basis for the Assessment was incorrect. (Cal. Code Regs. tit. 8, § 17250, subd. (b).)

The Assessment found \$71,026.07 was due in wages and training fund contributions, however, that amount was paid in full by the surety of the prime contractor. As a result, no unpaid wages or training fund contributions are found to be due under this Decision.

DLSE's Penalty Assessment Under Section 1775 Was Proper.

Section 1775, subdivision (a)(2)(B)(i), states that the penalty for failure to pay the required prevailing wage rate may not be less than \$40.00 for each calendar day for each worker paid less than the prevailing wage rate, unless the Labor Commissioner determines that the violation was a good faith mistake and the error was promptly and voluntarily corrected when brought to the contractor's attention. Section 1775, subdivision (a)(2)(D), provides that the determination of the Labor Commissioner as to the amount of the penalty shall be reviewable only for an abuse of discretion. Abuse of discretion is established if the "agency's nonadjudicatory action ... is inconsistent with the statute, arbitrary, capricious, unlawful, or contrary to public policy." (*Pipe Trades v. Aubry* (1996) 41 Cal.App.4th 1457, 1466.) In reviewing for abuse of discretion, however, the Director is not free to substitute his or her own judgment "because in [his or her] own evaluation of the circumstances the punishment appears to be too harsh." (*Pegues v. Civil Service Commission* (1998) 67 Cal.App.4th 95, 107.)

A contractor or subcontractor has the same burden of proof with respect to the penalty determination as to the wage assessment. Specifically, "the Affected Contractor or Subcontractor shall have the burden of proving that DLSE abused its discretion in determining that a penalty was due or in determining the amount of the penalty." (Cal. Code Regs., tit. 8, § 17250, subd. (c).)

DLSE assessed section 1775 penalties at the rate of \$40.00 based on Nu-Glass's deliberate and intentional misclassification and underpayment of its workers in 447 instances. The burden was on Nu-Glass to prove that DLSE abused its discretion in setting the penalty amount at the rate of \$40.00 per violation for 477 violations. Once again, having failed to appear at the Hearing, Nu-Glass failed to carry that burden. Accordingly, DLSE's penalty assessment will be affirmed in the total amount of \$17,880.00.

DLSE's Penalty Assessment Under Section 1813 Was Proper.

Section 1813 prescribes a penalty of \$25.00 per calendar day for each worker found to have worked overtime without having been paid at the applicable hourly overtime wage rate. DLSE's unrebutted evidence establishes 137 such violations by Nu-Glass. The \$3,425.00 penalty is affirmed.

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

**FINDINGS AND ORDER**

1. Affected subcontractor Nu-Glass Construction, Inc. filed a timely Request for Review of a timely Civil Wage and Penalty Assessment issued by DLSE with respect to the Project.
2. Nu-Glass Construction, Inc. underpaid its workers \$71,026.07 in prevailing wages and training fund contributions, which was paid in full by the surety company on the Project.
3. The Labor Commissioner did not abuse her discretion in assessing penalties against Nu-Glass Construction, Inc. under Labor Code section 1775,

subdivision (a), at the rate of \$40.00 per violation for 447 violations. Accordingly, the assessment of section 1775 statutory penalties in the sum of \$17,880.00 is affirmed.

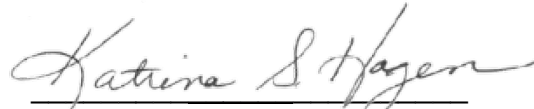
4. Nu-Glass Construction, Inc. failed to pay its workers the required prevailing wage overtime rate in 137 instances, and, therefore, is liable for a statutory penalty under Labor Code section 1813 in the sum of \$3,425.00.

5. The total sum of penalties under the Assessment, as affirmed by this Decision is \$21,305.00.

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

Wages due:	\$ -0-
Training Fund Contributions due:	\$ -0-
Penalties under section 1775, subdivision (a):	\$17,880.00
Penalties under section 1813:	\$3,425.00
<b>TOTAL:</b>	<b>\$21,305.00</b>

Dated: 10-16-2020



Katrina S. Hagen Director  
Department of Industrial Relations