

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

**William Williams, an individual dba
American Construction Engineers,**

Case No. 17-0190-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 William Williams, an individual dba American Construction Engineers (Williams) requested review of a Civil Wage and Penalty Assessment (Assessment) issued by the Division of Labor Standards Enforcement (DLSE) with respect to the Fire Station No. 5 Expansion (Project) performed for the City of Salinas (Salinas). The Assessment, initially served on December 16, 2016 and amended on May 9, 2017, determined that \$1,231,555.51 in unpaid prevailing wages and statutory penalties were due. These included penalties against Williams under Labor Code sections 1775 and 1813,¹ as well as penalties assessed under sections 1776 and 1777.7 for certified payroll records (CPRs) violations and apprenticeship violations. William served a request for review of the assessment (i.e., an appeal) on May 16, 2017.

A Hearing on the Merits as to the matter was held on May 8, 2018, in Fresno, California, before Hearing Officer Ed Kunnes. At the Hearing on the Merits, DLSE presented an amended audit that lowered the unpaid prevailing wages to \$358,839.06 and made an oral motion to amend the Assessment downward. There being no prejudice to Williams, the Hearing Officer granted the motion to amend the Assessment for unpaid prevailing wages to \$358,839.06 but did not change either the amounts owed to approved training funds or plans, or the penalties for prevailing wage violations under section 1775 and 1813 and apprenticeship violations under 1777.7. At the Hearing on Merits, DLSE

¹ All subsequent references to sections are to the Labor Code, unless otherwise specified.

also presented evidence that justified reducing the penalty for CPRs violation under section 1776. There being no prejudice to Williams, the Hearing Officer granted the motion to amend the Assessment for CPRs violations downward to \$241,800.00.

At the Hearing on the Merits, David Cross appeared for DLSE. Mark Aronson appeared for RLI Insurance Company, a surety of Williams. RLI Insurance Company never requested intervention pursuant to California Code of Regulations, title 8, section 17208, subdivision (b), and therefore its participation was limited to that of an interested person. Neither Williams nor a representative for Williams appeared.

The issues presented for decision are:

- Did DLSE use the correct prevailing wage classifications in the audit?
- Did Williams pay the required travel and subsistence?
- Did Williams pay the required employer contributions to an approved plan or fund?
- Did DLSE correctly list the hours worked in the audit?
- Were the mathematical calculations as set forth in the Assessment correct?
- Did the CPRs correctly list wages paid to workers, hours worked, identity of workers, and classification of workers?
- Did Williams answer DLSE's request for CPRs?
- Did Williams provide contract award information to the applicable apprenticeship committees and request dispatch of apprentices for employed crafts?
- Did Williams become liable for penalties under sections 1775, 1813, 1776, and 1777.7, and did DLSE apply the correct penalty rates?
- Did Williams become liable for liquidated damages?

Now, based on un rebutted evidence showing that Williams failed to pay the required prevailing wages to its workers, failed to answer timely the DLSE's request for CPRs, and failed to employ apprentices on the Project, as set forth below the Director of Industrial Relations affirms the Amended Assessment, and finds Williams liable for liquidated damages.

FACTS

Failure to Appear: On May 16, 2017, Williams, in writing, requested review of the Assessment. Notice of a Prehearing Conference was sent to Williams at the email address and physical address he provided. All subsequent notices were sent to these addresses. At the initial Prehearing Conference, Cross for DLSE appeared by telephone. The Prehearing Conference was continued to secure Williams' participation. At the next Prehearing Conference, Cross and Aronson for the surety company appeared, and Williams again did not appear. A notice setting the Hearing on the Merits, contained bold print warning Williams that a failure to appear at the Hearing on the Merits may adversely affect his rights. On May 8, 2018, Williams did not appear at the duly noticed Hearing on the Merits.

The Hearing Officer proceeded to conduct the Hearing on the Merits as noticed and scheduled for the purpose of formulating 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".]) DLSE's evidentiary Exhibits Number 1-37 were admitted into evidence without objection and the matter was submitted on the evidentiary record based on the testimony of DLSE's Deputy Labor Commissioner Lori Rivera and worker Robert Crum.

Amended Assessment: The testimony of Rivera and Crum, and the documentary evidence in Exhibits Number 1 through 37, submitted by DLSE, support the facts set forth below.

On November 7, 2015, Salinas advertised an invitation to accept bids for the Project. On February 23, 2016, Williams, as the general contractor, entered into a public works contract with Salinas to complete the Project. The agreement recites that the contractor agrees to comply with all Prevailing Wage Laws, agrees to submit contract award information (form DAS 140) to an applicable apprenticeship program that can supply apprentices to the Project, and agrees to employ apprentices at a ratio of one apprenticeship hour to every five journeymen hours on the Project. Forty-one workers performed work on the Project and workers were on the job site April 20, 2016, through January 14, 2017. Salinas recorded a Notice of Cessation on February 16, 2017.

The trades employed on the Project were Laborer (Groups 1-3), Operating Engineer, Cement Mason, Plumber, Iron Worker, Carpenter, Carpenter (Drywall Installer/Lather), Brick/Block Layer, Electrician, Tile Setter/Finisher, Plumber (Landscape Pipefitter), Plasterer, Painter (Brush & Spray), and Painter (Taper/Drywall Finisher). For each of the trades, the DLSE submitted at the Hearing on the Merits the effective prevailing wage determination (PWD) as of the job bid date, which was November 7, 2015. Additionally, DLSE submitted travel and subsistence provisions of the PWDs, indicating that Williams owed per diem wages for Brick/Block Layers and Iron Workers.

The evidence establishes that Williams failed to pay his workers the required prevailing wage rates of \$358,839.06 in underpaid wages and failed to pay training fund contributions of \$4,269.05 on the Project. At the hearing, Rivera provided detailed testimony of the failure by Williams to pay the full straight time prevailing wages, additional amounts for overtime, training fund contributions, and travel and subsistence per diems owed to Williams' workers on the Project. Crum confirmed these assertions as a percipient witness to these facts.

Rivera found job classification and hours-worked discrepancies between time cards, CPRs and Inspector Logs. Additionally, Crum testified that Williams failed to pay wages to him for months. Accordingly, DLSE assessed \$161,000.00 in penalties under section 1775, at the rate of \$200.00 per violation, for 805 instances of failure to pay the applicable prevailing wages. The Senior Deputy Tony Eguavoen did not mitigate the rate due to evidence of willful intent to violate prevailing wage law. Further, DLSE added section 1813 penalties at \$25.00 a day per worker for overtime pay violations.

According to the uncontroverted testimony of Rivera, DLSE requested CPRs from Williams on November 4, 2016. The CPRs were due on December 2, 2016, and Williams delivered CPRs on January 30, 2017, 58 days late. Therefore, DLSE assessed a penalty of \$241,800.00 for 41 workers over 58 days at \$100.00 per day.

Additionally, Rivera testified that Williams failed to provide award information to eight apprenticeship committees and failed to request apprentices from any of the apprenticeship committees. Williams' failure to hire Plumber apprentices lasted 234 days (i.e. the longest period of the various trades working on the Project without an apprentice). Notwithstanding, DLSE incorrectly indicated that Williams failed to request apprentices for 86 days in the Assessment, and therefore DLSE only assessed a penalty of \$8,600.00 for 86 days at the unmitigated rate of \$100.00 per day.

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. 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 Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 985.)

Section 1775, subdivision (a) requires, among other provisions, that contractors and subcontractors pay the difference to workers who received less than the prevailing

wage rate. Section 1775, subdivision (a) also prescribes penalties for failing to pay the prevailing wage 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, but it does not mandate mitigation when the Labor Commissioner determines that mitigation is inappropriate.

Section 1742.1, subdivision (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 under section 1741. Under section 1742.1, subdivision (b), a contractor may entirely avert liability for liquidated damages if, within 60 days from issuance of the CWPA, the contractor deposits into escrow with DIR the full amount of the assessment of unpaid wages, plus the statutory penalties under sections 1775. In addition, in December of 2016 when the Assessment was issued in this matter (as well as in May of 2017 when the amended Assessment was issued), (former) section 1742.1 allowed the Director to exercise his or her discretion to waive the liquidated damages if the contractor demonstrated that he or she had substantial grounds to appeal the assessment.²

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 violation. Unlike section 1775 above, section 1813 does not give DLSE any discretion to reduce the

² On June 27, 2017, subsequent to the issuance of the Assessment and the filing of the Request for Review. In this case, the Director's discretionary waiver power was deleted from section 1742.1 by Senate Bill 96 (stats. 2017, ch 28, § 16 (SB 96)). Legislative enactments are to be construed prospectively rather than retroactively, unless the legislature expresses its intent otherwise. (*Elsner v. Uveges* (2004) 34 Cal.4th 915, 936.) Further, "[a] statute is retroactive if it substantially changes the legal effect of past events." (*Kizer v. Hannah* (1989) 48 Cal.3d 1, 7.) Here, the law in effect at the time the civil wage and penalty assessment was issued (in 2016) allowed a waiver of liquidated damages in the Director's discretion, as specified, which could have influenced the contractor's decision as to how to respond to the assessment. Applying the current terms of section 1742.1 as amended by SB 96 in this case would have retroactive effect because it would change the legal effect of past events (i.e., what the contractor elected to do in response to the assessment). Accordingly, this Decision finds that the Director's discretion to waive liquidated damages in this case under section 1742.1, subdivision (a) is unaffected by SB 96.

amount of the penalty, nor does it give the Director any authority to limit or waive the penalty.

Employers on public works must keep accurate payroll records, recording, among other things, the work classification, straight time and overtime hours worked and actual per diem wages paid for each employee. (§ 1776, subd. (a).) This is consistent with the requirements for construction employers in general, who are required to keep accurate records of the hours employees work and the pay they receive. (Cal. Code Regs., tit. 8, § 11160, subd. 6.) The format for reporting of payroll records requested pursuant to section 1776 must be on a form provided by DLSE, or in another format that contains all the required information. (See Cal. Code Regs., tit. 8, § 16401, subd. (a).) "Acceptance of any other format [other than the DLSE form] shall be conditioned upon the requirement that the alternate format contain all of the information required pursuant to Labor Code Section 1776." (*Id.*) The contractor has 10 days (plus five days for mailing) to comply subsequent to receipt of a written notice requesting CPRs. (§ 1776 (h).) If a contractor fails to comply within the 10-day period, it is subject to a penalty of \$100.00 for each calendar day, or portion thereof, for each worker, "until strict compliance is effectuated." (*Id.*) The penalty rate provided by the statute is mandatory. Nothing in the statute provides DLSE with discretion to reduce 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. (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 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, 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. The contractor "shall have the burden of proving that the basis for the Civil Wage and Penalty Assessment is incorrect." (§ 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 Williams presented no evidence at the hearing and failed to disprove the basis for the Amended Assessment. Moreover, failing to appear, Williams presented no substantial grounds for appealing the Assessment that would justify the waiver of liquidated damages.

FINDINGS AND ORDER

1. William Williams, an individual doing business as American Construction Engineers underpaid his workers \$363,108.11 in prevailing wages, including training fund contributions of \$4,269.05.
2. Penalties under section 1775 are due from William Williams in the amount of \$161,000.00 for 805 violations at the unmitigated rate of \$200.00 per violation.
3. Penalties under section 1813 are due from William Williams in the amount of \$1,450.00 for 58 violations at \$25.00 per violation.

4. Penalties under section 1776 are due from William Williams in the amount of \$237,800.00 for 41 workers over 58 days at \$100 per violation.
5. Because none of the unpaid wages were paid within 60 days after service of the Assessment, liquidated damages are due from William Williams in the full amount of the unpaid wages, \$358,839.06.
6. Penalties under section 1777.7 are due from William Williams in the amount of \$8,600.00.
7. The amounts found due from William Williams in the Amended Assessment as affirmed by this Decision are as follows:

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| Wages due: | \$358,839.06 |
| Training Fund contributions: | \$4,269.05 |
| Penalties under section 1775, subdivision (a): | \$161,000.00 |
| Penalties under section 1813: | \$1,450.00 |
| Penalties under section 1776: | \$237,800.00 |
| Penalties under section 1777.77: | \$8,600.00 |
| Liquidated damages: | <u>\$358,839.06</u> |
| TOTAL | \$1,130,797.17 |

In addition, interest is due from William Williams and shall accrue on unpaid wages in accordance with 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: 9/28/18


 André Schoorl
 Acting Director of Industrial Relations