

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Dreambuilder Construction Corp

Case No: 21-0172-PWH

From a Notice of Withholding of Contract Payments issued by:

California Department of Transportation

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected contractor Dreambuilder Construction Corp (Dreambuilder) submitted a Request for Review of the Notice of the Withholding of Contract Payments (Notice) served April 30, 2021, by the California Department of Transportation (Caltrans). The Notice was issued with respect to work under Contract Number 03-4F6304 for construction on state highway (replacing guard railing) at various locations in the counties of El Dorado and Sierra (Project). The Notice determined that \$79,823.64 in unpaid prevailing wages, fringe benefits and training fund contributions were due, and assessed \$8,030.00 in penalties under Labor Code sections 1775 and 1813, for a total claim of \$87,853.64.¹

A Hearing on the Merits occurred over five days, January 13, February 9, February 10, April 6 and April 7, 2022 before Hearing Officer Michael R. Drayton. Brandon Reeves appeared as counsel for Caltrans. Thomas Kovacich appeared as counsel for Dreambuilder. Caltrans employees Patrick D'Archangelo and Robert Embree, as well as former Dreambuilder employees Juan Perez and Edgar Arceo, testified in support of the Notice. Dreambuilder owner Anurag Singh and Dreambuilder employees Enrique Ramirez, Luis Enrique Mora, Joseph Ramirez and Salvador Ramirez-Perez, testified in opposition to the Notice. Caltrans Exhibits 1 through 24 were admitted into evidence by the Hearing Officer. Dreambuilder Exhibits J, K, and O through X were also

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

admitted into evidence.² Following the parties' submission of closing briefs, the matter was submitted for decision on May 31, 2022.

Prior to the Hearing on the Merits, the parties stipulated to the following:

- The Project was a public work and required the payment of prevailing wages.
- The Request for Review was timely.
- No back wages were paid nor deposit made with the Department of Industrial Relations as a result of the Notice.

The issues for decision are as follows:

- Whether the Notice was timely served under Labor Code section 1741.
- Whether Dreambuilder misclassified employees on the Project.
- Whether Dreambuilder underpaid prevailing wages to its employees on the Project.
- Whether Dreambuilder paid the correct prevailing wages for all hours worked on the Project.
- Whether Dreambuilder paid the required overtime rates to its employees on the Project.
- Whether Dreambuilder was required to pay prevailing wages for the travel time to and from the Project.
- Whether Dreambuilder is liable for penalties assessed pursuant to sections 1775 and 1813.

² Declarations of the following witnesses who were produced for live testimony pursuant to Caltrans' request to cross-examine declarants were admitted into evidence, without objection: Edgar Arceo (Dreambuilder Exhibit O); Enrique Ramirez (Dreambuilder Exhibit P); Joseph Ramirez (Dreambuilder Exhibit T); Luis Enrique Mora (Dreambuilder Exhibit U); and, Salvador Ramirez-Perez (Dreambuilder Exhibit X). (Cal. Code Regs., tit. 8, § 17234.) Declarations of the following witnesses who were not produced for live testimony pursuant to Caltrans' request to cross-examine, were also admitted into evidence but were given only the same effect as other hearsay evidence: Geraldo Lizarraga Acosta (Dreambuilder Exhibit Q); Glen Wear (Dreambuilder Exhibit R); Jose Antonio Rocha (Dreambuilder Exhibit S); Raul Verdin (Dreambuilder Exhibit V); and, Ricardo Sainz (Dreambuilder Exhibit W). (Cal. Code Regs., tit. 8, §§ 17234, subds. (a), (c), and 17244, subd. (d).)

- Whether the Labor Commissioner or Caltrans abused their discretion in assessing penalties pursuant to section 1775 against Dreambuilder.
- Whether Dreambuilder is liable for liquidated damages pursuant to section 1742.1.

For the reasons set forth below, the Director of Industrial Relations finds that Caltrans failed to carry its burden of presenting evidence at the Hearing that provided prima facie support for the Notice. (See Cal. Code Regs., tit. 8, § 17250, subd. (a).) Accordingly, the Director issues this Decision dismissing the Notice.

FACTS

The Project.

Caltrans advertised the project for bid on November 5, 2018. ³ (Caltrans Exhibit No. 1, p. 2; Caltrans Exhibit No. 2, p. 15.) Caltrans awarded the contract to Dreambuilder on December 24, 2018. (Caltrans Exhibit No. 1, p. 3.) Dreambuilder contracted to replace guard railing in El Dorado and Sierra Counties. (*Ibid.*) The contract amount was \$1,610,061.00. (*Ibid.*) Dreambuilder employees worked on the Project from April 2, 2019 to September 27, 2019. (Caltrans Exhibit No. 12, pp. 458-482.) For this Project, Dreambuilder used 15 workers classified as Cement Mason, Laborer, Operator and Teamster. ⁴ (*Ibid.*)

The Notice.

By letter dated September 18, 2019, Caltrans requested Dreambuilder to provide various payroll records for the Project by October 3, 2019. (Caltrans Exhibit No. 7, pp.

³ The Notice to Bidders for the Project was dated November 5, 2018. (Caltrans Exhibit No. 1, p. 2.) It appears that the bid advertisement date was erroneously identified as January 18, 2018 in other Caltrans exhibits. (See Caltrans Exhibit No. 5, p. 168; Caltrans Exhibit No. 6, p. 219.) For this reason, there is no merit to Dreambuilder's argument that Caltrans did not rely on the applicable prevailing wage determinations based on the bid advertisement date.

⁴ The applicable prevailing wage determinations (PWDs) for these classifications were contained in Caltrans Exhibit No. 3. (See Caltrans Exhibit No. 3, pp. 26-33 [Cement Mason PWD], pp. 34-55 [Laborer PWD], pp. 56-72 [Operator PWD], and pp. 73-84 [Teamster PWD].)

251-252.) By letter dated December 13, 2019, Caltrans acknowledged that while Dreambuilder provided documents on September 24, October 2, October 3 and October 28, 2019, Dreambuilder failed to provide documentation of the following:

- Proof of hotel pay:
Missing copies of hotel receipts for every week ending, used for every employee listed on the Certified Payroll Record
- Copies of cancelled checks, front and back
- Missing certified time cards
- Missing employees on payroll
- Documentation for case advances
- Ivan Sanchez wage garnishment documentation.⁵

(*Id.* at pp. 234-250.) Caltrans requested that Dreambuilder provide the missing documents by December 27, 2019. (*Id.* at p. 235.) There is no evidence that Dreambuilder provided any certified payroll records in response to Caltrans' December 13, 2019 letter.

On February 9, 2020, Caltrans issued a Final Notice of Payroll Record Discrepancies.⁶ (Caltrans Exhibit No. 7, pp. 230-232.) Caltrans determined based on its audit of the available payrolls and contract records that 15 Dreambuilder employees were underpaid prevailing wages on the Project. (*Ibid.*) It requested Dreambuilder

⁵ Based on the documents provided by Dreambuilder, Caltrans prepared a spreadsheet that summarized its findings. (Caltrans Exhibit No. 7, pp. 236-249.) Specifically, Caltrans found: "Time card discrepancies: Missing hours for employees identified on timecards[;] Payroll discrepancies: Employees worked over 8 hours, and paid only straight time[;] Certified Payroll Records and pay stubs nets do not match[;] Payrolls do not match other contracts gross amounts earned and net wages for the week[;] Employees not listed on payrolls[;] Paystub discrepancies: Payroll and paystubs hourly rates do not match[;] Travel year to date amounts do not match payrolls[;] Not all mileage payments are added to the stubs[;] Proof of cash advance documentation[;] Training funds are listed on the payroll but not listed on the paystub[;] Training fund discrepancies: Training funds were only paid for the month of May and October[.]" (*Id.* at pp. 234-235.)

⁶ In the February 9, 2020 letter, Caltrans referenced a request for corrected records served on Dreambuilder on January 3, 2020. (*Id.* at p. 230.) However, the January 3, 2020 correspondence was not submitted as evidence.

provide a supplemental certified payroll to Caltrans within 10 days of receipt of the letter. (*Id.* at p. 230.) On February 24, 2020, Dreambuilder responded to the letter and provided employee declarations in support of its position that Dreambuilder employees were not underpaid prevailing wages on the Project. (Caltrans Exhibit No. 9, pp. 296-330.) There is no evidence that Dreambuilder submitted any supplemental certified payroll records in response to Caltrans' February 9, 2020 letter.

On March 30, 2021, Caltrans submitted their findings to the Division of Labor Standards Enforcement (DLSE) for approval of forfeiture of the unpaid wages and training fund contributions, and penalties.⁷ (Caltrans Exhibit No. 5, pp. 168-198; Caltrans Exhibit No. 6, pp. 214-218.) The Request for Approval of Forfeiture indicated that Caltrans found Dreambuilder underpaid compensable travel time, underpaid required training funds and underpaid overtime premiums.⁸ (Caltrans Exhibit No. 5, pp. 169-170; Caltrans Exhibit No. 6, pp. 215-216.) DLSE approved the forfeiture on April 20, 2021. (Caltrans Exhibit No. 5, p. 167; Caltrans Exhibit No. 6, pp. 212-213.)

Caltrans served the Notice on Dreambuilder on April 30, 2021.⁹ (Caltrans Exhibit No. 6, pp. 222-224.) To calculate travel time compensation, Caltrans relied on the classifications that Dreambuilder used in its Certified Payroll Records (CPRs) to classify its employees, and applied the hourly rates provided in the applicable PWDs for Cement Mason, Laborer, Operator and Teamster.

Testimony from Caltrans Witnesses.

Caltrans employees Robert Embree and Patrick D'Arcangelo, who are managers at the Caltrans district and headquarters levels, respectively, testified on behalf of

⁷ As required by section 1775, subdivision (a)(2)(A), the Labor Commissioner must determine the amount of the penalty for failure to pay prevailing wages.

⁸ Dreambuilder did not pay prevailing wages for travel time, nor did it pay training funds or overtime premiums for travel time.

⁹ Although the Notice was served on April 30, 2021, the Notice is dated May 3, 2021. (Caltrans Exhibit No. 6, pp. 208, 222-224.)

Caltrans. Embree testified with respect to his role at the district level in the investigation and review of the analysis and conclusions. D’Arcangelo testified with respect to his role in handling the investigation at the headquarters level, reviewing the district’s investigation and conclusions, preparing the Notice and serving it on Dreambuilder.

The witnesses authenticated the contents of the Caltrans exhibits, which were admitted into evidence as business and/or official records of Caltrans. Their testimony was consistent with and explained the Caltrans file documentation. Also, they testified regarding the bases for Caltrans’ Notice. These witnesses testified that Caltrans staff relied upon DIR publications and other resources in making the conclusions they relied upon for purposes of the Notice. (See Caltrans Exhibit No. 10, pp. 331-354.)

The contract documents referenced by the witnesses established the bid advertisement date as November 5, 2018 (Caltrans Exhibit No. 1, pp. 2-3.) Dreambuilder owner, Anurag Singh, was present for the pre-job meeting and signed the pre-job checklist that recited requirements for the Project, including the payment of prevailing wages. (Caltrans Exhibit No. 2, pp. 15-23.)

According to these Caltrans witnesses, the Notice asserted that Dreambuilder failed to pay prevailing wages for the travel time of employees to and from the Dreambuilder yard at 505 Porter Way, Placentia, California and a location proximate to the Project. The latter location Caltrans selected for calculation of travel distance and time is the “Travel Center” at 4044 North Freeway Boulevard, Sacramento, California, a location taken from the Cement Mason PWD (Sacramento Travel Center). (Caltrans Exhibit No. 3, p. 32.)

Fifteen of the sixteen Dreambuilder employees listed in the CPRs resided in Southern California. Caltrans determined that 7 hours was a reasonable estimate of travel time, each way, between the Dreambuilder yard and the Sacramento Travel

Center.¹⁰ Dreambuilder employee Aldolfo Hererra resided in the San Francisco Bay Area. Caltrans determined that three hours of travel time was a reasonable estimate of travel time, each way, between the Bay Area and the Sacramento Travel Center. These travel time estimates were based on Dreambuilder employee interviews and on computerized/internet map calculations. Caltrans relied upon Dreambuilder's CPRs and hotel billing information for determining the dates of travel.

Juan Perez, who worked for Dreambuilder for seven years, testified that it took him approximately seven and a half hours to travel from his home in Southern California to the Project or to the hotel near the Project site each Sunday, and that he returned home to Southern California each Friday. He usually travelled with his coworker, Edgar Arceo, and they drove a Dreambuilder truck that was kept at Arceo's home on the weekends. Sometimes, Perez and Arceo transported tools to the Project site. While in Northern California, Perez drove the truck to and from the hotel and the Project site. Perez testified that he was not paid for the time it took him to travel between Northern California and Southern California, and was not offered the option of staying in a hotel on weekends. He was unaware of any Dreambuilder employees staying in hotels over the weekend.

Edgar Arceo also testified that he worked for Dreambuilder. He traveled to and from the Project site from his residence in Los Angeles in a Dreambuilder truck. Arceo estimated it took between six and seven hours to drive from Southern California to Northern California, and that sometimes a coworker would ride with him. Arceo traveled back home on Friday after his work shift. He did not stay in a hotel on weekends. No one at Dreambuilder ever told him that he had the option of doing so. Sometimes Arceo drove on Sunday from Southern California directly to the Project site to begin a Sunday night shift. He testified that the first time he drove the truck to the Project, his

¹⁰ When Caltrans reached out to employee Salvador Ramirez-Perez, Caltrans was informed that his travel time was five hours, rather than seven hours. As a result, D'Arcangelo explained that the Notice amount was revised from \$92,276.68 to \$87,853.64 to account for this reduction in travel time.

supervisor directed him to pick up the company truck from the Dreambuilder yard in Placentia. Thereafter, Arceo kept the work truck at his home on the weekends. In Northern California, the truck was used to perform work at the Project.

Testimony from Dreambuilder Witnesses.

Singh, the president of Dreambuilder, testified that the company is located in Placentia, California, and has been in business since February of 2006. Dreambuilder's primary customer is Caltrans, and it has performed over 100 projects for Caltrans since 2006. Dreambuilder performs contracts for Caltrans in all its 12 districts throughout California, except Districts 1 (which extends to the Oregon border) and 2 (Redding). Dreambuilder is not signatory to any collective bargaining agreement.

Singh's duties include estimating and project management, and he was responsible for estimating this Project. He testified that he understood the requirement to comply with prevailing wage law, and that he did not recall seeing any requirement to pay for travel time in the specifications for the Project.

According to Singh, Dreambuilder employees lived all over California, sometimes a great distance from the Placentia yard, i.e., Lancaster, Salton Sea and Northern California.¹¹ He told prospective employees that Dreambuilder works projects all over California. Projects last many months, requiring the workers to be away from home for long periods of time. Dreambuilder workers are informed by the foreman of the location of the project, the dates and times of work, and where they will stay during a project. To staff projects, the foreman determines which employees are willing to work on a project.

Singh testified that Dreambuilder's policy was to pay travel time for the trip to the project at the beginning of the project, and to pay travel time for the trip down at

¹¹ Singh disputed Caltrans' estimate of 470 miles traveled by the workers from the Placentia yard to the Project. He asserted that the miles driven for someone living in Ojai or Palmdale and Lancaster would be significantly less than for one who lived in Temecula.

the end of the project.¹² Dreambuilder's travel policy was put into written form in response to Caltrans' claim in this case, in the beginning of 2020. He asserted that the unwritten policy was in existence for many years and that it was communicated to all workers when they were hired.

According to Singh, Dreambuilder provided a vehicle and a fuel card for employees who wished to go home on weekends. He testified that although employees were expected to stay at any project location for the duration of the job, the majority do not stay. Singh was responsible for booking the hotels for Dreambuilder employees. He explained that he attempted to book hotels as close as possible to the specific project location. Singh testified that the employee would need to let him know if the employee arrived in Northern California on Sunday, or if the employee was staying for the weekend, so that he could book the hotel room.

Singh asserted that Dreambuilder had no control over the workers during the time spent travelling to and from the Project. For instance, Dreambuilder did not control when the employee had to leave their house. Instead, Dreambuilder required employees to report to the jobsite at the assigned date and time. Singh testified that this Project was a day time, Monday through Friday project, with only one or two Saturdays worked.

Singh testified that he believed Luis Mora, Raul Verdin¹³ and Geraldo Acosta stayed near the Project site on weekends. He testified that Ricardo Sainz also may have stayed weekends. There was at least one weekend during the Project that employees

¹² Singh could not confirm that such travel payments were made on this Project because he had not reviewed the payroll. Singh believed that Caltrans Exhibit No. 16 contained the checks paid to the workers, and that some of checks may have included travel time going up to the Project the first time. (See, for example, Caltrans Exhibit No. 16, p. 663, p. 714.)

¹³ His recollection is that Verdin stayed with his family five to six times.

worked on a Saturday, and that employees Salvador Ramirez-Perez, Enrique Ramirez, and possibly Arceo and Juan Perez stayed over the weekend.¹⁴

Regarding the witness declarations submitted by Dreambuilder, Singh testified that his role was to request Dreambuilder employees attend a meeting in Cerritos. Singh explained to the workers that the goal in obtaining the declarations was to substantiate the procedures for Dreambuilder's travel policy and hotel stays.¹⁵

Enrique Ramirez testified that he worked for Dreambuilder since 2007, and that he was the foreman on the Project. He assembled a crew for the Project, based on who was willing to travel. He believed that workers could turn down a job for various reasons without any negative repercussions. Further, he believed that the written travel policy existed for five to six years and provided for payment for the drive at the beginning of the job and drive back at the end of the job. He received payment for the drive up at the beginning of the project and the drive back at the end of the Project. According to Ramirez, if employees wanted to stay at the hotel over the weekend or other non-work day, such as on account of rain, they could do so at Dreambuilder's expense. Employees worked and stayed over the weekend on at least two Saturdays for this Project, but he did not specify which weekends.

Luis Enrique Mora testified that he worked for Dreambuilder for nine years. Mora carpooled to the Project site with a coworker in a company truck, either meeting at the yard in Placentia or at the coworker's house in Sylmar. According to Mora, Dreambuilder paid him for travel to the Project site on the first day and on the last day. He provided the time records to the foreman for this travel time.¹⁶ He did not carry tools or equipment, and he only used the company truck for transportation to and from

¹⁴ Arceo and Juan Perez testified that they went home every weekend and that they were unaware that they could stay in a hotel on the weekends.

¹⁵ The employee declarations submitted by Dreambuilder discussed generally how employees travel to and from job sites, and were not specific to the Project at issue.

¹⁶ These records were not cited in the evidence, however.

Northern California. Mora testified that Dreambuilder paid for his hotel during the week while working on the Project, and that he was told Dreambuilder would pay for his hotel over the weekends. Mora recalled staying several times on this particular project over the weekend, without specifying which weekends.

Joseph Ramirez testified that he worked for Dreambuilder for four years. When he worked on the Project, he stayed in a hotel during the week, and he went home every weekend, with one or two exceptions. He testified that he was paid for the first travel to the jobsite and the return travel at the end of the Project, by check, based on the hours he reported.¹⁷ This was pursuant to Dreambuilder's travel policy. Joseph Ramirez was told by Singh that Dreambuilder would pay for a hotel if he wanted to stay on the weekends. He believed that he worked one Saturday on the Project, and that he stayed in a hotel that weekend. He was aware of other employees who also stayed in a hotel due to working on a Saturday, but he was not aware of any employees who stayed in a hotel over the weekend without working on the weekend. Joseph Ramirez carpooled to the Project site with another coworker, in his coworker's personal vehicle, and they did not meet at the Dreambuilder yard before traveling to Northern California.

Salvador Ramirez-Perez testified that he worked for Dreambuilder for over 13 years. While working on the Project, he recalled staying one weekend in Northern California. He did not work that weekend. Dreambuilder offered to pay for a hotel if he wanted to stay on a weekend. Typically, he drove to the Project site on Sunday nights, and he returned home on Fridays. Ramirez Perez testified that he chose to drive his own vehicle to and from the Project, and that he sometimes carpooled with other coworkers while driving his vehicle. He testified as to his belief that he was paid one time for the travel up at the beginning of the Project and once at the end of the Project.

Dreambuilder submitted declarations of witnesses who were not produced for cross-examination. These declarations of Glen Wear, Raul Verdin, Ricardo Sainz, Jose

¹⁷ No specific check was cited in the evidence.

Antonio Rocha and Geraldo Lizarraga Acosta, contained substantially similar language regarding general travel on Dreambuilder projects as the declarations of the Dreambuilder employees who testified. (Compare Dreambuilder Exhibits Q, R, S, V and W, with Dreambuilder Exhibits O, P, T, U and X.) The declarations were not specific to the Project at issue. The written testimony was similar, revealing that the employees were informed of the job location and duration before they started work on a project, and that some employees were supplied with a company truck (mostly those with the status of foreman), which they used to travel to job sites of whatever distance necessary, and they did not pay for the vehicle fuel. Others carpooled, either in the company truck or with another employee in a personal vehicle. They stated that even though they could stay in a hotel on jobs remote from where they reside, they “chose” to travel home on weekends to be with their families.

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 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*)). A Labor Compliance Program like Caltrans 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.”¹⁸ (§ 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.

When an enforcing agency, such as Caltrans, determines that a violation of the prevailing wage laws has occurred, a written notice of the withholding of contract payments is issued pursuant to section 1771.6. 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 60 days following service of a notice under section 1776.1.

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, Caltrans 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 [Notice] ... is incorrect.” (Cal. Code Regs. tit. 8, § 17250, subd. (b); accord, § 1742,

¹⁸ DLSE is responsible for enforcing the California prevailing wage laws. (Lab. Code, §§ 90.5 and 1741; Cal. Code Regs., tit. 8, §16100, subd. (a).) However, there are four legacy labor compliance programs (LCPs) that enforce compliance on their own public works projects. (<https://www.dir.ca.gov/lcp.asp>.) Caltrans has a legacy LCP. When Caltrans determines that a contractor on one of its public works projects has violated the prevailing wage laws, Caltrans prepares a Request for Approval of Forfeiture for LCO review and approval, then once it obtains approval, issues a Notice of the Withholding of Contract Payments to the contractor. (Lab. Code, §§ 1726, 1171.5 and 1171.6.) The Notice must “describe the nature of the violation and the amount of wages, penalties, and forfeitures withheld.” (Lab. Code, § 1171.6, subd. (a).) There is no merit to Dreambuilder’s argument that Caltrans may not enforce labor compliance on its own public works projects.

subd. (b).) At the conclusion of the hearing process, the Director issues a written decision affirming, modifying or dismissing the notice. (§ 1742, subd. (b).)

The Notice Was Timely.

Pursuant to Labor Code section 1741, the Notice had to be served on Dreambuilder “not later than 18 months after acceptance of the public work.” Although the parties both contend that the acceptance date of the Project is undisputed, Caltrans relies on an acceptance date of October 22, 2019, whereas Dreambuilder relies on an acceptance date of October 16, 2019. (Compare Caltrans Exhibit No. 5, p. 168, with Dreambuilder’s Closing Brief, p. 21, ln. 17.) Assuming that the acceptance date was the earlier date asserted by Dreambuilder, 18 months from October 16, 2019 is April 16, 2021. Caltrans served the Notice on April 30, 2021. (Caltrans Exhibit No. 6, pp. 222-224.) Despite the passage of 14 days from April 16, Caltrans served the Notice timely because the service period was tolled.

Two separate events resulted in the tolling of the time for service of the Notice. Caltrans asserted that the 18-month limitations period was tolled based on various executive orders issued by Governor Newsom in response to the global Covid-19 pandemic. The orders extended or suspended various deadlines, including the limitations period under section 1741. ¹⁹ (Caltrans’ Closing Brief, p. 7, ll. 3-13.) Based on the Governor’s executive orders extending or suspending the limitations period under 1741, Caltrans timely served the Notice.

Alternatively, Dreambuilders’ failure to respond to Caltrans request for payroll records resulted in tolling. The 18-month limitations period is “tolled for the period of time that a contractor or subcontractor fails to provide in a timely manner certified

¹⁹ These orders included the following: Executive Order N-63-20 dated May 7, 2020, paragraph 9(a) [extending deadline by 60 days]; Executive Order N-71-20 dated June 30, 2020, paragraph 39 [suspending deadline until the Order is modified or lifted, or until the State of Emergency declared March 4, 2020 is lifted, whichever is sooner]; and Executive Order N-08-21 dated June 11, 2021, paragraph 24(d) [extending deadline that would have occurred or would occur between May 7, 2020 and September 29, 2021, to September 30, 2021]. The Director takes official notice of Executive Order N-63-20, Executive Order N-71-20, and Executive Order N-08-21.

payroll records pursuant to a request from [an enforcing agency].” (§ 1741.1, subd. (a).) Here, the 18-month limitations period was tolled because there is no evidence that Dreambuilder produced certified payroll records in response to Caltrans’ request dated December 13, 2019. Caltrans’ December 13, 2019 letter requested that Dreambuilder provide responsive documents by December 27, 2019. (Caltrans Exhibit No. 6, p. 235.) Accordingly, the limitations period was tolled for 490 days, the period of time between when the certified payroll records were due on December 27, 2019 and when the Notice was served on April 30, 2021. As such, the limitations period was tolled 490 days from April 16, 2021 to August 19, 2022.²⁰ Therefore, Caltrans timely served the Notice on Dreambuilder on April 30, 2021.

Compensable Travel Time.

Although the time an employee commutes to work is not generally compensable, the Supreme Court recognized in *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575 (*Morillion*) that travel time may be compensable depending on the level of control exerted by the employer over its employees. In *Morillion*, agricultural workers were required to meet at specified assembly areas to be transported by buses provided and paid for by the employer, to and from the fields where the workers worked.²¹ (*Morillion*, 22 Cal.4th at p. 579.) In this regard, the Supreme Court used the term “compulsory travel time” to refer to “travel to and from a work site that an employer controls and requires,” in order to distinguish it from “an ordinary commute from home to work and back that employees take on their own.” (*Id.* at p. 579, fn. 2.)

²⁰ Caltrans asserted that the 18-month limitations period was tolled based on the executive orders issued by Governor Newsom in response to the global Covid-19 pandemic that extended or suspended various deadlines, including the limitations period under section 1741. (Caltrans’ Closing Brief, p. 7, ln. 3-13; Executive Order N-63-20; Executive Order N-71-20; Executive Order N-08-21.) As Dreambuilder did not object to Caltrans’ reference to these executive orders, the Director takes official notice of Executive Order N-63-20, Executive Order N-71-20, and Executive Order N-08-21.

²¹ The workers in *Morillion* alleged that they were entitled to overtime wages and penalties “for the time they spent (1) assembling at the departure points; (2) riding the bus to the fields; (3) waiting for the bus at the end of the day; and (4) riding the bus back to the departure.” (*Morillion*, 22 Cal.4th at p. 579.)

"[The Supreme Court] held that the employees in *Morillion* were entitled to compensation for their compelled travel time under the applicable wage order because they were subject to the control of an employer during that time."²² (*Frlekin v. Apple, Inc.* (2020) 8 Cal.5th 1038, 1049 [the Supreme Court discussed *Morillion* in deciding whether Apple employees should be compensated for time spent on exit searches].) *Morillion* is based on Wage Order 14-80 covering agricultural workers, which defines "hours worked" to mean "the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so." (Cal. Code Regs., tit. 8, § 11140, subd. 2(G).) Because all wage orders contain the same definition of "hours worked," including Wage Order 16-2001 for on-site construction workers, *Morillion* is the controlling authority as to compulsory travel time.²³ (See *Morillion*, 22 Cal.4th at p. 581; Cal Code Regs., tit. 8, § 11160, subd. 2(J).)

Caltrans Failed to Meet Its Burden of Proving a Prima Facie Case.

Under *Morillion*, the compensability of travel time depends on the level of control exerted by the employer over the employee. (*Morillion*, 22 Cal.4th at p. 587.) "[B]y requiring employees to take certain transportation to a work site, employers thereby subject those employees to its control by determining when, where, and how they are to travel." (*Id.* at p. 588.)

Caltrans contends that Dreambuilder employees were under the control of Dreambuilder during the time when they travelled to and from Southern and Northern

²² The fact that "Royal required plaintiffs to meet at the departure points at a certain time to ride its buses to work, and [that] it prohibited them from using their own cars, subjecting them to verbal warnings and lost wages if they did so," established that the employer controlled the workers within the meaning of "hours worked." (*Morillion*, 22 Cal.4th at p. 587.)

²³ To the extent that Caltrans relies on the DLSE Public Works Manual or the April 22, 2003 DLSE opinion letter (Caltrans Exhibit No. 10, pp. 340-344, 352-353), neither constitute mandatory legal authority. (DLSE Public Works Manual (May 2018), § 1.1 [the Public Works Manual is a training tool for the Labor Commissioner's enforcement staff, and does not constitute binding legal authority]; *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1029, fn. 11 [an opinion letter from the Labor Commissioner's Office may serve as guidance but is not controlling legal authority].)

California to work on the Project. (Caltrans' Closing Brief, p. 9, ln. 21-23.) Without more, Caltrans failed to show that Dreambuilder determined "when, where, and how" its workers had to travel to the Project. Caltrans provided no evidence as to the circumstances surrounding the travel. Unlike *Morillion*, where the agricultural workers were required to take the employer-provided transportation or risk discipline, there is no evidence in the record that the workers on the Project were required to "take certain transportation to a work site." (*Morillion*, 22 Cal.4th at p. 588.)

The fact that some Dreambuilder workers traveled in Dreambuilder vehicles is not dispositive. "Time employees spend traveling on transportation that an employer provides but does not require its employees to use may not be compensable as 'hours worked.'" (*Morillion*, 22 Cal.4th at p. 588 (citation omitted).) Here, there was no evidence that Dreambuilder required its workers to drive or ride in company vehicles. The Supreme Court emphasized in *Morillion* that "employers do not risk paying employees for their travel time merely by providing them transportation." (*Ibid.*)

All Other Issues Are Moot.

In view of the finding that Caltrans failed to meet its prima facie burden (Cal. Code Regs., tit. 8, § 17250, subd. (a)), the issues of underpayment of wages, training funds, and overtime premiums – all based on compensable travel time, and the imposition of penalties – are moot.

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

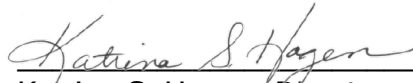
FINDINGS AND ORDER

1. The work under Contract Number 03-4F6304 for the replacement of guard railing at various locations in the counties of El Dorado and Sierra was a public work and subject to payment of prevailing wages and employment of apprentices.
2. The California Department of Transportation issued a timely Notice of the Withholding of Contract Payments to Dreambuilder Construction Corp

3. Dreambuilder Construction Corp filed a timely Request for Review of the Notice of the Withholding of Contract Payments issued by the California Department of Transportation with respect to the Project.
4. The California Department of Transportation did not meet its burden to prove that Dreambuilder Construction Corp underpaid its workers \$79,823.64 in compensable travel time.
5. All other issues are moot.

The Notice of the Withholding of Contract Payments is dismissed 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: 1/31/2023



Katrina S. Hagen, Director
California Department of Industrial Relations