

**STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS**

In the Matter of the Request for Review of
Tadros & Youssef Construction, Inc.

Case No. 06-0093-PWH

From the Civil Wage and Penalty Assessment issued by:
Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR

INTRODUCTION

Affected prime contractor, Tadros and Youssef Construction, Inc. ("Tadros"), requested review from a Civil Wage and Penalty Assessment ("CWPA") issued by the Division of Labor Standards Enforcement ("DLSE") on June 2, 2005, regarding the Don Benito Elementary School Phase 1 Modernization of the Pasadena Unified School District ("Project"). The CWPA assessed Tadros for unpaid prevailing wages for employee Miguel Aguilar for the period April 13, 2003, through December 21, 2003, in the amount of \$22,392.16, and penalties under Labor Code sections 1775 and 1813 for failure to pay prevailing wages in the amount of \$9,775.00,¹ for a total assessment in the amount of \$32,167.16. DLSE moved to dismiss the Request for review because it was filed untimely. The Hearing Officer, Christine L. Harwell, proceeded to take evidence under Rule 27 [Cal. Code Regs., tit. 8, §17227]. After review and analysis and as a result, the Request for review is dismissed for the following reasons.

FACTS

After DLSE served Tadros with the CWPA on June 2, 2005, Tadros sent a letter purporting to request review. The CWPA directed Tadros to file this request in Sacramento at the DLSE Civil Wage And Penalty Review Office. The CWPA also informed Tadros of its right to have an informal settlement conference with DLSE, which he could request by sending a letter to Deputy Labor Commissioner Yoon-mi Jo at her

¹ The penalties were broken down as follows: Failure to pay prevailing wages at \$50.00 each at \$6,550; failure to pay overtime and one day of double time at \$25.00 each at \$3,125.00. In addition an assessment was made for Tadros's failure to contribute the right amount of training fund contributions on the underpaid wages at \$381.30.

Los Angeles address. Despite the specific instructions where to send the request for review, Tadros mailed a one line letter to Deputy Labor Commissioner Jo, on August 1, 2005, in Los Angeles that stated:

Dear Sir

In accordance with the labor Code Section 1742, T&Y Construction is exercising our right to request review for the attached assessment.

Tadros admits that at that time it did not send a similar letter to the office of the Labor Commissioner in Sacramento, as directed by the DLSE's CWPA Notice.

In January 2006, when Deputy Yoon-mi Jo contacted the Civil Wage and Penalty Assessment Review Office to determine whether a request for review of the CWPA had been made,² she was advised that none had been filed. Thereupon in March, DLSE obtained a Superior Court Judgment for the full amount of the CWPA against Tadros, pursuant to Labor Code section 1742(d). On May 31, 2006, Tadros was advised of the entry of judgment, and it then obtained counsel who sent a letter inquiring about the judgment. DLSE's counsel advised Mr. Rudman that DLSE would oppose a further Request for review as untimely.

Tadros sent a June 2, 2006, Request for review directed to the correct office of the Labor Commissioner, which was received on June 5, 2006. The matter was referred for appointment of a hearing officer pursuant to Labor Code 1742(b); and on June 27, 2006, notice was given of a prehearing teleconference to be conducted by Hearing Officer Harwell on July 13, 2006. During the July 13, 2006, prehearing conference, DLSE's counsel, Bruce McManus advised the Hearing Officer that DLSE had already obtained a judgment and that the Hearing Officer was without jurisdiction to review this late filed request for review.³ The parties thereafter stipulated to set aside the default in the Superior Court action.⁴

² When asked by the Hearing Officer why Ms. Jo did not respond or forward Tadros' August 1, 2005 letter when it was received, DLSE's Mr. McManus explained that Ms. Jo was unaware of Tadros' August 1, 2005, letter prior to or at the time she called the Labor Commissioner's office in Sacramento and that the letter was not located in the file until Bruce Rudman, Esq. was retained to object to the default judgment DLSE obtained for Tadros' failure to file a request for review with the Labor Commissioner.

³ During the July 13, 2006, prehearing conference, the parties stipulated that (1) the work on the Pasadena Unified School District Don Benito Elementary School Phase 1 Modernization was a public work subject

Tadros asserted during the conference and in its written submission to the Hearing Officer that:

This is not the case of notice being sent to the “wrong address” where someone is not put on notice. Rather notice was provided to the address of the Labor Commission on the Civil Wage and Penalty Assessment. The Civil Wage and Penalty Assessment, as provided to T&Y, was ambiguous in that it had two different addresses.

August 14, 2006 letter from Bruce Rudman, Esq. to Hearing Officer, p. 2

Counsel for DLSE advised the Hearing Officer that Tadros had been involved in an earlier CWPA on a different project and that in May 2005, Tadros had sought review by submitting its request to the Labor Commissioner in Sacramento as directed by the same notice as on the CWPA in this case.

Because Tadros has raised the clarity of the notice it received, the two applicable notices are set forth in detail below:

On page two of the CWPA was the notice on the right to seek review, which states, in part:

Notice of Right to Obtain Review – Formal Hearing

In accordance with Labor Code Section 1742, an affected contractor or subcontractor may obtain review of this Civil Wage and Penalty Assessment by transmitting a written request to the office of the Labor Commissioner that appears below within 60 days after service of the assessment. **To obtain a hearing, a written Request for review must be transmitted to the following address:**

to the payment of prevailing wages under Labor Code sections 1720 through 1861; (2) that the CWPA was timely served; (3) The enforcement file was requested and produced by DLSE in a timely fashion to Tadros, and (4) that no back wages had been paid to Miguel Aguilar as a result of the CWPA..

⁴ The Director does not have jurisdiction to review an assessment when the underlying Assessment has become final and entered as a Court judgment. Rule 25(c) [Cal. Code . Reg., tit. 8, § 17225(c)] [“Notwithstanding any application or showing made under subpart (b) of this Rule, neither the Hearing Officer nor the Director may reinstate any Request for Review where the underlying Assessment or Withholding of Contract Payments has become final and entered as a court judgment.”] At the time the Request for Review was properly filed, there was a judgment; and the Director therefore had no jurisdiction to review the assessment. However, once the parties stipulated to set aside the judgment, and upon Superior Court relief from default, Rule 25(c) becomes inapplicable. Therefore, in that the Superior Court vacated the default judgment, the question is whether the Request for Review was filed timely.

Labor Commissioner, State of California
Civil Wage and Penalty Assessment Review Office
2031 Howe Ave., Suite 100
Sacramento, CA 95825

* * *

Failure by a contractor or subcontractor to submit a timely Request for review will result in a final order which shall be binding on the contractor or subcontractor, and which shall also be binding, with respect to the amount due, on a bonding company issuing a bond that secures the payment of wages and surety on a bond. Labor Code section 1743.

* * *

(Emphasis in original)

The right to request a settlement meeting was on the succeeding page (page three) and stated, in part:

Opportunity for Settlement Meeting

In accordance with Labor Code section 1742.1(b), the Labor Commissioner shall, upon receipt of a request from the affected contractor or subcontractor within 30 days following the service of this Civil Wage and Penalty Assessment, afford the contractor or subcontractor the opportunity to meet with the Labor Commissioner or his or her designee in an attempt to settle a dispute regarding the assessment. ... This opportunity to timely request an informal settlement meeting is in addition to the right to obtain a formal hearing, and a settlement meeting may be requested even if a written Request for review has already been made. Requesting a settlement meeting, however, does not extend the 60-day period during which a formal hearing may be requested.

A written request to meet with the Labor Commissioner or his or her designee to attempt to settle a dispute regarding this assessment must be transmitted to Yoon-mi Jo at the following address:

320 W. 4th St. Rm. #450

Los Angeles, CA 90013

DISCUSSION

The Civil Wage and Penalty Assessment is not Ambiguous

The first question is whether the CWPA sent to Tadros was ambiguous because it had addresses for both the Labor Commissioner in Sacramento and the Deputy in Los

Angeles. Black's Law dictionary describes three forms of ambiguity: (1) ambiguity on the factum, relating to the foundation of an instrument; (2) latent ambiguity, one that arises from a collateral matter when the document's terms are applied or executed; and (3) patent ambiguity, which clearly appears on the face of the document, arising from the language itself. See Black's Law Dict. (Abridged 7th ed., 2000) p. #63, col. 1. DLSE's notice of how to file for review of an assessment and how to arrange the settlement meeting described Labor Code section 1742.1(b) each are clear as to an affected contractor and subcontractor's rights and obligations. The only argument advanced by Tadros is that because page three of the CWPA lists an address in Los Angeles for requests for settlement, it was ambiguous whether a request for review (described in the previous page) could similarly be sent to the same address. However, the notice on page two is not ambiguous either as to the right to seek review nor as to the method of doing so. The assertion of an ambiguity because of the two separately stated instructions is therefore unsubstantiated.

Tadros has merely made a mistake that may be too late to rectify. Its attacks on the clarity of the language of the CWPA are unavailing.

The Director Has No Jurisdiction to Review DLSE's Civil Wage and Penalty Assessment Because Tadros' June 2, 2006, Request for Review Was Untimely.

A request for review must be directed to the Labor Commissioner at the address that appears on the assessment. Rule 22 ["A Request for Review shall be transmitted to the office of the Enforcing Agency designated on the Assessment or Notice of Withholding of Contract Payments from which review is sought."] Labor Code section 1742(a) provides that a request for review must be filed within 60 days from the date that a CWPA is served on an affected contractor or subcontractor. There is no standard form or elaborate process to make a request for review; a letter from the contractor or subcontractor to the Labor Commissioner simply asking for a hearing suffices to trigger the appeal process.⁵ Moreover, Rule 21(d) states: "Neither the making or pendency of a request for a settlement meeting, nor the fact that the parties have met or have failed or

⁵ Rule 22(e) states, in part: A Request for Review shall be liberally construed in favor of its sufficiency"

refused to meet as required by this Rule shall serve to extend the time for filing a Request for Review under Rule 22 below.”

The last sentence of Labor Code section 1742(a) provides that “[i]f no hearing is requested within 60 days after service of the assessment, the assessment shall become final.”⁶ Rule 22(a) expressly states that “Failure to request review within 60 days shall result in the Assessment or the Withholding of Contract Wages becoming final and not subject to further review under these Rules.” Where a statute sets out a duty and a consequence for the failure to act in conformity, that statute is said to be “mandatory.” *California Correctional and Peace Officers v. State Personnel Board* (“CCPOA”) (1995) 10 Cal.4th 1133. See also, *Progressive Concrete, Inc. v. Parker* (2006) 136 Cal.App.4th 540.

In *Pressler v. Bren* (1982) 32 Cal.3d 831, the court analyzed Labor Code section 98.2, which sets the time limit for appealing from a Labor Commissioner ruling on a claim for unpaid wages. Section 98.2(a) provides, in part: “Within 10 days after service of notice of an order, decision, or award the parties may seek review by filing an appeal to the superior court, where the appeal shall be heard de novo.” The Court found this requirement to be jurisdictional, in light of the language of former subsections (c) and (d) [now (d) and (e)] of Labor Code section 98.2, which make an Order, Decision, or Award that has not been timely appealed final and enforceable. *Pressler* held that “[a] late filing may not be excused on the grounds of mistake, inadvertence or excusable neglect.” *Id.* Here, there is not even an error due to mistake, inadvertence or excusable neglect since Tadros incorrectly addressed its Request For Review in violation of the specific instructions given in the CWPA and in its own past experience. See, *Triumph Precision Products, Inc. v. Insurance Company of North America* (1979) 91 Cal.App. 3d 362.

Pressler was relied on in *REO Broadcasting Consultants v. Martin* (1999) 69 Cal.App.4th 489, in which the court held that the time to appeal under The Talent Agencies Act (Lab. Code, §1700.44) was jurisdictional; and reliance on California Code of Civil Procedure section 473 was error. That court quoted *Pressler* that “the granting of

⁶ Similar to section 98.2(e), section 1742(d) provides that when an assessment becomes final, it may be filed and entered as a judgment of the superior court.

relief under Code of Civil Procedure section 473 would undercut the legislative purpose – and public policy – of assuring the expeditious collection of wages which are due but unpaid.” *Id.* at 496 (citation omitted). The Court found that the plaintiffs in the administrative proceeding, had not provided any “logical reason why the general holding in *Pressler* as to the timeliness of an appeal from a final determination by the Labor Commissioner is not equally applicable to *any* kind of administrative proceeding held before the Labor Commissioner, nor can they, in light of the *Pressler* court’s comments that:

Historically, the courts have not hesitated to apply the rules governing conventional appeals to appeals in which a trial de novo is required [citations]” and... “[t]he timely filing of the notice of appeal (1) forestalls the finality of the Labor Commissioner’s decision; (2) terminates the jurisdiction of the Labor Commissioner; and (3) vests jurisdiction to conduct a trial de novo in the appropriate court.

Id., at 496 (emphasis in original, citations omitted).

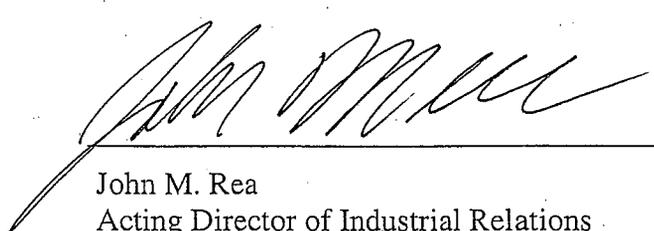
Had Tadros filed a timely request for review with the correct office, it would have forestalled the finality of the CWPA and would have vested the Director with jurisdiction to conduct a hearing. However, when the time has passed, there was no jurisdiction to proceed because “the assessment is final.” Lab. Code, § 1742(a). Because the time limit is mandatory and is jurisdictional by statute, Tadros’s late filing cannot be excused even if it presented grounds for mistake, inadvertence or excusable neglect, which it did not.

ORDER

Therefore, the request for review is DENIED, and the assessment is AFFIRMED as set forth in the foregoing findings. The Hearing Officer shall issue a Notice of the Findings which shall be served with the Decision on the parties.

Dated:

24 Jun 07


John M. Rea
Acting Director of Industrial Relations