

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Requests for Review of:

P&J ENGINEERING, a Partnership

Case Nos.: **12-0353-PWH**
12-0356-PWH
12-0357-PWH

From Civil Wage and Penalty Assessments issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected contractor P&J Engineering, a Partnership consisting of partners John Glen Howes and Patricia Melkyn Howes (P&J), requested review of a Civil Wage and Penalty Assessment (Assessment) issued by the Division of Labor Standards Enforcement (DLSE) with respect to each of the three following works of improvement: (A)¹ Hye Life Properties, LLC [12-0353-PWH]; (B) Raffaello's Ristorante [12-0356-PWH]; and (C) Slavko's Harbor Poultry [12-0357-PWH]. These projects were part of a larger "Business Incentive, Commercial Façade, and Signage Improvement Program" for property owners and tenants located within the Pacific Corridor Redevelopment Project Area. All three projects were funded by the same awarding body, the Community Redevelopment Agency of the City of Los Angeles. The Assessment for Project "A" determined that \$22,191.29 in unpaid prevailing wages and statutory penalties was due. The Assessment for Project "B" determined that \$9,701.45 in wages and statutory penalties was due. The Assessment for Project "C" determined that \$1,861.11 in wages and statutory penalties was due. The three matters were consolidated for the purpose of holding a single Hearing on the Merits, which was held on May 3, 2013, in Long Beach, California, before Hearing Officer John J. Korbol. William A. Snyder appeared for DLSE. John G. Howes appeared for P&J, in pro per. Now, based on un rebutted evidence

¹ The three projects were denominated by the letters "A", "B", and "C" for the purpose of identifying the Exhibits during the Hearing on the Merits.

showing that P&J failed to pay the required prevailing wage to its workers, the Director of Industrial Relations affirms the Assessments.

FACTS

Withdrawal of Contractor: Mr. Howes appeared for the Hearing on the Merits on behalf of P&J at the appointed time and place. P&J was not represented by legal counsel. Accompanying Mr. Howes were two witnesses for P&J: Edward Mainus, P&J's project supervisor, and Margaret Purcell, who handles accounting and payroll for P&J. Mr. Snyder appeared as counsel for DLSE with a witness, Michael Montiero, Deputy Labor Commissioner. DLSE also had several of P&J's workers present to testify.

Because P&J was not represented by legal counsel, before the Hearing commenced the Hearing Officer took time to explain to both of the parties (and to the witnesses present in the hearing room: Mr. Mainus, Ms. Purcell, and Mr. Montiero) the procedure involved, including such matters as the order of trial, the sequence of testimony, and the burden of proof. Mr. Mainus conceded that P&J had erred by failing to pay workers employed on the three projects a predetermined increase in the hourly wage rate. DLSE indicated that it would be making a motion to exclude witnesses from the hearing room. The Hearing Officer explained to P&J that this was a routine motion that was customarily granted, and that this did not mean that P&J's witnesses would be barred from testifying; rather, it meant that P&J's witnesses would have to wait outside the hearing room until called to testify. DLSE's witnesses, other than Mr. Montiero, were already in the waiting area outside the hearing room.

The Hearing Officer then opened the record. DLSE made an oral motion to exclude witnesses from the hearing room. The Hearing Officer inquired whether the motion was directed at both of P&J's witnesses, both of whom were still in the hearing room along with Mr. Howes. Mr. Snyder answered that he was moving to exclude both Mr. Mainus and Ms. Purcell. Before the Hearing Officer could rule on the motion, both Mr. Howes and Mr. Mainus erupted in anger, raising their voices and using vulgar language to protest that they were not getting a fair hearing. Mr. Howes rose to his feet, yelling, pointing, and gesturing at Mr. Snyder, and left the room, stating "I'm out of

here!” At this point, Mr. Mainus rose to his feet, and continued to express himself in a loud, aggressive, and inappropriate tone and manner. Meanwhile, Mr. Howes was forcefully pounding on the door to be let back in. The Hearing Officer ordered Mr. Mainus to leave the Hearing Room and opened the door to the waiting area. Mr. Howes re-entered, crossed the room, and again confronted Mr. Snyder face-to-face by yelling and gesticulating as before, before exiting a second time. Mr. Mainus and Ms. Purcell then left the hearing room together. Neither Mr. Howes, Mr. Mainus, nor Ms. Purcell returned.²

The disorderly and insolent behavior and language of Mr. Howes and Mr. Mainus constitutes misconduct and interference with the orderly conduct of the Hearing. Although Mr. Howes chose to leave the Hearing voluntarily, had he not done so the Hearing Officer would have been justified in prohibiting him from testifying or excluding him from the hearing room. Once Mr. Howes, as the sole legal representative of P&J, departed, the Hearing Officer was acting within his authority when he ordered Mr. Mainus to leave the hearing room.³

The Hearing Officer continued with the Hearing on the Merits in P&J’s voluntary absence, for the purpose of formulating a recommended decision as warranted by the evidence pursuant to California Code of Regulations, title 8, section 17243.⁴ DLSE called Mr. Montiero to testify and DLSE’s evidentiary exhibits were admitted into

² The statements made by the attorneys, the witnesses, and the Hearing Officer during this outburst were all made on the record and are recorded on compact disc. This summary of the facts is necessary because Mr. Howes and Mr. Mainus submitted an ex parte communication to the Hearing Officer in the form of a letter dated May 14, 2013. In that letter, Mr. Howes and Mr. Mainus make a number of false statements. Among those false statements are assertions that “P&J did not leave the room willingly,” that Mr. Korbol asked Mr. Howes to leave the room, and that P&J’s witnesses were not going to be allowed to testify. In accordance with the Government Code, this letter was shared with DLSE and has been made part of the record of these consolidated cases.

³ See Rule 47(a) [Cal. Code Regs. tit.8, § 17247(a)] and Government Code § 11455.10 (c). The question of whether to seek a contempt sanction under Government Code § 1455.20 is presently under consideration. Nothing in this Decision should be construed to indicate that the Director will not pursue contempt proceedings in Superior Court.

⁴ At the conclusion of the Hearing, DLSE raised the issue of whether P&J had, by voluntarily walking out of the Hearing, effectively withdrew its Requests for Review. Given the disposition here, and in light of the objections asserted on behalf of P&J in the letter of May 14, 2103, I decline to rule on this issue.

evidence. The matter was submitted on the evidentiary record based on the testimony of DLSE's investigator, Mr. Montiero.

Post-hearing, DLSE requested that Official Notice be taken of the Minutes of Prehearing Conference dated February 13, 2013, and April 3, 2013. This request is granted.

Assessments: **A.** With regard to Project "A", the facts below are based on Exhibits A-1 through A-25, and A-27, including the Assessment, and other documents in the Hearing Officer's file.

On or about June 24, 2011, P&J entered into a public works contract with 7th Street Properties to carry out façade improvements to storefronts located on West Seventh St. in San Pedro, California.⁵ Twelve workers performed labor for P&J under the contract on various dates within the period July 9, 2011, through September 24, 2011. The applicable prevailing wage determinations are: (1) LOS -2011-1, with predetermined increases, (General Prevailing Wage Determination for Los Angeles County) with the applicable job classification being Painter; (2) SC-23-102-2-2010-2, with predetermined increases, (General Prevailing Wage Determination for Southern California), with the applicable job classification being Laborer; and (3) SC-23-102-2-2010-1, with predetermined increases, (General Prevailing Wage Determination Southern California), with the applicable job classification being Carpenter.

Based on the evidence produced by DLSE, P&J failed to pay predetermined wage increases, failed to pay the proper wage rate, misclassified workers who performed carpentry work and other work as laborers (the lowest-paid classification), failed to pay overtime work at the proper rate, and failed to pay the correct training fund contributions. The total wages due are \$17,168.70. Unpaid training fund contributions come to an additional \$262.59.

⁵ The 7th Street Properties were owned by Hye Life Properties, LLC.

DLSE assessed \$4,410.00 in penalties under Labor Code section 1775⁶, at the rate of \$30 per violation for 147 instances of failure to pay the applicable prevailing wages. DLSE also assessed \$25.00 in penalties under section 1813 for 14 instances of failure to pay the proper overtime rate, totaling \$350.00.

B. With regard to Project “B”, the facts below are based on Exhibits A-10 through A-12, A-14-through A-15, B-1 through B-9, B-13, and B-17 through B-21, including the Assessment, and other documents in the Hearing Officer’s file.

On or about July 1, 2011, P&J entered into a public works contract with Raffaello Ristorante to carry out façade improvements to the restaurant. Seven workers performed labor for P&J under the contract on various dates within the period August 13, 2011, through September 10, 2011. The applicable prevailing wage determinations are: (1) LOS -2011-1, with predetermined increases, (General Prevailing Wage Determination for Los Angeles County) with the applicable job classification being Painter; (2) SC-23-102-2-2010-2, with predetermined increases, (General Prevailing Wage Determination for Southern California), with the applicable job classification being Laborer; and (3) SC-23-102-2-2010-1, with predetermined increases, (General Prevailing Wage Determination Southern California), with the applicable job classification being Carpenter.

Based on the evidence produced by DLSE, P&J failed to pay predetermined wage increases, failed to pay the proper wage rate, misclassified workers who performed carpentry work and other work as laborers (the lowest-paid classification), failed to pay overtime work at the proper rate, and failed to pay the correct training fund contributions. The total wages due are \$7,861.09. Unpaid training fund contributions come to an additional \$130.36.

DLSE assessed \$1,110.00 in penalties under Labor Code section 1775, at the rate of \$30 per violation for 37 instances of failure to pay the applicable prevailing wages. DLSE also assessed \$25.00 in penalties under section 1813 for 24 instances of failure to pay the proper overtime rate, totaling \$600.00.

⁶ All further statutory references are to the California Labor Code, unless otherwise indicated.

C. With regard to Project “C”, the facts below are based on Exhibits A-10 through A-12, A-14-through A-15, C -1 through C-9, C-13, C-17, C-18, and C-20, including the Assessment, and other documents in the Hearing Officer’s file.

On or about July 25, 2011, P&J entered into a public works contract with Slavko’s Harbor Poultry to carry out façade improvements to the premises of the business. Four workers performed labor for P&J under the contract on various dates within the period September 3, 2011, through September 24, 2011. The applicable prevailing wage determinations are: (1) LOS -2011-1, with predetermined increases, (General Prevailing Wage Determination for Los Angeles County) with the applicable job classification being Painter; (2) SC-23-102-2-2010-2, with predetermined increases, (General Prevailing Wage Determination for Southern California), with the applicable job classification being Laborer; and (3) SC-23-102-2-2010-1, with predetermined increases, (General Prevailing Wage Determination for Southern California), with the applicable job classification being Carpenter.

Based on the evidence produced by DLSE, P&J failed to pay predetermined wage increases, failed to pay the proper wage rate, misclassified workers who performed carpentry work and other work as laborers (the lowest-paid classification), failed to pay overtime work at the proper rate, and failed to pay the correct training fund contributions. The total wages due are \$1,283.57. Unpaid training fund contributions come to an additional \$32.54.

DLSE assessed \$420.00 in penalties under Labor Code section 1775, at the rate of \$30 per violation for 14 instances of failure to pay the applicable prevailing wages. DLSE also assessed \$25.00 in penalties under section 1813 for five instances of failure to pay the proper overtime rate, totaling \$125.00.

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.)

Section 1775, subdivision (a) requires, among other things, that contractors and subcontractors pay the difference to workers who received less than the prevailing rate and also prescribes penalties for failing to pay the prevailing wage rate. Section 1813 prescribes a fixed penalty of \$25.00 for each instance of failure to pay the prevailing overtime rate when due. 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.

When DLSE 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 may appeal that assessment by filing a Request for Review under section 1742. Subdivision (b) of section 1742 provides, among other things, that a hearing on the request for review “shall be commenced within 90 days” and that the contractor shall be provided with an opportunity to review evidence that DLSE intends to utilize at the hearing.

The contractor “shall have the burden of proving that the basis for the civil wage and penalty is incorrect.” (*Ibid.*) In this case, with P&J having voluntarily absented itself through Mr. Howes’ emphatic and definitive departure from the hearing room after the matter had gone on the record and before DLSE had started to put on its case, the record establishes that there is a valid basis for the Assessments. P&J presented no evidence to disprove the basis for the Assessments or to support a waiver of liquidated damages under section 1742.1, subdivision (a). Accordingly, the three Assessments are affirmed in their entirety.

FINDINGS

Case No. 12-0353-PWH

1. Affected contractor P&J Engineering, a Partnership consisting of partners John Glen Howes and Patricia Melkyn Howes, filed a timely Request for Review from a Civil Wage and Penalty Assessment issued by the Division of Labor Standards Enforcement.

2. Unpaid wages are due in the amount of \$17,168.70.

3. Unpaid training fund contributions are due in the amount of \$262.59.

4. In light of Findings 2 and 3 above, P&J underpaid its employees on the Hye Life Properties Project in the aggregate amount of \$17,431.29.

5. Penalties under section 1775 are due in the amount of \$4,410.00 for 147 violations at the rate of \$30.00 per violation.

6. Penalties under section 1813 are due in the amount of \$350.00 for 14 violations at the rate of \$25.00 per violation.

7. Liquidated damages are due in the amount of \$17,168.70, and are not subject to waiver under section 1742.1, subdivision (a).

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

Wages Due:	\$17,168.70
Training Fund Contributions Due:	\$ 262.59
Penalties under section 1775, subdivision (a):	\$ 4,410.00
Penalties under section 1813:	\$ 350.00
Liquidated damages:	\$17,168.70
TOTAL:	\$39,359.99

Interest shall accrue on unpaid wages in accordance with section 1741, subdivision (b).

Case No. 12-0356-PWH

1. Affected contractor P&J Engineering, a Partnership consisting of partners John Glen Howes and Patricia Melkyn Howes, filed a timely Request for Review from a Civil Wage and Penalty Assessment issued by the Division of Labor Standards Enforcement.

2. Unpaid wages are due in the amount of \$7,861.09.

3. Unpaid training fund contributions are due in the amount of \$130.36.

4. In light of Findings 2 and 3 above, P&J underpaid its employees on the Raffaello's Ristorante Project in the aggregate amount of \$7,991.45.

5. Penalties under section 1775 are due in the amount of \$1,110.00 for 37 violations at the rate of \$30.00 per violation.

6. Penalties under section 1813 are due in the amount of \$600.00 for 24 violations at the rate of \$25.00 per violation.

7. Liquidated damages are due in the amount of \$7,861.09, and are not subject to waiver under section 1742.1, subdivision (a).

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

Wages Due:	\$7,861.09
Training Fund Contributions Due:	\$ 130.36
Penalties under section 1775, subdivision (a):	\$1,110.00
Penalties under section 1813:	\$ 600.00
Liquidated damages:	\$7,861.09

TOTAL:

\$17,562.54

Interest shall accrue on unpaid wages in accordance with section 1741, subdivision (b).

Case No. 12-0357-PWH

1. Affected contractor P&J Engineering, a Partnership consisting of partners John Glen Howes and Patricia Melkyn Howes, filed a timely Request for Review from a Civil Wage and Penalty Assessment issued by the Division of Labor Standards Enforcement.

2. Unpaid wages are due in the amount of \$1,283.57.

3. Unpaid training fund contributions are due in the amount of \$32.54.

4. In light of Findings 2 and 3 above, P&J underpaid its employees on the Slavko's Harbor Poultry Project in the aggregate amount of \$1,316.11.

5. Penalties under section 1775 are due in the amount of \$420.00 for 14 violations at the rate of \$30.00 per violation.

6. Penalties under section 1813 are due in the amount of \$125.00 for five violations at the rate of \$25.00 per violation.

7. Liquidated damages are due in the amount of \$1,283.57, and are not subject to waiver under section 1742.1, subdivision (a).

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

Wages Due:	\$1,283.57
Training Fund Contributions Due:	\$ 32.54
Penalties under section 1775, subdivision (a):	\$ 420.00
Penalties under section 1813:	\$ 125.00

Liquidated damages: \$1,283.57

TOTAL: \$3,144.68

Interest shall accrue on unpaid wages in accordance with section 1741, subdivision (b).

ORDER

The Civil Wage and Penalty Assessments are affirmed in full 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: 11/22/13 _____

Christine Baker

Christine Baker
Director of Industrial Relations