

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

GBR Enterprise Inc.

Case No. 14-0490-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement.

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected subcontractor GBR Enterprise Inc. (GBR) submitted a request for review of a Civil Wage and Penalty Assessment (Assessment) issued by the Division of Labor Standards Enforcement (DLSE) on July 15, 2014, with respect to work performed by GBR on the Nursing Simulation Lab and Office Renovation project (Project) performed for the California State University Long Beach (CSULB) in Los Angeles County. The Assessment determined that \$8,792.38 was due in unpaid prevailing wages, \$5,600.00 was due in statutory penalties under Labor Code section 1775, and \$200.00 was due in statutory penalties under Labor Code section 1813.¹ A hearing on the merits was held on February 5, 2015, before Hearing Officer Howard Wien. William A. Snyder appeared for DLSE. GBR failed to appear at hearing. Now, based on un rebutted evidence showing that GBR failed to pay required prevailing wages to its workers in the sum of \$8,456.38, the Director of Industrial Relations modifies and affirms the Assessment.

FACTS

The prime contractor for the Project, Mackone Development, Inc. (Mackone), who also requested review of the Assessment, settled the assessed unpaid wages and section 1813 penalties with DLSE in full and withdrew its request for review on or about January 27, 2015.² The sole remaining issues for hearing are the assessment of penalties against GBR under section 1775 and liquidated damages under section 1742.1, subdivision (a).

¹ All further statutory references are to the California Labor Code, unless otherwise indicated.

² Case number 14-0639-PWH.

Failure to Appear: On November 14, 2014, the Hearing Officer's administrative assistant served GBR, by mail, with the "Notice of Appointment of Hearing Officer; Notice of Prehearing Conference; and Preliminary Orders." Mail service was made to GBR's address of record: Mr. Kapsoo Park, GBR Enterprise Inc., 1611 6th Avenue, Los Angeles, CA 90019. This Notice set a prehearing conference on November 24, 2014.

On November 24, 2014 the telephonic prehearing conference commenced pursuant to the above notice that had been mailed to GBR (and to DLSE) stated above. Jun Park appeared as representative of GBR, and Snyder appeared as counsel for DLSE. The prehearing conference was continued to December 9, 2014, and it was conducted that day by telephone with Jun Park appearing as representative for GBR and Snyder appearing for DLSE. In this prehearing conference, Jun Park, Snyder and the Hearing Officer agreed to set the Hearing on the Merits on February 5, 2015, at 10:00 a.m., at the Office of the Director – Legal Unit, Los Angeles. In response to statements made by Snyder, Jun Park stated that he was not an owner, officer, managing agent or attorney of GBR. The Hearing Officer instructed Jun Park that GBR must file with the Hearing Officer, and serve upon DLSE, an Authorization for Representation by Non-Attorney pursuant to Rule 9(a) (Cal. Code Regs.. tit. 8, § 17209, subd. (a)), with such authorization to be signed by an owner, officer or managing agent of GBR. The Hearing Officer informed Jun Park that he would enclose a copy of said form authorization with the Minutes and Order regarding the prehearing conference and Hearing on the Merits.

On December 29, 2014, the Hearing Officer's administrative assistant served by mail the "Minutes of Prehearing Conference; and Order Setting Hearing on the Merits," with the form authorization enclosed. This service was made to GBR's address of record stated above. This mailing was not returned by the Post Office; the Hearing Officer received no information disputing GBR's address of record.

The Hearing Officer did not receive the Authorization for Representation by Non-Attorney from GBR, nor any further communication from GBR. On February 5, 2015, the Hearing Officer waited until 10:33, 33 minutes after the scheduled start time, to begin the Hearing on the Merits to see if GBR would make an appearance or communicate with the Hearing Officer or his administrative assistant. However, there was no appearance or any other

communication from GBR. The Hearing on the Merits then proceeded as scheduled, with DLSE as the sole party present, pursuant to Rule 46(a) (Cal. Code Regs., tit. 8, § 17246, subd. (a)).

DLSE's evidentiary exhibits 1-17 were admitted into evidence without objection. Management Services Technician Roderick Smith testified on behalf of DLSE and Spanish language portions of Exhibits Nos. 10 and 11 were translated orally on the record by DLSE's interpreter Karen Betancur.

Assessment: The facts stated below are based on Exhibits 1-17 submitted by DLSE, the Assessment, the testimony of Roderick Smith, and any other documents in the Hearing Officer's file.

Mackone entered into a public works contract with CSULB for the Project and subcontracted with GBR on June 26, 2013, to perform demolition and carpentry work. Pursuant to this subcontract, GBR's employee Jesus Castanon Rodarte worked a total of 28 days on the Project from July 8 through September 25, 2013, with a total of 223 straight time hours and 21 overtime hours. Rodarte performed the following work on the Project: (1) demolition of walls, doors ceilings and other material; (2) framing of walls and ceiling, (3) installation of backing; and (4) patchwork where needed.

On its certified payroll records for the Project, GBR misclassified Rodarte as a "tile finisher" and reported a prevailing wage rate of \$33.52 per hour for straight time. The record shows, however, that GBR actually paid Rodarte a lower rate of \$16.00 per hour for all hours worked, and did not pay overtime. The correct classification for the work that Rodarte performed on the Project is "carpenter," and the applicable prevailing wage determination is SC-23-31-2-2011-1 (Carpenter and Related Trades) which set the prevailing wage at \$49.05 per hour for straight time and \$67.725 per hour for overtime. The evidence submitted by DLSE, including its "Public Works Investigation Worksheet" for the Project, establish that the wages GBR was required to pay Mr. Rodarte totaled \$12,360.38, but GBR only paid Mr. Rodarte wages of \$3,904.00 – thereby leaving \$8,456.38 due and owing. DLSE assessed \$8,792.38 in unpaid prevailing wages (however, as stated above, the actual sum owing, according to proof, is \$8,456.38), \$5,600.00 in penalties under section 1775, at the maximum rate of \$200.00 per violation, for 28 instances of failure to pay the applicable prevailing wage rates, and \$200.00 in

penalties under section 1813, at the statutory rate of \$25.00 per violation, for eight instances of failure to pay the applicable overtime prevailing wage rates.³ GBR neither paid any of the assessed unpaid wages nor made a deposit of the full amount of the Assessment with the Department of Industrial Relations for the Department to hold in escrow pending administrative and judicial review within 60 days after service of the Assessment under section 1742.1.

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." (Lab. Code § 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, up to a maximum of \$200.00 per violation, for failing to pay the prevailing 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 or subcontractor may appeal that assessment by filing a Request for Review under section 1742. The contractor or subcontractor "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 Assessment and GBR presented no evidence to disprove the basis for the Assessment; however, the record establishes that the unpaid prevailing wages

³ As noted above, Mackone paid the assessed unpaid prevailing wages and section 1813 penalties in full pursuant to its settlement with DLSE.

totalled \$8,456.38 rather than the assessed sum of \$8,792.38. Accordingly, the Assessment is modified in part and affirmed in part.

FINDINGS

1. Affected subcontractor GBR Enterprise Inc. filed a timely Request for Review from a Civil Wage and Penalty Assessment issued by the Division of Labor Standards Enforcement.

2. GBR underpaid the prevailing wages owed to Rodarte for his work on the Project in the amount of \$8,456.38. None of these wages were paid to Rodarte or deposited in escrow with the Department within 60 days after service of the Assessment and GBR has not established any basis for waiver of liquidated damages under section 1742.1, subdivision (a). Accordingly, liquidated damages are due in the sum of \$8,456.38 under section 1742.1, subdivision (a).

3. Penalties under section 1775 are due in the aggregate amount of \$5,600.00 for 28 violations at the maximum rate of \$200.00 per violation as assessed by the Labor Commissioner.

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

Liquidated damages under section 1742.1, subdivision (a):	\$8,456.38
Penalty under section 1775, subdivision (a):	\$5,600.00
TOTAL:	\$14,056.38

ORDER

The Civil Wage and Penalty Assessment is affirmed and modified as set forth in the above Findings. The Hearing Officer shall issue a Notice of Findings that shall be served with this Decision on the parties.

Dated: 7/29/2015



Christine Baker
Director of Industrial Relations