

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Worthington Construction, Inc.

Case No. 14-0502-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Worthington Construction, Inc. (Worthington), the subcontractor, requested review of a Civil Wage and Penalty Assessment (Assessment) issued by the Division of Labor Standards Enforcement (DLSE) with respect to the work of improvement known as the Heritage High School Building F (Project) performed for the Perris Union High School District (District) in the County of Riverside. The Assessment determined that Worthington owed \$11,049.49 in unpaid prevailing wages and owed \$4,560.00 in Labor Code section 1775 statutory penalties.¹ After the Assessment, Worthington paid the prevailing wages so that there only remained the issue of statutory penalties under the Assessment prior to the Hearing on the Merits.

Pursuant to written notice, a Hearing on the Merits was held on January 15, 2015, in Los Angeles, California, before Hearing Officer Ed A. Kunnes. David Cross appeared for DLSE. Dale Worthington, as an authorized representative, appeared for Worthington.

At trial, the parties stipulated to the issue for decision as follows: Is Worthington liable for penalties under 1775?

The parties had already previously stipulated at the prehearing conference on November 20, 2014 to the following:

- The Project was a public work and the work is subject to payment of prevailing wages;
- The DLSE timely brought the Assessment;
- Worthington timely requested review;

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

- The DLSE timely made the enforcement file available to Worthington; and
- Worthington paid wages as a result of the Assessment.

Since DLSE proceeded at the Hearing on the Merits based only on the statutory penalties in the Assessment, and not prevailing wages, the Director addresses only the statutory penalties and modifies those penalties in part and affirms those penalties in part.

Facts

The facts stated below are based on the testimony of the witnesses, Tony Eguavoen and Dale Worthington, and DLSE Exhibits 1 through 10, including the Assessment, and Worthington Exhibits A through D.

Bogh Engineering, Inc. (Bogh), the primary contractor, contracted with the District to construct the Project on June 3, 2013. Bogh hired Worthington as a subcontractor on the Project. Perris Union High School District published the Notice Inviting Bids on April 17 and April 22, 2013. The applicable Prevailing Wage Determination in effect on this date was SC-102-X-14-2013-1 (Landscape/Irrigation Laborer).

The Director of Industrial Relations, pursuant to sections 1770, 1773 and 1773.1, issued the Prevailing Wage Determination for Landscape/Irrigation Laborer from February 22, 2013 to July 31, 2013. Notwithstanding the July 31, 2013 expiration date, the Department of Industrial Relations attached a predetermined increase to the Prevailing Wage Determination such that between August 1, 2013 and August 1, 2014 the wage increased for the Landscape/Irrigation Laborer.

Footnote c to the Prevailing Wage Determination for Landscape/Irrigation Laborer provided the following directive: “The first employee on the jobsite shall be a Landscape/Irrigation Laborer; the second employee on the jobsite must be an Apprentice or a Landscape/Irrigation Laborer . . .”

Mr. Tony Eguavoen, the deputy investigator for the DLSE, determined that Worthington underpaid prevailing wages to Worthington’s first two workers on the Project. Two Worthington employees performed work on the Project from February 17, 2014 through June 20, 2014. The Assessment involved only these dates. Mr. Eguavoen testified that he prepared the Assessment and the Public Work Audit Worksheet based on Worthington’s Certified Payroll Records

(CPRs). Additionally, Mr. Eguavoen identified Worthington's CPRs and the applicable prevailing wage. Mr. Eguavoen further testified that the Assessment was properly served on July 29, 2014.

Worthington properly classified the first employee as a Landscape Laborer. However, Dale Worthington conceded that Worthington had underpaid the first employee. Pursuant to Footnote c to the prevailing wage determination, Worthington misclassified the second employee as a Tender as opposed to a Landscape/Irrigation Laborer. The misclassification resulted in Worthington underpaying the second employee. After June 20, 2014, Worthington employed other additional workers. DLSE made no assessment against Worthington for these additional workers because, as to these workers, Worthington properly classified them and properly compensated them.

In addition to the prevailing wage assessment, DLSE assessed penalties in the amount of \$80 for each calendar day for each worker paid less than the prevailing wage rate. In the Labor Code Section 1775 Penalty Review, Mr. Eguavoen identified, among other assessments, an assessment within the last year for which Worthington was required to pay \$86,810.47. A senior deputy at DLSE set the rate at \$80.00 per violation based upon the fact that Worthington had violated the prevailing wage law within the last three years. (See § 1775, subd. (a)(2)(B)(ii).) The Assessment reflects that Worthington committed 57 violations. At \$80.00 for each of the 57 violations, DLSE assessed total penalties in the amount of \$4,560.00.

After service of the Assessment, Worthington proved to DLSE's satisfaction that it had previously paid fringe benefits not credited by DLSE. DLSE accordingly reduced the wages Worthington owed, and Worthington made payment in this reduced amount. Whereas the Assessment shows that Worthington owes \$11,049.49 for prevailing wages, the Labor Code Section Penalty Review reflects that Worthington only owes \$6,934.09 for prevailing wages. The logical inference is that Mr. Eguavoen reduced the amount Worthington owed based on Worthington's evidence that it had paid fringe benefits. Notwithstanding this reduction, Mr. Eguavoen imported the same number of violations (i.e., 57 violations) from the Assessment into the Labor Code Section 1775 Penalty Review, and then testified at the Hearing on the Merits that

Worthington incurred 57 violations. Worthington did not submit evidence that refuted DLSE's contention that Worthington committed 57 violations.

Although DLSE significantly reduced the prevailing wages Worthington owed, the evidence did not indicate a need to make a downward adjustment for the number of violations. On direct examination, Dale Worthington testified that both the first employee and the second employee were underpaid. Furthermore, the CPRs confirm that Worthington consistently underpaid these workers for each calendar day they worked from February 17, 2014, through June 20, 2014, pursuant to the operative Prevailing Wage Determination for Landscape/Irrigation Laborer.

Nonetheless, DLSE appears to have overstated the number of violations. As per the CPRs, the first employee worked 25 calendar days during the dates covered by the Assessment and the second employee worked 22 calendar days during the dates covered by the Assessment. Thus, the evidence supports a finding that Worthington committed 47 wage violations as opposed to 57 wage violations. The parties, however, made scant reference to the number of violations assessed by DLSE. Rather, the parties focused their argument on whether the classification of the second worker on the Project, and consequently the underpayment of the second worker, was a good faith mistake.

As evidence of its good faith, Worthington points out that it promptly made restitution of the wages to both employees. Additionally, Worthington submitted a couple of examples of prevailing wage determinations that, although they were not relevant to the time period of the Project, stated that the second employee may be a Tender. To bolster Worthington's good faith mistake argument, Mr. Worthington testified that he worked for twenty years on public work projects and never saw a change to the requirement that the second employee on the job be a Tender until the deputy investigator brought this matter to his attention.

DLSE uses these same facts to argue that Worthington's underpayment of wages was a willful violation of prevailing wage law. DLSE shows that the Prevailing Wage Determination was posted at the jobsite. It further argues that Mr. Worthington, a veteran of public works projects, not only knew how to read the Prevailing Wage Determination but should have anticipated periodic changes to the requirements on public work projects.

Worthington submitted a timely request for review on August 21, 2014, and DLSE provided Worthington with a reasonable opportunity to review DLSE's evidence. Bogh did not request review of the Assessment. DLSE requested that the Director find Bogh and Worthington jointly and severally liable under the Assessment.

Discussion

The parties identified the issue at the Hearing on the Merits as one of Worthington's liability under section 1775. Worthington, however, conceded liability. On the other hand, Worthington argued that the DLSE was required to assess penalties at a rate lower than \$40.00 per violation² and possibly as low as zero because the error was allegedly a good faith mistake and Worthington promptly made restitution. For the reasons set forth below, Worthington's contention is a misstatement of the law and more particularly a misstatement of section 1775, subdivision (a)(2)(B)(i).

The Labor Commissioner Did Not Abuse Her Discretion in Setting the Amount of the Penalty at \$80.00 Per Violation.

The determination of the Labor Commissioner as to the amount of the penalty shall be reviewable only for abuse of discretion. (§ 1775, subd. (a)(D).) The Labor Commissioner has discretion to assess penalties up to \$200.00 per violation. (§ 1775, subd. (a).) Section 1775 contains no other maximum monetary limit as regards to penalties assessed by the Labor Commissioner. Other references to specific dollar amounts within section 1775 are benchmarks below which the Labor Commissioner may not assess a penalty for prevailing wage violations. (§ 1775, subd. (a)(2)(B).) Section 1775, subdivision (a)(2)(B) sets forth three subparts concerning penalty rates for prevailing wage violations, repeat prevailing wage violations, and willful prevailing wage violations. (§ 1775, subd. (a)(2)(B)(i), (ii) & (iii).) Of those three subparts, only section 1775, subdivision (a)(2)(B)(i) allows the Labor Commissioner to impose a penalty less than the stated penalty rate and only under certain circumstances. (§ 1775, subd.

² Section 1775 imposes penalties "for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rate." For ease of reference, this Decision refers to the penalty rate as a dollar amount per violation (e.g., \$80.00 per violation).

(a)(2)(B)(i).) But the discretion granted to the Labor Commissioner should not be confused as mandating a penalty less than \$40.00 per violation.

The Labor Commissioner must impose a penalty not less than \$40.00 per violation unless the failure was a good faith mistake and was promptly and voluntarily corrected. (§ 1775, subd. (a)(2)(B)(i).) That is, a good faith mistake promptly and voluntarily corrected permits, but does not require, the Labor Commissioner to impose a lesser penalty. The statute does not deny the Labor Commissioner discretion to impose a penalty equivalent to or greater than \$40.00 per violation under those same circumstances.

Notwithstanding the discretion granted by the Legislature to the Labor Commissioner to impose a penalty less than \$40.00 per violation, the Legislature granted no such discretion to the Labor Commissioner to impose a penalty less than \$80.00 per violation when the Labor Commissioner had penalized the contractor in the last three years for prevailing wage violations. (§ 1775, subd. (a)(2)(B)(ii).)

DLSE submitted credible and substantial evidence through testimony at the Hearing on the Merits that the Labor Commissioner had previously assessed prevailing wage violations against Worthington. In its defense, Dale Worthington attempted to elicit testimony on cross-examination of Mr. Eguavoen that Worthington had cooperated in rectifying these prior violations. But Worthington provided no evidence to refute the violations and/or the propriety of the assessments themselves.

The Labor Code Section 1775 Penalty Review references a prior prevailing wage violation by Worthington as “40-35599-CWPA issued on 2/7/14 for \$86,810.47.” Additionally, the Director pursuant to the Evidence Code sections 451 subdivision (a) and 452, subdivision (c) takes judicial notice of the Department's own Decisions to identify a prior violation by Worthington within the last year.³ Thus, the Labor Commissioner did not have discretion to impose anything less than a penalty of \$80.00 per violation against Worthington for its present violation of the prevailing wage law.

³ Case Numbers 14-0280-PWH and 14-0281-PWH.

As such, whether Worthington acted in good faith or acted willfully was irrelevant to the determination of the penalty rate. The issue could only have become relevant had the Labor Commissioner set the rate above the statutory minimum for repeat offenders. (See §1775, subd. (a)(2)(B)(ii).) Since the Labor Commission set the penalty at the statutory minimum, not only was the Labor Commissioner within her discretion, but she set the penalty rate at the lowest allowable statutory amount.

Worthington Committed 47 Wage Violations As Opposed to 57 Wage Violations.

DLSE assessed 57 prevailing wage violations for two employees from February 17, 2014 through June 20, 2014. Section 1775 calculates the rate per violation “for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rates.” Mr. Eguavoen testified that he arrived at the number of prevailing wage violations based on the CPRs. Notwithstanding, the CPRs reflect that the first employee worked 25 calendar days during the dates covered by the Assessment and the second employee worked 22 calendar days during the dates covered by the Assessment. Thus, the evidence supports a finding that Worthington committed 47 wage violations as opposed to 57 wage violations. On that basis, Worthington is found liable for 47 violations of section 1775, subdivision (a) at the rate of \$80.00 per violation totaling \$3,760.00.

Bogh is Jointly and Severally Liable for Worthington’s Prevailing Wage Violations.

DLSE requests that the Director find joint and several liability against the primary contractor, Bogh, and the subcontractor, Worthington. The contractor or subcontractor has the burden of proving that the basis for the civil wage and penalty assessment is incorrect. (§ 1742, subd. (b).) While section 1775, subdivision (b) provides a safe harbor to protect primary contractors from their subcontractor’s wage violations, Bogh had the burden of proving that the detailed requirements were met to avail itself of the safe harbor provision. Since Bogh did not request a review of the Assessment, it made no such evidentiary showing. Bogh and Worthington statutorily have joint and several liability for payment of all amounts due pursuant to a final order. (§ 1743, subd. (a).) Accordingly, Bogh is found to be jointly and severally liable with Worthington for all amounts found due under the Assessment..

FINDINGS

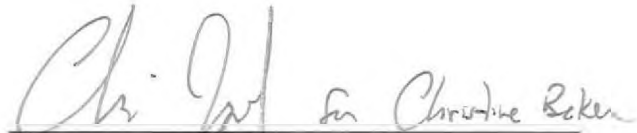
1. Affected subcontractor Worthington Construction, Inc. filed a timely Request for Review from a Civil Wage and Penalty Assessment issued by the Division of Labor Standards Enforcement.
2. Worthington Construction, Inc. underpaid prevailing wages to two employees on the Project.
3. Worthington Construction, Inc. promptly paid the employees the amount of the prevailing wages due them.
4. The Labor Commissioner did not abuse her discretion in setting the amount of the penalty at \$80.00 for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rate.
5. The Division of Labor Standards Enforcement proved that Worthington Construction, Inc. committed 47 violations of section 1775, subdivision (a).
6. Penalties under section 1775, subdivision (a) are due in the amount of \$3,760.00 for 47 violations at the rate of \$80.00 for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rate.
7. No liquidated damages are due under section 1742.1.
8. Bogh Engineering, Inc., the primary contractor, and Worthington Construction, Inc., its subcontractor, are jointly and severally liable for all amounts found due under the Assessment.
9. The amounts found due in the Assessment, as modified and affirmed by this Decision, are as follows:

Penalties under section 1775, subdivision (a):	\$3,760.00
TOTAL:	\$3,760.00

ORDER

The Civil Wage and Penalty Assessment is modified and affirmed 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: 3-2-15


Christine Baker
Director of Industrial Relations