

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

DMR Team, Inc.

Case No. 15-0227-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

ORDER DENYING RECONSIDERATION

On July 28, 2016, the affected contractor in the above matter, DMR Team, Inc. ("DMR"), requested reconsideration of the Decision served on July 21, 2016, ("Decision"). Based on my review of DMR's arguments and relevant parts of the record, I find no grounds for reconsideration of the Decision. Pursuant to Labor Code section 1742, subdivision (b)¹ and California Code of Regulations, title 8, section 17261, subdivision (b), the Director hereby denies the request in its entirety. (See Cal. Code Regs., tit. 8, § 17261, subd. (d).)

As to DMR's argument on liquidated damages, section 1742.1, subdivision (b) provides for no liability for liquidated damages if the full amount of the assessment, including penalties, is deposited with the Department of Industrial Relations within 60 days following service of the assessment. DMR argues it made such a deposit based on a photocopy of its check for \$40,778.74 dated August 28, 2015, drawn to the Division of Labor Standards Enforcement ("DLSE"). DMR has shown no reason why it could not have produced a copy of this check at the hearing. Setting aside the questions of timeliness of submitting this document and whether the check covered the full amount of the assessment, the administrative record shows that DLSE issued the assessment against DMR on June 10, 2015, and served it on DMR on the same date. To be entitled to the safe harbor under section 1742.1, subdivision (b), the full amount of the assessment must have been deposited with the Department of Industrial Relations within 60 days after June 10, 2015. Accordingly, even if it were to be considered as a late exhibit, a check sent to DLSE on or

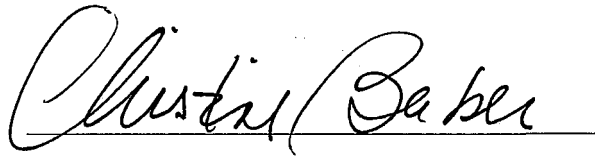
¹ All further statutory references are to the California Labor Code.

after August 28, 2015, would be both too late and not properly filed with the Department for purposes of section 1742.1, subdivision (b). Any question of credit for DMR's partial payment is not one for the Director, but one for DMR and DLSE to resolve.

In arguing for waiver of liquidated damages under section 1742.1, subdivision (a), DMR cites the same evidence and argument presented at the hearing as to why the unpaid wages were not due. DMR's arguments were considered and rejected for the reasons set forth in the Decision.

Accordingly, DMR's request for reconsideration is denied.

Dated: 8/4/2016

A handwritten signature in cursive script that reads "Christine Baker". The signature is written in black ink and is positioned above a horizontal line.

Christine Baker
Director of Industrial Relations

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

DMR Team, Inc.

Case No. 15-0227-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected contractor DMR Team, Inc. (DMR) requested review of a Civil Wage and Penalty Assessment (Assessment) issued by the Division of Labor Standards Enforcement (DLSE) on June 10, 2015, with respect to the work of improvement known as the Park Master Plan Capital Improvement Program and the Americans with Disabilities Access Program (Project) performed for the City of Monterey Park (City) in the County of Los Angeles. The Assessment determined that \$34,221.74 was due in unpaid prevailing wages, including training fund contributions, and \$7,757.00 was due under California Labor Code sections 1775 and 1813 as statutory penalties.¹ DMR did not deposit the Assessment amount for unpaid wages with the Department of Industrial Relations (DIR) pursuant to section 1742.1, subdivision (b).

Pursuant to written notice, a Hearing on the Merits was held on December 22, 2015, in Los Angeles, California, before Hearing Officer Richard T. Hsueh. Max Norris appeared for DLSE. Sam Talebian, president of DMR, appeared for DMR.

The issues for decision are:

- Whether the Assessment correctly found that DMR failed to pay the required prevailing wages for all straight time and overtime worked on the Project by its worker Bradford Clayton (Clayton);

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

- Whether DLSE abused its discretion in assessing penalties under section 1775 at the rate of \$79.00 per violation;
- Whether DMR failed to pay the required prevailing wage rate for overtime work and therefore was liable for penalties under section 1813;
- Whether the Assessment correctly found that DMR failed to contribute to an applicable apprenticeship training fund for Clayton; and
- Whether DMR has demonstrated substantial grounds for appealing the Assessment, entitling it to a waiver of liquidated damages under section 1742.1.

The Director finds that DMR has failed to carry its burden of proving that the basis of the Assessment was incorrect. DMR has also failed to carry its burden of proving grounds for waiver of liquidated damages. Based on the evidence showing that DMR failed to pay the required prevailing wages, this Decision affirms the Assessment, as modified, on all issues.

Facts

Assessment: The facts stated below are based on testimony of witnesses, Exhibits 1 through 29 submitted by DLSE, Exhibits B-G submitted by DMR, the Assessment and other documents in the Hearing Officer's file.²

DMR was the construction and project management consulting contractor on the Project. It employed Clayton to assist with the performance of its work on the Project. Clayton performed work for DMR between March 24, 2013, and July 28, 2013. The applicable prevailing wage determination in effect on the bid advertisement date is SD-23-63-2-2013-D (Building/Construction Inspector and Field Soils and Material Tester), with the applicable job classification in Group 2.

The Assessment found that DMR failed to pay Clayton the required prevailing wages and failed to make the required training fund contributions. The Assessment found a total of \$33,626.14 in unpaid prevailing wages, \$595.60 owed in training fund contribution, and \$7,757

² DMR's Exhibit A is the CWPA and was not admitted. All the other exhibits were admitted prior to the hearing by stipulation of the parties.

in section 1775 and 1813 statutory penalties (\$79 per violation for 83 violations under section 1775 and 48 violations at \$25 each under section 1813).³

Deputy Labor Commissioner Violeta Adoc (Adoc) testified as to the preparation of the Assessment and the supporting audit worksheets. She identified the scope of work for building/construction inspectors and the applicable Prevailing Wage Determinations for that classification. Adoc further testified that the Assessment was properly served on DMR on June 10, 2015. DMR then submitted a timely request for review received by DLSE on June 30, 2015.

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). See, too, *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 rate. Section 1742.1, subdivision (a) provides for the imposition of liquidated damages, essentially a doubling of 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 the contractor shall be provided with an opportunity to review evidence that DLSE intends to utilize at the hearing. At

³ During the hearing, DLSE stated that the section 1775 penalty was based on \$79.00 per violation for 83 violations rather than \$200.00 per violation as shown on the audit worksheet. This reduced the aggregate penalty amount under section 1775 from \$16,600.00 to \$6,557.00. This is also the penalty rate and aggregate penalty amount reflected in DLSE’s penalty review which was approved by Senior Deputy Labor Commissioner Ken Madu.

the hearing, the contractor “shall have the burden of proving that the basis for the civil wage and penalty assessment is incorrect.” (§ 1742, subd. (b).) If the contractor “demonstrates to the satisfaction of the director that he or she had substantial grounds for appealing the assessment ... with respect to a portion of the unpaid wages covered by the assessment..., the director may exercise his or her discretion to waive payment of the liquidated damages with respect to that portion of the unpaid wages.” (§ 1742.1, subd. (a).) Furthermore, DLSE’s determination “as to the amount of the penalty shall be reviewable only for abuse of discretion.” (§ 1775, subd. (a)(2)(D).)

In this case, the record established the basis for the Assessment. Prior to the Hearing on the Merits, the parties stipulated that the Project was public work and required the payment of prevailing wages under California Prevailing Wage Law. DLSE then presented evidence that Clayton performed work as a construction inspector. DLSE further presented evidence that DMR did not pay Clayton the prevailing wage for all hours worked, including overtime.

DMR argued that it was not required to pay Clayton the prevailing wage because Clayton was an independent contractor and not an employee. Alternatively, to the extent that Clayton is deemed to be an employee, he was not entitled to payment of overtime compensation because Clayton was an exempt employee under the applicable California wage order promulgated by the California Industrial Welfare Commission (IWC) because he was employed in an administrative capacity. Neither argument, however, has merit.

To begin with, DMR already stipulated that the Project was a public work and required the payment of prevailing wages. Section 1720, subdivision (a)(1) defines “public works” generally under a three pronged definition – (a) construction, alteration, demolition, installation or repair work, (b) done under contract, and (c) paid for in any part out of public funds. Workers employed on public works must be paid prevailing wages. The evidence submitted by DLSE shows that the Project was a public work because it included installation of picnic shelters, playground equipment and ADA improvements. The Project was done under contract and paid for out of City funds. What DMR failed to recognize is that special provisions govern the payment of wages to workers employed by a contractor for a public works project of more than \$1,000.00. (§§ 1770-1780.) Consequently, all workers, regardless of status, must be paid not

less than the general prevailing rate. The California wages orders promulgated by the IWC governing minimum wages and overtime compensation, therefore, have no application in public works, which is governed by specific provisions under the Labor Code. The Hearing Officer is not aware of any legal authority, and DMR did not provide any, that an independent contractor working on a public work is not entitled to payment of prevailing wages. Consequently, DMR's argument that Clayton, as an independent contractor, is not entitled to payment of prevailing wage and/or overtime compensation is unpersuasive.

Moreover, in order to assert the independent contractor defense, DMR would have to first prove that Clayton was an independent contractor. DMR, however, failed to meet its burden of proof on that issue. The Labor Code defines "[e]mployee[s]" to include virtually all persons "in the service of an employer under any ... contract of hire" (§ 3351), but specifically excludes "independent contractors." (§ 3357.) An independent contractor is defined as "any person who renders service for a specified recompense for a specified result, under the control of his principal as to the result of his work only and not as to the means by which such result is accomplished." (§ 3353.) Due to the numerous variables that can inform the employee/independent contractor distinction, the California Supreme Court has supplemented these statutory definitions with a host of classification factors. In doing so, the court has consistently emphasized, in keeping with the statutory definition, that "the most important factor is the right to control the manner and means of accomplishing the result desired." (*Empire Star Mines Co. v. Cal. Emp. Com.* (1946) 28 Cal. 2d 33, 43-44.)

The California Supreme Court's decision in (*S.G. Borello & Sons v. Dept. of Industrial Relations* (1989) (48 Cal.3d 341) is the seminal case detailing the factors in determining whether a worker is an employee or an independent contractor. In *Borello*, the court evaluated the following factors in addition to the common law control test: (a) whether the one performing services is engaged in a distinct occupation or business; (b) the kind of occupation, with reference to whether, in the locality, the work is usually done under the direction of the principal or by a specialist without supervision; (c) the skill required in the particular occupation; (d) whether the principal or the worker supplies the instrumentalities, tools, and the place of work for the person doing the work; (e) the length of time for which the services are to be performed; (f) the method of payment, whether by the time or by the job; (g) whether or not the work is a

part of the regular business of the principal; and (h) whether or not the parties believe they are creating the relationship of employer-employee. (*Id.* at 350-351.)

Here, DMR has the burden of proof on the issue and it failed to present any evidence to show that Clayton was an independent contractor. The only evidence submitted is the Form 1099 that Clayton received from DMR evidencing his compensation from DMR. That payment arrangement, however, is not determinative on the issue of whether Clayton was an employee or an independent contractor, as the parties' label is not dispositive and will be ignored if their actual conduct establishes a different relationship. (*Borello*, supra, 48 Cal.2d at 349).

Applying the common law control test of whether CMR had the right to control the manner and means by which Clayton accomplished the work and the *Borello* factors, the evidence shows that Clayton was not DMR's independent contractor.

Under the Professional Service Agreement between the City and DMR, DMR was to provide construction management services for the Project. This included providing a building inspector for the building inspection components of the proposed work as well as inspecting construction. During the hearing, Clayton testified regarding his job duties. His job was essentially making sure the contractors' work was in accordance with the blueprints. He coordinated the activities between Talebian and the different contractors on the job. He sought guidance from Talebian as needed and Talebian would direct him on what to do. Clayton described his role as the "eyes and ears" for Talebian on the Project. He inspected items such as the sidewalks, the curbs, the patio enclosures, the ADA handicap ramps, the painting of walls, grading, structures, etc. He filled out a Daily Project Log describing his activities on a daily basis. On each Daily Project Log, Clayton is listed as the Project Inspector. Additionally, DMR's time sheets for Clayton show that he performed "construction inspection" during his work hours.

DMR did not provide any evidence to rebut or contradict Clayton's testimony that he worked as a construction inspector. DMR's own documents such as its daily logs and the timesheets actually support Clayton's assertion that he worked as a construction inspector. Talebian merely argued that Clayton was hired as an "observer" instead of an inspector. According to Talebian, Clayton was supposed to just observe and report back to him about the

events at the jobsites. However, the evidence at the hearing shows that Clayton was not just an observer but that he actually performed construction inspections. The agreement between the City and DMR required DMR to provide personnel for building and construction inspections. There is no testimony that anyone other than Clayton performed those functions. Talebian tried to argue that Clayton was not a licensed inspector and therefore was not a covered person under the Prevailing Wage Determination for Building Construction Inspector. Talebian, however, then admitted on cross-examination that the scope of work for the Project did not require a licensed specialty inspector.

Here, the evidence shows that Clayton performed work that was an integral part of DMR's construction management work. By entering into a construction management agreement with the City and by providing workers to conduct it, DMR retained all necessary control over the operation as a whole. DMR controlled Clayton's work as he was required to prepare a Daily Project Log detailing his activities. Clayton was required to obtain and actually received guidance from DMR's principal Talebian in performing his duties. He was required to fill out timesheets. He was not engaged in a separate profession or business, and he was paid weekly, not by the job. During his employment with DMR, Clayton was working exclusively for DMR. In sum, the evidence established that Clayton was an employee, not an independent contractor of DMR.

Accordingly, DLSE's evidence constitutes prima facie support for the Assessment. DMR, in turn, failed to meet its burden of proof to disprove the basis for, or accuracy of, the Assessment or to show it had substantial grounds for believing the Assessment was in error to support a waiver of liquidated damages under section 1742.1, subdivision (a). As such, liquidated damages under section 1742.1 are due and are affirmed in an amount equal to the unpaid wages.

FINDINGS AND ORDER

1. Affected contractor DMR Team, Inc. filed a timely Request for Review from a Civil Wage and Penalty Assessment issued by the Division of Labor Standards Enforcement.
2. DMR Team, Inc. underpaid Bradford Clayton on the Project in the aggregate amount of \$33,626.14.

3. DMR Team Inc. failed to make training fund contributions in the amount of \$595.60.
4. Penalties under section 1775 are due in the amount of \$6,557.00 for 83 violations at the mitigated rate of \$79.00 per violation and DLSE did not abuse its discretion by setting penalties at that rate.
5. Penalties under section 1813 are due in the amount of \$1,200.00 for 48 violations at the rate of \$25.00 per calendar day for one affected employee.

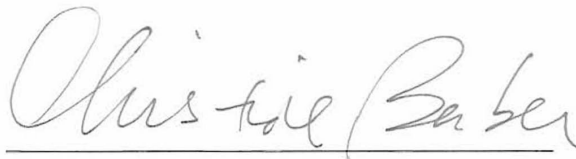
The amounts found due in the Assessment, as modified and affirmed by this Decision, are as follows:

Wages:	\$33,626.14
Training fund contributions:	\$595.60
Penalties under section 1775, subdivision (a):	\$6,557.00
Penalties under section 1813:	\$1,200.00
Liquidated damages:	\$33,626.14
TOTAL	\$75,604.88

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

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

Dated: 7/20/2014



Christine Baker
Director of Industrial Relations