

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Ed Nichols Drywall

Case No. 10-0056-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected subcontractor Edward Guy Nichols, doing business as Ed Nichols Drywall, submitted a timely request for review of a Civil Wage and Penalty Assessment (“Assessment”) issued by the Division of Labor Standards Enforcement (“DLSE”) with respect to work performed by Nichols on the Deer Creek Elementary School Campus Modernization (“Project”) in Nevada County. The Assessment determined that \$1,575.72 in unpaid prevailing wages and statutory penalties was due. A Hearing on the Merits occurred on August 12, 2010, in Sacramento, California, before Hearing Officer Nathan D. Schmidt. Nichols appeared on his own behalf and Ramon Yuen-Garcia appeared for DLSE.

The issues for decision are:

- Whether the Assessment correctly found that Nichols failed to make required subsistence payments to drywall installer Virgil Nickell.
- Whether the Assessment correctly found that Nichols failed to pay required travel time to taper Cecil Rodriguez.
- Whether Nichols has demonstrated substantial grounds for believing the Assessment to be in error, entitling him to a waiver of liquidated damages.

The Director finds that Nichols has carried his burden of proving that the basis of the Assessment was incorrect as to both Nickell and Rodriguez. Therefore, the Director of Industrial Relations issues this decision dismissing the Assessment in full.

SUMMARY OF FACTS

Peterson Developments, the general contractor for the Project, subcontracted with Nichols to furnish and install drywall for the Project. The Assessment found that drywall installer Nickell and taper Rodriguez had been underpaid required travel and subsistence pay in the total amount of \$895.72 and assessed penalties under Labor Code section 1775, subdivision (a) in the amount of \$680.00 for 34 violations.¹ DLSE mitigated the section 1775 penalty rate to \$20.00 per violation based on its determination that Nichols had no prior violations.

There are two applicable Prevailing Wage Determinations (“PWDs”) and their relevant travel and subsistence provisions:

Drywall Installer/Lather (Carpenter) for Northern California (NC-31-X-16-2008-1): This is the rate applicable to the work performed on the Project by Nickell. The drywall installer travel and subsistence provision provides in pertinent part as follows:

(a) No subsistence shall be paid on any job or project located less than fifty (50) road miles from any city hall or post office in the following cities:

Eureka	Santa Rosa
Monterey	Visalia
Fresno	Redding
Kings Beach	South Lake Tahoe
Auburn	Chico
Cloverdale	Woodland
Oakland	Jackson
Manteca	San Jose
Merced	

(b) On any job or project located fifty (50) or more road miles from a city hall or post office located in a city listed in paragraph 1(a), subsistence shall be paid at the rate of twenty-five dollars (\$25.00) per day. The individual employer shall pay to each employee covered by this Agreement the amount shown above for each day’s work in addition to their regular and overtime wages as subsistence.

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

General Prevailing Wage Determination for Nevada County (NEV-2008-1): This PWD includes the classification of taper which is the rate applicable to the work performed on the Project by Rodriguez. The taper travel provision provides in pertinent part as follows:

Section 6. Travel Expense: Where employees are required to use their private vehicles to the job site, beyond a fifty (50) mile radius from the point of dispatch (union dispatch office, employees home or individual Employer shop), the employee shall be paid at twenty five cents (\$0.25) per mile. If the Employer asks the employee to use a company vehicle or car pool, and the employee refuses, the employee is not entitled to travel expense.

- (a) **Travel Time:** Employees required to work beyond a fifty (50) mile radius from the point of dispatch (union dispatch office, employees home or individual Employer shop) as determined by the individual Employer, shall receive compensation of basic wage rate for all time travelled over fifty (50) mile radius. Mileage is to be based on speedometer reading by the most direct route to the job and return. [Emphasis in original.]

Failure to Make Subsistence Payments to Nickell: Nichols's shop in Fiddletown is located 79.43 miles from the Project site in Nevada City. Since Nichols's shop was located more than 50 miles from the Project site, DLSE determined that the job site was outside of the 50 mile radius "free zone" applicable to the Project under the drywall installer subsistence provision. The Assessment therefore found that Nickell was entitled to subsistence payments of \$25.00 per day for each of the 25 days that he had worked on the Project, a total of \$625.00. Nickell did not testify at the hearing, though he completed an employee questionnaire in the course of DLSE's investigation in which he indicated that he had been paid for all hours worked and had been paid travel benefits.

On cross-examination, Rachel Farmer, the Deputy Labor Commissioner conducting DLSE's investigation, expressed the opinion that the "free zone" cities listed in the drywall installer subsistence provision do not apply unless the contractor's shop is located within one of the listed cities. Consequently, the fact that the Project site was located less than 50 miles from Auburn did not change DLSE's determination that Nichols was required to pay Nickell subsistence on the Project. Nichols testified that he had not paid Nickell subsistence because no overnight stays were required during their work on the Project; but Nichols had paid Nickell one hour

of travel time per day, which was included in the total hours reported for Nickell on his certified payroll records (CPRs). Nichols disputed DLSE's interpretation of the drywall installer subsistence provision, arguing that the Project site was located in a "free zone" because it was within a 50 mile radius of Auburn, one of the cities listed in the provision. The Yahoo! map printout placed into evidence by DLSE shows the distance from downtown Auburn to the Project site as 27.2 miles.

Failure to Pay Rodriguez for Travel Time: The parties agree that Rodriguez was entitled to receive travel time pay under the taper travel provision for travel beyond a 50 mile radius from his point of dispatch, Nichols's shop. Rodriguez carpooled to and from the Project site in Nichols's vehicle, a distance each way of 79.43 miles, 29.43 miles beyond the 50 mile radius. The Assessment found that Rodriguez was therefore entitled to one hour of travel time per day at the base taper rate of \$30.08 per hour for nine of the ten days that he worked on the Project, a total of \$270.72. DLSE determined that Rodriguez had not been paid for the required travel time because travel time pay was not reported separately on Nichols's CPRs. Rodriguez did not testify at the hearing, though, like Nickell, he completed an employee questionnaire in the course of DLSE's investigation in which he indicated that he had been paid for all hours worked and had been paid travel benefits. Rodriguez's questionnaire also indicated that he had kept records of the days and hours he had worked on the Project, but no such records were submitted into evidence.

Nichols testified that he had paid Rodriguez one and one-half hours of travel time per day for each day that Rodriguez worked on the Project. Nichols included the travel time in the total hours reported for Rodriguez on his CPRs because the payroll reporting forms that he was given by the general contractor did not have a separate space for reporting travel or subsistence payments. Nichols testified that the one exception to this practice was on the CPR for Friday, July 25, 2008, when Rodriguez is reported as working only one and one-half hours on the Project. On that day, Nichols testified that Rodriguez split his time between two jobs in the same area and that Nichols had paid Rodriguez's travel time on the other job. DLSE assessed neither travel time nor penalties for Rodriguez's work on July 25, 2008.

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. Specifically:

The overall purpose of the prevailing wage law . . . is to benefit and protect employees on public works projects. This general objective subsumes within it a number of specific goals: to protect employees from substandard wages that might be paid if contractors could recruit labor from distant cheap-labor areas; to permit union contractors to compete with nonunion contractors; to benefit the public through the superior efficiency of well-paid employees; and to compensate nonpublic employees with higher wages for the absence of job security and employment benefits enjoyed by public employees.

(*Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 987 [citations omitted].) 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, supra*.)

Section 1775, subdivision (a) requires, among other things, that contractors and subcontractors pay the difference to workers who were paid 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 the unpaid wages, if those wages are not paid within sixty days following service of a Civil Wage and Penalty Assessment under section 1741.

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 the assessment by filing a Request for Review under section 1742. Subdivision (b) of section 1742 provides in part that “[t]he contractor or subcontractor shall have the burden of proving that the basis for the civil wage and penalty Assessment is incorrect.”

Nickell Is Not Entitled To Receive Subsistence Pay On The Project.

The determination of whether Nickell is entitled to subsistence pay for his work on the Project hinges on the operative language from the drywall installer travel and subsistence provision: "No subsistence shall be paid on *any* job or project located less than fifty (50) road miles from *any* city hall or post office in the following cities" (emphasis added). DLSE contends that this language must be construed narrowly and that the 50 mile radius "free zone" for subsistence must be measured from the employer's shop address unless the shop is actually located within one of the listed cities. Because Nichols's shop is not located in one of the listed cities, and is a distance of greater than 50 road miles from the Project site, DLSE contends that Nickell is entitled to subsistence pay for each of the 25 days that he worked on the Project. Nichols, however, argues for a literal reading of the provision, contending that Nickell is not entitled to subsistence because the Project site was located less than 50 miles from Auburn, one of the "free zone" cities listed in provision.

DLSE's interpretation of the provision goes beyond its plain language by adding an additional requirement that an employer's shop must be located in one of the listed cities in order for a "free zone" to be established. This interpretation has no support in the language of the provision. In this case, the Project site was less than 50 miles from one of the listed cities and was therefore located within a "free zone." I find that the Nichols's interpretation is the correct reading of the plain meaning of the provision. Therefore, Nichols has proven that the basis of the Assessment is incorrect as to Nickell.

The Record Supports A Finding That Rodriguez Received The Required Travel Time Pay.

Nichols does not dispute DLSE's determination that Rodriguez was entitled to receive one hour of travel time pay under the taper travel time provision for each of the days he worked on the Project. The parties' dispute on this issue is a factual one over whether Rodriguez actually received the required travel time pay. DLSE argues that the underpayment is apparent on the face of Nichols's CPRs, because travel time was not reported separately from Rodriguez's regular work hours. DLSE therefore concludes that no travel time payments were made to Rod-

riguez. Nichols testified to the contrary that he had included one and one-half hours of travel time per day in the hours that he reported for Rodriguez on his CPRs and that those hours were paid at the full taper rate; an amount in excess of the amount assessed by DLSE.

The only evidence of non-payment proffered by DLSE is that Nichols's CPRs do not specifically itemize the payment of travel time to Rodriguez. On their face alone, Nichols's CPRs are amenable to either interpretation, but Nichols's testimony that he paid Rodriguez for his travel time is supported by the only statements from Rodriguez on the record; his answers on the DLSE questionnaire stating that he had been paid for all the hours he had worked and that he had been paid travel benefits. In the absence of any complaint or direct testimony from Rodriguez, I find Nichols's testimony supported by Rodriguez's questionnaire answers sufficient to prove that the basis of the Assessment is incorrect as to Rodriguez.

All Other Issues Are Moot.

In light of the determinations above, all other issues are moot and need not be decided.

FINDINGS

1. Affected subcontractor Ed Nichols Drywall timely requested review of a civil wage and penalty assessment issued by the Division of Labor Standards Enforcement with respect to the work performed by Nichols on the Deer Creek Elementary School Campus Modernization in Nevada City, California.
2. The Assessment was issued timely.
3. Nickell is not entitled to receive subsistence pay for his work on the Project because the Project site was located within 50 miles of Auburn, California, one of the cities listed as a "free zone" in the drywall installer subsistence provision. The Assessment is therefore dismissed in full as to Nickell.
4. The record supports a finding that Rodriguez was paid the travel time pay required by the patcher travel provision. The Assessment is therefore dismissed in full as to Rodriguez.

5. All other issues are moot.

ORDER

The Civil Wage and Penalty Assessment is dismissed 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: 12/15/10

A handwritten signature in black ink, appearing to read "John C. Duncan", is written over a horizontal line.

John C. Duncan
Director of Industrial Relations