

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

KPRS Construction Services, Inc.
Dana Electric, Inc.

Case No. 17-0179-PWH
Case No. 17-0218-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards
Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected prime contractor KPRS Construction Services, Inc. (KPRS) and affected subcontractor Dana Electric, Inc. (DEI) each submitted a request for review of the Civil Wage and Penalty Assessment (Assessment) issued by the Division of Labor Standards Enforcement (DLSE) on April 21, 2017. The Assessment pertained to the Riverside Refresh, a renovation project (Project) in Riverside County, consisting of the construction of tenant improvements to four floors of office space leased by the State Compensation Insurance Fund (SCIF) in Riverside, California. The Assessment asserted that \$207,121.06 in unpaid prevailing wages and statutory penalties was due.

Prior to the first Prehearing Conference, KPRS raised an objection to the Assessment, asserting that the payment of prevailing wages was not required for the Project on the grounds that SCIF is not a public entity subject to the prevailing wage laws and that no public funds were involved in the Project. At Prehearing Conferences held on July 17 and August 28, 2017, the Hearing Officer informed the parties that KPRS's objection would be treated as a timely-raised threshold dispute over whether the Project was covered under the prevailing wage laws, pursuant to

the Hearing Officer's Preliminary Order no. 7.¹ The Hearing Officer informed the parties that he would make a recommendation to the Director as to the coverage issue after receiving position papers by the parties.

In addition to the initial objection by KPRS,² a brief was submitted by DLSE. Reply briefs were then filed and served by both KPRS and DEI. The issue presented for decision, submitted by the parties as of October 2, 2017, is whether the Project is a public work subject to prevailing wage requirements under the California Prevailing Wage Law (CPWL), Labor Code section 1720, et seq..

For the reasons set forth below, the Director finds that the construction performed in the course of the Project was not "paid for in whole or in part out of public funds" within the meaning of Labor Code section 1720, subdivision (a)(1).³ Accordingly, the provisions of the CPWL do not apply. KPRS and DEI have no liability for the alleged unpaid prevailing wages and statutory penalties, and the Assessment will be dismissed.

FACTS

The Contracts.

KPRS and SCIF entered into a contract in April 2015 to carry out the work of improvement termed the Riverside Refresh (the Contract). The first page of the

¹ Preliminary Order no. 7 states, in pertinent part: "DISPUTE OVER COVERAGE: Any contention that the workers listed in the Assessment were not entitled to the payment of prevailing wages shall be presented in writing to the Hearing Officer . . . and shall include sufficient information and analysis to enable the Hearing Officer and other parties to understand the legal and factual basis for the contention."

² The objection by KPRS was accompanied by points and authorities and supporting documents.

³ All further section references are to the Labor Code unless otherwise specified.

Contract described the scope of the Project as: "Riverside tenant improvement construction project includes 73,327 sf of demolition, concrete work, plumbing, millwork, drywall, tile, paint, insulation, doors, HVAC, electrical, acoustical ceiling, and Title 24 energy compliance." KPRS subcontracted the electrical portion of the Project to DEI. The Contract did not require the payment of prevailing wage rates and did not identify the Project as a public works project.

The Assessment.

DLSE served the Assessment on April 21, 2017. The Assessment asserted that DEI failed to pay its workers the correct prevailing hourly wage rate, failed to pay the correct overtime prevailing wage rate, and failed to make training fund contributions to a valid fund. The Assessment also asserted violation of apprenticeship requirements by DEI on the basis of its alleged failure to submit certain required forms to the applicable apprenticeship committees and the alleged failure to employ apprentices in the required minimum ratio of apprentices to journeypersons. The Assessment alleged a total of \$126,346.06 in underpaid prevailing wages.⁴ Penalties were assessed under sections 1775 and 1813 in the total amount of \$70,035.00. In addition, penalties were assessed under section 1777.7 for apprenticeship violations in the total amount of \$10,740.00.

The Project.

Work on the Project commenced on June 8, 2015. The record in this matter does not contain a notice of completion filed by SCIF or a date on which SCIF accepted the work. Because SCIF, KPRS, and DEI never considered the Riverside Refresh to be a public works project, few of the documents normally generated on a

⁴ Presumably, this figure included the unpaid training fund contributions; the dollar amount is not broken out on the face page of the Assessment.

public works exist. For example, there are no certified payroll records. There is no dispute that the project involved construction work done under contract to improve real property premises leased by SCIF, and that it was paid for by funds from SCIF. The issue that is in dispute and presented for resolution here is whether under such circumstances, the Project constituted a public work subject to the provisions of the CPWL.

DISCUSSION

The California Prevailing Wage Law (CPWL), set forth at Labor Code section 1720 et seq., requires the payment of prevailing wages to workers employed on public works projects. The purpose of the CPWL was summarized by the California Supreme Court in one case as follows:

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] *(Lusardi)*.) 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 also *Lusardi*, at p. 985.)

Section 1775, subdivision (a), requires, among other provisions, that contractors and subcontractors pay the difference to workers who were paid less than the prevailing wage rate, and also prescribes penalties for failing to pay the prevailing

wage rate. Section 1742.1, subdivision (a), provides for the imposition of liquidated damages (essentially a doubling of the unpaid wages) if the unpaid prevailing wages are not paid within 60 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, it may issue a written civil wage and penalty assessment pursuant to section 1741. An affected contractor may appeal that assessment by filing a request for review under section 1742. The request for review is transmitted to the Director of the Department of Industrial Relations, who assigns an impartial hearing officer to conduct a hearing in the matter as necessary. (§ 1742, subd. (b).) At the hearing, DLSE has the initial burden of producing evidence that “provides prima facie support for the Assessment” (Cal. Code Regs. tit. 8, § 17250, subd. (a).) When that burden is met, “the Affected Contractor or Subcontractor has the burden of proving that the basis for the Civil Wage and Penalty Assessment ... is incorrect.” (Cal. Code Regs. tit. 8, § 17250, subd. (b); accord, § 1742, subd. (b).) At the conclusion of the hearing process, the Director issues a written decision affirming, modifying or dismissing the assessment. (§ 1742, subd. (b).)

The term “public works” is defined by section 1720, subdivision (a), as including, among other types of work, “[c]onstruction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds” The term “paid for in whole or in part out of public funds” is, in turn, defined in section 1720, subdivision (b), to include:

The payment of money or the equivalent of money by the state or political subdivision directly to or on behalf of the public works contractor, subcontractor, or developer.

The basic question thus presented in this matter is whether the State Compensation Insurance Fund (SCIF) is a “political subdivision” of the state within the meaning of section 1720, subdivision (b), and more broadly, whether

the Project was paid for out of “public funds” within the meaning of section 1720, subdivision (a).

The Nature of SCIF As a Legal Entity and the Arguments Made by the Parties.

The arguments advanced by the each of the parties derive from the statutory and regulatory framework that describes the nature of SCIF as a legal entity and delineates SCIF’s organization, powers, and obligations. The origins of SCIF go back to the Boynton Act of 1913 (stats. 1913, ch. 176), which made provision for a state insurance fund to compete with private insurers for the purpose of insuring employers against liability for workers’ compensation. Today, “the establishment and management of a State compensation insurance fund” is explicitly authorized by article 14, section 4 of the California Constitution as part of a comprehensive workers’ compensation system.

The implementing legislation specifying the nature, powers, organization and other particulars of SCIF, is currently codified at Insurance Code sections 11770 through 11886.2. Several of these provisions address the nature of SCIF as an entity. Section 11770 provides, *inter alia*, that:

The State Compensation Insurance Fund is continued in existence, to be administered by its board of directors for the purpose of transacting workers’ compensation insurance, and insurance against the expense of defending any suit for serious and willful misconduct, against an employer or his or her agent, and insurance to employees and other persons of the compensation fixed by the workers’ compensation laws for employees and their dependents. Any appropriation made therefrom or thereto before the effective date of this code shall continue to be available for the purposes for which it was made.

(Ins. Code, § 11770, subd. (a).)

Subdivision (b) of Insurance Code section 11770 provides that nine of 11 members of the SCIF Board of Directors will be appointed by the Governor, one by the Speaker of the Assembly, and one by the Senate Rules Committee.

Insurance Code section 11773 states: "The fund shall be organized as a public enterprise fund." Insurance Code section 11771 provides that "[t]he State shall not be liable beyond the assets of the State Compensation Insurance Fund for any obligations in connection therewith," and section 11771.5, added by amendment in 2002, provides that any advertising of the State Compensation Insurance Fund shall include the following disclaimer: "The State Compensation Insurance Fund *is not a branch of the State of California.*" (Emphasis added.) Section 11775 states the Legislature's intent the SCIF is to be "fairly competitive" with other workers' compensation insurance carriers and shall be "neither more nor less than self-supporting."

Other statutory provisions pertain to SCIF's funding, operations, and assets. Pursuant to Insurance Code section 11800.1, SCIF is authorized to establish an account in the State Treasury in its own name, "but such moneys deposited with the State Treasurer are not state moneys within the intent of section 16305.2 of the Government Code."⁵ Section 11800.2 provides further that: "The State Controller shall keep a special ledger account pertaining to the State Compensation Insurance Fund. In the State Controller's general ledger this account may appear as a cash account, like other accounts of funds in the State Treasury, and only the actual cash credited or deposited to the credit of the State Compensation Insurance Fund shall be entered in the account." Section 11804 provides that "[j]oint or shared use of office building space, whether owned, leased or rented, and the joint use of all furniture, automobiles, office equipment, supplies and services shall be charged to each class of insurance business on an equitable and proportional basis." Property belonging to SCIF is not exempt from state taxes because such property is not considered state property, pursuant to Revenue and Taxation Code sections 202 and 12203. As noted

⁵ Under Government Code section 16305.2, subdivision (a), money collected by any state agency is to be referred to as "state money".

above, under Insurance Code section 11771, the State is absolved of liability for SCIF's obligations beyond the assets held by SCIF. SCIF may sue and be sued, and may enter into contracts relating to its business operations. (Ins. Code § 11783.) Insurance Code sections 11870 through 11872 provide that SCIF provides workers' compensation insurance and insurance services to state agencies, including through a master agreement with the California Department of Human Resources and through separate agreements with state agencies. (Ins. Code, §§ §118700-11872.)

Significantly, pursuant to Insurance Code section 11873, SCIF is statutorily exempt from most of the provisions of the Government Code, unless SCIF is specifically named as an agency to which any particular Government Code section applies. (See Ins. Code, § 11873, subd. (a) ["Except as provided by subdivision (b), the fund shall not be subject to the provisions of the Government Code made applicable to state agencies generally or collectively, unless the section specifically names the fund as an agency to which the provision applies."].) Subdivision (b) of section 11873 further provides that:

The fund shall be subject to the provisions of Chapter 10.3 (commencing with Section 3512) of Division 4 of Title 1 of [referring to state employer-employee relations], Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of [referring to the California Public Records Act], Chapter 6.5 (commencing with Section 8543) of Division 1 of Title 2 of [referring to the jurisdiction of the State Auditor], Article 9 (commencing with Section 11120 of Chapter 1 of Division 3 of Title 2 of, the Government Code [referring to the Brown Act open meeting law], and Division 5 (commencing with Section 18000) of Title 2 of the Government Code . . . [excepting certain provisions governing the rights and duties of SCIF personnel as public employees under Gov. Code §§ 19823, and 19849.2 through 19849.5].

In their briefing, the parties also cited cases in which courts have considered the legal character of SCIF with respect to governmental immunities. One of the earliest such cases is *Courtesy Ambulance Service of San Bernardino v. Superior Court*

(1992) 8 Cal.App.4th 1504 (*Courtesy Ambulance*). In that decision, the court held that SCIF could be sued for punitive damages by one of its insureds. The court found that SCIF could not invoke Government Code section 818 to shield itself from punitive damages due to its exemption from the Government Tort Claims Act (Gov. Code § 810 et seq.), of which Government Code section 818 is a part. The court observed that SCIF possesses many of the characteristics of a private company, rather than a governmental organization, having a special and unique character among state agencies. (*Courtesy Ambulance*, 8 Cal.App.4th at pp. 1514-1515.)

In *Maxon Industries, Inc. v. State Comp. Ins. Fund* (1993) 16 Cal.App.4th 1387 (*Maxon Industries*), the court held that SCIF could not assert sovereign immunity to avoid tort liability. The court followed and broadened *Courtesy Ambulance* in holding that the Tort Claims Act is not applicable to SCIF by virtue of Insurance Code section 11873, which as noted, exempts SCIF from most provisions of the Government Code. Referring to the legislation that resulted in the adoption of Insurance Code section 11873, the court observed "It is apparent that the Fund sought to cast itself as a private enterprise rather than a public entity when it sponsored the 1979 legislation [enacting Ins. Code § 11873]. It should be treated that way, receiving both the benefits and disadvantages of that status." (*Maxon Industries*, at p. 1392.)

The case of *P.W. Stephens, Inc. v. State Comp. Ins. Fund* (1994) 21 Cal.App.4th 1833 (*P.W. Stephens*) arose from an insured's suit against SCIF for injunctive relief and damages based on an allegedly illegal premium surcharge. Upholding SCIF's demurrer for failure to exhaust administrative remedies, the Court observed that "SCIF is at once both an agency of the state and an insurance carrier. In these two roles, it is self-operating and of a special and unique character." "[T]he Legislature has also established it as a state agency with 'unique characteristics' and one which is exempt from many of the immunities, requirements, restrictions, and procedures applicable to state agencies." (*P.W. Stephens*, at p. 1836.)

Lastly, the parties have cited *In re ATG, Inc.* (N.D. Cal. 2004) 311 B.R. 810, an adversary proceeding against SCIF in bankruptcy court. In that case, the court held that SCIF is not an arm of the state under federal law for the purpose of asserting Eleventh Amendment immunity. The Court observed:

The Fund is a public enterprise fund, a self-operating insurance carrier "of a special and unique character" subject to the same regulation and laws generally applicable to private insurance carriers. [Citation omitted] Although a public entity, the Fund's 'purpose and everyday function is indistinguishable from a private corporation,' and it is treated as a private enterprise. [Citation omitted.] Accordingly, although the Fund may lack corporate status, its treatment as a private enterprise and its independence weigh against considering it an arm of the state.

(*In re A.T.G.*, at p. 813.)

Based on the foregoing statutory provisions and case law, DLSE's chief argument is that because SCIF is a public entity, its expenditures for the Project must be considered public funds, thereby making the Project a public work covered by the CPWL. DLSE also places primary reliance on the definition of a "state agency" set forth in regulations promulgated under the Political Reform Act at title 2, California Code of Regulations, section 18249.⁶ DLSE asserts that SCIF meets every criteria in that "state agency" definition. DLSE also points out that SCIF administers and pays

⁶ This regulation defines the term "state agency" as follows:

An agency is a state agency within the provisions of Government Code sections 82004 and 86100-86300 only if all the following criteria are met:

- (a) The agency is authorized by statute, executive order, or the California Constitution.
- (b) At least one voting member is an elected state officer or is appointed by an elected state officer or an agency official or a state agency.
- (c) The agency is financed in part by any state funds or is subject to appropriation in the state budget.
- (d) An area larger than one county is included in its jurisdiction.

workers' compensation claims for other state agencies. In return, those agencies annually pay SCIF over \$107 million in the form of service fees and nearly \$six million in premiums. According to DLSE, this constitutes a "major source of revenue" in the form of public funding for SCIF. DLSE also points out that SCIF employees are public employees entitled to the health and pension benefits available to other persons employed by the state.

Further, DLSE argues that the discussion in *In re ATG* is inapposite because the court in that case did not address of the financial relationship between SCIF and other state agencies or the importance of SCIF serving as an insurer of last resort for California employers. DLSE also attacks *In re ATG* for placing emphasis on the provisions of the Insurance Code that define the special character of SCIF as an entity. DLSE asserts that the special attributes enjoyed by SCIF under the Insurance Code exist only for the purpose of allowing SCIF to operate as a competitive and self-supported workers' compensation insurance carrier on the open market. With this limited aim in mind, DLSE argues that the interpretation of those Insurance Code provisions should not be extended to "exempt" SCIF from the prevailing wage law, and that any such "exemption" could have been written into either the Insurance Code or the Labor Code, but the Legislature has not done so.

In contrast, KPRS places primary reliance on the *In re ATG* decision. KPRS argues that the court's conclusion in that case, that SCIF is not an arm of the state empowered to assert Eleventh Amendment immunity, applies to the present case with equal force and effect. KPRS also contends that the reasoning and results of the decisions in *P.W. Stephens*, *Courtesy Ambulance*, and *Maxon Industries* are dispositive here. In the absence of a specific contractual obligation to pay prevailing wages, according to KPRS, the prevailing wage law does not apply to SCIF or to this particular Project.

For its part, DEI approaches the issue from a slightly different angle, citing the

case of *State Bldg. & Const. Trades Council of California v. Duncan* (2008) 162 Cal.App.4th 289, 311 (*SBCTC*), for the proposition that the trigger for the application of the prevailing wage law is the payment of public funds. DEI points out that this “trigger” is echoed in the language of section 1720 subdivision (a)(1), requiring that a public work be “paid for in whole or in part out of public funds.” According to DEI, SCIF itself denies that it spends public funds on the Project. DEI also disputes DLSE’s argument that public funds were used for the Project by virtue of SCIF’s collection of fees and premiums from state agencies. DEI argues that this source of funding for SCIF is merely one small component of SCIF’s financing (because SCIF also receives premium funds from, and serves as an insurer to, private employers) and is too attenuated from the Project to support a finding that public funds were used for construction of the Project.

Based on a review of the applicable authorities, and in light of the terms and purposes of the CPWL, this Decision concludes that KPRS and DEI have the better argument. Although the parties dispute whether SCIF is a “state agency,” that is not the term used in the Prevailing Wage Law in any event. Rather, section 1720 defines a public work as one paid for in whole or in part out of “public funds,” which is defined, in turn, as including (among other forms of subsidy) the payment of money by the state or a “political subdivision.” (Lab. Code, § 1720, subd. (b).)⁷ It is apparent from the foregoing summary of the relevant statutes and case law that SCIF is a unique entity, which is considered a public entity and subdivision of the state for some purposes (e.g., SCIF employees are State employees and SCIF is subject to the Public Records Act), but not others (e.g., SCIF is not subject to the most provisions of

⁷DLSE’s reliance on the definition of “state agency” in the Political Reform Act regulations is also misplaced for another reason. As noted, Insurance Code section 11873 provides that SCIF is exempt from the provisions of the Government Code unless those provisions otherwise expressly apply to SCIF. The regulation defining “state agency” cited by DLSE was promulgated pursuant to sections of the Government Code (specifically, section 82004) that do not apply to SCIF in any event.

the Government Code and is not protected by the immunities in the Government Tort Claims Act). (Ins. Code, § 11873.) SCIF is expressly required to disclose in any advertising that it “is not a branch of the State of California.” (Ins. Code, § 11771.5.)

In cases such as *Courtesy Ambulance*, *Maxon Industries*, and *P.W. Stephens*, discussed above, the courts took note of the dual nature of SCIF as a public entity and an insurance carrier. They emphasized that SCIF was endowed with many of the attributes, functions, and characteristics of a private enterprise. The interplay between the Government Code, the Insurance Code, and decisional law make it clear that SCIF is treated as public entity only for certain specific and limited purposes. For other purposes, SCIF is treated under the law as being more akin to a private insurance carrier. (See, e.g., *Maxon Industries*, *supra*, 16 Cal.App.4th at p.1394.)

More fundamentally for purposes of this matter, the Director concludes that the Project at issue here was not subject to the CPWL because it was not paid for out of “public funds.” As emphasized by the court in *SBCTC*, under section 1720, subdivision (a), it is the expenditure of public funds on a construction project that triggers the coverage of the CPWL. (*SBCTC*, *supra*, 162 Cal.App.4th at p. 311.) But SCIF funds on deposit in the State Treasury “are not state moneys” within the meaning of the Government Code. (Ins. Code, § 11800.1.) SCIF is organized as a “public enterprise fund;” its assets are segregated within the State Treasury, and the State is not liable beyond the assets of SCIF for any of its obligations. (Ins. Code, §§ 11771-11774; 11800.2.) The funds and assets of SCIF are “applicable to the payment of losses sustained on account of insurance and to the payment of the salaries and other expenses charged against it in accordance with the provisions of this chapter.” (Ins. Code, § 11774.)

DLSE argues that SCIF funds are public funds because state agencies, using public funds, pay SCIF service fees and, to a lesser extent insurance premiums, for workers’ compensation claims administration. The fact that public funds are paid to

SCIF as compensation for services it performs for state agencies does not mean those funds remain “public funds” within the meaning of the CPWL when subsequently used for SCIF’s operational expenses and construction projects. This would not be the case for a private entity that is paid to provide services to a state agency. For example, a company that provides paper shredding services to state agencies, and then uses funds that were paid by state agencies for those services to renovate its offices would not be said to have performed a “public work” paid for out of “public funds.” If this were the case, every entity, whether public or private, for-profit or non-profit, would be subjecting itself to the coverage of the CPWL simply by doing business with the State. There is no authority for this expansive view of the Prevailing Wage Law, and none is cited by DLSE.

Further, as noted by the parties, SCIF does not provide workers’ compensation insurance coverage and services solely only to state agencies; it also (and perhaps even primarily) serves an insurer to private employers, and much of its funding and assets derives from those non-public sources. No evidence was submitted by DLSE that would permit a determination that the SCIF funds used for the Project at issue here derived from monies paid for workers’ compensation services by state agencies as opposed to funds paid by private employers insured by SCIF.

Lastly, DLSE contends that the Insurance Code provisions pertaining to SCIF should not be interpreted to “exempt” SCIF from the prevailing wage law. However, the issue is not one of exemption; the issue is whether the Project falls within the provisions of the CPWL in the first instance. For the foregoing reasons, this Decision finds that it does not.

Accordingly, the workers employed on the Project were not entitled to payment at prevailing wage rates under section 1720 et seq., and the Assessment will be dismissed.

FINDINGS

1. KPRS Construction Services, Inc. and Dana Electric, Inc. each filed a timely Request for Review from a Civil Wage and Penalty Assessment issued by the Division of Labor Standards Enforcement.

2. The work performed by the employees of affected subcontractor Dana Electric, Inc. was not subject to the prevailing wage requirements of Labor Code section 1720 et seq., and therefore neither Dana Electric, Inc. nor the prime contractor, KPRS Construction Services, Inc., are liable for the wages and penalties set forth in the Assessment.

ORDER

Based on these findings, it is ordered that the Assessment is dismissed in its entirety. The Hearing Officer shall issue a Notice of Findings which shall be served with this Decision on the Parties.

Dated: 11/18/2020



Katrina S. Hagen, Director
Department of Industrial Relations