

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Katch Environmental, Inc.

Case No. 20-0206-PWH

From a Notice of the Withholding of Contract Payments issued by:

California Department of Transportation

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected contractor Katch Environmental, Inc. (Katch) submitted a Request for Review of the Notice of Withholding of Contract Payments (Notice) issued by the California Department of Transportation (Caltrans) on March 18, 2020, with respect to work under Agreement Number 01A1953 for Encampment Site Waste Removal and Cleanup services (Project) in the counties of Del Norte, Humboldt, Mendocino, Lake and Trinity. The Notice determined that \$14,395.60 was due in unpaid prevailing wages and training fund contributions, and \$2,745.00 was due in statutory penalties.

A Hearing on the Merits occurred on June 22, 2021, before Hearing Officer Michael R. Drayton. Jidi Wong appeared as counsel for Caltrans. Katch appeared through its president, Paul Katchadourian. Caltrans Maintenance Contract Manager Danny Figueiredo, Caltrans Labor Compliance North Region Maintenance Services Administrator Andy Pueschel, and Caltrans Labor Compliance Wage Case Administrator Diane Huynh, testified in support of the Notice.¹ Following the parties' submission of closing briefs, the matter was submitted for decision on July 7, 2021.

At the Hearing, the parties stipulated to the admission of Caltrans' Exhibit Numbers 1 through 13. Katch did not seek to introduce documentary evidence. The parties stipulated on the record to the following:

- The Project was a public work and subject to payment of prevailing wages.
- The Project required the employment of apprentices.

¹ Paul Katchadourian declined the opportunity to testify under oath.

- Katch properly owed training fund contributions in the amount of \$183.64.
- The Notice was timely.
- The Request for Review was timely.
- The Enforcement File was made available timely.

The issues for decision are:

- Whether Katch is liable for unpaid wages in the form of payment for compensable travel time in the amount of \$14,211.96.
- Whether Katch is liable for penalties under Labor Code section 1775.²
- Whether Katch is liable for penalties under section 1813.³

For the reasons set forth below, the Director of Industrial Relations finds that Caltrans failed to carry its burden of presenting evidence at the Hearing that provided prima facie support for the unpaid wage portion of the Notice. (See Cal. Code Regs., tit. 8, § 17250, subd. (a).) Accordingly, the Director issues this Decision modifying the Notice.

FACTS

The Project.

Caltrans advertised the Project for bid on April 8, 2019. (Caltrans Exhibit No. 1, p. 2; Caltrans Exhibit No. 2, p. 66.) The Project consisted of the clean-up of unauthorized campsites along various state routes in Mendocino, Del Norte, Humboldt, Lake and Trinity counties. (Caltrans Exhibit No. 1, p. 5.) Caltrans awarded Katch an ongoing service contract (Contract No. 01A1953) (Contract), in effect from August 2, 2019, to July 31, 2022.⁴ (Caltrans Exhibit No. 1, pp. 3-64.) The Contract required Katch to “collect, remove, transport, and legally dispose of all environmentally-regulated,

² All subsequent section references are to the California Labor Code, unless otherwise specified.

³ The parties’ issues omitted whether Katch was liable for liquidated damages under section 1742.1 for wages found due and owing. As a result of this Decision, the issue is moot.

⁴ The Contract is a multi-provider contract, and Katch was the third contractor on the list. (Caltrans Exhibit No. 9, p. 245.)

biological and hazardous waste, and contaminated materials, debris, waste and other substances (collectively the "HazWaste Materials") at the sites sets forth in the task order, and also cleanup the sites so that no HazWaste Materials remain on the site (collectively the "HazWaste Services")."⁵ For this Project, Katch used 11 workers it classified as Laborer on the Project.⁶

The applicable prevailing wage rate (PWD) in the five counties in Northern California where the work was performed was Laborer, CN-23-102-1-2019-1 (Laborer PWD). (Caltrans Exhibit No. 3, pp. 77-80.) The Laborer PWD provided the following rates of pay: \$55.64 per hour for straight time hours; \$71.04 per hour for overtime hours; and \$86.43 per hour for travel on Sundays. (Caltrans Exhibit. No. 3, p. 77.) The Laborer PWD included a note that indicated, "contractors shall make travel and/or subsistence payments to each worker to execute the work." (*Ibid.*) The Travel and Subsistence Provisions for Laborer included three Supplements, Nos. 2, 6, and 7. (Caltrans Exhibit No. 3, pp. 88-100.) Supplement Nos. 2 and 7 did not apply to the type of work used for the Project.⁷ Neither party addressed whether Supplement No. 6 applied to the Project.⁸

⁵ The Contract required Katch workers to be trained in Hazardous Waste Operations and Emergency Response (HAZWOPER). (Caltrans Exhibit No. 1, p. 5.)

⁶ Katch employed a total of 14 workers on the Project. (Caltrans Exhibit No. 11, pp. 256-282.) Of the three workers not included in the Notice, one worker was classified as Operating Engineer, Group 3, and the other two workers were classified as Teamsters, Group 4. (*Ibid.*) Although the certified payroll records (CPRs) show that one of the workers classified as Teamsters, Group 4, Alex Vaughn, was paid for travel time during the Project, Vaughn is not included in the Notice. (*Ibid.*) The other two workers excluded from the Notice were not paid for any travel time according to the CPRs. (*Ibid.*)

⁷ Supplement Nos. 2 and 7 both governed travel payments for particular types of jobs. (Caltrans Exhibit No. 3, pp. 91-93, and pp. 99-100, respectively.) Supplement No. 2 applied to "gunite, shotcrete, panelcrete, and similar type of work," and Supplement No. 7 applied to the "concrete sawing, drilling, coring and breaking industry." (*Ibid.*)

⁸ Supplement No. 6 governed zone pay which adds \$3.00 to the base pay rate for work performed outside of an established free zone. (Caltrans Exhibit No. 3, pp. 94-96.)

The Notice.

On November 18, 2019, Caltrans notified Katch of payroll record discrepancies and requested corrections within 15 days. (Caltrans Exhibit No. 11, pp. 248-251.) Essentially, after Caltrans reviewed the CPRs submitted by Katch for this Project for the months of August, September and October of 2019, Caltrans determined that Katch underpaid its workers for the travel time listed on the CPRs. (Caltrans Exhibit No. 7, p. 193.) Specifically, the CPRs showed that Katch paid travel time at less than the required prevailing wage rates for Laborer. (Caltrans Exhibit No. 11, pp. 256-282.) In addition, Caltrans determined that Katch failed to make required training fund contributions for its workers. (Caltrans Exhibit No. 7, p. 193; Caltrans Exhibit No. 12, p. 285.) On December 6, 2019, Caltrans issued a Final Notice of Payroll Record Discrepancies.⁹ (Caltrans Exhibit No. 11, pp. 252-254.)

On March 10, 2020, Caltrans submitted this matter to the Division of Labor Standards Enforcement (DLSE) for approval of forfeiture of the unpaid wages and training fund contributions, and penalties.¹⁰ (Caltrans Exhibit No. 6, pp. 184-189.) DLSE approved the forfeiture on March 12, 2020. (Caltrans Exhibit No. 6, pp. 182-183.)

On March 18, 2020, Caltrans issued the Notice of Withholding of Contract Payments in this matter. The Notice relied solely upon the CPRs submitted by Katch for determining the number of hours for compensable travel time.¹¹ Katch's CPRs

⁹ By letter dated December 11, 2019, Katch emailed the Office of the Director – Research Unit requesting clarification on the travel and subsistence requirements for Laborers in Northern California. (Caltrans Exhibit No. 9, pp. 223-230.) On January 31, 2020, Katch provided additional information as requested by the Research Unit. (*Id.* pp. 224-225). On March 13, 2020, the Research Unit discussed the travel and subsistence requirements of the applicable PWD for Laborer, and then advised: "Please note that compensable travel may be required for any employer-mandated travel that occurs after the first location where the employee's presence is required by the employer. If workers are required to show up at the shop or begin work at the shop prior to traveling to a public works site, travel time is compensable at the required prevailing wage rate for the job." (Caltrans Exhibit No. 9, pp. 231-232.)

¹⁰ As required by section 1775, subdivision (a)(2)(A), the Labor Commissioner must determine the amount of the penalty for failure to pay prevailing wages.

¹¹ The Notice was based on the CPRs for the first three months of the Project.

documented travel time for its workers, showing payment for travel at rates between \$14.90 per hour and \$30.00 per hour.¹² (Caltrans Exhibit No. 11, pp. 256-282.) However, Katch used the rates in the Laborer PWD for purposes of compensation to the workers for work at Project sites.¹³

Testimony from Caltrans Witnesses.

Caltrans Maintenance Contract Manager Figueiredo testified that he observed the arrival of Katch workers in the morning at the locations he designated for safety meetings. These safety meetings were attended by the California Highway Patrol (CHP), Katch workers, and, at times, representatives of a county or city providing health and human services. According to Figueiredo, after the CHP cleared individuals from the first unauthorized campsite to be cleaned, Katch workers went to the campsite for clean-up operations. Figueiredo testified that Katch workers segregated trash and hazardous materials, including hypodermic needles, and placed them in appropriate containers. Referring to travel provisions of the Laborer PWD, Figueiredo also testified that the work did not require any gunite, shotcrete, or panelcrete work, nor did it require any concrete sawing, drilling, coring or breaking.

After the clean-up operations had been completed at a given campsite, the group travelled to other campsites that Figueiredo scheduled for clean-up. In this way, the Project work sites consisted of various campsites to be cleared and cleaned throughout the multiple county area. Figueiredo remained on site with Katch workers at each location for the duration of the workday. Depending on the progress made in the prior work day, Figueiredo determined the location where the workers assembled each morning for the safety meetings.

¹² The CPRs did not indicate the purpose of the travel. Nevertheless, the CPRs did explicitly identify pay for "travel" hours, either for straight time at hourly rates of \$14.90 and \$20.00 or overtime at hourly rates of \$22.35 and \$30.00. (Caltrans Exhibit No. 11, pp. 256-282.) In the Fringe Benefit Statement it submitted to Caltrans dated August 21, 2019, Katch indicated that it paid Laborers travel time at \$20.00 per hour to drivers and at \$14.90 per hour for passengers. (Caltrans Exhibit No. 12, p. 284; accord Caltrans Exhibit No. 9, p. 230.)

¹³ Katch did not dispute that these rates would apply for travel time on the Project, assuming the travel time was compensable under the Laborer PWD.

Figueiredo testified that he observed Katch workers arriving at the worksite in three vehicles: a white van with Katch-identifying graphics on the doors, suggesting to him that it was a Katch company vehicle; a semi roll-off bin truck, also with Katch-identifying graphics; and a light blue or gray pickup truck, which Figueiredo testified was driven by a Katch site supervisor by the first name Ron. Figueiredo explained that the Katch workers also traveled between clean-up sites in these three vehicles.

Caltrans Labor Compliance North Region Maintenance Services Administrator Pueschel testified that he reviewed Katch's CPRs. The CPRs indicated that Katch's office was located in Fresno, and that Katch's workers all had residence addresses in the Fresno area. Given the residence locations indicated on the CPRs, the fact that the CPRs showed payment to workers for lengthy travel time, and based upon Figueiredo's observation of Katch workers traveling in Katch vehicles, Pueschel concluded that the workers were subject to the control of Katch when they were compensated for the significant travel time depicted on the CPRs. He also interpreted Katch's payments for travel time on the CPRs as an acknowledgment that travel time pay was required.

Pueschel also testified that a DLSE training manual and a DLSE opinion letter from 2003 both supported his view that "significant" distances traveled to and from a job site were compensable at prevailing wage rates. (Caltrans Exhibit No. 4, pp. 154-158, 167.) To Pueschel, the number of hours for travel reflected on the CPRs was consistent with the amount of time that someone travelling from the Fresno area would take to arrive at Project sites in Northern California. Pueschel estimated that such travel would take five or six hours by car.¹⁴ Pueschel explained that because Caltrans interpreted the inclusion of travel time on the CPRs as an admission by Katch that such time was compensable, Caltrans did not interview any workers regarding the workers' departure point.

Using the example of worker Raphael Hernandez, Pueschel testified that on August 22, 2019, the CPRs showed Katch compensated the worker for travel time

¹⁴ Pueschel assumed that all of the workers left from the same dispatch point. However, the CPRs showed that the workers did not always travel the same exact number of hours on a given day. (Caltrans Exhibit No. 11, pp. 256, 262, 267-268, 272-273, 275-276.)

totaling 10 hours (5 at straight time rates, and 5 at overtime rates), at the hourly rates of \$14.90 for straight time and \$22.35 for overtime. Also, on that same date, Katch paid 3 hours for labor at the hourly rate of \$55.64 straight time and paid 5 hours for labor at the hourly rate of \$71.04 overtime. However, based on the Laborer PWD rates, Pueschel explained that Katch should have paid the travel time at the hourly rates of \$55.64 for straight time and \$71.04 for overtime. Based on the difference between what Katch paid to all Laborers and the PWD rates, and after giving credit for payments Katch had made, Pueschel calculated that the underpayment of compensable travel time for all the workers on the Project amounted to \$14,211.96. Together with unpaid training fund contributions in the amount of \$183.64, the Notice found \$14,395.60 in unpaid prevailing wages, and associated penalties under sections 1775 and 1813 in the amounts of \$1,920.00 and \$825.00, respectively.

Caltrans Labor Compliance Wage Case Administrator Huynh testified that she is responsible for reviewing audits and investigations from the Caltrans district offices. She reviewed Pueschel's work and verified his findings with regard to this case. Huynh also referred this wage claim to the DLSE for approval, and she testified that the Labor Commissioner approved the forfeiture. Huynh testified that the Notice was issued to Katch on March 18, 2020, after which Katch timely requested review. She explained Caltrans' calculations for the wages owed on the Project, which gave Katch credit for the travel payments listed on the CPRs. She also testified as to Caltrans' calculation of the penalties assessed against Katch in this case.

DISCUSSION

The California Prevailing Wage Law (CPWL), set forth in Labor Code sections 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*).) A Labor Compliance Program like Caltrans 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*, 1 Cal.4th at p. 985.)

Section 1775, subdivision (a), requires that contractors and subcontractors pay the difference to workers paid less than the prevailing rate and also prescribes penalties for failing to pay the prevailing rate. The prevailing rate of per diem wage includes travel pay, subsistence pay, and training fund contributions pursuant to section 1773.1.

When an enforcing agency, such as Caltrans, determines that a violation of the prevailing wage laws has occurred, a written notice of the withholding of contract payments is issued pursuant to section 1771.6. 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 notice under section 1776.1.

An affected contractor may appeal that notice 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, Caltrans has the initial burden of producing evidence that “provides prima facie support for the [Notice]....” (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 [Notice] ... 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 notice. (§ 1742, subd. (b); Cal. Code Regs. tit. 8, § 17260.)

Compensable Travel Time.

Although the time an employee commutes to work is not generally compensable, the Supreme Court recognized in *Morillion v. Royal Packing Co.* (2000) 22 Cal.4th 575 that travel time may be compensable depending on the level of control exerted by the employer over its employees. In *Morillion*, agricultural workers were required to meet at specified assembly areas to be transported by buses provided and paid for by the employer, to and from the fields where the workers worked.¹⁵ (*Morillion*, 22 Cal.4th at p. 579.) In this regard, the Supreme Court used the term “compulsory travel time” to refer to “travel to and from a work site that an employer controls and requires,” in order to distinguish it from “an ordinary commute from home to work and back that employees take on their own.” (*Id.* at p. 579, fn. 2.)

“[The Supreme Court] held that the employees in *Morillion* were entitled to compensation for their compelled travel time under the applicable wage order because they were subject to the control of an employer during that time.”¹⁶ (*Frlekin v. Apple, Inc.* (2020) 8 Cal.5th 1038, 1049 [the Supreme Court discussed *Morillion* in deciding whether Apple employees should be compensated for time spent on exit searches].) *Morillion* is based on Wage Order 14-80 covering agricultural workers, which defines “hours worked” to mean “the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so.” (Cal. Code Regs., tit. 8, § 11140, subd. 2(G).)

¹⁵ The workers in *Morillion* alleged that they were entitled to overtime wages and penalties “for the time they spent (1) assembling at the departure points; (2) riding the bus to the fields; (3) waiting for the bus at the end of the day; and (4) riding the bus back to the departure.” (*Morillion*, 22 Cal.4th at p. 579.)

¹⁶ The fact that “Royal required plaintiffs to meet at the departure points at a certain time to ride its buses to work, and [that] it prohibited them from using their own cars, subjecting them to verbal warnings and lost wages if they did so,” established that the employer controlled the workers within the meaning of “hours worked.” (*Morillion*, 22 Cal.4th at p. 587.)

Because all wage orders contain the same definition of “hours worked,” including Wage Order 16-2001 for on-site construction workers, *Morillion* is the controlling authority as to compulsory travel time.¹⁷ (See *Morillion*, 22 Cal.4th at p. 581; Cal Code Regs., tit. 8, § 11160, subd. 2(J).)

Caltrans Failed to Meet Its Burden of Proving a Prima Facie Case for the Unpaid Wage Portion of the Notice.

Under *Morillion*, the compensability of travel time depends on the level of control exerted by the employer over the employee. (*Morillion*, 22 Cal.4th at p. 587.) “[B]y requiring employees to take certain transportation to a work site, employers thereby subject those employees to its control by determining when, where, and how they are to travel.” (*Id.* at p. 588.)

Here, Caltrans contends that Katch’s workers were subject to its control because they were observed arriving at the morning safety meetings in Katch vehicles. Without more, Caltrans failed to show that Katch determined “when, where, and how” its workers had to travel to the Project. Caltrans provided no evidence as to the circumstances surrounding the travel. Unlike *Morillion*, where the agricultural workers were required to take the employer-provided transportation or risk discipline, there is no evidence in the record that the workers on the Project were required to “take certain transportation to a work site.” (*Morillion*, 22 Cal.4th at p. 588.)

The fact that Katch workers traveled in Katch vehicles is not dispositive. “Time employees spend traveling on transportation that an employer provides but does not require its employees to use may not be compensable as ‘hours worked.’” (*Morillion*, 22 Cal.4th at p. 588 (citation omitted).) Here, there was no evidence that Katch required its workers to drive or ride in company vehicles. The Supreme Court emphasized in

¹⁷ To the extent that Caltrans relies on the DLSE Public Works Manual or the April 22, 2003 DLSE opinion letter (Caltrans Exhibit No. 4, pp. 154-158, 167), neither constitute mandatory legal authority. (DLSE Public Works Manual (May 2018), § 1.1 [the Public Works Manual is a training tool for the Labor Commissioner’s enforcement staff, and does not constitute binding legal authority]; *Brinker Restaurant Corp. v. Superior Court* (2012) 53 Cal.4th 1004, 1029, fn. 11 [an opinion letter from the Labor Commissioner’s Office may serve as guidance but is not controlling legal authority].)

Morillion that “employers do not risk paying employees for their travel time merely by providing them transportation.” (*Ibid.*)

All Other Issues are Moot.

In view of the finding that Caltrans failed to meet its prima facie burden (Cal. Code Regs., tit. 8, § 17250, subd. (a)), the issues of underpayment of wages and the imposition of penalties are moot.

Based on the foregoing, the Director makes the following findings:

FINDINGS AND ORDER

1. The Agreement Number 01A1953 for Encampment Site Waste Removal and Cleanup services was a public work and subject to payment of prevailing wages and employment of apprentices.
2. The California Department of Transportation issued a timely Notice of the Withholding of Contract Payments to Katch Environmental, Inc.
3. Katch Environmental, Inc. filed a timely Request for Review of the Notice of the Withholding of Contract Payments issued by the California Department of Transportation with respect to the Project.
4. The California Department of Transportation timely made available its Enforcement File to Katch Environmental, Inc.
5. The California Department of Transportation did not meet its burden to prove that Katch Environmental, Inc. underpaid its workers \$14,211.96 in compensable travel time.
6. Per stipulation, Katch Environmental, Inc. failed to pay training fund contributions in the amount of \$183.64.
7. All other issues are moot.

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

Basis of the Notice	Amount
Training Fund Contributions Due:	\$ 183.64
TOTAL:	\$ 183.64

The Notice of the Withholding of Contract Payments is modified 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: 09-15-2022


Katrina S. Hagen, Director
California Department of Industrial Relations