

STATE OF CALIFORNIA  
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

**Shasta General Engineering, Inc.**

Case No. 08-0023-PWH

From a Civil Wage and Penalty Assessment issued by:

**Division of Labor Standards Enforcement**

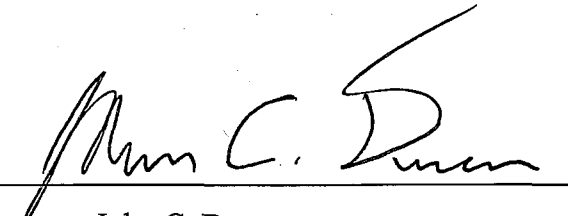
**ORDER DENYING RECONSIDERATION**

A request for reconsideration has been made of the Decision of the Director issued on March 9, 2011 ("Decision"), on the basis that the Decision failed to reduce the \$72,345.82 in assessed unpaid wages, penalties and liquidated damages against Shasta by the \$41,822.10 that the general contractor deposited with the Division of Labor Standards Enforcement ("DLSE") pursuant to Labor Code section 1727, subdivision (b).<sup>1</sup> I deny reconsideration for the following reason.

While there is a concern that the funds being held by DLSE might not be credited to Shasta's obligation, this concern is a matter between DLSE and Shasta. The Director does not have jurisdiction over funds that have been withheld by the awarding body or affected contractor pursuant to section 1727 or the manner in which the Assessment is ultimately satisfied.

Accordingly, reconsideration is denied.

Dated: 3/24/11



John C. Duncan  
Director of Industrial Relations

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

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**DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS**

The Director's Decision on the merits of this case ("Decision"), issued on April 28, 2009, affirmed in part and modified in part a Civil Wage and Penalty Assessment ("Assessment") issued by the Division of Labor Standards Enforcement ("DLSE") with respect to work performed by affected subcontractor Shasta General Engineering, Inc. ("Shasta") on the Copper Communications Cable and Voice and Data Equipment – Monitoring, Testing and Repair, California Aqueduct State Water Facilities project ("Project"). Shasta requested review of the Assessment. The affected contractor, Adesta Limited Partnership, Adesta Management Group, Inc. and Adesta LLC, Partners (collectively "Adesta"), did not request review of the Assessment. The Decision found that Shasta was liable for \$72,345.82 in unpaid prevailing wages and statutory penalties, including \$30,747.91 in liquidated damages imposed by operation of law under Labor Code section 1742.1, subdivision (a).<sup>1</sup>

Shasta and Adesta both sought judicial review of the Decision. On June 8, 2010, the Superior Court, in response to Shasta's Petition for Administrative Writ of Mandate, ordered that the Decision be set aside and that the matter be remanded to the Hearing Officer to "consider whether Adesta made a timely payment of the Assessment." The Superior Court's judgment on Shasta's petition did not change the Decision regarding Shasta's underpayment of prevailing wages and its liability for statutory penalties under sections 1775 and 1813. Adesta's petition

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

was dismissed as moot in light of the Court's ruling on Shasta's petition.

A further Hearing on the Merits following remand was conducted on September 14, 2010, in San Francisco, California, before Hearing Officer Nathan D. Schmidt. Mark J. Hansen and Monica Hansen appeared for Shasta, Ramon Yuen-Garcia appeared for DLSE, and Blair Shahbazian appeared for Adesta.<sup>2</sup>

The sole issue for decision on remand is whether Adesta made a timely payment of the assessed unpaid wages as contemplated by section 1742.1, which determines whether Shasta is liable for liquidated damages.<sup>3</sup> After considering the evidence from the prior hearing and additional evidence submitted on remand, the Director finds that Adesta did not make a timely payment of the assessed unpaid wages under section 1742.1, subdivision (a). Therefore, the Director of Industrial Relations issues this decision reaffirming the statutory imposition of liquidated damages.

### SUMMARY OF FACTS

DLSE served the Assessment by mail on November 16, 2007. The Assessment found that eight Shasta workers had been underpaid prevailing wages in the amount of \$30,822.10, and assessed penalties pursuant to Labor Code sections 1775 and 1813 in the amount of \$11,000.00. Among other things, the Assessment informed the affected contractor, subcontractor and surety of their potential liability for liquidated damages under section 1742.1 in an amount equal to the

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<sup>2</sup> Adesta participated in the hearing as an interested person pursuant to Rule 8 (d) (Cal. Code Regs., tit. 8, § 17208, subd. (d)). Because Shasta's pro per owners did not possess the facts to effectively argue the issue on remand and requested Adesta's assistance, the Hearing Officer granted Adesta leave to present evidence and argument on Shasta's behalf concerning Adesta's purported payment of the Assessment; in short, Adesta remains a non-party participant. Adesta's arguments on this issue will be referred to as Shasta's position since Adesta is arguing Shasta's case on Shasta's behalf. Rule 8 (e) severely limits the rights of non-parties who are allowed to participate in section 1742 proceedings and provides that such participation "shall not expand the scope of issues under review nor shall it extend any rights or interests which have been forfeited as a result of an Affected Contractor or Subcontractor's own failure to file a timely request for review." Accordingly, additional issues raised by Adesta for the first time on remand, which were not included in the Superior Court's remand order, including Adesta's contention that interest should have ceased accruing on the unpaid wages after it transferred the funds withheld from Shasta to DLSE, are barred by Rule 8 (e) and will not be addressed in this Decision.

<sup>3</sup> Adesta's liability for the Assessment, including liquidated damages, is not directly addressed in this Decision because Adesta never requested review and therefore is not a party.

wages, or portion thereof, remaining unpaid 60 days following service of the Assessment. In addition, the Assessment directed Adesta, the prime contractor on the Project, to comply with section 1727, subdivision (b) and withhold sufficient funds due to Shasta to satisfy the Assessment.

On January 11, 2008, Brian Crone, then counsel for Adesta, wrote to Sherry Gentry, the Deputy Labor Commissioner investigating Shasta's work on the Project, stating in pertinent part as follows:

The CWPA [Civil Wage and Penalty Assessment] asserts that Adesta's subcontractor, Shasta General Engineering ("Shasta"), committed violations of the prevailing wage laws, asserts that \$30,822.10 is owed for wages, and seeks an additional \$11,000.00 in penalties. Adesta has withheld the amounts claimed due in the CWPA and is desirous of transmitting the funds to the Division of Labor Standards Enforcement ("DLSE") to hold, pursuant to a Settlement Agreement and Release, until the CWPA becomes final. Adesta currently has multiple disputes with Shasta and wants to ensure that, should Shasta successfully defend against the CWPA, the funds are returned to Adesta and not released to Shasta. Moreover, Adesta is currently in negotiations with the awarding body to end the project, which makes forwarding the funds to that entity to hold more complicated.

Please contact me at your earliest convenience, Adesta is prepared to immediately transfer the funds to DLSE to satisfy the CWPA.

On January 16, 2008, Crone sent Gentry a proposed "Release Agreement" ("proposed Agreement") that he requested Gentry to execute releasing Adesta "from further liability after it transmits the funds necessary to satisfy the above-referenced CWPA to the DLSE." In summary, the proposed Agreement would have released Adesta from all liability under the Assessment, leaving Shasta liable for "any rights and remedies" that DLSE might have. With regard to the transfer of funds to DLSE, the proposed Agreement states in part:

2. DLSE and ADESTA have agreed to resolve all disputes concerning the CWPA identified above between the DLSE and ADESTA on the following terms: ADESTA has withheld from SHASTA funds sufficient to pay the CWPA identified above. ADESTA will forward a check in the amount of \$41,822.10 to the DLSE, to be held in trust by the DLSE until the CWPA is finally resolved (i.e. a final order that is no longer subject to judicial review.) In the event the CWPA is finally resolved in favor of the DLSE and against SHASTA, the DLSE shall retain these funds to satisfy the CWPA. In the event SHASTA chooses to seek review

of the CWPA and successfully reduces the amount assessed in the CWPA and /or entirely eliminates the CWPA, the DLSE shall remit any funds paid by ADESTA in excess of the finally adjudicated CWPA back to ADESTA. . . . The DLSE shall in no way remit any of the funds paid by ADESTA to SHASTA. . . .

Gentry responded to Crone via email the same day to inform Crone that she did not have the authority to sign such a release. In addition, Gentry wrote:

If payment is submitted by Adesta, the DLSE agrees not to disburse any monies until such time as a final order is issued that is no longer subject to judicial review. Of course, if Shasta prevails after a review and a lesser amount is found due, DLSE will refund the difference to Adesta.

Crone sent Adesta's check, dated January 16, 2008, in the amount of \$41,822.10 to Gentry, via Federal Express, on January 17, 2008. DLSE received the check on January 18, 2008, 63 days after service of the Assessment. Crone's letter accompanying the check states:

Enclosed is Adesta's check in the amount of \$41,822.10. As previously discussed, Adesta Limited Partnership is transferring the amount of the CWPA to DLSE to hold in trust until the CWPA is finally adjudicated. As you agreed, in the event the CWPA is reduced or eliminated, all monies in excess of the final CWPA will be remitted back to Adesta and no other entity, including without limitation Shasta General Engineering, Inc. Moreover, by transferring the monies it has withheld from Shasta to the DLSE, Adesta does not admit that it (or any of its affiliates) violated the Prevailing Wage Laws. Adesta is transferring these funds to the DLSE solely to address the alleged Prevailing Wage Laws [*sic*] of its subcontractor. Adesta understands that by transferring these funds to the DLSE, it is no longer subject to the CWPA as it satisfied its statutory responsibility.

Gentry wrote Crone on January 22, 2008, acknowledging receipt of Adesta's check but informing Crone that a check to be held in trust did not satisfy all of Adesta's obligations under the prevailing wage law:

We are in receipt of Adesta's check in the amount of \$41,822.10. This check satisfies Adesta's obligations under Labor Code § 1727(b), however transferring the funds to DLSE to hold in trust does not satisfy Adesta's liabilities under prevailing wage law. The check is not paid to DLSE unconditionally or absolutely and the funds are not out of pocket of Adesta.

The check will be held in DLSE's trust account pending final resolution of the Civil Wage & Penalty Assessment.

There was no further communication between Adesta and DLSE regarding the deposited funds until June 16, 2008, when Crone wrote to DLSE counsel Yuen-Garcia requesting DLSE to authorize the release of the funds being withheld from Adesta by the awarding body, the Department of Water Resources (“DWR”), pursuant to section 1727, subdivision (a). Crone asserted that no additional wages remained outstanding because Adesta had deposited the full amount of the Assessment with DLSE and thus there was no further purpose for DWR to retain funds due to Adesta on the Project. Yuen-Garcia responded to Crone on June 17, 2008, as follows:

This is in response to your letter of June 16, 2008. On January 17, 2008, you sent a letter to Deputy Labor Commissioner Sherry Gentry enclosing a check in the sum of \$41,822.10 to be held in trust. In your letter you indicated that if it is finally determined that the amount due is reduced or eliminated all excess amounts are to be returned back to Adesta Limited Partnership. The tender of the check conditionally is not considered as payment. (see Civil Code section 1478) Moreover, the check is insufficient to cover any liquidated damages should they be awarded by the Director. Additionally, interest in the sum of \$6,000.00 has accrued as of this date. We have been advised by the Department of Water Resources that the sum of approximately \$26,000.00 is being retained under the contract. This sum and the amount of the check are insufficient to cover the amount due should the Director decide to affirm the Civil Wage and Penalty Assessment, include the liquidated damages and interest. Under the circumstances, we regret that we cannot release the withholding of funds withheld by the Department of Water Resources.

After the Decision was issued on April 28, 2009, Adesta submitted a timely request for reconsideration of the Decision’s award of liquidated damages because it had deposited the assessed wages and penalties with DLSE within 60 days after service of the Assessment. Adesta submitted copies of Crone’s January 17, 2008, letter to Gentry and the accompanying check from Adesta as part of its request for reconsideration. The Director denied Adesta’s request for reconsideration on three grounds:

- Adesta was not a party to Shasta’s request for review and thus had no standing to seek reconsideration. (See Cal. Code Regs., tit. 8, §§ 17261-17262.)
- The January 17, 2008, letter and accompanying check were not introduced into evi-

dence at the Hearing on the Merits and were therefore were not part of the administrative record and could not form a basis for reconsideration.

- The version of Labor Code section 1742.1, subdivision (b) in effect during the relevant time period had no provision for depositing wages with DLSE to avoid liquidated damages.

Both Adesta and Shasta filed timely petitions for writ of administrative mandate challenging the Decision in Alameda County Superior Court.<sup>4</sup> Shasta's petition challenged both the Decision's findings on the merits and its affirmation of statutory liquidated damages, while Adesta's petition challenged only the affirmation of liquidated damages. The Court issued its Judgment as follows on June 8, 2010:

The Petition of Shasta General Engineering, Inc. ("Shasta") for Writ of Mandate is GRANTED. "Where the court finds that there is relevant evidence that, in the exercise of reasonable diligence, could not have been produced or that was improperly exclude at the hearing before respondent, it may enter judgment . . . remanding the case to be considered in light of that evidence." (C.C.P. section 1094.5(e).) Here the Court finds that the payment by Adesta of the Assessment constitutes relevant evidence that either was unknown to Shasta at the time of hearing and therefore not offered into evidence, and/or was improperly excluded by the Division of Labor Standards Enforcement. There is no evidence in the Administrative Record that the Hearing Officer considered this payment in making his findings. As such, judgment shall be entered commanding Respondent Department of Industrial Relations to set aside its Decision, and this matter is hereby REMANDED back to the Hearing Officer to consider whether Adesta made a timely payment of the Assessment. The Consolidated Petition of Adesta Limited Partnership, Adesta Management Group, Inc. and Adesta LLC for Writ of Mandate is MOOT in light of the Court's ruling on Shasta's Petition for Writ of Mandate.

## DISCUSSION

The Issue On Remand Is Whether Adesta's Check of January 16, 2008, Was A Timely Payment Of Unpaid Wages Under Labor Code Section 1742.1.

The Superior Court's remand order directs the Hearing Officer to "consider whether Ade-

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<sup>4</sup> Alameda County Superior Court case numbers RG09456820 and RG09457570, respectively.

sta made a timely payment of the Assessment” in light of previously unavailable evidence of “the payment by Adesta of the Assessment.” Shasta contends that this means the Court made a finding, based on evidence extrinsic to the administrative record, that Adesta had in fact paid the Assessment in full and that the only issue remanded is whether that payment was timely. DLSE disputes Shasta’s interpretation because, under the substantial evidence standard, the Court did not have the authority to admit evidence extrinsic to the administrative record or to make findings of fact based on such evidence. DLSE contends that the Court’s Judgment therefore remanded the threshold issue of payment of the Assessment in light of the previously unavailable evidence. I find that DLSE’s position is the most reasonable interpretation of the Court’s intent.

Code of Civil Procedure section 1094.5, subdivisions (e) and (f) provide:

(e) Where the court finds that there is relevant evidence that, in the exercise of reasonable diligence, could not have been produced or that was improperly excluded at the hearing before respondent, it may enter judgment as provided in subdivision (f) remanding the case to be reconsidered in the light of that evidence; or, in cases in which the court is authorized by law to exercise its independent judgment on the evidence, the court may admit the evidence at the hearing on the writ without remanding the case.

(f) The court shall enter judgment either commanding respondent to set aside the order or decision, or denying the writ. Where the judgment commands that the order or decision be set aside, it may order the reconsideration of the case in the light of the court's opinion and judgment and may order respondent to take such further action as is specially enjoined upon it by law, but the judgment shall not limit or control in any way the discretion legally vested in the respondent.

As DLSE correctly notes, the Superior Court’s authority was limited to the questions of whether the Director “proceeded without, or in excess of jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion” and that “abuse of discretion is established if the court determines that the findings are not supported by substantial evidence in the light of the whole record.” (Code Civ. Proc. § 1094.5, subd. (b), § 1742, subd. (c).) The determination that there was relevant evidence, unknown to Shasta, that could not have been produced at the time of the Hearing on the Merits necessarily required remanding the case to be reconsidered in light of that evidence. The Court was not “authorized by law to exercise its independent judgment on the evidence” and thus did not have authority to admit evidence extrinsic to



the administrative record or make factual findings based on such evidence. (Code Civ. Proc. § 1094.5, subd. (e).)

Consequently, the only possible interpretation of the Judgment is that the Court wanted the Director<sup>5</sup> to determine whether the assessed unpaid wages had been paid within 60 days after service of the Assessment as contemplated by section 1742.1, subdivision (a) in light of the previously unavailable evidence. The Court's common usage of the term "payment" to describe the deposit of funds by Adesta with DLSE cannot therefore be interpreted as a factual finding by the Court that "payment" had in fact been made as argued by Adesta.

Adesta's Deposit Of Funds With DLSE Did Not Constitute Payment Of The Unpaid Wages Under Section 1742.1, Subdivision (a).

At all times relevant to this Decision, section 1742.1, subdivision (a) provided in pertinent part as follows:

After 60 days following the service of a civil wage and penalty assessment under Section 1741 . . . , the affected contractor, subcontractor, and surety . . . shall be liable for liquidated damages in an amount equal to the wages, or portion thereof, that still remain unpaid. If the assessment . . . subsequently is overturned or modified after administrative or judicial review, liquidated damages shall be payable only on the wages found to be due and unpaid. If the contractor or subcontractor demonstrates to the satisfaction of the director that he or she had substantial grounds for believing the assessment . . . to be in error, the director shall waive payment of the liquidated damages.

By its plain language, section 1742.1, subdivision (a) provides three means of avoiding liquidated damages for assessed unpaid wages: 1) pay the unpaid wages within 60 days after service of the assessment; 2) prevail on the merits; or 3) establish grounds for waiver. Shasta's contentions on the merits and waiver were fully addressed in the original Decision in this matter which found no basis for waiver of liquidated damages. Those findings were not disturbed by the Superior Court. Shasta's contention that Adesta made a timely payment of the assessed unpaid wages, entitling Shasta to escape liquidated damages, is the sole issue on remand.

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<sup>5</sup> The order that the Hearing Officer make this decision is erroneous in that decisions under section 1742 are made by the Director.

Section 1727, subdivision (b) provides:

If the awarding body has not retained sufficient money under the contract to satisfy a civil wage and penalty assessment based on a subcontractor's violations, the contractor shall, upon the request of the Labor Commissioner, withhold sufficient money due the subcontractor under the contract to satisfy the assessment and transfer the money to the awarding body. These amounts shall not be disbursed by the awarding body until receipt of a final order that is no longer subject to judicial review.

Pursuant to this authority, the Assessment requested Adesta to withhold sufficient money due to Shasta to satisfy the Assessment and to transfer that money to the awarding body. Adesta's conduct, as evidenced by Crone's correspondence with Gentry, indicates that Adesta's intent in depositing a check in the amount of the assessed unpaid wages and penalties was to satisfy its mandatory obligation under section 1727; not to proffer an unconditional payment of the Assessment as Shasta now contends.

With no legal authority, Shasta conflates Adesta's statutory duty to withhold funds from Shasta under section 1727, subdivision (b) with payment of the assessed unpaid wages under section 1742.1, subdivision (a), and impliedly argues that the satisfaction of the former obligation constitutes satisfaction of the latter as well. While Adesta may have fulfilled its independent duty to withhold funds owing to Shasta on the Project, as discussed below, the transfer of those funds to DLSE did not constitute payment of the assessed unpaid wages and did not prevent the imposition of liquidated damages by operation of law.

Interpreting the analogous language of section 201 et seq., which requires an employer to pay "the wages earned and unpaid" within a time certain after a worker's discharge or resignation, the court of appeal found that "an employer is required to timely pay wages due under Labor Code section 201 or 202 *unconditionally* . . ." (*Singh v. Southland Stone, U.S.A., Inc.* (2010) 186 Cal.App.4th 338, 365 (emphasis added).)<sup>6</sup> The Labor Code does not contain a definition of "pay," but Black's Law Dictionary defines "pay" as "to discharge a debt by tender of payment

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<sup>6</sup> Similar to liquidated damages under the prevailing wage law, section 203 entitles a worker to recover up to 30 days continuation of wages as a penalty against an employer who willfully fails to pay "wages earned and unpaid" within the statutory time frame.

due.” (Black’s Law Dict. (5th ed. 1979) p. 1016, col. 1.) Because wages are due to the individual workers, a debt of unpaid wages can only be “paid” by tendering the wages due to the worker. The conditional deposit of an amount equivalent to the unpaid wages with a third party cannot discharge such a debt. Applying this analysis to section 1742.1, subdivision (a), it is clear that any assessed unpaid prevailing wages will remain “unpaid” for the purposes of that section until the wages owing have been unconditionally paid to the affected workers. Adesta’s tender of funds withheld from Shasta to DLSE “to hold in trust until the CWPA is finally adjudicated” was conditional on its face because none of the funds could be distributed to the affected workers until after the matter was fully adjudicated and any funds in excess of the amount affirmed by the decision were to be remitted back to Adesta.

Section 1727, subdivision (b) imposes an independent duty on the part of the affected contractor to withhold funds owed to its subcontractor and doing so does not satisfy or eliminate any of the contractor’s or subcontractor’s other independent duties, obligations or liabilities under the prevailing wage law. Shasta’s contention that it was relieved of its potential liability for liquidated damages by Adesta’s transfer of the funds that it withheld from Shasta to DLSE as required by section 1727 is without any legal basis.

For these reasons, Adesta’s deposit of funds in trust with DLSE did not constitute payment of the unpaid wages; and the assessed wages remain unpaid.<sup>7</sup> Because no payment was made under section 1742.1, subdivision (a), the issue of timeliness is moot.

## FINDINGS

1. Affected contractor Adesta Limited Partnership, Adesta Management Group, Inc. and Adesta LLC, Partners, Inc. satisfied its obligation under section 1727, subdivision (b) by de-

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<sup>7</sup> Section 1742.1 was amended effective January 1, 2009 (Stats. 2008, ch. 402, § 3 (Sen. Bill No. 1352)), more than 13 months after service of the Assessment. As amended, section 1742.1 contains a new subdivision (b) that provides a safe harbor from liquidated damages when the full amount of the assessment has been deposited with the Department within 60 days after service of the assessment. Because the 60 day time after service of the Assessment for payment of unpaid prevailing wages had run prior to the amendment’s effective date, however, the version in effect at that time remains applicable to this case and the new safe harbor provision was not available to Shasta or Adesta.

positing the amount of the assessed unpaid wages and penalties in the amount of \$41,822.10 with DLSE as directed by the Assessment.

2. Adesta's deposit of funds as required by section 1727, subdivision (b) did not constitute payment of the assessed unpaid prevailing wages under section 1742.1, subdivision (a).

3. The assessed unpaid wages, as modified by the Director's Decision of April 28, 2009, remained due and owing more than 60 days following issuance of the Assessment. Shasta is therefore liable for liquidated damages imposed by operation of law pursuant section 1742.1, subdivision (a) in the amount of \$30,747.91. As previously found in the Decision of April 28, 2009, there are insufficient grounds to waive payment of those damages.

### ORDER

The Director's Decision on the merits in this matter issued on April 28, 2009, is hereby readopted in its entirety and incorporated herein by reference, including the award of liquidated damages under section 1742.1, subdivision (a) which is hereby reaffirmed. The Hearing Officer shall issue a Notice of Findings which shall be served with this Decision on the parties.

Dated: 3/8/11



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John C. Duncan  
Director of Industrial Relations