

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Toro Enterprises, Inc.

Case No.: **16-0253-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 Toro Enterprises, Inc. (Toro) submitted a timely request for review of a Civil Wage and Penalty Assessment (Assessment) issued on April 15, 2016, by the Division of Labor Standards Enforcement (DLSE) with respect to work performed by Toro on the Chilled and Hot Water Pipeline Extension (Project) for the California State University, Cal Poly Pomona (CSU). The Assessment determined that the following amounts were due: \$82,002.03 in unpaid prevailing wages, \$60,720.00 in penalties under Labor Code section 1775,¹ \$3,075.00 in penalties under section 1813, and \$6,240.00 in penalties under section 1777.7.

On February 16, 2017, a Hearing on the Merits was held in Los Angeles, California, before Hearing Officer Douglas Elliott. David Cross appeared as counsel for the DLSE, and Brendan Sapien appeared as counsel for Toro. Testimony in support of the Assessment was provided by DLSE Deputy Labor Commissioner Yoon Mi Jo. Testimony on behalf of Toro was provided by Toro Controller Jerry Hannigan, Jr.

On January 9, 2017, DLSE filed a motion to amend the Assessment downward and the motion was granted. During the Hearing, DLSE again moved to amend the Assessment downward. Toro did not object and the motion is hereby granted. At the Hearing, the parties advised the Hearing Officer that all issues had been resolved as to employees classified in the Operating Engineer and Cement Mason crafts, the penalties under section 1777.7, and the

¹ All further section references are to the California Labor Code, unless otherwise specified.

classification and hours worked by employees classified by Toro as Laborers. With the resolution of these issues, and as amended, the Assessment ultimately determined that the following amounts were due: \$4,259.37 in unpaid prevailing wages (all in the form of allegedly unpaid fringe benefit amounts), \$11,280.00 in penalties under section 1775, and penalties under section 1813 in the amount of \$525.00. The amended Assessment did not include any penalties under section 1777.7.

Accordingly, the issues presented for decision are:

- Whether the amended Assessment correctly found that Toro had failed to pay the required fringe benefits for all hours worked on the Project by employees classified in the Laborer craft.
- If Toro did not pay the required fringe benefits for employees classified as Laborers, whether the Labor Commissioner abused her discretion in assessing statutory penalties under section 1775 at the rate of \$120.00 per violation in the total amount of \$11,280.00.²
- Whether the amended Assessment correctly found that Toro failed to pay the prevailing wage rate for all overtime hours worked, thereby making it liable for a penalty under section 1813 of \$25.00 per violation for 21 violations for a total of \$525.00.
- Whether Toro is liable for liquidated damages under section 1742.1, subdivision (a).

For the reasons set forth below, the Director of Industrial Relations finds that DLSE carried its initial burden of presenting evidence at the Hearing that provided prima facie support for the amended Assessment, but that Toro carried its burden of proving that the basis of the amended Assessment was incorrect. (See Cal. Code Regs., tit. 8, § 17250, subd. (a).)

Accordingly, the Director issues this Decision dismissing the amended Assessment.

² DLSE proposed for the statement of issues whether Requesting Party (Toro) correctly paid all fringe benefits, and if not, what is Requesting Party's liability for penalties. Under California Code of Regulations, title 8 section 17243, subdivision (d), the Hearing Officer has the authority to define the issues for the Hearing on the Merits. The amended Assessment based its findings only on one question: whether Toro paid all fringe benefits for workers in the Laborer craft. DLSE did not claim that the unpaid wages in the Assessment were based on underreporting of hours worked or out-of-classification work performed by those workers.

FACTS

On March 17, 2015, CSU published its invitation for bids for the Project. Toro was awarded the contract, which Toro and CSU entered into on May 18, 2015 (Contract). Work under the Contract consisted of installing chilled and hot water pipeline, including supply and return lines, insulation, valves and vaults. Toro performed work under the Contract from June 2015 through September 2015.

The Assessment.

The applicable prevailing wage determination (PWD) for the craft of Laborer in effect on the bid advertisement date was the Laborer and Related Classifications for Southern California, SC-23-102-2-2014-1 (Laborer PWD). In addition to the base hourly wage rate due the employee, the Laborer PWD also required payment of a fringe benefit hourly rate of \$18.69, consisting of \$6.81 for health and welfare, \$6.25 for pension, \$4.47 for vacation and holidays, \$0.52 for “other payment,” and \$0.64 for training fund contributions.

DLSE received a complaint from a labor compliance program that the work on the Project constituted Pipefitter work, and that Toro had misclassified its workers. Deputy Labor Commissioner Jo was assigned to investigate the alleged underpayment of prevailing wages. Jo testified that she found no evidence upon which to reclassify Laborers to Pipefitters. For her investigation, she reviewed the Laborer PWD, obtained Toro’s certified payroll records (CPRs) covering work from June to December 2015, and also obtained Toro’s proof of payment of fringe benefits.³ She determined that while Toro had paid the correct training fund contributions under the Laborer PWD (\$0.64 per hour), Toro had not paid the remaining fringe benefits required by the Laborer PWD in the amount of \$18.05 an hour (\$18.69 – \$0.64).

Jo testified that for each Laborer, the CPRs showed payment of fringe benefits in the amount of \$18.79 per hour, which exceeded the \$18.69 amount required by the Laborer PWD. Jo also acknowledged that Toro submitted as proof of payment the Labor Union Report Summary (Benefit Reports) from the Construction Laborers Trust Funds for Southern California (Trust Funds) to which Toro contributed the fringe benefit payments as a signatory employer. The Benefit Reports cover each month from June 2015 through December 2015, and disclose the

³ The Labor Union Report Summary (Benefit Reports) from August 2015 until December 2015 show that Toro paid a fringe benefit rate of \$19.09 on its public work projects.

total fringe benefit payments made for each worker in the given month. The Benefit Reports also showed an amount of payments that exceeded the required \$18.69 fringe benefit rate for each hour of work by Laborers. Jo testified that, nevertheless, she could not accept the figures in the CPRs and the Benefit Reports because the Benefit Reports disclosed amounts of paid fringe benefits for work hours by Laborers on both public work projects (at \$18.79 per hour) and private (commercial) projects (at \$11.26 per hour).⁴

Jo testified that she did not question whether Toro actually paid the \$18.79 in fringe benefits to the Trust Fund. Based on an “annualization principle” described in a DLSE training manual, however, when fringe benefits are paid annually for work done in both public work and private work projects, DLSE procedure was not to just accept at face value the paid fringe benefit figures provided by a contractor. Instead, according to Jo’s understanding, the procedure required her to perform a calculation, dividing the total amount of fringe benefits paid in connection with both public and private work by the total number of hours in both public and private work. To Jo’s understanding, that calculation resulted in the fringe benefit figure she as DLSE auditor was required to use as an hourly “credit” for paid fringe benefits to be used in determining if and to what extent the required fringe benefit level was met. If the hourly credit for fringe benefits was less than the amount required by the applicable PWD, the result would be an underpayment of fringe benefits, and thus an underpayment of the required prevailing wages, and applicable penalties under section 1775 for each instance of underpayment.⁵

⁴ While not made entirely clear in the Hearing, Toro’s contractual obligations to the Laborers Union apparently require that it pay to the Trust Funds the Laborer PWD fringe benefit rate for public work projects and a lower fringe benefit rate for non-public work projects, the latter called either “commercial” or “private” work in the Hearing record.

⁵ On Toro’s motion and without objection from DLSE, the Hearing Officer took official notice of three documents: a portion of the DLSE Public Works Manual (DLSE Manual), a DLSE memorandum dated September 18, 2008, which addresses the annualization principle (DLSE Memo), and chapter 15 of the U.S. Department of Labor’s Field Operations Manual used for enforcement in federal projects under the Davis-Bacon Act. (See Cal. Code Regs., tit. 8, § 17245, subd. (a).) The DLSE Manual, however, is simply a “training tool for the Division of Labor Standards Enforcement The Manual’s text, standing alone, is therefore not binding on the enforcement activities of the Division, or the Department of Industrial Relations ... or on the courts when reviewing DIR proceedings under the prevailing wage laws.” (DLSE Manual, § 1.1.) Official notice was taken of these materials solely for their use in elucidating the parties’ respective positions on the issues.

Jo further testified that the annualization principle can apply where a lump sum medical insurance payment is made for a given year for a worker performing both public and private work. In that instance, the total benefit payment is divided by 2,080, the number of hours in a year's time, in order to derive a credit to apply against a contractor's fringe benefit obligation.

Jo explained that in the present case, she did not perform the credit calculation by dividing by 2,080, because the Project lasted less than a year, from June 2015 to December 2015. As a result, in her audit Jo divided the total of all fringe benefits Toro paid for both public and private projects by the number of hours worked during time period of the Project. That figure resulted in a credit amount for Toro's paid fringe benefits against the Laborer PWD's required \$18.69 amount. The resulting total unpaid fringe benefits amounted to \$4,259.37 over the life of the Project, according to Jo's calculation.

Toro's Controller Hannigan testified that Toro is a signatory with the Laborers Union and pays fringe benefit sums to the Trust Funds on a monthly basis. He testified that Toro is also subject to audits by the union, and has never had issues with fringe benefit underpayment. Hannigan testified that the amounts as stated in the Benefit Reports are paid on a monthly basis on behalf of each employee directly to the Trust Funds. If the paid fringe benefit amount was less than that required by the PWD, he would catch the shortfall on Toro's monthly reports, and would correct it and pay the union so that the Trust Funds would not be underpaid. In 2015, the Laborers Union did not raise issue as to alleged underpayment of fringe benefit sums.

Hannigan further testified that the annualization calculation that is described in the DLSE materials did not apply in Toro's situation, because Toro did not seek a "credit" against the prevailing wage rate for fringe benefit payments made. Nor did Toro make payments to the workers or the Trust Funds in advance of the work, a situation described in the DLSE Memo. Toro's position is also that DLSE misapplied the annualization principle to this case because conversion of a lump sum fringe benefit payment was not proper since Toro paid an ascertainable hourly fringe benefit amount for all hours worked based on the Laborer PWD.

DLSE stipulated that Toro acted in good faith in making fringe benefit payments. Also, DLSE's penalty review document disclosed that Toro did not have a history of prevailing wage law violations.

DISCUSSION

The California Prevailing Wage Law (CPWL), set forth at Labor Code sections 1720 et seq., requires the payment of prevailing wages to workers employed on public works construction 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 required prevailing rate, and also prescribes penalties for failing to pay the prevailing rate. The required prevailing rate of per diem wage includes an amount for fringe benefits for health and welfare, pensions, vacations, and training fund contributions pursuant to section 1773.1. Section 1775, subdivision (a)(2), grants the Labor Commissioner the discretion to mitigate the statutory maximum penalty per day in light of prescribed factors. Section 1742.1, subdivision (a), provides for the imposition of liquidated damages, essentially a doubling of the unpaid wages, under specified circumstances. Section 1813 prescribes a fixed penalty of \$25.00 for each instance of failure to pay the prevailing overtime rate when due. The Labor Commissioner does not have discretion to reduce the amount of this penalty; nor does the Director have authority to limit, reduce, or waive the penalty.

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 or subcontractor may appeal the assessment by filing a request for review. (§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 presenting evidence that “provides prima facie support for the Assessment . . .” (Cal. Code Regs. tit. 8, § 17250, subd. (a).) When that initial 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).)

Toro Did Not Fail to Pay the Required Prevailing Wage Rate.

As ultimately amended, DLSE’s Assessment found that Toro had failed to pay the required prevailing wages based on a failure to pay the fringe benefit amounts set forth in the Laborer PWD.

Section 1773.1, subdivision (a), provides in relevant part:

Per diem wages . . . includes employer payments for the following:

- (1) Health and welfare.
- (2) Pension.
- (3) Vacation.
- (4) Travel.

Section 1773.1, subdivision (b), provides in relevant part:

Employer payments include all of the following:

- (1) The rate of contribution irrevocably made by the employer to a trustee or third person pursuant to a plan, fund, or program.
- (2) The rate of actual costs to the employer reasonably anticipated in providing benefits to workers pursuant to an enforceable commitment to carry out a financially responsible plan or program communicated in writing to the workers affected.
- (3) Payments to the California Apprenticeship Council pursuant to Section 1777.5.

Section 1773.1, subdivision (c) provides in relevant part that “Employer payments are a credit against the obligation to pay the general prevailing rate of per diem wages.” Under section 1773, subdivision (d), “An employer may take credit for employer payments . . ., even if contributions are not made, or costs not paid, during the same pay period for which credit is

taken, if the employer regularly makes the contributions, or regularly pays the costs, for the plan, fund or program on no less than a quarterly basis.”

Further, Section 1773.1, subdivision (e) provides in relevant part as follows:

(e) The credit for employer payments shall be computed on an annualized basis where the employer seeks credit for employer payments that are higher for public works projects than for private construction performed by the same employer, except where one or more of the following occur:

- (1) The employer has an enforceable obligation to make the higher rate of payments on future private construction performed by the employer.
- (2) The higher rate of payments is required by a project labor agreement.
- (3) The payments are made to the California Apprenticeship Council pursuant to Section 1777.5.
- (4) The director determines that annualization would not serve the purposes of this chapter.

In this case, based on the testimony of DLSE’s deputy, DLSE met its initial burden to present prima facie support for the amended Assessment. Based on the testimony of Toro’s controller, however, Toro met its burden to prove the basis for the amended Assessment was incorrect as to the question of underpayment of fringe benefits.

The Benefit Reports showed the fringe benefit payments for the Project for each month from June to December 2015. Those reports also reflected fringe benefit payments for private work done in the same months by the Laborers who worked on the Project, as DLSE noted. While the Benefit Reports disclosed that Toro’s monthly payments sufficiently covered the rates set forth in the Laborer PWD, Jo concluded that because Laborers worked on both public and private projects in each month, she needed to apply the annualization principle in order to derive an hourly amount to credit Toro towards its fringe benefit obligation. Because the fringe benefit rate paid for private work was lower than the rate for the Project, a calculation that combined the two payments predictably produced a credit amount that fell short of the Laborer PWD rate. Based on her calculation, Jo’s audit, as revised, found that Toro had failed to pay the correct prevailing wages for 21 Laborers, despite the fact that reports from the recipient of the fringe benefit payments (the Trust Funds) showed that the full fringe benefit rate required by the Laborer PWD had been paid.

Annualization is a principle adopted by the U.S. Department of Labor in enforcing the Davis-Bacon Act (40 U.S.C. § 3141 et seq.) for crediting contributions made to fringe benefit plans in circumstances where work is performed on federal public works and on private projects. The purpose of the annualization principle is to prevent employers from reducing prevailing wages owed by obtaining a credit using compensation provided on non-public works projects. (*Miree Construction Corporation v. Dole* (11th Cir. 1991) 930 F.2d 1536, 1539 (*Miree*)). “[T]he annualization principle requires that when converting an employer’s contribution to a plan into an hourly amount, the amount of payments must be divided by the total number of hours worked in a year, not just the number of hours worked on Davis–Bacon projects.... The annualization principle simply ensures that a disproportionate amount of [a year-long fringe] benefit is not paid for out of wages earned on Davis–Bacon work.” (*Id.*, at pp. 1539, 1546.) “In determining [the] cash equivalent credit for fringe benefit payments, the period of time to be used is the period covered by the contribution.” (U.S. Dept. Labor, Field Enforcement Manual (Mar. 21, 2016) § 15, subd. (f)(12)(a), p. 40 at <https://www.dol.gov/whd/FOH/FOH_Ch15.pdf>.) For enforcement purposes, the DLSE follows the federal enforcement guidelines. (DLSE Manual, p. 53.)⁶

The DLSE Manual describes the annualization principle as a formula “to convert the employer’s contribution into an hourly amount. The amount of payments must be divided by the total number of hours worked in a year on all projects, public and private.” (DLSE Manual, p. 55.)

The problem with applying the annualization principle to Toro’s situation here is that before DLSE’s calculation, Toro’s contribution was already expressed as an hourly amount. No conversion of a benefits contribution spread over any longer period of time (e.g., a year) was needed. Toro contributed its payments based on an hourly amount for each worker, the amount specified in the Laborer PWD, as the CPRs and Benefit Reports show. Toro does not seek to convert a lump sum medical, health insurance or other benefit into hourly amounts for purposes of determining a credit against the hourly amount required by the Laborer PWD.

⁶ “California courts look to federal law under the Davis-Bacon Act as guidance in interpreting California Prevailing Wage Law because the two schemes share similar purposes.” (*Southern Cal. Lab. Management etc. Committee v. Aubry* (1997) 54 Cal.App.4th 873, 882-883.)

Toro simply paid the hourly amount required, reported it on its CPRs, and received confirmation from the Trust Funds showing its payments sufficiently covered the required fringe benefit amount.

Examples where annualization is appropriate to obtain an hourly rate when non-hourly year-long fringe benefits are paid can be seen in *Miree*. In that case, at issue was whether the contractor was entitled to credit against the required prevailing wage obligation for contributions it had made to a non-union apprenticeship training fund in the amount of \$.25 per hour for each hour worked by Miree’s workers, for a total of \$11,293.52. The court declined to give Miree the sought-for credit, stating “an employer may only receive Davis–Bacon credit for contributions that are reasonably related to the cost of the training provided.” (*Miree, supra*, 930 F.2d at p. 1543.) The court then turned to application of the annualization principle, used for a lump-sum benefit payment the contractor had made. Because the apprentice training plan in question charged a \$500.00 annual tuition for the single Miree worker who enrolled in the training, the court limited the “creditable costs” for the apprenticeship benefit to the \$500.00 amount. (*Ibid.*) The court endorsed the Department of Labor’s use of the annualization principle to convert the value of the \$500.00 contribution to a per-hour basis in order to determine the credit amount on an hourly basis. During the year in which the \$500.00 benefit was paid, Miree worked both Davis-Bacon and private works projects. In order to calculate the amount of the credit to which the contractor was entitled against its prevailing wage obligations on public works projects, the court held it was appropriate to annualize the benefits paid by dividing the annual cost of the benefit by the total number of hours worked in the year on both Davis-Bacon and private projects. (*Miree, supra*, 930 F.2d at p. 1545.)

In this case, the amended Assessment represents a mistaken application of the annualization principle discussed in *Miree*. The policy considerations underlying the principle—preventing contractors from using lump sum fringe benefit payments covering both public works and private work as a credit to reduce their prevailing wage obligation on public works—are not implicated here. In this case, Toro made fringe benefit payments to the Trust Funds in a per-hour amount for the hours worked on public works projects, including the Project at issue, separate from fringe benefit payments that were made for private projects, and the records clearly demonstrated that Toro paid the required fringe benefit amount for work on the Project at

the rate required under the Laborer PWD.

Because the prevailing wage fringe benefits that were due and paid on behalf of Toro's Laborers were not reduced (i.e., diluted) by Toro's also applying such payments to hours worked on private projects, it cannot be concluded that the workers' prevailing wages were underpaid. As such, application of the annualization principle is neither necessary nor appropriate in this case, and would not serve the purposes of the CPWL. (§ 1773.1, subd. (e)(4).) Accordingly, since underpayment of fringe benefits comprised the entire basis for DLSE's finding of unpaid prevailing wages, no such wages are due under the amended Assessment.

The Issues of Penalties Under Section 1775 and Section 1813 and Liquidated Damages Under Section 1742.1 Are Moot.

In light of the analysis as to fringe benefit payments, *ante*, the issues of penalties for underpayment of prevailing wages under section 1775 and section 1813, and liquidated damages under section 1742.1 based on underpayment of wages, are moot and need not be addressed.⁷

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

FINDINGS AND ORDER

1. The amended Assessment did not correctly find that Toro Enterprises, Inc. failed to pay the required fringe benefit amounts for all hours worked on the Project by employees classified in the Laborer craft.
2. Toro Enterprises, Inc. is not liable for statutory penalties under section 1775.
3. Toro Enterprises, Inc. is not liable for liquidated damages under section 1742.1.
4. Toro Enterprises, Inc. did not fail to pay the required fringe benefits for overtime hours worked, and is not liable for penalties under section 1813.

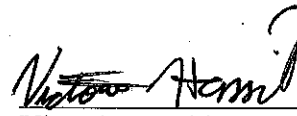
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⁷ The amended Assessment found penalties under section 1813, apparently based only on underpayment of fringe benefits for the overtime hours worked. Because this Decision finds no underpayment of fringe benefits, no basis exists for imposition of the section 1813 penalties.

5. The amended Civil Wage and Penalty Assessment is dismissed 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: July 10, 2019



Victoria Hassid
Chief Deputy Director⁸
Department of Industrial Relations

⁸ See Gov. Code, §§ 7, 11200.4.