

STATE OF CALIFORNIA  
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Requests for Review of:

**Pivot Group, Inc.**

Case Nos. 10-0310-PWH

From a Civil Wage and Penalty Assessment issued by:

**Division of Labor Standards Enforcement**

**DECISION OF THE ACTING DIRECTOR  
OF INDUSTRIAL RELATIONS**

Affected contractor Pivot Group, Inc. (Pivot) submitted a timely request for review of the Civil Wage and Penalty Assessment (Assessment) issued by the Division of Labor Standards Enforcement (DLSE) with respect to the Batavia Street and Glassell Street Sidewalk Improvements (Project) in Orange County.<sup>1</sup> The Assessment determined that \$129,799.26 in unpaid prevailing wages and statutory penalties was due. A Hearing on the Merits was conducted on June 13, 2011, in Los Angeles, California, before Hearing Officer Douglas P. Elliott. David L. Bell appeared for DLSE. Pivot did not appear, despite having been given notice. The matter was submitted for decision on July 11, 2011. On August 23, 2011, the Hearing Officer ordered the submission vacated due to a partially illegible audit worksheet, and ordered DLSE to submit a fully legible copy of this exhibit on or before September 2, 2011. Pivot was given until September 9, 2011, to file a response. DLSE timely complied with the order, and no response was received from Pivot. Accordingly, the matter stood re-submitted on September 9, 2011.

The issues for decision are:

- Whether the Assessment correctly found that Pivot had failed to report and pay

---

<sup>1</sup> Surety American Contractors Indemnity Co. (Surety) also submitted a timely request for review of the Assessment (10-0315 PWH). Surety withdrew its request for review after it settled with DLSE with regard to wages.

the required prevailing wages for all hours worked on the Project by the affected workers.

- Whether the Assessment correctly reclassified certain of the affected workers from the Laborers' prevailing wage rate to the Operating Engineer or Cement Mason's prevailing wage rate for their work on the Project.
- Whether DLSE abused its discretion in assessing penalties under Labor Code section 1775<sup>2</sup> at the maximum rate of \$50.00.
- Whether Pivot failed to timely submit certified payroll records and is therefore liable for penalties under section 1776.
- Whether Pivot failed to pay the required prevailing wage rates for overtime work and is therefore liable for penalties under section 1813.
- Whether Pivot has demonstrated substantial grounds for appealing the Assessment, entitling it to a waiver of liquidated damages.

The Acting Director finds that Pivot has failed to carry its burden of proving that the basis of the Assessment was incorrect. Therefore, the Acting Director issues this Decision affirming Assessment. Pivot has not proven the existence of grounds for a waiver of liquidated damages.

### FACTS

The City of Orange (City) advertised the Project for bid on April 30, 2009, and subsequently awarded the contract to Pivot. Pivot's employees worked on the Project from approximately February 11, 2010, through April 7, 2010. It is undisputed that the work took place in Orange County, and that Project was a public work subject to Labor Code's prevailing wage requirements.

The following applicable PWDs and scopes of work were in effect on the bid advertisement date:

Laborer and Related Classifications for Southern California (SC-23-102-2-2008-

---

<sup>2</sup> All further statutory references are to the California Labor Code, unless otherwise indicated.

1): This is the PWD used in the Assessment for all laborer work.

Cement Mason for Southern California (SC-23-203-2-2008-1): This is the PWD used in the Assessment for all cement work.

Operating Engineer for Southern California (SC-23-63-2-2008-2): This is the PWD used in the Assessment for all heavy equipment operation. The Operating Engineer PWD contains a predetermined pay rate increase that went into effect before the beginning of work on the Project.

The Assessment: DLSE served the Assessment on August 18, 2010. The Assessment found that Pivot failed to timely submit certified payroll records in violation of section 1776, failed to pay the correct prevailing rates and failed to prove its claim that fringe benefits required by section 1773.1 were paid directly to the workers, resulting in the underpayment of prevailing wages in violation of section 1774. The Assessment found a total of \$73,193.54 in underpaid prevailing wages, including \$2,115.01 in unpaid training fund contributions.<sup>3</sup> Penalties were assessed under section 1775 in the amount of \$50.00 per violation for 562 violations, totaling \$28,100.00. DLSE determined that the maximum penalty was warranted by its findings that Pivot's violations were willful and intentional. In addition, penalties were assessed under section 1813 for five overtime violations, at the statutory rate of \$25.00 per violation, totaling \$125.00. Further, penalties were assessed under section 1776, for 1008 violations of CPR requirements, at the statutory rate of \$25.00 per worker per day, totaling \$25,200.00.

The evidence presented at the Hearing on the Merits establishes that Pivot failed to pay the correct hourly rate to sixteen workers. In some instances, the workers were misclassified. For example, Jhon Loya operated heavy equipment, and should have been paid the prevailing rate for Operating Engineer, Group 3, but was instead paid as a Laborer. Sigifredo Ramirez did concrete finishing and should have been paid the prevailing rate for Cement Mason; instead he was instead paid as a Laborer.

---

<sup>3</sup> The numbers stated are taken from the audit worksheet submitted by DLSE on September 2, 2011, as a replacement for the partially illegible Exhibit 3. These numbers are slightly lower than the numbers originally stated in the Assessment.

Additionally, Pivot failed to pay the required hourly rate for Laborer Group 1. For example, Robert Laporta was paid \$15.00 per hour, while the published total hourly rate for Laborer Group I was \$40.42. Pivot did not introduce any evidence that it paid any of the sixteen workers the rates required in the applicable PWD.

At the Hearing on the Merits, Deputy Labor Commissioner Lorna Espiritu credibly testified that she assessed section 1775 penalties at the maximum rate of \$50.00 because she determined that the violations were willful. She based this determination on the fact that Pivot claimed to have made cash payments that it never made. There is no evidence to the contrary.

The record establishes that Pivot failed to timely respond to DLSE's request for certified payroll records, and that section 1776 penalties were assessed for 18 workers per day for the period February 11, 2010, through April 7, 2010, for a total of 1008 violations.

The record establishes that Pivot paid less than the required prevailing overtime wage rate to Jhon Loya on four occasions, and to Alfonso Flores on one occasion, for a total of five violations.

In failing to appear at the hearing, and failing to respond to DLSE's post-hearing submission of a substitute audit work sheet, Pivot failed to offer any evidence that the Assessment was incorrect in any way.

## DISCUSSION

Sections 1720 and following set forth a scheme for determining and requiring the payment of prevailing wages to workers employed on public works construction projects. Specifically:

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

efficiency of well-paid employees; and to compensate nonpublic employees with higher wages for the absence of job security and employment benefits enjoyed by public employees.

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

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

When DLSE determines that a violation of the prevailing wage laws has occurred, a written Civil Wage and Penalty Assessment is issued pursuant to section 1741. An affected contractor or subcontractor may appeal the Assessment by filing a Request for Review under section 1742. Subdivision (b) of section 1742 provides in part that "[t]he contractor or subcontractor shall have the burden of proving that the basis for the civil wage and penalty Assessment is incorrect."

Section 1775, subdivision (a) requires, among other things, that contractors and subcontractors pay the difference to workers who were paid less than the prevailing wage rate, and 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 those wages are not paid within sixty days following service of a Notice of Withholding under section 1776.1.

Pivot Was Required To Pay The Prevailing Rates For Laborer,  
Operating Engineer and Cement Mason For The Work Performed On  
The Project In Light Of The Information Publicly Available From DIR.

The prevailing rate of pay for a given craft, classification, or type of work is determined by the Director of Industrial Relations in accordance with the standards set forth in section 1773. It is the rate paid to the majority of workers; if there is no single rate payable to the majority of workers, it is the single rate paid to most workers (the modal rate). On occasion, the modal rate may be determined with reference to collective bargaining agreements, rates determined for federal public works projects, or a survey of rates paid in the labor market area. (§§ 1773, 1773.9, and *California Slurry Seal Association v. Department of Industrial Relations* (2002) 98 Cal.App.4th 651.) The Director determines these rates and publishes general wage determinations to inform all interested parties and the public of the applicable wage rates for the “craft, classification and type of work” that might be employed in public works. (§ 1773.) Contractors and subcontractors are deemed to have constructive notice of the applicable prevailing wage rates. (*Division of Labor Standards Enforcement v. Ericsson Information Systems* (1990) 221 Cal.App.3d 114, 125 (*Ericsson*).)

The applicable prevailing wage rate is the one in effect on the date the public works contract is advertised for bid. (§ 1773.2 and *Ericsson, supra.*) Section 1773.2 requires the body that awards the contract to specify the prevailing wage rates in the call for bids or alternatively to inform prospective bidders that the rates are on file in the body’s principal office and to post the determinations at each job site.

Section 1773.4 and related regulations set forth procedures through which any prospective bidder, labor representative, or awarding body may petition the Director to review the applicable prevailing wage rates for a project, within 20 days after the advertisement for bids. (*See Hoffman v. Pedley School District* (1962) 210 Cal.App.2d 72 [rate challenge by union representative subject to procedure and time limit prescribed by section 1773.4].) In the absence of a timely petition under section 1773.4, Pivot was bound to pay the prevailing rate of pay, as determined and published by the Director, as of the bid advertisement date. (*Sheet Metal Workers Intern. Ass’n, Local Union No. 104*

v. *Rea* (2007) 153 Cal.App.4th 1071, 1084-1085.)

Here the undisputed evidence establishes that 18 workers were paid less than the prevailing rate of pay as specified in the applicable PWD. In some instances, workers doing the work of Operating Engineer or Cement Mason were paid as Laborers. In the remaining cases, workers doing the work of Laborer Group 1 were paid less than the Laborer PWD's required hourly rate for that classification.

Consequently, because Pivot did not pay the prevailing wages specified for the Laborer Group 1, Operating Engineer Group 3 and Cement Mason classifications, and the scope of work provisions for those classifications encompassed the work in issue, it violated its statutory obligation to pay prevailing wages.

DLSE's Penalty Assessment Under Section 1775 Is Appropriate.

Section 1775, subdivision (a) states in relevant part:

(1) The contractor and any subcontractor under the contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than fifty dollars (\$50) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by the contractor or, except as provided in subdivision (b), by any subcontractor under the contractor.

(2)(A) The amount of the penalty shall be determined by the Labor Commissioner based on consideration of both of the following:

(i) Whether the failure of the contractor or subcontractor to pay the correct rate of per diem wages was a good faith mistake and, if so, the error was promptly and voluntarily corrected when brought to the attention of the contractor or subcontractor.

(ii) Whether the contractor or subcontractor has a prior record of failing to meet its prevailing wage obligations.

(B) (i) The penalty may not be less than ten dollars (\$10) . . . unless the failure of the . . . subcontractor to pay the correct rate of per diem wages was a good faith mistake and, if so, the error was promptly and voluntarily corrected when brought to the attention of the . . . subcontractor.

(ii) The penalty may not be less than twenty dollars (\$20) . . . if the . . . subcontractor has been assessed penalties within the previous three years for failing to meet its prevailing wage obligations on a separate contract, unless those penalties were subsequently withdrawn or overturned.

(iii) The penalty may not be less than thirty dollars (\$30) . . . if the Labor Commissioner determines that the violation was willful, as defined in subdivision (c) of Section 1777.1.<sup>[4]</sup>

The Acting Director's review of the Enforcing Agency's determination is limited to an inquiry into whether the action was "arbitrary, capricious or entirely lacking in evidentiary support . . ." (*City of Arcadia v. State Water Resources Control Bd.* (2010) 191 Cal.App.4th 156, 170.) In reviewing for abuse of discretion, however, the Acting Director is not free to substitute her own judgment "because in [her] own evaluation of the circumstances the punishment appears to be too harsh." (*Pegues v. Civil Service Commission* (1998) 67 Cal.App.4th 95, 107.)

A contractor or subcontractor has the same burden of proof with respect to the penalty determination as to the wage assessment. Specifically, "the Affected Contractor or Subcontractor shall have the burden of proving that the Labor Commissioner abused his or her discretion in determining that a penalty was due or in determining the amount of the penalty." (Rule 50(c) [Cal. Code Regs., tit. 8, §17250, subd. (c)].)

Section 1775, subdivision (a)(2) grants the Labor Commissioner the discretion to mitigate the statutory maximum penalty per day in light of prescribed factors, but it neither mandates mitigation in all cases nor requires mitigation in a specific amount when the Labor Commissioner determines that mitigation is appropriate. The record shows that DLSE considered the prescribed factors for mitigation and determined that the maximum penalty of \$50.00 per violation was warranted in this case. The Acting Director is not free to substitute her own judgment. Pivot has not shown an abuse of discretion and, accordingly, the assessment of penalties at the rate of \$50.00 is affirmed

---

<sup>4</sup> Section 1777.1, subdivision (c) defines a willful violation as one in which "the contractor or subcontractor knew or reasonably should have known of his or her obligations under the public works law and deliberately fails or refuses to comply with its provisions."



as modified for 562 violations.

DLSE's Penalty Assessment Under Section 1776 Is Appropriate.

Section 1776 states in relevant part:

(a) Each contractor and subcontractor shall keep accurate payroll records, showing the name, address, social security number, work classification, straight time and overtime hours worked each day and week, and the actual per diem wages paid to each journeyman, apprentice, worker, or other employee employed by him or her in connection with the public work. Each payroll record shall contain or be verified by a written declaration that it is made under penalty of perjury, stating both of the following:

(1) The information contained in the payroll record is true and correct.

(2) The employer has complied with the requirements of Sections 1771, 1811, and 1815 for any work performed by his or her employees on the public works project.

(b) The payroll records enumerated under subdivision (a) shall be certified and shall be available for inspection at all reasonable hours at the principal office of the contractor on the following basis:

(1) A certified copy of an employee's payroll record shall be made available for inspection or furnished to the employee or his or her authorized representative on request.

(2) A certified copy of all payroll records enumerated in subdivision (a) shall be made available for inspection or furnished upon request to a representative of the body awarding the contract, the Division of Labor Standards Enforcement, and the Division of Apprenticeship Standards of the Department of Industrial Relations.

...

(g) The contractor or subcontractor has 10 days in which to comply subsequent to receipt of a written notice requesting the records enumerated in subdivision (a). In the event that the contractor or subcontractor fails to comply within the 10-day period, he or she shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars (\$25) for each calendar day, or portion thereof, for each worker, until strict compliance is effectuated. Upon the request of the Division of Apprenticeship Standards or the Division of Labor Standards Enforcement, these penalties shall be withheld from progress payments then due. A contractor is not subject to a penalty assessment pursuant to this section due to the failure of a subcontractor to comply with this section.

Unlike section 1775 above, section 1776 does not give DLSE any discretion to reduce the amount of the penalty, nor does it give the Acting Director any authority to limit or waive the penalty. Pivot failed to prove that it responded to the demand for CPRs or had any defense to the imposition of this penalty. Accordingly, the assessment of penalties under section 1776, as assessed, is affirmed in the amount of \$25,200.00 for 1008 violations.

Overtime Penalties Are Due For The Workers Who Were Underpaid For Overtime Hours Worked On The Project.

Section 1813 states, in pertinent part, as follows:

The contractor or any subcontractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars (\$25.00) for each worker employed in the execution of the contract by the ... contractor ... for each calendar day during which the worker is required or permitted to work more than 8 hours in any one calendar day and 40 hours in any one calendar week in violation of the provisions of this article. ...

Section 1815 states in full as follows:

Notwithstanding the provisions of Sections 1810 to 1814, inclusive, of this code, and notwithstanding any stipulation inserted in any contract pursuant to the requirements of said sections, work performed by employees of contractors in excess of 8 hours per day, and 40 hours during any one week, shall be permitted upon public work upon compensation for all hours worked in excess of 8 hours per day and not less than 1½ times the basic rate of pay.

Unlike section 1775 above, section 1813 does not give DLSE any discretion to reduce the amount of the penalty, nor does it give the Acting Director any authority to limit or waive the penalty. Pivot failed to prove that it did not fail to pay its workers the correct overtime prevailing wage rate on five occasions. Accordingly, the assessment of penalties under section 1813, as assessed, is affirmed in the amount of \$125.00 for five violations.

Pivot Is Liable For Liquidated Damages.

Section 1742.1, subdivision (a) provides 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.

Additionally, if the contractor or subcontractor demonstrates to the satisfaction of the director that he or she had substantial grounds for appealing the assessment . . . with respect to a portion of the unpaid wages covered by the assessment . . ., the director may exercise his or her discretion to waive payment of the liquidated damages with respect to that portion of the unpaid wages.

Absent waiver by the Acting Director, Pivot is liable for liquidated damages in an amount equal to any wages that remained unpaid sixty days following service of the Assessment. Entitlement to a waiver of liquidated damages in this case is partially tied to Pivot's position on the merits and specifically whether, within the 60 day period after service of the Assessment, it had "substantial grounds for appealing the assessment . . . with respect to a portion of the unpaid wages covered by the assessment."

DLSE's audit worksheet states a total of \$71,078.53 in unpaid wages and \$2,115.01 in training fund payments due and owing, for a combined total of \$73,193.54. In failing to appear at the hearing or to offer any evidence that the Assessment was incorrect, Pivot has not met its burden of demonstrating that it had substantial grounds for appealing the Assessment.

Because the assessed back wages remained due more than sixty days after service of the Assessment, and Pivot has not demonstrated grounds for waiver, Pivot is also liable for liquidated damages in an amount equal to the unpaid wages.

## FINDINGS

1. Affected contractor Pivot filed a timely Request for Review of the Civil Wage and Penalty Assessment issued by DLSE with respect to the Project.
2. Pivot failed to pay its workers at least the prevailing wage for the disputed

work. Pivot underpaid its workers for their work on the Project in the aggregate amount of \$71,078.53, comprising 562 violations of section 1775 and five violations of section 1813.

3. Pivot failed to timely submit certified payroll records as required by section 1776, and is liable for penalties for 1008 violations.

4. Pivot failed to make all required training fund contributions to the Laborers, Cement Masons and Operating Engineers Training Funds. Pivot underpaid said funds in the aggregate amount of \$2,115.01.

5. In light of Findings 2 and 4, above, Pivot underpaid its employees on the Project in the aggregate amount of \$73,193.54, including unpaid training fund contributions.

6. DLSE did not abuse its discretion in setting section 1775, subdivision (a) penalties at the rate of \$50.00 per violation, and the resulting total penalty of \$28,100.00, as assessed, for 562 violations is affirmed in light of appropriate factors and the other findings in this Decision.

7. Penalties under section 1776, subdivision (g) at the rate of \$25.00 per violation are due for 1008 violations, for a total of \$25,200.00 in penalties.

7. Penalties under section 1813 at the rate of \$25.00 per violation are due for five violations on the Project, for a total of \$125.00 in penalties.

9. The unpaid wages found due in Finding No.5 remained due and owing more than sixty days following issuance of the Assessment. Pivot is therefore liable for an additional award of liquidated damages under section 1742.1 in the amount of \$101,418.54, and there are insufficient grounds to waive payment of these damages.

10. The amounts found remaining due in the Assessment as modified and affirmed by this Decision are as follows:

Wages Due:	\$ 71,078.53
Training Fund Contributions Due:	\$ 2,115.01

Penalties under section 1775, subdivision (a):	\$ 28,100.00
Penalties under section 1776, subdivision (g)	\$ 25,200.00
Penalties under section 1813:	\$ 125.00
Liquidated Damages:	\$ 73,193.54
<b>TOTAL:</b>	<b>\$ 199,812.08</b>

In addition, interest is due and shall continue to accrue on all unpaid wages as provided in section 1741, subdivision (b).

**ORDER**

The Civil Wage and Penalty Assessment is affirmed with modifications 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: 11/19/2011



Christine Baker  
Acting Director of Industrial Relations