STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Design Turf Technologies, Inc. Case Nos. 12-0063-PWH
12-0126-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected subcontractor Design Turf Technologies, Inc. (Design Turf) submitted timely requests for review of the Civil Wage and Penalty Assessment and Amended Civil Wage and Penalty Assessment (Amended Assessment) issued by the Division of Labor Standards Enforcement (DLSE) on January 7, 2012, and April 16, 2012, respectively, with respect to the Kelly Park Improvements Project (Project) in San Mateo County. The Amended Assessment determined that $25, 970.27 in unpaid prevailing wages (including training fund contributions) and statutory penalties was due. A Hearing on the Merits was conducted on August 17 and September 12, 2012, in Oakland, California, before Hearing Officer A. Roger Jeanson. Doug Adams (Adams) appeared for Design Turf, and David D. Cross appeared for DLSE. At the request of the Hearing Officer, DLSE submitted a final revised audit after the September 12, 2012, hearing. This revised audit determined that $21,616.71 in unpaid prevailing wages (including training fund contributions) and statutory penalties was due. The matter was submitted for decision on September 21, 2012.

The issues for decision are:

- Whether the Amended Assessment correctly found that the affected workers are entitled to payment for travel time, mileage and subsistence as required by the applicable prevailing wage determination for Soft Floor Layer.

- Whether the Amended Assessment correctly determined that Design Turf failed to pay required training fund contributions to an approved plan or fund.
- Whether DLSE abused its discretion in assessing penalties under Labor Code section 1775[1] at the reduced rate of $25.00 per violation.
- Whether Design Turf is liable for liquidated damages under section 1742.1, subdivision (a).

The Director finds that Design Turf has failed to carry its burden of proving that the basis of the Amended Assessment was incorrect as to payment for travel pay and subsistence and the failure to pay training fund contributions. Therefore, the Director issues this Decision affirming the Amended Assessment as modified in the revised audit. Design Turf also has failed to establish that DLSE abused its discretion in assessing penalties under section 1775, subdivision (a) at the rate of $25.00 per violation. Finally, Design Turf has not demonstrated substantial grounds for a waiver of liquidated damages.

FACTS

The City of Menlo Park advertised the Project for bid on April 28, 2010, and entered into a contract with O.C. Jones & Sons, Inc. (Contractor) on June 23, 2010. Contractor subcontracted a portion of the work on the Project to Design Turf, which is located in Whitefish, Montana. Design Turf's employees worked on the Project from approximately January 23, 2011, through February 13, 2011.

DLSE and Design Turf stipulated that the applicable prevailing wage determination (PWD) in effect on the bid advertisement date was: Commercial Building, Highway, Heavy Construction and Dredging Projects, No. SMA-2010-1, for the craft of Soft Floor Layer for San Mateo County, California, which contains a pre-determined rate increase effective prior to the date the Project commenced.[2] The Soft Floor Layer travel

[1] All further statutory references are to the California Labor Code unless otherwise indicated.

[2] Throughout the relevant time period, the prevailing hourly wage rate for Soft Floor Layer was comprised of a base rate of $45.36, fringe benefit contributions totaling $14.34, and a training fund contribution of $0.53. For an apprentice Soft Floor Layer, the hourly wage rate was comprised of a base rate of $39.25, fringe benefit contributions of $13.88, and a training fund contribution of $0.53.

and subsistence provisions require that the employer pay travel time (wages and benefits) to employees required to travel more than 25 miles from the point of dispatch (employee's home or individual employer's shop) for all time traveling beyond the 25 miles from the point of dispatch to the jobsite and return. Employees reporting to the jobsite in their private vehicles to a jobsite more than 25 miles from the point of dispatch shall also receive mileage at the current Internal Revenue Service (IRS) rate per mile for all miles traveled outside of the 25 miles. In addition, employees required to live away from their personal place of residence shall receive lodging, or an amount equal to reasonable lodging, plus subsistence of $75.00 per day.

The Amended Assessment found two principal violations by Design Turf: failure to pay travel time, mileage and subsistence, and failure to make training fund contributions. At the initial hearing, DLSE agreed that Design Turf had overpaid its journeyman workers, which DLSE applied to the alleged underpayment for travel and subsistence. The Amended Assessment also found that Design Turf had underpaid the apprentice on the job, Sergio Lomeli. However, before the second hearing date, Design Turf provided copies of check stubs showing it had paid Lomeli a base wage and fringe benefits in accordance with what the Northern California Floor Covering Joint Apprentice and Training Trust Fund had advised it was due the apprentice. At the second hearing, DLSE stipulated that the apprentice had been either fully paid or overpaid for wages and benefits based on the amount remaining unpaid in the Amended Assessment. Travel and subsistence payments for Lomeli remained disputed, and DLSE agreed that any overpayment for wages and benefits to him would be credited toward travel and subsistence pay it determined Lomeli was owed.

The workers stayed on the Project the entire time Design Turf was on the Project and, except for one worker, returned to Montana. DLSE calculated unpaid travel and subsistence for each affected worker based on the distance the worker traveled to the jobsite from his home or the employer's shop in Whitefish, Montana (round-trip for the workers who returned to Montana and one-way for the worker that did not) using Google

maps to determine times and distances.[3] In addition, DLSE assessed subsistence at the PWD rate for each affected worker. DLSE credited Design Turf for any mileage or lodging payments it made to the workers.

Adams testified that he did not pay travel and subsistence as required by the PWD in part because his wife, who handled the payroll for the Project, was told by the IRS that California did not have the authority to require payment of per diems for travel outside the State of California. To support this contention, Adams submitted prior to the second hearing date, a letter from the IRS to his wife. The letter states that companies and other organizations "use the per diem rate guide published by the General Services Administration[.] GSA regulates the per diem rates within the United States, not the individual states." (Underline in original.) As Adams conceded at the hearing, the letter does not reference California's prevailing wage laws, the extra-territorial effect of such laws, or whether an out-of-state contractor performing work on a public works project in California may be required to abide by the travel and subsistence provisions of a PWD for travel outside the State.

DLSE presented evidence that Design Turf had paid training fund contributions between January 2010 and January 2012 only on a single project, Ramona High School, in Riverside, California. Design Turf presented no evidence that it had made training fund contributions for hours worked on the Kelly Parks Improvement Project.

In the Amended Assessment, section 1775 penalties were assessed at the maximum rate of $50.00 per violation for 95 violations, totaling $4,750.00. After the first day of hearing, DLSE filed a motion dated August 21, 2012, to amend the Amended Assessment to revise the wages due to $21,220.27 (including training fund contributions) and to reduce the penalty rate to $25.00 per violation.

Lola Beavers determined the penalty rate for DLSE. She testified that she considered each of the pertinent factors set forth in section 1775 in setting the initial penalty rate at the maximum, and did so, in part, because Design Turf had two prevailing wage violations in 2007. After the first day of hearing, she reduced the penalty rate to

[3] For one worker who flew into San Diego, DLSE calculated the travel time from the San Diego airport to the job site.

$25.00 per violation because she felt Design Turf had made a good faith effort to determine what the PWD required and to comply with its provisions for the payment of wages and fringe benefits. After Adams testified that he did not own the company in 2007 but had bought it in May 2009, Beavers testified that she nevertheless would assess the penalty at $25.00 per violation because the failure to pay travel and subsistence had still not been corrected.

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."

The Affected Workers Are Entitled To Travel Pay And Subsistence As Determined In The Amended Assessment

Design Turf's only defense to the non-payment of travel and subsistence required by PWD SMA-2010-1 is that it was told by the IRS that California cannot require payment of per diem wage rates for time and travel outside the State.

The United States Supreme Court has noted that the California prevailing wage law is an example of state action in a field long regulated by the states. (*California Div. of Labor Standards Enforcement v. Dillingham Constr., Inc.* (1997) 519 U.S. 316, 330, 117 S.Ct. 832, 838, 136 L.Ed.2d 791.) As such, it is not preempted by federal law unless Congress's intent to do so is clear and manifest. (*Rice v. Santa Fe Elevator Corp.* (1947) 331 U.S. 218, 230, 67 S.Ct. 1146, 91 L.Ed. 1447.)

The California law requiring workers on a public works project to be paid the prevailing rate of per diem wages as set by the Director of the Department of Industrial Relations was enacted to protect and benefit employees of contractors or subcontractors who work on projects paid for with public funds. (*Sheet Metal Workers Internat. Assn., Local Union No. 104 v. Rea* (2007) 153 Cal.App.4th 1071, 1078; *Lusardi, supra*, at 985; § 1770.) The law is to be liberally construed to further these goals. (*City of Long Beach v. Department of Industrial Relations* (2004) 34 Cal.4th 942, 950.) Per diem wages include payment for travel and subsistence. (§ 1771, subd. (a).)

Design Turf presented no legal authority for its position. The only evidence presented to support its argument was the letter from the IRS which Adams acknowledged does not support the company's position. It refers only to per diem rates set by GSA, which are established for federal employees traveling on official business. (5 U.S.C. § 5702.) There is nothing whatsoever in the statute to suggest that establishment by GSA of these per diem rates preempts California's prevailing wage law requirements for workers employed on public works projects in California.

DLSE calculated the travel pay, mileage and subsistence owed for each affected worker and credited payments made by Design Turf for mileage and lodging. Design Turf has failed to prove that this basis for the Amended Assessment is incorrect.

Design Turf Failed To Pay Required Training Fund Contributions

DLSE presented prima facie evidence that Design Turf did not pay training fund contributions on the Project. Design Turf presented no evidence to the contrary. Accordingly, Design Turf has failed to meet its burden of showing that this basis for the Amended Assessment is incorrect.

DLSE's Penalty Assessment Under Section 1775 Is Appropriate

When the Project was bid, section 1775, subdivision (a) stated 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.
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> (2)(A) The amount of the penalty shall be determined by the Labor Commissioner based on consideration of both of the following:
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> (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.
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> (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.[4]

The Director's review of the Labor Commissioner'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 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)].)

In this case, DLSE initially assessed penalties at the maximum rate of $50.00 per violation. It reduced the penalty rate to $25.00 based on its determination after the first day of hearing that Design Turf had acted in good faith in attempting to determine and to comply with its obligations to pay wages and fringe benefits under the applicable PWD. Even though the initial determination was based on the apparently erroneous belief that the corporate entity that worked on the Project was the same entity that had committed prevailing wage violations in 2007, Beavers testified credibly that she would nevertheless assess the penalty at the rate of $25.00 per violation on the basis that the error in paying travel and subsistence had not been corrected.

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

[4] 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."

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 a penalty of $25.00 per violation was warranted in this case. The Director is not free to substitute her own judgment. Design Turf has not shown an abuse of discretion and, accordingly, the assessment of penalties at the rate of $25.00 is affirmed for 95 violations.

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

The principal dispute in the case involves the assessment for travel pay and subsistence. Design Turf's argument that it did not owe the travel and subsistence payments in the Amended Assessment rests almost entirely on a statement allegedly made by an IRS employee for which Design Turf presented neither supporting documentation nor legal authority. This is not substantial grounds for appealing the

Amended Assessment.

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

FINDINGS

1. Affected subcontractor Design Turf filed a timely request for review of the Amended Civil Wage and Penalty Assessment issued by DLSE with respect to the Project.

2. Design Turf's employees were entitled to travel and subsistence pay under the terms of the applicable Prevailing Wage Determination. After applying credit for the travel and lodging payments made by Design Turf, the total unpaid wages due and owing are $18,698.72.

3. Design Turf failed to make required training fund contributions in the amount of $542.99.

4. In light of Findings 2 and 3, above, Design Turf underpaid its employees on the Project in the aggregate amount of $19,241.71, including unpaid training fund contributions.

5. DLSE did not abuse its discretion in setting section 1775, subdivision (a) penalties at the rate of $25.00 per violation, and the resulting total penalty of $2,375.00 for 95 violations is affirmed.

6. The unpaid wages found due in Finding No. 4 remained due and owing more than sixty days following issuance of the Amended Assessment. Design Turf is therefore liable for an additional award of liquidated damages under section 1742.1 in the amount of $19,241.71, there being insufficient grounds to waive payment of these damages.

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

Wages Due:	$18,698.72
Training Fund Contributions Due:	$542.99
Penalties under section 1775, subdivision (a):	$2,375.00
Liquidated Damages:	$19,241.71
TOTAL:	**$40,858.42**

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

ORDER

The Amended Civil Wage and Penalty Assessment is affirmed as modified in the final revised audit 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: 11/5/2012

Christine Baker
Director of Industrial Relations