STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Davis Moreno Construction, Inc. Case No.: **11-0166-PWH**

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

This case is before the Director on order of the Superior Court of California, County of Tulare, dated July 1, 2011, for review of a Civil Wage and Penalty Assessment issued by the Division of Labor Standards Enforcement (DLSE) on December 3, 2008, (Assessment) against Davis Moreno Construction, Inc. (Davis Moreno) with respect to work performed on the Multi-Use & Administration Building at Wilson School for the Exeter Union Elementary School District (Exeter Project) by its subcontractor, Ayodeji Ogundare dba Pacific Engineering Co. (Pacific Engineering). The Assessment determined that Davis Moreno owed $87,406.82 in unpaid prevailing wages, including travel and subsistence plus statutory penalties under Labor Code sections 1775 and 1813.[1] A Hearing on the Merits was conducted on January 18, 2012, in Fresno, California, before Hearing Officer A. Roger Jeanson. William C. Hahesy appeared for Davis Moreno and Ramon Yuen-Garcia appeared for DLSE. The matter was submitted for decision following the filing of post-hearing briefs.

Prior to the Hearing, on or about January 4, 2012, DLSE issued and served a revised audit worksheet which reduced the assessed unpaid prevailing wages, including travel and subsistence, to $7,894.85 plus statutory penalties and liquidated damages.

The issues for decision are:

- Whether Pacific Engineering failed to pay the required prevailing wages, including fringe benefits, for all hours worked on the Exeter Project by the affected workers.

- Whether Davis Moreno is liable for the payment of travel and subsistence to the affected Laborers who worked on the Exeter Project for Pacific Engineering.
- Whether Davis Moreno is liable for the payment of training fund contributions for all hours worked on the Exeter Project by the affected workers.
- Whether DLSE abused its discretion in assessing penalties under section 1775 at the maximum rate of $50.00 per violation, and whether Davis Moreno is jointly and severally liable for penalties assessed against Pacific Engineering under section 1775.
- Whether Pacific Engineering failed to pay the required prevailing wage rates for overtime work on the Project and whether Davis Moreno is therefore liable for penalties under section 1813.
- Whether Davis Moreno has demonstrated substantial grounds for appealing the Assessment, entitling it to a waiver of all or a portion of the liquidated damages under section 1742.1, subdivision (a).

The Director finds that nine affected workers are entitled to receive prevailing wages or fringe benefits, that Davis Moreno is liable for the payment of training funds, that Davis Moreno is not liable for penalties assessed pursuant to section 1775, and that Davis Moreno has established substantial grounds entitling it to a waiver of liquidated damages for unpaid wages and overtime. With respect to subsistence, the Director finds that DLSE has not made a prima facie case that the workers are entitled to subsistence, and, accordingly, finds that none is owed. Finally, the Director finds that Davis Moreno has not met its burden of showing that the affected workers are not entitled to travel pay and mileage. However, the record is not sufficiently developed to make a final determination of how much is due to the affected workers. Therefore, the Director of Industrial Relations issues this decision affirming the Assessment in part, modifying it in part and remanding it in part. The matter is remanded to DLSE with instructions to prepare a new audit on the issue of travel pay and mileage only. This decision is final as to all other issues.

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

BRIEF HISTORY OF THE CASE

Neither Davis Moreno nor Pacific Engineering filed a timely request to review the Assessment under section 1742. On February 11, 2009, the Assessment was converted to a Clerk's Judgment at the request of DLSE in the Tulare County Superior Court and the Judgment was entered against Davis Moreno and Pacific Engineering in the amount of $185,509.83. Thereafter, Davis Moreno and Pacific Engineering both filed motions in the Superior Court to set aside the Judgment. The Superior Court denied their motions.

Davis Moreno and Pacific Engineering filed appeals with the Fifth District Court of Appeal. The Court of Appeal determined that the Superior Court could grant relief to Davis Moreno (but not to Pacific Engineering) on the grounds of extrinsic fraud and remanded the case to the Superior Court. Thereafter, on July 1, 2011, the Superior Court set aside the Judgment against Davis Moreno only on the equitable grounds of extrinsic fraud and sent the matter to DLSE for a review of the Assessment.[2] On July 7, 2011, Davis Moreno submitted a request for review to the Labor Commissioner.

FACTS

General contractor Davis Moreno entered into a contract on May 12, 2008, with the Exeter Union Elementary School District to construct a Multi-Use & Administration Building in Exeter, California. Davis Moreno subcontracted with Pacific Engineering on May 20, 2008, to perform earthwork and cement concrete work. Pacific Engineering started work on the Exeter Project in July 2008 and stopped work and abandoned the Project on or about September 23, 2008.

In early October 2008, DLSE received a complaint that four Pacific Engineering union employees had not been paid for the work they performed on the Project between September 15 and September 23, 2008. Deputy Labor Commissioner Sherry Gentry was assigned by DLSE to investigate the complaint. Gentry contacted Davis Moreno and made arrangements for Davis Moreno to pay the four workers: Musa M. Saleem, Shon Kekauoha, Gabriel Kekauoha, and

[2] The Superior Court found that Davis Moreno did not file a timely request for review because it was "lulled into a false sense of security" by statements made by DLSE to Davis Moreno shortly after the Assessment was served that "everything should be resolved" with Pacific Engineering and "Instructions to Davis [Moreno] to do nothing further except withhold payment from Pacific Engineering." (Minute Order dated July 1, 2011.)

Albert Hernandez. Davis Moreno paid these workers on or about October 8, 2008, based on information provided by the Laborer's Union. No other complaints were received that Pacific Engineering workers were not paid on the Exeter Project.

Gentry testified for DLSE. She described generally her investigation and the basis for the revised audit. Steve Abston, who oversaw the Exeter Project as operations manager for Davis Moreno, testified that Davis Moreno had a procedure for reviewing and logging the Certified Payroll Records (CPRs) submitted by Pacific Engineering, after which they were forwarded to the Project owner. He testified further that Davis Moreno had no knowledge that Pacific Engineering had not paid prevailing wages to its workers before being advised in October 2008 that the above-named four workers had not been paid for one payroll period. By that time, Pacific Engineering had abandoned the Project. Because of problems with their work, Davis Moreno did not make any payments to Pacific Engineering for its work on the Project.

Applicable Prevailing Wage Determinations (PWD):

The following applicable PWDs and travel and subsistence provision were in effect when the Exeter Project was bid:

Cement Mason (NC-23-203-1-2007-1):

This is the undisputed rate payable for all cement work on the Project. The Cement Mason PWD contains a predetermined pay rate increase that went into effect on June 30, 2008, before the beginning of work on the Project. Throughout the relevant time period, the prevailing hourly wage due under the Cement Mason PWD was $43.61, comprised of a basic hourly rate of $27.52, fringe benefits totaling $15.67 and a training fund contribution of $0.42. Daily overtime and Saturday work required time and one-half and Sunday and holiday work required double time. Travel and subsistence is not at issue for this classification.

Laborer and Related Classifications (NC-23-102-1-2007-2):

This is the undisputed rate payable for the majority of the work subject to the Assessment. The Laborer and Related Classifications (Laborer) PWD contains a predetermined pay rate increase that went into effect on June 30, 2008, before the beginning of work on the Project. Throughout the relevant time period, the prevailing hourly wage due under the Laborer PWD was $39.25, comprised of a basic hourly rate of $24.99, fringe benefits totaling $13.79 and

a training fund contribution of $0.47. Daily overtime and Saturday work required time and one-half and Sunday and holiday work required double time. The applicable Laborer travel and subsistence provision provides as follows:

> **Travel, Driving and Out of Town Expense Allowance:**
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> On projects sixty (60) miles or more by the shortest and most direct route from the main office or permanently established area office of the individual employer, such employer shall provide each employee transportation either physically or by paying the cost of such transportation. If the employer chooses to pay the cost of such transportation the cost shall be determined at the rate of forty ($0.40) cents per mile for each mile in excess of sixty (60) miles. Additionally the employee will be compensated at rate of one-half (1/2) of his straight time wage rate both to and from the job less seventy-five (75) minutes each way.
>
> Any employee operating or responsible for the control of a company vehicle being used to transport personnel, equipment and/or supplies from the employer's regularly established shop or yard to a jobsite shall be compensated at a rate of fifteen dollars and ninety-three cents ($15.93) per hour. Any employee who is a passenger in and not directly responsible for the control of a company vehicle is deemed to be in the vehicle voluntarily and is not subject to compensation other than discussed above. Employees assigned company vehicles will not be compensated for travel to and from the project to their homes unless it is in excess of sixty (60) miles from the regularly established shop or yard.
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> Travel & Driving is not subject to Section 28 (Fringe Benefits).
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> Employees required to stay out of town will be compensated at the rate of sixty dollars ($60.00) per day for each night the employee is at the project location. If an employee arrives on a project on Monday and returns to his home on Friday he/she would be compensated for four (4) night's subsistence. At the employer's option on continuing projects the employee may be paid subsistence through the weekend or pay the travel to and from the project for every weekend that the employee return to such project. If the employer pays for the lodging the employee will be compensated at the rate of twenty dollars ($20.00) per day for food and other out of town expenses.

The contentions of the parties with respect to the various matters at issue are set forth below.

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 an 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."[3]

[3] Under California Code of Regulations, title 8, section 17250, DLSE has the initial burden of producing evidence which "provides prima facie support for the Assessment." This burden "shall be construed in a manner consistent with relevant sections of the Evidence Code …" (*Ibid.*) Evidence Code section 550, subdivision (a) provides that "The burden of producing evidence as to a particular fact is on the party against whom a finding on the fact would be required in the absence of further evidence."

Nine Affected Workers Are Entitled To Receive Prevailing Wages, Including Fringe Benefits, For Work On The Project.

As DLSE points out in its Post Hearing Opening Brief, the principal issue raised by Davis Moreno with respect to wages is DLSE's failure to credit Pacific Engineering checks issued to three workers: Lonnie Crawford – check number 12952 in the net amount of $278.54; Samuel Landeros – check number 12953 in the net amount of $979.73; and Francisco Villa – check number 12950 in the net amount of $995.02.

DLSE has not credited these checks to the Exeter Project for the payroll period July 13, 2008 to July 19, 2008 because the memo field on the check to Crawford and Villa state "Payroll period: 07/08/2008 -07/14/08," and the memo field on the check to Landeros states "Payroll period: 07/06/2008 – 07/12/2008." All checks purport to pay for work during the payroll period shown on the CPR of July 13, 2008 to July 19, 2008. Gentry testified that Pacific Engineering had several jobs going on during this period, a number of which she was auditing, and that the notations on the checks indicate they were intended to cover work on other projects. Davis Moreno contends that the checks should be credited to the Exeter Project for the payroll period ending July 19, 2008 as shown on the CPR.

I find that the checks should be credited to the Exeter Project. While it is true, as DLSE argues, that the CPR does not show that Crawford worked on the Project in the period July 8, 2008 to July 14, 2008, the CPR for the payroll period July 13, 2008 to July 19, 2008 shows that he worked 7 hours on July 16, 2008 and was paid for the work performed that day by check number 12952 in the net amount of $278.54. Similarly for Landeros and Villa, the CPR for the July 13, 2008 to July 19, 2008 payroll period shows that they were paid for the hours that they are shown to have worked during that period by checks numbers 12953 and 12950, respectively. DLSE cannot argue that the hours worked by these workers on the Exeter Project as shown on the CPR are correct but, without more, that the checks reflected on the CPR as having paid for the work should not be credited to this Project. Moreover, while Gentry testified that Pacific Engineering was working on other projects during this period, she did not testify, and DLSE did not produce any other evidence, that Pacific Engineering had a payroll period of either July 8, 2008 to July 14, 2008 or July 6, 2008 to July 12, 2008 on any of the other projects. Finally, DLSE *has* credited a check paid to Javier Perez, the fourth worker shown on the CPR to have worked in the payroll period July 13, 2008 to July 19, 2008, even though the memo field on his

check, number 12951, also states "Payroll period: 07/08/2008 – 07/14/2008." Accordingly, I find that Davis Moreno has met its burden of showing that these three checks should be credited for work performed by the employees on the Exeter Project.

In its Post Hearing Brief, Davis Moreno calculated the wages other than for travel and subsistence due if the above checks are credited. Other than arguing that travel and subsistence are due, DLSE does not dispute the calculations. Based thereon, I find that the following affected workers are owed wages, exclusive of travel and subsistence, as follows:

(1) Lonnie Crawford - $26.98 for two hours of overtime paid at the regular rate;

(2) Jamare Davis - $22.47 for three hours of overtime;

(3) Cesar Pina - $62.56;

(4) Juan Ramirez - $78.69; and

(5) Victor Ramirez - $1,411.60 - the gross amount reflected in check number 13254, which was not credited by DLSE because only the check stub but not the cancelled check could be located.

In addition, the evidence shows that Davis Moreno did not pay fringe benefits to the four workers identified above who it paid in October 2008. In apparent reliance on information received from the Laborer's Union, Davis Moreno paid the workers for hours worked at the basic wage rate of $24.99 per hour but did not add payment for fringe benefits. Accordingly, these workers are owed the following payments for fringe benefits:

(1) Musa M. Saleem - $544.70. 64 (39.5 hours);

(2) Shon Kekauoha - $475.75 (34.5 hours);

(3) Gabriel Kekauoha - $475.75 (34.5 hours); and

(4) Albert Hernandez - $586.07 (42.5 hours).

The Case is Remanded For a Determination of Travel Pay And Mileage.

In the Assessment, DLSE determined that there was unpaid travel and subsistence totaling $1,742.15.[4] In the revised audit, the total due increased to $4,174.91. Gentry testified

[4] Travel includes travel pay and mileage.

that the increase was based on conversations between herself and Abston in which they tried to resolve the differences between them prior to the hearing, and on spread sheets prepared by Abston for that purpose. Davis Moreno objected to this testimony on the grounds that the discussions took place as part of settlement discussions between the parties. The spread sheets were not offered into evidence.

As a general rule, offers to settle or compromise and negotiations relating to such offers are inadmissible. (See, e.g., Witkin, 1 California Evidence (4th), Circumstantial Evidence, § 140; Evidence Code section 1152, subdivision (a).)[5] The discussions between Gentry and Abston that preceded the preparation of the revised audit were clearly in the nature of settlement discussions intended to resolve the issues in dispute without a hearing. That not having been accomplished, any admissions or offers to compromise made by the parties are inadmissible in this proceeding.

DLSE, however, has presented sufficient other evidence to establish a prima facie case that the workers on the Exeter Project are entitled to travel pay and mileage. The evidence shows that the main office of Pacific Engineering is more than 60 miles from the Project, which is sufficient to establish a basis for such pay and mileage. Davis Moreno argues that the employees, or at least some of them, traveled to the jobsite in a Pacific Engineering truck. However, the only evidence presented was Abston's testimony that he observed a Pacific Engineering truck on the jobsite on the three or four occasions he visited the site. He never saw the workers arrive at the jobsite and on only one occasion observed unidentified workers leaving together. This is not sufficient to meet Davis Moreno's burden of proving that this basis for the assessment is incorrect. Moreover, Abston admitted at the hearing that the workers are owed travel pay and mileage.

Accordingly, I find that the workers on the Exeter Project are entitled to travel pay and mileage. However, there is insufficient evidence in the record on which to make a final determination in this regard. Accordingly, the matter is remanded to DLSE with instructions to

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[5] Though not directly relevant here, section 1742.1 provides in pertinent part with regard to settlement meetings that occur within the 60-day period for seeking administrative review of an assessment, "No evidence of anything said or any admission made for the purpose of, in the course of, or pursuant to the settlement meeting is admissible … in any administrative … proceeding." Likewise, "No writing prepared for the purpose of, in the course of, or pursuant to the settlement meeting, other than a final settlement agreement, is admissible … in any administrative … proceeding."

prepare a new audit on the issue of travel pay and mileage only. DLSE shall present its new audit to Davis Moreno within 45 days of the date of service of this decision. Davis Moreno shall then have 30 days from service in which to request a hearing before the Hearing Officer, who shall retain jurisdiction for that purpose. This decision will be final as to all other issues.

I find, however, that DLSE has not presented a prima facie case that the workers are entitled to subsistence. No evidence was presented that any worker actually stayed overnight or was required to do so for this Project. It is not sufficient to assume that a person who worked on the jobsite two or three days in a row paid for lodging. DLSE did not demonstrate that the distances the workers traveled to the jobsite are so great that it is reasonable to infer that they were for that reason "required" to stay out of town. Accordingly, Davis Moreno is not liable to pay subsistence.

Davis Moreno Is Liable For The Payment Of Training Funds.

Gentry testified that she continuously checked the web-site of the California Apprenticeship Council to determine whether Pacific Engineering had paid training funds. She determined they had not. She also based her conclusion that no training funds had been paid for the Exeter Project on multiple conversations with Pacific Engineering, that there were no records showing payments had been made, and that the Laborer's Union had filed a complaint against the company claiming that no training funds had been paid. Abston testified that he had attempted to determine whether training funds had been paid by Pacific Engineering but could find nothing one way or the other.

Based on this record, Davis Moreno has not met its burden of proving that this basis for the Assessment of unpaid training funds is incorrect. Accordingly, it is required to pay training funds in the amount of $847.43 to the California Apprenticeship Council for the Exeter Project.

Davis Moreno Is Not Jointly or Severally Liable For Penalties Assessed Pursuant to Labor Code Section 1775.

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.[6]

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

[6] 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."

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)].)

The level of penalties assessed by DLSE in this case was based on the conduct - or misconduct - of Pacific Engineering. The only issue before the Director is whether the section 1775 penalties are properly assessed against Davis Moreno.

Under section 1775, an affected contractor and subcontractor are jointly and severally liable for section 1775 penalties unless the contractor can prove it had no knowledge of a subcontractor's failure to pay prevailing wages to its workers and that it meets four specific requirements:

> (1) The contract executed between the contractor and the subcontractor for the performance of work on the public works project shall include a copy of the provisions of Sections 1771, 1775, 1776, 1777.5, 1813, and 1815.
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> (2) The contractor shall monitor the payment of the specified general prevailing rate of per diem wages by the subcontractor to the employees, by periodic review of the certified payroll records of the subcontractor.
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> (3) Upon becoming aware of the failure of the subcontractor to pay his or her workers the specified prevailing rate of wages, the contractor shall diligently take corrective action to halt or rectify the failure, including, but not limited to, retaining sufficient funds due the subcontractor for work performed on the public works project.
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> (4) Prior to making final payment to the subcontractor for work performed on the public works project, the contractor shall obtain an affidavit signed under penalty of perjury from the subcontractor that the subcontractor has paid the specified general prevailing rate of per diem wages to his or her employees on the public works project and any amounts due pursuant to Section 1813.
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> (§1775, subd. (b).)

Because I find that Davis Moreno has met the requirements of this section 1775, subdivision (b), it is not necessary to determine whether DLSE abused its discretion in setting the penalties at the maximum rate of $50.00 per violation.

Abston testified credibly that Davis Moreno had no knowledge that Pacific Engineering had not paid prevailing wages to any of its workers before it was advised by DLSE in early October 2008 that the four workers had not been paid for the payroll period ending September 23, 2008. This apparently was the last payroll period that these workers were employed on the

Project. Pacific Engineering had abandoned the Project by the time Davis Moreno learned they had not been paid. There is no evidence that Davis Moreno had knowledge that Pacific Engineering was not properly paying its workers while Pacific Engineering was performing services under its subcontract with Davis Moreno and before Pacific Engineering abandoned the Project.[7]

Davis Moreno also has established that it meets the four requirements of section 1775, subdivision (b): (1) the subcontract executed between Davis Moreno and Pacific Engineering includes copies of sections 1771,1775, 1776, 1777.5, 1813, and 1815; (2) Davis Moreno had a procedure for regularly reviewing CPRs of the subcontractor; and (3) Davis Moreno took immediate corrective action when notified that certain Pacific Engineering workers had not been paid and, since it never paid the subcontractor, effectively retained sufficient funds to rectify any other failures to pay, though apparently no others were ever reported. The fourth factor is moot, since, as noted, Pacific Engineering abandoned the Project and Davis Moreno made no payments to the subcontractor.

Accordingly, I find that Davis Moreno is not liable, either jointly or severally, for the section 1775 penalties assessed in this matter.

Overtime Penalties Are Due For Workers Underpaid For Overtime 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

[7] DLSE argues that Davis Moreno did not investigate to determine whether other workers were properly paid by Pacific Engineering. However, the Superior Court found that when Abston contacted Gentry within six days after service of the Assessment, "It was Ms. Gentry's instructions to Davis [Moreno] to do nothing further except withhold payment from Pacific Engineering."

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."

The record establishes that section 1815 was violated for workers paid less than the required prevailing overtime wage rate for overtime hours worked: Lonnie Crawford (overtime hours worked August 20, 2008); Jamare Davis (overtime hours worked August 22, 2008, and September 2, 2008); Juan C. Ramirez (overtime hours worked August 12, 13, and 20, 2008); and Victor Ramirez (overtime hours worked one day during the week ending August 30, 2008). Accordingly, the assessment of penalties under section 1813 is affirmed in the amount of $175.00 for seven violations.[8]

Davis Moreno Has Established Substantial Grounds Entitling It To A Waiver Of A Portion Of The Liquidated Damages.

Section 1742.1, subdivision (a) provides in pertinent part as follows:

> After 60 days following the service of civil wage and penalty assessment ... under subdivision (a) of Section 1771.6, 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 . . . the notice, 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, Davis Moreno 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 tied to Davis Moreno's position on the merits and specifically whether it has established "substantial grounds for appealing the assessment ... with respect to a portion of the unpaid wages covered by the assessment ...."[9]

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[8] The Assessment found 37 overtime violations, the revised audit found 22.

[9] Under Section 1742.1, subdivision (a) and California Code of Regulations, title 8, section 17251, an affected contractor or subcontractor must have substantial evidence to believe the assessment to be in error within the 60-day period in which to file a request for review. However, under the singular facts of this case, that period will be extended to the date that the Superior Court ordered that the matter be returned to DLSE for review.

In the Assessment issued December 3, 2008, DLSE assessed unpaid wages of $83,393.01 and unpaid travel and subsistence of $1,742.15. At the time the audit was prepared, DLSE had received copies of Pacific Engineering's CPRs from the awarding body. However, when it issued the Assessment, DLSE credited only the wages paid by Davis Moreno to the four workers in October 2008 and based the Assessment on the determination that twenty of the twenty-four workers were paid no wages for the Exeter Project. In an email exchange with Abston in August 2009, Gentry did not deny that she knew in December 2008 that some wages should be credited to these workers and acknowledged that she had issued the Assessment "to motivate" Pacific Engineering to provide records requested by DLSE. The Superior Court found that in December 2008, Gentry "admitted to Mr. Abston that she knew the numbers on the assessment were incorrect as they showed that Pacific Engineering ... had paid nothing to its employees where clearly some wages had been paid."

Thus, as early as December 2008, it was apparent both to DLSE and to Davis Moreno that the unpaid wages shown in the Assessment were inflated. Relevant also is that while the Assessment is premised on twenty workers not having been paid over a two-month period, in fact, only four workers had complained through their Union that they had not been paid. Thus, it was reasonable for Davis Moreno to believe it had substantial grounds for seeking review of the Assessment.

That the Assessment grossly inflated the wages due is illustrated by the revised audit, which is based on payment records received by DLSE from Pacific Engineering in July 2009 augmented by canceled checks subpoenaed by Davis Moreno during the course of this proceeding. In the revised audit, the unpaid wages assessed, exclusive of travel and subsistence, have been reduced from $83,393.01 to $3,719.94. According to the revised audit, twelve of the twenty-four workers were owed no wages. Even with regard to the $3,719.94 figure, Davis Moreno has prevailed with respect to one of the principal issues in dispute, namely, whether to credit the checks paid to Crawford, Landeros, and Villa. Accordingly, I find that Davis Moreno has demonstrated substantial grounds for seeking review of the unpaid wages portion of the Assessment, including overtime, where the number of instances of allegedly unpaid overtime has been reduced from thirty-seven to seven.

Whether Davis Moreno is liable for liquidated damages for unpaid travel pay and mileage is deferred pending a final determination on that portion of the Assessment.

FINDINGS

1. This matter is before the Director on order of the Tulare County Superior Court to review a Civil Wage and Penalty Assessment issued by the Division of Labor Standards Enforcement against Davis Moreno Construction, Inc. with respect to the Exeter Project.

2. Davis Moreno owes unpaid wages, including overtime, to Lonnie Crawford, Jamare Davis, Cesar Pina, Juan Ramirez, and Victor Ramirez. The total unpaid wages are $1,602.30.

3. Davis Moreno failed to meet its burden of showing that fringe benefits had been paid to Musa M. Saleem, Shon Kekauoha, Gabriel Kekauoha, and Albert Hernandez for work performed in the period of September 15, 2008 to September 23, 2008. Accordingly, Davis Moreno owes payment for fringe benefits for these workers in the total amount of $2,082.27.

4. Davis Moreno failed to meet its burden of showing that training fund contributions were paid on the Exeter Project. Accordingly, Davis Moreno owes $847.43 in unpaid training funds to the California Apprenticeship Council.

5. Davis Moreno has established that it had no knowledge of Pacific Engineering's failure to pay prevailing wages in the period before the subcontractor abandoned the Project and that it meets the four requirements of section 1775, subdivision (b)(1) to (b)(4). Accordingly, Davis Moreno is not liable for penalties assessed under section 1775.

6. Overtime penalties are due for four workers underpaid for seven days of overtime work on the Project. Therefore, section 1813 penalties are assessed against Davis Moreno in the amount of $175.00.

7. Davis Moreno has demonstrated that it had substantial grounds for appealing the Assessment for unpaid wages and overtime, thereby entitling it to a partial waiver of liquidated damages for the unpaid wages and overtime portions of the Assessment.

8. DLSE has failed to present a prima facie case that Pacific Engineering workers on the Exeter Project were required to stay out of town. Accordingly, Davis Moreno is not liable for subsistence pay.

9. Davis Moreno failed to meet its burden of showing that affected workers were not entitled to travel pay and mileage. The amount of travel pay and mileage due is remanded to DLSE for recalculation in accordance with these Findings.

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

Wages:	$1,602.30
Fringe Benefits:	$2,082.27
Training Fund Contributions:	$847.43
Penalties under section 1813:	$175.00
Travel Pay and Mileage:	Remanded
TOTAL:	**$4,707.00**

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

11. This decision is final as to all issues not specifically subject to the Remand Order. (§ 1742, subd. (c).)

ORDER

The Civil Wage and Penalty Assessment is affirmed in part, modified in part and remanded in part as set forth in the above Findings.

Remand Order: The matter is remanded to DLSE to recalculate the unpaid travel pay and mileage owed to the affected workers as follows:

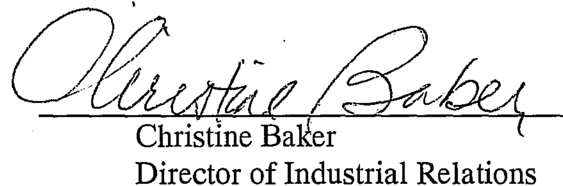
a. All recalculations shall be based on the applicable Laborer travel and subsistence provision cited above.

b. DLSE shall present its new audit to Davis Moreno within 45 days of the date of service of the Notice of Findings. Davis Moreno shall have 30 days from service in which to request a hearing before the Hearing Officer, who shall retain jurisdiction for that purpose. All other issues are final. The burden to show error shall remain on Davis Moreno. If no hearing is requested within 30 days, the revised audit shall become final.

d. In complying with the remand order, DLSE shall only rely on those documents admitted into evidence. If DLSE requires the use of other documents for its audit, it shall provide them to Davis Moreno at the time it presents the audit. Davis Moreno shall be provided an opportunity to supplement the record as well should it request a hearing.

The Hearing Officer shall issue a Notice of Findings which shall be served with this Decision on the parties.

Dated: 6/4/2012



Christine Baker
Director of Industrial Relations