STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Requests for Review of:

Worthington Construction Inc.

From a Civil Wage and Penalty Assessment and a Determination of Civil Penalty issued by:

Division of Labor Standards Enforcement

Case Nos. 14-0280-PWH

14-0281-PWH

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

INTRODUCTION

Worthington Construction, Inc. (Worthington), a subcontractor on the Mission Elementary School Modernization and New Construction Project (Project) in San Diego County, submitted Requests for Review of both a Civil Wage and Penalty Assessment (Assessment) and a Determination of Civil Penalty (Determination) issued by the Division of Labor Standards Enforcement (DLSE) arising from Worthington's work on the Project. DLSE moved to dismiss Worthington's Requests for Review of both the Assessment and the Determination because each request was untimely filed. The appointed Hearing Officer, Richard T. Hsueh, served an Order to Show Cause why Worthington's Requests for Review in both cases should not be dismissed for untimeliness. Worthington responded and DLSE replied.

For the reasons below, I find that the time limits for requesting review are jurisdictional and accordingly that Worthington's Requests for Review of both the Assessment and the Determination must be dismissed.

FACTS

On February 7, 2014, DLSE issued the Assessment against Erickson Hall-Construction Co. (Erickson), the affected contractor, and Worthington, Erickson's subcontractor, based on Worthington's failure to comply with the Labor Code's

prevailing wage requirements with respect to the Project. On the same date, DLSE also issued the Determination against Erickson and Worthington based on Worthington's failure to hire and train apprentices in violation of Labor Code section 1777.7 on the same Project.[1] On February 11, 2014, DLSE issued an Amended Assessment. DLSE served the Assessment and Determination by mail on February 7, 2014, and the Amended Assessment by mail on February 11, 2014. Erickson did not file its own request for review, and the Assessment and the Determination are both final as to it.

Worthington then sent a letter to DLSE dated May 5, 2014, purporting to request review of the Amended Assessment. The letter was postmarked May 6, 2014.[2] The letter stated the following:

> Good morning. Regarding the case number above, I have met with the Deputy Labor Commissioner regarding this case and despite my proof of payments shown to him, we were unable to resolve this matter.
>
> Therefore, I am requesting a Formal Hearing in which to attempt to resolve this false matter of failure to correct prevailing wage rates, etc.

Worthington also sent a separate letter to DLSE dated May 5, 2014, purporting to request a review of the Determination. This letter was also postmarked May 6, 2014.[3] The letter stated the following:

> Good morning. Regarding the case number above, I have met with the Deputy Labor Commissioner regarding this case and despite my proof of payments shown to him, we were unable to resolve this matter.
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> Therefore, I am requesting a Formal Hearing in which to attempt to resolve this false matter of failure to comply with apprentice requirement.
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> On September 8, 2014, the Hearing Officer held a consolidated Prehearing

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

[2] California Code of Regulations, title 8, section 17203, subdivision (b) states in relevant part that "Unless otherwise indicated by proof of service, if the envelope was properly addressed, the mailing date shall be presumed to be a postmark date imprinted on the envelope by the U.S. Postal Service if first-class postage was prepaid."

[3] California Code of Regulations, title 8, section 232.22, subdivision (c) states in relevant part that "A Request for Review shall be deemed filed on the date of mailing, as determined by the U.S. Postal Service postmark date on the envelope."

Conference in both cases. Pending before the Hearing Officer was DLSE's Application for Order to Show Cause Why Request for Review Should Not Be Dismissed as Untimely. The Hearing Officer granted DLSE's Application and thereafter served an Order to Show Cause why both cases should not be dismissed for untimeliness. Worthington responded in writing with its opposition and DLSE replied. On October 3, 2014, the Hearing Officer held another Prehearing Conference in which oral arguments were heard and the issue submitted.

DISCUSSION

Section 1742, subdivision (a) provides that an affected contractor or subcontractor may request review of a civil wage and penalty assessment within 60 days of service of the assessment.[4] If no hearing is requested within this period, "the assessment shall become final." (§1742, subd. (a).) California Code of Regulations, title 8, section 17222, subdivision (a), restates the 60-day filing requirement and expressly provides that "Failure to request review within 60 days shall result in the Assessment ... becoming final and not subject to further review under these Rules." California Code of Regulations, title 8, section 17227 authorizes the Director to dismiss a request for review that is untimely under the statute. Likewise, section 1777, subdivision (c)(1) provides that an affected contractor or subcontractor may request review of a determination within 60 days of service of the determination.[5] If no hearing is requested within this period, "the determination shall become final." (§1777, subd. (c)(1).)[6] California Code of

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[4] Since section 1741, subdivision (a) requires that service of the assessment be completed by mail "pursuant to Section 1013 of the Code of Civil Procedure," the time extension rules of Code of Civil Procedure section 1013 are taken into account, thus giving an in-state contractor or subcontractor 65 days from the date of mailing of the assessment to file a request for review. (See Cal. Code Regs., tit 8, § 17203, subd. (a).)

[5] Since section 1777, subdivision (c)(1) requires that service of the assessment be completed by mail "pursuant to Section 1013 of the Code of Civil Procedure," the time extension rules of Code of Civil Procedure section 1013 are taken into account, thus giving an in-state contractor or subcontractor 65 days from the date of mailing of the assessment to file a request for review. (See Cal. Code Regs., tit. 8, §§ 232.03, subd. (c) and 232.20, subd. (a).)

[6] California Code of Regulations, title 8, section 232.22 restates the filing requirement but provides that "Failure to request review within 30 days shall result in the Determination becoming final and not subject

Regulations, title 8, section 232.27 similarly gives the Director authority to dismiss a request for review that is untimely under the statute.

Therefore, under section 1742, subdivision (a), Worthington's Request for Review of the Amended Assessment needed to be served no later than April 17, 2014, the last day on which Worthington could have timely requested review. Likewise, under section 1777.7, subdivision (c)(1), Worthington's Request for Review of the Determination needed to be served no later than April 14, 2014, as the 65th day after service of the Determination fell on a Sunday, April 13, 2014. The postmark on each envelope was dated May 6, 2014. The Amended Assessment became final on April 18, 2014, the 65th day after it was served. Likewise, the Determination became final on April 15, 2014. Worthington did not transmit its Request for Review of either case until May 6, 2014. Under the plain language of sections 1742, subdivision (a) and 1777.7, subdivision (c)(1), the Director is without jurisdiction to proceed on Worthington's untimely Requests for Review of both the Assessment and the Determination. (See *Pressler v. Donald L. Bren Co.* (1982) 32 Cal.3d 831.) Where a statute sets out a duty and a consequence for the failure to act in conformity, that statute is said to be "mandatory." (*California Correctional and Peace Officers Association v. State Personnel Board ("CCPOA")* (1995) 10 Cal. 4th 1133). (See also *Progressive Concrete, Inc. v. Parker* (2006) 136 Cal. App. 4th 540.)

In its response to the Order to Show Cause, Worthington admits that its Requests for Review in both cases were untimely, stating "Worthington's Request was likely no more than 18 or 19 days tardy." Nevertheless, Worthington advances the argument that its untimely requests should be excused due to mistake, inadvertence, and excusable neglect of the affected contractor. Specifically, Worthington argues that its corporate officer, Dale Worthington, mistakenly thought that he was legally obligated to make and

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to further review under these Rules." However, the Determination contains an admonishment entitled "Notice of Right to Obtain Review-Formal Hearing" and admonished an affected contractor and subcontractor to file its request for review within 60 days after service of the Determination. Since Worthington's purported request for review of the Determination is more than 65 days after service of the Determination, it is unnecessary to address the discrepancy between section 1777.7 and California Code of Regulations, title 8, section 232.22.

exhaust every settlement attempt with DLSE to resolve the dispute and that the 60 day time period did not start to run until after his settlement meeting with DLSE, which was on March 27, 2014.

Under Code of Civil Procedure, section 473, subdivision (b), a default judgment or dismissal may be set aside or vacated by the court at the request of a party if a motion to do so is made within six months of the entry of default or dismissal and if the default or dismissal was the result of the party's "mistake, inadvertence, surprise, or excusable neglect." Although not specifically invoking section 473, subdivision (b), Worthington nevertheless urged the application of its principles to set aside the finality of the Assessment and the Determination.

While Code of Civil Procedure, section 473, subdivision (b) authorizes a trial court to set aside an entry of default or judgment on the basis of "mistake, inadvertence, surprise, or excusable neglect," neither the Labor Code nor its implementing regulations provides the Director with any authority to excuse an affected contractor or subcontractor from its failure to timely request review, regardless of grounds. To the contrary, the plain language of section 1742, subdivision (a) and section 1777.7, subdivision (c)(1) unequivocally provides that if there is a failure to timely request review within 60 days after service of the assessment or determination, such assessment or determination shall become final. When interpreting statutes, the inquiry begins with the plain, commonsense meaning of the language used by the Legislature. If the language is unambiguous, the plain meaning controls. (*Voices of Wetlands, v. State Water Resources Control Bd.* (2011) 52 Cal. 4th 499, 519.)

It should be noted that Worthington was placed on notice regarding the consequences of failure to timely request review of the Assessment and Determination and the effect of any settlement discussion with DLSE on such deadline. Specifically, page 2 of the Amended Assessment states in relevant part, in bold print, that

> Failure by a contractor or subcontractor to submit a timely Request for Review will result in a final order which shall be binding on the contractor and subcontractor . . .

The same language is also found in page 2 of the Determination. Additionally, page 3 of the Assessment, under the section entitled "Opportunity for Settlement Meeting," specifically states that "**Requesting a settlement meeting, however, does not extend the 60-day period during which a formal hearing may be requested.**" (Emphasis added.) The identical language is also found in page 3 of the Determination. Moreover, California Code of Regulations, title 8, section 17221, subdivision (d) states:

> Neither the making or pendency of a request for a settlement meeting, nor the fact that the parties have met or have failed or refused to meet as required by this Rule shall serve to extend the time for filing a Request for Review under Rule 22 below.

Although not specifically mentioned in its Memorandum of Points and Authorities, Worthington submitted three declarations that ostensibly raise the issue that the Assessment may have been based on complaining workers' fraudulent conduct and/or false statements. Worthington argues that a hearing on the merits is therefore justified despite the untimeliness of its request for review. Worthington cites *Department of Industrial Relations v. Davis Moreno Construction* (*Davis Moreno*) in support of its position. ((2011) 193 Cal. App. 4th 560.)

In *Davis Moreno*, the affected contractor, Davis Moreno Construction Inc. (Davis Moreno), and the affected subcontractor, Pacific Engineering Company (Pacific), both moved to vacate a judgment entered against them by DLSE pursuant to section 1742. Pacific argued that the judgment was entered in the wrong county and therefore void. Davis Moreno, however, further argued that the judgment against it had been obtained by means of extrinsic fraud and therefore was void under Code of Civil Procedure section 473, subdivision (d). Davis Moreno provided a declaration of its operations manager in support of its motion attesting that due to certain misrepresentations and directions by DLSE's personnel, it took no action concerning the Civil Wage and Penalty Assessment. (*Davis Moreno, supra*, 193 Cal. App. 4th at 568.) Davis Moreno argued that the superior court had the power to determine whether the final order of assessment and judgment was so obtained. (*Id.* at 568.) The superior court denied both Pacific's and Davis' motion to vacate the final order of assessment and judgment and concluded that it did not have

jurisdiction to grant the relief requested.

The Court of Appeal affirmed the judgment as to Pacific but reversed and remanded the matter back to the trial court as to Davis Moreno to determine whether the final assessment order and judgment against it was obtained by extrinsic fraud. If the superior court granted the motion, it was directed to vacate the final order of assessment and judgment and order the Director of the Department of Industrial Relations to grant Davis' request for review of the assessment pursuant to section 1742. If not, then the judgment against Davis would stand. (*Davis Moreno , supra,* 193 Cal. App. 4th at 582.) In remanding the case back to the superior court for further proceeding, the Court of Appeal specifically held that "a motion to vacate a judgment for extrinsic fraud is not governed by any statutory time limit, but rather is addressed to the **court's 'inherent equity power.'**" (Emphasis added.) (*Id.* at 570.)

While a court may possess such inherent equity power to vacate a judgment for extrinsic fraud, there is no such "inherent" authority provided to the Director of the Department of Industrial Relations, by case law or otherwise, once an Assessment or a Determination has become final. Moreover, the type of extrinsic fraud, which has been defined by the Court of Appeal as "one party's preventing the other from having his day in court" is not present here. *(Davis Moreno*, supra, 193 Cal. App. 4th at 570 (citing *City and County of San Francisco v. Cartagena* (1995) 35 Cal. App. 4th 1061, 1067).) Worthington did not present any evidence showing that DLSE had somehow, through misconduct or misrepresentation, deprived Worthington of the opportunity to be heard in a formal hearing.

Had Worthington filed a timely request for review with the correct office, it would have forestalled the finality of the Amended Assessment and the Determination and would have vested the Director with jurisdiction to conduct a hearing. Since the time has passed, however, there is no jurisdiction to proceed because both the Amended Assessment and the Determination have become final. (§§ 1742, subd. (a) and 1777.7, subd. (c)(1).) Because the time limits are mandatory and jurisdictional by statute, Worthington's late filing cannot be excused even if it presented grounds for mistake, inadvertence or excusable neglect.

FINDINGS

1. Worthington did not timely request review of the February 11, 2014, Amended Civil Wage and Penalty Assessment.
2. The Amended Assessment became a final order on April 18, 2014.
3. Worthington did not timely request review of the February 7, 2014, Determination of Civil Penalty.
4. The Determination became a final order on April 15, 2014.
5. The Director has no jurisdiction to proceed on Worthington's untimely Requests for Review of either the Assessment or the Determination.

ORDER

Worthington Construction, Inc.'s Requests for Review in Case Numbers 14-0280-PWH and 14-0281-PWH are dismissed as untimely as set forth in the foregoing findings. The Hearing Officer shall issue a Notice of Findings that shall be served with this Decision on the parties.

Dated: 12/12/2014

Christine Baker
Director of Industrial Relations