

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

E.J. Meyer Company

Case No. 06-0070-PWH

From an Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected Contractor EJ Meyer Company ("EJM") timely requested review of a Civil Wage and Penalty Assessment ("Assessment") issued by the Division of Labor Standards Enforcement ("Division") with respect to the Yucaipa Water District 1B Reclaimed Water System Project ("Project") in Yucaipa, California. A hearing on the merits was commenced on July 24, 2006, in Los Angeles, California, before Hearing Officer Terrance O'Malley. EJM appeared through Phillip Berlin, and the Division appeared through Bruce McManus. The parties presented evidence and arguments. Post-hearing briefs were served, and the case was eventually submitted for decision on October 6, 2006. Now, for the reasons set forth below, the Director issues this decision dismissing the Assessment.

FACTS AND PROCEDURAL HISTORY

The Division contends that Floyd Monroe worked as both a flagman (Laborer, Group 1) and a pipe layer (Laborer, Group 4) on the Project and should have been compensated accordingly. EJM responds that they correctly paid Monroe as a flagman the entire time he worked on the project.

EJM is a licensed general engineering contractor specializing in large-diameter water pipeline installation on public works projects. The work performed on the Project involved the installation of fourteen thousand feet of twenty-four inch ductile-iron pipe intended for the distribution of reclaimed water throughout the City of Yucaipa. The pipe was installed under paved surfaced streets throughout Yucaipa's existing residential neighborhoods. The Project

averaged the installation of approximately 250 to 300 feet of pressurized water line per day. EJM employed a crew of approximately fifteen to complete the daily planned work: one Foreman, seven Operating Engineers, Group 8, two Teamsters, Group 5, and six Laborers, Group 1. None of the employees on the Project were paid as Laborer, Group 4.

At the beginning of each work day, the crew would arrange directional cones for the diversion of traffic. They would deliver all heavy equipment, hand tools and saws to the work area necessary to complete the work planned for the day. The pipe was hauled to the location and work would begin. An excavator was used to excavate the ditch intended for the pipe. Workers set support jacks in the ditch to secure the walls. Once secured, two workers entered the ditch to measure and level the trench for the pipe. The pipe was lowered into the ditch by a backhoe and manually attached to another section of pipe by the two workers. One employee was positioned at each end of the pipe being attached. One used a push bar as leverage to push the pipe into the joint of the other section while the other employee guided the new pipe into the existing line. During this installation procedure the pipe was suspended from the backhoe by chain allowing the workers to guide, not lift, the section into position. After several sections were fit together the trench was backfilled with sand and fill dirt. At the completion of each day's work, all equipment and materials were removed from the work area, and the surface streets opened to unrestricted traffic flow.

This project required the diversion of residential vehicle traffic during construction. EJM stationed two flagmen, one at each end of the day's construction area, to divert traffic. Monroe was one of the flagmen on the Project.

Minerva Hernandez, the investigator for the Labor Commissioner, determined Monroe worked 16 to 20 hours as a flagman (Laborer, Group 1) and 24 to 32 hours as a pipe layer (Laborer, Group 4) based on Monroe's written statement and EJM's certified payroll records. Hernandez classified all non-flagman duties Monroe claims as Pipe Layer. In her audit Ms. Hernandez attributed all of the flagman hours to Mondays and Tuesdays and all of the pipe layer hours Wednesday through Saturday.

Monroe began work as a flagman on the Project in September 2004. His activities were directed by the foreman, Michael Meyer, at all times. Monroe testified his hours were divided

equally between flagging and other duties. He estimated he performed functions unrelated to flagman at least once per day for a couple of hours. His pipe layer duties included stringing pipe on the street before they were placed in the trench, passing fittings to workers in the ditch. Monroe testified he also performed several other functions on the Project including confined space monitoring of the gases in the trench during the welding process,¹ use of a digging bar to identify underground service lines, and digging up and straightening the underground valve cans and covers.² He claims to have directed the dumping of backfill into the ditch and operated a jet rod from the water truck several times. He also claimed to have raked asphalt over the patches created when they adjusted the valve cans.

Under cross examination Monroe changed his testimony about how often he performed non-flagman duties. He reduced his estimate from once per day to once per week. He also contradicted Hernandez's testimony that he worked Saturdays. Ultimately he settled on an estimate that he spent 75% of his time controlling traffic and 25% of his time performing duties unrelated to his flagman responsibilities. He was unable to quantify the amount of time he performed pipe layer functions versus other non-flagman related duties. Monroe's memory was poor, and it appeared he confused work he had done on other projects with the work performed at the Project.

EJM's certified payroll records confirm that the employees were classified as Laborer, Group 1, Operating Engineer, Group 8, or Teamster, Group 5. None of the employees working the Project were paid as Pipe Layer, (Laborer, Group 4) or as Pipe Layer's Backup Man (Laborer, Group 3). All of EJM's witnesses testified that Monroe only worked as a flagman on the Project.

¹ He recalls performing this duty twice over a three day period when the Project required placement of pipe into and out of two ravines. EJM denies any confined space monitoring was required or performed on the Project.

² According to Monroe, the cans insulated the water valves attached to the installed ductile iron Pipe. The valves were necessary to supply above-ground fire hydrants. The valves were painted purple signifying the water is reclaimed and not potable. The covers were set flush with the asphalt capping. If the covers were slanted and not level with the capping, EJM reset them by jack hammering the asphalt, excavating around the valve can with a shovel and digging bar and straightening the unit. The hole was then backfilled, compacted and capped with asphalt below finish grade. The finishers would then level the cover with the road. This work was restricted to the last week he was on the project. The foreman denied EJM did any of this work after the valve cap was initially set.

Randy Becker's duties involved grade checking the trench in which the pipe was installed, locating service lines, cutting and installing the pipe. He testified Monroe performed flagman duties only. Becker never saw Monroe using any hand tools on the Project. He never saw Monroe back filling trenches or installing meter boxes or valve cans.

Keith Newman operated the heavy equipment used for trenching, back filling and compaction. He never observed Monroe perform any function other than flagman. He felt Monroe was a poor Flagman with a bad attitude. He expressly denied ever seeing Monroe performing any pipe layer work.

John Pell worked as a truck driver and fueler on the Project. He testified he was constantly driving into and out of the job site to deliver dirt or re-fuel the equipment. This activity brought him into regular contact with Monroe. He only saw Monroe perform flagman work on the Project. He disputed Monroe's claim that Monroe was routinely ordered to abandon his position as flagman to assist on a different parts of the job. He insisted there was too much construction traffic to allow the flagmen to perform other functions.

Michael Meyer was the foreman on the project. He denied assigning responsibilities to Monroe beyond that of flagman. He also denied Monroe's claim that EJM installed meters on this project or that confined space monitoring was performed on the Project. He contradicted Monroe's testimony that the pipe was strung along the trench edge prior to installation. Meyer explained the pipe was moved directly from the truck bed to the ditch by a backhoe to avoid damage to the pipe.

Mike Corcoran, the Vice-President and co-owner of the contractor, criticized the Assessment for several reasons. Corcoran disputed the need to pay anyone on the Project as pipe layer. He insists that because the pipe was placed in the trench by heavy equipment rather than the employees, the workers joining the pipe were not pipe layers as contemplated by this classification. Under no circumstances would he have expected Monroe to be responsible for placing or connecting the pipes on the Project. Corcoran testified that it was EJM's custom and practice to assign this work to its most experienced employees. Because Monroe was a recent hire with little experience, the company policy prohibited assigning pipe layer responsibilities to him.

Finally, he explained that the Pipe Layer classification (Laborer, Group 4) was unnecessary since the persons on the job paid as Operators or Teamsters performed the technical aspects of installing the pipe. Since the wages for these classifications exceeded the Pipe Layer wage rate, the company was paying at least the prevailing wage for pipe layer work.

The parties agree the bid advertisement date for the Project was February 24, 2004, and the Prevailing Wage Determination that applied to this worker is No. SC-23-102-2-2003-2. Monroe began work in September 2004 at the appropriate basic hourly rate of \$20.60. The parties disagree on what particular classification(s) apply to this employee. In its post-hearing brief the Division claimed that even if Monroe did not perform pipe layer work as alleged in the Assessment, he performed other duties justifying a higher classification. EJM asserted that even if Monroe did other things besides Flagman duties, they were inconsequential to the project and did not materially affect his classification.

DISCUSSION

Labor Code section 1720 and following set forth a framework for determining and requiring the payment of prevailing wages to workers employed on public works construction contracts. "The overall purpose of the prevailing wage law is to protect and benefit employees on public works projects." (*Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 985.) The Division enforces these 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." (Lab. Code, § 90.5(a), and *see Lusardi, supra.*)

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." (Lab. Code, § 90.5 (a); *see Lusardi, supra.*)

Section 1775(a) requires, among other things, that contractors and subcontractors pay the difference to workers who were paid less than the prevailing rate, and section 1775(a) also prescribes penalties for failing to pay the prevailing rate. Section 1742.1(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 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.”

EJM Met Its Burden Of Proof That Monroe Was Paid Correctly For His Work.

The primary question here is whether Monroe was properly paid as a Laborer, Group 1 by EJM. Monroe may have performed other functions beyond flagman on the Project. However, the evidence does not support a finding that those functions rose to the level of any wage rate above beyond Laborer, Group 1. For these reasons, the Director determines prevailing wages have been properly paid.

On balance, it appears Monroe performed other functions at the Project besides flagman; however, none of his functions were outside the scope of work for a Laborer, Group 1. Monroe’s knowledge of the Project and the details of the work show that he understood and either observed or performed some of the many different tasks on the site. While he was a poor historian and appeared to confuse this Project with the other he worked on, Monroe was credible. He made important concessions on cross examination about the amount of time he spent doing non-flagman duties, but he did not waiver from his claim that he performed many tasks on the Project unrelated to flagging. He appeared to be honest in responding to questions. His testimony was consistent with his written complaints he prepared for the Division. He appeared to genuinely try to provide the most accurate testimony he could under direct and cross examination.

The accuracy of his description of the many tasks performed on the Project was confirmed by each of EJM’s employee witnesses, most particularly by Becker, whose description of the process is consistent with Monroe’s. Corcoran’s testimony that emphasized the team-work expected of the crews supported Monroe’s claim that he performed duties beyond his flagman responsibilities. However, the overwhelming weight of the evidence shows that Monroe

did not perform any work that would justify a wage rate higher than Laborer, Group 1.

The cleanup duties and light work Monroe testified he did fits more appropriately under the description of Laborer, Group 1 classification than in Group 4, as urged by the Division. Moreover, it is unlikely the contractor would risk assigning pipe layer responsibilities to a new employee with no experience or training. Even if Monroe assisted in the trench occasionally, the work he described is still fully encompassed by the Laborer, Group 1 classification. Finally, it is not credible that the Project could do without one of the flagmen for any period of time since it was on a residential street, with sufficient traffic to require two flagmen. For these reasons it is determined that Monroe was paid the correct prevailing wage under Laborer, Group 1 the entire time he worked on the Project and that no additional wages are due.

FINDINGS

1. Affected contractor, E.J. Meyer Company, filed a timely Request for Review from the Civil Wage and Penalty Assessment issued by the Division of Labor Standards Enforcement with respect to the Yucaipa Water District 1B Reclaimed Water System Project.
2. E.J. Meyer Company's employee, Floyd Monroe, was entitled to be paid the applicable prevailing wage rate for Laborer, Group 1 for the days worked on the Yucaipa Water District 1B Reclaimed Water System Project. Monroe was properly compensated for the work performed on the project.
3. No further wages are due Monroe from E.J. Meyer Company for the work done on the Yucaipa Water District 1B Reclaimed Water System Project. Accordingly, there was no basis for the Division to issue a Civil Wage and Penalty Assessment, and this Assessment must be dismissed in its entirety.
4. All other issues are moot.

ORDER

The Civil Wage and Penalty No. 40-17586-104 is dismissed. The Hearing Officer shall issue a Notice of Findings which shall be served with this Decision on the parties.

Dated: 2/11/08



John C. Duncan
Director of Industrial Relations