

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Telstar Instruments, Inc.

Case No. 07-0233-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected subcontractor Telstar Instruments, Inc. ("Telstar") submitted a timely request for review of a Civil Wage and Penalty Assessment ("Assessment") issued by the Division of Labor Standards Enforcement ("DLSE") with respect to work performed by Telstar on the City of Chowchilla Wastewater Treatment Plant Renovation ("Project") in Madera County. The Assessment, as amended at hearing, determined that \$24,028.33 in unpaid prevailing wages and statutory penalties was due. A Hearing on the Merits occurred on February 27, 2008, in San Francisco, California, before Hearing Officer Nathan D. Schmidt. June Johnsen, Telstar's General Manager, appeared for Telstar, and Ramon Yuen-Garcia appeared for DLSE. For the reasons set forth below, the Director of Industrial Relations issues this decision modifying and affirming the Assessment and remanding it for redetermination of penalties.

SUMMARY OF FACTS

Steve Dovali Construction, the general contractor for the Project, subcontracted with Telstar to perform electrical work on or about September 1, 2006. Telstar employees worked on the Project from approximately September 8, 2006, to July 31, 2007. The Assessment, as limited at hearing, found that 12 inside wiremen had been underpaid by Telstar because they had not received the required travel and subsistence pay for the work they had performed on the Project. The assessed underpaid travel and subsistence pay totals \$12,778.33.

The travel and subsistence provisions in the applicable prevailing wage determination (“PWD”) (MAD-2006-1) provide, in pertinent part, as follows:

Section 3.19 The employer shall pay for travel time and furnish transportation from shop to job, and job to job, and job to shop. . . .

* * *

Section 3.22 There shall be established a free zone within a ten (10) mile radius of the Fresno and Visalia City Halls, whereby the employees working under the terms of this Agreement for Employers with a recognized shop located within the jurisdiction of Local Union #100, IBEW, may be required to report on the job without travel time or expense at the regular starting time. When the Employer’s permanent shop is located in other towns in the jurisdiction of Local Union #100 IBEW, the same free zone radius from the center of the town will prevail for those permanent local shops only.^[1]

For the purpose of traveling expense, any traveling Employer shall be privileged to order and obtain workmen from the dispatch point in Fresno or Visalia, but employers shall not transfer or order their workmen to any other free zone other than from where they were originally dispatched unless travel time or subsistence is paid.

* * *

Travel time and mileage shall begin at the perimeter of each established ten-mile free zone. On all jobs beyond the perimeter of these free zones there shall be paid to each employee \$1.50 per day plus thirty-five (\$0.36) [*sic*] cents per mile each way for each mile beyond the perimeter of the zone, maximum travel time is \$23.10. This sum shall be full payment for all transportation and travel.

Section 3.23 All jobs or projects outside of a forty (40) mile radius from the center of the free zones shall be considered as subsistence jobs and shall be paid at the rate of thirty-five dollars (\$35.00) per day worked.

¹ These provisions, and the collective bargaining agreement from which they were drawn, covered the four counties of Madera, Fresno, Tulare, and Kings.

Hanford, located within the jurisdiction of IBEW Local Union #100, is approximately 70 miles from the Project site in Chowchilla. The affected workers were dispatched from Telstar's shop in Hanford, though they normally reported directly to the Project site from their homes. Throughout the course of Telstar's work on the Project, it provided the affected workers with company fuel credit cards and vehicle allowances to defray the cost of transportation to and from the Project site and other jobsites. Telstar contends that it is entitled to a credit against its travel and subsistence obligations for the value of the fuel and vehicle allowances provided to its workers.

For the first several months of work on the Project, Telstar erroneously paid its workers according to prevailing wage determination number MAD-2006-2, which was in effect at the time the work was performed, rather than number MAD-2006-1, which was in effect on the bid advertisement date. Telstar determined that the Project did not require payment of travel or subsistence pay under the travel and subsistence provisions of the later prevailing wage determination,²

On or about January 31, 2007, Telstar was informed by DLSE that a complaint had been filed against it and that DLSE was investigating whether Telstar had made the required travel and subsistence payments to its workers on the Project. Rachel Farmer, the Deputy Labor Commissioner conducting the investigation, testified that there had been five prior complaints against Telstar, two of which she had investigated. None of the five complaints resulted in a finding Telstar violated the prevailing wage law. Farmer stated that two of the five prior complaints had been purged, two had been closed due to the statute of limitations and that the fifth one, which she had investigated, resulted in a finding of no violations.³

² The travel and subsistence provisions of MAD-2006-2 are significantly different from those actually applicable to the Project.

³ Johnsen testified that Telstar had provided its workers with company fuel credit cards and vehicle allowances on the prior projects that Farmer had investigated, as it had on the Project, and that she believed that Farmer had given Telstar credit for those payments against its travel and subsistence pay obligations on those projects.

The original Assessment, dated August 8, 2007, assessed Telstar for subsistence only at the rate of \$35.00 per day. Telstar paid \$321.37 in supplemental travel and subsistence payments to three of the affected workers (Alfred Alcoser, Felix Fergurur, and Antonio Montano) on September 11, 2007. When calculating the amount of unpaid travel and subsistence pay due for this supplemental payment, Telstar offset the amount assessed by the fuel and automobile allowances that it had provided to the affected workers during the course of Telstar's work on the Project. DLSE subsequently amended the Assessment three times.⁴

The first amendment, on September 19, 2007, increased the travel and subsistence pay assessed to \$58.10 per day, adding the maximum travel time of \$23.10 per day to the \$35.00 per day subsistence pay which had originally been assessed. The second amendment, on December 7, 2007, added four workers to the Assessment and gave Telstar credit for a portion of its claimed fuel credit against the assessed travel and subsistence obligations. Telstar made additional supplemental travel and subsistence payments totaling \$1,727.93 to ten of the affected workers (Alfred Alcoser, Donald Badgett, Felix Fergurur, Steve Ingle, James McCaw, Antonio Montano, Craig Vanarsdale, Daniel Espinoza, Seth Debord and Steve Hahn) on January 25, 2008.

DLSE's final amendment of the Assessment, on February 4, 2008, reversed the partial credit that Telstar had previously been given for the value of fuel provided to the affected workers. DLSE did not credit Telstar for any of the \$2,049.30 in documented supplemental travel and subsistence payments that it made to ten of the 12 affected workers because Telstar had made the payments directly to the workers and had not submitted cancelled checks for all of the payments to DLSE prior to the last amendment.

DLSE contends that Telstar's travel and subsistence pay obligation is measured relative to the location of its permanent shop. Since that shop was located in Hanford, the applicable free zones were ten miles from the Hanford City Hall for travel pay, and 40 miles from the Hanford

⁴ DLSE failed to seek approval from the Hearing Officer for the first and second amendments, in violation of California Code of Regulations, title 8, section 17226, subdivision (a)(3). As no one has raised any issue (such as statute of limitations), there is no sanction in this case for the violation.

City Hall for subsistence pay. Consequently, as the distance between Hanford and the Project site was about 70 miles, DLSE determined that Telstar's employees were entitled to both travel pay and subsistence which were assessed at the maximum rates of \$23.10 and \$35.00 per day, respectively. DLSE determined that Telstar had knowledge of the applicable travel and subsistence requirements as a result of the prior investigations and assessed penalties under Labor Code section 1775, subdivision (a) at the maximum rate of \$50.00 per day.⁵

Telstar disputes DLSE's interpretation of the applicable travel and subsistence provisions, contending that it was exempt from any travel or subsistence payments on the project because such payments are only required for travel "from shop to job, and job to job, and job to shop" and thus travel from "home to job" as done by Telstar's workers is outside the requirement. Telstar also contends that it is entitled to credit for both the Visalia and Fresno free zones, as well as the free zone surrounding its shop, and that subsistence was not required for the Project because the Project site was less than 40 miles from the Fresno free zone.

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].) DLSE enforces prevailing wage requirements not only for the benefit of workers but also "to protect em-

⁵ All further statutory references are to the California Labor Code, unless otherwise indicated.

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 *see 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 rate, and also prescribes penalties for failing to pay the prevailing 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."

Telstar's Employees Were Entitled To The Maximum Travel and Subsistence Pay On The Project.

There is no dispute over the relevant facts. Both parties agree that the primary issue in this case is the proper interpretation of the contract language from which the travel and subsistence provisions applicable to MAD-2006-1 are derived. The dispute is entirely over: 1) whether the PWD provides for two or more free zones for all workers and jobs in the four county area; and 2) whether travel from the workers' homes to the jobsite is subject to travel time pay.

As Telstar notes, the collective bargaining language is not perfectly clear on its face. The general principle that a contract should be construed as a whole, however, giving effect to all of its terms in a manner consistent with its purpose, and not in an unduly literal fashion that ignores the overall purpose, favors DLSE's construction. (*See Civ. Code, §§ 1636, et seq. and Bank of the West v. Superior Court* (1992) 2 Cal.4th 1254, 1264-65.)

Telstar mistakenly reads sections 3.19, 3.22 and 3.23 of the travel and subsistence provi-

sions as elements of a single standard and argues that it is not required to pay travel time and mileage under section 3.22, because section 3.19 does not require payment for travel from "home to job." That interpretation is not supported by the plain language of the provisions. Section 3.19 is properly read independently of sections 3.22 and 3.23 and applies only when an employer requires workers to report to its shop and travel to the jobsite from there. In that situation, section 3.19 requires the employer to "pay for travel time and furnish transportation from shop to job, and job to job, and job to shop." In other words, if workers are required to report to the employer's shop before going to the jobsite, the employer must pay those workers full prevailing wages for their travel time from "shop to job," and back, and must physically provide transportation to and from the jobsite.

Section 3.22, by contrast, is independent of section 3.19 and applies only when workers are required to report directly from home to the jobsite without reporting to the employer's shop first. Section 3.22 provides for a local free zone within which no travel time and mileage is due and requires the employer to pay its workers a set rate for travel time and mileage beyond that local free zone. The free zone is based either on the location of the employer's business or the location of the hiring hall from which the employee is dispatched. For longer distance jobs, workers are also entitled to subsistence pay under section 3.23.

The PWD provides for a number of locations from which the free distance zone can be calculated. However, nothing indicates that there are multiple zones for any specific project, as Telstar argues, and the language of the PWD does not support such an unreasonable interpretation.

Telstar's free zone is prescribed by the location of its permanent shop in the city of Hanford, a distance of 70 miles from the Project site. The affected workers were therefore entitled to receive both travel and subsistence pay at the maximum rate for their work on the Project. The Assessment is affirmed to that extent. The Assessment is modified, however, by crediting Telstar for the \$2,049.30 in documented supplemental travel and subsistence payments that it made directly to ten of the affected workers subsequent to service of the Assessment. The total unpaid wages due, as modified, are therefore \$10,735.03.

Telstar Is Not Entitled To Credit For The Fuel Or Vehicle Allowances That It Provided To The Affected Workers Against Its Travel And Subsistence Pay Obligations For The Project.

Telstar contends that it should also receive credit for the fuel and vehicle allowances that it provided to the affected workers during the course of their work on the Project as an offset against its travel and subsistence pay obligations. There is no provision in the PWD to allow such a credit. In order to establish any entitlement, Telstar would at the very least need to establish precisely what portion of the fuel and vehicle allowances provided to each of the affected workers was payment for their mileage to and from this specific Project. While Telstar has documented the amounts of fuel and the vehicle allowances provided to each of the affected workers during the Project, and has divided that total by the number of days that worker worked on the Project, the sums claimed by Telstar as a credit are inherently inaccurate. All of the affected workers worked on multiple projects for Telstar during the period of the Project and presumably used their vehicles for personal travel during their off-hours using fuel that had been provided by Telstar. It is therefore impossible to determine, from the record as it stands, what portion of the fuel and vehicle allowances provided to the affected workers is directly attributable to travel directly related to their work on the Project. Consequently, Telstar has not established that it is entitled to receive credit for these payments as an offset to its travel and subsistence pay obligations on the Project.

DLSE Abused Its Discretion In Assessing Penalties Under Labor Code Section 1775 At The Maximum Rate.

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]

Abuse of discretion is established if the Labor Commissioner “has not proceeded in the manner required by law, the [determination] is not supported by the findings, or the findings are not supported by the evidence.” (Code of Civil Procedure section 1094.5(b).) In reviewing for abuse of discretion, however, the Director is not free to substitute his own judgment “because in [his] 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 Reg. tit. 8 §17250(c)].)

⁶ Labor Code §1777.1, subd. (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.”

The record establishes 225 violations of Telstar's prevailing wage obligations that justify the imposition of penalties under section 1775, subdivision (a), but the assessment of those penalties at the maximum rate of \$50.00 per violation cannot be sustained based on the factors cited by DLSE. Initially, though there had been five prior complaints against Telstar, none of those complaints resulted either in a finding of any violations by Telstar or the assessment of penalties. These five cases cannot be the basis of calculating a penalty amount. In fact, Telstar had apparently offset its travel and subsistence obligations by claiming credit for fuel and vehicle allowances provided to employees on the projects underlying the earlier complaints with DLSE's tacit approval. This record cannot reasonably be found to constitute "a prior record of failing to meet ... prevailing wage obligations" that would support that assessment of penalties at the maximum rate.

DLSE also has not taken into account the reasonableness of Telstar's error and its consequential good faith mistake in calculating the penalty amount. DLSE apparently had difficulty interpreting and applying the applicable travel and subsistence provisions as can be seen by its repetitive, unapproved amendments to the original Assessment. Further, Telstar did attempt to remedy the violation to some degree after the original Assessment, only to be subjected to amended Assessments. In short, DLSE has shown an inability to interpret these provisions and should take that inability into account when assessing Telstar's culpability.

Consequently, DLSE abused its discretion by relying on improper factors to assess penalties under section 1775 at the maximum rate. Because the discretion to set penalties under that section is committed to the Labor Commissioner, this part of the Assessment must be vacated and remanded to DLSE for redetermination of the penalties in light of the appropriate factors and the other findings in this Decision.

Telstar Is Not Liable For Liquidated Damages.

Labor Code section 1742.1(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. If the contractor or subcontractor demonstrates to the satisfaction of the director that he or she had substantial grounds for believing the Assessment . . . to be in error, the director shall waive payment of the liquidated damages.

Rule 51(b) [Cal.Code Reg. *tit.* 8 §17251(b)] states as follows:

To demonstrate “substantial grounds for believing the Assessment . . . to be in error,” the Affected Contractor or Subcontractor must establish (1) that it had a reasonable subjective belief that the Assessment . . . was in error; (2) that there is an objective basis in law and fact for the claimed error; and (3) that the claimed error is one that would have substantially reduced or eliminated any duty to pay additional wages under the Assessment . . .

Telstar would be liable for liquidated damages only on any wages that remained unpaid sixty days following service of the Assessment. Entitlement to a waiver of liquidated damages in this case is closely tied to Telstar’s position on the merits and specifically whether there was an “objective basis in law and fact” for contending that the assessment was in error.

Here Telstar’s position on the merits would unquestionably have produced a different result. Telstar plainly had a reasonable subjective belief that the Assessment was in error, and the claimed error would have eliminated its liability for back wages, thereby meeting the first and third tests of Rule 51(b). The remaining question is whether it had an objective basis in law and fact for the claimed error.

While Telstar’s interpretation of the travel and subsistence requirements has been rejected for the reasons noted above, it nevertheless was a plausible interpretation of less than clear language from a collective bargaining agreement that was excerpted and incorporated into the relevant prevailing wage determination without further explanation. The plausibility of Telstar’s interpretation is further bolstered by DLSE’s own difficulty in consistently applying the provisions and the contrary results arising from DLSE’s prior investigations of complaints against Telstar. Consequently, Telstar has demonstrated substantial grounds for believing the Assessment to be in error, and its liability for liquidated damages is waived.

FINDINGS

1. Affected subcontractor Telstar Sheet Metal, Inc. filed a timely Request for Review of the Civil Wage and Penalty Assessment issued by DLSE with respect to the Project.
2. Telstar's employees were entitled to travel and subsistence pay under the terms of Prevailing Wage Determination number MAD-2006-1 at the maximum rate of \$58.10 per day. After applying credit for the \$2,049.30 in supplemental travel and subsistence payments that Telstar paid to ten of the affected workers subsequent to the Assessment, the total unpaid wages due and owing are \$10,735.03.
3. DLSE abused its discretion in setting section 1775, subdivision (a) penalties at the maximum rate of \$50 per violation. The Assessment of \$11,250.00 in penalties under section 1775, subdivision (a) must therefore be vacated and remanded to DLSE for redetermination in light of appropriate factors and the other findings in this Decision.
5. Telstar has demonstrated that it had substantial grounds for believing the Assessment to be in error, thereby entitling it to a waiver of liquidated damages under section 1742.1, subdivision (a).
6. The amount found remaining due in the Assessment as modified and affirmed by this Decision is unpaid wages only in the amount of \$10,735.03. In addition, interest is due and shall continue to accrue on all unpaid wages as provided in section 1741, subdivision (b).

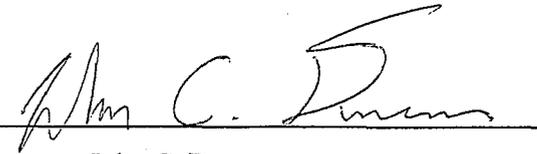
ORDER

The Civil Wage and Penalty Assessment is affirmed in part, modified in part, and vacated and remanded in part 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.

With respect to the remanded portion of this Decision only, DLSE shall have 60 days from the date of service of this Decision to issue a new penalty assessment under section 1775, subdivision (a). Should DLSE issue a new penalty assessment, Telstar shall have the right to

request review in accordance with section 1742, and may request such review directly with the Hearing Officer, who shall retain jurisdiction for that purpose.

Dated: 5/13/08

A handwritten signature in black ink, appearing to read "John C. Duncan", is written over a horizontal line.

John C. Duncan
Director of Industrial Relations