

STATE OF CALIFORNIA  
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

**James Ellis Brown dba Quantum General  
Contractors**

Case No. 08-0158-PWH

From a Civil Wage and Penalty Assessment issued by:

**Division of Labor Standards Enforcement.**

**DECISION OF THE DIRECTOR**

Affected Contractor James Ellis Brown, doing business as Quantum General Contractors (“Quantum”), requested review of a Civil Wage and Penalty Assessment (“Assessment”) issued by the Division of Labor Standards Enforcement (“Division”) with respect to construction work performed for the City of Oakland. A hearing on the merits was held on February 3, 2009, in San Francisco, California, before hearing officer John Cumming. The Division appeared through Ramon Yuen-Garcia. Quantum made a limited appearance through one of its attorneys Emerson Stafford for the sole purpose of submitting a written motion prepared by another one of its attorneys Beverly Baker-Kelly. Now, based on unrebutted evidence showing that Quantum underpaid its workers as a result of paying apprentice rates to workers who were not registered apprentices, not compensating employees for all hours worked, and failing to make required training fund contributions, the Director of Industrial Relations affirms the Assessment. Quantum’s motion for an order directing the City of Oakland to release funds being held in retention is denied on the grounds that it is outside the scope of the Director’s authority.

**Facts<sup>1</sup>**

On September 13, 2006, Quantum entered into a public works contract with the City of Oakland for a “One Year Term for As Needed Miscellaneous General Construction work at

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<sup>1</sup> This summary of facts is based on the unrebutted testimony of Deputy Labor Commissioner Arleen Elberg and Senior Deputy Labor Commissioner Lola Beavers, Exhibits 1 through 10 submitted by the Division, the Assessment, and the other documents in the hearing officer’s file.

Various City Facilities.” Following an investigation, the Division determined that \$193,775.37 in wages, \$33,325.00 in penalties, and up to an additional \$193,775.37 in liquidated damages were due based on Quantum’s failure to pay the correct prevailing wage. Based on Quantum’s own certified payroll records and payment records, the Division ascertained that Quantum improperly paid apprentice rates to workers who were not registered apprentices,<sup>2</sup> that in several instances Quantum did pay for all the hours of work reported on its certified payroll records, and that Quantum failed to make the training fund contributions required under section 1777.5(m). The record also shows that the City of Oakland made similar findings based on its own investigation of underpayments by Quantum.

The Division assessed \$33,000.00 in penalties under section 1775 based on 1100 prevailing wage violations assessed at the rate of \$30.00 per violation. The Division determined that the violations were not good faith mistakes nor were they corrected when called to Quantum’s attention. However, the Division mitigated these penalties from the \$50.00 maximum allowed under section 1775 because the Division had no record of any prior violations by Quantum. An additional \$325.00 in penalties were assessed under section 1813 (based on 9 violations at the rate of \$25 per violation) for failing to pay prevailing overtime rates when due.

### **Procedural History**

The Division issued its Assessment on May 22, 2008. By letter dated July 16, 2008, and sent from the Law Offices of Emerson Stafford, attorney Beverly Baker-Kelly requested review of the Assessment on behalf of Quantum. The request for review included an express waiver of the ninety (90) day time limit for commencing the hearing on the request under section 1742(b). On September 15, 2008, the hearing officer issued a Notice of Appointment of Hearing Officer; Notice of Prehearing Conference; and Preliminary Orders, with the prehearing conference scheduled to be conducted by telephone on the morning of October 10, 2008. Then, by letter dated October 1, 2008, a third attorney, Brian M. Junginger of McInerney & Dillon, associated in

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<sup>2</sup> Labor Code section 1777.5(c) states in relevant part that “[o]nly apprentices, as defined in [Labor Code] Section 3077, who are in training under apprenticeship standards that have been approved by the Chief of the Division of Apprenticeship Standards and who are parties to written apprentice agreements under Chapter 4 (commencing with Section 3070) of Division 3 are eligible to be employed at the apprentice wage rate on public works.” All further statutory references are to the Labor Code unless otherwise indicated.

as an additional counsel for Quantum and, among other things, expressed Quantum's intent to request "a continuation of the hearing to allow for further fact gathering and to allow Mr. Brown to meet with the City."

The initial prehearing conference was conducted at the scheduled time, with three attorneys (Junginger, Stafford, and Baker-Kelly) representing Quantum, and the matter was continued for another telephone prehearing conference on November 12, 2008. However, Baker-Kelly was upset by the hearing officer's denial of Quantum's request for a substantially longer continuance. She first telephoned the Chief Counsel on October 17, 2008, to complain, and then filed a written Motion to Disqualify the Appointed Hearing Officer; and Request for a Postponement of the Next Prehearing Conference, which was received by the Chief Counsel on November 7, 2008. The hearing officer, who was unaware of the written motion, proceeded with the prehearing conference on November 12. At Quantum's request, he continued the matter for another telephone prehearing conference on December 8, 2008, to give Quantum additional time to analyze the evidence and pursue settlement. Quantum then filed a Request for Decision on its Motion and an Amended Motion to Disqualify the Hearing Officer, seeking among other things, to "void" the November 12 prehearing conference.

On November 19, 2008, the Chief Counsel issued her decision denying the disqualification motion and directing that the case go forward as set.<sup>3</sup> On December 5, 2008, Quantum filed a Motion for Reconsideration of the Chief Counsel's decision which included a request that the prehearing conference not go forward on December 8, 2008. The hearing officer proceeded on that date, initially with all three counsels for Quantum and contractor Brown on the call. After restating their objection to proceeding, all of Quantum's representatives and Brown hung up; and the hearing officer then scheduled a hearing on the merits with only the Division's counsel present on the call. The hearing was set for February 3 and 4, 2009 in San Francisco, and the parties were ordered to file and serve lists of exhibits and witnesses by no later than January 23, 2009.

On December 22, 2008, the Director denied the Request for Reconsideration of the Chief Counsel's decision denying disqualification of the hearing officer. The Director's letter noted,

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<sup>3</sup> No error is found in the Chief Counsel's decision, which is incorporated herein by reference.

among other things, that it did not constitute a final appealable decision under section 1742(c) and that should Quantum wish to preserve its objections to the hearing officer, it should designate that as an issue at trial.

Quantum, through attorney Junginger, filed the requisite pretrial lists on the January 23, 2009, deadline. On January 29, 2009, five days before the scheduled hearing on the merits, contractor Brown filed his own Request for Continuance, stating that he was seriously ill and under the care of his doctors. Brown also stated that he expected to be well by March 2, 2009. The following day the hearing officer issued an Order stating that Brown's Request would be addressed at the start of the hearing of the merits, and adding that "[a]t that time, verification of the nature and extent of Brown's illness and his expected date of recovery should be provided[.]"

The only appearance for Quantum at the hearing on the merits was by attorney Stafford, for the purpose of submitting a written motion prepared by attorney Baker-Kelly. This motion requested this Department and the Division to direct the City of Oakland to release approximately \$90,000.00 being held by the City, and for the City to remit that sum to the Division as partial payment on the Assessment. The motion included Brown's declaration, dated that day, in which he admitted owing at least \$90,000.00 on the Assessment. However, no information was presented with respect to his asserted illness.

### **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. The Division 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(a), and see *Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976.)

Section 1775(a) requires, among other things, that contractors and subcontractors pay the difference to workers who received 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 the service of a civil wage and penalty assessment.

When the Division 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 may appeal that assessment by filing a Request for Review under section 1742. Subsection (b) of section 1742 provides, among other things, that a hearing on the request for review “shall be commenced within 90 days,” that the contractor shall be provided with an opportunity to review evidence that the Division intends to utilize at the hearing, but that the contractor “shall have the burden of proving that the basis for the civil wage and penalty assessment is incorrect.”

In this case, the record establishes the basis for the Division’s Assessment, and Quantum has presented no evidence to disprove the basis for the Assessment or to support waiver of liquidated damages under section 1742.1(a). In fact, Quantum conceded liability for *at least* the \$90,000.00 being withheld by the awarding body, the City of Oakland. Accordingly, the Assessment must be affirmed in its entirety.

Quantum did not pursue the disqualification issue at trial, and therefore it is not necessary to provide a further analysis of the basis for denying those successive motions. Nevertheless, the procedural history of this case reveals a common factor in each motion or request by Quantum, from the initial request for review through Brown’s Request for Continuance, which was a desire to delay these proceedings and the hearing on Quantum’s appeal. The persistency of these efforts raises serious doubts about the genuineness of the disqualification motions or Brown’s claim of illness, despite the uncertainty over what benefit these delays might have provided to Quantum.

Finally, Quantum’s last motion seeks relief that is outside the scope of the Director’s authority in this proceeding, which is confined to “affirming, modifying, or dismissing the assessment.” (§ 1742(b).) The Assessment may be subject to satisfaction in whole or in part through funds retained by the City of Oakland pursuant to section 1727. However, that is a matter to be determined by the Division, the City, and possibly Quantum, once these proceedings are concluded and this decision or any appeal from this decision becomes final.

## FINDINGS AND ORDER

1. Affected contractor James Ellis Brown, doing business as Quantum General Contractors filed a timely Request for Review from a Civil Wage and Penalty Assessment issued by the Division of Labor Standards Enforcement.

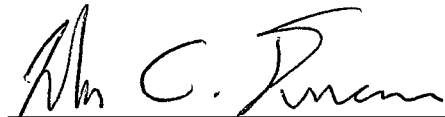
2. The record supports the Division's determination, as set forth in its Assessment, that \$193,775.37 in wages and \$33,325.00 in penalties are due.

3. There was no showing that the Assessment's determinations were incorrect or that the Division abused its discretion in determining the amount of penalties assessed under section 1775.

4. Liquidated damages are also due in the amount of \$193,775.37, and are not subject to waiver under section 1742.1(a).

*Accordingly*, the Civil Wage and Penalty Assessment is **affirmed** as set forth above, with interest to accrue on all unpaid wages in accordance with section 1741(b). The Hearing Officer shall issue a Notice of Findings which shall be served together with this Decision on the parties.

Dated: 2/19/09

  
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John C. Duncan  
Director of Industrial Relations