

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Advanced Professional Industries, Inc.

Case No. 12-0098-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement.

DECISION OF THE DIRECTOR

Affected subcontractor Advanced Professional Industries, Inc. (API), made 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 the work of improvement known as the Santa Fe Station Project (Project) performed for the Metropolitan Transit Authority (MTA) in Los Angeles County. The Assessment determined that \$323.49 in unpaid prevailing wages, \$6.50 in unpaid training funds, and \$55.00 in statutory penalties were due. API made a timely deposit of the full Assessment amount with the Department of Industrial Relations (DIR) pursuant to Labor Code section 1742.1, subdivision (b).¹ A Hearing on the Merits was held on March 19, 2013, in Los Angeles, California, before Hearing Officer Jessica L. Pirrone.² Max D. Norris appeared for DLSE. There was no appearance for API. Now, based on un rebutted evidence showing that API failed to pay the required prevailing wages and training funds, the Director of Industrial Relations affirms the Assessment.

Facts

Failure to Appear: Michael Watkins filed a Request for Review of the Assessment on behalf of API and appeared on API's behalf at four of the five duly noticed Prehearing Conferences. The final Prehearing Conference was held on January 11, 2013. At that time,

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

² The Hearing on the Merits was originally set for July 20, 2012, but was taken off calendar because the matter was removed to federal court. Once the matter was remanded, it was set on March 19, 2013, which was the earliest date that all the parties were available.

Watkins was consulted regarding the date for the Hearing on the Merits and a mutually convenient date was determined. The Minutes of the January 11, 2013, Prehearing Conference were served on Watkins and gave him further notice of the date, time and location of the Hearing on the Merits. At the Hearing on the Merits, DLSE's counsel told the Hearing Officer that Watkins had informed DLSE that he was not planning to attend the Hearing. The Hearing Officer's assistant called Watkins at about 10:30 a.m., and Watkins confirmed that he was not going to attend the Hearing. The Hearing Officer proceeded to conduct the Hearing on the Merits in API's absence for the purpose of formulating a recommended decision as warranted by the evidence pursuant to California Code of Regulations, title 8, section 17246, subdivision (a). DLSE's evidentiary exhibits were admitted into evidence without objection,³ and the matter was submitted on the evidentiary record based on the testimony of DLSE's investigator, Yoon-mi Jo, and DLSE's witness, Kevin Hanson.

Assessment: The facts stated below are based on Exhibits 1 through 14 submitted by DLSE, other documents in the Hearing Officer's file, and the testimony at the Hearing.

On or about March 14, 2009, MTA advertised for bid a project to design and build carwash and cleaning platforms at Division 20 of the MTA in Los Angeles County. Gonzalez Construction, Inc. was hired as the prime contractor and API was hired as a subcontractor. API hired Hanson as a concrete inspector. All of the concrete Mr. Hanson inspected was to be delivered to the Project. Hanson worked a total of ten hours on one day, September 27, 2010.

The applicable prevailing wage determination for the work performed by Hanson on the Project is SC-23-63-2-2008- 1D, the General Prevailing Wage Determination for Los Angeles County for Commercial Building, Highway, Heavy Construction and Dredging Projects, which includes the craft of "Building/Construction Inspector and Field Soils and Material Tester." The work Hanson performed falls within the scope of the classification "Group II, Concrete Batch Plant."

Based on Hanson's un rebutted testimony regarding the work he performed, number of hours he worked, and amount he was paid, the record shows that API failed to pay Hanson the

³ DLSE's request to admit into evidence Exhibit 15 (Decision on Administrative Appeal In re: Public Works Case no. 99-037) was denied because it did not constitute evidence.

required prevailing wages. There is no evidence that API paid training funds contributions as required by the applicable prevailing wage determination. The total unpaid wages due are \$323.49. The total training funds due are \$6.50.

DLSE assessed \$30.00 in penalties under section 1775, for one instance of failure to pay the applicable prevailing wages. DLSE also assessed \$25.00 in penalties under section 1813 for one instance of failure to pay the proper overtime rate.

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. 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 see *Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976.)

Section 1775 requires, among other things, that contractors and subcontractors pay the difference to workers who received less than the prevailing rate and also prescribes penalties for failing to pay the prevailing rate. During the relevant period, under section 1775, the penalty was a maximum of \$50 for each calendar day for each worker paid less than the prevailing wage. The penalty was a minimum of \$30 for each calendar day for each worker paid less than the prevailing wage where it is determined that the violation is willful.

During the relevant period, Section 1813 prescribed a fixed penalty of \$25.00 for each instance of failure to pay the prevailing overtime rate when due.

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 the service of a Civil Wage and Penalty Assessment. Alternatively, an affected contractor, subcontractor or surety can escape liquidated damages by depositing the full amount of the Assessment with DIR under section 1742.1, subdivision (b). API made a timely deposit of the full amount of the Assessment in this case and thus is not liable for liquidated damages.

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 may appeal that assessment by filing a Request for Review under section 1742. Subdivision (b) of section 1742 provides, among other things, that a hearing on the request for review "shall be commenced within 90 days" and that the contractor shall be provided with an opportunity to review evidence that DLSE intends to utilize at the hearing.

The contractor "shall have the burden of proving that the basis for the civil wage and penalty assessment is incorrect." (§1742, subd. (b).) In this case, the record establishes the basis for the Assessment and API has presented no evidence to disprove the basis for the Assessment. Accordingly, the Assessment is affirmed. Because API made a timely deposit of the amount of the Assessment with DIR pursuant to section 1742.1, subdivision (b), it is not liable for liquidated damages.

FINDINGS AND ORDER

1. Affected subcontractor Advanced Professional Industries, Inc. filed a timely Request for Review from a Civil Wage and Penalty Assessment issued by the Division of Labor Standards Enforcement.
2. Affected subcontractor Advanced Professional Industries, Inc., timely deposited with the Department of Industrial Relations, the full amount of the Assessment, including penalties and is therefore excused from liquidated damages under section 1742.1, subdivision (b).
3. Unpaid wages are due in the amount of \$323.49.
3. Unpaid training fund contributions are due in the amount of \$6.50.
4. In light of Findings 2 and 3, above, Advanced Professional Industries, Inc. underpaid Kevin Hanson in the aggregate amount of \$329.99.
5. Penalties under section 1775 are due in the amount of \$30.00 for one violation.
6. Penalties under section 1813 are due in the amount of \$25.00 for one violation.

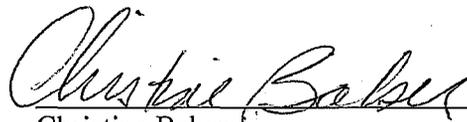
7. The amounts found remaining due in the Assessment as affirmed by this Decision are as follows:

Wages Due:	\$323.49
Training Fund Contributions Due:	\$6.50
Penalties under section 1775, subdivision (a):	\$30.00
Penalties under section 1813:	\$25.00
TOTAL:	\$384.99

Interest shall accrue on unpaid wages in accordance with section 1741, subdivision (b).

The Civil Wage and Penalty Assessment is affirmed 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.

Dated: 4/26/2013


Christine Baker
Director of Industrial Relations