

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

**Zvi Kur, an individual doing business
as ZK Construction**

Case No. 14-0376-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected contractor Zvi Kur, an individual doing business as ZK Construction (ZK Construction), requested review of a Civil Wage and Penalty Assessment (Assessment) issued by the Division of Labor Standards Enforcement (DLSE) on June 5, 2014, with respect to the work of improvement known as the Ryan Park Restroom Improvement & ADA Compliance Project (Project) performed for the City of Rancho Palos Verdes (City) in the County of Los Angeles.¹ The Assessment determined that \$50,958.01 was due in unpaid prevailing wages, including training fund contributions, and \$42,280.00 was due under Labor Code sections 1775 and 1813 as statutory penalties.² ZK Construction did not deposit the Assessment amount for unpaid wages with the Department of Industrial Relations (DIR) pursuant to section 1742.1, subdivision (b).

Pursuant to written notice, a Hearing on the Merits was held on March 19, 2014, in Los Angeles, California, before Hearing Officer Richard T. Hsueh. Max Norris appeared for DLSE. Danny Ceron, Esq., Ceron Law Office, appeared for ZK Construction.

The issues for decision are:

¹ The Assessment was issued against ZK Construction. By written stipulation dated November 18, 2015, the parties agreed that the Assessment was issued against "Zvi Kur, an individual, doing business as ZK Construction."

² All further statutory references are to the California Labor Code, unless otherwise indicated.

- Whether the Assessment correctly found that ZK Construction failed to pay the required prevailing wages for all straight time and overtime worked on the Project by its workers;
- Whether DLSE abused its discretion in assessing penalties under section 1775 at the rate of \$120.00 per violation;
- Whether ZK Construction failed to pay the required prevailing wage rate for overtime work and therefore was liable for penalty under section 1813; and
- Whether ZK Construction has demonstrated substantial grounds for appealing the Assessment, entitling it to a waiver of liquidated damages under section 1742.1.

The Director finds that ZK Construction has failed to carry its burden of proving that the basis of the Assessment was incorrect. ZK Construction has also failed to carry its burden of proving grounds for waiver of liquidated damages. Based on the evidence showing that ZK Construction failed to pay the required prevailing wages, this Decision affirms the Assessment, as modified, on all issues.

Facts

Assessment: The facts stated below are based on witness testimony, Exhibits 1 through 10, 14 and 15 submitted by DLSE, Exhibits A-E submitted by ZK Construction, the Assessment and other documents in the Hearing Officer's file.

ZK Construction was the primary contractor on the Project. Five workers performed work for ZK Construction under the contract between March 24, 2013, and July 28, 2013. The applicable prevailing wage determination in effect on the bid advertisement date is SD-23-102-2-2012-1 (Laborer) in Commercial Building, Highway, Heavy Construction and Dredging Projects, with the applicable job classification in Group 2.

Based on ZK Construction's certified payroll records (CPRs) provided by the awarding body, the Assessment found that ZK Construction failed to pay the required prevailing wages to five workers identified in the audit summary. ZK Construction also failed to make required training fund contributions. The Assessment found a total of \$50,958.01 in unpaid prevailing wages and \$42,280.00 in section 1775 and 1813 statutory penalties (\$120.00 per violation for 349 violations under section 1775 and sixteen violations at \$25 each under section 1813).

Deputy Labor Commissioner Kari Anderson testified as to the preparation of the Assessment and the supporting audit worksheets. She identified ZK Construction CPRs provided by the awarding body and the applicable prevailing wage determinations and apprentice wage rates. Anderson further testified that the Assessment was properly served on ZK Construction on June 5, 2014. ZK Construction then submitted a timely request for review received by DLSE on June 12, 2014.

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). See, too, *Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976.)

Section 1775, subdivision (a) 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. Section 1742.1, subdivision (a) provides for the imposition of liquidated damages, essentially a doubling of unpaid wages, if those wages are not paid within sixty days following the service of a civil wage and penalty assessment.

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 the contractor shall be provided with an opportunity to review evidence that DLSE intends to utilize at the hearing. 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).) If the contractor “demonstrates to the satisfaction of the director that he or she had substantial grounds for appealing the assessment ... with respect to a portion of the unpaid wages covered by the assessment..., the director may exercise his or her discretion to waive payment of the liquidated damages with respect to that

portion of the unpaid wages.” (§ 1742.1, subd. (a).) As well, DLSE’s determination “as to the amount of the penalty shall be reviewable only for abuse of discretion.” (§ 1775, subd. (a)(2)(D).)

In this case, the record established the basis for the Assessment. The parties stipulated that the Assessment was properly served on ZK Construction and that DLSE provided ZK Construction with a reasonable opportunity to review the evidence to be used at the hearing. DLSE then presented evidence that five of the workers, at times, performed work in the classifications of Laborer. DLSE presented evidence that ZK Construction did not pay the five affected workers for all hours worked, including overtime. DLSE presented further evidence that ZK Construction had a previous prevailing wage violation (Case No. 40-33243/235:CWPA issued 6/10/13 for \$51,057.74.) Although Anderson testified that she did not know about the status of that CWPA, Zvi Kur (Kur), the owner of ZK Construction, testified in response to the Hearing Officer’s inquiry that he was late in his request for review of that CWPA by about two weeks and that the CWPA thereafter became a final order.

ZK Construction called three witnesses to testify on its behalf. Kur essentially testified that after being served with the Assessment, he met with the five affected workers at his residence at different times and took remedial action by paying them the full amount of wages owed as determined by the Assessment. These wage payments were made in the form of both checks and cash from about \$100,000.00 cash that Kur had stashed at his residence. ZK Construction then called two of the affected workers, Ramiro Marin and Ruben Ceron, to testify that they had received the wages owed. ZK Construction also submitted five boiler-plate declarations by Ramiro Marin, Ruben Ceron, Armando Marin, Jesus Marin, and Mario Rivera as proof of remedial wage payments. It is noted that these hearsay declarations are identical in all respects, except for the name of each declarant. The handwritten portions of these declarations, including the dates of work on the Project and the dates of remedial wage payments, appeared to have been filled in by the same person and they all have the same dates. However, none of the declarations specifically identified the total amount received by each declarant and the breakdown of each amount paid in cash or by checks. There was no evidence that these workers actually read and understood their respective declarations.

After reviewing the totality of ZK Construction's evidence and observing its witnesses at trial, the Hearing Officer did not find their trial testimony and ZK Construction's evidence to be credible or persuasive. For example, Ramiro Marin testified that he was paid \$28.86 an hour despite signing an affidavit attesting that his hourly rate was \$46.84. He testified that Kur paid him about \$18,000.00 in cash for wages owed during a six month period before August 2014. On cross-examination, Marin was unable to recall payment details such as when he received his first cash payment or how many cash installments he had received over the six month period. Likewise, the testimony of Ruben Ceron that he was paid about \$20,000.00 in cash by Kur was also lacking in specification such as when and how he was paid in cash. His responses to questions during the cross-examination were vague at best. Their testimony contradicted Kur's testimony that ZK Construction had fully paid all the wages owed as the amount received by each of them was less than what was determined to be owed under the Assessment. The circumstances under which these remedial cash payments were made, as described by these witnesses, raise the question of whether such payments were in fact made by ZK Construction.

Moreover, Kur, who testified that he made various cash payments totaling about \$80,000 to the affected workers after DSLE had issued the Assessment, was unable to recall on cross-examination the details of how and when those payments were made. Interestingly, Kur testified that he paid Mario Rivera about \$7,000 in cash for back wages owed even though the Assessment determined that only \$5,688.24 was owed to Rivera. No explanation was offered as to why Rivera was paid more than what he was allegedly owed.

Perhaps most significantly, is the source of the cash that Kur used to pay the affected workers after the issuance of the Assessment. Kur testified that the cash came from a loan that he took out with the Union Bank *before* the start of the Project, and that he kept about \$100,000.00 in cash at his house even though he initially stated that someone else kept that cash for him. What was not explained, and none was offered, is why Kur did not just make the approximately \$80,000.00 in remedial payments to the affected workers in one lump sum, as opposed to installments over a period of six months, when he supposedly had about \$100,000.00 in his possession.

Further, despite conflicting testimony and declarations that the purported remedial payments were made to the affected workers, from about \$7,000.00 to about \$20,000.00, either in cash or a combination of checks and cash, ZK Construction did not even offer any cashed checks into evidence. Kur testified that he had copies of those checks in his possession but did not have them at the Hearing. Evidence Code Section 412 provides, "If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust."

Additionally, Kur also testified that he had receipts evidencing these remedial payments but that they were either stolen or lost. Collectively, the evidence shows that ZK Construction failed to pay the affected workers the amount of wages owed as determined in the Assessment. ZK Construction admitted as much when Kur testified that he notified the affected workers and made remedial payments after he was served with the Assessment. However, there is no credible evidence offered to support Kur's version of the events that he paid about \$80,000.00 in cash to the affected workers, including statutory penalties, after receiving the Assessment.

Accordingly, DLSE's evidence constitutes prima facie support for the Assessment. ZK Construction, in turn, failed to meet its burden of proof to disprove the basis for, or accuracy of, the Assessment or to show it had substantial grounds for believing the Assessment was in error to support a waiver of liquidated damages under section 1742.1, subdivision (a). At the commencement of the hearing, DLSE advised the Hearing Officer that about two weeks before the hearing, the surety had paid DLSE \$50,958.01 representing the amount of wages owed under the Assessment, but not the penalty. However, since the surety did not pay the wages covered by the Assessment within sixty (60) days following the service of the Assessment, liquidated damages under section 1742.1 are due and are affirmed in an amount equal to the unpaid wages.

FINDINGS AND ORDER

1. Affected contractor Zvi Kur, an individual doing business as ZK Construction, filed a timely Request for Review from a Civil Wage and Penalty Assessment issued by the Division of Labor Standards Enforcement.

2. Zvi Kur, an individual doing business as ZK Construction, underpaid five employees on the Project in the aggregate amount of \$49,188.41.

3. Zvi Kur, an individual doing business as ZK Construction, failed to make training fund contributions in the amount of \$1,769.60.

4. Penalties under section 1775 are due in the amount of \$41,880.00 for 349 violations at the rate of \$120.00 per violation.

5. Penalties under section 1813 are due in the amount of \$400.00 at the rate of \$25.00 per calendar day for one affected employee.

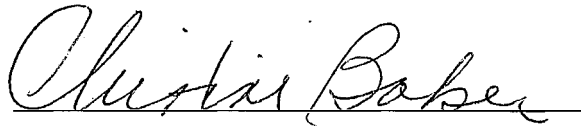
The amounts found due in the Assessment, as modified and affirmed by this Decision, are as follows:

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| Wages: | \$49,188.41 ³ |
| Training fund contributions: | \$1,769.60 |
| Penalties under section 1775, subdivision (a): | \$41,880.00 |
| Penalties under section 1813: | \$400.00 |
| Liquidated damages: | \$49,188.41 |
| TOTAL | \$142,426.42 |

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: 5/19/2016



Christine Baker
Director of Industrial Relations

³ DLSE may credit the amount paid by the surety toward the wages owed, including training fund contributions.