STATE OF CALIFORNIA | Arnold Schwarzenegger, *Governor*

DEPARTMENT OF INDUSTRIAL RELATIONS
DIVISION OF LABOR STANDARDS ENFORCEMENT
455 Golden Gate Avenue, 9th Floor
San Francisco, California 94102
(415) 703-4863
(415) 703-4806 fax

ANGELA BRADSTREET, STATE LABOR COMMISSIONER

ROBERT R. ROGINSON
Chief Counsel

February 4, 2009

Mr. William Diesel
President
BEC, Inc.
25051 East Fifth Street
San Bernardino, California 92410-5119

Re: Credit Available For Training Trust Payments

Dear Mr. Diesel:

This letter is in response to your letter dated September 18, 2008, to the Director of the Department of Industrial Relation, concerning the applicable credit BEC, Inc. (BEC) may take against its obligation to pay the general prevailing rate of per diem wages for training trust payments made on behalf of journeymen workers. The Division of Labor Standards Enforcement (Division or DLSE) is responsible for the enforcement of California's prevailing wage laws. Accordingly, your letter has been forwarded to this office for reply.

As described more fully below, the Division is unable, based upon the information presently provided by BEC, to determine whether BEC may take a credit for the full training trust contribution amount paid on behalf of its journeyman workers.

We understand that BEC is affiliated with and obtains apprentices from an approved apprenticeship training program, the Associated Builders and Contractors of Southern California Merit Training Trust Fund ("ABC Training Trust"). We also understand that BEC contributes to the ABC Training Trust for each hour worked by all journeymen and apprentices employed on the project. The amount paid by BEC to the ABC Training Trust is $.60 cents per hour, which is an amount more than the $.45 cents specified for "training" in the applicable prevailing wage determination made and published by the Director.

Labor Code section 1777.5(m)(1) requires public works contractors who employ journeymen or apprentices to perform any of the work under the contract to contribute to the California Apprenticeship Council "the same amount that the director determines is the prevailing amount of apprenticeship training contributions in the area of the public works site," and permits contractors to take as credit the amount so paid. The section also authorizes payment "to an approved apprenticeship program that can supply apprentices to the site of the public works project." Labor Code section 1773.1(b)(3) defines the term "employer payments" to include "[p]ayments to the California Apprenticeship Council pursuant to Section 1777.5." Section

2009.02.04

1773.1(c) likewise specifically entitles public works contractors to receive for employer payments "a credit against the obligation to pay the general prevailing rate of per diem wages." Thus, a contractor is entitled to full credit for the section 1777.5 apprenticeship training contributions for all workers and, accordingly, BEC may clearly take a credit against the prevailing wage obligation for $.45 cents of the $.60 cents per hour paid to the ABC Training Trust.

To determine if the contractor may take a credit for the additional $.15 cents paid to the ABC Training Trust, however, BEC must also establish that the extra $.15 cents per hour itself qualifies as an "employer payment" under Labor Code sections 1773.1(a)(6) and 1773.1(b)(1). Pursuant to those provisions, contractors may offer apprenticeship training programs as an employee benefit under section 1773.1(a)(6). Unlike the fixed training contribution to the California Apprenticeship Council under section 1777.5, however, which is not required by any statute or regulation to specifically benefit workers, a contractor cannot claim a credit against a worker's per diem wages for a benefit payment under section 1773.1(b)(1) unless the worker actually benefits from the payment.[1]

A contractor does not become entitled under Labor Code section 1773.1(b)(1) to such credit unless the payments are "pursuant to" the particular plan or program and unless there is a connection between the plan or program and the workers on whose behalf the payments are made in order to meet the fundamental mandate of Labor Code sections 1771 and 1774 that the prevailing rate of wages be paid to workers employed on the project. When a contractor seeks credit for additional contributions beyond the full rate specified by the Director, that contractor must affirmatively show entitlement to that credit under section 1773.1(b)(1).

This issue was recently addressed by the Director of the Department of Industrial Relations in two separate decisions following requests for review made by affected contractors pursuant to Labor Code § 1742. The first decision was in the matter, *Horn Electric Corporation*, Case No. 06-0101-PWH. In *Horn Electric*, the contractor sought to take credit for apprenticeship contributions for its apprentice inside wiremen, for training fund contributions paid in excess of the $.86 per hour mandated by the applicable prevailing wage determination. For its journeymen, the contractor paid only the required training fund contribution mandated by the applicable prevailing wage determination. The Director concluded that the contractor satisfactorily demonstrated that it had the right to take full credit for those contributions made on behalf of the apprentices. As the Director noted:

> Contributions to apprenticeship programs are specifically included in the definition of "employer payments" under section 1773.1, subdivision (a)(6), "so long as the cost of training is reasonably related to the amount of the contributions." Horn does not become entitled to a further credit for its additional contributions of $1.39 per hour to the WECA training fund, however, simply because apprenticeship training is an enumerated fringe

[1] Labor Code sections 1771 and 1774 require that wage payments be made "to" workers. Title 8 of the California Code of Regulations, section 16000, likewise requires that "employer payments" to a plan or program be made "for the benefit of employees, their families and dependents, or retirees."

benefit under section 1773.1, subdivision (a)(6) and WECA is a "plan, fund, or program" within the meaning of section 1773.1, subdivision (b)(1). Unlike the contribution under section 1777.5, which is not required to benefit the worker, an employer cannot claim a credit against a worker's per diem wages for a benefit payment under section 1773.1 unless the worker actually benefits from the payment. Horn has established that the affected apprentices did receive a benefit from its additional payments to the WECA training fund.

This issue was also addressed in the matter, *DBS Painting, Inc.*, Case No. 06-0168-PWH. In *DBS Painting*, the contractor sought to take credit for apprenticeship contributions for its journeymen employees for training fund contributions paid in excess of the $.25 per hour mandated by the applicable prevailing wage determination. The Director determined that the contractor had not demonstrated it had a right to take the credit in this case. Specifically, the Director determined that DBS presented *no evidence* that the affected journeymen were beneficiaries of the apprenticeship trust to which the contributions were paid. As the Director noted:

> DBS has failed to prove the requisite connection between the affected workers and the Trust and is not entitled to a credit against the per diem wages owed to those workers for any contributions to the ABC GGC Training Trust in excess of the amount mandated by section 1777.5.

A copy of each decision is enclosed for your review.

As you can see from each of these determinations, in deciding whether a contractor was entitled to take any credit for training fund contributions in excess of the training fund amount identified in the applicable prevailing wage determination, it is necessary for the contractor to show that the employee for whom the credit was taken actually benefited from the payment. In the present matter, BEC submitted information including portions of the apprenticeship standards for the ABC Training Trust as well as a three page description of the continuing education programs apparently offered for journeyman by the ABC Southern California Chapter. It is unclear from the document itself whether the continuing education programs are offered by the ABC Training Trust and if so, whether its costs are covered by the contributions made by employers, including BEC. In short, these documents and information are not sufficient upon which the Division can make a determination that the journeyman for whom the $.60 payment was made benefitted from the $.15 paid in excess of the training amount set forth in the determination.

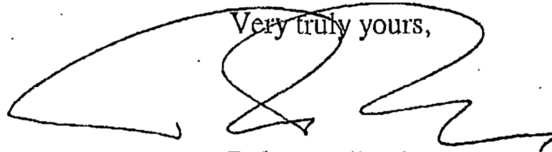
This matter is presently pending on a public works project where there is a Labor Compliance Program (LCP), Harris & Associates, responsible for enforcing California's prevailing wage requirements. [2] Accordingly, it is appropriate at this stage for Harris & Associates to make

[2] We are informed that Harris & Associates' status as an approved Labor Compliance Program (LCP) expired December 31, 2008. We are also informed that Harris & Associates is applying for a renewal as an approved LCP. To the extent this means that Harris & Associates is no longer the LCP for this project, the responsibility for monitoring and enforcing the prevailing wage projects would fall to any approved LCP for this project and, if none, then to the DLSE as part of its normal enforcement jurisdiction.

the determination whether BEC is entitled to take a credit against its prevailing wage obligation for any contributions to the ABC Training Trust which are in excess of the training amount set forth in the applicable determination. We are sending a copy of this letter to Harris & Associates so that Harris & Associates is informed of the Division's position on this issue, which is consistent with the Director's determinations in two recent decisions.

Please contact me if you have any questions or comments.

Very truly yours,



Robert R. Roginson
Chief Counsel

RRR:

Cc: Labor Commissioner Angela Bradstreet
Harris & Associates
Nance Steffen, DLSE
DLSE Public Works Attorneys

2009.02.04

STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

DBS Painting, Inc.

Case No. 06-0168-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR

Affected subcontractor DBS Painting, Inc. ("DBS") 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 DBS on the Calistoga Farm Labor Camp Remodel. A telephonic Hearing on the Merits occurred on April 16, 2007, before Hearing Officer Nathan D. Schmidt. Robert Fried appeared for DBS, and Ramon Yuen-Garcia appeared for DLSE. For the reasons set forth below, the Director of Industrial Relations issues this Decision affirming the Assessment.

SUMMARY OF FACTS

The parties stipulated to the following facts:

"1. On or about April 15, 2005, the Napa Valley Housing Authority, published a Notice of Bid for the work of improvement known as the Calistoga Farm Labor Camp Remodel ('Project'), in the County of Napa, California.

"2. The Notice of Bid specifies that the prevailing wage law shall apply to the Project.

"3. On or about May 26, 2005, the Napa Valley Housing Authority entered into a written public works contract with Helmer & Sons, Inc. for the construction of the Project.

"4. On or about July 8, 2005, Helmer & Sons, Inc. entered into a subcontract with DBS Painting, Inc. to perform a part of the work on the Project.

"5. In the performance of the subcontract relating to the Project, DBS Painting, Inc. hired certain painters to perform the work on the Project.

2009.02.04

"6. Under Labor Code section 1720 et seq., all workers who performed work on the Project are required to be paid the general prevailing wages within the geographical area of the prevailing wage determination issued by the Director..

"7. The applicable prevailing wage rate for the classification of Painter for work performed after June 30, 2005, is contained in Determination No. NAP-2005-2..

"8. The prevailing wage rate for the classification of Painter (Brush and Spray) under Determination No. NAP-2005-2, is the sum of $29.61 in basic hourly rate, $13.54 in fringe benefits, and $0.25 in contribution to apprenticeship training funds, for a total sum of $43.40.

"9. On or about February 17, 2006, the Division of Labor Standards Enforcement ('DLSE') received a complaint that the workers of DBS Painting, Inc. were not paid the required prevailing wages for work performed on the Project.

"10. As a result of an investigation, DLSE determined that DBS Painting, Inc. had paid its painters the correct basic hourly rate of $29.61. However, it paid the painters only $12.79 per hour in fringe benefits instead of $13.54. The balance of the required fringe benefits of $0.75 per hour and the required $0.25 per hour in contribution to apprenticeship training funds were paid by DBS Painting, Inc. to the [Associated Builders and Contractors Golden Gate Chapter ('ABC GGC')] Training Trust. A copy of the Contribution Worksheets and cancelled checks in payment of the contributions is attached and incorporated hereto as Exhibit A, and becomes a part of the stipulation herein.

"11. DBS did not communicate orally or in writing to its workers that it had contributed $0.75 per hour of their prevailing wages to the ABC GGC Training Trust.

"12. Attached and incorporated hereto as Exhibit B, is a copy of the Subscribing Employer Agreement, Agreement to Participate in the ABC Golden Gate Chapter Apprenticeship Program, entered into between the Associated Builders and Contractors, Golden Gate Chapter, Training Trust and DBS Painting, Inc. on December 20, 2002. The stipulation herein is limited to the authenticity of the document, and does not include any stipulation as to its contents, or the relevancy of the contents of the document to the issues involved herein.

"13. Attached and incorporated hereto as Exhibit C, is a copy of the Adoption Agreement entered into between the Associated Builders and Contractors, Golden Gate Chapter,

Training Trust Fund and DBS Painting, Inc. on December 20, 2002. The stipulation herein is limited to the authenticity of the document, and does not include any stipulation as to its contents, or the relevancy of the contents of the document to the issues involved herein.

"14. Attached and incorporated hereto as Exhibit D, is a copy of the Trust Agreement of the Associated Builders and Contractors, Golden Gate Chapter, Training Trust Fund. The stipulation herein is limited to the authenticity of the document, and does not include any stipulation as to its contents, or the relevancy of the contents of the document to the issues involved herein.

"15. Attached and incorporated hereto as Exhibit E, is a copy of the Associated Builders and Contractors, Golden Gate Chapter, Training Trust Fund, Fringe Benefit Contribution Payment Guidelines for Participating Employers. The stipulation herein is limited to the authenticity of the document, and does not include any stipulation as to its contents, or the relevancy of the contents of the document to the issues involved herein.

"16. On or about June 29, 2006, DLSE notified DBS Painting, Inc. that as a result of its investigation, it determined that DBS Painting, Inc. had violated the prevailing wage law by underpaying the painters $0.75 per hour, and there is due the sum of $440.25. The notice also advised DBS that if it voluntarily pay the wage deficiencies, DLSE would substantially reduce the penalties assessed under Labor Code section 1775.

"17. DBS Painting, Inc. did not voluntarily correct the wage deficiencies. Thereafter, on or about August 22, 2006, DLSE issued and served upon DBS Painting, Inc. a Civil Wage and Penalty Assessment as provided in Labor Code section 1741, for the sum of $440.25 in wages and the sum of $4,600.00 in penalties at the rate of $50.00 per violation as provided in Labor Code section 1775.

"18. In determining the amount of penalties to be assessed under Labor Code section 1775, DLSE considered whether the failure of DBS Painting, Inc. to pay the correct rate of per diem wages to the workers was a good faith mistake and, if so, the error was promptly and voluntarily corrected when brought to its attention, and whether it has a prior record of failing to meet its prevailing wage obligations.

"19. The records of DLSE do not show that a Civil Wage and Penalty Assessment had previously been issued to DBS Painting, Inc. for violating the prevailing wage law.

"20. In issuing the Civil Wage and Penalty Assessment, DLSE determined that the failure to pay the full amount of the fringe benefits to the painters was not a mistake, but an intentional act. Even if it was a good faith mistake, DBS Painting, Inc. did not promptly and voluntarily correct the underpayments when brought to its attention. It also took into consideration that no Civil Wage and Penalty Assessment had previously been issued to DBS Painting, Inc. for violating the prevailing wage law.

"21. On or about September 25, 2006, DBS Painting, Inc. filed a Request for Review of the Civil Wage and Penalty Assessment as provided in Labor Code section 1742.

"22. As of this date, DBS Painting, Inc. has not paid any portion of the wages found to be due in the Civil Wage and Penalty Assessment."

The two issues to be decided are:

1. Whether DBS is entitled to credit toward its per diem wage obligation for training fund contributions paid in excess of the $0.25 per hour mandated by the applicable prevailing wage determination; and
2. Whether DLSE abused its discretion in assessing penalties under Labor Code section 1775[1] at the maximum rate of $50.00 per violation.

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.

[1] All further unspecified section references refer to the Labor Code.

(*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 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, subd. (a), and *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 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."

DBS Is Not Entitled To Credit Toward Its Prevailing Wage Obligations For Additional Training Fund Contributions Made To ABC GGC.

Section 1771 requires, with certain exceptions not relevant here, that "not less than the general prevailing rate of per diem wages for work of a similar character in the locality . . . be paid to all workers employed on public works." Similarly, section 1774 requires "[t]he contractor to whom the contract is awarded, and any subcontractor under him, [to] pay not less than the specified prevailing rates of wages to all workmen employed in the execution of the contract." There are three components to the prevailing wage: the basic hourly rate, fringe benefit payments and a contribution to the California Apprenticeship Council ("CAC") or an approved apprenticeship training fund. The first two components (also known as the total prevailing wage) must be paid to the worker or on the worker's behalf and for his or her benefit. An employer cannot pay a worker less than the basic hourly rate; the balance must either be paid to the worker as wages or offset by credit for "employer payments" authorized by sec-

tion 1773.1.

In this case, the parties stipulate that all affected workers received the basic hourly rate and that DBS made the required training fund contributions of $0.25 per hour to the ABC GGC Training Trust. The sole question presented here is whether DBS is entitled to credit toward the balance of its per diem wage obligation for an additional $0.75 per hour that it paid to the ABC GGC Training Trust for hours worked by each of the affected journeymen. The answer is that DBS has not shown that it had a right to do so in this case.

Section 1773.1 defines "per diem wages" for purposes of both establishing prevailing wage rates and crediting employer payments toward those rates, providing in pertinent part as follows:

> (a) Per diem wages . . . shall be deemed to include employer payments for the following:.
>
> (1) Health and Welfare.
>
> (2) Pension
>
> * * *
>
> (6) Apprenticeship or other training programs authorized by Section 3093, so long as the cost of training is reasonably related to the amount of the contributions.
>
> * * *
>
> (b) Employer payments include all of the following:
>
> (1) The rate of contribution irrevocably made by the employer to a trustee or third person pursuant to a plan, fund, or program.
>
> (2) The rate of actual costs to the employer reasonably anticipated in providing benefits to workers pursuant to an enforceable commitment to carry out a financially responsible plan or program communicated in writing to the workers affected.
>
> (3) Payments to the California Apprenticeship Council pursuant to Section 1777.5.

The mandatory apprenticeship training contribution is established by section 1777.5, subdivision (m)(1), which provides that:

> A contractor to whom a contract is awarded, who, in performing any of the work under the contract, employs journeymen or apprentices in any apprenticeable craft or trade shall contribute to the California Apprenticeship Council the same amount that the director determines is the prevailing amount of ap-

2009.02.04

prenticeship training contributions in the area of the public works site. A contractor may take as a credit for payments to the council any amounts paid by the contractor to an approved apprenticeship program that can supply apprentices to the site of the public works project. The contractor may add the amount of the contributions in computing his or her bid for the contract.

The payment required by section 1777.5 is distinct from the per diem wages due to workers under section 1773.1, and must be distinguished from apprenticeship or training programs offered as an employee fringe benefit under section 1773.1, subdivision (a)(6). It is not a direct employee fringe benefit since it is never paid to the worker and may be paid to programs that do not necessarily have a direct connection to the workers employed on the project.

The payment required under section 1777.5, subdivision (m) does not preclude contractors from offering apprenticeship or training programs as a specific employee fringe benefit under section 1773.1, subdivision (a)(6), or from making additional contributions to those programs, as DBS has done here. However, DBS does not become entitled to a further credit for its additional contributions of $0.75 per hour to the ABC GGC Training Trust simply because apprenticeship training is an enumerated fringe benefit under section 1773.1, subdivision (a)(6), even though the ABC GGC Training Trust may be a "plan, fund, or program" within the meaning of section 1773.1, subdivision (b)(1). Unlike the contribution under section 1777.5, which is not required to benefit the worker, an employer cannot claim a credit against a worker's per diem wages for a benefit payment under section 1773.1 unless the worker actually benefits from the payment.

The purpose of the ABC GGC Training Trust Fund, as stated in its Trust Agreement, is:

> to provide a distinct legal entity into which monies may be contributed by participating employers and employees for the exclusive purpose of creating and administering an employee welfare benefit plan providing apprenticeship and training programs (or plans) *for the benefit of participating employees*, and their beneficiaries, and for defraying reasonable expenses of administration. [*Emphasis added.*]

The Trust Agreement defines "participating employee" as:

> Any individual employee of a participating employer who is eighteen (18) years of age, who has entered into a written apprenticeship agreement which conforms with the apprenticeship standards adopted by a related unilateral apprenticeship committee and who is not covered by the terms of a collective bargaining agreement."

This means that the beneficiaries of the ABC GGC Training Trust are limited to apprentices. DBS presented no evidence that the four affected journeymen are beneficiaries of the Trust. Consequently, DBS has failed to prove the requisite connection between the affected workers and the Trust and is not entitled to a credit against the per diem wages owed to those workers for any contributions to the ABC GGC Training Trust in excess of the amount mandated by section 1777.5.[2]

DBS relies on *DLSE Management Memo 93-3*, an internal policy memorandum issued by the State Labor Commissioner fourteen years ago, for its contention that the additional training fund contributions should be credited toward its fringe benefit obligations whether or not the journeymen directly benefit. However, the memorandum clearly states the fundamental statutory requirement that any fringe benefit payments must be for the benefit of the employees for whom the credit is claimed. While some of the examples given in the memorandum indicate that additional training fund contributions can be used to offset an employer's per diem wage obligations in some circumstances, none of the examples given include factual situations similar to the one here where contributions are being required of workers who are not beneficiaries of the apprenticeship agreement. Therefore, DBS may not rely on the examples alone without reference to the substantive discussion of the requirement in *DLSE Management Memo 93-3* to claim credit for its additional training fund contributions without showing a benefit to the journeymen working on the Project.

DBS can affiliate with an apprenticeship program that requires a larger contribution that that mandated by the applicable prevailing wage determination. However, such an affiliation on its own does not entitle DBS to claim the additional contribution as an offset against required per diem wages owed to workers who are not beneficiaries of those contributions and whose contribution amounts have not been annualized. Accordingly, the Assess-

[2] Moreover, the Adoption Agreement that DBS signed with the ABC GGC Training Trust and the Fringe Benefit Contribution Payment Guidelines For Participating Employers adopted by the Trust obligated DBS to contribute a minimum of $1.00 to the Trust for each hour worked by journeyman painters on public works projects only. Even if the affected journeymen were beneficiaries of the Trust due to some additional provision of the Trust Agreement that has not been submitted into evidence, the limitation of contributions to hours worked on public works projects would make the contributions a seasonal benefit that is subject to annualization under section 1773.1, subdivision (d). The stipulated record is devoid of any evidence regarding either the ratio of private to public works hours worked by the affected journeymen during the relevant time period or the annualization of DBS's contributions to the ABC GGC Training Trust on behalf of those workers. Consequently, DBS would

ment of back wages in the amount of $440.25, which represents the net underpayment of per diem wages at the rate of $0.75 per hour, is affirmed.

DLSE Did Not Abuse Its Discretion In Assessing Penalties Under Labor Code Section 1775 At The Maximum Rate.

Section 1775(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.[3]

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 re-

still not be entitled to a credit for those contributions even if the stipulated record supported a finding that the affected journeymen were beneficiaries of the Trust.

[3] 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

2009.02.04

viewing 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, namely, "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)].)

DBS's sole defense against the penalty award is tied to its arguments on the merits. DBS contends that it acted in good faith by complying with what it believed to be DLSE's interpretation of section 1773.1, subdivision (a)(6) and that the assessment of penalties, which was based on a different interpretation and without prior notice, is therefore an abuse of discretion. As discussed above, however, DBS's proffered interpretation of section 1773.1, subdivision (a)(6) is based solely on the examples given in *DLSE Management Memo 93-3* without reference to the substantive statutory discussion in the memorandum. Although it was not addressed in the examples, the memorandum expresses DLSE's interpretation that per diem wages must be paid to the worker or on the worker's behalf and for his or her benefit. The record does not establish that DLSE changed its interpretation of section 1773.1 without prior notice to the detriment of DBS.

DLSE's determination that DBS knew or reasonably should have known of its obligation to pay the full per diem wages on the Project to or for the benefit of its journeymen is supported by the record. While section 1775, subdivision (a)(2) grants DLSE the discretion to mitigate the statutory maximum penalty in light of prescribed factors, it does not mandate the exercise of that discretion in a particular manner. The record shows that DLSE considered the prescribed factors for mitigation and determined that the maximum penalty of $50 per violation was warranted in this case. The Director is not free to substitute his own judgment. The record does not establish an abuse of discretion and, accordingly, the assessment of penalties in the amount of $4,600.00 under section 1775 is affirmed.

---

refuses to comply with its provisions."

DBS Is 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 . . .

In accordance with the statute, DBS 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 DBS'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.

As discussed above, DBS reasonably should have known of its obligation to pay the full per diem wages on the Project to or for the benefit of its journeymen. Its proffered interpretation of section 1773.1, subdivision (a)(6) based on the examples given in *DLSE Management Memo 93-3* cannot be found to constitute an "objective basis in law and fact" for contending that the Assessment on the Project was in error. Because the assessed back wages remained due more than sixty days after service of the Assessment, and DBS has not demonstrated grounds for waiver, DBS is also liable for liquidated damages in an amount equal to the unpaid wages, that is, an additional $440.25.

FINDINGS

1. Affected subcontractor DBS Painting, Inc. filed a timely Request for Review of the Civil Wage and Penalty Assessment issued by DLSE with respect to the Project.

2009.02.04

2. DBS failed to show that it is entitled to credit for payments made to the ABC GGC Training Trust beyond those allowed by the Division of Labor Standards Enforcement. In particular, DBS failed to establish that the additional $0.75 per hour that it contributed to the Trust above the amount required by the applicable prevailing wage determination was for the benefit of the employees on whose behalf the contributions are made.

3. The Assessment correctly determined that DBS underpaid its employees on the Calistoga Farm Labor Camp Remodel in Napa County in the aggregate amount of $440.25.

4. The DLSE did not abuse its discretion in setting section 1775(a) penalties at the rate of $50 per violation, and the resulting total penalty of $4,600.00 is affirmed.

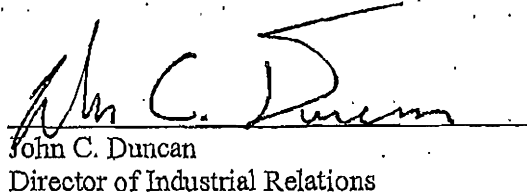
5. The back wages found due in Finding No. 3 remained due and owing more than sixty days following issuance of the Assessment. DBS is liable for an additional award of liquidated damages under section 1742.1 in the amount of $440.25, and there are insufficient grounds to waive payment of these damages.

6. The total amount found due and affirmed by this Decision is $ 5,480.50. 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 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: 12/10/07



John C. Duncan
Director of Industrial Relations

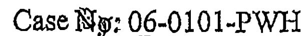
STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

FILED
Department of Industrial Relations
Office of the Director - Legal Unit
Hearing Officers Unit - SF
SEP 12 2007

In the Matter of the Request for Review of:

Horn Electric Corporation


Case No: 06-0101-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR

Affected subcontractor Horn Electric Corporation ("Horn") 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 Horn on the Yuba City Wastewater Treatment Facility Upgrades ("the Project"). The Assessment, which issued on May 19, 2006, determined there was $42,419.90 in unpaid prevailing wages and statutory penalties. Horn filed a timely Request for Review on June 15, 2006. A Hearing on the Merits occurred on November 21, 2006, in Sacramento, California, and concluded telephonically on November 22, 2006, before Hearing Officer Nathan D. Schmidt. Dennis B. Cook appeared for Horn, and David D. Cross appeared for DLSE. For the reasons set forth below, the Director of Industrial Relations issues this decision modifying the Assessment and waiving any payment of liquidated damages.

SUMMARY OF FACTS

The issues were narrowed at the hearing, when the parties stipulated that all required training fund contribution had been made and that four journeyman were owed a total of $1,242.24 in unpaid wages because of Horn's failure to pay predetermined wage increases, as follows:

Nathan Cox	$22.32
Jorge Flecha	$676.28
Daniel Rodriguez	$421.34
Kenneth Cavin	$122.30

2009.02.04

The Assessment was amended at the hearing to $19,013.40 in unpaid prevailing wages, composed primarily of unpaid fringe benefits due to apprentices. The parties were directed to address the issue of how many prevailing wage and overtime violations were represented by the stipulated underpayments to the four journeymen in their closing briefs.

Two primary issues remain to be decided in this case:

1. Whether Horn correctly took credit for apprenticeship contributions for its apprentice inside wiremen, for training fund contributions paid in excess of the $0.86 per hour mandated by the applicable prevailing wage determination; and
2. Whether DLSE abused its discretion in assessing penalties under Labor Code section 1775[1] at the maximum rate of $50.00 per violation.

Based on a review of Horn's certified payroll records ("CPR") for the Project, DLSE Industrial Relations Representative Julia Sidhu determined that five inside wireman apprentices[2] had been paid less than the prevailing wages due under the applicable prevailing wage determination ("PWD"), number SUT-2002-1. All five apprentices were paid at least the correct base hourly rates, but the CPRs did not reflect the payment of the additional amounts required for fringe benefits and training fund contributions.

Sidhu acknowledged that the required training fund contributions ($0.086 per hour) had been made for all the apprentices on the Project but noted that Horn took a credit against the total prevailing wage obligation paid to the apprentices of the difference between its $2.25 per hour contribution to the apprenticeship program and that $0.86 per hour training fund contribution (difference is $1.39 per hour). She also testified that DLSE would not give any credit for training fund contributions made on behalf of first-year apprentice Dave Garcia, as the PWD did not require training fund contributions for first-year apprentices.

With regard to section 1775 penalties for non-payment of prevailing wages, Sidhu explained that DLSE's practice is to automatically set the penalty at the maximum of $50.00 per violation unless the investigation shows grounds for mitigation. Sidhu stated that there were no grounds for mitigation in this case, as Horn had been served with, and settled, three prior Civil Wage and Penalty Assessments in the past three years. One of those assessments, issued

[1] All further unspecified section references refer to the Labor Code.

2009.02.04

on June 2, 2004, was for Horn's failure to pay two predetermined wage increases when due. Sidhu's penalty recommendation was reviewed and approved by her supervisor, Senior Deputy Labor Commissioner Denise Padres.

All of the inside wireman apprentices who worked for Horn on the Project were dispatched by the Western Electrical Contractors Association, Inc. (WECA) Electrical Apprenticeship and Training Committee subject to an Agreement to Train Apprentices ("Training Agreement") between WECA and Horn. Pursuant to the Training Agreement, Horn was required to pay into WECA's ERISA governed Health and Welfare and Retirement Plans on behalf of any apprentices that it employed. Christine Hall, WECA's Training Director, testified that, for each apprentice, Horn was required to pay $3.00 per hour to the Health and Welfare Plan, which covers medical, dental, disability and life insurance and the employee assistance program. Horn was also required to pay between $0.00 and 2.00 per hour into the Retirement Plan for each apprentice, based on his or her year in the program;[3] and could elect to make additional "excess" contributions to the Retirement Plan at its discretion.

In addition to the fringe benefit payments (ranging from $3.00 to $5.00 per hour), Horn was obligated to contribute $2.25 per hour to the WECA apprenticeship training fund for each apprentice. This pays for WECA's training facilities, instructors and other administrative costs of the apprenticeship program. Hall testified that the size of the employer contribution to the apprenticeship training fund is directly related to WECA's annual operating budget and was the same amount whether an apprentice was employed on a public or private work. For journeymen, WECA only required the training fund contribution mandated by the applicable PWD: in this case, $0.86 per hour.

Hall testified that Horn made all required fringe benefit and training fund contributions during the relevant time period and submitted a list of posted general ledger transactions documenting the training fund, health and welfare fund and both regular and excess pension fund contributions made to WECA by Horn between August 31, 2003, and September 30, 2006. With the exception of excess Retirement Fund contributions, which are detailed by the

[2] Matt Mueller, Andrey Palamarchvk, John Ciuriuc, Dave Garcia and Jeremiah Bennett.

[3] The mandatory contribution was $0.50 per hour for each year of the apprenticeship that has been completed, with no pension contribution required for first-year apprentices, $0.50 per hour for second-year apprentices and so on, up to $2.00 per hour for fifth-year apprentices.

2009.02.04

name of the worker and amount of the contribution, however, the list of fringe benefit and training fund payments provided by Hall does not give any detail as to how the payments were applied.

Deborah Castelan, Horn's Office Manager, handled payroll and prepared the CPRs for the Project. She testified that the fringe benefit and training fund payments for apprentices were not recorded on the CPRs because they were paid directly to WECA. Every month during the Project, Castelan prepared an Apprentice Monthly Hour Worksheet which was submitted with Horn's payment to WECA, and which recorded the private and public work hours for each WECA apprentice during the reporting period and detailed the required training fund, health and welfare fund and regular and excess retirement fund contributions for each apprentice based on the total hours worked during the month. Castelan acknowledged that overtime worked by apprentices Matt Mueller and Andrey Palamarchvk had either been erroneously reported or improperly paid during the weeks of October 6 through 12, 2003, and October 13, through 19, 2003. She testified that she had prepared revised CPRs for those two weeks and checks had been issued for the unpaid overtime.

Castelan stated that she implemented pay increases for journeymen on public works projects when new PWDs were issued each year, and thus inadvertently underpaid some journeymen for a few months when predetermined wages increases took effect before a new PWD was issued. She agreed that Horn had received three prior civil wage and penalty assessments, but said that she didn't believe that Horn had admitted any liability by settling those prior cases.

After the conclusion of post-hearing briefing, the Hearing Officer determined that the record was insufficient to make a determination of the number of prevailing wage and overtime violations represented by the stipulated underpayments to the four journeymen. The Hearing Officer therefore vacated submission of the matter on July 31, 2007, and reopened the case on the sole issue of penalties with direction to DLSE to submit amended penalty audits for the journeymen whose assessed unpaid wages had been reduced by stipulation at hearing. DLSE submitted amended penalty audits for Flecha and Cavin only. The assessments for Cox and Rodriguez were unchanged. Horn submitted a declaration from Castelan which

2009.02.04

was admitted into evidence solely on the issue of penalties with its response. The case was resubmitted on August 30, 2007.

Castelan declared that she had erroneously reported Cavin as having worked on Friday, April 2 and Saturday, April 3, 2004 when she prepared the CPR for that week. She stated that he actually worked on the Thursday, April 1 and Friday, April 2, 2004, as indicated by the weekly timesheet for the Project submitted with her declaration. She admitted that Horn had missed a predetermined wage increase which was effective on June 1, 2003, but stated that Horn had paid back wages and fringe benefits to Flecha on August 29, 2003, for the period of June 1 through August 3, 2003.

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 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(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 section1741.

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."

Horn Is Entitled To Full Credit For Fringe Benefit And Training Fund Contributions Made To WECA On Behalf Of Its Apprentices.

Section 1771 requires that all workers on a public work receive at least the general prevailing "per diem wage." There are three components to the prevailing wage: the basic hourly rate, fringe benefit payments and a contribution to the California Apprenticeship Council ("CAC") or an approved apprenticeship training fund. The first two components (also known as the total prevailing wage) must be paid to the worker or on the worker's behalf and for his benefit. An employer cannot pay a worker less than the basic hourly rate; the balance must be paid to the worker as wages or offset by credit for "employer payments" authorized by section 1773.1.

In this case, it is undisputed that all five of the affected apprentices received the basic hourly rate and that Horn made the required training fund contributions of $0.86 per hour to WECA. The question presented here is whether Horn is entitled to credit toward the balance of its per diem wage obligation for fringe benefit payments and an additional $1.39 per hour training fund contribution that it paid to WECA for hours worked by each of the affected apprentices. The answer is that Horn has shown that it had a right to do so in this case.

Section 1773.1, defines "per diem wages" for purposes of both establishing prevailing wage rates and crediting employer payments toward those rates, providing in pertinent part as follows:

> (a) Per diem wages . . . shall be deemed to include employer payments for the following:
>
> (1) Health and Welfare.
>
> (2) Pension. [¶] . . . [¶] . . . [¶] . . . [¶]
>
> (6) Apprenticeship or other training programs authorized by Section 3093, so long as the cost of training is reasonably related to the amount of the

contributions. [¶] . . . [¶] . . . [¶] . . . [¶]

(b) Employer payments include all of the following:

(1) The rate of contribution irrevocably made by the employer to a trustee or third person pursuant to a plan, fund, or program.

(2) The rate of actual costs to the employer reasonably anticipated in providing benefits to workers pursuant to an enforceable commitment to carry out a financially responsible plan or program communicated in writing to the workers affected.

(3) Payments to the California Apprenticeship Council pursuant to Section 1777.5.

(c) . . . Credits for employer payments also shall not reduce the obligation to pay the hourly straight time or overtime wages found to be prevailing.

The mandatory apprenticeship training contribution is established by section 1777.5, subdivision (m)(1), which provides that:

> A contractor to whom a contract is awarded, who, in performing any of the work under the contract, employs journeymen or apprentices in any apprenticeable craft or trade shall contribute to the California Apprenticeship Council the same amount that the director determines is the prevailing amount of apprenticeship training contributions in the area of the public works site. A contractor may take as a credit for payments to the council any amounts paid by the contractor to an approved apprenticeship program that can supply apprentices to the site of the public works project. The contractor may add the amount of the contributions in computing his or her bid for the contract.

The payment required by section 1777.5 is distinct from the per diem wages due to workers defined by section 1773.1, and must be distinguished from apprenticeship or training programs offered as an employee fringe benefit under section 1773.1, subdivision (a)(6). It is not a direct employee fringe benefit since it is never paid to the worker and may be paid to programs that do not necessarily have a direct connection to the workers employed on the project. The contribution is required when a contractor employs workers in an apprenticeable craft, even if the contractor chooses to pay the additional fringe benefit portion of the prevailing wage directly as additional wages to the workers.

The payment required under section 1777.5, subdivision (m) does not limit or preclude contractors from offering apprenticeship or training programs as a specific employee fringe benefit under section 1773.1, subdivision (a)(6), or from making additional contributions to those programs, as Horn has done here. For a contractor to receive credit for such contributions against the prevailing wage obligation, the payments must fall within the definition of

"employer payments" under subdivision (b) of section 1773.1 and they must be for the benefit of workers employed on the project. (§§1771 and 1774.)

The evidence demonstrates that the benefit contributions for retirement, health, and welfare, meet the requirements for credit as "employer payments" under section 1773.1. Horn offered the WECA retirement and health and welfare plans into evidence. As ERISA governed plans, they satisfy the requirements of section 1773.1, subdivision (b)(1), which allows credits for "the rate of contribution irrevocably made by the employer to a trustee or third party pursuant to a plan, fund, or program." In ERISA terms, the necessary connection between the plan and the project employees is shown by establishing that the workers are "participants" or "beneficiaries" in the plan within the meaning of 29 United States Code sections 1002(7) or (8). ERISA requires plans, funds, or programs to be for the sole benefit of participants and beneficiaries, which is the same as the "benefits to workers" requirement found in Labor Code section 1773.1, subdivision (b)(2), pertaining to self-funded non-ERISA plans or programs. Hall specifically testified that the required fringe benefit payments for all apprentices employed by Horn were made and provided documentation of Horn's payments to WECA. In addition, the Apprentice Monthly Hours Worksheets prepared by Castelan which were submitted with those payments documents the contributions to both funds for each of the apprentices included in the Assessment. Horn has therefore provided substantial evidence that fringe benefits were paid for its apprentices as required by the Training Agreement.

Even after providing full credit for the health and welfare and retirement fund contributions made on behalf of the five apprentices, however, their compensation falls slightly short of the required per diem wages. The following tables detail and compare the basic hourly rate and fringe benefit contributions required by both the applicable PWD and WECA's training agreement for the relevant apprenticeship periods:

2009.02.04

Apprenticeship Period	Required Basic Hourly Rate	Required Health & Welfare	Required Pension	Required Training	Required Total Fringe Benefits	Required Total Hourly Rate
First	$11.980	$4.71	$0.360	$0.00	$5.070	$17.050
Third	$16.605	$4.71	$1.575	$0.86	$7.145	$23.752
Fourth	$19.930	$4.71	$1.890	$0.86	$7.460	$27.392
Fifth	$23.245	$4.71	$2.205	$0.86	$7.775	$31.020

Apprenticeship Period	Required Basic Hourly Rate	WECA Health & Welfare	WECA Pension[4]	WECA Training	WECA Total Fringe Benefits	WECA Total Hourly Rate
First	$11.980	$3.00	$0.00	$2.25	$5.25	$17,230
Third	$16.605	$3.00	$1.00	$2.25	$6.25	$22.855
Fourth	$19.930	$3.00	$1.50	$2.25	$6.75	$26.680
Fifth	$23.245	$3.00	$2.00	$2.25	$7.25	$30.495

In addition to the $0.86 per hour training fund contribution required under section 1777.5, subdivision (m)(1), for which DLSE has agreed to give credit, Horn contends that it is also entitled to receive credit for the remaining $1.39 per hour training fund contribution that it is required to pay for its apprentices under its training agreement with WECA. California's prevailing wage laws does not prohibit such additional contributions nor do they limit the amount of the contribution or corresponding credit beyond the base-line obligation to pay the requisite non-fringe hourly wages directly to the workers. (§1773.1, subd. (c).) As discussed below, these "excess" training fund contributions are entitled to credit toward Horn's prevailing wage obligation under section 1773.1, subdivision (a)(6).

While the fringe benefits component of the prevailing wages mandated by the applicable PWD is broken down by specified amounts due for health and welfare, pension and training, Title 8, California Code of Regulations, section 16200, subdivision (a)(3)(I), provides that:

The contractor obligated to pay the full prevailing rate of per diem wages may

[4] In addition to the pension contributions required by the WECA training agreement, Horn also made optional "excess" pension contributions to WECA for all five apprentices in amounts ranging from $0.41 to $1.07 per hour. These "excess" pension contributions are not included in the WECA Total Hourly Rate figures in this chart, but are detailed by worker below.

take credit for amounts *up to the total of all fringe benefit amounts listed as prevailing in the appropriate wage determination.* This credit may be taken only as to amounts which are actual payments under Employer Payments Section 16000(1)-(3). In the event the total of Employer Payments by a contractor for the fringe benefits listed as prevailing is less than the aggregate amount set out as prevailing in the wage determination, the contractor must pay the difference directly to the employee No amount of credit for payments over the aggregate amount of employer payments shall be taken nor shall any credit decrease the amount of direct payment of hourly wages of those amounts found to be prevailing for straight time or overtime wages.[5] [Emphasis added.]

Thus, an employer may be deemed to have satisfied its obligation to pay the fringe benefits due under the applicable PWD as long as the total amount which can be credited as "employer payments" is equal to or greater than the "total of all fringe benefit amounts listed as prevailing in the appropriate wage determination." The employer's credit is limited to the aggregate amount of fringe benefits due under the applicable PWD, and may not "decrease the amount of direct payment of hourly wages of those amounts found to prevailing for straight or overtime wages." This limitation is not in issue here, as the parties agree that Horn paid the base hourly wages required by the PWD to all affected apprentices.

Contributions to apprenticeship programs are specifically included in the definition of "employer payments' under section 1773.1, subdivision (a)(6), "so long as the cost of training is reasonably related to the amount of the contributions." Horn does not become entitled to a further credit for its additional contributions of $1.39 per hour to the WECA training fund, however, simply because apprenticeship training is an enumerated fringe benefit under section 1773.1, subdivision (a)(6) and WECA is a "plan, fund, or program" within the meaning of section 1773.1, subdivision (b)(1). Unlike the contribution under section 1777.5, which is not required to benefit the worker, an employer cannot claim a credit against a worker's per diem wages for a benefit payment under section 1773.1 unless the worker actually benefits from the payment. Horn has established that the affected apprentices did receive a benefit from its additional payments to the WECA training fund.

All five of the apprentices identified in the Assessment were dispatched by WECA and were indentured in its apprenticeship program, thus they directly received the benefit of

---

[5] The language of Cal. Code Reg. tit. 8 §16000 with regard to "Employer Payments" is essentially identical to that of Lab. Code §1773.1, subd. (b) cited above.

2009.02.04

the training which was funded in part by the Horn's mandatory contributions of $2.25 per hour under the Training Agreement. Moreover, Hall's testimony that the size of the employer contribution to the apprenticeship training fund is directly related to WECA's annual operating budget satisfies the additional requirement of section 1773.1, subdivision (a)(6) that "the cost of training is reasonably related to the amount of the contributions." The direct relationship between the amount of the training fund contribution and the training actually received by the WECA apprentices employed by Horn is underscored by the fact that WECA only required the higher contribution for apprentices. For journeymen, by contrast, Horn was only required to contribute the $0.86 per hour mandated by the PWD. For these reasons, Horn is entitled for full credit for its documented fringe benefit and training fund contributions to WECA on behalf of its apprentices, including the $1.39 per hour paid to the WECA training fund in excess of the $0.86 per hour required by the PWD.

Review of the CPRs and DLSE's audit worksheets for the Project, as well as the Apprentice Monthly Hours Worksheets sent to WECA with Horn's payments, establishes that, with the exception of a nine day period in the case of Bennett, all five of the apprentices named in the Assessment were paid at least the full prevailing wages due them on the Project, as detailed in the following chart:

Apprentice/ Period	Hourly Rate Paid	Health & Welfare Paid	Pension Paid	Excess Pension Paid	Training Paid	Total Fringe Benefits Paid	Total Hourly Rate Paid	Required Total Hourly Rate
Dave Garcia, 1st	$12.88	$3.00	$0.00	$0.41	$2.25	$5.66	$18.54	$17.050
Jeremiah Bennett, 3rd	$16.61/ $19.63[6]	$3.00	$1.00	$0.70	$2.25	$6.95	$23.56/ $26.58	$23.752
Jeremiah Bennett, 4th	$23.80/ $27.44	$3.00	$1.50	$0.70	$2.25	$7.45	$31.25/ $34.89	$27.392
John Ciuriuc, 3rd	$19.93	$3.00	$1.00	$0.41	$2.25	$6.66	$26.59	$23.752
John Ciuriuc, 4th	$23.80	$3.00	$1.50	$0.41	$2.25	$7.16	$30.96	$27.392
Matt	$19.93	$3.00	$1.50	$1.07	$2.25	$7.82	$27.75	$27.392

[6] Bennett was paid an hourly rate of $16.61 from April 12, 2004 through April 25, 2004. He was paid an hourly rate of $19.63 through the end of his third year of apprenticeship on June 27, 2004, when his hourly rate increased to $23.80. He received a subsequent increase to $27.44 on August 2, 2004.

Mueller, 4th								
Andrey Palamarchvk, 5th	$23.25/ $26.17[7]	$3.00	$2.00	$0.95	$2.25	$8.20	$31.45/ $34.37	$31.020

The one documented underpayment to an apprentice on the Project was to Bennett, who was underpaid by $0.192 per hour for the 70 straight-time hours he worked on nine days between April 12, 2004 and April 25, 2004, at an hourly rate, before benefits, of $16.61. The total unpaid wages owed to Bennett for this period are $13.84. Bennett was paid at, or in excess of, the total required hourly rate for the balance of his work on the Project. Both Bennett and Ciuriuc received slightly less than the required fringe benefit amounts for all of their work on the Project, but the CPRs establish that they received in excess of the shortfall in cash, in the form of higher than required hourly wages. Horn's total liability for unpaid prevailing wages to apprentices on the Project is therefore $13.84 and constitutes nine violations of section 1775, subdivision (a).

The Stipulated Unpaid Prevailing Wages To Journeyman Represent 25 Violations Of Section 1775(a) And One Violation Of Section 1813.

At the hearing, the parties stipulated that four journeyman were owed a total of $1,242.24 in unpaid wages, but they did not stipulate to the number of violations of sections 1775, subdivision (a), and 1813 that were represented by those unpaid wages. Horn stipulated to the prevailing wages owing and unpaid for Cox and Rodriguez, $22.32 and $421.34, respectively, that were originally assessed by DLSE. On that basis, DLSE's assessment of penalties for 13 violations of section 1775 and one violation of section 1813 represented by those unpaid wages is affirmed.

By contrast, the unpaid wages originally assessed for Flecha were reduced from $1641.97 to $676.28, and the unpaid wages originally assessed for Cavin were reduced from $141.32 in the original audit to $122.30. DLSE prepared amended penalty audits for both of these workers to coincide with the stipulated unpaid wages, finding that the underpayments to Flecha represented 25 violations of section 1775(a) and one violation of section 1813, and that the underpayments to Cavin represented two violations of section 1775(a). The additional

[7] Palamarchvk was paid an hourly rate of $23.25 through April 25, 2004, and $26.17 through June 6, 2004, when he last worked on the Project as an apprentice.

evidence submitted by Horn partially disproves the basis of DLSE's amended assessment of penalties with regard to hours worked by Flecha and Cavin on the Project.

The amended penalty audit for Flecha assessed penalties for 25 violations of section 1775(a), for the 25 days he worked on the Project between July 14 and August 21, 2003, and for one violation of section 1813 for overtime worked on March 2, 2003. The amended audit worksheet shows, however, that Flecha was fully paid the prevailing straight-time and overtime wages due for March 2, 2003, and thus does not support the assessment of a penalty under section 1813 for that day. Castelan admits that Horn did not implement the June 1, 2003 predetermined wage increase on time, but her declaration, a check stub and a supplemental payroll report submitted with it, both dated August 29, 2003, establish that Horn paid Flecha an additional $5.42 per hour in wages and fringe benefits for the 333 hours that he worked on the Project between June 1 and August 3, 2003. This remedied the underpayment for that period well in advance of the Assessment, including 13 days for which DLSE assessed penalties under section 1775. Horn has thus disproved the basis for the assessment of penalties for that time period. It remains undisputed, however, that Flecha was underpaid for the 12 days that he worked between August 4 and August 21, 2003, and thus DLSE's assessment of penalties under section 1775 for those 12 days is affirmed.

The amended penalty audit for Cavin assessed penalties for two violations of section 1775(a) on Friday April 2, 2004 and Saturday, April 3, 2004. The amended audit worksheet shows, however, that Cavin was fully paid the prevailing wages due for April 2 and that the only basis for the stipulated underpayment was the assessment of unpaid overtime wages on Saturday April 3. While the CPR for the week ending April 4, 2004 does report Cavin as having worked on Saturday, Castelan's declaration and Horn's weekly timesheet for that week of the project, along with the fact that none of the other six workers reported on the CPR for that week worked on Saturday, provide compelling evidence for the finding that Cavin actually worked on Thursday and Friday that week and was not due overtime for work on Saturday April 3, 2004. The record therefore shows that Cavin was fully paid the prevailing wages that he was due for his work on the Project and, thus, there is no basis for an assessment of penalties with regard to the hours worked by him.

Horn contends that it should be relieved from its stipulation to the unpaid prevailing

2009.02.04

wages owed to Cavin and Flecha, because the additional evidence admitted on the issue of penalties after hearing proved that the stipulation overstated the unpaid wages actually due them. Stipulations made in the course of litigation serve the public policies of settling disputes, expediting trials and "avoid[ing] the necessity of expenditure of the time and money of the parties and the public by removing from the litigation an item not in dispute." [*County of Sacramento v. Workers' Compensation Appeals Bd.* (2000) 77 Cal.App.4th 1114, 1119.] To further those policies, stipulations, once made, are binding on the parties and may not be set aside without a good cause showing that the stipulation was "entered into through inadvertence or mistake of fact." Otherwise, "other parties could not rely upon the stipulation and, rather than being expedited, hearings would be subject to uncertainty and disruption in order for parties to gather and present evidence on issues thought to have been laid to rest by the stipulation." [*Id.* at pp. 1120-1121.] Horn has made no attempt to show good cause to be released from its stipulation, aside from the unfavorable outcome of being bound by a stipulation that was ultimately shown to have overstated the amount of unpaid wages due to two workers by a few hundred dollars,. Horn has not alleged that the records were unavailable at the time of hearing or that it entered the stipulation as a result of "inadvertence or mistake of fact." In hindsight, the stipulation binds Horn to a result that it might have avoided if it had not stipulated and the information in Castelan's declaration had come out at trial, "[but] a poor outcome is not a principled reason to set aside a stipulation by counsel." [*Id.* at 1121.]

While the record, as augmented after hearing, undermines the factual basis for the parties' stipulation, Horn agreed to remove the issue of unpaid prevailing wages due to journeyman who worked on the Project from the litigation by stipulating to specific amounts that were due and owing and may not now be released from the stipulation because it was not, in hindsight, a favorable one. Horn therefore remains bound by its stipulation especially as the only reason to vacate the submission originally was to augment the record on the penalty issue only. The issue of the penalties associated with the stipulated underpayments was not part of the stipulation, however, and Horn is entitled to relief from the portion of DLSE's amended penalty assessment that is disproved by Castelan's post-hearing declaration and accompanying records.

Consequently, Horn is liable for a total 25 violations of section 1775(a) and one violation of section 1813 for its stipulated underpayment of prevailing wages to journeymen on the

2009.02.04

project and DLSE's penalty assessment, as modified, is affirmed.

DLSE Did Not Abuse Its Discretion In Assessing Penalties Under Labor Code Section 1775 At The Maximum Rate.

Section 1775(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.[8]

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 judg-

---

[8] Labor Code §1777.1(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."

2009.02.04

ment "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)].)

In this case, Horn acknowledges having received and settled three prior civil wage and penalty assessments, one of which involved failure to timely implement predetermined wage increases: the apparent cause of the stipulated underpayments to four journeymen on the Project and the primary basis for penalties under the Assessment. Horn's only defense for failing to implement the predetermined wage increases required for its journeymen under the applicable PWD was Castelan's testimony that her normal practice was to implement wage increases on public works projects when a new PWD was issued rather than when the increases were due under the PWD which actually governed prevailing wages on the Project. In other words, Horn admits that it simply did not bother to implement the predetermined pay wages increases required by the applicable PWD even though the prior assessments provided more than adequate notice of the actual requirements.

The record shows that DLSE considered the prescribed factors for mitigation and determined that the maximum penalty of $50 per violation was warranted in this case, primarily on the basis of Horn's prior documented and uncontested failures to meet its prevailing wage obligations. The Director is not free to substitute his own judgment. The record does not establish an abuse of discretion and, accordingly, the assessment of penalties under section 1775, as modified, is affirmed.

Overtime Penalties Are Due For The Workers Who Were Underpaid For Overtime Hours Worked On The Project.

Labor Code section 1813 states as follows:

> "The contractor or any subcontractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars ($25.00) for each worker employed in the execution of the contract by the ... contractor ... for each calendar day during which the worker is re-

2009.02.04

quired or permitted to work more than 8 hours in any one calendar day and 40 hours in any one calendar week in violation of the provisions of this article."

...

Labor Code section 1815 states in full as follows:

"Notwithstanding the provisions of Sections 1810 to 1814, inclusive, of this code, and notwithstanding any stipulation inserted in any contract pursuant to the requirements of said sections, work performed by employees of contractors in excess of 8 hours per day, and 40 hours during any one week, shall be permitted upon public work upon compensation for all hours worked in excess of 8 hours per day and not less than 1½ times the basic rate of pay."

The record establishes that Horn violated Labor Code §1815 by paying less than the required prevailing overtime wage rate for one overtime hour worked by journeyman Daniel Rodriguez on November 12, 2002. Unlike Labor Code section 1775 above, section 1813 does not give DLSE any discretion to reduce the amount of the penalty, nor does it give the Director any authority to limit or waive the penalty. Accordingly, the assessment of penalties under section 1813, as modified, is affirmed.

<u>Horn Is Liable For Liquidated Damages On The Stipulated Unpaid Wages Owed To Journeymen.</u>

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 . . ..

In accordance with the statute, Horn 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 Horn's position on the merits and specifically whether there was an "objective basis in law and fact" for contending that the Assessments were in error.

Horn has shown an "objective basis in law and fact" for contending that the Assessment on the Project was in error as to the apprentices employed on the Project, by establishing that it properly paid nearly all of the required fringe benefits, including training fund contributions, for apprentices working on the Project to the WECA training and benefit trust funds, though it failed to report them on the CPRs. Consequently, Horn is not liable for liquidated damages on the $13.84 in unpaid wages owed to Bennett.

Horn has not, however, shown an "objective basis in law and fact" for contending that the Assessment on the Project was in error as to the journeymen employed on the Project. While Horn has shown that it did properly pay training fund contributions for work done on the Project by journeymen, it stipulated to underpayments of prevailing wages to four journeymen, due primarily to its admitted failure to implement predetermined wage increases on time. The mere fact that the Assessment has ultimately been reduced does not constitute "substantial grounds for believing the Assessment . . . to be in error" when Horn took no action to pay admittedly unpaid wages due on the Project during the 60 day period following service of the Assessment and had previously been cited by DLSE for failure to implement predetermined wage increases. Accordingly, there can be no waiver and Horn's liability for liquidated damages in an amount equal to the stipulated unpaid wages due to journeymen on Project is affirmed.

FINDINGS

1. Affected subcontractor Horn Electric Corporation filed a timely Request for Review of the Civil Wage and Penalty Assessment issued by DLSE with respect to the Projects.

2. Horn made all required training fund contributions, for both apprentices and journeymen to WECA, fully satisfying its training fund obligations under the applicable prevailing wage determination.

3. Horn made all required fringe benefit payments for the apprentices employed

2009.02.04

on the Project to WECA's trust funds, including an additional $1.39 per hour paid to the WECA training fund pursuant to it training agreement with WECA, and fully satisfied its prevailing wage obligations to four of the five apprentices working on the Project.

4. Inside wireman apprentice Jeremiah Bennett was underpaid a total of $13.84 between April 12, 2004 and April 25, 2004, constituting nine violations of section 1775, subdivision (a).

5. Horn underpaid four journeymen inside wireman on the Project a total of $1,242.24, constituting 25 violations of section1775, subdivision (a) and one violation of section 1813, as follows:

Nathan Cox	$22.32
Jorge Flecha	$676.28
Daniel Rodriguez	$421.34
Kenneth Cavin	$122.30

6. The Division did not abuse its discretion in setting the penalty for these violations at the rate of $50.00 per violation for 34 violations on the Project, for a total of $1,700.00 in penalties under section 1775, subdivision (a).

7. Penalties under section 1813 at the rate of $25.00 per violation are due for one violation on the Project, for a total of $25.00 in penalties.

8. In light of Findings 4 and 5, above, the potential liquidated damages due under the Assessment are $1,256.08. Horn has demonstrated that it had substantial grounds for believing that the Assessment was in error as to the apprentices working on the project. Accordingly, Horn is not liable for liquidated damages on the $13.84 in unpaid wages owed to Bennett. With regard to the journeymen, however, no part of the stipulated unpaid wages was paid within 6o days following service of the Assessment and Horn has not demonstrated that it had substantial grounds for believing the Assessment of these remaining wages to be in error. Accordingly, Horn is liable for liquidated damages on the Project in the amount of $1,242.24 under Labor Gode section 1742.1, subdivision (a).

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

Wages Due: $1,256.08

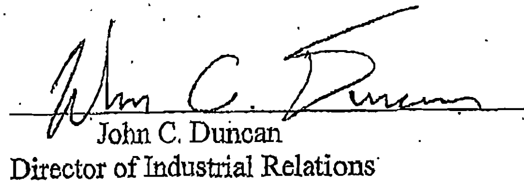
2009.02.04

Penalties under section 1813:	$25.00
Penalties under section 1775, subdivision (a):	$1,700.00
Liquidated Damages:	$1,242.24
TOTAL:	$4,223.32

ORDER

The Civil Wage and Penalty Assessment is modified 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: 9/10/07



John C. Duncan
Director of Industrial Relations

2009.02.04