

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Bannaoun Engineers Constructors Corporation

Case No. 16-0380-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected prime contractor Bannaoun Engineers Constructors Corporation (Bannaoun) requested review of a Civil Wage and Penalty Assessment (Assessment) issued by the Division of Labor Standards Enforcement (DLSE) on August 8, 2016, with respect to the Bradfield Avenue Street Improvement Project (Project) performed for the City of Lynwood (Lynwood). DLSE's motion to amend the Assessment upward was granted on January 11, 2018. The amended Assessment determined that \$303,976.49 in unpaid prevailing wages and statutory penalties were due. These included penalties against Bannaoun under Labor Code sections 1775 and 1813,¹ as well as penalties assessed under sections 1776 and 1777.7, for certified payroll records (CPRs) violations and apprenticeship violations, respectively.

A Hearing on the Merits was held on February 27, 2019, in Los Angeles, California before Hearing Officer Howard Wien. At the Hearing on the Merits, DLSE made an oral motion to amend the Assessment downward by reducing unpaid prevailing wages from \$131,846.93 to \$130,622.13. DLSE did not move to amend any of the other determinations in the Assessment. There being no prejudice to Bannaoun, the Hearing Officer granted the motion. The final amended Assessment thus determined the following sums were due: \$130,622.13 in unpaid prevailing wages, \$2,779.56 in unpaid training funds, \$111,000.00 in section 1775 penalties,

¹ All subsequent references to sections are to the Labor Code, unless otherwise specified.

\$1,150.00 in section 1813 penalties, \$44,800.00 in section 1776 penalties, and \$12,400.00 in section 1777.7 penalties.

At the Hearing on the Merits, Lance Grucela appeared as counsel for DLSE. No counsel or any other representative of Bannaoun appeared. DLSE Industrial Relations Representative Alfredo Roman testified in support of the amended Assessment.

The issues presented for decision are:

- Did the Assessment as amended correctly find that Bannaoun failed to report and pay the required prevailing wages for all hours worked on the Project by the affected workers?
- Did Bannaoun pay the required employer contributions to an approved training plan or fund?
- Did Bannaoun timely respond to DLSE's request for CPRs?
- Did Bannaoun provide contract award information to the applicable apprenticeship committees and request dispatch of apprentices for employed crafts?
- Is Bannaoun liable for penalties under sections 1775, 1813, 1776, and 1777.7, and did DLSE apply the correct penalty rates?
- Is Bannaoun liable for liquidated damages?

For the reasons set forth below, the Director of Industrial Relations finds that DLSE carried its burden of presenting evidence at the Hearing that provided prima facie support for the amended Assessment. (See Cal. Code Regs., tit. 8, § 17250, subds. (a).) This evidence stood unrebutted as no representative appeared for Bannaoun. Accordingly, the Director issues this Decision affirming the amended Assessment.

FACTS

Failure to Appear.

On August 26, 2016, Bannaoun requested review of the Assessment by way of a letter from its Chief Executive Officer Omar Maloof. Maloof appeared at all six telephonic prehearing conferences preceding the Hearing on the Merits, including the prehearing conference on

October 29, 2018, at which the Hearing on the Merits was set for February 27, 2019. On February 27, 2019, neither Maloof nor any other representative of Bannaoun appeared at the duly noticed Hearing on the Merits. At the designated time for the Hearing, when Bannaoun did not appear, the Hearing Officer phoned Bannaoun at its telephone number of record, but no one answered.

The Hearing Officer proceeded to conduct the Hearing on the Merits as noticed and scheduled for the purpose of formulating a recommended decision as warranted by the evidence. (See Cal. Code Regs., tit. 8, § 17246, subd. (a) [“Upon the failure of any Party to appear at a duly noticed hearing, the Hearing Officer may proceed in that Party’s absence and may recommend whatever decision is warranted by the available evidence, including any lawful inferences that can be drawn from an absence of proof by the non-appearing Party”].) DLSE’s evidentiary Exhibits Nos. 1 – 42 were admitted into evidence without objection, except that DLSE withdrew Exhibits 14, 17, 30 and 35. The matter was submitted on the evidentiary record based on the admitted exhibits and Roman’s testimony.

Amended Assessment.

The testimony of Roman and the exhibits admitted into evidence support the facts set forth below.

On May 14, 2015, Lynwood advertised an invitation to accept bids for the Project. Bannaoun, as the general contractor, entered into a public works contract with Lynwood to complete the Project.

Twenty-nine workers performed work on the Project, with the first day of work on August 3, 2015, and the final day of work on December 5, 2015. The trades employed on the Project were Laborer, Cement Mason, Operating Engineer and Teamster. For each of these trades, DLSE submitted as an exhibit the prevailing wage rate determination (PWD) effective for the bid advertisement date of May 14, 2015.

The evidence establishes that Bannaoun failed to pay its workers the required prevailing wage rates for a total of \$130,622.13 in underpaid wages and also failed to pay training fund contributions of \$2,779.56 on the Project. At the hearing, Roman testified as to the failure by Bannaoun to pay the full, straight time prevailing wages, additional amounts for overtime, and training fund contributions.

First, for 26 of the workers, DLSE relied upon the hours worked by each worker and the classifications of each worker as Bannaoun reported in the CPRs. DLSE multiplied the hours worked by the prevailing wage rate stated on the PWD applicable to each worker to determine the total wages due each worker. DLSE determined from its calculation and other evidence it obtained that Bannaoun had underpaid certain workers, as described below. In response to DLSE's request, Bannaoun produced copies of some paycheck stubs. Also, DLSE received copies of paychecks and paycheck stubs from three workers it interviewed – Rodolfo Hernandez, Manual Dominguez and Rafael Cruz. Each paystub states a gross wage, payroll deductions (federal income tax, Social Security, Medicare, state income tax and state disability), and the resulting net sum paid to the worker. However, DLSE presented prima facie evidence, including statements made by Hernandez, Dominguez and Cruz, that Bannaoun never paid over the payroll deductions to the applicable government agencies. Therefore the sole consideration the workers received was the net amount of each paycheck. DLSE then gave credit to Bannaoun for the wages actually paid and calculated the sum that Bannaoun had underpaid.

Second, for two of the workers, Hernandez and Dominguez, DLSE used the classification that Bannaoun reported in the CPRs. Hernandez and Dominguez provided DLSE evidence of the actual hours they worked on the Project. Using that evidence and the rates in the PWDs applicable to the two workers, DLSE determined the total wages due to each of them. DLSE then gave credit to Bannaoun for the paid wages as reported in the CPRs and calculated the sum that Bannaoun had underpaid.

Third, worker Cruz provided DLSE with evidence establishing that Bannaoun incorrectly classified him solely as Laborer, when in fact he worked various hours in the trades of Operating Engineer and Teamster as well. Cruz provided DLSE with further evidence showing Bannaoun under-reported the hours he worked on the Project. DLSE determined from that evidence the amount of hours that Cruz had worked on the Project in each of the three trades, and calculated the total wages due Cruz based on the rates contained in the respective PWDs. DLSE then gave credit to Bannaoun for the paid wages for Cruz as reported in the CPRs and calculated the sum that Bannaoun had underpaid.

The unpaid wages for the 29 workers as listed in the amended Assessment totaled \$130,622.13.

DLSE also assessed \$111,000.00 in penalties under section 1775, at the rate of \$200.00 per violation for 555 instances of failure to pay the applicable prevailing wages. DLSE Senior Deputy Lorna Espiritu did not mitigate the penalty rate due to evidence of willful intent to violate prevailing wage law. Further, DLSE added section 1813 penalties at \$25.00 a day per worker for each overtime pay violation, totaling \$1,150.00.

As to the assessment of the section 1776 penalty, according to the uncontroverted testimony of Roman and relevant exhibits, Bannaoun received DLSE's request for CPRs on June 24, 2016. The CPRs were due within ten business days from receipt of the request, such that the response was due on July 11, 2016.² As of the issuance of the Assessment on August 8, 2016, Bannaoun had not produced CPRs to DLSE. DLSE calculated the section 1776 penalty period to commence on July 12, 2016, and end on August 8, 2016, for a total of 28 days. As of the issuance of the Assessment, DLSE was aware of only 16 workers on the Project. Accordingly, the section 1776 penalty was calculated at \$100.00 for 16 workers for 28 days for a total of \$44,800.00.³

Additionally, Roman testified that Bannaoun failed to provide public works contract award information to the applicable apprenticeship committees for the trades of Cement Mason and Teamster, Bannaoun failed to request apprentices from those apprenticeship committees, and Bannaoun failed to hire any apprentices in those trades. DLSE assessed a section 1777.7 statutory penalty of \$12,400.00, at the rate of \$100.00 per day for the 124-day period commencing the day after the first day a journeyman Cement Mason worked on the Project, August 4, 2015, and ending the last day a journeyman of any craft performed work on the Project, December 5, 2015.

DISCUSSION

The California Prevailing Wage Law (CPWL), set forth at Labor Code sections 1720 et seq., requires the payment of prevailing wages to workers employed on public works

² DLSE's request for CPRs specified that the response was due ten business days from receipt.

³ It was not until DLSE subsequently obtained the CPRs that DLSE learned there were a total of 29 workers. DLSE did not move to increase the section 1776 penalty, however, so it remained at \$44,800.00.

construction projects. The purpose of the CPWL was summarized by the California Supreme Court in one case as follows:

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 (*Lusardi*).

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 *Lusardi*, at p. 985.)

Section 1775, subdivision (a), requires, among other provisions, that contractors and subcontractors pay the difference to workers who received less than the prevailing wage rate, and also prescribes penalties for failing to pay the prevailing wage rate. The prevailing rate of per diem wage includes travel pay, subsistence pay, and training fund contributions pursuant to section 1773.1. Section 1775, subdivision (a)(2), grants the Labor Commissioner the discretion to mitigate the statutory maximum penalty per day in light of prescribed factors.

Section 1742.1, subdivision (a), provides for the imposition of liquidated damages, essentially a doubling of the unpaid wages, if those wages are not paid within 60 days following the service of a civil wage and penalty assessment under section 1741. Under section 1742.1, subdivision (b), a contractor may entirely avert liability for liquidated damages if, within 60 days from issuance of the CWPA, the contractor deposits into escrow with the Department of Industrial Relations (DIR) the full amount of the assessment of unpaid wages, plus the statutory penalties under sections 1775. In addition, in August 2016 when the Assessment was issued, former section 1742.1 allowed the Director to exercise his or her discretion to waive the liquidated damages if the contractor demonstrated it had substantial grounds to appeal the

assessment.⁴

Section 1813 requires that workers are compensated for overtime pay pursuant to section 1815 when they work in excess of eight hours per day or more than 40 hours during a calendar week, and imposes a penalty of \$25.00 per day per worker per violation. Unlike 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.

Employers on public works must keep accurate payroll records recording the work classification, straight time and overtime hours worked and actual per diem wages paid for each employee, among other information. (§ 1776, subd. (a).) This is consistent with the requirements for construction employers in general, who are required to keep accurate records of the hours employees work and the pay they receive. (Cal. Code Regs., tit. 8, § 11160, subd. 6.) The format for reporting of payroll records requested pursuant to section 1776 must be on a form provided by DLSE, or in another format that contains all the required information. (See Cal. Code Regs., tit. 8, § 16401, subd. (a).) “Acceptance of any other format [other than the DLSE form] shall be conditioned upon the requirement that the alternate format contain all of the information required pursuant to Labor Code Section 1776.” (*Id.*) The contractor has ten days to comply subsequent to receipt of a written notice requesting CPRs. (§ 1776, subd. (h).) If a contractor fails to comply within the ten day period, it is subject to a penalty of \$100.00 for each calendar day, or portion thereof, for each worker, “until strict compliance is effectuated.” (*Id.*)

In general, and unless an exemption applies, section 1777.5 and the applicable regulations require the hiring of apprentices to perform one hour of work for every five hours of work performed by journeypersons in the applicable craft or trade. (Cal. Code Regs., tit. 8, §

⁴ On June 27, 2017, the Director’s discretionary waiver power was deleted from section 1742.1 by Senate Bill 96. (Stats. 2017, ch. 28, § 16 (SB 96).) Legislative enactments are to be construed prospectively rather than retroactively, unless the legislature expresses its intent otherwise. (*Elsner v. Uveges* (2004) 34 Cal.4th 915, 936.) Further, “[a] statute is retroactive if it substantially changes the legal effect of past events.” Here, the law in effect at the time the civil wage and penalty assessment was issued (August 8, 2016) allowed a waiver of liquidated damages in the Director’s discretion, as specified, which could have influenced the contractor’s decision as to how to respond to the assessment. Applying the current terms of section 1742.1 as amended by SB 96 in this case would have retroactive effect because it would change the legal effect of past events (i.e., what the contractor elected to do in response to the assessment). Accordingly, this Decision finds that the Director’s discretion to waive liquidated damages in this case under section 1742.1, subdivision (a) is unaffected by SB 96.

230.1, subd. (a).) Prior to commencing work on a contract for public works, every contractor must submit contract award information to applicable apprenticeship programs that can supply apprentices to the project. (§ 1777.5, subd. (e).) The Division of Apprenticeship Standards (DAS) has prepared form DAS 140 that a contractor may use to submit contract award information to an applicable apprenticeship committee. (Cal. Code Regs., tit. 8, § 230, subd. (a).)

A contractor does not violate the requirement to employ apprentices in the 1:5 ratio if it has properly requested the dispatch of apprentices and no apprenticeship committee in the geographic area of the public works project dispatches apprentices during the pendency of the project, provided the contractor made the request in enough time to meet the required ratio. (Cal. Code Regs., tit. 8, § 230.1, subd. (a).) DAS has prepared another form, DAS 142, which a contractor may use to request dispatch of apprentices from apprenticeship committees. Thus, the contractor is required to both notify apprenticeship programs of upcoming opportunities and to request dispatch of apprentices.

When DLSE determines that a violation of the prevailing wage laws has occurred, including with respect to any violation of the apprenticeship and/or CPR requirements, 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. The request for review is transmitted to the Director, who assigns an impartial hearing officer to conduct a hearing in the matter as necessary. (§ 1742, subd. (b).) At the hearing, DLSE has the initial burden of producing evidence that “provides prima facie support for the Assessment” (Cal. Code Regs., tit. 8, § 17250, subd. (a).) When that burden is met, “the Affected Contractor or Subcontractor has the burden of proving that the basis for the Civil Wage and Penalty Assessment ... is incorrect.” (Cal. Code Regs., tit. 8, § 17250, subd. (b); accord, § 1742, subd. (b).) At the conclusion of the hearing process, the Director issues a written decision affirming, modifying or dismissing the assessment. (§ 1742, subd. (b).)

In this case, the record establishes the basis for the Assessment (as amended). DLSE presented evidence at the Hearing on the Merits supporting all elements of the Assessment. Bannaoun presented no evidence at the Hearing, and accordingly, failed to disprove the basis for

the Assessment. Moreover, failing to appear, Bannaoun presented no substantial grounds for appealing the Assessment that would justify the waiver of liquidated damages.

FINDINGS AND ORDER

1. Bannaoun Engineers Constructors Corporation underpaid its workers \$130,622.13 in prevailing wages

2. Unpaid training fund contributions are due from Bannaoun Engineers Constructors Corporation in the amount of \$2,779.56.

3. Penalties under section 1775 are due from Bannaoun Engineers Constructors Corporation in the amount of \$111,000.00 for 555 violations at the unmitigated rate of \$200.00 per violation.

4. Penalties under section 1813 are due from Bannaoun Engineers Constructors Corporation in the amount of \$1,150.00 for 46 violations at \$25.00 per violation.

5. Penalties under section 1776 are due from Bannaoun Engineers Constructors Corporation in the amount of \$44,800.00 for 16 workers at \$100 per violation for 28 days.

6. Liquidated damages are due from Bannaoun Engineers Constructors Corporation in the full amount of the unpaid wages, \$130,622.13.

7. Penalties under section 1777.7 are due from Bannaoun Engineers Constructors Corporation in the amount of \$12,400.00.

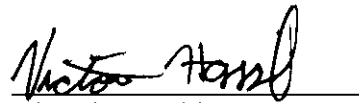
8. The amounts found due from Bannaoun Engineers Constructors Corporation in the Assessment as affirmed by this Decision are as follows:

Wages due:	\$130,622.13
Training Fund contributions:	\$2,779.56
Penalties under section 1775, subdivision (a):	\$111,000.00
Penalties under section 1813:	\$1,150.00
Penalties under section 1776:	\$44,800.00
Penalties under section 1777.7:	\$12,400.00
Liquidated damages:	<u>\$130,622.13</u>
TOTAL:	\$433,373.82

In addition, interest is due from Bannaoun Engineers Constructors Corporation and shall accrue on unpaid wages in accordance with section 1741, subdivision (b).

The Civil Wage and Penalty Assessment, as amended by Order issued on January 11, 2018, and as further amended in the Hearing on the Merits on February 27, 2019, is affirmed. The Hearing Officer shall issue a Notice of Findings, which shall be served with this Decision on the parties.

Dated: September 9, 2019



Victoria Hassid
Chief Deputy Director
Department of Industrial Relations⁵

⁵ See Government Code sections 7, 11200.4.