

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

California Averland Construction, Inc.

Case No. 18-0340-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected contractor California Averland Construction, Inc. (Averland) submitted a timely request for review of the Civil Wage and Penalty Assessment (Assessment) issued on August 1, 2018, by the Division of Labor Standards Enforcement (DLSE) with respect to the Old Town Temecula Community Theater Remediation project (Project) for the City of Temecula (City) in Riverside County. The Assessment asserted that \$82,038.04 in unpaid prevailing wages and penalties were due for violations under Labor Code section 1775 and Labor Code section 1813, respectively.¹

A duly noticed Hearing on the Merits was conducted on July 24, 2019, in Los Angeles, California, before Hearing Officer John J. Korbol. Jenifer A. Aikman appeared as counsel for DLSE; there was no appearance by or on behalf of Averland. The Hearing Officer proceeded to conduct the Hearing on the Merits in Averland's absence to formulate a recommended decision as warranted by the evidence, pursuant to California Code of Regulations, title 8, section 17246, subdivision (a).

Prior to the Hearing on the Merits, DLSE presented an amended audit that lowered the unpaid prevailing wages from \$33,553.04 to \$25,737.56, and reduced the penalties from \$48,485.00 to \$38,270.00, exclusive of unpaid training fund contributions of \$474.58. At the Hearing, DLSE moved to amend the Assessment accordingly. There being no prejudice to Averland, the Hearing Officer granted the motion.

¹ All further section references are to the California Labor Code, unless otherwise specified.

Also prior to the Hearing, DLSE had provided notice of its intention to introduce as evidence the affidavits of Francisco Rodriguez, Pedro Rodriguez, Ernesto Zavala, Edwin Rodriguez, Landon Georgianna, Pablo Rodriguez, Vicente Calzada, and Elias Hernandez, in lieu of live oral testimony, pursuant to California Code of Regulations, title 8, section 17234. All of the affiants had been employed as workers on the Project by Averland. Averland did not serve a notice of a request to cross-examine the affiants as provided by the applicable regulation. At the Hearing, DLSE moved to have the affidavits admitted into the record as evidence without oral testimony or cross-examination. The Hearing Officer granted the motion. DLSE's documentary exhibits were also admitted into evidence without objection. Deputy Labor Commissioner Norbert Flores testified in support of the Assessment, and the matter was submitted on the evidentiary record. Averland filed no motion seeking relief from its non-appearance, as permitted under California Code of Regulations, title 8, section 17246, subdivision (b). The Hearing was concluded and the matter was deemed submitted for decision on July 24, 2019.

The issues for decision are:

- Did DLSE's audit use the correct prevailing wage classifications for the workers employed by Averland on the Project?
- Did Averland pay the required prevailing wages for all hours worked on the Project?
- Did Averland pay the required pre-determined wage increases for workers employed by Averland on the Project?
- Did Averland pay the required training fund contributions for all hours worked on the Project?
- Is Averland liable for penalties under section 1775, and did DLSE properly assess such penalties?
- Is Averland liable for penalties under section 1813?
- Is Averland entitled to a waiver of liquidated damages under section 1742.1?

For the reasons set forth below, the Director of Industrial Relations finds that DLSE carried its initial burden of presenting evidence at the Hearing that provided prima facie support for the Assessment as amended, and that Averland failed to carry its burden of proving that the basis of the Assessment was incorrect. (See Cal. Code Regs., tit. 8, § 17250, subds. (a), (b).) Accordingly, the Director issues this Decision affirming the Assessment as amended.

FACTS

The facts stated below are based on DLSE Exhibit Numbers 1 and 3-35, the testimony of Flores, and the contents of the Hearing Officer's file.

Failure to Appear.

Averland never appeared in these proceedings after it filed the Request for Review. Averland did not appear for the duly noticed Prehearing Conferences on January 28, and February 25, 2019. Neither DLSE nor the Hearing Officer were contacted by a representative of Averland at any time before the date of the Hearing. There was no appearance by or on behalf of Averland at the Hearing.

The Assessment.

On October 30, 2014, the City advertised for bids on the Project. The City awarded a contract, which Averland and the City entered into on December 4, 2014 (Contract). Pursuant to the Contract, Averland agreed to renovate and repair the Old Town Temecula Community Theater. The work to be performed under the Contract included: removing and replacing guardrails, handrails, building accessories, signage, stairs, wood siding, and metal cladding; repairing roof surfaces; constructing structural deck framing, and installing doors, deck finishes, and door frames. The scope of work under the Contract required demolition and carpentry. Fifty-three workers employed by Averland performed work on the Project beginning March 1, 2015. The Project was completed on January 24, 2017. The City recorded a Notice of Completion on February 1, 2017.

According to Averland's certified payroll records (CPRs), its workers were classified and paid as Laborers, Laborer Apprentices, Carpenters, or Carpenter Apprentices. The prevailing wage determinations (PWDs) and scopes of work in effect on the bid advertisement date for these crafts are embodied in the PWD for Carpenter and Related Trades (SC-23-31-2-2014-1) and the PWD for Laborer and Related Classifications (SC-23-102-2-2014-1). The PWD for Carpenters included a predetermined wage increase for Carpenter Apprentices that became effective July 1, 2015. Under the predetermined wage increase, the hourly base pay for Carpenter Apprentices went up from \$31.44 to \$32.54, the training fund contribution increased from 47 cents per hour to 57 cents per hour, and the fringe benefit payment increased from \$13.00 per hour to \$13.80 per hour.

The Assessment, as amended, asserted that some of Averland's workers had been misclassified and underpaid in the collective amount of \$25,737.56.² The amended Assessment asserted section 1775 penalties were due at the rate of \$120.00 per violation, in the total amount of \$37,920.00 based on 316 instances on which the workers were underpaid prevailing wages. The amended Assessment also asserted section 1813 penalties were due at the rate of \$25.00 per violation, in the total amount of \$350.00 for 29 instances of failing to pay overtime.

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 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

² In addition to the \$25,737.56 in underpaid wages, the amended Assessment asserted unpaid training fund contributions of \$474.58.

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); see also *Lusardi*, at p. 985.)

Section 1775, subdivision (a), requires, among other provisions, that contractors and subcontractors pay the difference to workers paid less than the prevailing rate and also prescribes penalties for failing to pay the prevailing 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.

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, § 230.1, subd. (a).) Section 1777.5, subdivision (h), requires contractors to “endeavor, to the greatest extent possible, to employ apprentices during the same time period that the journey[persons] in the same craft or trade are employed at the jobsite.” The Department has adopted a regulation implementing this statutory directive, stating that “apprentices employed on public works must at all times work with or under the direct supervision of journey [persons].” (Cal. Code Regs. tit. 8, §230.1, subd. (c).)

When DLSE determines that a violation of the prevailing wage laws has occurred,

including with respect to any violation of the apprenticeship requirements, it may issue a written civil wage and penalty assessment pursuant to section 1741. An affected contractor or subcontractor may appeal the Assessment by filing a Request for Review under section 1742. The Request for Review is transmitted to the Director of the Department of Industrial Relations, who assigns an impartial hearing officer to conduct a hearing in the matter as necessary. (§ 1742, subd. (b).) At the hearing, DLSE has the burden of producing evidence that “provides prima facie support for the Assessment ...” (Cal. Code Regs. tit. 8, § 17250, subd. (a).) When that initial burden is met, the contractor or subcontractor “shall have the burden of proving that the basis for the civil wage and penalty assessment is incorrect.” (Cal. Code Regs. tit. 8, § 17250, subd. (a); 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 that DLSE presented prima facie support for the Assessment, and Averland failed to prove the basis for the Assessment was incorrect. Flores testified about the content of the Assessment, the underlying audit, and the subsequent assessment. In the course of conducting his audit and gathering information about Averland’s prevailing wage violations, Flores interviewed some of Averland’s workers and asked them to describe the work they did on the Project. These workers filled out calendars to reflect their recollection of days and hours worked, notably including unreported overtime hours. Flores assisted the workers in the preparation of their affidavits. He reviewed the Contract and the PWDs for Laborers and Carpenters, including the scopes of work covered by these classifications. He reviewed Averland’s CPRs and noted discrepancies between the CPRs and the complaints by the workers he had interviewed, especially as to an apparent underreport of hours worked and the misclassification of workers paid as Laborers instead of the higher rates for Carpenters. Flores obtained a cell phone photograph with an embedded date to conclude that at least some work was performed on one particular

Saturday. He also noted that according to Averland's own CPRs, some apprentices employed on the Project worked some days without the presence of a journeyman. All of this evidence was unrebutted in light of Averland's failure to participate in the Hearing.

The following prevailing wage violations were detected by Flores and included in the amended Assessment. These violations are substantiated by the evidence produced by DLSE at the Hearing.

Averland underreported the hours worked by Laborers on the Project, resulting in underpayment. Eight of Averland's workers performed work on the Project that was not reported on the CPRs. The underreported hours were mainly for overtime work done on Saturdays. In some instances, the workers were not paid for this work. In others, the workers were underpaid in the form of cash payments from Averland.

Averland failed to pay Carpenters at the applicable overtime rate. Two Averland workers employed as Carpenters were paid for Saturday overtime at the one and one-half times the straight hourly rate. The PWD required double time for Saturday work. The Assessment properly asserted these two workers to have been underpaid for their Saturday overtime hours.

Averland misclassified some of its workers. Four of Averland's workers were paid as Laborers on the Project when, in reality, they performed carpentry work throughout. Despite this, Averland listed these workers as Laborers on the CPRs and paid them at the lower Laborer rate rather than the higher Carpenter rate. The Assessment properly reclassified these four workers as Carpenters and determined that they had been underpaid.

Averland failed to pay a predetermined wage increase. Under the Carpenter PWD, Carpenter Apprentices were to have had their hourly wage automatically increased as of July 1, 2015. However, Averland failed to implement the predetermined wage increase for two of the Carpenter Apprentices employed on the Project. The Assessment properly determined that these two apprentices were underpaid on an

hourly basis for their work performed on and after July 1, 2015.

Apprentices were employed on the Project without the presence of journeypersons. According to the CPRs, Averland regularly put apprentices to work on the Project without the benefit of having journeypersons of the same classification on the Project site for guidance and supervision. DLSE properly determined that this practice was illegal and it upgraded the classification of five apprentices who were so employed. DLSE properly determined that, on those days when journeypersons were absent, Averland was not entitled to classify those five workers as apprentices for the purpose of paying them the lower apprentice wage rate.

Averland did not pay all training fund contributions due. Due to the underreported hours on the CPRs, DLSE properly determined that Averland failed to pay all training fund contributions required for its work on the Project. The shortfall takes into consideration the training fund contributions that were paid by Averland as recorded by the California Apprenticeship Council.

Given Averland's failure to appear and participate in the Hearing, Averland has failed to carry its burden to prove the Assessment is incorrect. It must be concluded that the workers employed on the Project by Averland were underpaid in the aggregate amount of \$25,737.56, and Averland underpaid training fund contributions in the amount of \$474.58.

DLSE's Penalty Assessment Under Section 1775 Was Proper.

Section 1775, subdivision (a)(2)(B)(iii), states that the penalty for failure to pay the required prevailing wage rates may not be less than \$120.00 if the Labor Commissioner determines that the violation was willful, as defined in subdivision (c) of section 1777.1.³ Section 1775, subdivision (a)(2)(D), provides that the determination of the Labor Commissioner as to the amount of the penalty shall be reviewable only for

³ The reference in section 1775, subdivision (a)(2)(B)(iii) to section 1777.1, subdivision (c) is mistaken. The correct reference is to section 1777.1, subdivision (d). According to that subdivision as it existed on the October 30, 2014 date of the bid advertisement, a willful violation is defined 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."

an abuse of discretion. Abuse of discretion is established if the "agency's nonadjudicatory action . . . is inconsistent with the statute, arbitrary, capricious, unlawful, or contrary to public policy." (*Pipe Trades v. Aubry* (1996) 41 Cal.App.4th 1457, 1466.) In reviewing for abuse of discretion, however, the Director is not free to substitute his or her own judgment "because in [his or her] 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 DLSE abused its discretion in determining that a penalty was due or in determining the amount of the penalty." (Cal. Code Regs., tit. 8, § 17250, subd.(c).)

DLSE assessed section 1775 penalties at the rate of \$120.00 based on Averland's intentional misclassification and underpayment of its workers 316 instances. The penalty rate of \$120.00 per violation was chosen because Averland had three other assessments pending at the time this one was issued. The burden was on Averland to prove that DLSE abused its discretion in setting the penalty amount at the rate of \$120.00 per violation. Averland failed to carry that burden and the penalty assessment in the amount of \$37,920.00 will be affirmed.

Averland Is Liable for Liquidated Damages.

Section 1742.1, subdivision (a), provides for the imposition of liquidated damages (essentially a doubling of unpaid wages) if those wages are not paid within 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 assessment, the contractor deposits into escrow with the Department the full amount of the assessment of unpaid wages, plus the statutory penalties under section 1775. There is no evidence that

Averland made such a deposit with the Department, or that any of the assessed wages were paid within 60 days.

Accordingly, with the finding that unpaid prevailing wages are due and owing, Averland is liable for liquidated damages in the amount of \$25,737.56.

Based on the foregoing, the Director makes the following findings:

FINDINGS

1. DLSE timely served the Civil Wage and Penalty Assessment on California Averland Construction, Inc. with respect to the Project.

2. Affected contractor California Averland Construction, Inc. filed a timely Request for Review of the Civil Wage and Penalty Assessment issued by DLSE with respect to the Project.

3. California Averland Construction, Inc. underpaid its workers in the amount of \$25,737.56 in prevailing wages.

4. Penalties under Labor Code section 1813 are due from California Averland Construction, Inc. in the amount of \$350.00 for 14 violations at the rate of \$25.00 per violation.

5. The Labor Commissioner did not abuse her discretion in assessing penalties against California Averland Construction, Inc. under section 1775 at the rate of \$120.00 per violation for 316 violations, for a total amount of \$37,920.00.

6. Because none of the unpaid prevailing wages were paid within 60 days after service of the Assessment, liquidated damages are due from California Averland Construction, Inc. in the amount of \$25,737.56.

7. California Averland Construction, Inc. underpaid the required training fund contributions in the amount of \$474.58.

8. The amounts asserted in the amended Assessment to be due, and affirmed by this Decision, are as follows:

Wages Due	\$25,737.56
Training Fund Contributions	\$474.58
Penalties under section 1775, subd. (a):	\$37,920.00
Penalties under section 1813:	\$350.00
Liquidated Damages:	\$25,737.56
TOTAL:	\$90,219.70

In addition, interest is due and shall continue to accrue on all unpaid wages as provided in section 1741, subdivision (b).

ORDER

The amended 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: December 24, 2019

/S/ Victoria Hassid
Victoria Hassid,
Chief Deputy Director
Department of Industrial Relations⁴

⁴ See Government Code sections 7 and 11200.4.