

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Reliable Tree Experts

Case No. 08-0018-PWH

From a Notice of Withholding issued by:

California Department of Transportation

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected contractor Reliable Tree Experts (“Reliable”) submitted a timely request for review of a Notice of Withholding (“Notice”) issued by the California Department of Transportation (“Caltrans”) with regard to tree pruning and removal work performed by Reliable at various locations within Marin, Solano and Sonoma Counties (“the Project”). A Hearing on the Merits was conducted on December 11, 2008, in San Francisco, California before Hearing Officer Nathan D. Schmidt. Jason Curliano appeared for Reliable, and Cheryl Pirtle appeared for Caltrans.

The primary issues to be decided are whether the Project was subject to the payment of prevailing wages, and, if so, whether the correct classification for the work that is the subject of the Notice was Laborer, Construction Specialist. In this Decision, the Director finds that the Project constitutes “maintenance,” as defined by California Code of Regulations, title 8, section 16000, and is subject to the payment of prevailing wages pursuant to Labor Code section 1771.¹ The correct rate of pay for the work that is the subject of the Notice is Laborer, Construction Specialist (“Laborer”). Therefore, the Director of Industrial Relations’ decision affirms the Notice.

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

SUMMARY OF FACTS

Reliable, the prime contractor for the Project, contracted with Caltrans on or about March 22, 2006, to perform tree pruning and removal work on highway right-of-ways at various locations within Marin, Solano and Sonoma Counties. Reliable employees worked on the Project from approximately May 13, 2006, to January 12, 2007.

The Notice found that Reliable paid one of its workers, Ernesto Beltran ("Beltran"), at the Tree Trimmer (High Voltage Line Clearance), Climber ("Tree Trimmer") pay rate rather than the Laborer rate for 37 days of work between June 29, 2006, and August 30, 2006. On the days subject to the Notice, Beltran did not work near high voltage lines.² As a result of the pay misclassification, the Notice found that Beltran had been underpaid prevailing wages in the amount of \$2,816.11.

Caltrans found that the violations were willful and support the imposition of penalties under section 1775 at \$30.00 per violation. Caltrans further found that a single penalty of \$25.00 for failing to pay the correct overtime rate was due.

The relevant prevailing wage determinations ("PWDs") are: C-TT-2004-2 (Tree Trimmer); NC-LML-2000-1 (Landscape Maintenance Laborer ("Landscape Maintenance")); and NC-23-102-1-2005-1 (Laborer).

The Scope of Work for Tree Trimmer, which is the rate Beltran received, states in part:

This classification is to be utilized for the maintenance of high voltage distribution and transmission electrical lines only. It shall not be utilized in connection with public work projects involving demolition work, landscape construction, etc.

Contractors may not utilize this classification for the removal of trees, stumps and general landscaping projects. (emphasis added.)

The Scope of Work for Landscape Maintenance, which is the rate Reliable now claims is due, describes the work covered under the classification as including:

² The Notice did not include any hours worked by Beltran on August 22, August 23 or August 29, 2006, in its calculation of underpaid prevailing wages.

ROUTINE – mowing, watering, pruning, trimming, weeding, spraying, occasional planting and replacement of plants and janitorial work incidental to such landscape maintenance.

COMPLEX – servicing of irrigation and sprinkler systems, repairing of equipment used in such landscape maintenance.

Note: This determination does not apply to work of a landscape laborer employed on landscape construction (work incidental to construction or post-construction maintenance during the plant installation and establishment period).

The scope of work for Laborer, which is the rate used in the Notice, includes the sub-classification of “Chainsaw.”³

On December 5, 2005, Caltrans solicited bids for the Project through a Public Notice. The Project’s scope of work was described as: “Highway Planting Restoration (Remove and Prune Diseased Trees).” The Public Notice and the later Pre-Construction Labor Compliance Conference checklist (signed by Jim Mussels, Reliable’s Vice President), both stated that prevailing wages were required.

Reliable’s work on the Project was conducted on state owned highway rights-of-way, and included brush removal, tree trimming and tree removal. Approximately 80% of the trees were diseased and therefore were removed; the remaining 20% were trimmed and left in place. Reliable’s contract with Caltrans was for one-time work and did not involve ongoing maintenance of the subject trees by Reliable once they had been trimmed or removed. Caltrans, however, has a continuing obligation to maintain the rights-of-way and has awarded contracts to Reliable and other contractors for this purpose.

From June 29 to August 30, 2006, Reliable paid Beltran at, or slightly above, the Tree Trimmer rate of pay, according to Reliable’s certified payroll records. Beltran worked three-quarters of an hour of overtime on August 8, 2006, for which he was paid at the rate of \$36.30 per hour.

³ There is an additional Laborer classification (Group I), which includes “tree climber” in its scope of work. Since no party advocated its use, the Director will not consider it here.

On or about July 14, 2006, Caltrans informed Reliable that the correct rate of pay for its workers on the Project was Laborer because the Tree Trimmer classification pay rate could only be used for work in the vicinity of high voltage electrical lines. Thus, the Tree Trimmer rate of pay was improper for the majority of Reliable's work on the Project. Reliable paid its workers at the Laborer rate from September 8, 2006, through the conclusion of the Project. Reliable also paid 13 of its workers, including Beltran, restitution in the amount of the difference between their actual pay and the Laborer rate of pay for the period from the commencement of work on the Project to September 7, 2006.

However, Reliable's \$2,816.12 restitution check to Beltran was returned by the bank due to insufficient funds. Caltrans wrote to Reliable on August 23, 2007, requesting that the returned check be replaced by a cashiers check to Beltran for the same amount on or before August 30, 2007. Reliable did not provide a replacement restitution check for Beltran, and the Notice issued on December 17, 2007. As of the date of hearing, Reliable had not paid the unpaid wages owing under the Notice.

DISCUSSION

Sections 1720 and following set forth a scheme for determining and requiring the payment of prevailing wages to workers employed on public works 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].) An Awarding Body with a Labor Compliance Program such as Caltrans 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(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 notice of withholding under section 1741.

When Caltrans determines that a violation of the prevailing wage laws has occurred, a Notice of Withholding of Contract Payments is issued pursuant to section 1741. An affected contractor or subcontractor may appeal the Notice by filing a Request for Review under Labor Code section 1742. Subdivision (b) of section 1742 provides in part that the contractor or subcontractor shall have the burden of proving that the basis for the Notice of Withholding is incorrect.

Reliable's Work On The Project Is Subject To Prevailing Wage Requirements.

Section 1771 requires that prevailing wages must be paid to workers employed on public works projects:

Except for public works projects of one thousand dollars (\$1,000) or less, not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the public work is performed, and not less than the general prevailing rate of per diem wages for holiday and overtime work fixed as provided in this chapter, shall be paid to all workers employed on public works.

This section is applicable only to work performed under contract, and is not applicable to work carried out by a public agency with its own forces. **This section is applicable to contracts let for maintenance work.** (Emphasis added.)

California Code of Regulations, title 8, section 16001, subdivision (f), states that “[p]ublic works contracts for maintenance are subject to prevailing wage rate payment as set forth in Section 1771 of the Labor Code.”

“Maintenance” is defined by California Code of Regulations, title 8, section 16000 as including:

- (1) Routine, recurring and usual work for the preservation, protection and keeping of any publicly owned or publicly operated facility (plant, building, structure,

ground facility, utility system or any real property) for its intended purposes in a safe and continually usable condition for which it has been designed, improved, constructed, altered or repaired.

* * *

(3) Landscape maintenance. See Public Contract Code Section 21002.⁴

There is no dispute that the state highway rights-of-way on which the Project's work occurred are public property. Reliable argues, however, that the work was not "routine, recurring and usual" because Reliable's contract did not require it to perform ongoing maintenance of the subject trees once they had been trimmed or removed. When determining whether work is "routine, recurring and usual," the fact finder's focus must be on the **work** in terms of the property being worked on, not the terms of an individual contract. The circumstances that future maintenance of the sections of right-of-way included in the Project may not be performed by Reliable, or that specific trees that were removed will not need future trimming, do not, by themselves, convert the Project from maintenance into a class of work exempt from the prevailing wage law. The work subject to the Notice "clearly constitute[d] maintenance work." (*Franklin v. City of Riverside* (1962) 58 Cal.2d 114, 115-116.)⁵

Reliable mistakenly relies on a prior public works coverage determination that a tree removal project by the San Bernardino County Fire Department did not constitute maintenance for public works purposes. [Public Works Case Number 2005-026, *Tree Removal, County of San Bernardino Fire Department* (November 18, 2005).]⁶ The San Bernardino County project involved contracts to remove dead, dying and diseased trees located on **private** property that posed a fire risk; the work was not to be repeated. The Director found that the San Bernardino County

⁴ Public Contract Code section 21002, subdivision (d) (4) defines "Landscape maintenance" as "including mowing, watering, trimming, pruning, planting, replacement of plants, and servicing of irrigation and sprinkler systems."

⁵ At the time *Franklin* was decided, section 1771 explicitly excluded maintenance from prevailing wage obligations, and the Supreme Court ruled that the project was not public work under the then existing exclusion for maintenance under that section. Since *Franklin*, section 1771 has been amended to include maintenance. (*infra*)

⁶ The Department's public works coverage determinations are not precedential, and thus are not binding beyond the project that is the subject of the determination. Public notice of the Department's September 4, 2007, decision to discontinue the use of precedent decisions can be found at [www.dir.ca.gov/DLSF/09-06-2007\(pwcd\).pdf](http://www.dir.ca.gov/DLSF/09-06-2007(pwcd).pdf).

project was not maintenance because the work was being performed on private property and not on a “publicly owned or publicly operated facility,” as required by section 16000. Further, the Director found that the work would be performed one time only, so it was not work of a routine, recurring or usual nature.

Even if the work constitutes maintenance, Reliable contends that standalone maintenance contracts that are not part of a larger public work are not subject to prevailing wage requirements because maintenance is never “construction, alteration, demolition, installation, or repair.” (§1720(a)(1).⁷) Reliable’s argument that section 1771 requires that the maintenance work meet the definition of public work in section 1720(a)(1) was rejected in *Reclamation District No. 684 v. Department of Industrial Relations* (2005) 125 Cal.App.4th 1000, 1005, fn. 6, where the court found that maintenance is an independent category of public work which, if paid for with public funds, requires the payment of prevailing wages. Reliable presents no argument why *Reclamation District* is still not good law.

Consequently, the Project constitutes maintenance as defined by California Code of Regulations, title 8, section 16000, and is therefore a public works project within the meaning of section 1771.

Reliable Was Required To Pay The Prevailing Rate For Laborer For The Work Beltran Performed On The Project That Was Not In The Vicinity Of High Voltage Electrical Lines.

The prevailing rate of pay for a given “craft, classification, or type of work” is determined by the Director of Industrial Relations in accordance with the standards set forth in section 1773. It is the rate paid to the majority of workers; if there is no single rate payable to the majority of workers, it is the single rate paid to the most workers (the modal rate). On occasion, the modal rate may be determined with reference to collective bargaining agreements, rates deter-

⁷ Section 1720, subdivision (a)(1), defines “public works” as “[c]onstruction, alteration, demolition, installation, or repair work done under contract and paid for in whole or in part out of public funds, except work done directly by any public utility company pursuant to order of the Public Utilities Commission or other public authority. For purposes of this paragraph, “construction” includes work performed during the design and preconstruction phases of construction including, but not limited to, inspection and land surveying work.”

mined for federal public works projects, or a survey of rates paid in the labor market area. (§§1773, 1773.9, and *see California Slurry Seal Association v. Department of Industrial Relations* (2002) 98 Cal.App.4th 651.) The Director determines these rates and publishes general wage determinations such as Laborer and Tree Trimmer to inform all interested parties and the public of the applicable wage rates for the “craft, classification and type of work.” (§ 1773.) Contractors and subcontractors are deemed to have constructive notice of the applicable prevailing wage rates. (*Division of Labor Standards Enforcement v. Ericsson Information Systems* (1990) 221 Cal.App.3d 114, 125.)

The applicable prevailing wage rates are the ones in effect on the date the public works contract is advertised for bid. (*See* Lab. Code, §1773.2 and *Ericsson, supra.*) Section 1773.2 requires the body that awards the contract to specify the prevailing wage rates in the call for bids or alternatively to inform prospective bidders that the rates are on file in the body’s principal office and to post the determinations at each job site. In the absence of a timely petition under section 1773.4, the contractors and subcontractors were bound to pay the prevailing rate of pay, as determined and published by the Director, as of the bid advertisement date. [*Sheet Metal Workers Intern. Ass’n, Local Union No. 104 v. Rea* (2007) 153 Cal.App.4th 1071, 1084-1085.]

The pay rate dispute is over the proper rate for the 37 days of Beltran’s work on the Project that was not near high voltage lines. Tree Trimmer cannot apply to these days because its scope of work provisions limit it to “the maintenance of high voltage distribution and transmission electrical lines only.” Reliable’s alternative contention that the applicable rate should be that of Landscape Maintenance is not supported by the facts. The scope of work provisions for Landscape Maintenance describe “routine” work under that classification as: “mowing, watering, pruning, trimming, weeding, spraying, occasional planting and replacement of plants and janitorial work incidental to such landscape maintenance.” The vast majority of Beltran’s work on the Project involved tree climbing, and approximately 80% of Reliable’s work on the Project involved the removal of trees. While the Landscape Maintenance scope of work includes “occasional planting and replacement of plants,” tree climbing and the wholesale removal of trees are clearly outside of that scope.

Reliable has not met its burden to prove Caltrans's use of the Laborer rate of pay was incorrect in light of its payment to Beltran and others of this rate after September 8, 2006, and its restitution to 13 workers, including Beltran, for the period before September 8, 2006, as well as its failure to explain why Beltran alone is not eligible to receive this rate. Consequently, because Reliable did not pay Beltran the prevailing wages specified for the Laborer classification, it violated its statutory obligation to pay prevailing wages. The Notice of Withholding is therefore affirmed. The total unpaid wages owing to Beltran are \$2,816.11, for 270.5 hours of straight time and .75 hours of overtime worked on 37 days.

Caltrans' Penalty Assessment Under Section 1775 Is Appropriate.

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 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. 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)].)

Reliable’s defense against the penalty award, tied to its arguments on the merits, is that there was no prevailing wage violation; therefore penalties cannot apply. Reliable introduced no other evidence of abuse of discretion. Because Reliable’s defense to prevailing wages failed, so it fails here. Therefore, there were 37 instances when penalties attach.

Section 1775, subdivision (a)(2) grants the Labor Commissioner the discretion to mitigate the statutory maximum penalty per day in light of prescribed factors, but it does not mandate mitigation in all cases. Caltrans did not abuse its discretion in setting the amount of each penalty since Reliable knew of the requirement to pay prevailing wages, starting with bid advertisements, and failed to issue a replacement restitution check to Beltran, which constituted a willful violation of its prevailing wage obligations. The record shows that Caltrans considered the pre-

⁸ Section 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 refuses to comply with its provisions.”

scribed factors for mitigation and determined that a penalty of \$30 per violation was warranted in this case. As the Director is not free to substitute his own judgment in the absence of evidence of an abuse of discretion, the assessment of penalties as noticed is affirmed.

Overtime Penalties Are Due For The Underpaid Overtime Hours Beltran Worked On The Project.

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 required 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.” ...

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 Reliable violated section 1815 by paying less than the required prevailing overtime wage rate to Beltran for the .75 hours of overtime that he worked on August 8, 2006. Unlike section 1775 above, section 1813 does not give Caltrans 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 noticed, is affirmed.

Reliable Is Liable For Liquidated Damages.

At all times relevant to this Decision, section 1742.1(a) provided in pertinent part as follows:

After 60 days following the service of . . . a notice of withholding under subdivision (a) of Section 1771.6, 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 . . . notice subsequently is overturned or modified after administrative or judicial review, liquidated damages shall be pay-

able 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 . . . notice to be in error, the director shall waive payment of the liquidated damages.⁹

Rule 51(b) [Cal. Code Reg. tit. 8 §17251(b)] states as follows:

To demonstrate “substantial grounds for believing the . . . Notice to be in error,” the Affected Contractor or Subcontractor must establish (1) that it had a reasonable subjective belief that the . . . Notice 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 . . . Notice.

In accordance with the statute, Reliable would be liable for liquidated damages on any wages that remained unpaid sixty days following service of the Notice. Entitlement to a waiver of liquidated damages in this case is closely tied to Reliable’s position on the merits and specifically whether there was an “objective basis in law and fact” for contending that the Notice was in error.

As discussed above, Reliable’s arguments on the merits are unsupported by either the law or the facts of this case. Such arguments cannot be found to constitute an “objective basis in law and fact” for contending that the Notice was in error. Because the unpaid prevailing wages remained due more than sixty days after service of the Notice, and Reliable has not demonstrated grounds for waiver, Reliable is also liable for liquidated damages in an amount equal to the unpaid prevailing wages.

FINDINGS

1. Affected contractor Reliable Tree Experts filed a timely Request for Review of the Notice of Withholding issued by Caltrans with respect to the Project.
2. The Project constitutes “maintenance” as defined by California Code of Regula-

⁹ Section 17542.1(a) was amended effective January 1, 2009. [Stats 2008 ch 402 § 3 (SB 1352).] Because the 60 day time after service of the Notice for payment of unpaid prevailing wages had run prior to the amendment’s effective date, however, the version in effect at that time remains applicable to this case.

tions, title 8, section 16000, and is therefore a public works project within the meaning of section 1771.

3. The appropriate classification for the Project that was not done in conjunction with high voltage electrical lines is Laborer, Construction Specialist.

4. Ernesto Beltran was underpaid a total of \$2,816.11 between June 29, 2006, and August 30, 2006, constituting 37 violations of section 1775, subdivision (a) and 1 violation of section 1813.

5. Caltrans did not abuse its discretion in setting section 1775(a) penalties at the rate of \$30 per violation, and the resulting total penalty of \$1,110.00, as assessed, for 37 violations is affirmed.

6. 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.

7. The unpaid wages found due in Finding No. 4 remained due and owing more than sixty days following issuance of the Notice. Reliable is therefore liable for an additional award of liquidated damages under section 1742.1 in the amount of \$2,816.11, and there are insufficient grounds to waive payment of these damages.

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

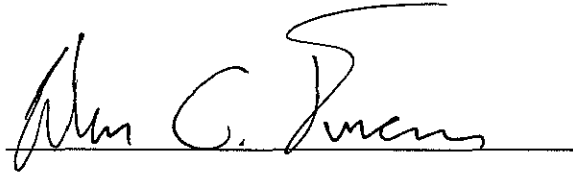
Wages Due:	\$2,816.11
Penalties under section 1775, subdivision (a):	\$1,110.00
Penalties under section 1813:	\$25.00
Liquidated Damages:	\$2,816.11
TOTAL:	\$6,767.22

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

ORDER

The Notice of Withholding 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: 3/12/09

A handwritten signature in black ink, appearing to read "John C. Duncan", written over a horizontal line.

John C. Duncan
Director of Industrial Relations