

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Damon Const. Co.

Case No.: **08-0231-PWH**

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

**ORDER DENYING ARCH INSURANCE COMPANY'S
PETITION FOR RECONSIDERATION**

On Tuesday, September 6, 2011, Arch Insurance Company (Arch), surety for Requesting Party, Damon Construction (Damon), filed its Request for Reconsideration of the Acting Director's August 19, 2011, Decision in the above entitled matter. Arch asserts that the Hearing Officer did not serve proper notice of the July 1, 2011, Hearing on the Merits because Arch had changed its address.

The Request for Reconsideration is denied because it is untimely. Labor Code section 1742, subdivision (b), third paragraph, provides that the Director may reconsider a decision within 15 days "of issuance." Because the time in which to reconsider runs from the date of issuance and not service by mail, the extra time allowed in Code of Civil Procedure section 1013 does not apply. (See, *Division of Labor Standards Enforcement v. Atlantic Baking Co.* (2001) 89 Cal.App.4th 891.)

Even if the Request for Reconsideration were timely, it would still be denied on the merits. Arch is not a party to this proceeding because it never filed a petition to intervene or otherwise participate under Rule 8(b) or (d) (Cal. Code Regs., tit. 8 §§ 17208 (b), (d)). Arch was provided notice of the hearing at the address originally provided, and Arch never filed a change of address with the Hearing Officer. In that Arch is not a party, did not timely seek to participate as an interested person, nor apprise DIR of its current address as required by Rule 10(c) (Cal. Code Regs., tit. 8 §§ 17210), Arch's Petition for Reconsideration is DENIED.

Dated: September 7, 2011



Christine Baker, Acting Director

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Damon Construction Co.

Case No. 08-0231-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

**DECISION OF THE ACTING DIRECTOR OF INDUSTRIAL
RELATIONS**

INTRODUCTION

Affected contractor Damon Construction Co., (Damon), timely requested review of a Civil Wage and Penalty Assessment (Assessment) issued by the Division of Labor Standards Enforcement (DLSE) with respect to a City of Long Beach Annual Contract to repair sidewalks, curbs and roads (Project) performed for the City of Long Beach Department of Public Works. The Assessment determined that \$313,387.01 in unpaid prevailing wages and statutory penalties was due. A hearing on the merits was set and conducted on July 1, 2011, in Los Angeles, California, before Hearing Officer Christine L. Harwell. David L. Bell appeared for DLSE. Damon did not appear; its counsel, Gregory D. Wolflick, advised in writing that Damon would not appear as it is no longer in business. The matter was submitted for decision on July 1, 2011.

The issues for decision are:

- Whether the Assessment correctly reclassified the affected workers as Laborer Group 1, Cement Mason or, Operating Engineer at their respective prevailing wage rates for their work on the Project.
- Whether the Assessment correctly found that Damon had failed to pay the required prevailing wages for all hours worked on the Project by the affected workers.

- Whether DLSE abused its discretion in assessing penalties under Labor Code section 1775¹ at the maximum rate of \$50.00 per violation.
- Whether Damon failed to pay the required prevailing wage rates for overtime work and is therefore liable for penalties under section 1813.
- Whether Damon has demonstrated substantial grounds for appealing the Assessment, entitling it to a waiver of liquidated damages.

The Acting Director finds that Damon has failed to carry its burden of proving that the basis of the Assessment was incorrect. Therefore, the Acting Director issues this Decision affirming the Assessment. Damon has not proven the existence of grounds for a waiver of liquidated damages.

FACTS

The City of Long Beach advertised the annual Project for bid on two separate dates, November 6, 2002 (2002 Bid) and again on October 15, 2004 (2004 Bid), and each time awarded the contract to Damon (contract numbers R6595 and R-6666). The Project involved sidewalk, curb, and street repair crafts within the categories of Operating Engineer Group 8, Cement Mason and Laborer, Group 1. This was a continuing contract performed over a period of time. All of the work performed was subject to the payment of prevailing wages. Damon's employees worked on the Project from approximately June 6, 2003, through December 31, 2007.

Applicable Prevailing Wage Determinations (PWDs):

The following applicable PWDs and scopes of work were in effect on the bid advertisement dates. The prevailing wage determinations applied for the relevant periods were assessed pursuant to the General Prevailing Wage Determination for Los Angeles, county:

For 2002 Bid date:

¹

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

Cement Mason (SC-23-203-2-2002-1): This is the rate used in the Assessment for all cement work. The Cement Mason PWD contains a predetermined pay rate increase that went into effect before the beginning of work on the Project.

Laborer Group 1 (SC-23-2-2002-3) This is the rate used for workers for concrete screeding for rough strike-off, concrete water curing, demolition laborer work such as cleaning brick, general or construction labor or general clean-up.

For 2004 Bid date:

Cement Mason (SC-23-203-2004-1): see above.

Laborer Group 1 (SC23-203-2-2004-1): see above

Operating Engineer Group 8 (SC-23-63-2004-1) This is the rate used for workers for asphalt and concrete spreading operators, asphalt paving machine operators, backhoe operators, combination mixers and compressor operators, self propelled compactor operators and concrete mixer operators.

DLSE served the Assessment on November 17, 2008. The Assessment found that Damon failed to report all of its employees performing work on the Project on his CPRs, failed to pay the required prevailing wages, including failure to pay the required prevailing wage rate for overtime, misclassified employees and failed to make the required training fund contributions for any of the affected workers. Further, the Assessment determined that Dominic Leno (Leno), an Operating Engineer, did work daily on the Project and had been instructed not to tell others he worked for Damon; Leno was told to say he worked for another related company, Joe Rullo Equipment, for which he received a salary below prevailing wage. Leno regularly worked on the Project for Damon as an Operating Engineer. The other two workers, Salvador Macias (Macias), a Laborer, Group 1, and Eric Flores (Flores), a Cement Mason, were reported but not paid the predetermined increase or appropriate fringe benefits requirements. The Assessment found a total of \$227,605.01 in underpaid prevailing wages, including \$1,082.00 in unpaid training fund contributions. Penalties were assessed under section 1775 in the amount of \$50.00 per violation for 1479 violations, totaling \$73,950.00. DLSE determined that the maximum penalty was warranted by its findings that Damon's

violations were willful. In addition, penalties were assessed under section 1813 for 430 overtime violations, at the statutory rate of \$25.00 per violation, totaling \$10,750.00.

Monica Curi (Curi), Deputy Labor Commissioner, testified that she prepared the Assessment, and the supporting audit worksheets, determining that \$228,687.01 in wages (including training funds) were unpaid to three workers on the continuing contract of Damon with the City of Long Beach. Curi identified the written affidavits and completed questionnaires of Leno, Macias and Flores. She described her interviews with each the workers. Curi advised that Leno submitted written statements that explained that he had been paid a flat salary of \$800.00 per week but was told to lie about being employed by Damon. Leno told her that he worked eight hours per day on the Project in which he removed old concrete, did asphalt fill and backfill, and that he used a 430G cat, back hoe and skip loader to do that daily. Leno completed a calendar of days he worked commencing January 3, 2005, through December 28, 2008, in which he indicated he worked eight hours each day. He provided copies of three check stubs (dated August 21, 2005, October 8, 2006 and May 27, 2007) from Joe Rullo Equipment company, an affiliate of Damon, that reflected his pay for 40 hours at \$800.00, which he advised was the manner in which he was paid on the Project. Leno told Curi, and signed an affidavit that, his checks were brought to the Project worksite on Fridays.

Curi also testified that Flores, a Laborer Foreman, and Macias, a Cement Mason, completed DLSE Employee Questionnaires that advised the nature of the work performed and she determined, based on comparison of Damon's Certified Payroll Records (CPRs) that Flores and Macias had not been properly paid the required prevailing wages for their work and overtime.

Curi explained that she utilized the relevant PWDs and predetermined increases for the two contract bid dates in making her calculations of underpayments. She credited the fringe benefits and training fund payments Damon made to the respective workers in instances where payments were reflected on Damon's CPRs. On November 11, 2008, she completed a "Legal Referral and Case Summary" to Senior Deputy Labor Commissioner, Nance Steffen, who approved the assessment of underpaid wages at \$228,687.01 and assigned \$50.00 for underpayment violations in the total amount of

\$73,950.00 on the basis that “Contractor has previous complaints and failed to pay one worker, for a long period, the prevailing wage.” Ms. Curi testified that the Assessment was properly served on Damon.

Damon presented no evidence in response.

DISCUSSION

Labor Code 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.² 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 section 1741.

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

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

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.”

Damon Was Required To Pay The Prevailing Rate For The Work Performed On The Project In Light Of The Information Publicly Available From DIR.

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.” 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 section 1773.1

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.

Damon failed to prove that the Assessment is incorrect in any manner. Because Damon did not pay the prevailing wages specified for the Operating Engineer Group 8, Laborer Group 1 and Cement Mason, it violated its statutory obligation to pay prevailing wages in the amount listed in the Assessment. In this case, Dominic Leno, who performed as an Operator Group 8 was paid a set salary far below the prevailing rate under the false premise that he was not Damon’s employee, when, in fact, he worked on the Project, operating machinery, and performing work for Damon. Similarly, Eric Flores, a Cement Mason and Salvador Macias, a Laborer foreman, were not paid the prevailing rates for their work.

DLSE's Penalty Assessment Under Section 1775

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 by DLSE is established if the “agency's nonadjudicatory action . . . is inconsistent with the statute, arbitrary, capricious, unlawful or contrary to public policy.”

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 refuses to comply with its provisions.”

(*Pipe Trades v. Aubry* (1996) 41 Cal.App.4th 1457, 1466.) In reviewing for abuse of discretion, however, the Acting Director is not free to substitute her own judgment “because in [her] own evaluation of the circumstances the punishment appears to be too harsh.” *Pegues v. Civil Service Commission*, 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)].)

DLSE assessed Labor Code section 1775 penalties at the rate of \$50.00 because Damon had previous complaints and failed to pay one worker, Leno, over a long period of time. 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. 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 as assessed is affirmed.

Overtime Penalties Are Due For The Workers Who Were Underpaid For Overtime Hours 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 Damon violated section 1815 by paying less than the required prevailing overtime wage rate for 430 separate occasions; mostly to Macias, who routinely worked more than eight hours in a day. 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. Accordingly, the assessment of penalties under section 1813, as assessed, is affirmed.

Damon 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, Damon 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 Damon’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.

Because the assessed back wages remained due more than sixty days after service of the Assessment, and Damon has not demonstrated grounds for waiver, Damon is also liable for liquidated damages in an amount equal to the unpaid wages.

FINDINGS

1. Affected contractor Damon Construction Company filed a timely Request for Review of the Civil Wage and Penalty Assessment issued by DLSE with respect to the Project.

2. Damon failed to pay its workers at least the prevailing wage for the disputed work, as it paid the affected workers less than the required prevailing wage rate rather than the applicable appropriate prevailing wage rate in the amounts listed in the Assessment.

3. Damon failed to make all required training fund contributions, as to workers Dominic Leno, Eric Flores and Salvador Macias and in doing so failed to satisfying its training fund obligations under the applicable Prevailing Wage Determination.

4. In light of Findings 2, and 3, Damon underpaid its employees wages on the Project in the aggregate amount of \$228,687.01, including unpaid training fund contributions.

5. DLSE did not abuse its discretion in setting section 1775(a) penalties at the rate of \$50.00 per violation, and the resulting total penalty of \$73,950.00, as assessed, for 1,479 violations is affirmed

6. Penalties under section 1813 at the rate of \$25.00 per violation are due for 430 violations on the Project, for a total of \$10,750.00 in penalties.

7. The unpaid wages found due in Finding No 4 remained due and owing more than sixty days following issuance of the Assessment. Damon is therefore liable for an additional award of liquidated damages under section 1742.1 in the amount of \$228,687.01, and there are insufficient grounds to waive payment of these damages.

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

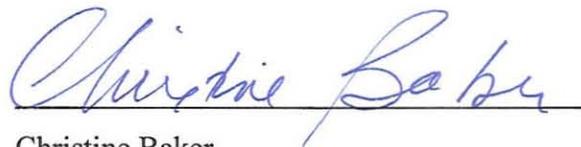
Wages Due:	\$227,605.01
Training Fund Contributions Due:	\$1,082.00
Penalties under section 1775, subdivision (a):	\$73,950.00
Penalties under section 1813:	\$10,750.00
Liquidated Damages:	\$228,687.01
TOTAL:	\$542,074.02

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: 8/10/2011



Christine Baker
Acting Director of Industrial Relations