

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Bernards Bros, Inc.

Case No. **09-0092-PWH**

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement.

DECISION OF DIRECTOR OF INDUSTRIAL RELATIONS

Affected contractor, Bernards Bros, Inc. (“Bernards”) submitted a request for review of a Civil Wage and Penalty Assessment (“Assessment”) issued by the Division of Labor Standards Enforcement (“DLSE”) on March 5, 2009, with respect to work performed by affected subcontractor Moranth Fabrication, Inc. (“Moranth”) on the Science Replacement Building at California State University Los Angeles (“Project”).¹ The Assessment, as amended without objection on the day of the hearing on the merits, determined that \$49,541.72 in unpaid wages, \$652.05 in training fund contributions, and penalties under Labor Code sections 1775 and 1813² in the amount of \$13,500.00 (set at \$50.00 per violation for section 1775 penalties) were due. A Hearing on the Merits occurred on July 23, 2009, in Los Angeles, California, before Hearing Officer Makiko Meyers. Bernards was represented by its project executive, Randy Grosskopf, and David Cross appeared for DLSE.

The issues for decision are:

- Whether the Assessment correctly found that Moranth paid eight of its workers less than the prevailing wages required for the work they performed on the Project.
- Whether Bernards is jointly and severally liable for the penalties assessed against Moranth under section 1775.
- Whether Bernards is liable for liquidated damages under section 1742.1.

¹ Moranth did not request review of the Assessment.

² All unspecified section references are to the Labor Code, unless otherwise specified.

This Decision modifies and affirms the Assessment as amended.

FACTS

Bernards was the general contractor for the Project and subcontracted composite metal panel work to Moranth. It is unclear when Moranth commenced actual work, but the subcontract was terminated in March 2008. The time period subject to the Assessment is October 2007 through March 2008. The Project was located in Los Angeles County. The applicable prevailing wage determination (“PWD”) is for Los Angeles County (LOS-2004-2).

Deputy Labor Commissioner Monica Curi obtained Moranth’s Certified Payroll Records (“CPRs”), interviewed workers, and collected Employee Questionnaires along with work hour calendars and worker affidavits to determine if a wage violation occurred. DLSE determined that Moranth failed to pay prevailing wages in the amount of \$78,243.67 and assessed penalties under sections 1775 and 1813 in the amount of \$14,950. There was no assessment for unpaid training fund contributions. The Assessment calculated the unpaid prevailing wages based on the Sheet Metal Worker classification, as reported on the CPRs. Both parties agree that Moranth’s CPRs for the Project are inaccurate, and neither party submitted the CPRs into evidence.

DLSE amended the Assessment by recalculating the unpaid prevailing wages at the Glazier rate, which Bernards asserted was the appropriate rate for the work performed. It is therefore undisputed that the correct prevailing rates applicable to all workers are \$40.92 per hour for straight time and \$56.02 per hour for overtime, as well as \$0.35 per hour training fund contribution.

Bernards’ project superintendent, Andrew Stuhler, kept daily field reports that recorded the number of workers present on the job site per subcontractor for each day that work was performed on the Project. Stuhler prepared a daily field report for each day of work; if no report existed for a specific day, then the construction site was closed. The daily field reports do not, however, list the names of the individual workers or the number of hours worked by each worker. As to Moranth’s workers, the number of workers on site each day was recorded

based on a visual head count conducted during Stuhler's tour of the job site conducted twice per day.

Three of the eight affected workers, Michael Kim, Michael Green and Shane Cohen, testified at the hearing. Kim kept a record of the hours worked by both Cohen and himself, and Green kept his own time records. Both Kim and Green testified that Moranth paid them approximately \$30 per hour for a portion of the hours they had worked on the Project. The total amount paid to these three workers was shown via cancelled payroll checks from Moranth. Kim worked a total of 379 straight time hours and 10 hours of overtime, over three days. Kim has been paid \$4,771.32. Cohen worked 361 straight hours³ with no overtime, for which he has been paid \$4,450.99.

Green's time records show that he worked a total of 325 hours with no overtime. However, Green testified that he always rode to work with Kim or Cohen because he did not have transportation. While Green claims to have worked on November 5, 6, 7, and 8, 2007, neither Kim nor Cohen reported working on those days. Thus, the total time worked by Green is 296 straight time hours.

Four other workers, Mark Gahagan, Michael Dale, Richard Bohlen, and Steve Levoit submitted their time records to DLSE via Employee Questionnaires and affidavits. Gahagan's time records show he worked a total of 324 hours, one of which was overtime. Gahagan states that he received \$30.51 per hour for the 324 hours he worked. Dale's calendar shows that he worked 315 hours of straight time and 1 hour of overtime. Dale states that he was paid for all hours at \$30.51 per hour. Bohlen submitted an Employee Questionnaire stating that he and Levoit worked for eight hours over two days and that each was paid \$36 per hour.

The remaining worker, James Horton states in his Employee Questionnaire that he did not keep his own time records but was paid only a portion of the hours he worked at \$30.51 per hour. Based on Moranth's CPRs, the Assessment found that Horton worked 95 hours of

³ This excludes three Saturdays (12/1, 12/8 and 12/5) for total of 16 hours. The construction site was closed on those days, and the Assessment excluded those hours.

regular time and one hour of overtime. The cancelled checks show that Horton was paid a total of \$2,927.84.

In issuing the Assessment, DLSE compared the hours claimed by the each worker with those reported on the CPRs and used the larger number of hours, crediting payments only based on Moranth's records. The Assessment found that the hours worked by each of the affected workers, and the payments credited for each worker, were as follows: Kim worked 324 regular time hours and 16.25 overtime hours for which he was paid \$4,527.28; Cohen worked 368.25 regular time hours and 7.5 overtime hours for which he was paid \$4,206.99; Green worked 286 regular time hours and 8.25 overtime hours for which he was paid \$2,635.70; Gahagan worked 326 regular time hours and 4 overtime hours for which he was paid \$6,285.06; Dale worked 321 regular time hours and 2 overtime hours for which he was paid \$13,247.36; Bohlen worked 34.5 regular time hours for which he was paid \$1,411.74; Levoit worked 51.25 regular time hours for which he was paid \$2,097.15; and Horton worked 95 regular time hours and one overtime hour for which he was paid \$2,927.84.

DISCUSSION

Sections 1720 and following set forth a scheme for determining and requiring the payment of prevailing wages to workers on public works construction projects. Specifically:

“The overall purpose of the prevailing wage law ... is to benefit and protect employees on public works projects. This general objective subsumes within it a number of specific goals: to protect employees from substandard wages that might be paid if contractors could recruit labor from distant cheap-labor areas; to permit union contractors to compete with nonunion contractors; to benefit the public through the superior efficiency of well-paid employees; and to compensate non public 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, 9877 [citations omitted].) DLSE enforces prevailing wage requirements not only of 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 standard.” (Section 90.5, subdivision (a); and see *Lusardi, supra*.)

Section 1775, subdivision (a) requires, among other things, that contractors and subcontractors pay the difference to workers who were paid less than the prevailing rate, and also prescribes penalties for failing to pay the prevailing rate. 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 sixty days following service of a Civil Wage and Penalty Assessment under section 1741.

Upon determining that a contractor or subcontractor has violated prevailing wage requirements, DLSE issues a civil wage and penalty assessment, which an affected contractor or subcontractor may appeal by filing a request for review under section 1742. In such an appeal, “[t]he contractor or subcontractor shall have the burden of proving that the basis of the civil wage and penalty assessment is incorrect.” (Section 1742, subdivision (b).)

Moranth Failed To Pay The Required Prevailing Wages To Its Eight Workers.

The sole factual dispute is whether the work hours assessed by DLSE are accurate. Bernards contends that they are not accurate insofar as DLSE relied at all on the admittedly inaccurate CPRs. Both parties agree that Moranth’s CPRs are inaccurate and unreliable, yet DLSE combined the hours claimed by the individual workers with those reported on the CPRs to yield the greatest number of days and hours for the Assessment. Bernards also argues that the workers’ own time records are inaccurate because they do not match the data on Bernards’ daily field reports.

Based on the record as a whole, it is unreasonable to rely on the data from the CPRs to expand the claims of workers who submitted detailed accounts of the days and hours they worked. Consequently, with the exception of Horton, for whom the only record of hours worked is the CPRs, the Assessment for each of the affected workers must be modified to reflect only the hours specifically claimed by each worker. For Horton, there are no other records on which to rely for an estimate of the hours he worked other than the CPRs. In light of the entire record (including the lack of employer time records), Horton’s hours as reported

on the CPRs are accepted as the hours worked by a “just and reasonable inference.” (*Hernandez v. Mendoza* (1988) 199 Cal. App.3d 721; see also Cal. Code Regs., tit. 2, §11160(6).)

To the extent that Bernards’ daily field reports seemingly contradict the workers’ calendars, the daily field reports alone do not constitute evidence to disprove the accuracy of the Assessment. Because the daily field reports do not report the names of the Moranth workers that Bernards recorded as being on the job site each day, they cannot establish which worker’s calendar entry is, or could be, erroneous in the case of an apparent conflict. On February 12, 2008, for example, three workers claim to have worked on the Project, but Bernard’s daily field report only shows two workers. The daily field reports are not useful at all to determine the hours worked by any individual worker as they only record the head counts of workers at a particular time of each workday. As a result, it is plausible that at the time of the superintendent’s tour, one worker was not present at the particular area where Moranth’s work was being performed. Bernards’ daily field reports therefore do not prove with specificity that the hours claimed by the workers are incorrect.

The record establishes, and the Assessment is therefore modified, with regard to each of the affected workers as follows:

Worker	Straight Time	Overtime	Total Wages	Wages Paid	Wages Due	Training Fund Contribution Due
Kim	379	10	\$16,068.88	\$4,771.34	\$11,297.56	\$136.15
Cohen	361	0	\$14,722.12	\$4,450.99	\$10,321.13	\$126.35
Green	296	0	\$12,122.32	\$2,879.70	\$9,232.63	\$103.60
Gahagan	323	1	\$13,273.18	\$9,885.24	\$3,387.94	\$113.40
Dale	315	1	\$12,945.82	\$9,641.16	\$3,304.66	\$110.60
Bohlen	8	0	\$327.36	\$288.00	\$39.36	\$2.80
Levoit	8	0	\$327.36	\$288.00	\$39.36	\$2.80
Horton	95	1	\$3,943.42	\$2,927.84	\$1,015.58	\$33.50

DLSE's Penalty Assessment Under Section 1775 Is Appropriate.

Section 1775, subdivision (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.^[4]

⁴ 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."

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, subdivision (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, subd. (c)].)

Here, DLSE assessed \$50.00 per violation, the maximum under section 1775(a), because Moranth “failed to pay the workers even though it knows or should have known it is obligated to pay.” The record shows that that Moranth paid its workers between \$30 and \$36 per hour although the required prevailing wage rate was \$40.92. Moranth therefore failed to pay its workers the prevailing wages on all days of work on the Project. There is no evidence to show that DLSE abused its discretion by assessing \$50 per violation. As Moranth failed to pay prevailing wages on any days of work to any of the workers, the total number of violations based on the established work hours is 263. The correct amount of penalties under section 1775 is therefore \$13,150.00.

Bernards Is Jointly Liable For Penalties Under Section 1775.

A general contractor may escape joint and several liability for penalties arising from the violations of one of its subcontractors only when the conditions set forth in section 1775, subdivision (b) are met.

Section 1775, subdivision (b) states:

If a worker employed by a subcontractor on a public works project is not paid the general prevailing rate of per diem wages by the subcontractor, the prime contractor of the project is not liable for any penalties under subdivision (a) unless the prime contractor had knowledge of the failure of the subcontractor to pay the specified prevailing rate of wages to those workers or unless the prime contractor fails to comply with all of the following requirements:

- (1) The contract executed between the contractor and the subcontractor for the performance of work on the public works project shall include a copy of the provisions of Sections 1771, 1775, 1776, 1777.5, 1813, and 1815.
- (2) The contractor shall monitor the payment of the specified general prevailing rate of per diem wages by the subcontractor to the employees, by periodic review of the certified payroll records of the subcontractor.
- (3) Upon becoming aware of the failure of the subcontractor to pay his or her workers the specified prevailing rate of wages, the contractor shall diligently take corrective action to halt or rectify the failure, including, but not limited, to retaining sufficient funds due the subcontractor for work performed on the public works project.
- (4) Prior to making final payment to the subcontractor for work performed on the public works project, the contractor shall obtain an affidavit signed under penalty of perjury from the subcontractor that the subcontractor has paid the specified general prevailing rate of per diem wages to his or her employees on the public works project and any amounts due pursuant to Section 1813.

While the record shows that Bernards satisfied the requirements (1) and (4), it did not meet the requirements (2) and (3). The period subject to the Assessment commenced in mid October 2007. Moranth's workers were working on the project as early as October 18, 2007. Prior to 2008, Bernards appears only to have made annual requests for CPRs. Bernards' repeated requests to Moranth for CPRs were not made until February and March 2008⁵. Furthermore, the sole evidence Bernards produced regarding retention of fund is an e-mail, dated February 27, 2009, from Curi to her supervisor stating that Moranth "stated that he has not been paid by the Prime Contractor [Bernards] ..." Bernards has presented no evidence to

⁵ Bernards requested CPRs from Moranth on July 12, 2006 and July 31, 2007. It is unclear whether Moranth had commenced work at that time. Even if the Moranth had commenced work, these two requests were sporadic at most.

show that it properly monitored wage payments or took any remedial actions between October 2007 and February 2008. Accordingly, Bernards is jointly liable for the penalties under section 1775.

Overtime Penalties Under Section 1813 Are Due for Unpaid Overtime Hours.

Section 1813 provides:

The contractor or 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) for each worker employed in the execution of the contract by the respective contractor or subcontractor 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 an one calendar week in violation of the provisions of this article. In awarding any contract for public work, the awarding body shall cause to be inserted in the contract a stipulation to this effect. The awarding body shall take cognizance of all violations of this article committed in the course of the execution of the contract, and shall report them to the division of Labor Standards Enforcement.

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 shows that Moranth did not apply the prevailing overtime rate for any of the overtime hours worked by the affected workers. Michael Kim worked overtime on three days, and Mark Gahagan, Michael Dale, and James Horton worked overtime on one day each. The total number of overtime violations is 6. Thus, the correct amount of penalties under section 1813 is \$150.00.

Bernards Is Liable For Liquidated Damages Under Section 1742.1.

Section 1742.1 provides:

“(a) After 60 days following the service of a civil wage and penalty assessment under Section 1741 or a notice of withholding under subdivision (a) of Section 1771.6, the affected contractor, subcontractor, and surety on a bond or bonds issued to secure the payment of wages covered by the assessment or notice shall be liable for liquidated damages in an amount equal to the wages, or portion thereof, that still remain unpaid. If the assessment or notice 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.

Additionally, if the contractor or subcontractor demonstrates to the satisfaction of the director that he or she had substantial grounds for appealing the assessment or notice with respect to a portion of the unpaid wages covered by the assessment or notice, the director may exercise his or her discretion to waive payment of the liquidated damages with respect to that portion of the unpaid wages. Any liquidated damages shall be distributed to the employee along with the unpaid wages. Section 203.5 shall not apply to claims for prevailing wages under this chapter.

(b) Notwithstanding subdivision (a), there shall be no liability for liquidated damages if the full amount of the assessment or notice, including penalties, has been deposited with the Department of Industrial Relations, within 60 days following service of the assessment or notice, for the department to hold in escrow pending administrative and judicial review. The department shall release such funds, plus any interest earned, at the conclusion of all administrative and judicial review to the persons and entities who are found to be entitled to such funds.”

Rule 51(b) (Title 8 of California Code of Regulations §17251(b)) states:

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

Bernards is liable for liquidated damages only for wages, including unpaid training fund contributions, that remained unpaid sixty days following service of the Assessment, absent waiver by the Director. Here, no wages were paid or deposited with the Director as a

result of the Assessment within the time provided in section 1742.1. Entitlement to a waiver of liquidated damages in this case is closely tied to Bernards' position on the merits and specifically whether there was an "objective basis in law and fact" for "appealing the assessment . . . with respect to a portion of the unpaid wages covered by the assessment . . ." (Section 1742.1, subdivision (a).)

As discussed above, the undisputed evidence shows that Moranth did not pay the required prevailing wage rate for any of the work performed by its workers. Nor did Moranth make any training fund contributions on behalf of the eight affected workers. Bernards' primary argument on the merits, that the hours claimed by Moranth's workers are not accurate, is not supported by any substantial evidence. This argument cannot be found to constitute an "objective basis in law and fact" for appealing the Assessment; thus, there are no substantial grounds for waiver of the liquidated damages. The total amount of unpaid prevailing wages and training fund contributions due, based on the modified work hours, is \$39,300.21. Because the unpaid prevailing wages remained due more than sixty days after service of the Assessment and Bernards has not demonstrated grounds for waiver, Bernards is also liable for liquidated damages in an amount equal to the unpaid prevailing wages and training fund contributions.

FINDINGS

1. Affected Contractor Bernards Bros, Inc. filed a timely Request for Review from a Civil Wage and Penalty Assessment issued by the Division of Labor Standard Enforcement.
2. Eight workers working for Bernards' subcontractor Moranth Fabrication, Inc., (Michael Kim, Shane Cohen, Michael Green, Mark Gahagan, Michael Dale, Richard Bohlen, Steve Levoit, James Horton) were not paid prevailing wages for their work on the Project.
3. Kim, Gahagan, Dale, and Horton were not paid the prevailing overtime wage rate for their overtime work on the Project.

4. Moranth did not make the required training fund contributions on behalf of any of the eight workers.

5. In light of Finding Nos. 2 through 4 above, Moranth underpaid its workers on the Project in the aggregate amount of \$38,638.21 in unpaid prevailing wages and \$662.00 in unpaid training fund contributions.

6. DLSE did not abuse its discretion setting section 1775, subdivision (a) penalties at the rate of \$50 per violation, and the resulting total penalty of \$13,150.00, as modified, for 263 violations is affirmed.

7. Bernards did not exercise due diligence in monitoring record keeping and wage payments by Moranth and is thus jointly and severally liable for penalties under section 1775, subdivision (a) as set forth in Finding No. 6 above.

8. Penalties under section 1813 at the rate of \$25.00 per violation are due for 6 violations on the Project, for a total of \$150.00.

9. The unpaid wages found due in Finding No. 5 remained due and owing more than sixty days following issuance of the Assessment. Bernards is therefore liable for liquidated damages under section 1742.1 in the amount of \$39,300.21 as there are insufficient grounds to waive payment of these damages.

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

Wages Due:	\$38,638.21
Training Fund Contributions Due:	\$662.00
Penalties under section 1775, subdivision (a):	\$13,150.00
Penalties under section 1813:	\$150.00
Liquidated Damages:	\$39,300.21
TOTAL:	\$91,900.42

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 in part and modified in part as set forth above. The Hearing Officer shall issue a Notice of Findings which shall be served together with this Decision.

SO ORDERED

Dated: September 28, 2009



John C. Duncan, Director of Industrial Relations