

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Azurelite, Inc.

Case No. 11-0079-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

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

Affected subcontractor Azurelite, Inc. (Azurelite) submitted a timely request for review of the Civil Wage and Penalty Assessment (Assessment) issued by the Division of Labor Standards Enforcement (DLSE) with respect to the Legacy Apartments Hollywood and Vine Project (Project) in Los Angeles County. The Assessment determined that \$206,783.00 in unpaid prevailing wages and statutory penalties was due. A Hearing on the Merits was conducted on July 11, and August 29 and 31, 2011, in Los Angeles, California, before Hearing Officer Douglas Elliott. Thomas Kovacich appeared for Azurelite, and David Cross appeared for DLSE. The matter was submitted for decision on October 5, 2011.

The issues for decision are:

- Whether the Assessment was timely.
- Whether the Assessment correctly found that Azurelite had failed to report and pay the required prevailing wages for all hours worked on the Project by the affected workers.
- Whether any of the work performed in Azurelite, Inc.'s shop was exempt from prevailing wage requirements.

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

The central substantive issue in dispute is whether Azurelite was required to pay prevailing wages and report on its Certified Payroll Records work three workers claim to have performed for the Project in Azurelite's permanent off-site shop. The Acting Director finds that Azurelite has disproven the basis of the Assessment as to coverage of the off-site work. Therefore, the Acting Director issues this Decision dismissing the Assessment.

FACTS

On or about March 28, 2007, the Community Redevelopment Agency of the City of Los Angeles (Agency) entered into a Disposition and Development Agreement (DDA) with Legacy Partners Hollywood & Vine, L.P. (Legacy) for the development of a 9-story apartment building. On or about November 14, 2007, Legacy entered into a prime contract with Webcor Construction, Inc. dba Webcor Builders (Webcor). Webcor subcontracted with Azurelite on February 14, 2008, to furnish and install glass and aluminum framing of all exterior openings, as well as glazing of interior window openings. Section 25.16 of the subcontract provides in part that: "Subcontractor shall pay or cause to be paid to all workers employed in connection with the Project lower-tier subcontractors, not less than the prevailing rate of wages, as provided in the statutes applicable to the Community Redevelopment Agency of the City of Los Angeles ('Agency') public work contracts, including without limitation ... Sections 1720-1780 of the California Labor Code" Azurelite's employees worked on the Project from October 2008, through November 2009.

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

Applicable Prevailing Wage Determination (PWD): The following applicable PWD and scope of work was in effect on the contract date:

Glazier for Los Angeles County (LOS-2007-1): This is the rate used in the Assessment for all work in question. The Glazier PWD contains a predetermined pay rate increase that went into effect before the beginning of work on the Project.² Section 4 of the Scope of Work for the Glazier PWD includes, among other things, "all outside installation and fabrication."

The Assessment: DLSE served the Assessment on December 21, 2010. The Assessment found that Azurelite failed to report all of its employees performing work on the Project on its CPRs, failed to pay the required prevailing wages, including failure to pay the required prevailing wage rate for overtime, and failed to make the required training fund contributions for any of the affected workers. The Assessment found a total of \$166,458.88 in underpaid prevailing wages, including \$3,172.80 in unpaid training fund contributions. Penalties were assessed under section 1775 in the amount of \$50.00 per violation for 800 violations, totaling \$40,000.00. DLSE determined that the maximum penalty was warranted by its findings that three workers were not listed on the CPRs, suggesting that the violations were willful and intentional. In addition, penalties were assessed under section 1813 for 13 overtime violations, at the statutory rate of \$25.00 per violation, totaling \$325.00.

Timeliness of Assessment: No notice of completion was filed on the project. A Certificate of Occupancy was issued by the City of Los Angeles on June 8, 2010. The Community Redevelopment Agency of the City of Los Angeles issued a Final Certificate of Completion on June 23, 2010, which was recorded on June 24, 2010. At the behest of the Agency, Webcor is withholding contract payments from Azurelite.

Work Performed in Azurelite's Shop: John Song, a senior project manager for Azurelite, testified that the contract specifications required that the window system be

² The prevailing hourly wage due under the Glazier PWD for work performed between June 1, 2008 and May 31, 2009, was \$47.43. For work performed on or after June 1, 2009, the rate was \$47.71. Daily overtime and Saturday work required time and one-half and Sunday and holiday work required double time.

provided by Arcadia, a third party manufacturer/supplier. Song and Jim Schaden, president of Arcadia, both testified that Arcadia was responsible for providing the entire window system. In order to coordinate delivery of the window system, however, it was agreed that Azurelite would cut the drywall adapters and U-channels, that would normally have been pre-cut by Arcadia, to the specified lengths from 24-foot stock lengths provided by Arcadia.³ No deduction in the purchase price was taken by Azurelite in return for performing this work.

DLSE presented testimony from three workers who claimed to have performed this work. Isaac Zuniga-Zarza (Isaac), his brother Jose Zuniga-Zarza (Jose), and Carlos Romero testified that they used a chop saw, table saws, electric and battery drills, a caulking gun, various and other tools, as well as alcohol, caulking and silicon in performing shop work for the Project. The Zuniga-Zarza brothers also claimed to have delivered the drywall adapters and U-channels to the Project site.

Romero testified that he performed this work every day between September 14, 2008, and November 8, 2009. Isaac testified that he performed this work every day between November 2, 2008, and November 9, 2009. Jose testified that he performed this work every day between November 8, 2008, and November 4, 2009. Romero provided an affidavit to DLSE claiming to have worked approximately 2000 hours on the Project, while the Assessment finds that he worked 1972 hours. Isaac's affidavit claims 1440 hours on the Project, while the Assessment finds that he worked 1635. Jose's affidavit also claims approximately 1440 hours worked on the Project, while the Assessment finds that he worked 1585 hours.

Azurelite's president, Wendy Hase, testified that the total shop hours worked by the affected workers related to all Azurelite projects during the relevant period were:

| | |
|--------------------|---------|
| Carlos Romero | 2,751.5 |
| Isaac Zuniga-Zarza | 874.5 |

³ A "U-channel" is a U-shaped anchor attached at the top and bottom of the opening to capture and hold the window frame in place and to allow lateral movement. A drywall adapter is an interior aesthetic cap placed on either two or four sides to cover the gap between the drywall and the window frame.

Jose Zuniga-Zarza 1,059

Song testified that materials from Arcadia were first delivered to the shop in December, 2008, and that the last cuts were made on or about June 9, 2009. He testified that cut sheets were released to the shop on December 2, 2008; December 15, 2008; January 8, 2009; March 5, 2009; and June 9, 2009. According to his testimony, the work in question would have been performed in proximity to those dates. In response to Song's testimony, DLSE's post-hearing brief states that its audit shows the following hours worked by the affected workers from December 2, 2008, through June 9, 2009:

| | |
|--------------------|---------|
| Carlos Romero | 1,008 |
| Isaac Zuniga-Zarza | 1,005.5 |
| Jose Zuniga-Zarza | 959 |

In response to evidence presented by Azurelite that Isaac was laid off from March 5, 2009, through April 24, 2009, DLSE concedes that his hours should be reduced to 697.5. In response to Jose's admission that he was laid off from April 3, 2009 through April 23, 2009, DLSE concedes that his hours should be reduced to 863.

Azurelite presented testimony and photographs establishing that its shop/warehouse is approximately 1,000 square feet, and has a single chop saw that was used for cutting the 24-foot stock lengths to the designated lengths. Azurelite's testimony was that shop employee Herbert Acosta would mark the stock, and Acosta or Romero would generally do the cutting. Isaac and Jose simply packaged the stock for delivery to the jobsite, and none of the claimants made deliveries to the jobsite. The drywall adapters did not require drilling, while the U-channels had several holes drilled in them.

Azurelite provided evidence that it installed a total of 470 windows in the Project. This required 470 U-channels and 855 drywall adapters. The drywall adapters required a total of 3761 cuts to the required lengths, and the U-channels required 940 cuts. Song estimated that each cut would take approximately 30 seconds. Based on these numbers, Azurelite calculated that it would take a total of 31.3 hours to cut all of the drywall

adaptors and 7.8 hours to cut all of the U-channels. Schaden testified that it would have taken Arcadia employees approximately 32 hours to do this work in Arcadia's shop.

The record establishes that the only non-shop work included in the Assessment was not performed by Isaac and Jose as they claim. Azurelite presented testimony and documentary evidence showing that Isaac and Jose were neither authorized nor licensed to drive the company delivery truck; that they erroneously identified the delivery location at the Project site; and that John Rankin was in fact the employee who made the deliveries. Based on these facts and the demonstrably excessive hours of worked claimed in relation to the Project, Isaac and Jose's testimony is found to lack credibility both as to the hours claimed and the nature of the work performed.

DISCUSSION

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. 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] *(Lusardi)*.) DLSE enforces prevailing wage requirements not only for the benefit of workers but also "to protect employers who comply with the law from those who attempt to gain competitive advantage at the expense of their workers by failing to comply with minimum labor standards." (§ 90.5, subd. (a), and *Lusardi, 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 wage rate, and prescribes penalties for failing to pay the prevailing wage 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.

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

The Dismissal of the Assessment On The Merits Renders The Issue Of Its Timeliness Moot.

Section 1741, subdivision (a) provides in part:

The assessment shall be served not later than 180 days after the filing of a valid notice of completion in the office of the county recorder in each county in which the public work or some part thereof was performed, or not later than 180 days after acceptance of the public work, whichever occurs last. However, if the assessment is served after the expiration of 180 days, and the awarding body has not yet made full payment to the contractor, the assessment is valid up to the amount of funds retained.

Azurelite contends that the Project was accepted no later than June 8, 2010, when the Certificate of Occupancy was issued, and that the Assessment is untimely because it was not served within 180 days thereafter. DLSE responds that the Project was not accepted before the Final Certificate of Completion was issued on June 23, 2010, and that the Assessment is therefore timely. DLSE further contends that the 180 day extension applies because Webcor is withholding funds at the behest of the Agency. For the reasons discussed below, the Assessment is dismissed on its merits, and the timeliness issue is therefore moot.

Azurelite Was Not Required To Pay The Prevailing Rate For Glaziers
For The Shop Work At Issue.

Section 1772 provides that: "Workers employed by contractors or subcontractors in the execution of any contract for public work are deemed to be employed upon public work." Section 1774 provides that: "The contractor to whom the contract is awarded, and any subcontractor under him, shall pay not less than the specified prevailing rates of wages to all workmen employed in the execution of the contract."

The statutory term "execution" was interpreted in *Williams v. SnSands Corporation* (2007) 156 Cal.App.4th 742, 749-750 (*Williams*):

In determining legislative intent, courts are required to give effect to statutes according to the usual, ordinary import of the language employed in framing them. [Citations and quotation marks omitted.] The familiar meaning of "execution" is "the action of carrying into effect (a plan, design, purpose, command, decree, task, etc.); accomplishment" (5 Oxford English Dict. (2d ed.1989) p. 521); "the act of carrying out or putting into effect," (Black's Law Dict. (8th ed.2004) p. 405, col. 1); "the act of carrying out fully or putting completely into effect, doing what is provided or required." (Webster's 10th New Collegiate Dict. (2001) p. 405.) Therefore, the use of "execution" in the phrase "in the execution of any contract for public work," plainly means the carrying out and completion of all provisions of the contract.

The analysis in *O.G. Sansone Co. v. Department of Transportation* [1976] 55 Cal.App.3d 434, 127 Cal.Rptr. 799 (*Sansone*) of who is, and who is not, a subcontractor obligated to comply with the state's prevailing wage law also informs our assessment of the intended reach of the prevailing wage law to "[w]orkers employed ... in the execution of any contract for public work." (§ 1772.)

Williams and *Sansone v. Department of Transportation* (1976) 55 Cal.App.3d 434 (*Sansone*) recognized an exemption for material suppliers, basing their analyses in part on *H. B. Zachry Company v. United States* (1965) 344 F.2d 352, 170 Ct. Cl. 115, a federal case that applied a long-standing interpretation of the Davis-Bacon Act (40 U.S.S. §§ 3141 *et seq.*, generally exempting material suppliers from coverage to find that truck drivers employed by a material supplier to deliver supplies to a public works jobsite are not required to be paid prevailing wages. In *Zachry*, the court explained that:

Beginning as early as 1942 [fn. omitted], the Solicitor [of the Department of Labor] has excluded from statutory coverage the employees of bona fide materialmen who sell to a contractor engaged in construction contracts covered by the Davis-Bacon Act. The exemption has been qualified to the extent that the materialman must be selling supplies to the general public, the plant must not be established specially for the particular contract, and the plant is not located at the site of the work. [Fn. omitted.] The Solicitor has always held that truck drivers employed by materialmen (exempt from statutory coverage) to transport supplies to the jobsite are no more subject to the provisions of the Davis-Bacon Act and the Eight-Hour Laws than are other employees of the materialmen. [Fn. omitted.]

(*Id.* at p. 359, quoted in *Sansone, supra*, 55 Cal.App.3d at p. 442.)

By its terms, section 1772 requires prevailing wages only for “[w]orkers employed by contractors or subcontractors in the execution of any contract for public work” (Emphasis supplied.) It is undisputed that Azurelite was a subcontractor within the meaning of section 1772. Under the *Williams* analysis, however, the inquiry does not end with the status of the employer as a subcontractor:

Following *Sansone, supra*, 55 Cal.App. 3d 434, ... we consider: whether the transport was required to carry out a term of the public works contract; whether the work was performed on the project site or another site integrally connected to the project site; whether work that was performed off the actual construction site was nevertheless necessary to accomplish or fulfill the contract.

(*Williams, supra*, 156 Cal.App.4th at p. 752.)

In the context of off-site fabrication, the above factors may be paraphrased as follows:

1. Whether the work in question is required to carry out the terms of the construction contract/subcontract;
2. Whether the work in question was performed on-site or off-site; and
3. Whether the off-site work was nevertheless necessary to accomplish or fulfill the contract.

Taken together, these factors represent points for consideration in determining whether a particular worker is deemed employed upon public work. The weight to be

given each factor will depend on the facts of the case, and must therefore be determined on a case-by-case basis. Generally, the first factor looks at the terms of the contract. The second factor looks at the location of the work. The third factor applies only where the work in question is performed off the jobsite, and looks to the conditions requiring that the work be performed at an off-site rather than on-site location.

With regard to the first factor, Azurelite was under no contractual obligation to cut the U-channels and drywall adapters. In fact, the independent material supplier, Arcadia, was contractually obligated to do this work. Azurelite did the work as a matter of convenience and efficiency in scheduling, and not because it was contractually required to. The first factor supports non-coverage.

With regard to the second factor, the fabrication work unquestionably was performed off site in Azurelite's permanent shop.⁴ The second factor thus supports non-coverage.

With regard to the third factor, the question is whether the work was "necessary to accomplish or fulfill the contract," i.e., whether work Azurelite was contractually required to perform had to be done off-site. Since Azurelite was not contractually required to perform the work at all, the third factor cannot provide a basis for coverage.

Thus, under the *Williams* analysis, the shop work performed by Azurelite was not done in the execution of the contract within the meaning of section 1772. DLSE did not consider *Williams*, *Sansone* or any other case law in determining that the shop work was subject to prevailing wage requirements. Rather, DLSE based its determination solely on the PWD's Scope of Work's inclusion of "all outside installation and fabrication." As Azurelite argues, DLSE's understanding of "outside" to mean in the shop appears erroneous. A contractor normally would be doing installation on the construction site, not in its shop, so "outside" must refer to work done on the construction site. Moreover, the mere cutting and drilling of lengths of metal does not rise to the level of "fabrication,"

⁴ As found above, Azurelite has disproved the basis of the Assessment for the only non-shop work included in the assessment. The record establishes that Isaac and Jose did not drive the delivery truck as they claimed, were not authorized or licensed to do so and were unable to correctly identify the delivery point at the Project site.

as that term is commonly understood.⁵ In any event, the Scope of Work provision, adopted from a union contract, is not a basis for determining whether work is done in the execution of a public works contract.

For the reasons set forth above, the shop work in question was not done in the execution of the contract and therefore is not subject to prevailing wage or CPR requirements. The Assessment must therefore be dismissed in its entirety.

All Other Issues Are Moot

In light of the determination above, all other issues are moot and need not be decided.

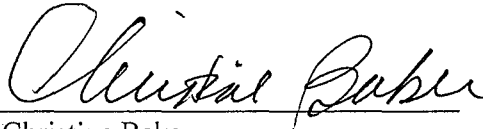
FINDINGS

1. Affected subcontractor Azurelite filed a timely Request for Review of the Civil Wage and Penalty Assessment issued by DLSE with respect to the Project.
2. Azurelite met its burden under section 1742 of proving that the basis for the Assessment is incorrect, in that the shop work for which the Assessment found wages due Carlos Romero, Jose Zuniga-Zarza and Isaac Zuniga-Zarza was not subject to prevailing wage requirements.
3. All other issues are moot.

ORDER

The Civil Wage and Penalty Assessment is dismissed 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: 12/05/2011


Christine Baker
Acting Director of Industrial Relations

⁵ "Fabricate" is defined as: "Construct, manufacture; specifically: to construct from diverse and usually standardized parts." ([http://www.merriam-webster.com/dictionary/fabricate.](http://www.merriam-webster.com/dictionary/fabricate))