

STATE OF CALIFORNIA  
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Requests for Review of:

**G Coast Construction, Inc.**

Case No.: **13-0010-PWH**

From Civil Wage and Penalty Assessments issued by: .....

**Division of Labor Standards Enforcement** .....

**DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS**

Affected contractor G Coast Construction, Inc. (G Coast), requested review of a Civil Wage and Penalty Assessment (Assessment) issued by the Division of Labor Standards Enforcement (DLSE) with respect to a work of improvement identified as “MAPA<sup>1</sup> Tree Demolition / Harvesting” (Project). G Coast contracted with the Los Angeles Community College District as a licensed general building and landscaping contractor to fell and remove trees preparatory to the construction of the new MAPA building on the campus of Los Angeles Valley College. Employees of G Coast performed labor on the Project in late 2011 and early 2012. The Assessment determined that \$8,733.74 in unpaid prevailing wages and statutory penalties was due. Hearing Officer John J. Korbol conducted the Hearing on the Merits on August 8, 2013 in Los Angeles, California. Max W. Norris appeared for DLSE. Ezra Levi appeared for G Coast as the company’s president. The matter was submitted for decision on August 8, 2013.

The issues for decision are:

- Was the Project subject to the payment of prevailing wage rates?
- Did G Coast underpay the workers employed on the Project by failing to pay the total prevailing wage rate, including mandatory fringe benefits?
- Did G Coast fail to make training fund contributions?

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<sup>1</sup> MAPA stands for the Media Arts Performing Arts center.

- Whether Jeffrey Benevides was a registered apprentice, and if not, whether Jeffrey Benevides was underpaid for his work on the Project?
- Whether DLSE's assessment of penalties under Labor Code section 1775<sup>2</sup> at the mitigated rate of \$20 per alleged violation constituted an abuse of discretion.
- Whether G Coast is liable for liquidated damages under section 1742.1, subdivision (a).

The Director finds that the Project was a public work subject to the requirements of California Prevailing Wage Law. It is found that G Coast has failed to carry its burden of proving that the Assessment was incorrect as to Cool Air Supply's failure to pay in full the fringe benefit component of the prevailing wage rate to the workers employed on the Project. The Director also finds that G Coast has failed to carry its burden of proving that it made the mandatory training fund contributions. It is found that Jeffrey Benevides was not a registered apprentice and was therefore not paid the correct basic hourly wage rate. It is found that the DLSE's assessment of penalties under section 1775 at the rate of \$20 per violation does not constitute an abuse of discretion. Finally, the Director finds that G Coast has not demonstrated substantial grounds for a waiver of liquidated damages.

### FACTS

On November 8, 2011, G Coast entered into a public works contract with the Los Angeles Community College District (Awarding Body) to fell and remove trees standing on the site of the future MAPA building on the campus of Los Angeles Valley College. Aside from the Project supervisor, ten workers performed labor for G Coast under the contract on various dates within the period December 5, 2011, through January 6, 2012. The Awarding Body caused the Notice of Completion to be recorded on May 18, 2012.

DLSE's assertion that the Project is a public work requiring the payment of prevailing wages under the California Prevailing Wage Law, sections 1720 through 1861 was not disputed by G Coast at the Hearing on the Merits. Similarly, G Coast did not dispute that the applicable prevailing wage determination is (1) SC-23-102-2-2011-1 (General Prevailing Wage Determination for several counties in Southern California,

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<sup>2</sup> All further references are to the Labor Code unless otherwise indicated.

including Los Angeles County) with the applicable job classification being Laborer, Groups 1 through 5.

The Project did not fall within the purview of Awarding Body's Labor Compliance Program. Instead, the Awarding Body referred the alleged underpayment of wages to DLSE for investigation. DLSE opened an investigation of these allegations and conducted an audit of the relevant documents, including the Certified Payroll Records (CPRs) produced by G Coast. This process culminated in the November 13, 2012 Assessment which was served on G Coast by certified mail on the same date. G Coast requested review of the Assessment by a letter dated January 7, 2013. There is no contention that either the Assessment or the Request for Review were untimely.

### **EVIDENCE AND TESTIMONY AT THE HEARING**

At the Hearing on the Merits, DLSE's Exhibits 1 through 21 were admitted into evidence without objection. G Coast did not offer any documentary evidence.

Deputy Labor Commissioner Gustavo Alfaro, Jr. testified that, after the Awarding Body referred this matter to DLSE, he was able to contact two of the workers employed on the Project. Both denied getting paid the fringe benefit component of the prevailing wage rate applicable to laborers. Alfaro stated that the CPRs compiled by G Coast set forth the payment of a basic hourly wage rate and tax deductions, but they do not reflect payments of fringe benefits or training fund contributions. He contacted the California Apprenticeship Council, which confirmed that fringe training fund contributions had not been paid by G Coast. Alfaro was unable to obtain any back-up documents from G Coast that might have corroborated the payment of fringe benefits and training fund contributions to appropriate third-parties, and he concluded that such payment had not been made.<sup>3</sup>

Alfaro testified that, according to the website maintained by the Division of Apprenticeship Standards (DAS), there was no evidence that Jeffrey Benavides was registered as an apprentice. Alfaro concluded that Benavides was not an apprentice and that Benavides should have been paid at the journey level prevailing wage rate instead of the apprentice level rate. Alfaro also testified that the DLSE penalty review process resulted in the assessment of penalties at the rate of \$20 per violation pursuant to section 1775 instead of the maximum rate of \$50 per violation.

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<sup>3</sup> See the definition of "payroll record" in California Code of Regulations, title 8, section 16000.

On the basis of the information he was able to obtain, Alfaro produced an Assessment alleging that G Coast had underpaid its workers on the Project by \$7,413.74. DLSE also assessed \$1,320.00 in penalties under section 1775 at the rate of \$20 per violation for 66 instances of failure to pay the applicable prevailing wages.

The only witness that testified for G Coast was Ezra Levi, President of G Coast. Levi testified that a labor union representative present at a preconstruction meeting told Levi that he needed to have an apprentice on the Project and that Benevides was an apprentice.

Levi stated that he contacted the union as work was about to commence and asked the union to send over an apprentice. According to Levi, the union dispatched Benevides to the Project site.<sup>4</sup> Levi testified that acted in reliance on the union to send him an apprentice. As to the penalties assessed against G Coast, Levi testified that he had no motive to underpay Benevides as an apprentice, he had not been acting in bad faith, and he simply made a mistake regarding Benevides.

Levi asserted that G Coast had in fact paid fringe benefits and training fund contributions to the union. He could not recall the name of the training fund.

## 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. 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 Construction Co. v. Aubry* (1992) 1 Cal.4<sup>th</sup> 976.)

Section 1775, subdivision (a) requires, among other things, that contractors and subcontractors pay the difference to workers who received less than the prevailing rate and also 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 the service of an Assessment under section 1741.

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<sup>4</sup> Levi never identified the union that he was communicating with.

When DLSE determines that a violation of the prevailing wage laws has occurred, an Assessment is issued pursuant to section 1741. An affected contractor may appeal that assessment by filing a Request for Review under section 1742. “The contractor or subcontractor shall have the burden of proving that the basis for the civil wage and penalty Assessment is incorrect.” (§ 1742 subd. (b).)

Section 1771 requires that all workers on a public work receive at least the general prevailing “per diem wage.” There are three components to the prevailing wage: the basic hourly rate, fringe benefit payments, and a contribution to the California Apprenticeship Council or an approved apprenticeship training fund. (§ 1773.1.) The first two components (also known as the total prevailing wage) must be paid to the worker or on the worker’s behalf and for his benefit. An employer cannot pay a worker less than the basic hourly rate; the balance must be paid either to the worker as wages or may be offset by credit for “employer payments” authorized by section 1773.1, such as to a union trust fund.

Employers on public works must keep accurate payroll records that reflect, among other things, the work classification, hours worked, and actual per diem wages<sup>5</sup> paid for each employee. (§ 1776, subd. (a).) This is consistent with the requirements for employers of construction workers in general, who are required to keep accurate records of the hours employees work and the pay they receive. (Cal.Code Regs., tit. 8, § 11160, subd. 6.)

An apprentice is a person who had entered into a written apprentice agreement with an employer or an approved apprenticeship program sponsor. Apprentice agreements are required to be registered with DAS. (Cal.Code Regs., tit. 8, § 206, subd. (a).) Contractors are required to employ apprentices on public works. (Cal.Code Regs., tit. 8, § 230.1.) The Department issues special prevailing wage rates for apprentices employed in the building construction industry. (Cal.Code Regs., tit. 8, § 208.)

G Coast Did Not Meet Its Burden of Proving That The Basis For The Assessment Is Incorrect.

At the hearing, DLSE had the initial burden to produce prima facie evidence for the Assessment. DLSE met this burden by eliciting credible testimony from Alfaro and by moving its Exhibits 1 through 21 into evidence.

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<sup>5</sup> The term “per diem wages” as defined in section 1773.1, subdivision (a) includes, but is not limited to, payments for health and welfare, pension, vacation, and training, all of which were required by the pertinent prevailing wage determination in this case.

With DLSE having met its initial burden to produce a quantum of evidence to provide prima facie support for the Assessment, the burden of proving the Assessment to be incorrect fell to G Coast. G Coast did not meet this burden of proof.

The Assessment and supporting documents establish that \$5,100.66 in fringe benefits and \$239.04 in training fund contributions went unpaid. G Coast presented no substantial evidence to controvert the DLSE's findings of non-payment or that these dollar amount are incorrect. The Certified Payroll Records submitted by G Coast did not specify the payment of fringe benefits, including training funds, in violation of section 1776, subdivision (a). Other than the general assertion by Levi that the fringe benefits and training funds had been paid, G Coast failed to submit cancelled checks or any documentary evidence to show where the purported fringe benefit or training fund payments might have been directed, how much money was paid, or for which workers G Coast purportedly paid the fringe benefit and training fund components of its prevailing wage obligation on the Project.

Likewise, G Coast failed to prove that Benevides was a duly registered apprentice laborer which would have authorized G Coast to pay Benevides at the basic hourly rate of \$15.15 for apprentice laborers. Instead, the DLSE properly found that Benevides should have been paid at the basic hourly rate of \$27.29 for a journey-level laborer, group 1. G Coast erroneously paid Benevides \$1,151.40 at the apprentice rate. Instead, Benevides should have been paid \$2,074.04, excluding fringe benefits.

Levi's claim that he was misled by the statements and conduct of unidentified representatives of an unidentified union, and that he was legally entitled to rely on such statements and conduct, is given no weight because of the hearsay nature of this testimony. Even if this testimony were to be accepted at face value despite its hearsay nature, Levi's contention lacks persuasive force because it is so vague and nebulous. Moreover, there is no other evidence in the record to bolster Levi's testimony, and no other witnesses were called to attest to Levi's version of events.

The only substantial evidence produced in this case supports DLSE's conclusion that G Coast underpaid the wages due to G Coast's workers employed on the Project by failing to pay for fringe benefits and failing to make training funds contributions. The evidence also substantiates DLSE's finding that Benevides should not have been paid at the wage rate for Laborer, Group 1.

DLSE's Penalty Assessment Under Section 1775 is Appropriate.

DLSE assessed G Coast a penalty of \$20.00 per day for each instance that one of its workers was underpaid on the Project, pursuant to section 1775. The Director's review of DLSE's determination is limited to an inquiry into whether it was "arbitrary, capricious, or entirely lacking in evidentiary support . . ." (*City of Arcadia v. State Water Resources Control Bd.* (2010) 191 Cal.App.4th 156, 170.) In reviewing for abuse of discretion, however, the 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* (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 Regs., tit. 8 § 17250, subd. (c)].)

In this case, DLSE assessed penalties at the *minimum* rate of \$20.00 per violation.<sup>6</sup> The Director is not free to substitute her own judgment.<sup>7</sup> G Coast has not shown an abuse of discretion, and the assessment of penalties at the rate of \$20.00 per violation is affirmed.

G Coast is Liable for Liquidated Damages.

Section 1742.1, subdivision (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.

Additionally, if the contractor or subcontractor demonstrates to the satisfaction of the Director that he or she had substantial grounds for appealing the assessment . . . with respect to a portion of the unpaid wages covered by the assessment . . . , the Director may exercise his or her discretion to waive liquidated damages with respect to that portion of the unpaid wages.

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<sup>6</sup> This was the minimum rate set forth in the version of section 1775 as it existed in 2011, when G Coast and the Awarding Body entered into the contract for the Project.

<sup>7</sup> The Director agrees with DLSE that no further mitigation of penalties is appropriate under the facts of this case.

Absent waiver by the Director, G Coast is liable for liquidated damages in an amount equal to any wages that remained unpaid 60 days following service of the Assessment. It is plausible that G Coast had a reasonable subjective belief that part of the Assessment was in error based on the assertion that G Coast had relied upon a union to dispatch a registered apprentice. However, by submitting an incomplete and non-compliant set of Certified Payroll Records, G Coast cannot plausibly assert that it also had an objective factual basis for claiming the Assessment was erroneous. (Cal. Code Regs., tit. 8, § 17251, subd. (b).) Consequently, there are no grounds for waiving the liquidated damages as measured by the difference between the applicable prevailing wage rates and the actual wages paid to G Coast's workers. Because the assessed unpaid wages remain due and owing more than 60 days after service of the Assessment, G Coast is liable for liquidated damages.

#### FINDINGS

1. The contract between the Los Angeles Community College District and the Contractor, G Coast Construction, Inc., concerning the MAPA Tree Demolition / Harvesting Project, Project No. 38V.5801.02, is a public works contract subject to the payment of the prevailing rate of wages to the workers employed in the execution of the contract.

2. Affected contractor G Coast Construction, Inc. filed a timely request for review of the Civil Wage and Penalty Assessment issued by the Division of Labor Standards Enforcement.

3. G Coast Construction, Inc. did not submit accurate payroll records by failing to report any payment for mandatory fringe benefits or training funds contributions.

4. DLSE correctly reclassified Jeffrey Benevides from apprentice laborer to laborer (journeyperson), group 1. Unpaid wages arising from this misclassification are due in the amount of \$2,074.04.

5. G Coast Construction, Inc. underpaid its workers by failing to pay them the fringe benefits component of the per diem wages as set forth in the general prevailing wage determination applicable to journeyperson laborers employed on the Project. Unpaid wages for these violations of the California Prevailing Wage Law are due in the additional amount of \$5,100.66.

6. G Coast Construction, Inc. failed to make the required training fund contributions for its workers on the Project, resulting in underpayment of \$239.04.

7. In light of Findings 4, 5 and 6 above, G Coast Construction, Inc. underpaid its employees on the Project in the aggregate amount of \$7,413.74, comprising 66 violations of section 1775.

8. DLSE did not abuse its discretion in setting section 1775, subdivision (a) penalties at the rate of \$20.00 per violation, and the resulting total penalty of \$1,320, as assessed, for 66 violations on the Project is affirmed in light of appropriate factors and the other findings in this Decision.

9. The unpaid wages found due in Finding Nos. 4 and 5 remained due and owing more than sixty days following the issuance of the Assessment and there are insufficient grounds to waive payment of liquidated damages on those unpaid wages. G Coast Construction, Inc. is therefore liable for liquidated damages under section 1742.1 in the amount of \$7,174.70.

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

Wages Due:	\$7,174.70
Training Fund Contributions Due:	\$239.04
Penalties under section 1775, subdivision (a):	\$1,320.00
Liquidated Damages under section 1742.1, subdivision (a):	\$7,174.70
<b>TOTAL:</b>	<b>\$15,908.44</b>

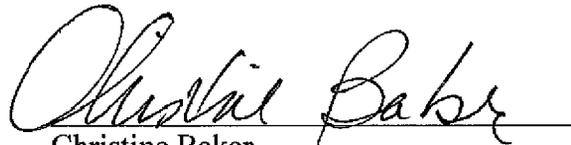
In addition, interest is due and shall continue to accrue on all unpaid wages as provided in section 1741, subdivision (b).

#### ORDER

The Assessment is affirmed. The Hearing Officer shall issue a Notice of Findings which shall be served with this Decision on the parties.

Dated:

7/8/2014



Christine Baker,  
Director of Industrial Relations