

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

RMV Construction, Inc.

Case No. 14-0384-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

ORDER DENYING RECONSIDERATION

Philadelphia Indemnity Insurance Company (“Philadelphia”) seeks reconsideration of the Decision of the Director issued on June 24, 2015 (“Decision”), on the basis that it was not allowed to intervene in the administrative proceeding in this matter pursuant to California Code of Regulations, title 8, section 17208, subdivisions (b) and (d) (“Rule 8”). Based on my review of Philadelphia’s arguments and the relevant parts of the record, I deny reconsideration for the following reasons.

Philadelphia neither requested review of the Civil Wage and Penalty Assessment (“Assessment”) nor timely sought to intervene in RMV Construction, Inc.’s (“RMV”) request for review. This means it has never become a “party” to these proceedings. The right to reconsideration is reserved to parties. (See, Cal. Code Regs., tit. 8, §§ 17261 & 17262.) Philadelphia’s failure to exhaust its administrative remedies by requesting review of the Assessment or timely requesting to intervene means that Philadelphia is not a party in this case and therefore lacks standing either to request reconsideration or to seek judicial review of the Decision.

The administrative record shows that the Division of Labor Standards Enforcement issued the Assessment against RMV on May 8, 2014. The proof of service indicates that that document was served by mail on Philadelphia Indemnity, in care of CT Corporation System, on the same date. Subsequently, in response to RMV’s request for review of the Assessment, a Notice of Appointment of Hearing Officer; Notice of

Prehearing Conference; and Preliminary Orders issued in this matter on October 29, 2014. That document was likewise served by mail on Philadelphia Indemnity Insurance Company, in care of CT Corporation System, on the same date.

Rule 8, subdivision (b) allows a surety or bonding company such as Philadelphia to intervene at or before the first prehearing conference and within either 30 days after being served with a copy of the Assessment or 30 days after the filing of the Request for Review, whichever is later. Philadelphia made no such request within the prescribed time frames.

By its own admission, Philadelphia requested to intervene by letter dated May 13, 2015, which was some seven weeks after the Hearing on the Merits was completed and the case was submitted for decision. Moreover, said request to intervene was not submitted to the Hearing Officer, but rather was sent to the Deputy Labor Commissioner, who has no jurisdiction to decide such requests. Consequently, the Hearing Officer did not receive the request until after the Decision had been issued.

Philadelphia offers no explanation for never requesting to intervene prior to the Hearing on the Merits. It does not claim that it did not receive notice of the Assessment and of the first Pre-Hearing Conference. Because Philadelphia took no action to participate in the proceedings at that stage, it never became a party to the proceedings, and the Hearing Officer had no occasion to notify it of subsequent proceedings.

Philadelphia argues that its request was timely because Rule 8 provides that a surety or bonding company's request to intervene made after the time limits specified therein "shall be treated as a motion for permissive participation under subpart (d) of this Rule." However, subpart (d) states: "Interested Persons who are permitted to participate under this Rule shall *not* be regarded as parties to the proceeding for any purpose, but may be provided notices and the opportunity to present arguments under such terms as the Hearing Officer deems appropriate." (Emphasis in original.) Thus, even if the Hearing Officer had received Philadelphia's request prior to the Hearing on the Merits, it could not have had party status, could have had no standing to present evidence, and at most could have been allowed to present arguments. The Hearing Officer properly did not deem it appropriate (or within his authority) to reopen the case to hear Philadelphia's arguments *after the case had already been decided*.

Accordingly, Philadelphia's request for reconsideration is denied.

Dated: 7/9/2015



Christine Baker
Director of Industrial Relations

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

RMV Construction, Inc.

Case No. 14-0384-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected contractor RMV Construction (RMV) requested review of a Civil Wage and Penalty Assessment (Assessment) issued by the Division of Labor Standards Enforcement (DLSE) with respect to the work of improvement known as the Helix Water District Small Valve Replacement (Project) performed for the Helix Water District (District) in the County of San Diego. The Assessment determined that \$314,803.95 in unpaid prevailing wages and training fund contributions, \$286,250.00 in Labor Code sections 1775 and 1813 statutory penalties, and \$93,000 in Labor Code section 1776 penalties were due.¹ RMV did not deposit the Assessment amount for unpaid wages with the Department of Industrial Relations (DIR) pursuant to section 1742.1, subdivision (b).

Pursuant to written notice, a Hearing on the Merits was held on March 25, 2015, in San Diego, California, before Hearing Officer Douglas P. Elliott. William A. Snyder appeared for DLSE. There was no appearance for RMV, which likewise did not appear for the three noticed Prehearing Conferences. At the first of these conferences, when the Hearing Officer dialed the telephone number on file for RMV, the call was answered by voice mail, and the Hearing Officer left a message. At the subsequent conferences, the Hearing Officer's call to the same number resulted in a voice mail greeting stating that the user's mailbox was full.

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

The issues for decision are:

- Whether the Assessment correctly found that RMV failed to report and pay the required prevailing wages for all straight time and overtime worked on the Project by its workers;
- Whether the Assessment correctly found that RMV failed to contribute to the applicable training funds for its workers on the Project;
- Whether RMV has demonstrated substantial grounds for appealing the Assessment, entitling it to a waiver of liquidated damages under section 1742.1;
- Whether RMV failed to timely submit certified payroll records and is therefore liable for penalties under section 1776.

Since RMV failed to appear at the Hearing on the Merits, the Hearing Officer proceeded with the hearing in RMV's absence under California Code of Regulations, title 8, section 17246, subdivision (a). The Director finds that RMV has failed to carry its burden of proving that the basis of the Assessment was incorrect. RMV has also failed to carry its burden of proving grounds for waiver of liquidated damages. Accordingly, the Director affirms the Assessment in full.

Facts

Failure to Appear: RMV's unsigned Request for Review apparently was filed by its principal, Robert Michael Vasil, II (Vasil). The matter was first set for Prehearing Conference (Conference) on November 12, 2014. RMV's mailing address on file is 3562 Summit Trail Court, Carlsbad, CA 92010. This is the address where the Assessment was served. On October 29, 2014, December 2, 2014, and December 22, 2014, notices of prehearing conference (Notice) were mailed to RMV at that address, giving RMV notice that the hearing officer would be conducting a telephonic prehearing conference on the date stated in each Notice. On November 12, 2014, RMV failed to appear at the Conference, and it was continued to December 16, 2014. On that date, RMV again failed to appear at the Conference, and it was again continued to January 23, 2015. When RMV again failed to appear, the Hearing Officer set a Hearing on the Merits for March 25, 2015. On February 3, 2015, notice of said hearing was mailed to RMV at the Summit Trail address. On March 25, 2015, RMV failed to appear for the Hearing on the Merits.

At each of the noticed conferences, the Hearing Officer called RMV's telephone number on file, (619) 780-517-5837, but received only a voice mail response. On November 12, 2014, the voice mail greeting invited the caller to leave a message, which the Hearing Officer did. At the subsequent conferences, the voice mail greeting indicated that the user's mailbox was full.

The Hearing Officer proceeded to conduct the Hearing on the Merits pursuant to the Notice for the purpose of formulating a recommended decision as warranted by the evidence pursuant to California Code of Regulations, title 8, section 17246, subdivision (a). DLSE's evidentiary exhibits were admitted into evidence without objection and the matter was submitted on the evidentiary record based on the testimony of DLSE's Deputy Labor Commissioner, Lance A. Grucela.

Assessment: The facts stated below are based on Exhibits 1 through 22 submitted by DLSE, including the Assessment and other documents in the Hearing Officer's file.

RMV was the primary contractor on the Project. Fifteen workers performed work for RMV under the contract between February 22, 2013 and September 27, 2013. The applicable prevailing wage determinations in effect on the bid advertisement date are: (1) SD-23-102-3-2012-1 (Laborer), with the applicable job classifications being Laborer: Engineering Construction, Group 1 and Laborer: Engineering Construction, Group 4 (which contains a predetermined increase that went into effect on July 1, 2013; (2) SD-23-63-3-2012-1 (Operating Engineer), with the applicable job classifications being Operating Engineer, Group 4; and (3) SD-23-261-3-2012-2 (Teamster), with the applicable job classification being Teamster, Group 2.

Based on RMV's certified payroll records (CPRs), employee questionnaires and interviews, the Assessment found that RMV failed to pay the required prevailing wages to the fifteen workers employed on the Project and failed to pay the required training funds for any of the workers. The Assessment found a total of \$314,803.95 in unpaid prevailing wages and training funds, \$270,440 in section 1775 statutory penalties in the amount of \$200 per violation for 1,372 violations, \$11,925 in section 1813 penalties in the amount of \$25 per day, and \$93,000 in section 1776 penalties.

Grucela testified that he prepared the Assessment and the supporting audit worksheets. He identified RMV's CPRs and the applicable prevailing wage determinations and apprentice wage rates. Grucela further testified that the Assessment was properly served on RMV on May 8, 2014. RMV then submitted a timely request for review, and DLSE provided RMV with a reasonable opportunity to review DLSE's evidence.

Certified Payroll Records: The facts stated below are based on Grucela's testimony, Exhibits 3 and 6 submitted by DLSE and other documents in the Hearing Officer's file.

A Request for Certified Payroll Records and Notice of Apprenticeship Compliance was mailed to RMV on December 24, 2013. Prior to February 11, 2014, RMV submitted copies of CPRs that were not signed and classified numerous workers as "Owner," "Owner General Contractor Salary," "Owner GC On Site," "Owner GC Superintendent," and other inappropriate classifications. The District also provided copies of CPRs RMV had submitted to it, and Grucela determined that these CPRs were significantly different from those RMV had submitted to DLSE. The records submitted to DLSE omitted some workers entirely and reported less hours. Grucela concluded that RMV had falsified these CPRs.

A Second Request for Payroll Records was sent to RMV via certified and regular mail on February 11, 2014, requesting that RMV provide certified, non-redacted CPRs with accurate addresses and Social Security numbers, time records, pay stubs, and proof of payment of wages. RMV never provided a complete response to this Second Request. On March 10, 2014, Vasil faxed a printout of a "Payroll Details" report for a single worker, Manny Martinez, stating "Veronica working on CPR's right now and rest of pay stubs / cancelled checks." Grucela subsequently discovered that Martinez was one of the few workers on the Project still employed by RMV, and that Vasil had issued checks to Martinez that included wages for both Martinez and another worker, Joe Daniels, in order to make it appear that RMV was paying the required prevailing wage. On March 19, 2014, Grucela received another fax from RMV with a "Payroll Details" report printout and copies of cancelled checks for three additional workers, two of whom had worked on

the Project for a single week. RMV did not provide any copies of pay stubs or any additional payroll information as requested. On March 20, 2014, DLSE mailed a Notice of Impending Debarment to RMV for failure to respond to the Second Request for Payroll Records. Grucela received no further communications or information from RMV.

On February 11, 2014, Grucela mailed Employee Questionnaires to RMV's workers on the Project. He received completed questionnaires confirming complaints that RMV paid workers between \$12.50 and \$25.00 per hour worked and did not always pay for overtime worked.

The Second Request for Certified Payroll Records was sent by regular and certified mail on February 11, 2014. United States Postal Service records reflect that RMV received the Request on February 13, 2014. Therefore, the records were due by February 28, 2014 (allowing an additional five days for service by mail). A Notice of Impending Debarment was served on RMV via regular and certified mail on March 20, 2014. As of April 30, 2014, RMV had not provided a complete response to the Request. Section 1776 penalties were assessed in the amount of \$91,0000.00, based on RMV's failure to respond for a period of sixty-one (61) days and employing fifteen (15) workers on the Project.

Kickbacks: Grucela testified that his investigation revealed that Vasil had required at least four (4) workers to cash checks and return the funds as "kickbacks" on multiple occasions. Vasil personally transported several workers to the bank, sometimes even accompanying them inside. On at least one occasion, Vasil sat with a teller as the worker endorsed and cashed the checks according to his instructions.

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). See, too *Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 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 rate. Section 1742.1, subdivision (a) provides for the imposition of liquidated damages, essentially a doubling of unpaid wages, if those wages are not paid within sixty days following the service of a civil wage and penalty assessment.

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 may appeal that assessment by filing a request for review under section 1742. Subdivision (b) of section 1742 provides, among other things, that a hearing on the request for review “shall be commenced within 90 days” and that the contractor shall be provided with an opportunity to review evidence that DLSE intends to utilize at the hearing. At the hearing the contractor “shall have the burden of proving that the basis for the civil wage and penalty assessment is incorrect.” (§ 1742, subd. (b).) If the contractor “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 payment of the liquidated damages with respect to that portion of the unpaid wages.” (§ 1742.1, subd. (a).) As well, DLSE’s determination “as to the amount of the penalty shall be reviewable only for abuse of discretion.” (§ 1775, subd. (a)(2)(D).)

Additionally, employers on public works must keep accurate payroll records, recording, among other things, the work classification, straight time and overtime hours worked and actual per diem wages paid for each employee. (§ 1776, subd. (a).) This is consistent with the requirements for construction employers 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.)

Section 1776, subdivision (h) provides that:

(a) Each contractor and subcontractor shall keep accurate payroll records, showing the name, address, social security number, work classification, straight time and overtime hours worked each day and week, and the actual per diem wages paid to each journeyman, apprentice, worker, or other employee employed by him or her in connection with the public work. Each payroll record shall contain or be verified by a written declaration that it is made under penalty of perjury, stating both of the following:

(1) The information contained in the payroll record is true and correct.

(2) The employer has complied with the requirements of Sections 1771, 1811, and 1815 for any work performed by his or her employees on the public works project.

(b) The payroll records enumerated under subdivision (a) shall be certified and shall be available for inspection at all reasonable hours at the principal office of the contractor on the following basis:

(1) A certified copy of an employee's payroll record shall be made available for inspection or furnished to the employee or his or her authorized representative on request.

(2) A certified copy of all payroll records enumerated in subdivision (a) shall be made available for inspection or furnished upon request to a representative of the body awarding the contract, the Division of Labor Standards Enforcement, and the Division of Apprenticeship Standards of the Department of Industrial Relations.

* * *

(h) In the event that the contractor or subcontractor fails to comply within the 10-day period, he or she shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit one hundred dollars (\$100) for each calendar day, or portion thereof, for each worker, until strict compliance is effectuated.

In this case, the record established the basis for the Assessment. DLSE presented evidence that the Assessment was properly served on RMV and that DLSE provided RMV with a reasonable opportunity to review the evidence to be used at the hearing. DLSE presented evidence that the fifteen workers, at times, performed work in the classifications of Laborer, Group I; Laborer, Group 4, Laborer Apprentice; Operating Engineer, Group 4; and Teamster, Group 2, thus requiring application of the Laborer,

Operating Engineer, Teamster and applicable Apprentice prevailing wage determinations. DLSE presented evidence that RMV did not pay the fifteen affected workers for all hours worked, including overtime. DLSE presented evidence that RMV failed to make the required contribution to the applicable training funds for the fifteen workers who worked on the Project. DLSE presented further evidence that RMV had previous prevailing wage violations.

With regard to RMV's failure to provide CPRs upon request, DLSE showed that RMV was served with the first Request via mail to the Summit Trail address. The Second Request was served by regular and certified mail to that address. For service of a request for CPRs, the applicable regulation does not prescribe any particular type of service. Instead, it states that the request "shall be in any form and/or method which will assure and evidence receipt thereof." (Cal. Code. Regs., tit. 8, § 16400, subd. (d).) The Summit Trail address is the same used for service of the Assessment. RMV has not provided any alternate address that it used at the time or anytime thereafter. DLSE's documented mailing constituted effective service of the Requests on RMV and there is evidence showing the receipt of the Requests by RMV. This conclusion is supported by the fact that RMV has not denied timely receipt of the Requests and in fact responded to the Requests, albeit inaccurately and incompletely.

Accordingly, DLSE's evidence constitutes prima facie support for the Assessment. RMV, in turn, presented no evidence to disprove the basis for, or accuracy of, the Assessment or to show it had substantial grounds for believing the Assessment was in error to support a waiver of liquidated damages under section 1742.1, subdivision (a). The Assessment therefore is affirmed in full, and liquidated damages are affirmed in an amount equal to the unpaid wages.

FINDINGS AND ORDER

1. Affected contractor RMV Construction, Inc. filed a timely Request for Review from a Civil Wage and Penalty Assessment issued by the Division of Labor Standards Enforcement.
2. RMV Construction, Inc. underpaid fifteen employees on the Project in the aggregate amount of \$308,350.83.

3. Penalties under section 1775 are due in the amount of \$270,440.00 for 1,372 violations at the rate of \$200.00 per violation.
4. Penalties under section 1813 are due in the amount of \$11,925.00 at the rate of \$25.00 per calendar day for fifteen affected employees.
5. RMV Construction, Inc. did not make the required contributions to the applicable training funds for fifteen employees on the Project in the aggregate amount of \$6,453.12.
6. Liquidated damages are due in the amount of \$308,350.83 and are not subject to waiver under section 1742.1, subdivision (a).
7. On February 11, 2014, DLSE served RMV Construction, Inc. with a request for certified payroll records, to be produced to DLSE within 10 days from the receipt of the request, or be subject to penalties under section 1776, subdivision (h) in the amount of \$100.00 per calendar day or portion thereof for each worker until the records were received. The request was received by RMV on February 13, 2014, at the address RMV uses for mailing purposes.
8. RMV Construction, Inc. failed to timely submit certified payroll records pursuant to the DLSE request, as required by section 1776.
9. DLSE properly assessed penalties against RMV Construction, Inc. under section 1776, subdivision (h) for its failure to provide certified payroll records to DLSE ~~within 10 days of February 18, 2013, allowing five days for service by mail.~~
10. In light of the findings above, RMV Construction, Inc. is liable for penalties under section 1776, subdivision (h) in the total amount of \$93,000.00.

The amounts found due in the Assessment, as affirmed by this Decision, are as follows:

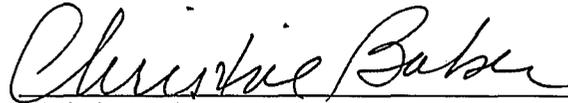
Wages:	\$ 308,350.83
Training Fund:	\$6,453.12
Penalties under section 1775, subdivision (a):	\$ 270,440.00
Penalties under section 1813:	\$11,925.00

Liquidated damages:	\$ 308,350.83
Penalties under section 1776, subdivision (h)	\$93,000.00
TOTAL	\$998,519.78

Interest shall accrue on unpaid wages in accordance with section 1741, subdivision (b).

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: 6/22/2015


Christine Baker
Director of Industrial Relations