STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Nemecheck, Inc.

Case No. 14-0386-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected subcontractor Nemecheck, Inc. (Nemecheck) requested review of a Civil Wage and Penalty Assessment (Assessment) issued by the Division of Labor Standards Enforcement (DLSE) with respect to work performed by Nemecheck on the project of the City of Gardena (Gardena) known as the Pedestrian Safety Improvements 2013 Various Locations (Project). On April 29, 2014, DLSE served the Assessment on Nemecheck. The Assessment determined that the following amounts were due: $21,774.72 in unpaid prevailing wages, $844.40 in unpaid training funds, and $7,000.00 in statutory penalties under Labor Code section 1775.[1] Nemecheck timely filed its Request for Review of the Assessment on or about June 26, 2014.[2]

Pursuant to written notice, a Hearing on the Merits was held on April 27, 2016, in Los Angeles, California, before Hearing Officer Howard Wien. Theresa Bichsel appeared for DLSE. There was no appearance for Nemecheck.

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

[2] In Case No. 14-0387-PWH Nemecheck requested review of the Determination of Civil Penalty (Determination) issued by DLSE on April 29, 2014, addressing the identical work performed by Nemecheck on the Project that is addressed in this Case No. 14-0386-PWH. These two cases were not consolidated. Accordingly, the Director is concurrently issuing a separate Decision in Case No. 14-0387-PWH. The prime contractor on the Project, ARC Construction Company, did not file a Request for Review from the Determination or from the Assessment.

The issues for decision are:

- Was Nemecheck, as a suspended corporation, precluded from asserting a defense in this case?
- Was the Project a public work requiring payment of prevailing wages under the California Prevailing Wage Law, sections 1720 et seq.?
- Was the Assessment timely issued?
- Was the enforcement file timely made available to Nemecheck?
- Did the Assessment correctly find that Nemecheck failed to pay the required prevailing wages for all time worked on the Project by its workers?
- Did the Assessment correctly find that Nemecheck failed to contribute to the training fund for its workers on the Project?
- Did the Labor Commissioner abuse her discretion in assessing penalties under section 1775 at the rate of $40.00 per violation for 175 violations?
- Is Nemecheck liable for liquidated damages under section 1742.1, subdivision (a)?

Since Nemecheck failed to appear at the Hearing on the Merits, the Hearing Officer proceeded with the hearing in Nemecheck's absence under California Code of Regulations, title 8, section 17246, subdivision (a). The Director finds that Nemecheck's status as a suspended corporation did not preclude it from a defense. The Director further finds that Nemecheck failed to carry its burden proving that the basis of the Assessment was incorrect, its burden of proving grounds for waiver of liquidated damages, and its burden of proving that the Labor Commissioner abused her discretion in assessing penalties. Based on DLSE's unrebutted evidence, the Director affirms the Assessment in its entirety.

FACTS

Nemecheck's Status as a Suspended Corporation.

On February 3, 2015, DLSE filed and served its "Application For An Order to Show Cause Why A Suspended Corporation Should Not Be Precluded From Asserting A Defense" (Application for OSC). In the Application for OSC, DLSE presented indisputable evidence that the California Franchise Tax Board (FTB) had suspended Nemecheck. In prehearing conferences on March 20, 2015, and June 22, 2015, Nemecheck's representative, President Jim Nemecheck (Mr. Nemecheck), admitted that Nemecheck was a suspended corporation and the suspension had not been lifted. On June 22, 2015, the Hearing Officer of case at that time, John J. Korbol,[3] issued the Order to Show Cause (OSC), giving Nemecheck to and including July 22, 2015, to respond in writing. Nemecheck did not submit any response to the OSC. In the prehearing conference on August 21, 2015, the Hearing Officer told the parties that he was reserving this issue for further consideration and determination in connection with the Hearing on Merits; the Hearing Officer subsequently issued a written Order stating this reservation of the issue. On the day of the Hearing on the Merits, Nemecheck remained suspended.

Nemecheck's Failure to Appear.

Nemecheck timely filed its request for review on or about June 26, 2014, signed by Mr. Nemecheck. Mr. Nemecheck participated in five prehearing conferences as Nemecheck's representative on the following dates: December 5, 2014, March 20, 2015, June 22, 2015, August 21, 2015, and January 15, 2016.

At the August 21, 2015, prehearing conference, Mr. Nemecheck participated in selecting September 22, 2015, 10:00 a.m., as the date and time for the Hearing on the Merits. However, Mr. Nemecheck did not appear. At approximately 10:30 a.m., DLSE's attorney David Cross informed the Hearing Officer that Mr. Nemecheck had sent Cross an e-mail message that Mr. Nemecheck's vehicle had a mechanical breakdown on the freeway while attempting to drive to downtown Los Angeles to attend the Hearing on the

[3] On October 2, 2015, Howard Wien was appointed Hearing Officer in place of John J. Korbol.

Merits. In subsequent communications with Cross, Mr. Nemecheck stated that his vehicle was towed to a shop and was out of service, and Mr. Nemecheck requested a continuance based on these circumstances. Cross did not object, and the Hearing Officer ordered a continuance of the Hearing on the Merits to December 9, 2015, at 10:00 a.m.

On December 7, 2015, Mr. Nemecheck, by email, requested a continuance of the December 9, 2015, Hearing on the Merits on the ground he was "in and out of the hospital in the past couple of weeks and ha[d] testing schedule[d] for Wednesday [December 9, 2015]." The Hearing Officer responded by email that day to Mr. Nemecheck and DLSE granting the request for the continuance and stating that the Hearing Officer's administrative assistant will contact each of them to schedule a telephonic prehearing conference to set the new date for the Hearing on the Merits. Subsequently, with the consent of Mr. Nemecheck and DLSE, the telephonic conference was set for January 15, 2016.

Mr. Nemecheck and DLSE participated in the telephonic prehearing conference on January 15, 2016, including participating in setting the new date for the Hearing on the Merits on April 27, 2016, commencing at 10:00 a.m. The Hearing Officer stated that there shall be no further continuances absent extraordinary circumstances established by documentary evidence. On that day, minutes of this prehearing conference and the Order on Continuance of Hearing on the Merits were served on the parties. The Order stated the date and time of the Hearing on the Merits and the above admonishment regarding no further continuances.

At the Hearing on the Merits on April 27, 2016, no one appeared for Nemecheck. DLSE was represented by Theresa Bichsel, who had replaced Cross as DLSE's representative.

At the commencement of the Hearing on the Merits, Bichsel stated that at 9:39 a.m. she had received a message from her office stating that Mr. Nemecheck had left a phone message. Mr. Nemecheck's message was that he will not attend the hearing because he no longer owned his business, and today he was called into work on his new job because another worker was injured.

The Hearing Officer immediately phoned Mr. Nemecheck. In this telephone conversation, Mr. Nemecheck stated that he had planned to attend the hearing, but his boss had called him into work due to the injury or illness of another worker. The Hearing Officer then slowly read to Mr. Nemecheck, verbatim, California Code of Regulations, title 8, section 17246, subdivisions (a) and (b). (Those provisions addressed, inter alia, the authority of a hearing officer to proceed in a party's absence and recommend a decision warranted by the available evidence, and the absent party's right to seek a rehearing by filing a written motion no later than ten days after the hearing.) Mr. Nemecheck responded that he was not an attorney and he did not understand what the Hearing Officer had read to him. The Hearing Officer then summarized for Mr. Nemecheck, in layman's terms, the provisions the Hearing Officer had read verbatim. Further, the Hearing Officer explained that if Mr. Nemecheck wishes to have an attorney review those regulations with him, he may retain an attorney. Mr. Nemecheck stated that he had hoped to present evidence and testimony today. The Hearing Officer responded that Nemecheck had not exchanged with DLSE nor filed with the Hearing Officer any exhibit list or witness list and had not served any exhibits upon DLSE – all in violation of a prior written Order of the Hearing Officer requiring Nemecheck to do so prior to the Hearing on the Merits. (That Order was issued by then-Hearing Officer John J. Korbol on August 21, 2015.) Mr. Nemecheck asked if the Hearing Officer will send him a notice in writing of the matters stated in this telephone conference. The Hearing Officer stated that he would not do so, and that if Nemecheck did not timely submit a written motion for rehearing within ten days as stated above, the next communication Nemecheck would receive would be the decision on the case issued by the Director of Industrial Relations. This concluded the telephone conference.

The Hearing Officer proceeded to conduct the Hearing on the Merits pursuant to California Code of Regulations, title 8, section 232.46, subdivision (a). DLSE's exhibits were admitted into evidence without objection, and the matter was submitted on the evidentiary record based on the testimony of DLSE's witness, Deputy Labor Commissioner Jeffrey Pich. The matter stood submitted on April 27, 2016. Nemecheck never filed a motion for rehearing.

Assessment.

The facts stated below are based on the testimony of Pich and DLSE's Exhibits 1 through 26, including the Assessment.

DLSE submitted evidence regarding Nemecheck's ten workers who performed work on the Project at various times between April 22, 2013, and July 19, 2013. The evidence showed that one worker performed work as landscape tender and two workers performed work as landscape laborers. Nemecheck properly paid these three workers the prevailing wages for their respective classifications under Prevailing Wage Determination SC-102X-14-2011-1, but Nemecheck failed to pay the training fund contributions required by that determination.

The evidence further showed that Nemecheck's seven other workers on the Project performed work as laborers, but Nemecheck misclassified them as tree trimmers and paid those workers the prevailing wage for tree trimmers. Due to the higher prevailing wage for the classification of laborer under Prevailing Wage Determination SC-23-102-2-2012-1, the seven workers were underpaid prevailing wages in the aggregate sum of $21,774.72.

The evidence further showed that Nemecheck failed to pay the training fund contributions for the seven laborers required by Prevailing Wage Determination SC-23-102-2-2012-1. For the seven laborers – plus the two landscape laborers and one landscape tender addressed above – the aggregate unpaid training fund contributions totaled $844.40.

DISCUSSION

1. Nemecheck's Status as a Suspended Corporation.

DLSE's application for an OSC to preclude Nemecheck from asserting a defense to the Assessment in this case was reserved for the Hearing on the Merits. Notably, during Nemecheck's suspension, it "may not prosecute or defend an action [citation], appeal from an adverse judgment [citation], seek a writ of mandate [citation], or renew a judgment obtained prior to suspension [citation]." (*Grell v. Laci Le Beau Corp.* (1999)

73 Cal.App.4th 1300, 1306 [citing Rev. & Tax. Code § 23301].) Still, permitting Nemecheck to defend and present evidence before the Hearing Officer would satisfy the mandate that a party in a hearing under section 1742 be afforded administrative due process. Nemecheck, as a suspended corporation, could seek to revive the corporation by application to the Franchise Tax Board together with payment of taxes, interest and penalties. (Rev. & Tax. Code, § 23305.) If Nemecheck does not so and thereafter filed a petition for writ of mandate to the superior court without having secured a revivor, that court could then consider any DLSE motion to strike the petition proceedings for lack of capacity and seek entry of a final judgment. Accordingly, this Decision finds that Nemecheck was not precluded from asserting any defense to the Assessment in this section 1742 hearing due to its status as a suspended corporation.

2. Project Was a Public Work; Assessment Was Timely; DLSE Made Its Enforcement File Available.

In the Hearing on the Merits, DLSE presented evidence establishing that the Project was a public work requiring payment of prevailing wages and training fund contributions, the Assessment was timely and properly served upon Nemecheck, and DLSE timely and reasonably made its enforcement file available to Nemecheck for review and copying. Nemecheck presented no evidence otherwise. Accordingly, this Decision finds that the Project was a public work, the Assessment was timely and properly served on Nemecheck, and DLSE timely and reasonably made its enforcement file available to Nemecheck for review and copying.

3. Nemecheck Underpaid Prevailing Wages.

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

Section 1775, subdivision (a) requires, among other things, that contractors and subcontractors pay the difference to workers paid less than the prevailing rate and prescribes penalties for failing to pay the prevailing rate.

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 that assessment by filing a request for review under section 1742. Under section 1742, subdivision (b), and California Code of Regulations, title 8, section 17224, the contractor shall be provided with an opportunity to review evidence that DLSE intends to utilize at the hearing. DLSE has the burden of providing evidence that "provides prima facie support for the Assessment ...." (Cal. Code Regs., tit. 8, § 17250, subd. (a).) When that initial burden is met, "the Affected Contractor or Subcontractor has the burden of proving that the basis for the Civil Wage and Penalty Assessment ... is incorrect." (Cal. Code Regs., tit. 8, § 17250, subd. (b); accord, §1742, subd. (b).)

Here, DLSE presented prima facie evidence as follows. Nemecheck misclassified seven of its workers on the Project as tree trimmers and paid those workers the prevailing wage for tree trimmers. The work performed by those workers on the Project was within the scope of work for laborers, not tree trimmers, under the applicable prevailing wage determinations. Under the higher prevailing wage for the classification of laborer, the seven workers were underpaid prevailing wages in the aggregate sum of $21,774.72.

Nemecheck presented no evidence to disprove the basis for, or the accuracy of, the Assessment. Accordingly, Nemecheck is liable for payment of prevailing wages in the aggregate sum of $21,774.72.

4. Nemecheck Is Liable for Liquidated Damages.

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. It provides in pertinent part:

> 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 payment of the liquidated damages with respect to that portion of the unpaid wages.

Further as to liquidated damages, section 1742.1, subdivision (b) provides:

> . . . 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.

Here, there was no evidence that Nemecheck paid any of the back wages to any of its workers within sixty days following service of the Assessment. There was no evidence that Nemecheck deposited the amount of the Assessment, or any part thereof, with the Department of Industrial Relations within sixty days following service of the Assessment (or at any other time). There was no evidence that Nemecheck had any substantial ground for appealing any portion of the Assessment. Accordingly, Nemecheck is liable for liquidated damages in an amount equal to the unpaid wages,

$21,774.72.

5. Nemecheck Failed to Make Training Fund Contributions.

Section 1777.5, subdivision (m)(l) requires contractors on public works projects who employ journeyman or apprentices in any apprenticeable craft to pay training fund contributions to the California Apprenticeship Council or to an apprenticeship committee approved by the Department of Apprenticeship Standards, as follows:

> A contractor to whom a contract is awarded, who, in performing any of the work under the contract, employs journeymen or apprentices in any apprenticeable craft or trade shall contribute to the California Apprenticeship Council the same amount that the director determines is the prevailing amount of apprenticeship training contributions in the area of the public works site. A contractor may take as a credit for payments to the council any amounts paid by the contractor to an approved apprenticeship program that can supply apprentices to the site of the public works project. The contractor may add the amount of the contributions in computing his or her bid for the contract.

Here, DLSE presented prima facie evidence that Nemecheck was obligated by the applicable prevailing wage determinations to make training fund contributions for all ten workers on the Project in the aggregate sum of $844.40, but Nemecheck made no training fund contributions. Nemecheck presented no evidence to disprove the basis for, or the accuracy of, the Assessment. Accordingly, Nemecheck is liable for payment of training funds in the aggregate sum of $844.40.

6. Nemecheck Is Liable for Penalties under Section 1775.

As to penalties in the Assessment for underpayment of prevailing wages, DLSE's determination "as to the amount of the penalty shall be reviewable only for abuse of discretion." (§ 1775, subd. (a)(2)(D).) Abuse of discretion by DLSE is established if the "agency's nonadjudicatory action ... is inconsistent with the statute, arbitrary, capricious, unlawful or contrary to public policy." (*Pipe Trades v. Aubry* (1996) 41 Cal.App.4th 1457, 1466.) 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.)

The 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." (Cal. Code Regs., tit. 8, § 17250, subd. (c).)

Nemecheck is liable for penalties for "each calendar day, or portion thereof, for each worker paid less than the prevailing wage rates...." (§ 1775, subd. (a)(1).) Here, DLSE presented prima facie evidence that Nemecheck committed 175 total violations. The Assessment set the penalty rate at $40.00 per violation, resulting in a total penalty of $7,000.00. As to this rate of $40.00 per violation, section 1775, subdivision (a)(2)(B)(i) states in relevant part:

> The penalty may not be less than forty dollars ($40) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rate, unless 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.

There was no evidence that Nemecheck's failure to pay prevailing wages and training funds was a good faith mistake, no evidence that Nemecheck corrected its errors when brought to its attention, and no evidence that the $40.00 rate was an abuse of discretion. Accordingly, Nemecheck is liable for penalties under section 1775, subdivision (a), in the sum of $7,000.00, computed at the rate of $40.00 for 175 violations.

FINDINGS

1. Affected subcontractor Nemecheck, Inc. filed a timely Request for Review from a Civil Wage and Penalty Assessment issued by the Division of Labor Standards Enforcement.

2. Nemecheck, Inc. underpaid the prevailing wages owed to seven of its workers on the Project in the aggregate amount of $21,774.72. Accordingly, prevailing wages in the sum of $21,774.72 are due.

3 Nemecheck, Inc. did not prove any basis for waiver of liquidated damages under section 1742.1, subdivision (a). Accordingly, under section 1742.1, subdivision (a), liquidated damages in the sum of $21,774.72 are due.

4. Nemecheck, Inc. did not make required training fund contributions in the aggregate amount of $844.40 for ten workers on the Project. Accordingly, training fund contributions in the sum of $844.40 are due.

5. The Labor Commissioner did not abuse her discretion in assessing penalties under section 1775, subdivision (a), at the rate of $40.00 per violation for 175 violations. Accordingly, statutory penalties in the sum of $7,000.00 are due.

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

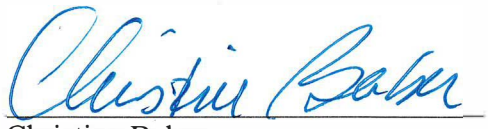
Wages:	$ 21,774.72
Liquidated damages under section 1742.1:	$ 21,774.72
Training Fund Contributions:	$ 844.40
Penalties under section 1775, subdivision (a):	$ 7,000.00
TOTAL:	**$ 51,393.84**

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

ORDER

The Civil Wage and Penalty Assessment is affirmed as set forth in the above Findings. The Hearing Officer shall issue a Notice of Findings which shall be served with this Decision on the parties.

Dated: 6/16/2017



Christine Baker
Director of Industrial Relations