

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

S. C. Clemons, Inc.

Case No. 15-0409-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

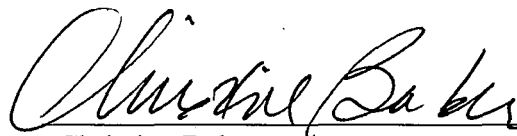
**Order Modifying Decision of Director of Industrial Relations to Correct
Clerical Error**

It has come to the attention of the Director that her Decision of August 1, 2016, issued on August 4, 2016, should be amended *nunc pro tunc* to reflect the correct name of the subcontractor liable under the terms of the Decision. The Decision stated the subcontractor's name as "S.C. Clemons, Inc." in the body and caption of the Decision, and the correct name as reflected on the Civil Wage and Penalty Assessment is "S. E. Clemons, Inc."

Labor Code §1742(b) states in part that "[w]ithin 15 days of the issuance of the decision, the director may reconsider or modify the decision to correct an error, except that a clerical error may be corrected at any time." In this case, the correction sought by the Director's own motion is of a minor and routine clerical error that does not affect the substance of the Decision. Accordingly, it is within the Director's authority to reconsider the decision in order to make this correction. Good cause appearing,

IT IS ORDERED that the Decision of the Director in this matter shall be and is hereby corrected as set forth in the attached Corrected Decision of the Director of Industrial Relations, and this amendment is made *nunc pro tunc* and shall not revive or extend any right of appeal or reconsideration from the original decision.

Dated: 8/9/2016



Christine Baker
Director of Industrial Relations

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**CORRECTED DECISION
OF THE DIRECTOR OF INDUSTRIAL RELATIONS**

Affected prime contractor Pacific Empire Builders, Inc. (Pacific) and affected subcontractor S. E. Clemons, Inc. (Clemons), submitted timely requests for 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 40-Unit Jefferson Blvd. Housing Project (Project) performed for the Los Angeles Housing and Community Investment Department in Los Angeles County. The Assessment, as amended, determined that \$10,355.47 in unpaid prevailing wages and training funds and \$65,820.00 in statutory penalties were due. A Hearing on the Merits was held on July 20, 2016, in Los Angeles, California, before Hearing Officer Jessica L. Pirrone. Max D. Norris appeared for DLSE. Before the Hearing, Pacific and DLSE reached a settlement resolving all issues as to Pacific; thus there was no appearance by Pacific. Clemons also did not appear. Now, based on unrebutted evidence showing that Clemons failed to pay the workers the required prevailing wages and meet its apprenticeship obligations, the Director of Industrial Relations affirms the Assessment.

FACTS

Settlement with Prime Contractor. On October 28, 2015, Pacific withdrew its Request for Review based on its settlement with DLSE, resolving the unpaid wages, training funds, and liquidated damages issues.

Failure to Appear: The Hearing Officer obtained contact information for Clemons from Clemons's October 20, 2015, Request for Review, which provides a telephone number and addresses in Adelanto and San Bernardino. The Hearing Officer used the telephone number from the Request for Review to contact Clemons for Prehearing Conferences. All Notices, Minutes and Orders were served at both the Adelanto and San Bernardino addresses.

The Notice of Appointment of Hearing Officer and Prehearing Conference was served on November 19, 2015. In accordance with the Notice, the first telephonic Prehearing Conference was held on February 22, 2016 at 10:00 a.m. The Hearing Officer called Clemons at the number on the Request for Review, but there was no answer and no voicemail. The Hearing Officer conducted the February 22, 2016, Prehearing Conference without Clemons. The Hearing Officer continued the Prehearing Hearing Conference to April 11, 2016, and set the Hearing on the Merits for July 20, 2016. The Minutes of the Prehearing Conference and related Orders were duly served.

At the April 11, 2016, Prehearing Conference, the Hearing Officer called Clemons, but there was only a recording that said voicemail had not been set up. The Prehearing Conference was conducted in Clemons's absence. Following the Prehearing Conference, the Hearing Officer issued minutes dated April 14, 2016, which stated, among other things: "The Hearing will commence as noticed regardless of whether there is an appearance by the Requesting Party."

At the July 20, 2016, Hearing on the Merits, Clemons again failed to appear. The Hearing Officer conducted the Hearing in Clemons's absence 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 made an oral motion to amend the Assessment downward to correct a clerical error, which the Hearing Officer granted pursuant to California Code of Regulations, title 8, section 17226, subdivision (b).¹ DLSE's exhibits were admitted into evidence without objection, and the matter was submitted on the evidentiary record.

¹ The Public Works Audit Worksheet attached to the Assessment indicates that the Labor Code section 1775, subdivision (a) penalties were \$47,960.00. (See Exhibit 39.) But, those penalties, as correctly reflected in the Penalty Review, are \$35,160.00. (See Exhibit 38.) Accordingly, the Assessment was amended downward in the amount of \$12,800.00.

Assessment: The facts stated below are based on Exhibits 1 through 40 submitted by DLSE, and other documents in the Hearing Officer's file.

Pacific entered into a public works contract with the District regarding the Project and later subcontracted with Clemons to perform sheet metal work. The applicable prevailing wage determination is R-166-102-1-2011-1 and the applicable classification is sheet metal worker.

According to the Assessment, as amended, Clemons failed to pay the required prevailing wages to its workers on the Project in the aggregate amount of \$9,356.89 and failed to make training fund contributions in the aggregate amount of \$998.58. In addition, DLSE assessed: (1) \$35,160.00 in Labor Code section 1775² penalties at the rate of \$120.00 per day for 293 instances of failure to pay the applicable prevailing wages; (2) \$4,500.00 in section 1813 penalties at the rate of \$25.00 per violation for 180 instances of failure to pay the proper overtime rate; and (4) \$26,160.00 in section 1777.7 penalties at the rate of \$60 for 436 instances of failure to meet its obligations to request the dispatch of and hire apprentices.

Given that Pacific settled certain issues as stated, above, the issues for hearing are sections 1775, 1813 and 1777.7 penalties.

DISCUSSION

Sections 1720 and following set forth a scheme for requiring the payment of prevailing wages and hiring of apprentices 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.4th 976.)

Section 1775 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. During the relevant period, under section 1775, the penalty was a maximum of \$200.00 for each calendar day for each worker paid less than the prevailing wage. Here, DLSE mitigated the penalty to \$120.00 per day. Section 1813 prescribed a fixed penalty of \$25.00 for each instance of failure to pay the prevailing overtime rate when due.

Sections 1777.5 through 1777.7 set forth the statutory requirements governing apprentices on public works projects. These requirements are further addressed in regulations promulgated by the California Apprenticeship Council. These statutes and regulations require that a contractor on a public work: (1) submit within a specified time period to applicable apprenticeship programs particular contract award information (§1777.5, subd. (e); Cal. Code Regs., tit. 8, § 230, subd. (a)); and (2) submit within a specified time period to applicable apprenticeship programs a request for the dispatch of apprentices and/or maintain a specified ratio of apprentices to journeymen on the project. (§1777.5, subd. (g) and Cal. Code Regs., tit. 8, § 230.1, subd. (a).)

If a contractor "knowingly" violates section 1777.5, a civil penalty is imposed under section 1777.7 in an amount not to exceed \$100 for each full calendar day of noncompliance. The amount of this penalty may be reduced by the Labor Commissioner if the amount of the penalty would be disproportionate to the severity of the violation. Here, the Labor Commissioner reduced the penalty to \$60.00 per violation.

When DLSE determines that a violation of the prevailing wage or apprenticeship requirements has occurred, it may issue a written Civil Wage and Penalty Assessment. (§§1741 and 1777.7, subd. (c)(1).) An affected contractor may appeal that assessment by filing a request for review. (§§1742 and 1777.7, subd. (c)(1).) The contractor has the burden of proving that the basis for the civil wage and penalty assessment is incorrect. (§§1742, subd. (b) and 1777.5.)

In this case, the record establishes the basis for the Assessment and Clemons presented no evidence to disprove the basis for the Assessment. Accordingly, the Assessment is affirmed.

FINDINGS AND ORDER

1. Affected subcontractor S. E. Clemons, Inc. filed a timely Request for Review from a timely Civil Wage and Penalty Assessment issued by the Division of Labor Standards Enforcement.
2. Affected contractor Pacific Empire Builders, Inc. settled the issues of unpaid wages, training funds, interest, and liquidated damages before the Hearing.

² All further statutory references are to the California Labor Code, unless otherwise indicated.

3. Penalties under section 1775, subdivision (a) are due in the amount of \$35,160.00 for 293 instances of failure to pay the applicable prevailing wages.

4. Penalties under section 1813 are due in the amount of \$4,500.00 for 180 instances of failure to pay the proper overtime rate.

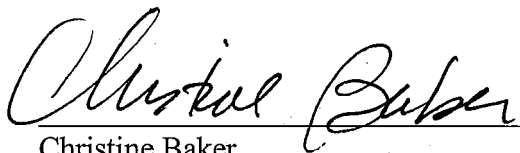
5. Penalties under section 1777.7 are due in the amount of \$26,160.00 for 436 instances of failure to request dispatch of and hire apprentices.

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

Penalties under section 1775, subdivision (a):	\$35,160.00
Penalties under section 1813:	\$4,500.00
Penalties under section 1777.7:	\$26,160.00
TOTAL:	\$65,820.00

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: 8/9/2016



Christine Baker
Director of Industrial Relations