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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

TRUXELL & VALENTINO LANDSCAPE
DEVELOPMENT, INC.,

Plaintiff and Appellant,

v.

CHRISTINE BAKER, AS ACTING DIRECTOR
OF CALIFORNIA DEPARTMENT OF
INDUSTRIAL RELATIONS,

Defendant and Respondent;

DEPARTMENT OF INDUSTRIAL
RELATIONS, DIVISION OF LABOR
STANDARDS ENFORCEMENT,

Real Party in Interest and Respondent.

F061206

(Super. Ct. No. 09CECG01198)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Jeff Hamilton, Judge.

Michael J. F. Smith, A Professional Corporation, Michael J. F. Smith, for Plaintiff and Appellant.

Ramon Yuen-Garcia for Defendant and Respondent, and for Real Party in Interest and Respondent.

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Appellant Truxell & Valentino Landscape Development, Inc. (Truxell), removed and replaced landscaping at Clovis West High School. The job included the construction of a large paved area with cement walkways and cement seating areas. Truxell paid its employees at the prevailing wage rate for landscape workers for the entire job. Respondents and Real Party in Interest Department of Industrial Relations, Division of Labor Standards Enforcement (DLSE), issued a wage-and-penalty assessment, finding that the workers who performed the cement work were misclassified and should have been paid the prevailing wage for cement masons. The assessment included the difference in wages plus penalties.

After a hearing, respondent Director of the Department of Industrial Relations (Director)¹ modified and affirmed the wage assessment, imposed liquidated damages, and remanded the case to the DLSE for a redetermination of the penalties. The DLSE redetermined the amount of the penalties, and Truxell did not request review by the Director. Truxell filed a petition for a writ of mandate in the superior court seeking reversal of all the relief ordered. The court denied the petition.

Truxell appeals from the denial, asking us to hold that the misclassification finding was not supported by substantial evidence and that the penalties were excessive, amounting to an abuse of discretion. Truxell also argues that, even if its position on the classification is wrong, it had a reasonable belief that the law supported its position, and that liquidated damages therefore cannot properly be imposed.

We hold that substantial evidence supports the agency finding on the misclassification issue. Further, Truxell forfeited its claim on the issue of penalties when it decided not to request administrative review of the redetermination of the penalties. We agree with Truxell, however, that there was a reasonable (though mistaken) basis in

¹At the time of agency proceedings, the Director of Industrial Relations was John C. Duncan. Currently, Christine Baker is the Acting Director.

law and fact for its position on the classification of the workers, and that liquidated damages therefore were not appropriate. We reverse the judgment and direct the superior court to grant relief on the liquidated damages issue.

FACTUAL AND PROCEDURAL HISTORIES

Truxell entered into a contract with Clovis Unified School District on June 19, 2006, to carry out “[s]ite and [l]andscape [i]mprovements” at Clovis West High School. The work was divided roughly into thirds: One-third was grading and the removal of existing landscaping; another one-third was the installation of a new underground irrigation system and the planting of new trees, shrubs and grass; and the remaining one-third was cement work.

The cement work, as described in the Director’s written decision, included “the construction of curbing, sidewalks, seating walls, mowstrips, concrete stairs, and disabled ramps, and the installation of bollards,” which are removable cement posts used to control vehicle access. Blueprints and photographs of all these concrete features are included in the administrative record. The photographs indicate that “seating wall[s]” are low walls, usually located at borders between sidewalks and planted areas, on which students can sit. “Mowstrips” are narrow strips of concrete separating lawns from other areas.

For the cement work, Truxell hired a separate crew of seven workers and a supervisor. Truxell’s regular employees did the balance of the work. At least five of the workers hired for the cement work had experience as cement masons, ranging between two and 20 years. Truxell paid the crew that did the cement work at the same wage rates as it paid the remaining workers, the rates for landscape tradesmen and landscape assistant journeymen, which ranged from \$14 to \$25 per hour. The applicable rate for cement masons would have been about \$40 per hour. Truxell’s president, John Valentino, stated in a letter to Deputy Labor Commissioner Rachel Farmer that he believed paying all the workers at the lower rates was appropriate because “all the work

on this project is covered by a landscape contractors license (C-27), and as such, we consider it all landscape work.”²

The DLSE conducted an investigation to determine whether the cement workers were classified correctly. As the parties agree, the classification question is controlled by the scope-of-work provisions of the governing collective bargaining agreements for landscape workers and cement masons. The scope of work for landscape workers is as follows:

“The Landscape industry is defined as follows: Decorative landscaping, such as decoration walls, pools, ponds, fountains, reflection units, low voltage lighting displays, hand grade landscape areas, tractor grade landscape areas, finish rake landscape areas, spread top soil, build mounds, trench for irrigation manual or power, layout for irrigation backfill trenches, asphalt, plant shrubs, trees, vines, set boulders, seed lawns, lay sod, use ground covers such as flatted plant materials, rock rip rap, colored rocks, crushed rock, pea gravel, and any other landscapeable ground covers, installation of header boards and cement mowing edges, soil preparation such as wood shavings, fertilizers (organic, chemical or synthetic), top dress ground cover areas with bark of any woods residual or other specified top dressing, watering of plants and all clearing and clean up prior to and after landscaping.

“A. In addition to the above Paragraph, the work covered shall include but not be limited to all work involved in the distribution, laying, and installation of landscaping irrigation pipe, the installation of low voltage automatic irrigation and lawn sprinkler systems, including but not limited to the installation of automatic controllers, valves, sensors, master control panels, display boards, junction boxes and conductors including all components thereof.

²California Code of Regulations, title 16, section 832.27, describes the work covered by a C-27 license: “A landscape contractor constructs, maintains, repairs, installs, or subcontracts the development of landscape systems and facilities for public and private gardens and other areas which are designed to aesthetically, architecturally, horticulturally, or functionally improve the grounds within or surrounding a structure or a tract or plot of land. In connection therewith, a landscape contractor prepares and grades plots and areas of land for the installation of any architectural, horticultural and decorative treatment or arrangement.”

“B. Installation of valve boxes, thrust blocks, both precast and poured in place, pipe hangers and supports, incidental to the installation of the entire piping system.

“C. Start-up testing, flushing, purging, water balancing, placing into operation all piping equipment, fixtures and appurtenances installed under the Agreement.

“D. Any line inside a structure which provides water to work covered by this Agreement, including piping for ornamental pools and fountains when performed in conjunction with landscaping.

“E. All piping for ornamental stream beds, and waterways.

“F. All swimming pools in connection with single family residential units, condominiums, town house[s], apartment houses, including remodels, additions, all service and repair, mobile home parks, and motels and hotels up to four stories in height may be performed under the terms and conditions and wage and fringe rates of this Agreement. All other swimming pool piping shall be done by Building Trades Journeyman and Apprentices only, who may be dispatched out of UA Local 355, at no less than the wage and fringe rate of the UA Local Union Master Labor Agreement having jurisdiction in the geographical area where the work is being performed. The Hiring Hall provisions contained in the Local Union’s Master Labor Agreement where the work is being performed shall not apply.

“G. All temporary irrigation and lawn sprinkler systems and all types of hydro mulching and erosion control.

“H. This Agreement may be used to cover maintenance and plant establishment. Plant establishment as such work is described in the [employer’s] contract documents shall be work covered by this agreement. This work may be performed exclusively by all classifications outlined in this agreement without the supervision of a Journeyman except for Apprentice which would require the supervision of a Journeyman. No ratios.

“I. Trenchers are covered by this Agreement provided the Trencher is of 35 horsepower or less.

“J. The installation of playground equipment and prefabricated park service equipment.”

The scope of work for cement masons provides:

“Without limiting the scope of the work covered hereby, it is agreed that Cement [Masons’] work shall include but shall not be limited to all the following construction work:

“(1) All building construction, including but not limited to the construction, erection, alteration, repair, modification, demolition, addition or improvement in whole or in part of any building structure.

“(2) All heavy highway and engineering construction, including but not limited to the construction, improvement modifications and demolition of all or part of any streets and highways (including sidewalks, curbs and gutters), bridges, viaducts, railroad, tunnels, airports, water supply, irrigation, flood control and drainage systems, sewers and sanitation projects, wharves, docks, break-waters or rip rap stone, or operation incidental to such heavy construction work.

“Subject to the foregoing provision of this Section and to the provisions of Section 6 of this Agreement, the work to be performed by Cement [Masons] shall include but not be limited to the following, when tools of the Cement Masons’ trade are used or required:

“Setting screeds, screed pins, curb forms and curb and gutter forms, rodding, spreading and tamping concrete, hand application of curing compounds, applying topping (wet or dry) colors or grits; using Darby and push floats, hand troweling or hand floating; marking edging, brooming or brushing, using base cover or step tools; chipping, and stoning, patching or sacking; dry packing; spreading and finishing gypsum, operating mechanical finishers (concrete) such as Clary, Jackson, Bidwell Bridge Deck Paver or similar types; grinding machines, troweling machines, floating machines, powered concrete saws, finishing of epoxy and resin materials, bush hammering and exposed finishes for architectural work.

“Operation of skill saw, chain saw, Laser Screed, Laser Level, Curb and Slipform machines, Epoxy Type Injection pumps, stamps or other means of texturing, any new devices which are beneficial to the construction of or with concrete or related products.

“The foregoing shall apply to temporary yards established off the jobsite, to service a particular job, for the duration of that job.”

After considering these definitions, the DLSE concluded that the cement crew had been misclassified and should have been paid at the prevailing wage for cement masons, which it found to be \$40.91 per hour. The DLSE also found that Truxell committed 369 overtime violations and failed to pay most of its regular crew members fully for the

fringe-benefit portion of the prevailing wage. It issued a civil wage-and-penalty assessment requiring Truxell to pay \$91,606.20 in unpaid wages, \$41,450 in penalties under Labor Code section 1775 (823 violations at the maximum statutory rate of \$50 per violation),³ and \$9,225 in penalties under Labor Code section 1813⁴ (369 overtime violations at the statutory rate of \$25 per violation). The penalties were payable to the school district, the government agency that awarded the contract. (§§ 1775, subd. (a)(1), 1813.)

The assessment advised Truxell that under section 1742.1 it would be liable for liquidated damages equal to the amount of the unpaid wages if it failed to pay the assessment within 60 days of service, except that the liquidated damages would be waived if Truxell demonstrated that there were substantial grounds for believing the assessment to be erroneous. Liquidated damages are distributed to the affected employees. (§ 1742.1, subd. (a).)

Pursuant to section 1742, Truxell requested review of the assessment by a hearing officer appointed by the Director. The hearing was held on November 28 and 29, 2007.

At the hearing, the DLSE presented blueprints and photographs of the cement work Truxell performed at Clovis West. Five of the cement workers testified. In addition to describing the benches, walkways, planters, curbs, bollards, and mowstrips they constructed, they also described some of the processes and techniques they used: building wooden forms, placing rebar, pouring cement, finishing with brooms, floats and trowels, installing joints, and removing forms.

Richard Vaillancour, a landscape architect who designed the project, was called as a witness by Truxell. He testified, first, that the cement seating walls or benches constructed as part of the project had two purposes: “First of all, to provide places for

³In fact, \$50 times 823 violations equals \$41,150. This discrepancy has no significance in this appeal, however, since the penalty assessment was revised.

⁴Subsequent statutory references are to the Labor Code unless noted otherwise.

people to sit under a tree canopy and be able to have conversation, essentially. And the second thing is to kind of be able to control foot traffic and dissuade people from walking through planted areas.” Then he said, “[P]retty much all the walls, if not every wall, is a decorative wall on that site.” Finally, he testified, “The function of the seating wall is just to provide a place for people to sit upon, essentially. And the alternative—or the—in addition to that, that function would also be aesthetic value of creating a three-dimensional form within the space.” He did not know whether terms such as “decoration” have the same meaning for an architect as they have in the scope-of-work provisions of the collective bargaining agreements at issue.

Truxell also called Valentino, its president. He opined that all the cement work the company did at Clovis West was “decorative landscaping,” and that all the seating walls were “decoration walls,” within the meaning of the scope-of-work provision in the collective bargaining agreement for landscape workers. He also testified that the walkways were only three and one-half inches thick and did not have rebar or other reinforcing materials, and that this showed that they were for pedestrians, not cars. He said, “I think the key is not concrete that trucks and cars drive on, but concrete that people walk on. That’s what landscape architects do, that’s what you learn about if you go to a landscape school, that’s who installs it and that’s because it’s landscaping. And if it’s landscaping, I think you can pay it with a landscape rate. And that’s really what this boils down to.”

In response to a question intended to establish that he had good-faith reasons for requesting the review, Valentino testified:

“You know, I really thought—I don’t think I’m right all the time, I think I can be wrong, but I really thought I did this properly.

“What I wanted to do was talk to somebody. I was very frustrated all along the process that no one really seemed to want to talk about it. Even when we were assessed this amount, that wasn’t without—that wasn’t with any discussion with me, or comparing notes, or trying to understand how we arrived at these classifications, which I think are very reasonable.

“So, yes, I still thought I was right [after the assessment]. I was concerned that others thought I was wrong, and I was eager to talk to someone about it. And that’s why I’m very eager to have an impartial person hear it. Because it’s been frustrating to me not to be able to understand why is it that my reasoning is wrong.”

Valentino also testified, again to show his good faith, that his company was unusual in that it pays union-scale wages and benefits even on private projects.

Dennis Soares, a business manager for United Association Local 355, the union that negotiated the agreement for landscape workers, testified for Truxell at the hearing. He said he had known Valentino for 15 years and never knew him not to pay the union rate for any job. He opined that any work within the scope of a C-27 landscape contracting license would also be within the scope of work for landscape workers, and that other cement work would fall outside that license. He was not asked, and did not say, however, whether all the work at Clovis West fell within the C-27 license.

Soares also said decoration walls, within the meaning of the scope of work for landscape workers, are sometimes made of cement. Asked to elaborate, he said, “We have decorative walls that are basically smaller walls that are sometimes built up with blocks or something and coated with concrete or mixtures of that and then designs put in them.” Further, “[D]ecorative walls are for visual effect.” When asked what sort of wall building would be reserved for cement masons, Soares mentioned highway sound walls, walls of buildings, and “a structural wall supports something, holds something up” In Soares’s opinion, the term “landscapeable ground cover” in the scope of work for landscape workers also could include “some concrete work.”

The Director issued a written decision after the hearing. The decision upheld the DLSE’s determinations that the cement workers should have been paid the prevailing wage for cement masons and that Truxell failed to pay some of the fringe benefits owed to the other landscape workers.

The Director found:

“The record establishes that the cement work done on the Project included specific processes described in the Cement Mason scope of work provisions (including floating and sacking and patching). The testimony, photographs of the completed work, and the Project blueprints (which were a significant source of objective information for the hearing officer) show that the cement work was performed predominantly, if not exclusively, in areas designed for extensive student use for walking or sitting. The work includes sidewalk areas, three and a half inches thick and ranging from widths as narrow as five feet to an open section in the front of the campus which appears to be over 100 feet in width and 150 feet in length, and seating walls, which were low and wide enough for students to sit down. The cement work intersects with other landscaping primarily as retaining walls, sometime with bench seating, for raised planted areas located adjacent to buildings or in rectangles or circles within the open paved areas. The walls incorporated decorative elements to make them aesthetically pleasing, but this appears to be secondary to their functional purpose. The breadth of the open space and presence of bollards also shows that some of these areas are designed for vehicular access when necessary.”

In light of these findings, the Director concluded that the bulk of the cement work was neither expressly nor impliedly authorized by the scope-of-work provision for landscape workers. That provision could not be read to cover the work without wrongly “divorcing ‘decoration walls’ and ‘ground cover’ from their context as specific items included within the general definition of ‘decorative landscaping.’” Instead, “the work explicitly fell within the ambit of the Cement Masons’ scope of work, in that it included items such as sidewalks and gutters and specific work processes that are enumerated therein. The work also was far more appurtenant to building construction than to the landscaping of grounds, in that it created or repaired plazas, seating areas, and sidewalks adjacent to school buildings.” The Director further concluded that Truxell’s own actions showed that it should have known that the cement masons’ scope of work was applicable:

“Though Truxell is an experienced landscape contractor and considered this work to be within the scope of its landscape contractor license, it did not use its own regular crew to perform the cement work. Rather Truxell hired a separate crew comprised largely of experienced cement workers to perform that work. By its own action, Truxell should have been on notice of the need to classify and compensate those workers as Cement Masons.”

The Director reduced the wage assessment by a small amount, however, because the cement mowstrips installed by Truxell fell within the express terms of the scope of work for landscape workers. The wages due were reduced by \$1,367.52 and the number of violations for purposes of penalties was accordingly reduced.

The Director also reduced the amount assessed for fringe-benefit payments. The decision stated that Truxell should have been credited with \$2,002.81 more than the DLSE found, but he rejected Truxell's contention that an additional \$7,189.52 had been paid. After the adjustments, the wages due were \$88,235.87.

The Director's decision reversed the \$41,450 in penalties under section 1775. Section 1775, subdivision (a), provides a maximum penalty of \$50 per day for each worker who was not paid the correct prevailing wage. (§ 1775, subd. (a)(1).) In determining the amount, the DLSE is required to consider whether the failure was a good-faith mistake that was promptly and voluntarily corrected and whether the contractor had a prior record of failing to pay prevailing wages. (§ 1775, subd. (a)(2)(A)(i), (ii).) The Director found that the DLSE failed to consider Truxell's prior violation-free record of public works contracting. The case was remanded to the DLSE for a redetermination of the section 1775 penalties. The \$9,225 in penalties under section 1813 was affirmed.

Finally, the Director's decision applied section 1742.1, subdivision (a), to impose liquidated damages of \$88,235.87, equal to the amount of the unpaid wages. That section requires imposition of liquidated damages equal to the unpaid wages if the contractor fails to pay an assessment within 60 days after the assessment is served. As it read until the end of 2008, section 1742.1 provided that the liquidated damages would not be imposed, however, if the contractor "demonstrates to the satisfaction of the director that he or she had substantial grounds for believing the assessment ... to be in error."⁵

⁵Section 1742.1 was amended effective January 1, 2009. It now provides merely that the Director "may exercise his or her discretion" to waive liquidated damages if there

(Former § 1742.1, subd. (a).) California Code of Regulations, title 8, section 17251(b), known as Rule 51(b), provides the following standard for finding substantial grounds:

“To demonstrate ‘substantial grounds for believing the Assessment ... to be in error,’ the Affected Contractor or Subcontractor must establish (1) that it had a reasonable subjective belief that the Assessment ... was in error; (2) that there is an objective basis in law and fact for the claimed error; and (3) that the claimed error is one that would have substantially reduced or eliminated any duty to pay additional wages under the Assessment”

The DLSE issued the assessment on June 8, 2007, the Director’s decision was filed on February 17, 2009, and Truxell paid no part of the back wages in the intervening time, so the assessment had gone unpaid for more than 60 days. The Director found:

“The evidence shows that Truxell had a reasonable subjective belief that the Assessment was in error, and that the claimed classification error would have eliminated most of Truxell’s liability for back wages, thereby meeting the first and third tests of Rule 51(b). However, Truxell failed to establish that it had an objective basis in law and fact for classifying its cement workers as Landscape Tradesmen. In the final analysis, Truxell understood that the cement work required the services of experienced cement workers, that is, cement masons, and the facts could not be stretched to fit its arguments on why that work should be regarded as part of the landscape trade. In addition, Truxell now has been fully credited for all fringe benefit payments it has established were made for Project work. Accordingly, there are no grounds for waiving liquidated damages on the modified wage assessment.”

The Director’s decision imposed a total of \$185,696.74 in wages due, penalties under section 1813, and liquidated damages under section 1742.1, plus interest on the wages. Regarding the remand for redetermination of the penalties under section 1775, the Director’s decision stated that the DLSE had 30 days to issue a new penalty determination and that Truxell would have the right to request review of the redetermination by the hearing officer.

were substantial grounds for an appeal. The Director does not argue that this change has any impact on this case.

Truxell submitted a request for reconsideration on February 26, 2009, in which it argued that the seating walls should have been found to be decorative. On this basis, it asked for a reduction in the wage assessment of \$20,961.74. The Director denied the request on March 4, 2009. In a written order, the Director stated:

“The only support for calling the walls ‘decorative walls’ is a conclusory statement by Truxell’s architect, which was somewhat undercut by the testimony of Truxell’s union witness who said that decorative walls are generally for ‘visual effect’ rather than being structural. There is no reference to ‘decoration’ or ‘decorative’ walls anywhere within the Project blueprints. Instead, the blueprints identified the items in question as ‘concrete seating walls,’ which by design and appearance serve the principal purpose of providing places for high school students to sit in between classes.”

The DLSE issued its redetermination of the penalties on March 16, 2009. It reduced the section 1775 penalties to \$35 per violation, for a total of \$28,805. The administrative record contains no written explanation of the amount imposed. Truxell did not request review of the redetermination by the hearing officer.

On April 22, 2009, Truxell filed a petition in the superior court pursuant to Code of Civil Procedure section 1094.5 for a writ of mandamus reversing the Director’s decision. The court denied the petition on June 28, 2010, and entered judgment for the Director on July 14, 2010. The court found that the record supported the findings that the cement paving was not a “‘landscapeable ground cover,’” and the seating walls were not “‘decoration walls’” within the meaning of the scope-of-work provision for landscape workers. It also found that there was no abuse of discretion in the imposition of penalties. Liquidated damages are not specifically mentioned in the court’s written order.

DISCUSSION

I. Standard of review

Code of Civil Procedure section 1094.5 governs a trial court’s review of an administrative agency’s proceedings upon a petition for administrative mandamus. Except in a limited class of cases involving fundamental vested rights (*Bixby v. Pierno*

(1971) 4 Cal.3d 130, 143-144), the trial court reviews the whole administrative record to determine whether the agency's findings are supported by substantial evidence and whether the agency committed any errors of law (*Concord Communities v. City of Concord* (2001) 91 Cal.App.4th 1407, 1413; *Ryan v. California Interscholastic Federation-San Diego Section* (2001) 94 Cal.App.4th 1048, 1077). Section 1742, subdivision (c), also specifies that if the petitioner claims the Director's findings are not supported by the evidence, the substantial evidence standard applies. On appeal, our function is identical to that of the trial court. (*Ryan v. California Interscholastic Federation-San Diego Section, supra*, at p. 1077.)

Substantial evidence is "relevant evidence that a reasonable mind might accept as adequate to support" the challenged conclusion. (*California Youth Authority v. State Personnel Bd.* (2002) 104 Cal.App.4th 575, 584.) The evidence must be "reasonable, credible, and of solid value." (*Id.* at p. 585.) We do not independently reweigh the evidence. Conflicts in the evidence and reasonable doubts about the agency's decision must be resolved in the agency's favor. (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 571; *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 407.)

The burden of affirmatively showing a lack of substantial evidence to support the agency's findings is on the petitioner. (*Barthelemy v. Chino Basin Mun. Water Dist.* (1995) 38 Cal.App.4th 1609, 1617.) To make this affirmative showing, it is not enough to point to portions of the administrative record that favor the petitioner's position. Instead, the petitioner must set forth all the evidence material to the challenged finding and then demonstrate that this evidence cannot reasonably support the finding. A reviewing court is not obligated to search the administrative record and assemble all the relevant evidence on the petitioner's behalf. (*California Native Plant Society v. City of Rancho Cordova* (2009) 172 Cal.App.4th 603, 626.)

II. Classification

We reject Truxell's contention that substantial evidence does not support the Director's finding that the cement workers were misclassified. To the contrary, the evidence was sufficient to support the finding.

There is no doubt that Truxell's cement workers employed *processes* described in the scope-of-work provision for cement masons. The use of floats and trowels and the spreading, rodding, and brooming of concrete were all testified to by the cement workers and are all listed in the cement masons' scope of work. These processes would have been employed pervasively throughout the cement portion of the project. Further, the blueprints and photographs show that curbs were built; this undoubtedly required the setting of curb forms, a process listed in the cement masons' scope of work.

There also was substantial evidence to support the Director's finding that the *things built* were within the cement masons' scope of work. In essence, the cement part of the project created plazas with walkways and seating to serve the school buildings. This fact formed a reasonable basis for the Director's conclusion that "[t]he work also was far more appurtenant to building construction than to the landscaping of the grounds, in that it created or repaired plazas, seating areas, and sidewalks adjacent to school buildings." That conclusion in turn is a reasonable basis for the view that the cement work fell within the category described in the cement masons' scope of work of "[a]ll building construction, including but not limited to the construction, erection, alteration, repair, modification, demolition, addition or improvement in whole or in part of any building structure." Further, the cement paving was covered under the term "sidewalks" in the cement masons' scope of work.

Finally, to the extent that a distinction between decorative and functional construction is relevant, there was substantial evidence to support the Director's finding that the cement work at Clovis West was primarily functional. There is little room for disputing the proposition that the main purpose of the cement work as a whole was to

provide places for students and staff to walk and sit while they were on campus. The result might be nice to look at, but it was not built primarily to be looked at.

The evidence supporting the view that the cement work fell within the scope-of-work provision for landscape workers, by contrast, was weaker. No witness testified that the seating walls were built primarily to serve as “decoration walls,” the term in the landscape workers’ scope of work. Soares, the union business manager, used the example of a wall built with blocks, covered with concrete, and decorated with designs pressed into the concrete. The seating walls at issue here did not fit that description.

Vaillancour, the project architect, testified that the seating walls he designed had two purposes: “to provide places for people to sit under a tree canopy and be able to have conversation,” and to “control foot traffic.” The walls *also* were decorative and had an aesthetic role, but this was merely “in addition” to the other two purposes. Valentino testified that the seating walls were decoration walls because of their “intricacy.” He said they were “decoration walls that do lots of other things at the same time,” such as “[c]reating spaces, making places for people to sit.” Valentino opined that this clearly meant the walls fell within the landscape workers’ scope of work, but his opinion was conclusory. His own account was, in essence, that the seating walls had a function (i.e., seating) as part of the plaza, and also that they were appealing to see. This was consistent with Vaillancour’s testimony to the effect that the seating walls were functional structures that also were attractive.

The evidence did not provide much support for Truxell’s contention that the extensive concrete paving, including sidewalks and a plaza area of about 15,000 square feet,⁶ was a “landscapeable ground cover” within the meaning of the landscape workers’ scope of work. Soares testified that landscapeable ground cover could include “some concrete work,” but that description does not fit a 15,000-square-foot concrete plaza.

⁶This is the “open section in the front of the campus which appears to be over 100 feet in width and 150 feet in length,” as described in the Director’s decision.

Truxell claims Vaillancour and Valentino gave supporting testimony on this point, but the testimony it cites is not very helpful. Vaillancour said yes when asked whether “landscaping design sometimes includes pedestrian paving” and whether that paving sometimes is made of concrete. These answers, however, do not show that paving a large area with concrete is applying a landscapeable ground cover.

Valentino said the paved area was a landscapeable ground cover because it was made for pedestrians, not cars, and because landscape architects learn in landscape architecture school to design paved areas for pedestrians. He went on to conclude that this meant the installation of paved areas for pedestrians should be paid for at the wage rate for landscape workers. This conclusion is a non sequitur, since no evidence was presented indicating that landscape architects never design or learn to design anything that must be built by cement masons. The record also contains no support for Valentino’s idea that whether cement pavement is a landscapeable ground cover depends on whether it is made for pedestrians or cars. In sum, Truxell has not pointed out any testimony that would have compelled the Director to find that building a 15,000-square-foot concrete pedestrian plaza is using a landscapeable ground cover.

Truxell does not attempt in its appellate briefs to defend the position that all the cement work was covered by its C-27 landscape contractor’s license and that all work covered by that license falls within the landscape workers’ scope of work. The record does not, in any event, contain evidence on this point that would have compelled the Director to find for Truxell. There was opinion testimony by Soares that anything covered by the landscape license would be within the landscape scope of work. There was no evidence, however, that all the cement work at Clovis West was covered by the C-27 license.⁷ Further, we have not found in the record or briefs any legal argument

⁷There was some inconclusive testimony on this topic by Valentino. He said he believed that all work covered by the landscape license would also be within the landscape scope of work, but expressed doubt about whether the converse was true, i.e., whether work not covered by the landscape license would fall outside the landscape

intended to establish that the landscape contractor's license covers the same work as the landscape workers' scope of work.

To prevail under the substantial evidence standard of review, an appellant is required to show not just that the record contains some evidence that supports its position, but that the record contains no substantial evidence supporting the agency's decision. For the above reasons, Truxell has failed to show this is the case.

III. Liquidated damages

Truxell argues that the Director abused his discretion in awarding liquidated damages. Specifically, Truxell says the Director could not reasonably conclude that there was no "objective basis in law and fact for the claimed error" (Cal. Code Regs., tit. 8, § 17251(b).) We agree.

As we have said, substantial evidence supported the Director's finding that the cement work at Clovis West fell within the cement masons' scope of work. In spite of this, it cannot be said that the work in question *clearly* fell within either the cement masons' scope of work or the landscape workers' scope of work. As Truxell points out, the cement masons' scope of work emphasizes the construction of buildings and other heavy construction. The scope of work is expressly nonexclusive when it refers to these things, and that is one of the reasons we are upholding the Director's conclusion. An interpretation, however, according to which light construction, like the construction of pedestrian paving and benches, fell outside the scope of work was not objectively unreasonable. Further, the provision's reference to sidewalks and curbs comes immediately after a reference to streets and highways, so there is some support for the inference that sidewalks and curbs are within the cement masons' scope of work only when they are built alongside streets and highways. Some of the processes expressly mentioned in the cement masons' scope of work were employed in the Clovis West work,

scope of work. He also said he thought building benches with rebar was within the landscape license. He never testified that all the work was within the license however.

as we have said, but there is a colorable argument that the relevance of this depends on a prior determination that the structures built via those processes are within the scope of work as well.

What we have just said indicates that there was a reasonable basis for Truxell's view that the Clovis West cement work did *not* fall within the cement masons' scope of work. There was, in addition, a reasonable basis for the view that the work *did* fall within the landscape workers' scope of work. The landscape scope of work covered "[d]ecorative landscaping." The main thrust of Valentino's testimony was that it would be sensible to define this term to conform to the assumptions of landscape architects, who are trained to design pedestrian plazas with seating like the Clovis West project, and the assumptions of landscape design contractors, who often build similar things. The law does not, of course, always understand the same term to have the same meaning in different contexts, and the record supported the Director's implicit finding that "decorative landscaping" within the meaning of the scope of work does not necessarily cover everything landscape architects and landscape contractors might assume it covers. Yet Valentino's view was not objectively unreasonable, given the failure of the landscape scope of work clearly to include or exclude the type of work at issue here.

Further, there is some inconsistency between the Director's conclusion that Truxell had no objective basis in fact and law for its erroneous view and his conclusion that Truxell *did* have a reasonable subjective belief that its position was correct. It is difficult to see how Truxell's belief was not just an actual subjective belief but also a *reasonable* one if it had no objective basis in fact and law. A subjective belief that lacks an objective basis is an *unreasonable* subjective belief.

Finally, we are unpersuaded by the Director's view that Truxell had no objective basis for this view because "Truxell understood that the cement work required the services of experienced cement workers" The fact that Truxell hired experienced cement workers only shows that Truxell knew the obvious: that it was building a cement

project. It does not show that Truxell had knowledge of the more obscure proposition that this particular cement project fell within the cement masons' scope of work. Further, the notion that Truxell *knew* the project required cement masons as defined in the cement masons' scope of work contradicts the Director's finding that Truxell had a subjective belief that it classified the workers correctly.

For these reasons, we conclude that, as a matter of law, Truxell's view had an objective basis in fact and law and the Director's contrary conclusion was an abuse of discretion. The Director conceded that the other prongs of the Rule 51(b) test were satisfied, so liquidated damages should have been waived.

IV. Penalties

Truxell contends that the agency abused its discretion by imposing penalties under section 1775. It says the record shows the agency failed to consider the necessary factors and relied on improper considerations when it imposed these penalties. The agency contends that the redetermination cannot be challenged now because Truxell did not request a hearing before the hearing officer to challenge it.

The procedure for obtaining review of a civil wage-and-penalty assessment is described in section 1742. "An affected contractor or subcontractor may obtain review of a civil wage and penalty assessment under this chapter by transmitting a written request to the office of the Labor Commissioner that appears on the assessment within 60 days after service of the assessment." (§ 1742, subd. (a).) If no hearing is requested during the 60-day period, "the assessment shall become final." (*Ibid.*) If a hearing is requested, it is held before a hearing officer appointed by the Director. (*Id.*, subd. (b).)

At the hearing, "[t]he contractor or subcontractor shall have the burden of proving that the basis for the civil wage and penalty assessment is incorrect.... [¶] Within 45 days of the conclusion of the hearing, the director shall issue a written decision affirming, modifying, or dismissing the assessment." (§ 1742, subd. (b).) A contractor "may obtain review of the decision ... by filing a petition for writ of mandate to the appropriate

superior court pursuant to Section 1094.5 of the Code of Civil Procedure within 45 days after service of the decision.” (*Id.*, subd. (c).) If no petition is filed within the 45-day period, the director’s “order shall become final.” (*Ibid.*) Section 1742 “shall provide the exclusive method for review of a civil wage and penalty assessment by the Labor Commissioner under this chapter” (*Id.*, subd. (g).)

The effect of these provisions is that an assessment can only be challenged via mandate proceedings in the superior court after it has been challenged and upheld in a hearing before a hearing officer. There appears to be no explicit authority, however, on the question of whether the same is true for a *redetermination* issued by the DLSE after proceedings before the hearing officer have already taken place. Is the contractor required to request a second hearing before the hearing officer? In this case, the Director apparently assumed that would be the proper procedure. The Director’s decision stated that if the DLSE issues a new penalty assessment, “Truxell shall have the right to request review in accordance with section 1742, and may request such review directly with the Hearing Officer, who shall retain jurisdiction for this purpose.”

Truxell says it did not request a hearing to review the redetermination because it was required to file its writ petition in the superior court within 45 days after the Director issued his decision. When the DLSE issued the redetermination on March 16, 2009, a month had already passed since the Director issued his decision. If Truxell had requested another hearing before the hearing officer, some period of time would have been necessary for scheduling the hearing, and then after the hearing the Director would have had 45 days to issue a decision. Truxell therefore argues that if it were required to go through a hearing to review the redetermination, it would have lost its opportunity for review in the superior court.

We reject Truxell’s argument. Section 1742 makes it clear that the Legislature intended the DLSE’s assessments to be reviewed by a hearing officer before being presented to the superior court. This case illustrates the wisdom of that policy. The

penalty assessment following the redetermination incorporates the Director's decision by reference but otherwise gives no reasons for the new assessment of \$35 per violation. Without the record of a hearing on the penalty redetermination, there was nothing for the superior court to review, and there is nothing for us to review. We cannot make a reasoned decision about whether the DLSE abused its discretion under these circumstances. This tends to show that it would be inconsistent with the scheme set up by section 1742 if we were to hold that a contractor can proceed directly from a redetermination to the superior court, with no intervening hearing. We will not reach this conclusion, and instead agree with the agency that Truxell has forfeited this issue.

Truxell could have preserved its rights by requesting a hearing *and* filing a writ petition simultaneously. If it had done so, we (and the superior court) would have had to choose between two rules: (1) the rule that a hearing before the hearing officer must occur on all issues before a writ petition can be heard, so the petition must be dismissed, the 45-day period for filing must be tolled during the pendency of the hearing on the penalty redetermination, and Truxell must re-file its writ petition after that hearing; or (2) the rule that writ petitions on separate issues can proceed separately, so the issues on which the hearing before the hearing officer was completed can be decided now, and the penalty redetermination issue can be decided in new writ proceedings after the hearing on that issue is completed. Either of these rules would preserve the principle that section 1742 requires a hearing with a hearing officer before court proceedings take place on a given issue. As it is, we need not make the choice, because Truxell has not preserved the possibility of a hearing before a hearing officer on the penalty redetermination issue.

Truxell's only argument about the section 1813 penalties is that they should be vacated because the underlying wage assessment was not supported by substantial evidence. We have rejected that argument.

DISPOSITION

The judgment is reversed and the case is remanded to the superior court. The court shall issue a writ of mandate ordering the Director to issue a new order vacating the award of liquidated damages but otherwise affirming the Director's decision to uphold the DLSE's assessment. The parties shall bear their own costs on appeal.

Wiseman, Acting P.J.

WE CONCUR:

Cornell, J.

Kane, J.