

STATE OF CALIFORNIA  
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

**Ron Guidry's Floor Covering, Inc.**

Case No. 19-0267-PWH

From a Civil Wage and Penalty Assessment issued by:

**Division of Labor Standards Enforcement**

**DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS**

Affected contractor Ron Guidry's Floor Covering, Inc. (Ron Guidry) requested review of a Civil Wage and Penalty Assessment (Assessment) issued by the Division of Labor Standards Enforcement (DLSE) on May 8, 2019, with respect to work performed on Bid Number 1617-733 Flooring Replacement at Multiple Sites (Project) for the Orange Unified School District (Awarding Body) in Orange County. The Assessment found that unpaid prevailing wages in the amount of \$1,986.88 and penalties under Labor Code section 1775 in the amount of \$280.00 were due.<sup>1</sup>

A Hearing on the Merits occurred in Los Angeles, California, on February 26, 2020, before Hearing Officer Ann Wu. Edwin Jay, Ron Guidry Human Resources representative and Emad Aziz, Ron Guidry Contract Compliance Administrator, appeared for Ron Guidry, and Luong Chau appeared as counsel for DLSE. Deputy Labor Commissioner Oluchi Iwuoha and Ron Guidry worker Honorio Moreno Retana testified in support of the Assessment. Ron Guidry workers Sergio Pomares and Julian Ramirez, and Vince Ramos, representative of the Resilient Floor & Decorative Covering Local Union 1247 (Union), testified for Ron Guidry. Ron Guidry filed its closing brief on March 17, 2020, and DLSE filed its closing brief on April 1, 2020. The matter was submitted for decision on April 1, 2020.

Prior to the Hearing on the Merits, DLSE presented an amended audit that lowered the unpaid prevailing wages from \$1,986.88 to \$1,009.40, with no change in

<sup>1</sup> All further section references are to the California Labor Code, unless otherwise indicated.

the penalty amount of \$280.00. At the Hearing, DLSE moved to amend the Assessment accordingly. There being no objection or prejudice to Ron Guidry, the Hearing Officer granted the motion. During the hearing, the parties stipulated to further amend the Assessment to lower the unpaid prevailing wages from \$1,009.40 to \$835.24, with no change in the penalty amount of \$280.00, such that the revised total amount of the amended Assessment is \$1,115.24.

On the day of Hearing, the parties stipulated to the following:

- The work at issue in the Civil Wage and Penalty Assessment was subject to the prevailing wage and apprenticeship requirements.
- The Labor Commissioner timely served the Civil Wage and Penalty Assessment.
- The Request for Review was timely filed.
- The Labor Commissioner timely made its investigative file available to the contractor.
- No back wages have been paid nor deposit made with the Department of Industrial Relations as a result of the Assessment.

The issues for decision are as follows:

- Did Ron Guidry correctly pay Honorio Moreno Retana based on the work performed?
- Did the Labor Commissioner provide prima facie support for the Civil Wage and Penalty Assessment?
- Did the Labor Commissioner abuse her discretion in assessing Labor Code section 1775 penalties?
- Is Ron Guidry liable for liquidated damages?

For the reasons set forth below, the Director of Industrial Relations finds that DLSE carried its initial burden of presenting evidence that provided prima facie support for the amended Assessment, and that Ron Guidry failed to carry its burden of proving that the basis for the amended Assessment was incorrect. (See Cal. Code Regs., tit. 8,

§ 17250, subds. (a), (b).) Accordingly, the Director issues this decision affirming the amended Assessment.

## **FACTS**

### The Project.

The Awarding Body advertised the Project for bid on March 1, 2017. (DLSE Exhibit No. 4, p. 0021.) The bid advertisement specified that the successful bidder was to pay no less than the applicable prevailing wage to all workers employed in the execution of the contract. (DLSE Exhibit No. 5, p. 0022.) The successful bidder was Ron Guidry, which entered into a contract with the Awarding Body on May 12, 2017. (DLSE Exhibit No. 6, pp. 0034-0035.) Ron Guidry had workers on the Project from June 26, 2017, to August 5, 2017. (DLSE Exhibit No. 8, pp. 0050-0126.) A Notice of Completion was filed with the Orange County Clerk-Recorder on December 4, 2017, stating that the work was completed on August 31, 2017, and accepted by the Awarding Body on November 9, 2017. (DLSE Exhibit No. 8, p. 0049.)

### The Prevailing Wage Rate Determinations.

Two prevailing wage determinations (PWDs) are at issue in this matter: Carpet, Linoleum, Resilient Tile Layer, ORA 2017-1 (Floor Layer); and Carpet, Linoleum, Material Handler, ORA 2017-1 (Material Handler).<sup>2</sup> (DLSE Exhibit No. 1, p. 0007; DLSE Exhibit No. 2, p. 0015; DLSE Exhibit No. 3, p. 0018; DLSE Exhibit No. 17, p. 0242). Apprentice rates are payable to Floor Layer apprentices only if they are registered with the Division of Apprenticeship Standards for the particular craft in question.

The applicable scope of work for the Floor Layer craft provides, in relevant part:

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<sup>2</sup> The basic hourly rate for journey-level Floor Layer, including predetermined wage increases, is \$32.35, and the combined fringe benefits (excluding training fund contributions of \$0.63 per hour) are \$14.21 per hour, for a total of \$46.56 for each straight-time hour. The basic hourly rate for journey-level Material Handler, including predetermined wage increases, is \$10.00, and the combined fringe benefits (excluding training fund contributions of \$0.63 per hour) are \$8.09 per hour, for a total of \$18.09 for each straight-time hour. The Assessment did not find underpayment of training fund contributions.

Floor and decorative covering workers' work will include, but not be limited to: (1) measuring, cutting, fabricating, fitting, installing to be cemented, tacked or otherwise applied to its base and/or underlayment(s) wherever it may be, all materials whether used either as a decorative covering, topping or as an acoustical appliance such as carpets of all types and designs, sheet rubber, sheet linoleum, sheet vinyl, laminate floors and laminate floor systems, rubber tile, linoleum tile, asphalt tile, cork flooring, interlocking tile, vinyl tile, vinyl composition tile, composition in sheet or tile form, top set base of any kind including profile rubber base, and all derivatives of above;... (2) the fitting of all devices for the attachment of the above materials and the fitting of all decorative or protective trim to and adjoining the above materials which shall include the drilling and plugging of holes and attaching of strips, slats, nosing, etc. on any base and/or underlayment(s) where the above materials are to be installed or applied, such as drilling, plugging or slating for installing or fastening of carpet, the installation of all nosings, cap strips, corner beads and edgings of any material and the preparatory work of the craft for all of the aforesaid, which includes but is not limited to sanding, substrate preparation and the application of all self-leveling, trowelable and board underlayments;....

(DLSE Exhibit No. 9, pp. 0143-0146.)

The applicable scope of work provisions for the Material Handler craft provides, in relevant part:

...Duties shall be limited to pick-up and delivery of material, shop tools, demolition of and removal of existing floor covering, moving of furniture, fixtures or equipment, cleaning or waxing of floors before and after installation. Material handlers may not perform bargaining unit work as defined in [the scope of work provisions for the Floor Layer craft].

(DLSE Exhibit No. 9, pp. 0143-0147.)

The Public Works Complaint and Certified Payroll Records.

On August 6, 2018, Ron Guidry worker Honorio Moreno Retana (Moreno) filed a public works complaint with DLSE alleging prevailing wage violations relating to work he performed on the Project. Moreno's complaint alleged that he was underpaid by Ron Guidry. (DLSE Exhibit No. 11.)

The certified payroll records (CPRs) submitted by Ron Guidry to DLSE list Moreno on Payroll Number 1-0 for three days, June 26, 2017, June 28, 2017, and June 29, 2017, with the classification Floor Layer, at the basic hourly rate of \$14.56 and a total hourly rate of pay of \$18.04. The CPRs also list Moreno on Payroll Number 3-0 for four days on July 10, 2017, July 11, 2017, July 12, 2017, and July 13, 2017, with the classification "Carpet, Linoleum, Resilient Floor Layer/A-1" (A-1 Floor Layer), at the basic hourly rate of \$14.56 and a total hourly rate of \$18.04.<sup>3</sup> (DLSE Exhibit No. 8, pp. 0060 and 0086.)

#### The Assessment.

The Assessment found that Ron Guidry misclassified and paid Moreno at the Floor Layer apprentice rate for work that should have been classified and paid at the Floor Layer journey-level rate. It further found that Moreno was underpaid for hours worked because in some of those hours he performed the work of a Material Handler. Altogether, the Assessment, as amended, found that Ron Guidry underpaid the required prevailing wages in the amount of \$835.24. Penalties were assessed under section 1775 at the rate of \$40.00 per violation for seven violations in a total amount of \$280.00.

#### Testimony of Worker Honorio Moreno Retana.

Moreno testified that he performed work for Ron Guidry on the Project at Crescent Elementary School (Crescent) and Orange Unified Pre-K School (Orange Pre-K). According to Moreno, he moved furniture, he removed carpet, he sanded and scraped the floor, poured cement to level the floor, applied glue to the floor, cut carpet,

<sup>3</sup> Although Moreno was classified on the CPRs as a Floor Layer for the three days in the week of June 25, as indicated, and apprentice level one (A-1) Floor Layer for four days in the week of July 9, 2017, the CPRs disclose that Moreno was not paid for those days at the required PWD rates for Floor Layer and A-1 Floor Layer. Instead, according to the CPRs, Moreno was paid for both weeks at the basic hourly rate of \$14.56, with the combined fringe benefits of \$2.85 per hour and training fund contributions of \$0.63 per hour, for a total of \$18.04 for each straight-time hour. The amount shown on the CPRs as pay for Floor Layer fails to fully compensate him for the required total hourly rate for that classification. (\$46.56; see *ante*, footnote 2.) The amount shown on the CPRs as pay for A-1 Floor Layer likewise falls short of the required total hourly rate for apprentice. Notwithstanding the CPRs' inclusion of the A-1 Floor Layer apprentice designation, at the Hearing, Ron Guidry did not contend Moreno should have been paid apprentice Floor Layer rates.

rolled carpet to flatten the carpet and remove air bubbles, trimmed carpet, applied base, cleaned glue from the carpet seams, replaced the furniture, picked up debris and moved extra material. Moreno testified that at Crescent, he and co-worker Joaquin Ramirez removed the carpets and prepared the rooms ahead of the other journeypersons, then they went back and helped the journeypersons complete their tasks, which included trimming carpet, setting glue, rolling carpet to remove air bubbles, and installing base. Moreno testified that it took about one to two hours to remove carpet and prepare the floor for each classroom, depending on how well-glued the carpeting was and how many workers there were. Moreno testified that he sometimes prepared multiple classrooms in a day. Moreno testified that in the other hours of the day, he would go back and install carpet, i.e., trimming carpet, setting glue, rolling carpet, and installing base. Moreno testified that the journeypersons expected all of the workers to work, and that the journeypersons gave bad recommendations if the Material Handlers only performed Material Handler work.<sup>4</sup> Moreno testified that his duties were the same at Orange Pre-K.

Testimony of Deputy Labor Commissioner Iwuoha.

Iwuoha testified that she investigated Moreno's public works complaint, and that she issued the Assessment against Ron Guidry on May 8, 2019. According to Iwuoha, the Assessment found Ron Guidry misclassified Moreno as an apprentice Floor Layer based on Moreno's description of the work he performed on the Project. (See DLSE Exhibit No. 1, p. 001.) During her investigation, Iwuoha received documentation from the Southern California Resilient Floor and Decorative Covering Crafts Joint Apprenticeship & Training Committee (JATC) that showed Moreno was dropped from the apprenticeship program effective June 22, 2017, before his work commenced. (DLSE Exhibit No. 10, p. 0158.)

Based on Moreno's description of his work, Iwuoha reclassified Moreno as a Material Handler for 50 percent of the time he worked on the Project, and as a

<sup>4</sup> Neither DLSE nor Ron Guidry asked Moreno what he meant by "bad recommendations."

journey-person Floor Layer for the other 50 percent of the time.<sup>5</sup> (DLSE Exhibit No. 11, pp. 0160-0162; DLSE Exhibit No. 13, pp. 0163-172; DLSE Exhibit No. 17, p. 0243.) In this regard, Iwuoha testified that she relied on the scope of work provisions for the Floor Layer and Material Handler crafts and Moreno's description of the division of hours spent in each classification. In particular, Iwuoha found that, according to his description, Moreno worked as a Floor Layer in the tasks of mixing and pouring cement, cutting and preparing carpet for installation, measuring carpet, sanding down and removing old glue from the floor, and installing flooring.

DLSE's Calculation of Unpaid Wages.

Iwuoha determined that Moreno worked on the Project eight hours a day for seven days, a total of 56 hours, and that he was paid \$17.41 per hour (excluding the \$.63 per hour training fund contribution). (DLSE Exhibit No. 8, pp. 0060 and 0086; DLSE Exhibit No. 17, p. 0243.) For the duration of the Project, the total prevailing wage rate for Material Handler was \$18.09 per hour; and the total prevailing wage rate for a journey-level Floor Layer was \$46.56 per hour. Accordingly, after giving credit to Ron Guidry for payments made as shown in the CPRs, Iwuoha determined that Moreno is owed \$835.24 in wages, calculated as follows:

1. Underpayment of \$8.16, based on the Material Handler PWD rate of \$18.09 for 12 hours over three days in the week ending July 1, 2017;
2. Underpayment of \$349.80, based on the journey-level Floor Layer PWD rate of \$46.56 for 12 hours over three days in the week ending July 1, 2017;
3. Underpayment of \$10.88, based on the Material Handler PWD rate of \$18.09 for 16 hours over four days in the week ending July 15, 2017; and
4. Underpayment of \$466.40, based on the journey-level Floor Layer PWD rate of \$46.56 for 16 hours over four days in the week ending July 15, 2017.

(DLSE Exhibit No. 17, p. 0243.)

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<sup>5</sup> Iwuoha testified that she amended the Assessment to reflect the 50-50 split in Moreno's job duties after she had a further discussion with Moreno regarding his job duties following informal settlement discussions with Ron Guidry.

Assessment of Penalties Under Section 1775.

Iwuoha testified that the Senior Deputy Labor Commissioner assessed penalties under section 1775 of \$40.00 per day. Based on the seven days that Moreno was underpaid, the penalties under section 1775 totaled \$280.00.

Testimony of Dispatcher Pomares.

Pomares testified that he is a dispatcher for Ron Guidry, in charge of scheduling workers, sending workers to job sites including sending the people in charge of the jobs, checking job sites and workers, and performing quality control of the jobs. Pomares testified that Ron Guidry sponsored Moreno to join the Union as a level one apprentice Floor Layer. Pomares testified that after Moreno was dropped from the apprenticeship program, he called to the Union to see if he could continue to employ Moreno because Moreno was a good worker. Ron Guidry requested that Moreno be reclassified as a Material Handler effective June 23, 2017, and according to Pomares, the Union agreed.<sup>6</sup> (Ron Guidry Exhibit E.) However, according to the CPRs, Moreno was classified as a journey level Floor Layer for the week of June 25, 2017, and as a level one apprentice Floor Layer for the week of July 9, 2017 (although the pay rates in the CPRs did not reflect those classifications).

Pomares testified that he never allowed Material Handlers, or even apprentice Floor Layers up to level three, to install carpet or do the journey level work of a Floor Layer, because they do not know how to lay down carpet, prepare the floor, measure a room, or cut the carpet. Pomares testified that he was certain Moreno never installed carpet, because in his opinion Moreno did not know how to install carpet. However, Pomares conceded that he was not on-site at the Project every day. Instead, Pomares visited the Project sites every other day, for about an hour or an hour and a half per visit. Further, no evidence shows that Pomares was tasked with the responsibility to

<sup>6</sup> Iwuoha testified that the documentation of the Union's reclassification of Moreno to Material Handler effective June 23, 2017, was not provided to her during the course of her investigation. Regardless, Iwuoha reclassified Moreno based on the work he performed, without regard to his registration with the Union.



direct Material Handlers or make assignments to them. Nevertheless, Pomares insisted that he was 110% sure that the journeypersons on the Project never let Moreno install carpet.

Testimony of Journeyperson Ramirez.

Ramirez testified that he has been a Floor Layer for 23 years, 17 years of which was at the journey level. Ramirez testified that Moreno never laid carpet, installed base, measure carpet, or cut carpet. Ramirez testified that Moreno only swept the floor, moved furniture, and brought the tools and materials. Ramirez testified he supervised Moreno at Crescent, but he could not remember the names of the other three or four individuals who worked at that site. However, the CPRs do not show that Ramirez worked any hours during which Moreno worked at Crescent that week. (DLSE Exhibit No. 8, pp. 0050-0060.)

Testimony of Union Representative Ramos

Ramos testified that he has been a Union representative for 14 and one-half years. He worked as a journeyperson Floor Layer prior to working for the Union. Ramos testified that Moreno was classified as a level one apprentice Floor Layer. Ramos also testified that after the JATC dropped Moreno from the Floor Layer apprenticeship program, the Union reclassified him as a Material Handler.<sup>7</sup> According to Ramos, Material Handlers deliver material to job sites, pick up trash, do demolition, move furniture, and sweep. Ramos testified that Material Handlers do not lay floors, because they are not allowed to work with the tools. However, Ramos admitted that he had no personal knowledge of the actual work performed by Moreno on the Project.

**DISCUSSION**

The California Prevailing Wage Law (CPWL), set forth at Labor Code sections 1720 et seq., requires the payment of prevailing wages to workers employed on public works construction projects. The purpose of the CPWL was summarized by the California Supreme Court in one case as follows:

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, citations omitted (*Lusardi*)).) 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 also *Lusardi, supra*, at p. 985.) Section 1775, subdivision (a), requires that contractors and subcontractors pay the difference to workers who were paid less than the prevailing wage rate, and prescribes penalties for failing to pay the prevailing wage rate. Section 1742.1, subdivision (a), provides for the imposition of liquidated damages (essentially a doubling of the unpaid wages) if the unpaid wages are not paid within 60 days following service of a civil wage and penalty assessment under section 1741.

When DLSE determines that a violation of the prevailing wage laws has occurred, it may issue a written civil wage and penalty assessment pursuant to section 1741. An affected contractor or subcontractor may appeal the assessment by filing a request for review under section 1742. The request for review is transmitted to the Director of the Department of Industrial Relations, who assigns an impartial hearing officer to conduct a hearing in the matter as necessary. (§ 1742, subd. (b).) At the hearing, DLSE has the initial burden of presenting evidence that “provides prima facie support for the Assessment . . . .” (Cal. Code Regs., tit. 8, § 17250, subd. (a).) When that 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).) At the conclusion of the hearing process,

the Director issues a written decision affirming, modifying or dismissing the assessment. (§ 1742, subd. (b).)

The prevailing rate of pay for a given craft, classification, or type of worker is determined by the Director of Industrial Relations in accordance with the standards set forth in section 1773. The Director determines the rate for each locality in which public work is performed (as defined in section 1724), and publishes a general prevailing wage determination (PWD) for a craft, such as Material Handler or Floor Layer, to inform all interested parties and the public of the applicable prevailing wage rates. (§ 1773.) Contractors and subcontractors are deemed to have constructive notice of the applicable prevailing wage rates. (*Division of Labor Standards Enforcement v. Ericsson Information Systems* (1990) 221 Cal.App.3d 114, 125.) Ultimately, the Director's PWDs determine the proper pay classification for a type of work. The nature of the work actually performed, not the title or classification of the worker, is determinative of the rate that must be paid. The Department publishes an advisory scope of work for each craft or worker classification for which it issues a PWD. The decision about which craft or classification is appropriate for the type of work requires comparison of the scope of work contained in the PWD with the actual work duties performed.

DLSE Properly Relied on Moreno's Description for Its Audit that Resulted in the Amended Assessment.

The resolution of the wage portion of this case is tied directly to the question of the accuracy and reliability of the documentary and testimonial evidence. DLSE based its Assessment that Ron Guidry underpaid wages on the Moreno's description about the nature of the work he performed on the Project when compared to the scopes of work of the crafts in question.

Every employer in the on-site construction industry, whether the project is a public work or not, must keep accurate information with respect to each employee. Industrial Welfare Commission (IWC) Wage Order No. 16-2001, which applies to on-site occupations in the construction industry, provides as follows:

Every employer who has control over wages, hours, or working conditions, must keep accurate information with respect to each employee including...name, home address, occupation, and social security number....[t]ime records showing when the employee begins and ends each work period....[t]otal wages paid each payroll period....[and] [t]otal hours worked during the payroll period and applicable rates of pay....

(Cal. Code Regs., tit. 8, § 11160, subd. (6)(A).) Also, the employer must furnish each employee with an itemized statement in writing showing all deductions from wages at the time of each payment of wages. (Cal. Code Regs., tit. 8, § 11160, subd. (6)(B); see also Lab. Code, § 226.) Employers on public works have the additional requirement to keep accurate certified payroll records. (§ 1776; Cal. Code Regs., tit. 8, § 11160, subd. (6)(D).) Those records must reflect, among other information, “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 journey[person], apprentice, worker, or other employee employed by him or her in connection with the public work.” (§ 1776, subd. (a).)

In this case, for the following reasons, DLSE presented prima facie support for the amended Assessment. DLSE relied on the description Moreno gave it as to the nature of the work he performed on the Project and the amount of time he spent in the different job tasks. Moreno testified credibly at the Hearing on the Merits, in a manner consistent with what he told DLSE during its investigation. Moreno explained that after he prepared the classrooms for the carpet installation work to take place, he went back to help the journeyman install carpet, undertaking many tasks that fall within the Floor Layer scope of work. Those tasks – such as trimming carpet, setting glue, rolling carpet to remove air bubbles, and installing base – amount to the carpet cutting and preparatory work described in that scope of work, whereas the tasks find no expression in the Material Handler scope of work. Moreno’s evidence that he was expected to work beyond the Material Handler classification or risk a bad recommendation supports DLSE’s showing that he performed Floor Layer work.

Further, as to the fact that Moreno had been an apprentice Floor Layer, the Assessment properly upgraded Moreno to journey-level Floor Layer rates for the work he performed within that craft's scope of work. Section 1771 requires the payment of prevailing wage for all workers on a public work. Apprentices can be employed on public works at less than the journey person rates, but only if they are registered as apprentices in the craft in question. (See § 1777.5, subds. (b)(1), (c) ["Only apprentices ... who are in training ... and who are parties to written apprenticeship agreements ... are eligible to be employed at the apprentice rate ...."]; Cal. Code Regs., tit. 8, § 230.1, subds. (a), (c).) By direct application of these authorities, where an apprentice is not in training and not party to a written apprenticeship agreement, the Labor Commissioner is empowered to reclassify the work of the apprentice to the journey person classification for those days on which the apprentice works in the classification in question. Since Moreno was not a registered apprentice by the date of his work on the Project, he could not be compensated at apprentice rates for his Floor Layer work. (§ 1777.5, subd. (c).)

Evidence from Moreno also provides a factual basis for a just and reasonable inference that at least 50 percent of his time he performed Floor Layer work, as found in the Assessment. The evidence shows he worked not only as a Material Handler in tasks such as moving furniture and removing carpeting for one to two hours per classroom, but also as a Floor Layer in the tasks such as cutting and preparing carpet for installation, measuring carpet, and installing flooring, all steps found within a reasonable reading of the Floor Layer scope of work. Moreno's performance of the task of mixing and pouring cement preparatory to the carpet-laying qualifies as the "substrate preparation" listed in the scope of work. (DLSE Exhibit No. 9, pp. 0143-0146.) While a precise calculation of the 50/50 division of tasks was not presented, that division represents a reasonable estimate of the work Moreno performed.

Faced with DLSE's prima facie showing, Ron Guidry failed to carry its burden of proving that the basis for the Assessment is incorrect. (§ 1742, subd. (b); Cal. Code Regs., tit. 8, § 17250, subd. (b).) No witnesses for Ron Guidry specifically denied that

Moreno undertook the tasks he described nor did they rebut the 50/50 estimate, per se. Pomares testified that he was only on-site at the Project every other day, and each of his visits lasted no more than 90 minutes. Further, his main function appears to have been as a dispatcher, not as a supervisor of Moreno. Ron Guidry allowed the journeypersons on the Project to supervise the other workers. Given Pomares's limited time on the Project and his need to attend other duties, his opinion that he was "110% sure" that the journeypersons never let Moreno install carpet must be discounted. That opinion must also be discounted because of its general nature. Pomares did not specifically deny that Moreno performed the other tasks Moreno described as preparatory to and related to installing carpet, tasks that nonetheless fall within the Floor Layer scope of work. Instead, Pomares opined that Moreno could not have installed carpet because he did not believe Moreno knew how to install carpet. Similarly, the testimony of Union representative Ramos offers no basis on which Ron Guidry can carry its burden to prove the Assessment is incorrect, in that Ramos had no personal knowledge of what Moreno did on the Project.

While journeyperson Ramirez testified that he supervised Moreno at Crescent and was adamant that Moreno never installed carpet, Ramirez could not remember anyone else who worked at Crescent besides Moreno, and he did not testify about Moreno's work at the other school, Orange Pre-K. Ramirez's testimony also contradicted the CPRs which showed that he did not work the week of June 25, 2017, when Moreno was working at Crescent. For those reasons, Ramirez's testimony, too, must be discounted.

Ron Guidry contends that Moreno was working as a Material Handler because he was reclassified by the Union as a Material Handler as of June 23, 2017, after being dropped from the Floor Layer apprenticeship program. Yet, this contention is belied by the CPRs for the weeks beginning June 25, 2017, and July 9, 2107. Those CPRs classified Moreno as a Floor Layer and first level apprentice Floor Layer, respectively, not Material Handler. Further, classifications given by a union do not control the statutory analysis. It is the nature of the work actually performed and the applicable

craft scopes of work, not the title or classification of the worker given by a union or an employer, which are determinative of the rate that must be paid under section 1771. Moreno credibly testified that he performed duties within the scope of work provisions of both the Material Handler and the Floor Layer trades. Based on the hours he spent in the duties associated with each trade, DLSE reasonably estimated a 50/50 split of Moreno's time between those trades, and Ron Guidry did not dispute that split other than to deny Moreno installed carpets. That denial, for the reasons stated, cannot be accepted.

On balance, and given the totality of the evidence, DLSE properly reclassified Moreno as a journeyman Floor Layer for the hours that he performed the work of a Floor Layer and Ron Guidry failed to carry its burden to prove the reclassification was incorrect. Moreover, DLSE properly found Ron Guidry underpaid Moreno for the hours he worked as a Material Handler. Accordingly, the Assessment, as amended, is affirmed that Ron Guidry owes \$835.24 in unpaid prevailing wages.

DLSE's Penalty Assessment Under Section 1775.

Section 1775, subdivision (a), states in relevant part:

(1) The contractor and any subcontractor under the contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than two hundred dollars (\$200) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by the contractor or, except as provided in subdivision (b), by any subcontractor under the contractor.

(2)(A) The amount of the penalty shall be determined by the Labor Commissioner based on consideration of both of the following:

(i) Whether 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.

(ii) Whether the contractor or subcontractor has a prior record of failing to meet its prevailing wage obligations.

(B) (i) The penalty may not be less than forty dollars (\$40)... unless the failure of the contractor... 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...

(ii) The penalty may not be less than eighty dollars (\$80)... if the contractor...has been assessed penalties within the previous three years for failing to meet its prevailing wage obligations on a separate contract, unless those penalties were subsequently withdrawn or overturned.

(iii) The penalty may not be less than one hundred twenty dollars (\$120)... if the Labor Commissioner determines that the violation was willful, as defined in subdivision (c) of Section 1777.1.<sup>8</sup>

...

(D) The determination of the Labor Commissioner as to the amount of the penalty shall be reviewable only for abuse of discretion.

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 his or her own judgment "because in [his or her] own evaluation of the circumstances the punishment appears to be too harsh." (*Pegues v. Civil Service Commission* (1998) 67 Cal.App.4th 95, 107.)

A contractor or subcontractor has the same burden of proof with respect to the penalty determination as to the wage Assessment. Specifically, "the Affected Contractor or Subcontractor shall have the burden of proving that the Labor Commissioner abused his or her discretion in determining that a penalty was due or in determining the amount of the penalty." (Cal. Code Regs., tit. 8, § 17250, subd. (c).)

DLSE assessed section 1775 penalties at the rate of \$40.00, which is the lowest allowable penalty per statute; the maximum allowable penalty is \$200.00 per violation. The burden was on Ron Guidry to prove that DLSE abused its discretion in setting the penalty amount under section 1775 at the rate of \$40.00 per violation.

<sup>8</sup> Section 1777.1 defines a willful violation as one in which "the contractor or subcontractor knew or reasonably should have known of his or her obligations under the public works law and deliberately fails or refuses to comply with its provisions."



There was no evidence that Ron Guidry made a good faith mistake in misclassifying and underpaying Moreno for the work he performed on the Project. Although Ron Guidry disputes the DLSE's calculation of its underpayment to Moreno, Ron Guidry admits in its closing brief that it underpaid Moreno for the 56 hours that he worked on the Project. There was no evidence that Ron Guidry promptly and voluntarily corrected its misclassification error and consequent failure to pay the correct prevailing wage when these issues were brought to its attention. Indeed, Ron Guidry lacked any reasonable defense to the misclassification of Moreno as a Material Handler, which supports a finding that the violations were willful.

Section 1775, subdivision (a)(2), grants the Labor Commissioner the discretion to mitigate the statutory maximum penalty per day in light of prescribed factors, but it does not mandate mitigation in all cases. The Director is not free to substitute his or her own judgment.

Ron Guidry did not carry its burden to prove an abuse of discretion as to the section 1775 penalties found in the Assessment. Accordingly, the finding of seven violations and penalties at the rate of \$40.00 per violation for a total of \$280.00 in penalties under section 1775 is affirmed.

#### Ron Guidry Is Liable for Liquidated Damages

Section 1742.1, subdivision (a), provides for the imposition of liquidated damages, as follows:

After 60 days following the service of a civil wage and penalty assessment under Section 1741... , the affected contractor, subcontractor, and surety... shall be liable for liquidated damages in an amount equal to the wages, or portion thereof, that still remain unpaid. If the assessment... subsequently is overturned or modified after administrative or judicial review, liquidated damages shall be payable only on the wages found to be due and unpaid....

At the time the Assessment was issued, the statutory scheme regarding liquidated damages provided contractors two alternative means to avert liability for liquidated damages (in addition to prevailing on the case, or settling the case with DLSE agreeing to waive liquidated damages). Under section 1742.1, subdivision (a), the

contractor has 60 days to decide whether to pay the workers all or a portion of the wages assessed in the civil wage penalty assessment, and thereby avoid liability for liquidated damages on the amount of wages so paid. Under section 1742.1, subdivision (b), a contractor may entirely avert liability for liquidated damages if, within 60 days from issuance of the civil wage penalty assessment, the contractor deposits with the Department of Industrial Relations the full amount of the assessment of unpaid wages, including all statutory penalties.

In this case Ron Guidry did not pay any back wages to Moreno in response to the Assessment; nor did it deposit with the Department the assessed wages and statutory penalties. Accordingly, Ron Guidry is liable for liquidated damages under section 1742.1 in the amount of \$835.24.

Based on the foregoing, the Director makes the following findings:

#### **FINDINGS AND ORDER**

1. The work at issue in the Civil Wage and Penalty Assessment was subject to the prevailing wage and apprenticeship requirements.
2. The Labor Commissioner timely served the Civil Wage and Penalty Assessment.
3. The Request for Review was timely filed.
4. The Labor Commissioner timely made its investigative file available to the contractor.
5. No back wages have been paid or deposited made with the Department of Industrial Relations as a result of the Assessment.
6. Ron Guidry's Floor Covering, Inc. underpaid Honorio Moreno Retana prevailing wages in the amount of \$835.24.
7. The Labor Commissioner's evidence provides prima facie support for the Civil Wage and Penalty Assessment, and Ron Guidry's Floor Covering, Inc. failed to carry its burden of proving that the basis for the amended Assessment was incorrect.


8. The Labor Commissioner did not abuse her discretion in assessing Labor Code section 1775 penalties in the amount of \$280.00.
9. Ron Guidry's Floor Covering, Inc. is liable for liquidated damages in the amount of \$835.24.
10. The amount found due in the Assessment, as amended, is affirmed by this Decision, as follows:

<b>Basis of the Assessment</b>	<b>Amount</b>
Wages Due:	\$835.24
Penalties under section 1775:	\$280.00
Liquidated damages	\$835.24
<b>TOTAL:</b>	<b>\$1,950.48</b>

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

The Civil Wage and Penalty Assessment, as amended, 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: 12/30/2020



Katrina S. Hagen  
 Director,  
 Department of Industrial Relations