

STATE OF CALIFORNIA  
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

**Minako America Corporation  
dba Minco Construction**

Case No. 17-0383-PWH

From a Civil Wage and Penalty Assessment issued by:

**Division of Labor Standards Enforcement.**

**DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS**

Affected subcontractor Minako America Corporation dba Minco Construction (Minako) submitted a timely Request for Review of a Civil Wage and Penalty Assessment issued on September 20, 2017, by the Division of Labor Standards Enforcement (DLSE) with respect to the work of improvement known as the San Jose Creek Water Quality Laboratory HVAC Upgrade project (Project) performed for the County Sanitation District No. 2 of Los Angeles County (County). The Assessment determined that Minako owed \$132,036.01 in unpaid prevailing wages, training fund contributions, and penalties for prevailing wage violations under Labor Code section 1775 and apprenticeship violations under Labor Code section 1777.7.<sup>1</sup> A Hearing on the Merits was held on January 23, 2019, in Los Angeles, California, before Hearing Officer Jessica L. Pirrone. Lance Grucela appeared as counsel for DLSE. There was no appearance by or on behalf of Minako. On February 4, 2019, Minako filed a motion seeking relief from its failure to appear, which DLSE opposed.

Stipulations and Issues.

At a March 19, 2018 Prehearing Conference, the parties entered the following stipulations:

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

1. The work subject to the Assessment was performed on a public work and required the payment of prevailing wages and employment of apprentices under the California Prevailing Wage Law, Labor Codes sections 1720 through 1861.
2. Minako's Request for Review was timely.
3. DLSE timely made available the enforcement file.
4. Minako did not pay wages or deposit funds with the Department of Industrial Relations as a result of the Assessment pursuant to section 1742.1.

The issues for decision are as follows:

- Whether the Assessment was timely.
- Whether the Assessment correctly found that Minako failed to pay \$27,054.53 in required prevailing wages.
- Whether the Assessment correctly found that Minako failed to make the required training fund contributions to an approved apprenticeship program or the California Apprenticeship Council in the amount of \$981.48.<sup>2</sup>
- Whether the Labor Commissioner abused her discretion in assessing penalties under section 1775 at the rate of \$200.00 per violation for 271 violations.
- Whether the Assessment correctly found that Minako failed to pay the prevailing wage rate for all overtime hours worked, thereby making Minako liable for penalties under section 1813 of \$25.00 per violation for 42 violations.
- Whether the Assessment correctly found that Minako failed to comply with the law governing employment of apprentices on public works projects.

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<sup>2</sup> At the Hearing, the Hearing Officer granted DLSE's motion to amend the Assessment downward. Under that motion, due to a miscalculation in the original Assessment, the amount of unpaid training fund contributions decreased by \$6.46 (from \$987.94 to \$981.48).

- Whether the Labor Commissioner abused her discretion in assessing penalties under section 1777.7 at the rate of \$150.00 per violation for 325 violations.
- Whether Minako is liable for liquidated damages under section 1742.1, subdivision (a), in the amount of \$27,054.53.
- Whether Minako made a showing that good cause exists for it to be relieved from its failure to appear at the duly noticed Hearing.

Based on the evidence and law 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. Minako failed to appear and therefore failed to carry its burden of proving the basis for the amended Assessment was incorrect. (See Cal. Code Regs., tit. 8, § 17250, subds. (a), (b).) The Director further finds that Minako failed to make a showing that good cause exists for it to be relieved from its failure to appear at the duly noticed Hearing. Accordingly, the Director issues this Decision affirming the Assessment, as amended, and awarding liquidated damages.

## **FACTS**

### Minako's Failure to Appear.

Minako was originally represented by the law firm Atkinson, Andelson, Loya, Rudd & Romo (Atkinson). In a letter dated July 27, 2018, Atkinson withdrew as counsel and indicated that all future communications regarding the matter should be directed to Refaat Mina. At that time, the matter was set for a Hearing on the Merits on August 29, 2018.

On August 13, 2018, Mina sent an email to the Hearing Officer requesting that the matter be continued because Minako had not retained counsel. The Hearing Officer responded on August 14, 2018, denying the request because Minako made no showing that it had attempted to retain counsel or had otherwise established good cause for a continuance.

Mina appeared on behalf of Minako at the August 29, 2018 Hearing, and again requested a continuance on the grounds that Minako had not retained counsel. Upon

Minako's showing that it had made efforts to retain new counsel, the Hearing Officer granted the request over DLSE's objection. The parties agreed to January 23, 2019, at 10:00 a.m., as the date and time for the continued Hearing, and notice was duly served.

At the reconvened Hearing on January 23, 2019, Minako failed to appear. Grucela reported to the Hearing Officer that at approximately 10:30 a.m. on that date, he called Mina and left him a voicemail message. At approximately 11:45 a.m., while on the record, the Hearing Officer called Mina and left a message with an attendant advising that the present time and date had been agreed to for the continued Hearing and the matter would proceed as noticed.

The Hearing.

The Hearing Officer conducted the Hearing in Minako'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 offered exhibits 1-34. There being no objection, those exhibits were entered into evidence after DLSE rested its case. Grucela called one witness, Deputy Labor Commissioner Jeffrey Pich.

DLSE's evidence supports the following facts. The Project was advertised for bid on May 31, 2012. On November 10, 2012, Minako entered into a contract with the County to perform the work required on the Project. The contract states that Minako is required to pay the prevailing wage rates and comply with requirements for hiring apprentices. The contract also cites the California Prevailing Wage Law and advises where a copy of the general prevailing rates may be obtained physically and online. Based on Minako's certified payroll records (CPRs), Minako performed work on the Project between March 26, 2013, and February 9, 2014. A valid notice of completion was recorded on March 25, 2016.

Pich testified that upon receipt of a March 31, 2015 complaint from the Center for Contractor Compliance regarding the Project, he investigated whether Minako was complying with the applicable prevailing wage requirements. In conducting the investigation, Pich relied on Minako's CPRs for the following purposes: the identity of the 22 workers at issue, the classifications of the workers at issue, the dates and hours

worked, the apprentice to journey person ratios used, and the amount of wages paid to the workers.<sup>3</sup> Pich also relied on Minako's documentation regarding its provision of the required notice of contract award information to apprenticeship committees (using Division of Apprenticeship Standard (DAS) 140 forms or equivalent) and the required requests for dispatch of apprentices (using DAS 142 forms or equivalent). For the applicable prevailing wage determinations (PWDs), Pich identified the PWDs in effect on the date the Project was advertised for bid for five craft classifications.<sup>4</sup> Pich obtained from Minako and the California Apprenticeship Council proof of Minako's fringe benefit payments to determine whether Minako complied with PWD requirements as to fringe benefit payments and training fund contributions.

Pich further testified that he compared the hours listed on the CPRs with proof of payment to the workers, and found that Minako did not pay the workers the full basic hourly rates for the hours listed on the CPRs. Similarly, Pich's comparison of the proof of payment with the level of training fund contributions due under the PWDs demonstrated that Minako did not pay all of the required training fund contributions based on the hours showing on the CPRs. Pich concluded that Minako's failure to pay the correct prevailing wage rate was knowing and willful. He based that conclusion on DLSE records of prior violations of prevailing wage laws by Minako. Additionally, Pich testified that while Minako claimed that it had made the required fringe benefit payments to the applicable funds on the workers' behalf in lieu of direct payments to the workers, Minako produced no evidence of such payments.

As to the DAS 140 forms, Pich testified that he determined that Minako did not submit the forms to all of the applicable apprenticeship committees, and most of the DAS 140 forms that Minako did submit were not submitted by the first day of the Project, as required. For example, the CPRs indicate the first day of work, and based on that date,

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<sup>3</sup> The CPRs reflected the following crafts were used on the Project: Laborer, Cement Mason, Operating Engineer, Electrician (Inside Wireman and Commercial and System Installer), and Plumber (Pipefitter).

<sup>4</sup> As of May 31, 2012, the applicable Prevailing Wage Determinations for the County of Los Angeles for the relevant crafts and the corresponding basic hourly rate were as follows: Laborer - SC-23-102-2-2011-1, \$44.68; Cement Mason - SC-23-203-2-2012-1, \$50.25; Operating Engineer - SC-23-63-2-2011-2, \$57.19; Electrician (Inside Wireman and Commercial and System Installer), LOS-2012-1, \$61.76; and Plumber (Pipefitter) - LOS-2012-1, \$59.40.

the last day to submit the DAS 140 form, was March 26, 2013. Minako did not submit the DAS 140 forms to apprenticeship committees for Operating Engineers, Cement Masons, and Laborers until January 22, 2014.

Pich testified he also found violations of the required 1:5 apprentice-to-journeyman ratios for the crafts of Cement Mason and Laborer. Minako neither disputed those findings nor showed that it had timely submitted valid DAS 140 forms and DAS 142 forms as to all of the applicable committees in the geographic area for those crafts. Further, Pich concluded that Minako's failure to comply with the requirements for hiring apprentices was knowing and willful on the following bases. First, DLSE's records showed that Minako had prior violations, which suggests Minako knew the applicable law and had engaged in a pattern of not complying with it. Second, Minako's violations were manifold in that it did not give the required contract award notice for several crafts, it did not meet the requirements for requesting dispatch of apprentices for several crafts, and it did not meet the ratio requirement for two crafts.

Based on his investigation, Pich prepared a penalty review and the Assessment. DLSE served the Assessment on Minako by mail on September 20, 2017. The Assessment found that 22 workers who performed work on the Project between March 26, 2013, and February 14, 2014, were owed \$27,054.53 in unpaid prevailing wages. It further found that \$987.94 in unpaid training fund contributions were due. At the Hearing, Pich testified that he miscalculated the amount of unpaid training funds and that the correct amount of unpaid training fund contributions was \$981.48.

As to statutory penalties, the Assessment found that for unpaid prevailing wages, \$54,200.00 in penalties were due under section 1775 at the maximum rate of \$200.00 per violation for 271 instances of willful violations; for unpaid prevailing wages for overtime work, \$1,050.00 in penalties were due under section 1813 at the rate of \$25.00 per violation for 42 violations; and for violation of apprenticeship requirements, \$48,750.00 in penalties were due under section 1777.7 at the mitigated rate of \$150.00 per violation for 325 instances of willful violations.

Motion for Relief for Non-Appearance.

On February 4, 2019, Atkinson served a motion seeking to excuse Minako's failure to appear at the Hearing. DLSE opposed the motion. In its motion, Minako argued good cause exists to relieve Minako from its failure to appear because: (1) Mina had mis-calendared the hearing date as January 19 instead of January 23; (2) Minako was unrepresented on several cases at the same time while also trying to run a business, and (3) no prejudice would result.

DLSE contended in opposition that Minako's argument that it had mis-calendared the Hearing was not credible. First, Mina was present at the initial Hearing when the date for the continued Hearing was picked. Second, Minako was emailed notice of the continued Hearing date twice – once on August 31, 2018, and again on December 6, 2018. Third, Minako did not file and serve exhibit lists as ordered by the Hearing Officer, suggesting that it did not intend to participate in the Hearing. Fourth, if, as Mina claims, he thought the Hearing was set for January 19, he would have figured out the calendaring error when January 19 came and went.

With respect to Minako's argument that it did not have counsel, that its principal had a busy business, and that it had several pending cases, DLSE responded that those facts do not excuse Minako from responding immediately when the mistake was called to its attention. If Mina had responded to the Hearing Officer's or DLSE's calls or emails on the morning of the Hearing, the Hearing Officer could have considered his request for relief from his alleged calendaring error before moving forward with the Hearing.

As to prejudice, DLSE argued that the State and the workers would be prejudiced if the motion were granted and the Hearing reinstated on the calendar. The State would be prejudiced because the resources expended in preparing for the Hearing, traveling to the Hearing, and putting on the case would be wasted. Additionally, in August of 2018, on the originally scheduled day of the Hearing, Minako requested and was granted a continuance over DLSE's objection for the purpose of obtaining new counsel despite the fact that DLSE's counsel and deputy had already prepared for and traveled to the Hearing. As to the workers, DLSE argued that they performed the work at issue several years ago, and are prejudiced by any further delay in obtaining a Decision.

## DISCUSSION

The California Prevailing Wage Law, set forth at Labor Code sections 1720 et seq., requires the payment of prevailing wages and hiring of apprentices 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*, at p. 985.)

Section 1775 requires, among other provisions, 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 wage rate. Under the version of section 1775 in effect on May 31, 2012, the date of the bid advertisement for the Project, the penalty under section 1775 for failure to pay prevailing wages is a maximum of \$200.00 for each calendar day for each worker paid less than the prevailing wage. Section 1775, subdivision (a)(2)(D) states, “The determination of the Labor Commissioner as to the amount of the penalty shall be reviewable only for abuse of discretion.” Further, “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).) Abuse of discretion 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.)

Section 1742.1, subdivision (a), provides for the imposition of liquidated damages, essentially a doubling of the unpaid wages, if unpaid prevailing wages are not paid within 60 days following the service of a civil wage and penalty assessment under section 1741. Under section 1742.1, subdivision (b), a contractor may entirely avert liability for liquidated damages if, within 60 days from issuance of the CWPA, the contractor deposits into escrow with the Department of Industrial Relations (DIR) the full amount of the assessment of unpaid wages, plus the statutory penalties.<sup>5</sup>

Sections 1777.5 through 1777.7 set forth the statutory requirements governing the employment of apprentices on public works projects. These requirements are further addressed in regulations promulgated by the California Apprenticeship Council (CAC). California Code of Regulations, title 8, section 227 provides that the regulations “shall govern all actions pursuant to . . . Labor Code sections 1777.5 and 1777.7.” DLSE enforces the apprenticeship requirements not only for the benefit of apprentices, but to encourage and support apprenticeship programs which the Legislature has recognized as “a vital part of the educational system in California.” (Stats. 1999, ch. 903, § 1.)

Contractors are required to: (1) give notice of contract award information to applicable committees within ten days of the contract and no later than the first day of work on the project (using a DAS 140 form or its equivalent); (2) request dispatch of apprentices with at least 72 hours’ notice (using a DAS 142 form or its equivalent); and (3) maintain a ratio of one hour of apprentice work for every five hours of journey person work. (§ 1777.5.) If a contractor knows or should have known of the requirements and fails to comply, the contractor is liable for penalties.

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<sup>5</sup> On June 27, 2017, the Director’s discretionary ability to waive liquidated damages was deleted from section 1742.1 by legislative amendment. (Stats. 2017, ch. 28, §16 [Sen. Bill No. 96].)

A contractor shall not, however, be considered in violation of the ratio requirement if it has properly given notice of contract award information and requested the dispatch of apprentices, but no apprenticeship committee in the geographic area of the public works project dispatches apprentices during the pendency of the project. (Cal. Code Regs., tit. 8, § 230.1, subd. (a).)

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 may appeal that assessment by filing a Request for Review. (§ 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).)

With respect to failure to appear at a hearing, California Code of Regulations, title 8, section 17246, subdivision (b), allows a hearing officer to relieve a party from the consequences of its failure to appear upon a showing of good cause and under such terms as are just.

Here, the record establishes that DLSE met its initial burden of presenting prima facie support for the Assessment. Having failed to appear, Minako presented no evidence to disprove the basis for the Assessment or to avoid the award of liquidated damages. The record also establishes that the Assessment was timely, in that it was filed within 18 months of the filing of a valid notice of completion within the meaning of section 1741, subdivision (a).<sup>6</sup> Further, the record establishes that the circumstances surrounding

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<sup>6</sup> The notice of completion was recorded on March 25, 2016, stating the Project was completed on March 23, 2016. The Assessment was issued on September 20, 2017, 17 months, 24 days later and within the 18 month period under section 1741.

Minako's failure to appear do not establish good cause for relief from its failure to appear. Minako had actual notice of the date of the Hearing, the Hearing Officer and the DLSE called Minako on the day of the Hearing, and Minako's excuse that it miscalendared the Hearing four days before the January 23, 2019 Hearing date is not credible because it did not appear on the date it claims to have calendared the Hearing, or take any steps to comply with the Hearing Officer's orders regarding prehearing filing of exhibit and witness lists. Further, the fact that Minako is a busy company with several cases does not constitute excusable neglect. Finally, as to prejudice, DLSE credibly demonstrated that it would be prejudiced if it were forced to put on its case again. DLSE's lawyer and witness spent a day traveling to the Hearing and presenting DLSE's case and evidence at the Hearing. The taxpayers should not be required to pay for DLSE to do so again, particularly in light of the fact the Hearing had already been continued once after DLSE had prepared and appeared. Additionally, the Hearing Officer heard the case, prepared Minutes of Hearing and drafted a recommended Decision for the Director. It would be a waste of State resources to re-hear the case.

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

#### **FINDINGS**

1. Affected subcontractor Minako America Corporation dba Minco Construction's Motion for Relief from Non-Appearance is denied.
2. Affected subcontractor Minako America Corporation dba Minco Construction filed a timely Request for Review from a timely Civil Wage and Penalty Assessment issued by the Division of Labor Standards Enforcement.
3. The Assessment, as amended, correctly found that Minako America Corporation dba Minco Construction underpaid prevailing wages in the amount of \$27,054.00.
4. The Assessment, as amended, correctly found that Minako America Corporation dba Minco Construction failed to make the required training fund contributions to an approved apprenticeship program or the California Apprenticeship Council in the amount of \$981.48.

5. The Labor Commissioner did not abuse her discretion in assessing \$54,200.00 in penalties under section 1775 at the maximum rate of \$200 per violation for 271 willful violations.
6. The Assessment, as amended, correctly found that Minako America Corporation dba Minco Construction failed to pay the overtime prevailing wage rate for all overtime hours worked, thereby making Minako liable for \$1,050.00 in penalties under section 1813 at the rate of \$25.00 per violation for 42 violations.
7. The Assessment, as amended, correctly found that Minako America Corporation dba Minco Construction failed to comply with the laws governing employment of apprentices on public works projects.
8. The Labor Commissioner did not abuse her discretion in assessing \$48,750.00 in penalties under section 1777.7 at the rate of \$150.00 per violation for 325 willful violations.
9. Minako America Corporation dba Minco Construction is liable for liquidated damages under section 1742.1, subdivision (a) in the amount of \$27,054.00.
10. The amounts found due in the amended Assessment as affirmed by this Decision are as follows:

Wages Due:	\$ 27,054.00
Training Fund Contributions:	\$ 981.48
Penalties under section 1775, subdivision (a):	\$ 54,200.00
Penalties under section 1813:	\$ 1,050.00
Penalties under section 1777.7:	\$ 48,750.00
Liquidated damages section 1742.1, subdivision (a):	\$ 27,054.00
<b>TOTAL:</b>	<b>\$159,089.48</b>

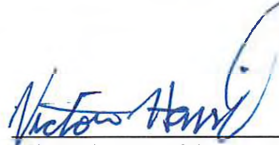
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**ORDER**

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: November 1, 2019



Victoria Hassid  
Chief Deputy Director  
Department of Industrial Relations<sup>7</sup>

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<sup>7</sup> See Government Code sections 7, 11200.4.