

**STATE OF CALIFORNIA**  
**DEPARTMENT OF INDUSTRIAL RELATIONS**

In the Matter of the Request for Review of:

Dynamic Home Performance Inc.,  
dba Dynamic Mechanical

Case No.: 19-0002-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

**DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS**

On January 2, 2019, affected subcontractor Dynamic Home Performance Inc., doing business as Dynamic Mechanical (Dynamic), requested review of a Civil Wage and Penalty Assessment (Assessment), issued by the Division of Labor Standards Enforcement (DLSE) on November 2, 2018, with respect to installation of HVAC equipment in ducting for multi-residential buildings identified as Delta Lane Apartments, Phase 1 (the Project), located in the County of Yolo. Dynamic performed work on the Project from the week ending April 17, 2016, through May 5, 2017. The Assessment determined that \$30,000.00 was due in statutory penalties under Labor Code section 1776.

The matter was initially assigned to Hearing Officer Steven McGinty, who set the Hearing on the Merits for January 8, 2019. The matter was re-assigned to Hearing Officer Michael R. Drayton, and at the request of Dynamic as agreed to by DLSE, the Hearing was continued to February 6, 2020. At the Hearing, David Cross appeared as counsel for DLSE. Suzanne M. Alves of the law firm Alves Radcliffe LLP appeared on behalf of Dynamic. DLSE Industrial Relations Representative (IRR) Brianna Roberts (formerly Brianna Carnegie in some documentation in the record) testified in support of

the Assessment. David Vechtomov, Chief Financial Officer of Dynamic, testified on behalf of Dynamic.<sup>1</sup>

Twice before the Hearing, DLSE moved to amend the Assessment, first upward then downward. The first amendment sought to increase the Assessment based on payroll records DLSE received from Dynamic. The motion was granted by Hearing Officer McGinty. The second amendment sought to decrease the Assessment's imposition of penalties under Labor Code sections 1775 and 1776.<sup>2</sup> There being no objection and no prejudice to Dynamic, the Hearing Officer granted the second motion. As amended, the Assessment found unpaid prevailing wages in the amount of \$36,277.03, penalties under section 1775 in the amount of \$38,480.00, penalties under section 1813 in the amount of \$75.00, and penalties under section 1776 in the amount of \$10,000.00.

DLSE's Exhibit Numbers 1 through 18 (sequentially "Bates" numbered 00002 through 00354) were admitted into evidence, except that Dynamic's objection to DLSE Exhibit Numbers 2 and 17 was deferred to this Decision. Dynamic Exhibit Number 1 (sequentially numbered DELTA\_00001 through DELTA\_00889)<sup>3</sup>, which purports to be a copy of the DLSE enforcement file copied at the time it was made available to Dynamic, was admitted into evidence without objection. Dynamic also submitted the Declarations of Andrey Vechtomov, Edward Vechtomov, and Vladislav Vechtomov, respectively (Dynamic Exhibit Nos. 2, 3, and 4), which were received into evidence and afforded the evidentiary weight provided under the applicable regulations.<sup>4</sup> No objection was made

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<sup>1</sup> Dynamic performed work on the Project as a subcontractor of prime contractor Advent Companies, Inc. (Advent). Advent did not request review of the Assessment within 60 days after it issued. (Lab. Code § 1742, subd. (a).)

<sup>2</sup> All further section references are to the California Labor Code unless otherwise specified.

<sup>3</sup> Although the order setting the Hearing directed that DLSE utilize numbers to identify its exhibits and that Dynamic utilize letters of the alphabet for its exhibits, Dynamic utilized numbers. In this Decision, the numbered exhibits are identified as "DLSE Exhibit Number [xx]" and "Dynamic Exhibit Number [xx]" to distinguish them from one another.

<sup>4</sup> DLSE objected to admission of the witness declarations in lieu of testimony for nonconformance with the procedures under Rule 34. (Cal. Code Regs., tit. 8, § 17234.) Dynamic conceded that the declarations

as to Dynamic Exhibit Number 5 (consisting of four pages of emails). Dynamic Exhibit Number 5 was admitted into evidence, with a hearsay objection noted.<sup>5</sup> The matter was deemed submitted upon receipt of the parties' post-hearing briefs on February 20, 2020.

Prior to the first day of Hearing, the parties stipulated to the following:

- The work subject to the Assessment was a public work subject to the prevailing wage and apprenticeship requirements under the California prevailing wage law.
- The Labor Commissioner timely served the Assessment.
- The Request for Review was timely filed.
- No back wages have been paid or deposited with DIR as a result of the Civil Wage and Penalty Assessment.

The parties stipulated that the issues for decision are as follows:

- Were the correct prevailing wage classifications used in the audit?
- Were the hours worked as listed in the audit correct?
- Were the mathematical calculations as set forth in the Assessment correct?
- Were the wages paid to the workers listed correctly in the certified payroll?
- Were all workers classified correctly on the certified payroll?
- Were all hours worked on the Project listed in the certified payroll?
- Were all overtime hours worked paid at the correct overtime rate?
- Were all required fringe benefits paid?
- Is Dynamic liable for penalties under section 1775?

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do not comply the procedures therein, but argued that the regulation states that "the affidavit or declaration may be introduced in evidence but shall be given only the same effect as other hearsay evidence under Rule 44." (Cal. Code Regs., tit. 8, §§ 17234, subd. (a), (c); & 17244, subd. (d).) The declarations were admitted as hearsay subject to DLSE's objection.

<sup>5</sup> Dynamic Exhibit Number 5 was not sequentially numbered in the same manner as Delta Exhibit Number 1 and was therefore sequentially numbered by the Hearing Officer for the record as pages E-1 through E-4).

- Is Dynamic liable for penalties under section 1813?
- Is Dynamic liable for penalties under section 1776?
- Is Dynamic 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 at the Hearing that provided prima facie support for the Assessment, as amended, and that Dynamic failed to carry its burden of proving that the basis for the Amended Assessment was incorrect, except with respect to overtime hours, the pay for employee Valeriy Borodayev, and associated penalties under section 1775. (See Cal. Code Regs., tit. 8, § 17250, subds. (a), (b).) Accordingly, the Director issues this decision affirming the Assessment, as amended and modified, with the exceptions noted.

### **DYNAMIC'S EVIDENTIARY OBJECTIONS**

Dynamic objects to the admission of DLSE Exhibit Numbers 2 and 17, which Dynamic asserts were not part of the enforcement file made available to it. Dynamic does not assert that DLSE's enforcement file was not timely made available, but contends that the file made available was not complete. A copy service retained by Dynamic copied the Department's file in this matter. Dynamic asserts generally that the absence of these documents from the file provided to it results in Dynamic not being fully informed of the basis for the Assessment. Dynamic did not specify prejudice that it claims to have suffered by these documents not having been copied at the time its copy service reproduced the file. Dynamic relies on the regulatory requirement that the file be made available and on title 8, California Code of Regulations, section 17224, subsection (d), which states in part, "[t]he Enforcing Agency's failure to make evidence available for review as required by Labor Code §1742(b) and this Rule, shall preclude the Enforcing Agency from introducing such evidence in proceedings before the Hearing Officer or the Director."

Dynamic Exhibit Number 1 is a copy of the file purportedly made by Dynamic's copy service. DLSE Exhibit Number 2 consists of DLSE's Public Works Investigation

Worksheets, DLSE Exhibit Number 17 consists of DLSE PW 900 Notes, and they do not appear in Dynamic Exhibit Number 1.

The prehearing order setting the Hearing required that the parties exchange their exhibits at least three weeks prior to the Hearing date. This stipulation was memorialized by Hearing Officer McGinty's Minutes, dated June 8, 2019, and October 29, 2019, which were duly served on the parties. DLSE asserts that its exhibits were provided to Dynamic on January 23, 2020, which included Exhibits 2 and 17. This is not refuted by Dynamic. Assuming that DLSE Exhibit Numbers 2 and 17 were not present in the file when copied or were erroneously not copied by the copy service, Dynamic's receipt of DLSE's exhibits three weeks before the Hearing was sufficiently in advance of the Hearing to allow Dynamic to prepare for the Hearing.

Though not specifically argued, there was no evidence of prejudice resulting from surprise regarding the issues to be resolved at the Hearing by information in these exhibits. The significant issue that remained between DLSE and Dynamic that required a Hearing was proof of payment of fringe benefits. The parties had previously had discussions regarding the need for proof of payment of fringe benefits long before the Hearing in February 2020. In the Minutes of Hearing and Order dated June 18, 2019, it is noted that "The parties are still attempting to resolve the issue of payment of fringe benefits. DLSE has not yet received the information it needs from the Requesting Party to complete its audit and provide appropriate credit." Further prehearing conferences were continued several times thereafter. A Motion To Amend Assessment was filed by DLSE on August 13, 2019, which included the first page of the audit worksheet which summarizes and thus gives notice to Dynamic of the hours DLSE claims each employee worked, including overtime hours, the pay for each employee, the amount DLSE claimed was underpaid, and penalties. On the date of the Hearing, the Hearing Officer provided Dynamic with another copy of DLSE Exhibit Number 2. No request for a continuance was made by Dynamic to allow it further time to consider Exhibits 2 and 17. Finally, Dynamic was in possession of other file documentation, including the sign-in

sheets and checks of employee Valeriy Borodayev, which were utilized on cross-examination of Roberts.

In light of the foregoing, Dynamic's objection to DLSE Exhibit Numbers 2 and 17 is overruled and the exhibits are admitted into evidence.

## **FACTS**

The Awarding Body advertised the Project for bid on May 7, 2015. Advent was awarded the prime contract and hired Dynamic for HVAC installation. The Project began in June 2015, and the notice of completion, recorded on May 2, 2017, indicates a completion date of May 1, 2017.

The prevailing wage determination (PWD) at issue in this matter is that of Sheet Metal Worker (Residential), R-166-162-1-2014-1.<sup>6</sup>

DLSE's investigation in this matter began with a report made by The Foundation For Fair Contracting (FFC). Roberts testified that on August 3, 2017, she requested Dynamic's payroll information, including certified payroll records (CPRs), by a Request For Payroll Records. (DLSE Exhibit No. 12.) Roberts testified as to the custom and practice regarding the service of such requests. DLSE made a second request for payroll records on November 2, 2018. (DLSE Exhibit No. 13.) This second request indicates DLSE received a response to the initial request on August 25, 2017, a fact that no party disputes. The second request also indicates that the initial response failed to include worker addresses and Social Security numbers, information that is required to be included on CPRs. The second request also sought additional payroll records, including, but not limited to, time cards, cancelled checks, cash receipts, books, and documents. Roberts testified that no documentation was ever received from Dynamic substantiating payment of fringe benefits. Roberts testified that Dynamic's Statement of Employer Payments reflected payment of fringe benefits by way of cash (direct) payments to the workers, as permitted under the law.

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<sup>6</sup> The basic hourly rate for Sheet Metal Worker (Residential) is \$25.38, with hourly fringe benefit payments of: Health & Welfare, \$6.45; Pension, \$3.28; Training, \$0.48; and Other, \$0.66.

On November 2, 2018, DLSE issued the original Assessment finding penalties under section 1776 in the amount of \$30,000.00. However, in a subsequent motion to amend the Assessment, this amount was reduced to \$10,000.00. Roberts calculated a ten-day penalty period from the due date for compliance, August 14, 2017, to the date the response was due, August 24, 2017. Again, the documents were produced, albeit in a non-complying format which omitted addresses and Social Security numbers on the CPRs, on August 25, 2017.

Roberts testified that her investigation determined that Dynamic had underpaid prevailing wages based on its failure to pay required fringe benefits. Her conclusion that fringe benefits were not paid was based, in turn, entirely upon Dynamic's failure to produce documentary proof of the payment of fringe benefits, notwithstanding that Dynamic represented on its CPRs that those benefits had been paid. A basis for Roberts' concern was the accuracy of the CPRs given that Dynamic was working on two projects at once.

Roberts further testified that she did not simply rely upon the allegations made by FFC but rather performed her own independent investigation of the facts. In determining the hours worked by the ten employees of Dynamic, she utilized both the CPRs provided by Dynamic and the daily employee time records of Dynamic. Roberts reconciled the CPRs and daily employee sign-in logs. Her audit used the job classification based upon the Residential Sheet Metal Worker job classification stated by Dynamic in its CPRs.

Roberts also testified regarding DLSE's Penalty Review that she prepared. (DLSE Exhibit No. 5, pp. 43 - 48.) The Penalty Review indicates total unpaid wages in the amount of \$36,277.93, with a total of 481 violations of section 1775. The penalty rate for each violation was set at \$80.00 by the DLSE Senior Deputy Labor Commissioner Christopher Kim. The resulting penalty calculation section 1775 penalties totaled \$38,480.00.

Dynamic's cross-examination of Roberts attempted to call into question the accuracy of her record keeping and her communications with Dynamic regarding the

defective CPRs. The evidence establishes that on August 25, 2017, DLSE received CPRs from Dynamic for the Project. Roberts testified she corresponded with Dynamic representatives regarding the defects she perceived in the CPRs. The PW 900 file notes (DLSE Exhibit No. 17) include an entry dated September 6, 2017, corroborating her testimony, noting that "they are unacceptable as submitted as they do not contain the employee address." The note further indicates "called contractor and spoke to David letting him know that he needs to include the employee addresses. He said to include it in an email." The notation indicates that an email was sent, and a copy of an email from Roberts (then named Carnegie), dated September 6, 2017, at 11:33 AM, addressed to dynamichomeperformance@gmail.com, is pasted into the 900 notes. The email reads in part: "Hello David, per our telephone conversation today, please provide the employee addresses as well as the full Social Security Number of each worker included on the provided certified payrolls. You may email this information." Roberts admitted she does not have proof of delivery of the email, and could not recall where she got the email address. Dynamic did not, however, provide any testimony indicating that the email was not received. In fact, Dynamic's own Exhibit Number 5 includes emails to "David" at dynamichomeperformance@gmail.com.

DLSE served on the Awarding Body a Request For Information dated August 3, 2017. (DLSE Exhibit No. 14.)

DLSE Exhibit Number 13 is the second Request For Payroll Records with a Notice Of Impending Debarment, dated November 2, 2018, with a proof of service of the same date. This second request corroborates that the initial response was received by DLSE on August 25, 2017, but that DLSE viewed it as deficient in that the certified payroll documents did not include worker addresses and Social Security Numbers.\

Vechtomov testified that he was knowledgeable regarding payroll in that he was responsible for oversight of payroll at Dynamic. He did not testify, however, based on personal knowledge of payment of wages to employees or how the wages were paid. Instead, his testimony was based on his being generally responsible for oversight of the payment of wages. He testified that the base and fringe wages were paid to all ten



employees, as reflected in the CPRs, but with no direct personal knowledge of such payments, he neither calculated wages based on timesheets nor prepared the employee paychecks. He further testified that to his recollection that no employee worked overtime on the Project. Vechtomov recalled at least one time he was contacted by DLSE. He recalled that DLSE requested CPRs and he provided them. He recalled that DLSE contacted him again for unredacted copies. He testified that he did not recall being aware prior to that contact that the records had redactions. Vechtomov's testimony was conclusory and vague, lacking details demonstrating personal knowledge of facts. His testimony thus lacked evidentiary foundation and credibility.

Dynamic Exhibit Number 5, page E-1, is a Labor Compliance Management (LCM) representative email, dated August 21, 2017, with a subject matter line indicating "DIR investigation." Vechtomov testified that LCM is a company retained by the Awarding Body that was in charge of CPR compliance for Dynamic. The company provides a digital platform onto which Dynamic enters data, and "they do the rest." The LCM email asks Vechtomov, "Have you received the attached yet." However, Dynamic Exhibit Number 5 does not include an attachment. Vechtomov testified that he recalled receiving a request from at around the time of the email and that he received CPRs from LCM. He confirmed that he physically dropped the CPRs off at DLSE's offices on August 25, 2017. He admitted that he reviewed the CPRs prior to dropping them off, but testified that he did not recall whether he noticed redactions.

Vechtomov also testified that he did not recall being requested to submit cancelled checks or check stubs. He was also asked whether he recalled receiving DLSE's December 4, 2018 request for CPRs and supporting documents, including "copies of the certified payroll checks and check stubs (both) issued which reflect the all wages paid, as reported on the certified payrolls records." (Dynamic Exhibit No. 1, p. DELTA\_00873.) He answered that he did not recall.

Vechtomov further testified he reviewed each of the three witness declarations submitted by Dynamic. (Dynamic Exhibit Nos. 2, 3, and 4.) He confirmed on cross-examination that each of the declarant is a member of his extended family. In the

exhibits, each declarant states, "I received payment for all wages in fringe benefits owed for my work on the Delta Lane Apartments, phase 1 project." Each declarant also specifically denies being underpaid in the amount found by DLSE.

## **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, among other provisions, 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. The prevailing rate of per diem wage includes travel pay, subsistence pay, and training fund contributions pursuant to section 1773.1. Section 1775, subdivision (a)(2), grants the Labor Commissioner the discretion to mitigate the statutory maximum penalty per day in light of prescribed factors. 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 an Assessment under section 1741.

When DLSE determines that a violation of the prevailing wage laws has occurred, it may issue a written 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 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 Director publishes an advisory scope of work for each craft or worker classification for which she 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 Made a Prima Facie Showing That Dynamic Failed to Pay Required Prevailing Wages.

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, DLSE presented prima facie support for the Assessment through Roberts' testimony. (Cal. Code Regs., tit. 8, § 17250, subd. (a).) Roberts used the Sheet Metal Worker (Residential) rate and fringe benefits for the Project. There was no dispute that this was the appropriate classification for the ten workers. Roberts testified regarding her method of conducting the audit and investigation, including the documentary information that she relied upon in preparing her worksheets. She

acknowledged that Dynamic's CPRs showed wage amounts sufficient to cover both the basic hourly wage and the fringe benefits due the workers, and that Dynamic wrote payroll check numbers on the CPRs. She explained that the basis for finding that prevailing wages were not paid was that Dynamic did not provide documentary proof of the payment of fringe benefits. DLSE did give Dynamic credit for paid wages toward the base wages of the ten employees. However, credit was not given for fringe benefits despite the fact that Dynamic was allowed to pay fringe benefits to the workers "in cash," meaning directly to the employee, not to third parties such as pension and health and welfare funds.

For all ten employees covered by the audit, DLSE declined to credit payment of fringe benefits where the check numbers of cancelled checks Dynamic provided to DLSE did not match the check numbers Dynamic inserted on the CPRs as cash "in lieu of Fringes." In that Dynamic employed its workers on at least two projects at once, including this Project, DLSE acted reasonably in declining credit to Dynamic's unsubstantiated claim that it had paid the required fringe benefits until it obtained proof that payments made were associated with this Project. Therefore, it is concluded that DLSE met its prima facie burden in that the evidence sufficiently establishes that DLSE sought proof of payment of fringe benefits, Dynamic did not provide the proof, and DLSE reasonably declined to credit Dynamic for payment of those benefits absent the requested proof.

In cross-examination of Roberts, counsel for Dynamic was able to isolate various aspects of DLSE's documentation that were inaccurate. Yet, Dynamic did not explain how those aspects are material to the resolution of the case. Similarly, Dynamic's argument that section 1776 only requires production of CPRs, not proof of payment of fringe benefits, is to no avail. That argument may be made as to the imposition of penalties under section 1776. But the reference to CPRs in section 1776 does not constrain DLSE from requiring proof of payment when fashioning an assessment, as done in this case.

Having made a prima facie showing, the burden of proof to demonstrate that the audit is inaccurate shifted to Dynamic to produce evidence that fringe benefits were in fact paid. (Cal. Code Regs., tit. 8, § 17250, subd. (b).)

Dynamic Failed to Carry Burden of Proof as to Wages of Individual Workers Other Than Valeriy Borodayev.

Dynamic did not introduce credible evidence demonstrating payment of fringe benefits to nine of its employees. Documentary evidence such as cancelled checks and employee pay stubs proving payment, though uniquely available to Dynamic, was not offered into evidence for nine of the ten workers at issue under the Assessment. Dynamic introduced such proof as to one employee, Borodayev, yet inexplicably failed to produce the evidence for the other nine.

Dynamic did demonstrate the Assessment was partially incorrect with respect to Borodayev using the records contained in the DLSE enforcement file, which included pay stubs and cancelled checks for Borodayev. In that regard, the following evidence suffices as evidence to show Borodayev's paid wages in three instances included his entitlement to fringe benefits:

- DLSE Exhibit Number 18, page 289, the CPR for the week ending August 14, 2016, showing check number 51954 in the amount of \$280.09, together with Dynamic Exhibit Number 1, page Delta 0040, a pay stub for check number 51954, showing payment of \$280.05 (albeit with a four cent discrepancy);
- DLSE Exhibit Number 18, page 283, the CPR for the week ending July 31, 2016, showing check number 51903 in the amount of \$1306.12, together with Dynamic Exhibit Number 1, page Delta 0043, for check number 51903, showing payment of \$1306.12.
- DLSE Exhibit Number 18, page 254, the CPR for the week ending May 15, 2016, showing check number 2012 in the amount of \$280.05, together with Dynamic Exhibit Number 1, page DELTA\_0052, the pay stub for check number 2012, showing payment of \$280.05.

Review of the other evidence of record, however, shows either no cancelled checks or pay stubs, or checks and pay stubs that do not match the check numbers on the CPRs in four other instances for Borodayev. That circumstance represents a failure of Dynamic to carry its burden to prove the Assessment was incorrect in those four instances. For the three instances where the numbers on the checks and/or pay stubs for Borodayev match the numbers Dynamic placed on the CPRs, the amount of wages due under the Assessment will be reduced. For the other instances where the numbers on the checks and pay stubs do not match the CPR notations, reduction in the Assessment is not appropriate.

Dynamic having met its burden of proof as to three instances of Borodayev's pay treatment, DLSE did not thereafter introduce evidence to rebut the evidence presented by Dynamic nor did DLSE present sufficient testimony to support the Assessment as to the three instances. Accordingly, the amount of underpayment of wages attributed in the Assessment for Borodayev is reduced in the amount of \$1,866.22.

The above-stated details of the case Dynamic presented as to Borodayev's pay stand in stark contrast to the paucity of proof Dynamic offered regarding the accuracy of the Assessment with respect to the remaining nine employees listed in DLSE's audit. As indicated previously, the entire basis for DLSE's finding that prevailing wages were not paid was the lack of documentary support for the payment of fringe benefits that were reflected in the CPRs. The second request for payroll information in November 2018 alerted Dynamic that proof of payment of wages and fringe benefits was being sought by DLSE. The need for documentation of the payment of fringe benefits further appears from the March 18, 2019 minutes and order of Hearing Officer McGinty. Therefore, well before the Hearing Dynamic had notice of the facts at issue and the need for proof of the payment in cash for the fringe benefits.

Given that notice, Dynamic's counsel was fully prepared to cross-examine Roberts with respect to the pay records for Borodayev, which DLSE received with the FFC/ Borodayev initial complaint and which Dynamic received when it obtained a copy of the DLSE's enforcement file. At the Hearing Dynamic's counsel compared CPR entries

for Borodayev to cancelled checks establishing that those wages received by Borodayev were sufficient to cover the required prevailing wages in terms of the basic hourly and fringe benefit rates. Dynamic did not present at the Hearing documentary proof of payment in the form of checks or check stubs for any other of its ten employees on the Project or introduce evidence that proof of payments no longer existed.

Instead, Dynamic only presented the nearly identical, conclusory declarations of three family members of the CFO that they were paid in whole. But those declarations cannot be accepted as proof of the payment of fringe benefits. Nothing in the declarations evidence an awareness of the amount of fringe benefits to which the declarants were entitled or that prevailing wages were paid correctly according to prevailing wage law. The declarations do not include facts that demonstrate personal knowledge obtained by looking at their pay history, as represented on pay stubs or banking records. Further, Dynamic offered no argument that the declarations would be admissible over objection in a civil action. (Cal. Code Regs., tit. 8, § 17244, subd. (d).) Nor does the testimony of the CFO, also presented in a conclusory manner, that employees had been paid as indicated in the CPRs constitute adequate proof of payment of fringe benefits. He did not testify to facts that establish his personal knowledge regarding the calculation or payment of wages for the employees, and a payroll company, not Dynamic and not the CFO, made the payments. His testimony also is dependent upon his memory of such details years after the fact. The accuracy of the CFO's testimony is especially suspect in view of Dynamic's failure to provide contemporaneous documentary proof by way of cancelled checks that, by a reasonable inference, was available to it. "If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust." (Evid. Code, § 412.) That is where Dynamic left the case—without the stronger evidence that might have carried the day.

It may be that Dynamic was satisfied that calling into question the accuracy of the audit with respect to Borodayev was sufficient to meet its burden of proof as to



other employees. But Dynamic's failure to present better evidence that logically would have been in its possession to show that the Assessment was inaccurate leads to a reasonable inference that such evidence does not exist because the cash payments for fringe benefits were not, in fact, made. Dynamic thus failed to carry its burden of proof to show the Assessment was incorrect with respect to the unpaid wages for these nine employees. From the above, it is concluded that the workers Dynamic employed on the Project were underpaid in the total amount of \$34,410.81, as calculated by taking the \$36,277.03 unpaid wages found in the Assessment, less the amount DLSE found was unpaid to Borodayev (\$1,866.22).

DLSE's Penalty Assessment under Section 1775 Was Proper, for the Most Part.

Section 1775, subdivision (a)(1), provides that the contractor and any subcontractor be penalized a maximum of \$200.00 "for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rates as determined by the director . . . ." Section 1775, subdivision (a)(2)(B)(ii), states that the penalty for failure to pay the required prevailing wage rates may not be less than \$80.00 the contractor or subcontractor 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. 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 \$80.00 based on Dynamic having been assessed penalties within the previous three years for failing to meet its prevailing wage obligations on a separate contract, October 10, 2016, February 10, 2017, and October 16, 2017. (DLSE Exhibit No. 5, p. 00048.) DLSE concluded that Dynamic owed hourly wages to workers on 481 occasions over the term of the Project.

The burden was on Dynamic to prove that DLSE abused its discretion in setting the penalty amount under section 1775 at the rate of \$80.00 per violation and in calculating the number of violations. Dynamic did not meet its burden either as to the penalty rate or the number of violations, except in part with respect to Borodayev. The Assessment found 26 violations for underpayment to Borodayev for his work on the Project. This Decision finds Borodayev was underpaid on only 19 days. The section 1775 penalties should therefore be reduced by 7 violations, from 481 to 474.

Accordingly, Dynamic is liable for section 1775 penalties in the sum of \$37,920.00, calculated at the \$80.00 penalty rate for 474 violations.

Dynamic Is Not Liable For Penalties under Section 1813.

Section 1813 provides that a contractor or subcontractor shall pay a flat \$25.00 penalty for each calendar day, per worker, for failure to pay the required overtime premium prescribed by the applicable PWD. In this case, the amended Assessment found that section 1813 penalties were due at the rate of \$25.00 per violation, in the total amount of \$75.00 for three instances of Dynamic failing to pay overtime rates to his workers.

The burden was on Dynamic to prove that DLSE abused its discretion in finding the three violations. Dynamic cross-examined Roberts regarding the basis for overtime. The cross-examination sufficiently rebutted the accuracy of the Assessment with respect to overtime. Dynamic pointed out employee sign-in sheets for dates that the Audit Worksheets indicate that employees worked overtime did not reflect that an employee worked overtime on the specified dates. This then shifted the burden to DLSE to show where in the record the information on which Roberts relied to conclude that employees worked overtime or to introduce other admissible record of unpaid overtime.

DLSE did not do this. Roberts only testified regarding the Audit Worksheet, which indicates overtime for employee Vitaliy Vetchtomov for the week ending July 3, 2016, and the week ending December 4, 2016. DLSE did not demonstrate that support for such overtime exists in the evidence. Accordingly, Dynamic is not liable for section 1813 penalties in the sum of \$75.00.

Dynamic 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 and DLSE agreeing to waive liquidated damages). These required the contractor to make key decisions within 60 days of the service of the Assessment on the contractor.

First, the above-quoted portion of section 1742.1, subdivision (a), states that the contractor shall be liable for liquidated damages equal to the portion of the wages "that still remain unpaid" 60 days following service of the Assessment. Accordingly, the contractor had 60 days to decide whether to pay to the workers all or a portion of the wages assessed in the Assessment, and thereby avoid liability for liquidated damages on the amount of wages so paid.

Second, under section 1742.1, subdivision (b), a contractor would entirely avert liability for liquidated damages if, within 60 days from issuance of the Assessment, the contractor deposited into escrow with DIR the full amount of the Assessment of unpaid wages, plus the statutory penalties under sections 1775. Section 1742.1, subdivision (b), stated in this regard:

[T]here shall be no liability for liquidated damages if the full amount of the assessment..., including penalties, has been deposited with the Department of Industrial Relations, within 60 days of the service of the assessment..., for the department to hold in escrow pending administrative and judicial review.

Here, it is stipulated that Dynamic has not paid any back wages to the workers within 60 days after the Assessment or deposited with the Department the full amount of assessed wages and statutory penalties. This Decision finds unpaid wages in the amount of \$34,410.81. Accordingly, Dynamic is liable under section 1742.1 for liquidated damages in the amount of \$34,410.81.

Dynamic Is Liable for Penalties under Section 1776.

Employers on public works must keep accurate payroll records, recording among other things, the work classification, straight time and overtime hours worked and actual per diem wages paid for each employee. (§ 1776, subd. (a).) This is consistent with the requirements for construction employers in general, who are required to keep accurate records of the hours employees work and the pay they receive. (Cal. Code Regs., tit. 8, § 11160, subd. 6.) The payroll records must be certified and available for inspection or furnished upon request to a representative of DLSE. (§ 1776, subd. (b)(2).) The contractor must file a certified copy of the payroll records within ten days after receipt of a written request. (§ 1776, subd. (d).) “In the event the that the contractor...fails to comply within the 10-day period, he or she...shall, as a penalty to the state..., forfeit one hundred dollars (\$100) for each calendar day, or portion thereof, for each worker, until strict compliance is effectuated.” (§ 1776, subd. (h).) DLSE lacks discretion in setting penalties under section 1776.

Roberts’ testimony regarding the custom in practice related to service of her request for payroll documents is sufficient proof that the written request was sent by U.S. Postal Service mail on Thursday, August 3, 2017. However, DLSE’s calculation of when Dynamic would have received the request is based on the misplaced assumption that the request was received by Dynamic on or about August 4, 2017. Dynamic did not testify to the date it was received. Under the Code of Civil Procedure, when there is a

legal an obligation to respond to a document served by mail, the responding party has five additional days from the date of service to respond, even though service is deemed complete upon deposit. (Code Civ. Proc., § 1013, subd. (a).) Under section 1776, subdivision (h), Dynamic had ten days within which to produce the CPRs to DLSE. With the five days for mailing and the ten days to respond, Dynamic response was due on Friday August 18, 2017.

It is undisputed that the CPRs were delivered to DLSE on Friday, August 25, 2017. Based on DLSE's misplaced assumption of the start of the penalty period, the Assessment found \$10,000.00 in section 1776 penalties. However, applying the statutory language, *ante*, that penalty must be reduced. For a due date of August 18 and a receipt date of August 25, the penalty period for this delay is six days. At the rate of \$100 per day per worker, the total penalties under section 1776, subdivision (h), are \$6,000.00.

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

### **FINDINGS AND ORDER**

1. The work subject to the Civil Wage and Penalty Assessment was subject to 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 her investigative file available to the contractor.
5. No back wages have been paid nor deposit made with the Department of Industrial Relations as a result of the Assessment.
6. Dynamic Home Performance, Inc., dba Dynamic Mechanical, underpaid the workers' prevailing wages in the amount of \$34,410.81.
7. The Labor Commissioner did not abuse her discretion in assessing Labor Code section 1775 penalties at the rate of \$80.00 per violation for 474 violations, resulting in the total penalty amount of \$37,920.00.

8. The Labor Commissioner abused her discretion in assessing Labor Code section 1813 penalties at the rate of \$25.00 per violation.
9. Dynamic Home Performance, Inc., dba Dynamic Mechanical, is liable for a statutory penalty under Labor Code section 1776 in the amount of \$6,000.00.
10. Dynamic Home Performance, Inc., dba Dynamic Mechanical, is liable for liquidated damages in the amount of \$34,410.81.
11. The amounts found due and remaining in the Assessment, as amended, are modified and affirmed as follows:

<b>Basis of the Assessment</b>	<b>Amount</b>
Wages Due:	\$34,410.81
Penalties under section 1813:	\$0.00
Penalties under section 1775:	\$37,920.00
Penalties under section 1776:	\$6,000.00
Liquidated damages:	\$34,410.81
<b>TOTAL</b>	<b>\$112,741.62</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 modified and 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: 12-13-21



Katrina S. Hagen, Director  
California Department of Industrial Relations