

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Recom, Inc.

Case No. 14-0066-PWH

From a Civil Wage and Penalty Assessment issue by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

INTRODUCTION

Affected subcontractor Recom, Inc. (Recom) submitted a request for review of a Civil Wage and Penalty Assessment (Assessment) issued by the Division of Labor Standards Enforcement (DLSE) on October 23, 2013, with respect to work performed by Recom on the University of California, Los Angeles (UCLA) Pauley Pavilion project (Project). The Assessment determined that \$189,047.05 was due in unpaid prevailing wages and statutory penalties. DLSE filed a motion to amend the Assessment pursuant to Rule 26, subdivision (a)(3),¹ to increase the Assessment to \$191,330.71. A Hearing on the Merits occurred in Los Angeles, California over three dates, December 16, 2014, January 22, 2015, and February 5, 2015, before Hearing Officer Steven A. McGinty. Richard Minasian (Minasian) appeared for Recom, and David D. Cross (Cross) appeared for DLSE. On the first day of hearing, DLSE filed a second motion to amend the Assessment pursuant to Rule 26, subdivision (a)(1) to reduce the amount due to \$185,483.53.² The matter was submitted for decision on February 5, 2015.

The issues for decision are as follows:

- Whether the Assessment was issued timely?
- Whether the documentary evidence relied upon by DLSE should be excluded because it was not made available timely?
- Whether the witnesses who testified were credible?

¹ Cal. Code Regs., tit. 8, § 17226, subd. (a)(3).

² Upon review, while the amount of claimed wages (\$123,634.61) and Labor Code section 1813 penalties (\$1,525.00) represented reductions, the amount of claimed Labor Code section 1775 penalties (\$51,300) represented an increase of \$3,150 over the amount of previous assessments.

- Were the correct prevailing wage classifications used?
- 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 records?
- Were all of the hours of individuals who worked on the Project listed correctly on the certified payroll records?
- Was the correct overtime prevailing wage rate paid for all overtime hours worked?
- Were the required training fund contributions paid to an approved plan or fund?
- Is Recom liable for penalties under Labor Code section 1775?
- Is Recom liable for penalties under Labor Code section 1813?
- Is Recom liable for liquidated damages under Labor Code section 1742.1, subdivision (a)?

In this Decision, the Director finds that Recom was not prejudiced by DLSE's failure to make the Enforcement file available within 20 days of the receipt of the Request for Review. On the merits of the case, this Decision affirms the Assessment on all but the issue of how many hours Parseghian worked on the Project and the corresponding penalties that resulted from his employment. Therefore, the Director of Industrial Relations issues this Decision affirming and modifying the Assessment.

FACTS

The Project was advertised for bid on December 11, 2009. Recom employees worked on the Project from May 23, 2011, to September 14, 2012, in Los Angeles County, within the city limits of Los Angeles. For Recom's work on the Project, the Certified Payroll Records (CPRs) were prepared by Recom. On September 20, 2013, a Notice of Completion was filed with the Los Angeles County Registrar-Recorder indicating that work on the Project was completed on September 13, 2013.

Timeliness of Assessment: DLSE served the Assessment by mail on October 23, 2013. The Assessment was prepared by Monica Curi (Curi). The Assessment found that 10 workers had been underpaid prevailing wages by Recom in the amount of \$130,243.13, and assessed

penalties pursuant to Labor Code sections 1775 and 1813 in the amount of \$49,800.00 and training fund contributions in the amount of \$9,023.92.³

Availability of Enforcement File: Recom's Request for Review ("Request") was postmarked December 18, 2013, and received by DLSE's Assessment Review Office in Sacramento on December 20, 2013. The Request letter included a request that copies of all documents submitted and used in the determination of the Assessment be provided. On December 20, 2013, DLSE's office in Sacramento served a Notice of Opportunity to Review Evidence (Notice of Opportunity) to Recom, which indicated that the procedure to exercise the opportunity to review evidence was to complete an attached form "Request to Review Evidence" and to return it to DLSE's Long Beach office addressed to Curi. On December 27, 2013, Recom returned the Notice of Opportunity to DLSE, addressed to Curi at her office in Long Beach, and it was received in DLSE's Long Beach office on December 30, 2013. At that time, it was Curi's practice, based on office policy, to forward a completed Request to Review Evidence to DLSE's Legal Unit. The Legal Unit would send a letter to the requestor saying that Sir Speedy Copy Service would provide the opportunity to make a copy of the case file. Curi later discovered that a Sir Speedy Letter was not sent out to Recom.

On January 24, 2014, DLSE's office in Sacramento served a second Notice of Opportunity to Recom. Subsequently, on March 7, 2014, Cross served a letter by facsimile on Recom notifying Recom that he now represented DLSE, that the original investigation file containing evidence of the Assessment was available for copying in the Sacramento office, and providing a list of four copy services in the Sacramento area.

At the time of the initial Pre-Hearing Conference on October 9, 2014, Recom had yet to access the evidence. Recom maintained that it had not received the January 24, 2014, Notice of Opportunity or the March 7, 2014, letter from Cross. The Pre-Hearing Conference was continued to November 13, 2014, to allow Recom the opportunity to hire a copy service to copy the evidence at the DLSE office in Sacramento. At the time of the continued Pre-Hearing Conference in November, Recom had obtained a copy of the evidence.

On the first day of hearing, Recom introduced as part of its Exhibit C, a copy of the Notice of Opportunity dated January 24, 2014, which DLSE had served on it. On cross-

³ All further statutory references are to the Labor Code unless otherwise indicated.

examination, Ingrid Minasian, Recom's Office Manager, confirmed that the fax number used by Cross when sending his letter of March 7, 2014, was the number belonging to Recom.

Ingrid Minasian testified that when Recom first received the Assessment, Recom wrote a letter to Curi requesting that it be provided all of the supporting documents used to conduct the audit. Recom introduced a copy of the letter as Exhibit G. The letter was dated October 16, 2013. Curi received the letter. Both Minasian and Curi testified that in response to the letter, Curi told Minasian that she needed to file a request for review in writing and send it to Sacramento.

Applicable Employee Classifications And Prevailing Wage Determinations: Recom employed fire sprinkler fitters, fire sprinkler apprentices (group 6), and laborers (group 1) on the Project. There are two applicable Prevailing Wage Determinations: Fire Sprinkler Fitter for Los Angeles County (LOS-2009-2); and Laborer and Related Classifications (SC-23-102-2-20009-1)

Reclassification From Laborer To Fire Sprinkler Fitter: The Assessment reclassified one worker, Gharakhanian, from Laborer to Fire Sprinkler Fitter. Gharakhanian testified that he worked installing pipes for fire sprinklers. He installed pipes and fittings in the ground and attached pipes to the ceiling. In doing so, he worked with a thread machine to make the pipes, to make threads and cut pipes to different sizes. He used a scissor lift to reach up to the high level and attach pipes to the ceiling. Gharakhanian testified that he also unloaded deliveries and moved materials.

Reclassification From Quality Control Manger To Journeyman Fire Sprinkler Fitter: The Assessment reclassified one worker, Parseghian, from Quality Control Manager, essentially a foreman, to journeyman Fire Sprinkler Fitter. Parseghian testified that he hung pipes for fire sprinkler protection in the ceiling at the job site. He used hand tools, extension cords, a drill, and a thread machine for pipe. Allahgholi, a journeyman fire sprinkler fitter, testified that Parseghian would work like the other fire sprinkler fitters, by their side. Parseghian did the same thing that the fire sprinkle fitters were doing installing pipe; he did manual labor himself.

Allahgholi testified that Parseghian was supervising the workers, and if they needed to do something he would tell them. But he worked himself like them. In addition, Parseghian would go to meetings. Parseghian would tell them what to do, go to the meeting, and come back and work with them.

Parseghian acknowledged that he was hired as a foreman. Minasian told him to be like a foreman. He was told to tell the guys how they should install the pipe and make sure they worked safely. He was told to have contact with the superintendent; to go the office and coordinate with the guys to see what part of the job site was important to work on and finish, then to work on a different area; the jobsite was large. When Minasian was not on the job site, he would call Parseghian to give him directions. Parseghian acknowledged that he signed Pre-Job Safety Instruction sheets on the line designated for the supervisor. He also signed one Daily Extra Work Report on behalf of Recom.

Minasian testified that Parseghian was hired and he had agreed to do the job of a quality control manager for a base hourly wage plus a commission based on the number of change orders, and a bonus based on how soon or how fast he would finish a project based on the savings of the labor, that he would discuss and he would decide how much faster the job would be finished. He claimed that Parseghian was hired as a quality control manager, to oversee the installation of the fire sprinklers by his other workers who worked there. Minasian testified that he was not on the job site on a daily basis, and he could not tell if Parseghian did or did not perform the duties of a fire sprinkler fitter. Parseghian was not required to perform any physical work on the jobsite. If he did perform any physical work on the jobsite, that was his choice and Minasian did not know if that happened or not.

Underpayment of Prevailing Wage Rate: The final Assessment found that three Fire Sprinkler Fitters, Allahgholi, Gharakhanian, and Parseghian, and four Laborers, Espinoza, Klajyan, Solis, and Vartani were underpaid. To calculate the underpayment, Curi used the hours of work provided by Recom in their CPRs, except for Parseghian. For Parseghian, Curi calculated his hours by reviewing a calendar that Parseghian provided to her and compared the hours on the calendar to the hours that Recom provided on the CPRs; she audited them together.

According to Curi, Recom's CPRs indicated that Allahgholi was paid \$64.68 an hour. Curi testified that she used an actual rate of pay of \$20.00 an hour to determine the underpayment, based on a telephone conversation she had with Allahgholi. The correct rate was \$62.83.

At the hearing, in rebuttal, Allahgholi testified that he was paid less than \$20.00 an hour. It was either \$16.00 or \$18.00 an hour. He was told the pay rate was \$16.00 an hour to start. Allahgholi was asked if he was paid the same amount every hour that he worked. He responded,

yes. When asked if it was under \$20.00 an hour, he again responded, yes. Allahgholi also testified that his son translated for him when he spoke to Curi.

According to Curi, Recom's CPRs indicated that Gharakhanian was paid \$28.51 an hour. Gharakhanian testified he was Paid \$20.00 an hour. The correct rate was \$62.83.

According to Curi, Recom's CPRs indicated that Espinoza was paid \$25.87 an hour. The correct rate was \$44.03.

According to Curi, Recom's CPRs indicated that Klajyan was paid \$38.51 an hour. The correct rate was \$44.03.

According to Curi, Recom's CPRs indicated that Solis was paid \$25.87 an hour. The correct rate was \$44.03.

According to Curi, Recom's CPRs indicated that Vartani was paid \$38.51 an hour. The correct rate was \$44.03.

According to Curi, Recom's CPRs indicated Parseghian was paid \$35.00 an hour. The correct rate was \$62.83.

Parseghian testified he was paid \$35.00 an hour. Some of the hours that he reported to DLSE as having worked for Recom were written on his calendar. He testified that sometimes he would work elsewhere, other than at the Project, for Recom. He worked at a Recom job at LACCB and at the Beverly Hills Children's Library. He acknowledged that some of the hours on his calendar may have been for time he worked at other Recom job sites, other than the Project. Parseghian testified he was not sure where he worked on August 15, 2012. He also testified that on Monday, August 6, while he has listed 15 hours of work, a few of those hours he worked at night at the Beverly Hills Children's Library. Parseghian testified that maybe he was working at UCLA, and sometimes Minasian would call him, and he would go to another job. He said that where he had a doubt, he put a question mark. So it was possible that he worked at UCLA and it is possible that he did not work at UCLA.

Underpayment of Overtime: The final Assessment found that Parseghian worked 258 hours of overtime and 6 hours of double time. Parseghian testified that he worked overtime, and was not paid more than \$35.00 an hour and sometimes paid nothing. He testified that he was not paid at all three or four days. He worked eight hours on two Saturdays in July, the 14th and the 21st, but was not paid overtime. He worked another nine hours of overtime in July for which he was not paid at all, one hour extra on the 25th, and eight hours extra on Saturday, July 28. On

cross-examination, Parseghian testified that he worked a total of 127 hours overtime, 24 hours of which were at the UCLA Project.

Failure to Pay Training Fund Contributions: The final Assessment found that no training fund contributions were paid for the following 11 workers: Allahgholi; Gharakhanian; Parseghian; Espinoza; Klajyan; Solis; Vartani; Bogozian; Manuoukian; Mansuryan; and, Sokzi. Curi testified that she checked with the California Apprenticeship Council to see if training fund contributions had been paid. She determined that training fund contributions had been paid for other projects Recom worked on but not this Project. In addition, Recom did not return forms to DLSE indicating that training fund contributions had been paid for this project.

DISCUSSION

Sections 1720 and following set forth a scheme for determining and requiring the payment of prevailing wages to workers employed on public works construction projects. Specifically:

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].) DLSE enforces prevailing wage requirements not only for the benefit of workers but also "to protect employers who comply with the law from those who attempt to gain competitive advantage at the expense of their workers by failing to comply with minimum labor standards." (§ 90.5, subd. (a), and see *Lusardi, supra.*)

Section 1775, subdivision (a) requires, among other things, that contractors and subcontractors pay the difference to workers who were paid less than the prevailing rate, and section 1775, subdivision (a) also prescribes penalties for failing to pay the prevailing rate. Section 1742.1, subdivision (a) provides for the imposition of liquidated damages, essentially a doubling of the unpaid wages, if those wages are not paid within sixty 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, a written Civil Wage and Penalty Assessment is issued pursuant to section 1741. An affected contractor or subcontractor may appeal the Assessment by filing a Request for Review under section 1742. Subdivision (b) of section 1742 provides in part that “[t]he contractor or subcontractor shall have the burden of proving that the basis for the Civil Wage and Penalty Assessment is incorrect.”

The Assessment Was Issued Timely: At the time the Assessment was issued, section 1741, subdivision (a) provided in relevant part that, “[T]he assessment shall be served not later than 180 days after the filing of a valid notice of completion in the office of the county recorder in each county in which the public work or some part thereof was performed...” A Notice of Completion was filed with the Los Angeles County Registrar-Recorder indicating that work on the Project was completed on September 13, 2013. DLSE served the Assessment by mail on October 23, 2013, 40 days later. The Assessment was clearly served within the time allowed by the statute.

DLSE’s Request To Amend Assessment: DLSE made two requests to amend the Assessment under Rule 26. The second request, the operative one for this Decision, made on the day of hearing, was to correct for a clerical error. The incorrect prevailing wage rate had been used to calculate the rate of pay for fire sprinkler journeymen and resulted in a decrease in the amount of wages owed by the contractor. In addition, the amount of Section 1813 penalties was reduced. However, the amount of claimed section 1775 penalties was increased by \$3,150.00 because the original Assessment failed to include those penalties for one of the workers. Because Recom would be prejudiced by the addition of section 1775 penalties on the day of hearing, the second motion to amend the assessment is granted in part and denied in part. That portion of the second amended Assessment increasing the Section 1775 penalties is disallowed.

DLSE’s Delay In Making The Enforcement File Available Does Not Warrant Evidentiary Exclusion In This Matter: Section 1742, subdivision (a) provides in relevant part that, “An affected contractor or subcontractor may obtain review of civil wage and penalty assessment...by transmitting a written request...within 60 days after service of the assessment.” Further, section 1742, subdivision (b) provides in relevant part that, “The contractor or subcontractor shall be provided an opportunity to review evidence to be utilized by the Labor Commissioner at the hearing within 20 days of the receipt of the written request for a hearing.”

Section 1742.1, subdivision (a) provides in relevant part that, "After 60 days following the service of a civil wage and penalty assessment...the affected contractor, subcontractor...shall be liable for liquidated damages in an amount equal to the wages, or portion thereof, that still remain unpaid." Further, section 1742.1, subdivision (b) provides that, "There 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." Finally, section 1742.1, subdivision (c) affords the affected contractor or subcontractor with an opportunity to have an early settlement meeting with DLSE before the running of the 60-day deadline for filing a Request for Review of the Assessment and for the imposition of liquidated damages. All of the statutory provisions noted above are included in the text of the Assessment.

Thus, a contractor like Recom must decide within 60 days after the service of the Assessment whether to accept and pay all or part of the Assessment back wages and penalties in order to avoid liability for liquidated damages. Undoubtedly, it would behoove the contractor to seek Review early on to obtain the evidence gathered by DLSE, and request an early settlement meeting, to assist it in determining its potential liability and what course of action to take.

The Assessment was served October 23, 2013. Recom had until December 27, 2013, to file a Request for Review and pay any back wages due to avoid the imposition of liquidated damages. While Recom filed its Request for Review timely on December 18, 2013, it did not pay the back wages found owing by the Assessment. By waiting until December 18, 2013, to file its Request for Review, it was not assured of obtaining the evidence to be relied upon by DLSE until after the end of the 60-day period to deposit funds with the Department had lapsed. There was no evidence that Recom requested an early settlement meeting, or that it deposited back wages at any time.

Rule 24⁴ further construes the evidence disclosure requirement of section 1742, subdivision (b). Subdivision (a) of Rule 24 requires DLSE to provide a contractor with the notice of opportunity and the procedures for reviewing the evidence to be used at the hearing, within 10 days of receiving the Request for Review. Subdivision (d) requires DLSE to make its evidence available for review within 20 days of its receipt of the Request for Review and precludes DLSE

⁴ Cal. Code Regs., tit. 8, § 17224.

from introducing evidence at the hearing if it fails to comply with section 1742, subdivision (b) and the Rule.

DLSE complied with Rule 24, subdivision (a) by sending Recom a Notice of Opportunity on December 20, 2013, two days after Recom had sent in its Request for Review. The Notice of Opportunity indicated that the procedure to exercise the opportunity to review evidence was to complete an attached form "Request to Review Evidence" and to return it to DLSE's Long Beach office addressed to Curi. On December 27, 2013, Recom returned the Notice of Opportunity to DLSE, addressed to Curi at her office in Long Beach, and it was received in DLSE's Long Beach office on December 30, 2013. At that time, it was Curi's practice, based on office policy, to forward a completed Request to Review Evidence to DLSE's Legal Unit. The Legal Unit would send a letter to the requestor saying that Sir Speedy Copy Service would provide the opportunity to make a copy of the case file. Curi later discovered that a Sir Speedy Letter was not sent out to Recom.

On January 24, 2014, more than 20 days after the receipt of the Request for Review, DLSE's Office in Sacramento served a second Notice of Opportunity to Recom. Subsequently, on March 7, 2014, Cross served a letter by facsimile on Recom notifying Recom that he now represented DLSE, that the original investigation file containing evidence of the Assessment was available for copying in the Sacramento office, and providing a list of four copy services in the Sacramento area.

At the time of the initial Pre-Hearing Conference on October 9, 2014, Recom had yet to access the evidence. Recom maintained that it had not received the January 24, 2014 Notice of Opportunity or the March 7, 2014 letter from Cross. However, on the first day of hearing, Recom introduced as part of its Exhibit C, a copy of the Notice of Opportunity dated January 24, 2014, which DLSE had served on it. In addition, on cross-examination, Ingrid Minasian, Recom's Office Manager, confirmed that the fax number used by Cross when sending his letter of March 7 was the number belonging to Recom.

The initial Pre-Hearing Conference on October 9, 2014 was continued to November 13, 2014 to allow Recom the opportunity to hire a copy service to copy the evidence at the DLSE office in Sacramento. At the time of the continued Pre-Hearing Conference in November, Recom had obtained a copy of the evidence.

At the hearing, Ingrid Minasian testified that when Recom first received the Assessment, Recom wrote a letter to Curi requesting that it be provided all of the supporting documents used to conduct the audit. Recom introduced a copy of the letter as Exhibit G. The letter was dated October 16, 2013. Curi received the letter. Both Minasian and Curi testified that in response to the letter, Curi told Minasian that she needed to file a request for review in writing and send it to Sacramento. Recom waited until December 18, 2014, to do so.

Although, DLSE complied with Rule 24, subdivision (a), and clearly intended to make the evidence available for review within 20 days of its receipt of the Request for Review, the evidence was not made available until later. DLSE tried several times to remedy the miscommunication that had occurred. Ultimately, Recom had the evidence at the time of the prehearing conference, and more than a month before the hearing on the merits.

It appears that the primary purposes for the 20-day evidence disclosure requirement is to give the affected contractor or subcontractor an opportunity to make a decision about liquidated damages and to have adequate time to prepare for the hearing. In this case, Recom waited too long to access the evidence, by filing its Request for Review on December 18, 2013, for it to make an informed decision about liquidated damages. Nor did it take advantage of the early settlement meeting that may have resulted in the ability to access the evidence. Finally, Recom had the evidence with adequate time to prepare for the hearing. Indeed, Recom offered no evidence at hearing as to how it may have been prejudiced by the delay in receipt of the evidence. Thus, in this matter, there was no prejudice to Recom that the exclusion of DLSE's documentary evidence would remedy.

More importantly, the Assessment is based almost entirely on Recom's CPRs. Section 1776 requires that contractors keep accurate payroll records, and that each payroll record be signed under penalty of perjury that the information contained in it is true and correct. Recom's CPRs were signed under penalty of perjury by Minasian as President of Recom and therefore constitute admissions under the Evidence Code.

Curi testified that she used the hours of work provided by Recom in their CPRs in preparing the Assessment, except for Parseghian. For Parseghian, Curi calculated his hours by reviewing a calendar that Parseghian provided to her and compared the hours on the calendar to the hours that Recom provided on the CPRs; she audited them together. The hours provided by Recom would stand alone even without the calendar.

In addition, even if the documentary evidence obtained by DLSE from workers employed by Recom on the Project - Allahgholi, Gharakhanian, and Parseghian - was excluded, those same workers who submitted the evidence were called to testify at the hearing and were subject to cross-examination by Recom. Thus, there is sufficient evidence in the form of admissions and testimony to support the Assessment.

Recom Misclassified Gharakhanian and Parseghian: Gharakhanian and Parseghian testified credibly that they performed the work of a journeyman fire sprinkler fitter. They described the actual work duties that they performed and the tools that they used. In addition, Allahgholi, a journeyman fire sprinkler fitter, testified credibly that Parseghian would work like the other fire sprinkler fitters, by their side. According to Allahgholi, Parseghian did the same thing that the fire sprinkle fitters were doing installing pipe; he did manual labor himself.

While it may have been Recom's intention initially to have Parseghian act as a quality control manager or foreman, it may have actually encouraged Parseghian to do the work of a journeyman fire sprinkle fitter. Minasian testified that his deal with Parseghian had a bonus based on how soon or how fast Parseghian would finish a project based on the savings of the labor, that he would discuss and he would decide how much faster the job would be finished. Thus, if Parseghian worked alongside the other journeymen, as Allahgholi testified, the work would get done faster and cheaper as he was being paid only \$35.00 an hour rather than the \$62.85 required by prevailing wage laws.

In addition, Minasian testified that he was not on the job site on a daily basis, and he could not tell if Parseghian did or did not perform the duties of a fire sprinkler fitter. Parseghian was not required to perform any physical work on the jobsite. If he did perform any physical work on the jobsite, that was his choice and Minasian did not know if that happened or not. But clearly Recom benefited from the journeyman work that Parseghian did on the Project. Recom presented no evidence that Parseghian did not do the work of a journeyman fire sprinkler fitter, or that his other duties of interfacing with the superintendent and filling out forms precluded him from doing the work of a journeyman.

Recom Failed To Pay The Proper Prevailing Wage Rate: While Recom disputed whether Gharakhanian and Parseghian were misclassified, Recom neither disputed that Parseghian was paid \$35.00 an hour nor rebutted the evidence that Gharakhanian and Allahgholi were paid \$20.00 or less an hour, when the correct rate for all three was \$62.83 an hour. Similarly, Recom

did not dispute that the correct prevailing wage rate for Espinoza, Klajyan, Solis, and Vartani was \$44.03 an hour.

DLSE Used The Hours Certified By Recom For The Assessment: Curi testified credibly that in determining the underpayments and penalties applicable to this Project, she used the CPRs prepared by Recom. In addition, for Parseghian, Curi calculated his hours by reviewing a calendar that Parseghian provided to her and compared the hours on the calendar to the hours that Recom provided on the CPRs; she audited them together. Thus, for all employees, other than Parseghian, the hours of work were those provided by Recom.

Parseghian testified that he worked overtime, and was not paid more than \$35.00 an hour and sometimes paid nothing. He testified that he was not paid at all three or four days. He worked eight hours on two Saturdays in July 2012, the 14th and the 21st, but was not paid overtime. He worked another nine hours of overtime in July for which he was not paid at all, one hour extra on the 25th, and eight hours extra on Saturday, July 28.

The only hours of work that Recom contested were those for Allahgholi and Parseghian. Allahgholi testified credibly that he worked full time. Recom's own CPRs indicate that he worked more than one day a week.

Parseghian's testimony regarding the hours he worked created some uncertainty about the hours of work that he had listed on his calendar that were different from those on Recom's CPRs. Parseghian testified that sometimes he would work elsewhere, other than at the Project, for Recom. He worked at a Recom job at LACCB and at the Beverly Hills Children's Library. He acknowledged that some of the hours on his calendar may have been for time he worked at other Recom job sites, other than the Project. Parseghian testified he was not sure where he worked on August 15, 2012. He also testified that on Monday, August 6, while he has listed 15 hours of work, a few of those hours he worked at night at the Beverly Hills Children's Library. In addition, while the final Assessment found that Parseghian worked 258 hours of overtime and six hours of double time. Parseghian testified that he worked a total of 127 hours overtime for Recom, 24 hours of which were at the UCLA Project.

Given Parseghian's credible testimony, the hours of work used by DLSE in the Assessment must be adjusted to reflect only those hours reported by Recom, and any additional hours for which there is independent evidence other than just Parseghian's calendar.

Recom Failed to Pay Training Fund Contributions: Curi credibly testified that Recom did not return forms to DLSE indicating that training fund contributions had been paid for this Project. She checked with the California Apprenticeship Council to see if training fund contributions had been paid, and determined that training fund contributions had been paid for other projects Recom worked on but not this Project. In addition, Recom did not provide any evidence that it paid training fund contributions for any of the employees listed in their CPRs for this Project. Thus, Recom failed to meet its burden to disprove the basis for the Assessment.

DLSE's Penalty Assessment Under Section 1775: Section 1775, subdivision (a), as it read at the time Recom's work on the Project was performed, 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 fifty dollars (\$50) 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 ten dollars (\$10) . . . unless the failure of the . . . 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 . . . subcontractor.

(ii) The penalty may not be less than twenty dollars (\$20) . . . if the . . . 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.

(iii) The penalty may not be less than thirty dollars (\$30) . . . if the Labor Commissioner determines that the violation was willful, as defined

in subdivision (c) of Section 1777.1.⁵

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 her own judgment "because in [her] own evaluation of the circumstances the punishment appears to be too harsh." (*Pegues v. Civil Service Commission*, 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." (Rule 50, subd. (c) [Cal. Code Reg. tit. 8 §17250, subd. (c)].)

DLSE assessed Labor Code section 1775 penalties at the rate of \$50.00 because Recom misclassified workers and underpaid workers in a significant amount comprising over 900 violations.

The burden is on Recom to prove that DLSE abused its discretion in setting the penalty amount under section 1775 at the maximum rate of \$50.00 per violation. Recom essentially disputed that it had misclassified two workers, Gharakhanian and Parseghian, and disputed the hours Parseghian claimed that he worked. Otherwise, Recom did not dispute the hours worked by the other employees or that the other employees were not properly paid. While there was some basis to dispute Parseghian's claimed hours of work, Recom provided no relevant evidence that would have established the workers had not been misclassified. Recom did not introduce evidence of abuse of discretion by DLSE. The number and variety of prevailing wage violations committed by Recom, and Recom's lack of reasonable defense to the vast majority of violations, support a finding that Recom's violations were willful.

Section 1775(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 her own judgment. Recom has not shown an abuse of

⁵ Section 1777.1, subdivision (c) 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."

discretion and, accordingly, the assessment of penalties at the maximum rate of \$50.00 is affirmed. The Decision reduces the total assessed violations to take into account the reduction in violations associated with the number of days Recom's CPRs reflect that Parseghian worked on the project.

Overtime Penalties Are Due For The Workers Who Were Underpaid For Overtime Hours Worked On The Project:

Section 1815 states in full as follows:

Notwithstanding the provisions of Sections 1810 to 1814, inclusive, of this code, and notwithstanding any stipulation inserted in any contract pursuant to the requirements of said sections, work performed by employees of contractors in excess of 8 hours per day, and 40 hours during any one week, shall be permitted upon public work upon compensation for all hours worked in excess of 8 hours per day at not less than 1½ times the basic rate of pay.

Section 1813 states as follows:

The contractor or any subcontractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five dollars (\$25.00) for each worker employed in the execution of the contract by the ... contractor ... for each calendar day during which the worker is required or permitted to work more than 8 hours in any one calendar day and 40 hours in any one calendar week in violation of the provisions of this article. ...

The record establishes that Recom violated section 1815 by paying less than the required prevailing overtime wage rate on five separate occasions to Parseghian. Unlike section 1775 above, section 1813 does not give DLSE any discretion to reduce the amount of the penalty, nor does it give the Director any authority to limit or waive the penalty. Accordingly, the assessment of penalties under section 1813 is assessed as modified by the number of separate occasions.

Recom Is Liable For Liquidated Damages:

Labor Code section 1742.1, subdivision (a) provides in pertinent part 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. If the contractor or

subcontractor demonstrates to the satisfaction of the director that he or she had substantial grounds for believing the Assessment . . . to be in error, the director shall waive payment of the liquidated damages.

Rule 51, subdivision (b) (Cal. Code Regs., tit. 8, § 17251, subd. (b)) states as follows:

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

In accordance with the statute, Recom would be liable for liquidated damages only on any wages that remained unpaid sixty days following service of the Assessment. Entitlement to a waiver of liquidated damages in this case is closely tied to Recom's position on the merits and specifically whether there was an "objective basis in law and fact" for contending that the assessment was in error.

Because the assessed back wages remained due more than sixty days after service of the Assessment, and Recom has not demonstrated grounds for waiver, Recom is also liable for liquidated damages in an amount equal to the unpaid wages.

FINDINGS

1. The Project was a public work subject to the payment of prevailing wages.
2. The Civil Wage and Penalty Assessment was timely served by DLSE in accordance with section 1741.
3. Affected contractor Recom, Inc., filed a timely Request for Review of the Civil Wage and Penalty Assessment issued by DLSE with respect to the Project.
4. Recom, Inc. was not prejudiced by the failure of DLSE to make the Enforcement file available within 20 days.
5. No wages were paid or deposited with the Department of Industrial Relations as a result of the Assessment.
6. Allahghoni, Gharakhanian, and Parseghian performed work in Los Angeles County within the City limits of Los Angeles during the pendency of the Project and were entitled to be paid the journeyman rate for Fire Sprinkler Fitter for that work.

7. Parseghian worked 1,424 hours of straight time, and 34 hours of overtime. Therefore, the Assessment is reduced by \$32,539.42 in unpaid prevailing wages assessed.
8. Espinoza, Klajyan, Solis, and Vartani performed work in Los Angeles County within the City limits of Los Angeles during the pendency of the Project and were entitled to be paid the journeyman rate for Laborer Group 1 for that work.
9. In light of findings 6 through 8 above, Recom underpaid its employees on the Project in the aggregate amount of \$91,095.19.
10. Recom failed to pay training fund contributions for its employees on the Project, and the resulting assessment of \$8,435.32 as modified for the reduction in hours worked by Parseghian, is affirmed.
11. DLSE did not abuse its discretion in setting section 1775 penalties at the rate of \$50.00 per violation, and the resulting total penalty of \$46,050, as modified for 921 violations, is affirmed.
12. Penalties under section 1813 at the rate of \$25.00 per violation are due for five violations on the Project, for a total of \$125.00 in penalties.
13. The unpaid wages found in Finding No. 9 remained due and owing more than 60 days following issuance of the Assessment. Recom is liable for an additional amount of liquidated damages under section 1742.1 and there are insufficient grounds to waive payment of these damages.
14. The amount found remaining due in the Assessment is modified and affirmed by this Decision are as follows:

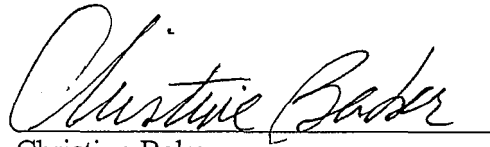
Wages due:	\$91,095.19
Penalties under section 1775(a):	\$46,050.00
Penalties under section 1813:	\$125.00
Training Fund Contributions:	\$8,435.32
Liquidated damages:	\$91,095.19
TOTAL	\$236,800.70

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

ORDER

The Civil Wage and Penalty Assessment is affirmed in part and modified in part 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: 4/22/2015



Christine Baker
Director of Industrial Relations

