

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

**William Williams, an individual dba
American Construction Engineers,**

Case No. 17-0189-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement.

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected prime contractor William Frederick Williams, an individual dba American Construction Engineers (Williams) requested review of a Civil Wage and Penalty Assessment issued by the Division of Labor Standards Enforcement (DLSE) on December 15, 2016, with respect to the City Hall Signage Barrier Removal Project (Project) performed for the City of Sacramento (Sacramento). The Assessment determined that \$3,900.00 in penalties under Labor Code section 1776 was due based on Williams' untimely provision of payroll records.¹ Subsequently, pursuant to its second request for payroll records, DLSE received additional records from Williams and, based thereon, amended the Assessment on April 21, 2017 (Amended Assessment). The Amended Assessment determined that \$119,246.65 in unpaid prevailing wages and statutory penalties under sections 1775, 1813, 1776, and 1777.7 were due. Williams requested review of the Amended Assessment on April 28, 2017.

A duly-noticed Hearing on the Merits was held on November 13, 2018, in Sacramento, California before Hearing Officer Gayle Oshima. David Cross appeared as counsel for DLSE. Neither Williams nor a representative for Williams appeared. DLSE Deputy Labor Commissioner Lori Rivera testified in support of the Assessment.

The issues presented for decision are:

- Did DLSE use the correct prevailing wage classifications in the audit?

¹ All subsequent references to sections are to the Labor Code, unless otherwise specified.

- Did Williams make the required travel and subsistence payments?
- Were all required training fund contributions paid to an approved plan or fund?
- Did Williams pay the required employer contributions to an approved plan or fund?
- Did DLSE correctly list the hours worked in the audit?
- Were the mathematical calculations as set forth in the Assessment correct?
- Did the certified payroll records (CPRs) correctly list wages paid to workers, hours worked, identity of workers, and classification of workers?
- Did Williams provide public works contract award information to the applicable apprenticeship committees and request dispatch of apprentices from those committees for the employed crafts?
- Did Williams employ the correct number of registered apprentices on the Project?
- Did Williams become liable for penalties under sections 1775, 1813, 1776, and 1777.7, and did DLSE apply the correct penalty rates?
- Did Williams become 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 Amended Assessment and that Williams failed to carry his burden of proving the basis for the Amended Assessment was incorrect. (See Cal. Code Regs., tit. 8, § 17250, subds. (a), (b).) Accordingly, the Director issues this Decision affirming the Amended Assessment, except as modified in part, as specified.

FACTS

Failure to Appear:

On April 28, 2017, Williams requested review of the Amended Assessment. After Williams failed to appear at the Hearing on the Merits, the Hearing Officer proceeded to

conduct the Hearing as noticed and scheduled for the purpose of formulating a recommended decision as warranted by the evidence. (See Cal. Code Regs., tit. 8, § 17246, subd. (a) [“Upon the failure of any Party to appear at a duly noticed hearing, the Hearing Officer may proceed in that Party’s absence and may recommend whatever decision is warranted by the available evidence, including any lawful inferences that can be drawn from an absence of proof by the non-appearing Party”].) DLSE Exhibit Numbers 1-23 were admitted into evidence without objection and the matter was submitted for decision.

The Amended Assessment:

On September 16, 2015, Sacramento advertised an invitation to accept bids for the Project. On November 3, 2015, Williams, as the general contractor, entered into a public works contract with Sacramento (Agreement). The Agreement recites that the contractor agrees to comply with all prevailing wage laws. The Project included removing signage, preparing and painting surfaces for installation of new signage, and preparing plywood for electrical and telecom equipment and elevator pit ladders at Sacramento City Hall. Four workers performed work on the Project from May 7, 2016, to June 4, 2016. Sacramento recorded a Notice of Completion on December 5, 2016.

Williams classified his workers as Painter, Brush, Spray & Paperhanger, except for one worker who it classified as a Laborer. The DLSE submitted at the Hearing on the Merits the prevailing wage rate determination (PWD), SAC-2015-2 for Painter, Brush, Spray & Paperhanger (Painter PWD) that was in effect as of the job bid advertisement date. Additionally, DLSE submitted the travel and subsistence provisions for the Painter PWD.

Rivera testified that during her investigation, she obtained CPRs and worker time cards from Williams, the Painter PWD scope of work, worker “Sign In Logs” that showed the arrival and departure times of the workers at City Hall, and inspector logs. Rivera also interviewed three workers, and obtained their work calendars showing hours of work. Rivera found that the CPRs and time cards conflicted with the Sign In Logs

and worker representations. Rivera noted that the time cards seemed to have identical signatures purporting to be signed by the workers. Based on her understanding of the work done and the Painter scope of work, Rivera also testified that she reclassified the one Laborer to the Painter craft. She found that Williams under-reported hours worked, failed to pay overtime rates, and failed to make fringe benefit payments and travel time and subsistence payments required by the Painter PWD. Further, because the workers claimed they were not paid the full prevailing wage rates and because Williams provided no proof of wages being paid, in her audit Rivera gave Williams no credit for having paid wages. In total, Rivera determined that Williams failed to pay his workers the applicable prevailing wage rates, including travel time and subsistence, in the total amount of \$30,092.19. She also determined that Williams failed to pay \$51.46 in training fund contributions that were required by the Painter PWD.

Rivera further testified that she found the underpayment of wages had occurred on 48 days for the four workers combined. As a penalty under section 1775, DLSE assessed \$9,600.00 at the rate of \$200.00 per violation. Further, penalties under section 1813 were imposed for Williams' failure to pay required overtime rates, calculated at \$25.00 a day per worker for each of 28 violations, for a total amount of \$700.00.

Rivera also testified that penalties under section 1776 were due. She had mailed Williams a first request for CPRs on November 4, 2016. According to the postal service return receipt, Williams received the request on November 15, 2016. Under the statutory time limits for a response, Williams' CPRs were due to DLSE on November 30, 2016. When no response was received, Rivera mailed a second request for CPRs on December 15, 2016, requesting not only CPRs, but also cancelled checks to show wages paid the workers and proof of fringe benefit payments. On January 9, 2017, Williams delivered the CPRs to DLSE, along with a statement of employer payments, and training fund documents, but not all the requested payroll information. Because Williams did not fully respond to DLSE's requests, Rivera calculated the daily penalty

under section 1776 for the period from December 1, 2016, to April 17, 2017, the date of the DLSE penalty review.² In the Amended Assessment, DLSE gave a penalty of \$76,000.00, calculated at \$100.00 per day for each of the four workers for a period of 190 calendar days.

Additionally, Rivera testified as to Williams' failure to comply with apprentice requirements. She stated that Williams failed to provide public work contract award information to two applicable apprenticeship committees for the Painter craft, failed to request apprentices from either of those applicable apprenticeship committees, and failed to hire apprentices in the one-to-five apprentice to journey person ratio required by law. Williams' failure to provide the contract award information lasted calendar 28 days. On that basis, DLSE assessed a penalty of \$100.00 per day, for a total of \$2,800.00.

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 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.

² The penalty review listed the period of time between these two dates as 190 days. However, in fact, the period was only 138 days.

(*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), and see *Lusardi*, at p. 985.)

Section 1775, subdivision (a), requires that contractors and subcontractors pay the difference to workers who received less than the prevailing wage rate. Section 1775, subdivision (a), also 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 those 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 DIR the full amount of the assessment of unpaid wages, plus the statutory penalties under sections 1775. In addition, in December of 2016 when the Assessment was first issued (as well as on April 21, 2017, when the Amended Assessment was issued and April 28, 2017, when the Request for Review was filed), (former) section 1742.1 allowed the Director to exercise his or her discretion to waive the liquidated damages if the contractor demonstrated that he or she had substantial grounds to appeal the assessment.³

³ On June 27, 2017, the Director’s discretionary waiver ability was deleted from section 1742.1 by statutes 2017, chapter 28, section 16 (Sen. Bill No. 96) (SB 96). Legislative enactments, however, are to be construed prospectively rather than retroactively, unless the legislature expresses its intent otherwise. (*Elsner v. Uveges* (2004) 34 Cal.4th 915, 936.) Here, there was no expression of legislative intent that SB 96 apply retroactively. Further, “[a] statute is retroactive if it substantially changes the legal effect of

Section 1813 requires that workers are compensated for overtime pay pursuant to section 1815 when they work in excess of eight hours per day or more than 40 hours during a calendar week, and imposes a penalty of \$25.00 per day per worker for violation. 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.

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 format for reporting of payroll records requested pursuant to section 1776 must be on a form provided by DLSE, or in another format that contains all the required information. (See Cal. Code Regs., tit. 8, § 16401, subd. (a).) "Acceptance of any other format [other than the DLSE form] shall be conditioned upon the requirement that the alternate format contain all of the information required pursuant to Labor Code Section 1776." (*Id.*) The contractor has 10 days (plus five days for mailing) to comply subsequent to receipt of a written notice requesting CPRs. (§ 1776, subd. (h).) If a contractor fails to comply within the 10-day period, it is subject to a penalty of \$100.00 for each calendar day, or portion thereof, for each worker, "until strict compliance is effectuated." (*Id.*) The penalty rate provided by the statute is mandatory. Nothing in the statute provides DLSE with discretion to reduce

past events." (*Kizer v. Hannah* (1989) 48 Cal.3d 1, 7.) Here, the law in effect at the time the civil wage and penalty assessment was issued (in 2016) allowed a waiver of liquidated damages in the Director's discretion, as specified, which could have influenced the contractor's decision as to how to respond to the assessment. Applying the current terms of section 1742.1 as amended by SB 96 in this case would have retroactive effect because it would change the legal effect of past events (i.e., what the contractor elected to do in response to the assessment). Accordingly, this Decision finds that the Director's discretion to waive liquidated damages in this case under section 1742.1, subdivision (a) is unaffected by SB 96.

the penalty.

In general, and unless an exemption applies, section 1777.5 and the applicable regulations require the hiring of apprentices to perform one hour of work for every five hours of work performed by journeymen in the applicable craft or trade. (Cal. Code Regs, tit. 8, § 230.1, subd. (a).) Prior to commencing work on a contract for public works, every contractor must submit contract award information to applicable apprenticeship programs that can supply apprentices to the project. (§ 1777.5, subd. (e).) The Division of Apprenticeship Standards (DAS) has prepared form DAS 140 that a contractor may use to submit contract award information to an applicable apprenticeship committee. (Cal. Code Regs, tit. 8, § 230, subd. (a).)

A contractor does not violate the requirement to employ apprentices in the 1:5 ratio if it has properly requested the dispatch of apprentices and no apprenticeship committee in the geographic area of the public works project dispatches apprentices during the pendency of the project, provided the contractor made the request in enough time to meet the required ratio. (§ 230.1, subd. (a).) DAS has prepared another form, DAS 142, that a contractor may use to request dispatch of apprentices from apprenticeship committees. Thus, the contractor is required to both notify apprenticeship programs of upcoming opportunities and to request dispatch of apprentices.

When DLSE determines that a violation of the prevailing wage laws has occurred, including with respect to any violation of the apprenticeship and/or certified payroll records requirements, 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, 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).)

In this case, the record establishes the basis for the Amended Assessment. DLSE presented evidence at the Hearing on the Merits supporting elements of the Amended Assessment as to unpaid wages and training fund contributions, and penalties under sections 1813 and 1777.7. Williams presented no evidence at the Hearing and, therefore, failed to disprove the basis for the Amended Assessment. Accordingly, Williams is liable for \$30,092.19 in prevailing wages, training fund contributions of \$51.46, penalties under section 1813 in the amount of \$700.00, and penalties under section 1777.7 in the amount of \$2,800.00.

DLSE’s Penalty Assessment Under Section 1775 Is Affirmed.

Section 1775, subdivision (a)(1) states:

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

Section 1775, subdivision (a)(2)(D), provides that the Labor Commissioner’s determination as to the amount of the penalty shall be reviewable only for an abuse of discretion. 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.)

DLSE presented prima facie evidence that Williams failed to pay the required prevailing wages on 48 calendar days for the four workers. DLSE set the penalty rate at \$200.00 per violation. Williams presented no evidence to carry his burden to disprove the basis for, or the accuracy of, this determination, or to show the penalty rate was an abuse of discretion.

Accordingly, Williams is liable for penalties under section 1775 in the sum of \$9,600.00, calculated at the \$200.00 penalty rate for a total of 48 calendar days during which the prevailing rate was not paid to the workers.

Williams Failed to Provide Payroll Records Upon Request, and Is Liable for Modified Section 1776 Penalties.

Section 1776 provides in pertinent part:

(a) Each contractor . . . shall keep accurate payroll records, showing 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 journeyman, apprentice, worker, or other employee employed by him or her in connection with the public work. Each payroll record shall contain or be verified by a written declaration that it is made under penalty of perjury, stating both of the following:

(1) The information contained in the payroll record is true and correct.

(2) The employer has complied with the requirements of Sections 1771, 1811, and 1815 for any work performed by his or her employees on the public works project.

(b) The payroll records enumerated under subdivision (a) shall be certified and shall be available for inspection at all reasonable hours at the principal office of the contractor on the following basis:

(1) A certified copy of an employee's payroll record shall be made available for inspection or furnished to the employee or his or her authorized representative on request.

(2) A certified copy of all payroll records enumerated in subdivision (a) shall be made available for inspection or furnished upon request to a representative of the body awarding the contract and the Division of Labor Standards Enforcement of the Department of Industrial Relations.

...

(h) The contractor . . . has 10 days in which to comply subsequent to receipt of a written notice requesting the records enumerated in subdivision (a). In the event that the contractor . . . fails to comply within the 10-day period, he or she shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit one hundred dollars (\$100) for each calendar day, or portion thereof, for each worker, until strict compliance is effectuated. Upon the request of the Division of Labor Standards Enforcement, these penalties shall be withheld from progress payments then due. . . .

According to DLSE's penalty review, the period of noncompliance lasted from December 1, 2016, to April 18, 2017, the date of the penalty review, a period of 138 calendar days. "Strict compliance" under section 1776, subdivision (h), was not effectuated in that Williams never produced all the requested payroll records.

Section 1776 does not give the Director any authority to limit or waive the penalty. However, the penalty review mistakenly listed the number of days in the noncompliance period as 190, while based on the dates DLSE provided, the correct number of days is 138. Williams presented no evidence or argument to demonstrate that the factual basis for DLSE's beginning and end dates of the period of noncompliance constituted an abuse of discretion. For the foregoing reasons, the amended Assessment is affirmed as modified to reduce the section 1776 penalty from \$76,000.00 to a total amount of \$55,200.00, calculated at the rate of \$100.00 per day for each of four workers over a period of 138 days.

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Williams Is Liable for Liquidated Damages.

Former 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 Assessments were issued, the statutory scheme regarding liquidated damages provided contractors three 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 CWPA on the contractor.

First, the above-quoted portion of former 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 CWPA. Accordingly, the contractor had 60 days to decide whether to pay to the workers all or a portion of the wages assessed in the CWPA, and thereby avoid liability for liquidated damages on the amount of wages so paid.

Under former section 1742.1, subdivision (b), a contractor would entirely avert liability for liquidated damages if, within 60 days from issuance of the CWPA, the contractor deposited into escrow with DIR the full amount of the assessment of unpaid wages, plus the statutory penalties under sections 1775. Former section 1742.1, subdivision (b), states 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.

Lastly, the contractor could choose not to pay any of the assessed wages to the workers, and not to deposit with DIR the full amount of assessed wages and penalties, and instead to rely on the Director's discretion to waive liquidated damages under the following portion of former section 1742.1:

Additionally, if the contractor or subcontractor demonstrates to the satisfaction of the director that he or she had substantial grounds for appealing the assessment ... with respect to a portion of the unpaid wages covered by the assessment ..., the director may exercise his or her discretion to waive payment of the liquidated damages with respect to that portion of the unpaid wages.

Here, Williams did not pay any back wages to the workers in response to the Assessment; nor did it deposit with the Department the assessed wages and statutory penalties. Moreover, failing to appear, Williams presented no substantial grounds for appealing the Assessment that would justify the waiver of liquidated damages. Accordingly, Williams is liable for liquidated damages under former section 1742.1 in the amount of \$30,092.19.

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

FINDINGS AND ORDER

1. William Frederick Williams, an individual doing business as American Construction Engineers, underpaid his workers \$30,092.19 in prevailing wages, including training fund contributions of \$51.46.
2. Penalties under section 1775 are due from William Frederick Williams in the amount of \$9,600.00 for 48 violations at the rate of \$200.00 per violation.
3. Penalties under section 1813 are due from William Frederick Williams in the amount of \$700.00 for nine violations at \$25.00 per violation.

4. Penalties under section 1776 are due from William Frederick Williams in the amount of \$55,200.00 for 4 workers over 138 days at \$100 per violation.
5. Because none of the unpaid wages were paid within 60 days after service of the Assessment, liquidated damages are due from William Frederick Williams in the full amount of the unpaid wages, \$30,092.19.
6. Penalties under section 1777.7 are due from William Frederick Williams in the amount of \$2,800.00.
7. The amounts found due from William Frederick Williams in the Amended Assessment as affirmed by this Decision are as follows:

Wages Due:	\$30,092.19
Training Fund Contributions:	\$51.46
Penalties under section 1775, subdivision (a):	\$9,600.00
Penalties under section 1813:	\$700.00
Liquidated damages:	\$30,092.19
Penalties under section 1776:	\$55,200.00
Penalties under section 1777.7:	\$2,800.00
TOTAL:	\$128,535.84

In addition, interest is due from William Frederick Williams and shall accrue on unpaid wages in accordance with section 1741, subdivision (b).

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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: 5/11/20



Katrina S. Hagen
Director, Department of Industrial Relations