STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Gaul & Gaul, Inc. Case No. 12-0332-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected contractor Gaul & Gaul, Inc. (Gaul & Gaul) submitted a timely request for review of the Civil Wage and Penalty Assessment (Assessment) issued by Division of Labor Standards Enforcement (DLSE) with respect to the Chemistry and Life Sciences Buildings renovation (Project) at the Los Angeles Community Colleges. The Assessment determined that $7,515.01 in unpaid prevailing wages and statutory penalties were due. A Hearing on the Merits was conducted on July 15, 2013, and August 20, 2013, in Los Angeles, California, before Hearing Officer Harold L. Jackson. Carlos R. Perez appeared for Gaul & Gaul and William A. Snyder appeared for DLSE. After post-hearing briefs, the matter was deemed submitted for decision on September 30, 2013.

The issues for decision are:

- Whether the Assessment correctly found that Gaul & Gaul failed to pay the required prevailing wages for hours worked on the Project by the affected workers.
- Whether DLSE abused its discretion in assessing penalties under Labor Code section 1775[1] at the mitigated rate of $30.00 per violation.
- Whether Gaul & Gaul failed to pay the required prevailing wage rates for overtime work and is therefore liable for penalties under section 1813.

[1] All further statutory references are to the California Labor Code, unless otherwise indicated.

- Whether Gaul & Gaul has demonstrated substantial grounds for appealing the Assessment, entitling it to a waiver of liquidated damages.
- Whether the Assessment should be set aside for alleged lack of jurisdiction based on a private dispute mechanism between the Laborers' International Union of North America and the United Union of Roofers, Waterproofers and Allied Workers.

The Director finds that Gaul & Gaul failed to pay the affected workers the correct prevailing wage rate for their work on the Project, and Gaul & Gaul did not prove that DLSE abused its discretion in assessing penalties under Labor Code section 1775. The Director also finds that Gaul & Gaul failed to pay the required prevailing wage rates for overtime work and is therefore liable for penalties under section 1813. The Director also finds that Gaul & Gaul has demonstrated substantial grounds for appealing the Assessment and is not liable for liquidated damages, and the Assessment should not be set aside based on lack of jurisdiction. Therefore, the Director issues this Decision affirming the Assessment.

FACTS

The Los Angeles Community Colleges advertised the Project for bid on September 17 and 24, 2010, calling for bids for the modernization of existing Life Sciences and Chemistry Buildings to convert existing science labs to classrooms. Woodcliff Corporation (Woodcliff) was awarded the prime contract, entered on November 3, 2010. Woodcliff subcontracted with Gaul & Gaul, doing business as Craftsman Concrete Cutting, for demolition work that eventually included removing existing roof material and flashing at the Project. Gaul & Gaul employees worked on the roofing demolition part of the Project from approximately July 17 through July 31, 2011.

Applicable Prevailing Wage Determination (PWD): The following applicable PWD and scope of work were in effect on the bid advertisement date:

Roofer for Los Angeles County (LOS-2010-2): This PWD (Roofer PWD) was issued August 22, 2010, and provides the rates used in the Assessment for the roofing

work. Throughout the relevant time period, the prevailing hourly wage due under the Roofer PWD was $44.07, comprised of a base rate of $34.65 per hour and fringe benefits totaling $9.42 per hour. The scope of work for the Roofer PWD includes a September 8, 2003, Memorandum of Understanding (MOU) between the Laborers' International Union of North America (Laborers' Union) and the United Union of Roofers, Waterproofers and Allied Workers (Roofers' Union). That scope provides, in part:

- All removal of roofing materials on a roof deck where roofing material is to be re-applied is the work of the roofer. This is also to include any small repairs to the decking in preparation of laying the new roof.
- All removal of roofing materials on a roof deck where no new roofing material is to be applied is the work of Laborers.
- Demolition of roof decking is the work of Laborers.

The MOU also provides that in the event of a dispute concerning the work, the matter shall be referred to the offices of the two International Unions for resolution.

The Assessment: DLSE served the Assessment on August 29, 2012. The Assessment found that Gaul & Gaul failed to pay the required prevailing wages, including the required prevailing wage rate for overtime. The Assessment found a total of $4,730.01 in underpaid prevailing wages. Penalties were assessed under section 1775 at the mitigated rate of $30.00 per violation for 92 violations, totaling $2,760.00, and a penalty under section 1813 in the amount of $25.00 per violation for one overtime violation, totaling $25.00.

Gaul & Gaul paid its workers the prevailing hourly wage rate for Laborers, together with fringe benefits associated with the Laborers' PWD.[2] DLSE deputy Michael Nagtalon testified that he reclassified the workers from Laborer to Roofer primarily on the basis of the Roofer scope of work and contract documents. Nagtalon concluded the

[2] Neither party submitted a prevailing wage determination for Laborers. However, DLSE records show Gaul & Gaul paid its workers according to three journeyman Laborer classifications, the average rate being $45.23, comprising an average base rate of $27.84 per hour and fringe benefits totaling $17.39 per hour.

scope of work called for Roofer rates because it provided that removal of roofing materials was Roofer work where roofing material is to be re-applied. Nagtalon also relied on a number of factors, including photographs of Gaul & Gaul's workers on the roof that showed roofing materials were being removed; a statement by the awarding body that Gaul & Gaul demolished the roof and a new roof would be installed by a roofing contractor; Woodcliff's document designating a subcontractor to build up the roofing; a Gaul & Gaul document showing another subcontractor would install roof insulation; and the absence of any contention from Gaul & Gaul that roofing material was not replaced.

The Roofer PWD required a higher base hourly rate than Gaul & Gaul paid its workers in the Laborer classification, but called for a lower fringe benefit level (at $9.42 per hour) than the level Gaul & Gaul paid (at $17.39 per hour). Nagtalon testified that he knew the Labor Code provided for a credit for employer payments of fringe benefits as against the basic hourly rate obligation, but before it was amended effective January 1, 2013, the law limited him to giving credit for the amount of fringe benefits under the Roofer PWD. To credit more than that amount would cut into the Roofers' basic hourly rate. Therefore, Nagtalon felt he could not give credit for the full amount of fringe benefits Gaul & Gaul actually paid its workers as Laborers. The parties stipulated that if the amended law was in effect at the time of the Assessment, credits for fringe benefits would eliminate the basis for the Assessment.

Regarding the penalty rate, Nagtalon stated he initially recommended the maximum $50.00 rate and DLSE had the discretion to reduce the rate if deemed too harsh. Nagtalon's supervisor reduced the rate to $30.00 per violation and Nagtalon based the Assessment on the reduced rate, which was a rate provided by statute.

Mark Gaul (Gaul) testified that at the Project, his company did various tasks such as demolition, cutting door openings and removing walls. Close to the end of the job, Woodcliff asked Gaul for a price to demolish the roof because Woodcliff had lost a different demolition subcontractor who was to have performed the work. To do the work, Gaul & Gaul workers tore out all the rock, asphalt and tar sheeting from the roof's

concrete deck, flashing, ducts, electrical wiring and water lines feeding into the building, and curbs and platforms on which mechanical equipment sat. They also drilled ("cored") new holes for piping for new HVAC units to be placed on the roof.

Gaul & Gall did not, however, install or reapply new roofing. Gaul did not know what others did with the roof after his workers were done. He admitted, however, that after his workers put on new curbs and platforms, others probably put a roof over that. Gaul also learned from Woodcliff that "a lot of roof" was later put on. Still, Gaul did not consider that work to be a "re-roof," which, to his mind, would signify Roofer work. Gaul acknowledged that if a worker demolishes and reinstalls a roof, it was Roofer work. But, he maintained that the work his company did was Laborer work because his workers removed roofing materials and did not reapply new roofing material themselves. Gaul also testified that he has performed other school roof demolitions without citation by DLSE, and the awarding body's labor compliance department monitored the Project and never indicated there was any problem in the bidding or performance of his work. Also, while the Contractors State License Board (CLSB) had initially cited him for working without a roofer's license, that citation was withdrawn. The withdrawal suggested to Gaul that his roof demolition work did not require Roofer wage rates. Also, during the roof work Gaul's crew was approached by a Roofers' Union representative and asked to stop working on the Project because it was Roofer work. In response, Gaul called his Laborers' Union local representative, described the work he was doing, and was told it was work on a tenant improvement project that the Laborers' Union had the right to perform. Gaul also testified that although he was president of Gaul & Gaul since January 1, 2010, he had received no training in prevailing wage compliance. Instead, he relied on his estimator to know about prevailing wage requirements.

Javier Nunez, president of Local 300 of the Laborers' Union, testified that the work in question belonged to the Laborers' Union because Gaul & Gaul was removing and "interrupting" the roof (referring to the "coring" work), and what was on the roof had to be removed for a new roof to be applied. Gaul & Gaul did not mention to him that a new roof would be applied, yet Nunez allowed that common sense holds that a new roof

would be put on. Nunez further maintained that the Roofer classification under the MOU did not apply because the building was empty and the MOU applies to occupied buildings. While Nunez had nothing to do with the drafting the MOU between the two International Unions that is part of the Roofers PWD, he stated that the work Gaul & Gaul did was demolition, not re-roofing, and was properly considered per the MOU as Laborer work. Nunez added that the Roofers' Union representative never referred the dispute at the Project to the Roofers' and Laborers' Unions for resolution.

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*] (*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 *Lusardi.*)

Section 1775, subdivision (a) requires, among other things, that contractors and subcontractors pay the difference to workers who were paid less than the prevailing wage rate, and prescribes penalties for failing to pay the prevailing wage rate. Section 1742.1, subdivision (a) provides for the imposition of liquidated damages, essentially a doubling of the unpaid wages, if 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."

Upon determining that a contractor or subcontractor has violated prevailing wage requirements, DLSE issues a civil wage and penalty assessment, which an affected contractor or subcontractor may appeal by filing a request for review under section 1742. In such an appeal "[t]he contractor or subcontractor shall have the burden of proving that the basis for the civil wage and penalty assessment is incorrect." (§1742(b).)

The prevailing rate of pay for a given craft, classification, or type of work, is something that the Director of Industrial Relations determines in accordance with the standards set forth in section 1773. It is the single rate that may be determined with reference to collective bargaining agreements, rates determined for federal public works projects, or a survey of rates paid in the labor market area. (Lab. Code, §§ 1773 and 1773.9, and *see, California Slurry Seal Association v. Department of Industrial Relations* (2002) 98 Cal.App.4th 651.)

Gaul & Gaul Was Required To Pay Roofer Prevailing Wage Rates.

At the time of the bid advertisement date, the scope of work for the Roofer PWD set out three classification options, based on an MOU between the Roofers' and Laborers' International Unions. The three options were: the Roofer classification applies as to "All removal of roofing materials on a roof deck where roofing material is to be re-applied"; the Laborer classification applies as to "All removal of roofing materials on a roof deck where no new roofing material is to be applied"; and the Laborer classification also applies as to "Demolition of roof decking." The Roofer classification is noted "to include any small repairs to the decking in preparation of laying the new roof."

Gaul & Gaul workers removed roofing materials, including rock, asphalt and tar sheeting, platforms and curbs. While Gaul & Gaul did not re-apply any roofing material, the evidence suggests roofing material was eventually re-applied by some other subcontractor. The awarding body indicated to DLSE that a new roof would be installed by a roofing contractor and Woodcliff's document showed another subcontractor was retained to "build up" the roofing. To DLSE, because roofing material would be re-applied, albeit by another subcontractor, Gaul & Gaul's removal work fell under the first option in the scope of work calling for the Roofer classification. To Gaul & Gaul, because its own crew did not re-apply roofing material, the removal work was properly paid under either the second or third option in the scope of work calling for the Laborer classification.

The third option for demolition of roof decking does not apply because no evidence shows Gaul & Gaul demolished the concrete roof decking itself. Instead, Gaul & Gaul workers removed roofing materials of various sorts from the decking and drilled holes in the decking for new piping to feed into the building. The second option for removal of roofing materials where no new roofing material is to be applied does not apply because the evidence shows roofing material was, in fact, to be re-applied. The awarding body informed DLSE that a new roof would be installed by a roofing contractor and Woodcliff designated a subcontractor to build up the roofing. Other evidence showed another subcontractor would install roof insulation. Gaul testified that Woodcliff indicated that roofing was later put on, and Nunez testified common sense holds that a new roof was going to be placed. Since roofing material was to be re-applied, the first option that designates the removal work to the Roofer classification applies. That a subcontractor different from Gaul & Gaul was to perform the re-application process is of no moment, since the scope of work's first option does not condition itself on which crew or company would be re-applying the roofing material. Conditions not provided in the scope of work will not be read into it. Also, the circumstance of Gaul & Gaul performing concrete deck coring work to facilitate future placement of mechanical equipment supports the first option to the extent the work recalls the "small repairs to the decking in

preparation of laying the new roof" that the first option assigns to the Roofer classification.

Gaul & Gaul argues the scope of work in the Roofer PWD incorporates an ambiguous MOU between the Laborers' and Roofer International Unions and DLSE failed to present evidence as to the intentions of the parties to the MOU, the past practices of the parties, or the custom in the industry. Gaul & Gaul does not say how or in what way the MOU is ambiguous. That there was "removal of roofing materials" as described under the first and second options in the MOU is not disputed. On its face, the phrasing in the MOU, "to be re-applied," admits to no ambiguity. Gaul & Gaul states that the testimony of Laborer local union official Nunez showed the work at issue was Laborers' work, not Roofers' work. That testimony suggested the work was Laborers' work because the building was unoccupied and, in addition to removing roofing materials, Gaul & Gaul cored through the cement decking. Yet, the scope of work does not differentiate the Roofer and Laborer classifications on the basis of coring work or the building being occupied. Instead, the scope of work differentiates the classifications solely on the basis of whether roofing material "is to be re-applied." Therefore, DLSE properly reclassified the work performed by Gaul & Gaul to the Roofer classification.

Gaul & Gaul argues for the Laborer classification because the CLSB initially cited him for working without a roofer's license, but the citation was withdrawn. No evidence discloses the considerations made in withdrawing the citation nor can a discretionary decision of CSLB to withdraw a citation of a license violation collaterally estop DLSE from applying the prevailing wage law to the facts as it sees them. Gaul & Gaul also argues for the Laborer classification because it was required to pay Laborer rates under a master labor agreement that required it to make fringe benefit contributions on behalf of its workers to pension, vacation, training and other Laborers' trust funds. Once it has contracted to perform public work, the collective bargaining agreements Gaul & Gaul previously entered cannot dictate the statutory analysis. (*See Lusardi, supra,* 1 Cal.4th at pp. 987-88.) The question is whether Gaul & Gaul properly paid the wages and fringe benefits found to be prevailing according to the applicable PWD, not whether

Gaul & Gaul complied with its own collective bargaining agreements.

Gaul & Gaul Is Entitled To Credit For Fringe Benefit Payments, But Not For Payments Beyond Those Required Under The Roofer PWD.

The Director determines the prevailing wage rates and publishes general wage determinations, such as Roofer for Los Angeles County (LOS-2010-2), to inform all interested parties and the public of the applicable wage rates for the "craft, classification and type of work" that might be employed in public works. (§ 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 (*Ericsson*).) The applicable prevailing wage rates are the ones in effect on the date the public works contract is advertised for bid. (*See* § 1773.2 and *Ericsson*.) Section 1773.2 requires the body that awards the contract to specify the prevailing wage rates in the call for bids or alternatively to inform prospective bidders that the rates are on file in the body's principal office and to post the determinations at each job site. Quarterly determinations by the Director of changes in any prevailing wage rate are not effective as to any contract for which the notice to bidders has been published. (§ 1773.6.)

Section 1773.1, subdivisions (a) and (b), which define "per diem wages" both for purposes of establishing prevailing wage rates and for crediting employer payments toward those rates, provide as follows:

> (a) Per diem wages shall be deemed to include employer payments for health and welfare, pension, vacation, travel, subsistence, and apprenticeship or other training programs authorized by Section 3093, so long as the cost of training is reasonably related to the amount of the contributions, and similar purposes, when the term "per diem wages" is used in this chapter or in any other statute applicable to public works.
>
> (b) Employer payments include all of the following:
>
> (1) The rate of contribution irrevocably made by the employer to a trustee or third person pursuant to a plan, fund, or program.
>
> (2) The rate of actual costs to the employer reasonably anticipated in providing benefits to workers pursuant to an enforceable commitment to

carry out a financially responsible plan or program communicated in writing to the workers affected.

(3) Payments to the California Apprenticeship Council pursuant to Section 1777.5.

Until January 1, 2013, section 1773.1, subdivision (c) provided that:

> Employer payments are a credit against the obligation to pay the general prevailing wage of per diem wages. However, no credit shall be granted for benefits required to be provided by other state or federal law. Credits for employer payments also shall not reduce the obligation to pay the hourly straight time or overtime wages found to be prevailing.

Section 1773.1 was amended by Assembly Bill (AB) 2677 (stats. 2012, ch. 827, § 1, eff. Jan. 1, 2013). As amended, subdivision (c) provides that:

> Employer payments are a credit against the obligation to pay the general prevailing wage of per diem wages. However, no credit shall be granted for benefits required to be provided by other state or federal law. Credits for employer payments also shall not reduce the obligation to pay the hourly straight time or overtime wages found to be prevailing. However, an increased employer payment contribution that results in a lower hourly straight time or overtime wage shall not be considered a violation of the applicable prevailing wage determination so long as all of the following conditions are met:
>
> (1) The increased employer payment is made pursuant to criteria set forth in a collective bargaining agreement.
>
> (2) The basic hourly rate and increased employer payment are no less than the general prevailing rate of per diem wages and the general prevailing rate for holiday and overtime work in the director's general prevailing wage determination.
>
> (3) The employer contribution is irrevocable unless made in error.

The awarding body advertised the Project for bid on September 17 and 24, 2010. As of that date, the applicable the Roofer PWD provided a prevailing hourly wage of $44.07, comprised of a base rate of $34.65 per hour and fringe benefit contributions totaling $9.42 per hour. The Assessment found that Gaul & Gaul underpaid its workers $4,730.01 because, although Gaul & Gaul made fringe benefit contributions on behalf of its workers in the amount of $17.39 per hour, to give credit for more than the $9.42 allowed under the Roofer PWD would reduce the obligation to pay the hourly straight

time or overtime wages found to be prevailing in violation of section 1773.1, subdivision (c) as it existed on the bid advertisement date. Gaul & Gaul argues the Assessment should have credited the full $17.39 per hour in fringe benefits it paid each worker. Yet, to give credit for the full $17.39 per hour would reduce the base rate paid the workers to below $34.65 per hour, in violation of the applicable statute.

Gaul & Gaul argues the Assessment should be dismissed because the amended version of section 1773.1, subdivision (c), as enacted by AB 2677, should apply. As the parties stipulated, under the amended version, credit for the fringe benefits actually paid would eliminate the basis for the Assessment. Gaul & Gaul argues that the amended statute should apply because it merely clarified existing law and legislative history of AB 2677 shows the amendments codified prior Department opinions. Gaul & Gaul further asserts rules of statutory construction that hold statutory remedies do not vest until final judgment and statutory rights and remedies should be disposed of under the statute in force when a decision is rendered.

The legislative history of AB 2677 does not disclose that the bill merely clarified existing law, as Gaul & Gaul argues. To the contrary, the legislative reports disclose that existing law would be changed by AB 2677 in relevant respects. (*See, e.g.,* Assem. Concur. Sen. Amend., analysis of Assem. Bill. No. 2677 (2011-2012 Reg. Sess.) as amended August 24, 2012, p. 2 ["Existing law, however, provides that credits for employer payments do not reduce the obligation to pay the hourly straight time or overtime wages found to be prevailing. ¶This bill would provide that an increased employer payment that results in a lower hourly straight time or overtime wage is not considered to be a violation of the applicable prevailing wage determination so long as specified conditions are met"].) Gaul & Gaul cites earlier legislative committee reports on AB 2677 that allude to opinion letters of the Department of Industrial Relations suggesting that where employees under collective bargaining agreements have set amounts deducted from paychecks for supplemental pension or health care accounts, it is not a prevailing wage violation "as long as the total hourly package equals the correct prevailing wage rule (*sic*)." (*See, e.g.,* Assem. Comm. on Labor & Employment analysis

of Assem. Bill. No. 2677 (2011-2012 Reg. Sess.) as amended March 29, 2012, p. 1.) Those references, cryptic as they are, do not present a sufficient basis on which to show AB 2677 merely codified Department practice, especially given that later legislative reports state that existing law provided that credits for fringe benefit payments do not reduce the obligation to pay the hourly straight time rate. This conclusion is also supported by a past prevailing wage decision, which found that a contractor's credit for fringe benefit contributions against its prevailing wage obligation was limited to the value of the total fringe benefit component of the applicable prevailing wage rate. (*See Bedard Controls, Inc.*, Case No. 09-0256-PWH (June 9, 2011) at pp. 13-14 ["To allow any higher credit would be to invade the basic hourly rate, which is prohibited by section 1773.1"].)

Gaul & Gaul cites the Director's decision in *Horn Electric Corp.,* Case No. 06-0101-PWH (September 10, 2007) as an example of a prevailing wage enforcement decision of the Director that gave credit for fringe benefit contributions that reduced the obligation to pay the hourly straight time wages under the former section 1773.1, subdivision (c). Gaul & Gaul misreads *Horn Electric.* In that decision, the Director specifically noted that "The employer's credit [for fringe benefit contributions] is limited to the aggregate amount of fringe benefits due under the applicable PWD, and may not 'decrease the amount of direct payment of hourly wages of those amounts found to be prevailing for straight or overtime wages.' This limitation is not in issue here ...." (*Horn Electric, supra,* Case No. 06-0101 at 10.) The limitation was in issue in *Bedard Controls,* which found that the contractor's credit for fringe benefit contributions against its prevailing wage obligation was limited to the value of the total fringe benefit component of the applicable prevailing wage rate.

As for Gaul & Gaul's argument about the rules of statutory construction, close review of those rules dictates that this matter should be disposed of under the statute in effect at the bid advertisement date. Statutory amendments are presumed to operate prospectively absent a clear indication that the legislature intended otherwise. "The presumption of prospective operation is classically intended to protect ... the right to have liability-creating conduct evaluated under the liability rules in effect at the time the conduct occurred." (*Californians for Disability Rights v. Mervyn's, LLC* (2006) 39

Cal.4th 223, 233 (*Mervyn's*). The text of section 1773.1, subdivision (c) does not expressly indicate the amendment by AB 2677 was intended to have retrospective application. Further, the legislative history of AB 2677 discloses no legislative intent for its amendment of allowable credits for employer fringe benefit payments to operate retroactively. (*See, e.g.*, Sen. Rules Com., Off. of Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 2677 (2011-2012 Reg. Sess.) as amended August 20, 2012, pp. 3-4 [implementation of bill requires changes to prevailing wage determinations to add information about benefit packages under collective bargaining agreements].) Therefore, no basis appears on which to depart from the presumption that the amended version of section 1773.1, subdivision (c) was intended to operate prospectively.

Even if a statutory amendment is intended to operate prospectively, the next question is whether application of the amendment is allowed because it only has a prospective effect, not an impermissible retrospective effect. An amended statute only has retrospective effect when it changes the legal consequences of past conduct by imposing new or different liabilities based upon such conduct or substantially affects existing rights and obligations. (*Mervyn's, supra*, 39 Cal. 4th at 230-31.)

As provided in section 1773.1, subdivision (c), the liability rules in effect at the time of Gaul & Gaul's conduct limited its credit to the $9.42 rate of fringe benefit contributions provided in the Roofer PWD in order not to reduce the basic hourly per diem rate below $34.65. To apply section 1773.1, subdivision (c) as amended after January 1, 2013, would altogether remove the basis for the Assessment and eliminate the $4, 730.01 in wages due the workers. Manifestly, that would "change[ ] the legal consequences of past conduct by imposing new or different liabilities based upon such conduct. " (*Mervyn's, supra*, 39 Cal. 4th at 231.) Further, where the statutory scheme for the awarding of public work contracts turns on the bid advertisement date, to apply the statute as amended after that date substantially affects existing vested or contractual rights and undermines the concept of a level playing field for competing bidders. Gaul & Gaul was on constructive notice of the applicable prevailing wage rates, and is bound by section 1773.1, subdivision (c) as it existed on the bid advertisement date. At that time, the statute limited credit for fringe benefit contributions to amounts that do not reduce the

obligation to pay the basic hourly straight time or overtime wages found to be prevailing. DLSE properly credited Gaul & Gaul's fringe benefit contributions in the amount of $9.42 per hour, the amount that preserved the basic hourly rate of $34.65 as provided in the Roofer PWD.

The Unions' MOU Did Not Divest DLSE Of Jurisdiction To Issue The Assessment Based on the Roofer PWD.

Gaul & Gaul also argues DLSE lacked jurisdiction to issue the Assessment based on the MOU between the Laborers' Union and the Roofers Union as contained in the Roofer PWD because the MOU provides that any dispute concerning that work shall be referred to the offices of the two International Unions for resolution. Gaul & Gaul points out there is no record that the dispute over Gaul & Gaul's work was ever submitted to the "appropriate offices" of the two unions. Gaul & Gaul relies on case law holding that courts should not insert themselves in contractual disputes, particularly if remedies to resolve them have not been exhausted, citing *Service Employees International Union Local 100 v. Dept. of Personnel Admin.* (2006) 142 Cal. App. 4th 866, among others. The cases Gaul & Gaul cites do not control the analysis here. They concern parties to collective bargaining agreements filing lawsuits that were then barred for failure to exhaust the arbitration mechanism in the agreements. Even accepting that the complaint that led to the Assessment was filed by a representative of the Roofers Union, the MOU cannot bar the Director or DLSE from fulfilling their statutory duties to enforce the prevailing wage laws and determine how performed work should be classified according to scopes of work in PWDs published by the Director. (*See §§* 1741, 1770, 1773; *State Bldg. and Constr. Trades Council of California v. Duncan* (2008) 162 Cal. App. 4th 289; Cal. Code Regs., tit. 8, § 16303, subd. (a).) Finally, the MOU does not describe the private dispute resolution mechanism and it does not provide that referral to the two International Unions of a work assignment dispute is the exclusive remedy. Further, the MOU does not purport to bar a union representative from filing with DLSE a complaint of violation of the prevailing wage laws.

DLSE's Penalty Assessment Under Section 1775 Did Not Constitute an Abuse of Discretion

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

(1) The contractor and any subcontractor under the contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than 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 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) The penalty may not be less than twenty dollars ($20) . . . if 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.

(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.[3]

[3] Section 1777.1, subdivision (d) 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." This provision was in effect on the bid

The Director's review of the Labor Commissioner's determination is limited to an inquiry into whether the action was "arbitrary, capricious or entirely lacking in evidentiary support ...." (*City of Arcadia v. State Water Resources Control Bd.* (2010) 191 Cal.App.4th 156, 170.) 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* (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." (Rule 50(c) [Cal. Code Regs., tit. 8, § 17250, subd. (c)].)

DLSE found that the mitigated penalty amount of $30.00 per violation was appropriate. Section 1775, subdivision (a)(2)(B)(iii) provides that the penalty shall not be less than $30.00 if DLSE determines that the violation was willful. Under section 1777.1, subdivision (c), the question is whether Gaul & Gaul "knew or reasonably should have known" its obligation under the public works law and deliberately failed or refused to comply. Gaul testified he took no training in prevailing wage compliance. Instead, he relied on his estimator to know what the law provided. This evidence is sufficient to find that the violation was willful under the statute.

Gaul & Gaul bears the burden of proof to show DLSE's mitigated penalty rate of $30.00 was an abuse of discretion. Gaul & Gaul argues for an abuse of discretion based on it being a unionized employer that provides benefits consistent with a Laborers' Union master labor agreement and because it paid its employees a total wage and benefit package that is more than that called for under the Roofer PWD. Gaul & Gaul also argues that no penalties should be imposed because since January 1, 2013, the amended section 1773.1, subdivision (c) would provide a basis for credit for the fringe benefit level

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advertisement date, but it was then located in section 1777.1, subdivision (c).

paid by Gaul & Gaul. These arguments do not show an abuse of discretion in DLSE's selection of $30.00 as the penalty rate.

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

Section 1813 states, in pertinent part, as follows:

> The contractor or 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) for each worker employed in the execution of the contract by the respective contractor or subcontractor 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. ...

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 and not less than 1½ times the basic rate of pay.

The Assessment, as revised, imposed a penalty under section 1813 at $25.00 for one violation. The record establishes that Gaul & Gaul violated section 1815 by paying less than the required prevailing overtime wage rate for the one violation involving one employee. 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 must be affirmed in the amount of $25.00 for one violation.

Gaul & Gaul Is Not Liable For Liquidated Damages.

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.
>
> 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.

Absent waiver by the Director, Gaul & Gaul is liable for liquidated damages in an amount equal to any wages that remained unpaid sixty days following service of the Assessment. Gaul & Gaul argues for entitlement to a waiver of liquidated damages in this case because it paid fringe benefit contributions well above that required under the Roofers PWD. In addition to that circumstance, the evidence shows that at or about the time the work was being performed, Woodcliff never informed Gaul there was any problem in the bidding or performance of his work. Also, during the work period when a Roofers' Union representative asked him to stop working on the Project because it was Roofer work, Gaul called his Laborers' Union local representative, described the work he was doing and was led to believe he was proceeding appropriately. None of the Gaul & Gaul workers complained about underpayment of prevailing wages and Gaul & Gaul's arguments are not insubstantial challenges to the Assessment, as the comprehensive and able briefing by its counsel demonstrates. Finally, Gaul was cooperative and candid with DLSE during its investigation. Altogether, these facts establish that Gaul & Gaul had substantial grounds for appealing the Assessment and is therefore entitled to a waiver of liquidated damages.

FINDINGS

1. Affected contractor Gaul & Gaul filed a timely Request for Review of the Civil Wage and Penalty Assessment issued by DLSE with respect to the Project.

2. Gaul & Gaul failed to apply the required prevailing wage rates to its workers in the Roofer classification.

3. Gaul & Gaul underpaid the basic hourly prevailing wage rate due to its employees on the Project under the Roofer PWD in the total amount of $4,730.01.

4. DLSE did not abuse its discretion in setting section 1775, subdivision (a) penalties at the rate of $30.00 per violation. Penalties under section 1775 are due for 92 violations on the Project, for a total of $2,760.00 in penalties.

5. A penalty under section 1813 at the rate of $25.00 per violation is due for one violation on the Project, for a total of $25.00.

6. While the unpaid wages found due in Finding Nos. 3 and 4 remained due and owing more than sixty days following issuance of the Assessment, there are sufficient grounds to waive payment of liquidated damages on those unpaid wages, and Gaul & Gaul is therefore not liable for an additional award of liquidated damages under section 1742.1.

7. The amounts found remaining due in the Assessment, as affirmed by this Decision, are as follows:

Wages:	$4,730.01
Penalties under section 1775, subdivision (a):	$2,760.00
Penalties under section 1813:	$25.00
TOTAL	**$7,515.01**

Interest shall accrue on unpaid wages in accordance with section 1741, subdivision (b).

ORDER

The Civil Wage and Penalty Assessment is affirmed, as set forth in the above findings.

The Hearing Officer shall issue a notice of Findings which shall be served with this Decision on the parties.

Dated: 7/3/2014

Christine Baker
Director of Industrial Relations