

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

A & B Construction, Inc.

Case No. 18-0063-PWH

From a Notice of the Withholding of Contract Payments issued by:

Los Angeles Unified School District

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected contractor A & B Construction, Inc. (A&B) requested review of a Notice of the Withholding of Contract Payments (Notice) issued by the Los Angeles Unified School District (LAUSD) on February 27, 2018, with respect to work performed on Venice High School Contract #1410124 for the project #97F00977 (Project) in Los Angeles County. The Notice indicated that A&B owed \$277,596.62 in unpaid prevailing wages, training fund contributions, and statutory penalties. Thereafter, LAUSD revised its audit twice and arrived at the final revised Notice dated October 23, 2019, that indicated a total due of \$267,278.46.

A Hearing on the Merits commenced on October 11, 2019, before Hearing Officer John Korbol. Subsequently, the Hearing on the Merits continued over eight more dates before Hearing Officer Edward Kunnes, culminating on October 26, 2022. Fabiola Rivera, Jaqueline Orozco, and Paul Rayburn appeared as counsel for LAUSD, and Mark Feldman, Tait Viskovich, and Sumner Schwartz appeared as counsel for A&B. LAUSD employees Uyenbinh Nguyen, senior labor compliance officer, and Monique Menchaca, administrative analyst for maintenance and operations, and A&B employees Manuel Jesus Gamero, Jaime Payes, and Raymundo Manuel Gamero, testified in support of the Notice.¹ A&B president Aiman Berouti, vice president Siavash Mehrshahi, project

¹ Raymundo Manuel Gamero identified himself as such at the beginning of his testimony. However, some exhibits refer to him as Manuel Gamero and Manuel Reymundo Gamero. Likewise, some exhibits refer to Manuel Jesus Gamero as Manuel de Jesus Gamero and Manuel Gamero, Jr.

manager Carlos Romo, employee Luis Martinez, and B-Plumbing, Inc. president, George Johnson, testified in support of A&B. Following the submission of posttrial briefs, the matter was submitted for decision on January 23, 2023.

Prior to the Hearing, the parties stipulated as follows:

- The Project was a public work and required the payment of prevailing wages under the California Prevailing Wage Law, Labor Code sections 1720 through 1861.
- A&B filed a Request for Review timely.
- LAUSD made its enforcement file available timely.
- A&B did not pay back wages or deposit funds with the Department of Industrial Relations.²

The issues for decision are as follows:

- Whether A&B underreported hours/days worked by workers on the Project.
- Whether A&B used unidentified workers on the Project.
- Whether LAUSD reclassified properly work performed on the Project.
- Whether A&B underpaid prevailing wages to workers on the Project.
- Whether A&B owes training fund contributions.
- Whether LAUSD assessed accurately the number of Labor Code section 1775 violations.³
- Whether the Labor Commissioner abused discretion in setting the section 1775 penalty rate at \$180 per violation.
- Whether A&B is liable for section 1813 penalties.
- Whether A&B is liable for liquidated damages under section 1774.1 when the Awarding Body has withheld more than the total amount assessed.

² At the Hearing on the Merits, the Parties did not raise any argument regarding the timeliness of the Notice although the issue was not previously stipulated.

³ All further statutory references are to the Labor Code.

For the reasons set forth below, the Director of Industrial Relations finds that LAUSD carried its initial burden of presenting evidence that provided prima facie support for the some of the Notice, and thereafter the Requesting Party rebutted some portions of the Notice, including some alleged unpaid wages and penalties under sections 1775, but not the penalty rate. (See Cal. Code Regs., tit. 8, § 17250, subds. (a), (b).) Furthermore, the Director finds that A&B owes liquidated damages for unpaid wages owed to the workers. Accordingly, the Director issues this decision affirming but modifying the Notice.

FACTS

The Project.

The Awarding Body, LAUSD, advertised the Project for bid on April 16 and 21, 2014, (LAUSD Exhibit No. 67, p. 3.) On May 21, 2014, A&B presented the lowest bid at \$6,600,000.00. (*Id.* at p. 1.)⁴ The Project consisted of corrective work for HVAC at the high school.

LAUSD sent a notice to proceed on the Project to A&B on August 18, 2014. The notice indicated the period for work on the Project started August 2014 and ended October 8, 2016 for 781 calendar days.⁵ (LAUSD Exhibit No. 68.) A Notice of Completion

⁴ A&B indicated that it would use multiple subcontractors on the Project, listing them by name and their type of work as follows: TB Electric for electrical work; Telenet VOIP, Inc. and Apple Valley Communications, Inc. for fire alarm work; Integrated Mechanical Systems, Inc. for mechanical work; Action Duct Cleaning Company, Inc. for duct cleaning; B-Plumbing, Inc. for plumbing work; Kiss Enterprises dba Golden State Roofing for roofing work; Russell Sigler, Inc. for controls work; and, Asbestos Instant Response, Inc. dba Air Demolition & Environment Solutions for asbestos abatement. (LAUSD Exhibit No. X.)

⁵ There was a prior project at Venice High School on which A&B was the prime contractor. A&B did not complete the work on the prior contract because LAUSD needed to redraw the HVAC system plans. (Hearing Transcript, Day 6, Testimony of Aiman Berouti, 762:15-22, 764:3-11, 764:25, 765:1-6, and 772:18-23.)

was signed on September 9, 2016 and recorded in the County Recorder's Office on the same date. (LAUSD Exhibit No. 55, pp. 1-2.)

The Public Works Complaint Investigation.

On June 29, 2015, LAUSD sent a notice to A&B that its Labor Compliance Department (LAUSD) had initiated an audit of A&B. (LAUSD Exhibit No. 1.) The same day LAUSD requested from A&B cancelled payroll checks, check stubs or payroll registers, time cards, sign-in sheets, fringe benefits contribution reports/statements, and proof of payment of fringe benefits for all workers, as well as daily construction reports, classifications of workers employed on the Project, and year levels for each apprentice. (LAUSD Exhibits No. 5.)

On August 2, 2015, Menchaca from LAUSD made a site-visit to the Project. Menchaca interviewed Luis Martinez. He informed Menchaca that his duties that day were cleaning and digging. (LAUSD Exhibit No. 25, p. 1.) Martinez identified two other A&B workers on the Project site as Oscar and Manuel. (LAUSD Exhibit No. 24, p. 2.)

On October 5, 2015, LAUSD mailed letters to A&B workers Oscar Reymundo Gamero, Rene Gamero, and Jamie Payes soliciting their responses to questions related to dates they worked on the Project, their classifications, and rates of pay.⁶ (LAUSD Exhibit No. 8, pp. 1-12.) On or about October 15, 2015, Jaime Payes submitted a complaint to LAUSD. (LAUSD Exhibit No. 9.) Payes complained that A&B paid him \$15 per hour, and he indicated he performed carpentry, painting, and drywall taping on the Project. (*Id.* at pp. 2-5.) Payes marked on a calendar that he worked eight hours on November 3-8, 10-14, 17-22, and 24-26, 2014. (*Id.* at p. 20.) In the worker interview questionnaire, Payes described working as a framer and carpenter, and periodically painting, applying mesh for stucco, and installing insulation inside the roof and walls. (LAUSD Exhibit No. 10, p. 2.) He later marked November 28 and December 2, 2014,

⁶ Letters addressed to A&B workers Manuel Gamero and Luis Martinez went undelivered.

and May 18, 2016 on a calendar as days he worked on the Project. (LAUSD Exhibit No. 12.)

On October 22, 2015, LAUSD notified A&B that it had received a prevailing wage complaint against A&B. (LAUSD Exhibit No. 2.)

On December 11, 2015, LAUSD requested from A&B cancelled payroll checks, check stubs or payroll registers, time cards, sign-in sheets, fringe benefits contribution reports/statements, and proof of payment of fringe benefits for all workers, as well as daily construction reports, classifications of workers employed on the Project, and year levels for each apprentice. (LAUSD Exhibits No. 6.)

On June 20, 2016, Nguyen from LAUSD made a site-visit inspection to the Project. Nguyen interviewed Luis Martinez, Rene Gamero, and Oscar Gamero. They indicated that their duties on that day included work on the roof, including removal of the top layer of the roof and painting. (LAUSD Exhibit No. 27, pp. 1-3.)

On January 11, 2017, Raymundo Manuel Gamero submitted to the LAUSD a complaint and a completed worker interview questionnaire. (LAUSD Exhibits Nos. 13 and 14.) In the questionnaire, Gamero stated that he was paid \$840 per week, worked eight-ten hours per day performing carpentry, drywall, and plaster work at the Project, and he indicated that on average his wage was \$18 an hour. (LAUSD Exhibit No. 14, pp. 8, 9, and 11; Exhibit No. 16, p. 6.) In addition, Gamero described installing steel poles using anchor bolts to attach them. (Exhibit No. 14, p. 9.) He indicated that he worked with A&B employees Oscar Gamero, Pedro Gamero, Luis Martinez, Rene Gamero, and Jaime Payes. (*Ibid.*) On January 13, 2017, Gamero submitted a calendar to LAUSD on which he had marked the dates he worked at the Project. (LAUSD Exhibit No. 15.) The calendar began earlier than the start date of the Project and continued beyond the Project completion date. The calendar indicated that Gamero worked at the Project most weekdays and numerous Saturdays regardless of holidays. (*Id.* at pp. 1-9.)

On January 30, 2017, LAUSD requested from A&B cancelled payroll checks, check stubs or payroll registers, time cards, sign-in sheets, fringe benefits contribution reports/statements, and proof of payment of fringe benefits for all workers, as well as

daily construction reports, classifications of workers employed on the Project, and year levels for each apprentice. (LAUSD Exhibit No. 7.)

On March 9, 2017, Raymundo Manuel Gamero submitted a second complaint to LAUSD wherein he described cashing an A&B paycheck with his name on it for \$1,500.00, returning \$660.00 to A&B, and retaining \$840.00 for himself. (LAUSD Exhibit No. 16 at p. 7.) In addition, Gamero attached a calendar to the second complaint that included minor variations in the hours worked from the calendar he filed with his initial complaint. (*Id.*, pp. 11-19.) On April 19, 2017, Gamero submitted a third calendar to LAUSD on which he greatly scaled back the hours he claimed to have worked on the Project, showing a start date of September 9, 2014 and an end date of July 7, 2016. (LAUSD Exhibit No. 17.)

On March 9, 2017, Manuel Jesus Gamero, the son of Raymundo Manuel Gamero, submitted a complaint to LAUSD. (LAUSD Exhibit No. 20.) Manuel Jesus Gamero indicated that he performed painting, drywall, and wood framing on the Project for which he was paid \$14 an hour. (LAUSD Exhibit No. 21, p. 1.) He also stated that some workers were forced to return money to A&B, and he was told to hide from inspectors. (LAUSD Exhibit No. 20, p. 5.) Gamero marked a calendar attached to the complaint supplementary form, showing that he worked every weekday from November 23, 2015 through May 31, 2016, regardless of holidays and worked three Saturdays. (*Id.* at pp. 4-5.) In addition, photos of the jobsite, workers, and Manuel Jesus Gamero taken during the pendency of the Project were attached to the complaint. (*Id.* at pp. 6-8, and 11-14.) On March 16, 2017, Manuel Gamero submitted a worker interview questionnaire to LAUSD in which he indicated again that A&B paid him \$14 an hour for framing, drywall, painting, duct work, and demolition from November 2015 to May 2016. (LAUSD Exhibit No. 22, pp. 1-2.)

Classifications and Prevailing Wage Rate Determinations.

The LAUSD investigation revealed that A&B workers on the Project performed work in seven crafts: Carpenter; Drywall Installer/Lather (Carpenter); Drywall Finisher;

Iron Worker; Laborer Group 1; Painter: Lead Abatement; and, Roofer.⁷ (LAUSD Exhibit No. 64a, pp. 1-2.)

The Audit.

LAUSD's audit of A&B's work on the Project revealed that A&B underreported workers' hours, used unidentified workers, misclassified workers, and underpaid prevailing straight time and overtime wages. (LAUSD Exhibit No. 64a, p. 2.) With respect to misclassification, based on the A&B's Daily Construction Report from November 9, 2015, LAUSD reclassified workers Raymundo Manuel Gamero and Luis Martinez from Carpenter to Drywall Installer. (LAUSD Exhibit No. 57, p. 8.) Based on the A&B's Daily Construction Report from March 16, 2016, LAUSD reclassified workers Oscar Gamero and Martinez from Carpenter to Drywall Installer. (*Ibid.*) The final audit dated October 8, 2019 found A&B owed unpaid wages of \$85,898.65 to Raymundo Manuel Gamero, \$6,100.98 to Jaime Payes, \$1,947.16 to Luis Martinez, \$2,641.86 to

⁷ The Carpenter straight time total hourly rate on the date work began was \$53.74 and the basic hourly rate was \$39.30. (LAUSD Exhibit No. 64a, p. 1.) The predetermined increase raised the straight time total hourly rate to \$55.74 and the basic hourly rate to \$40.40. (*Ibid.*) The Drywall Installer/Lather (Carpenter) straight time total hourly rate on the date work began was \$53.95 and the basic hourly rate was \$39.30. (*Ibid.*) The predetermined increase raised the straight time total hourly rate to \$55.95 and the basic hourly rate to \$40.40. (*Ibid.*) The Drywall Finisher straight time total hourly rate on the date work began was \$49.91 and the basic hourly rate was \$34.03. (*Ibid.*) The predetermined increase raised the straight time total hourly rate first to \$51.66 and then to \$53.66 and the basic hourly rate to \$35.03 and then to \$36.13. (*Ibid.*) The Ironworker straight time total hourly rate on the date work began was \$60.84 and the basic hourly rate was \$33.50, and those wage rates remained effective through the Project. (LAUSD Exhibit No. 39.) The Laborer Group 1 straight time total hourly rate on the date work began was \$48.93 and the basic hourly rate was \$30.19, and those wage rates remained effective through the Project. (LAUSD Exhibit Nos. 41 and 42.) The Painter: Lead Abatement straight time total hourly rate on the date work began was \$43.37 and the basic hourly rate was \$30.27. (LAUSD Exhibit No. 44.) The predetermined increase raised the straight time total hourly rate to \$44.37 and the basic hourly rate to \$30.72. (*Ibid.*) The Roofer straight time total hourly rate on the date work began was \$65.62 and the basic hourly rate was \$35.90, and those wage rates remained effective through the Project. (LAUSD Exhibit No. 64a, p. 2.)

Oscar Reymundo Gamero, \$1,674.44 to Rene Gamero, \$37,742.08 to Manuel Jesus Gamero, and \$1,733.04 to unidentified workers. (LAUSD Exhibit No. 64a, pp. 3-4.)

LAUSD reported to the Labor Commissioner that as of January 19, 2018, it had withheld \$387,012.68 from A&B for the Project. Also, it had assessed A&B \$13,296.49 within the last three years under one other notice of withholding. (LAUSD Exhibit No. 57, p. 9.) LAUSD sought approval from the Labor Commissioner for section 1775 penalties at the rate of \$200 per violation for the Project. The Labor Commissioner approved a rate of \$180 per violation. (LAUSD Exhibit Nos. 56, p. 10 and 57, p. 2.) The final revised audit found 709 section 1775 violations for a total of \$127,620.00 in section 1775 penalties. (LAUSD Exhibit No. 64a, p. 4.)⁸ In addition, the Labor Commission approved LAUSD's request to impose Section 1813 penalties at \$25 per violation, concerning one violation regarding Jaime Payes and three violations regarding Raymundo Manuel Gamero, for a total of \$100. (LAUSD Exhibit Nos. 57, p. 2 and 64a, p. 3.)

DISCUSSION

The California Prevailing Wage Law (CPWL), set forth at Labor Code section 1720 et seq., requires the payment of prevailing wages to workers employed on various specified public works projects. The California Supreme Court summarized the purpose of the CPWL 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

⁸ The breakdown of the section 1775 penalties per worker was as follows: Jaime Payes 22 violations for \$3,960; Luis Martinez 71 violations for \$12,780; Raymundo Manuel Gamero 397 violations for \$71,460; Oscar Reymundo Gamero 44 violations for \$7,920; Rene Gamero 44 violations for \$7,920; Manuel Jesus Gamero 127 violations for \$22,860; and, unidentified workers four violations for \$720. (LAUSD Exhibit No. 64a, p. 4.)

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*).) A Labor Compliance Program, like the LAUSD, 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.”⁹ (§ 90.5, subd. (a), and see *Lusardi*, 1 Cal.4th at p. 985.)

Section 1775, subdivision (a), requires that contractors and subcontractors pay the difference to workers paid less than the prevailing rate and prescribes penalties for failing to pay the prevailing rate. The prevailing rate of per diem wage includes travel pay, subsistence pay, and training fund contributions as described in section 1773.1, with the latter paid to the California Apprenticeship Council in accordance with section 1777.5, subdivision (m)(1).

When an enforcing agency, such as LAUSD, determines that a violation of the prevailing wage laws has occurred, a written notice of the withholding of contract payments is issued pursuant to section 1771.6. Section 1742.1, subdivision (a) provides

⁹ DLSE is responsible for enforcing the California prevailing wage laws. (§§ 90.5 and 1741; Cal. Code Regs., tit. 8, § 16100, subd. (a).) However, there are four legacy labor compliance programs (LCPs) that have been approved by the Director to enforce compliance on their own public works projects. (§ 1771.5; <https://www.dir.ca.gov/lcp.asp>.) LAUSD has a legacy LCP. When LAUSD determines that a contractor on one of its public works projects has violated the prevailing wage laws, LAUSD prepares a Request for Approval of Forfeiture for review and approval by the Labor Commissioner’s Office (LCO), then once it obtains approval, issues a Notice of the Withholding of Contract Payments to the contractor. (Cal. Code Regs., tit. 8, §§ 16436-16437; Lab. Code, §§ 1771.5, 1771.6.) The Notice must “describe the nature of the violation and the amount of wages, penalties, and forfeitures withheld.” (§ 1771.6, subd. (a).)

for the imposition of liquidated damages, essentially a doubling of the unpaid wages, if those wages are not paid within 60 days following service of the written notice of withholding under section 1771.6.

An affected contractor may appeal that notice by filing a request for review under section 1742. The request for review is transmitted to the Director of the Department of Industrial Relations, who assigns an impartial hearing officer to conduct a hearing on the matter as necessary. (§ 1742, subd. (b).) At the hearing, the enforcing agency, LAUSD in this case, has the initial burden of producing evidence that “provides prima facie support for the [Notice]....” (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 [Notice] ... 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 Notice. (§ 1742, subd. (b); Cal. Code Regs. tit. 8, § 17260.)

The prevailing rate of pay for a given craft, classification, or type of worker is determined by the Director of Industrial Relations in accordance with the standards set forth in section 1773. The Director determines the rate for each locality in which public work is performed (as defined in section 1724) and publishes a general prevailing wage determination (PWD) for a craft, such as Drywall Installer/Lather (Carpenter), to inform all interested parties and the public of the applicable prevailing wage rates. (§ 1773.) Contractors and subcontractors are deemed to have constructive notice of the applicable prevailing wage rates. (*Division of Labor Standards Enforcement v. Ericsson Information Systems* (1990) 221 Cal.App.3d 114, 125.) Ultimately, the Director’s PWDs determine the proper pay classification for a type of work. The nature of the work actually performed, not the title or classification of the worker, is determinative of the rate that must be paid. The Department publishes an advisory scope of work for each craft or worker classification for which it issues a PWD. The decision about which craft or classification is appropriate for the type of work requires comparison of the scope of work contained in the PWD with the actual work duties performed.

Additionally, employers on public works must keep accurate payroll records, recording, among other information, 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.)

LAUSD Determined Properly that A&B Underpaid Wages to Jaime Payes.

Jaime Payes was the first worker to come forward to complain about A&B having underpaid him. (LAUSD Exhibit No. 9, p. 3.) Payes recalled working for A&B on the Project for slightly more than a month in November and December 2014. (Hearing Transcript, Day 4, Testimony of Jaime Payes (Payes Testimony) 567:8-567:11.) Payes confirmed that he was paid \$15.00 an hour for his work on the Project, that A&B reported his salary was \$39.00 an hour, and that A&B never provided him a paystub. (Payes Testimony, 572:4-572:6, 574:6-574:8, 575:20-24, 584:16-21, and 585:9-11.)

On October 15, 2015, Payes marked on a blank calendar provided to him by the LAUSD those days he worked on the Project. (Payes Testimony, 576-580.) Payes marked on the calendar the following workdays: November 3-8 (six days), November 10-14 (five days), November 17-22 (Six days), and November 24-26 (three days); a total of 20 days. Later, Payes added the dates November 28 and December 2, 2014, and May 18, 2016. (LAUSD Exhibit Nos. 9, p. 20, and 12.) Thus, Payes indicated that he worked 22 eight-hour days on the Project in November and December, 2014, totaling 176 hours. (*Ibid.*)

A&B used sign-in sheets on the Project. LAUSD presented A&B sign-in sheets with Payes's name on them for five days: November 14, 17, 19, 21, and 25, 2014. (LAUSD Exhibit No. 83, pp. 40-47.)

The CPRs prepared by A&B showed Payes working fewer days and fewer hours than Payes had claimed, but more days than indicated by the sign-in sheets. According to A&B, Payes worked six days—November 14, 17, 19, 21, 26, and December 2, 2014—

for a total of 43 hours. (LAUSD Exhibit No. 72, pp. 22, 24, and 26.) There was no CPR entry associated with Payes for May 18, 2016.

A&B issued seven handwritten paychecks to Payes as follows: three checks of \$595.95 (totaling \$1,787.85) dated November 21, 2014; two checks of \$499.55 (totaling \$999.10) on November 26, 2014; and two checks of \$242.66 (totaling \$485.32) on December 5, 2014. (LAUSD Exhibit No. 84, pp. 303-309.) None of the checks indicated the name of the project or the pay period; they did not appear to have been attached to a paystub.¹⁰ (*Ibid.*)

A&B issued three paystubs with Payes's name on them. One in the amount of \$595.95 for the pay period November 14-20, 2014, a second in the amount of \$499.55 for the pay period November 21-27, 2014, and a third in the amount of \$242.60 for the pay period November 28, 2014-December 4, 2014. (LAUSD Exhibit No. 84, pp. 1-3.) Although these three paystubs contain at the top what appears to be printed replicas of the paychecks (without the bank and A&B information thereon), two of the paystubs do not match two of the issued handwritten checks, which showed one handwritten check was short by \$8.30 and another check was an overpayment of \$3.41. (*Id.* at pp. 1-3 and pp. 303-309.) This discrepancy, although minor in amount, went unexplained, and it appears inexplicable if A&B prepared the paystubs before the handwritten checks.

A&B, in its case-in-chief, presented CPRs, paychecks, and testimony of Siavash Mhershahi. However, this evidence presented by A&B did not rebut the underpayment of Payes because A&B created the ambiguity whereby the paychecks did not indicate for which project and for what pay period they were issued, and A&B did not attach the paystubs to the paychecks. (LAUSD Exhibit Nos. 72 and 84; Hearing Transcript, Day 7, Testimony of Siavash Mhershahi (Mhershahi Testimony) 1027-1033.) Furthermore, two of the three paychecks contained errors indicating the possibility that A&B did not create the paystubs at the same time as the paychecks. Finally, comparing the CPRs

¹⁰ Aiman Berouti testified that the paystub was placed in an envelope with the paycheck. (Hearing Transcript, Day 6, Testimony of Aiman Berouti, 791:19-22.)

and sign-in sheets revealed that one third of the time the hours and days worked did not match. Mhersshahi's testimony, based upon unreliable documentation, was insufficient to counter Payes's credible testimony because Mhersshahi admitted that he was merely interpreting documents made by someone else. (Mhersshahi Testimony, 1251:10–13.)

A&B argued that Payes could not plausibly remember every work date approximately a year later when he created the calendar for the LAUSD. (A&B posttrial brief, p. 25.) While Payes admitted that he did not keep a contemporaneous calendar while he worked on the Project (Payes Testimony, 580:19-22.), A&B kept poor records. Still, the Director will infer that more likely than not Payes did not work on the Project on those dates when A&B's superintendent, Alfonso Marquez, was not on the Project because the practice by A&B appeared to require a superintendent for daily management of its workers.¹¹

Therefore, the LAUSD met its burden of proof coming forward with evidence that supported a prima facie case of underpayment of prevailing wages to Payes, through the testimony of Payes, his complaint, the completed questionnaire, and the days/hours worked calendar. (LAUSD Exhibit Nos. 9, 10, 11, and 12.) While LAUSD determined correctly the wages owed and the penalties for the most part, there are three days—November 8, 22, and 28, 2014—for which LAUSD failed to establish Payes worked. (LAUSD Exhibit No. 72, pp. 19, 20, and 23-26.) As a result, the amount of wages owed and penalties imposed for those three days was incorrect. The amounts found owing in the Notice related to Payes are reduced accordingly. The work classifications assigned Payes are discussed *post*.

¹¹ Marquez worked on the days for which Payes is compensated. (LAUSD Exhibit No. 72, pp. 18-26 and 167.)

LAUSD Determined Properly that A&B Underpaid Wages to Raymundo Manuel Gamero.

After having worked at A&B for 20 years on school projects, Raymundo Manuel Gamero submitted a public works complaint to the LAUSD a year and a few months after Jamie Payes had submitted his complaint. (Raymundo Manuel Gamero Testimony, 634:14-25; 635:1-2; LAUSD Exhibit No. 13.) Raymundo Manuel Gamero testified that A&B paid him \$18 an hour, marked down less hours than he worked, and required him to return wages to A&B from his paycheck when paid greater than \$840 a week. (Hearing Transcript Day 5, Testimony of Raymundo Manuel Gamero ("Raymundo Manuel Gamero Testimony"), 643:13-15; 646:6-7; 650:12-17; 651:1-16, 22-25; 652:1-14.) On the LAUSD's questionnaire and interview form, he stated that A&B paid him an additional \$250 or \$300 when he worked overtime. (LAUSD Exhibit No. 14, p. 9.) He apparently estimated his average rate of pay at \$18 an hour. (LAUSD Exhibit No. 16, p. 6.) Raymond Manuel Gamero also testified that A&B instructed him to tell project inspectors that he earned \$33.50. (Raymundo Manuel Gamero Testimony, 668:13-25; 669:1-10.)

A&B issued 57 handwritten paychecks, with most paychecks in the range from \$550 to \$650. (LAUSD Exhibit No. 84, pp. 62-177.) Paystubs accompany those paychecks, but again the checks themselves were not attached to the paystubs. (*Ibid.*) A&B issued those paychecks and paystubs from September 2014 to December 7, 2015. (*Ibid.*) Those documents showed that A&B paid Raymundo Manuel Gamero \$36,904.06 for the Project up until December 7, 2015. (*Id.* at p. 173.) Although the parties presented only the paystubs and paychecks through December 7, 2015, the CPRs show Raymundo Manuel Gamero working from December 14, 2015 through July 7, 2016 and earning \$4,522.09 for work on the Project during that time. (LAUSD Exhibit No. 72, pp. 135-177.) Thus, A&B paid Raymundo Manuel Gamero a total of \$41,426.15 for his work on the Project.

Raymundo Manuel Gamero submitted to LAUSD his check deposit register reflecting checks he had cashed at a check cashing store. (LAUSD Exhibit No. 18.) The

register identifies checks made by A&B, the check number, the deposit date of the check, and its amount. (*Ibid.*) These checks were dated from a time before the start of the Project to a date after the end of the Project. Raymundo Manuel Gamero deposited 52 checks written by A&B between October 4, 2014 and July 20, 2016 totaling \$34,518.00. (*Id.* at pp. 1-3.) While only one paycheck over \$1,000 (i.e. \$1,122.65) appeared on the CPRs, the check deposit registers for the same period showed A&B checks for \$1,008.00, \$1,060.00, \$1,340.00, \$1,260.00, \$1,020.00, \$1,092.00, \$1,263.00, and \$1,008.00. (LAUSD Exhibit Nos. 84, pp. 100-101 and 18, pp. 1-3.)¹² The A&B checks in excess of \$1,000 that appear on the check deposit register were dated in the ranged from August 7, 2015 to April 22, 2016. (LAUSD Exhibit No. 18, p. 2.)

The calendar Raymundo Manuel Gamero provided to the LAUSD showed that he worked eight hours when he worked on the Project. (LAUSD Exhibit No. 17.) In 2014, he worked 128 hours in September, 184 hours in October, 136 hours in November, and 176 hours in December. (*Id.* at p. 2.) In 2015, he worked 160 hours in January, 52 hours in February, 160 hours in March, 176 hours in April, 160 hours in May, 176 hours in June, 176 hours in July, 168 hours in August, 168 hours in September, 160 hours in October, 112 hours in November, and 128 hours in December. (*Id.* at pp. 1 and 3.) In 2016, he worked 88 hours in January, 160 hours in February, 176 hours in March, 160 hours in April, 16 hours in May, 56 hours in June, and 28 hours in July. (*Id.* at pp. 4 and 5.) He worked 624 hours in 2014, 1,896 hours in 2015, and 684 hours in 2016, for a total of 3,204 hours on the Project.

By contrast, A&B's CPRs showed that Raymundo Manuel Gamero worked in 2014, 36 hours in September, 60 hours in October, 72 hours in November, and 88

¹² The paycheck for \$1,122.65 is dated February 20, 2015, and A&B issued it for the pay period February 13-February 19, 2015. (LAUSD Exhibit No. 84, pp. 100-101.) The CPR showed that Raymundo Manuel Gamero worked both days that weekend, but Raymundo Manuel Gamero did not indicate this work on his calendar. (LAUSD Exhibit No. 72, p. 47.)

hours in December. (LAUSD Exhibit No. 72, pp. 6-33.) In 2015, he worked 84 hours in January, 68 hours in February, 56 hours in March, 72 hours in April, 68 hours in May, 100 hours in June, 96 hours in July, 72 hours in August, 88 hours in September, 76 hours in October, 52 hours in November, and 64 hours in December. (*Id.* at pp. 35-140.) In 2016, he worked 16 hours in April, eight hours in May, 20 in June, and 20 hours in July. (*Id.*, pp. 158-177.) He worked 256 hours in 2014, 896 hours in 2015, and 64 hours in 2016, for a total of 1,216 hours on the Project.

Below is a table summarizing the number of hours worked for each year per Complainant Raymundo Manuel Gamero's calendar and A&B's CPRs:

Years	Calendar – hours	CPRs – hours
2014	624	256
2015	1,896	896
2016	684	64
Total	3,204	1,216

Despite the disparity between the hours Raymundo Manuel Gamero and A&B contended were worked on the Project, they substantially agree his start date was in September 2014 and his end date was in July 2016. From the start date of the Project until the end of December 2015, Raymundo Manuel Gamero worked solely on this Project and only at the end of this Project did his work briefly overlap with another school project. (Raymundo Manuel Gamero Testimony, 654:15-18; LAUSD Exhibit Nos. 15, pp. 5-9 and 17, p. 5.) Aside from that other school project in July 2016, Raymundo Manuel Gamero allegedly worked on Berouti's house in San Clemente for the first half of 2016. (Hearing Transcript, Day 6, Testimony of Aiman Berouti (Berouti Testimony) 894:5-9 and 901:1-9.) Berouti's testimony corresponds with Raymundo Manuel Gamero's calendar. Raymundo Manuel Gamero only showed work for the first of January, 16 hours in May, and 7 days in June, but otherwise worked all February, March, and April, 2016 at the Project. (LAUSD Exhibit No. 17, p. 4.)

The difference between the hours Raymundo Manuel Gamero and A&B contend were worked on the Project is 1,988 hours. The Project lasted approximately 22 months. Based on a hypothetical full-time employee working 40 hours a week, there are approximately 3,812 hours over the duration of this Project, and while holidays, sick days, and vacations may further reduce hours worked, 1,216 hours approximates only seven months of work. Whereas 3,204 hours reflects a realistic number for a full-time employee working over a duration of 22 months. Accordingly, the LAUSD met its prima facie burden of proof through the testimony of Raymundo Manuel Gamero, his complaint, questionnaire, calendar, and deposit register. (LAUSD Exhibit Nos. 13, 14, 17, and 18.)

A&B attempted to rebut LAUSD's evidence through its CPRs, paychecks, and the testimony of Berouti, Mehrshahi, Martinez, Romo, and Johnson. (LAUSD Exhibit Nos. 72 and 84; Berouti Testimony 890:9-12, 894:5-9, and 901:1-9; Mehrshahi, Testimony 1058-1067; Hearing Transcript Day 8, Testimony of Luis Martinez (Martinez Testimony) 1113-1125; Hearing Transcript Day 8, Testimony of Carlos Romo (Romo Testimony) 1152-1153; Hearing Transcript Day 9, Testimony of George Johnson (Johnson Testimony) 1292-1295.) Martinez, Romo, and Johnson testified that they never saw any workers hide from inspectors, money exchanged between workers, and notes to workers directing payment of wages to other workers. (Martinez Testimony, 1113-1125; Romo Testimony, 1152-1153; and, Johnson Testimony 1292-1295.) Additionally, Berouti's rejected Raymundo Manuel Gamero's allegations of hiding from inspectors. (Berouti Testimony, 890:9-12.) Finally, Mehrshahi's testimony was intended to show that Raymundo Manuel Gamero could not have been at the Project other than on the dates stated in the CPRs. (Mehershahi Testimony, 1058-1067.)

However, A&B did not rebut LAUSD's case because it failed to explain why the CPRs showed Raymundo Manuel Gamero worked typically only 16 hours a week over the duration of most of the Project, if he worked at all, despite the fact that he was skilled in the type of work performed by A&B on the Project and had been an employee of A&B for 20 years. Furthermore, A&B failed to explain the numerous A&B checks that

Raymundo Manuel Gamero deposited during the pendency of the Project that did not match the A&B paychecks, paystubs, and CPRs provided to LAUSD by A&B.¹³

Additionally, the problem indicated in Payes's payment history was replicated with regard to Raymundo Manuel Gamero's paychecks, by failing to identify a project and a pay period, and failing to attach a paycheck to a paystub.

A&B argued that Raymundo Manuel Gamero was wrong about some dates he worked because to work at the high school campus on weekends and holidays required a documented procedure, for which there was no confirming documentation. In addition, Raymundo Manuel Gamero's own calendars conflicted regarding workdays. (A&B posttrial brief, pp. 25, 55-61; LAUSD Exhibit Nos. 15, 16, 17, and 30.) Further, Raymundo Manuel Gamero wrote in his workdays on the LAUSD calendars approximately two to three years after he had worked on the Project, and the LAUSD did not show that he had prepared a contemporaneous calendar when working on the Project. Finally, A&B's contention that Raymundo Manuel Gamero did not work eight hours every day he was at the jobsite was substantiated by A&B's superintendent also not being at the jobsite eight hours every workday of the Project. (LAUSD Exhibit No. 72.)

The evidence submitted by both parties regarding Raymundo Manuel Gamero's workdays on the Project was unreliable, given that A&B underreported Raymundo Manuel Gamero's hours worked on the Project and Raymundo Manuel Gamero's calendars were inconsistent and inaccurate. While A&B must bear responsibility for its questionable record keeping, this Decision will infer that more likely than not there was no appearance by Raymundo Manuel Gamero on the Project before September 18, 2014, the date on which the LAUSD Project Inspector noted A&B had started work, and

¹³ Berouti testified that some workers received two checks in one week to compensate for an irregularly small paycheck due to lack of work. (Berouti Testimony, 833:11-23.) The veracity of this testimony is rejected by the Hearing Officer given the duration over which Raymundo Manuel Gamero consistently was underemployed during the Project, according to the CPRs. (LAUSED Exhibit No. 72.)

on the dates A&B's superintendent did not appear on the jobsite. (LAUSD Exhibit Nos. 72, pp. 36, 135, 137, and 142, and 74, p. 1.)

Accordingly, the Decision will remove September 9, 10, 11, 12, 15, 16, 17, 2014, January 2, December 15 and 24, 2015, and January 9, 2016 from the Notice and approve the remaining workdays assessed by LAUSD.¹⁴ (LAUSD Exhibit No. 72, pp. 1- 172.) Otherwise, this Decision also approves the penalties assessed by the LAUSD, with discussion *post* of Raymundo Manuel Gamero's work classifications.

LAUSD Determined Properly that A&B Underpaid Wages to Manuel Jesus Gamero.

Manuel Jesus Gamero submitted a complaint to the LAUSD on February 8, 2017. He reported that he worked on the Project for seven months from November 2015 to May 2016, and marked on a calendar working every weekday, including holidays, from November 23 through May 31, 2016.¹⁵ Gamero indicated that A&B paid him \$14.00 an hour. (LAUSD Exhibit Nos. 20, 21, and 22, pp. 1-2.)

At hearing, Manuel Jesus Gamero testified that during his work on the Project he worked five to six days a week, including a couple of Saturdays, Thanksgiving, and Christmas in 2015. (Manuel Jesus Gamero Testimony, 515:5-8, 516:6-21, 517:18-25, and 518:1-9.) He testified further that he stopped work at A&B in March 2016. (Hearing Transcript, Day 4, Testimony of Manuel Jesus Gamero (Manuel Jesus Gamero Testimony) 493:15-19.) Gamero testified he did not maintain contemporaneous records of his workdays and had no documents to show that he worked on holidays. (Manuel Jesus Gamero Testimony, 519:20-25 and 520:1.) He also stated that no paystub

¹⁴ A&B incorrectly marked the CPR for Tuesday, July 5, 2016 as a Sunday, on which its superintendent did not work. (LAUSD 72, p. 172.) Since the date does not match the day of the week, the date will remain a day on which Raymundo Manuel Gamero worked.

¹⁵ Manuel Jesus Gamero also reported that A&B paid him \$10-\$11 an hour, but at hearing, he clarified that the lower salary was for an earlier job. (Manuel Jesus Gamero Testimony 499:3-19.)

accompanied the paychecks he received from A&B, but he received W-2s from A&B. (LAUSD Exhibit No. 22, p. 2.) Gamero testified that he was supposed to hide from LAUSD employees, but if they did find him, he was instructed to say that A&B paid him \$33 an hour. (Manuel Jesus Gamero, Testimony, 500:3-25 and 501:1-6.)

LAUSD assessed A&B for wages due for Manuel Jesus Gamero from November 20, 2015 through May 25, 2016. (LAUSD Exhibit No. 64, pp. 66-70.) Apparently, LAUSD based its assessment on the calendar, as LAUSD did not submit into evidence W-2s for Manuel Jesus Gamero for the years 2015 and 2016, paychecks, or a check deposit register.

The testimony of Payes, Martinez, and Romo called into question whether Manuel Jesus Gamero worked on the Project. They testified that Manuel Jesus Gamero worked at earlier A&B jobs, including an earlier job at Venice High School, but not the subsequent Project at Venice High School, which was the subject of the Notice. (Payes Testimony, 597:6-25 and 598:1-5; Martinez Testimony, 1109:8-17; Romo Testimony, 1149:14 -25 and 1150:1-22; and, A&B Exhibit No. EEE.) When Raymundo Manuel Gamero testified, he initially did not identify his son as working on the Project, and only when directly asked, did he state that his son worked on the Project. (Raymundo Manuel Gamero Testimony, 641:12-20.) Finally, Manuel Jesus Gamero proved to be less than credible when he failed to acknowledge a Los Angeles Superior Court child support order against him during cross-examination. (Manuel Jesus Gamero Testimony, 541:19-25, 542:1-25, 543:1-25, and 544:1-9; Berouti Testimony, 778:2-25, 779; 780; 781; 782; and 783:1-18; and A&B Exhibit No. GGG.)

Notwithstanding the testimonial evidence against Manuel Jesus Gamero working on the Project, Manuel Jesus Gamero did possess time stamped photographs from his cell phone showing work on the Project and himself at the Project. (LAUSD Exhibit No. 23.) The photographs were date stamped December 7, 2015, February 16, March 28,

and April 22, 2016. (LAUSD Exhibit No. 23, pp. 1-4.)¹⁶ Other photographs exist without date stamps, but Manuel Jesus Gamero did not testify to dates for those photographs. (LAUSD Exhibit No. 23 pp. 1-8; Manuel Jesus Gamero Testimony, 526, 527.)

While there was evidence that militated against awarding the full claim of Manuel Jesus Gamero, there was also evidence favoring awarding some of his claim. Militating against Manuel Jesus Gamero's claim, LAUSD provided no checks or W-2s showing that he had worked for A&B from 2014-2016; the conflicting evidence regarding his testimony and calendar for work after March, 2016; the lack of witnesses to him being on the jobsite during the Project; and, his failure to truthfully testify about the child support order issued against him during cross-examination. Favorable to his claim is A&B's CPRs were proven incorrect about Payes and Raymundo Manuel Gamero and his photographic proof of work on the Project.

Weighing this evidence, this Decision finds that Manuel Jesus Gamero worked on December 7, 2015, February 16, 2016, March 28, 2016, and April 22, 2016. This Decision removes 123 days of wages and penalties assessed by the LAUSD. (LAUSD Exhibit No. 64a, p. 4.)

Unidentified Workers

It is necessary to understand the basis of LAUSD's contention that there were unidentified workers on the Project. LAUSD assessed one unidentified worker for the dates September 18, 19, 30, and November 22, 2014, based on discrepancies between the Project Inspector's Daily Reports and the documents prepared by A&B (i.e., the Daily Construction Reports and the CPRs). (LAUSD Exhibit No. 64a, p. 16.) These discrepancies form the basis for the claim that wages are due to unidentified workers. (Hearing Transcript, Day 2, Testimony of Uyenbinh Nguyen (Nguyen Testimony) 285:5-25, 286, 287, 288, and 289:1-9; LAUSD Exhibit Nos. 72, 74, and 81.) While the LAUSD

¹⁶ As concerns December 7, 2015, Manuel Jesus Gamero's pay period December 4-10, 2015 is missing from the audit. (LAUSD Exhibit No. 64, p. 66.) Apparently, the LAUSD's audit incorrectly labeled the pay period December 4-10, 2015 as a pay period for December 11-17, 2015 because December 11-17, 2015 appears twice. (*Ibid.*)

had the name of each A&B worker on the Project, it only had calendars prepared by the complaining workers (i.e., Payes, Raymundo Manuel Gamero, and Manuel Jesus Gamero). Consequently, a Project inspector's Daily Report for any particular date that identified more workers on the jobsite than A&B reported would result in a finding within the audit that unidentified workers worked on the Project for that particular day.

A&B indicated that no A&B workers were on the Project on September 18 and 19, 2014. (LAUSD Exhibit Nos. 72, pp. 5-7 and 81, pp. 14-15.) However, the Project Inspector indicated two A&B workers worked on the Project on September 18 and 19. (LAUSD Exhibit No. 74, pp. 1-5.) Since the LAUSD assessed unreported and unpaid days of work for Raymundo Manuel Gamero on those dates, the other worker is unidentified. (LAUSD Exhibit No. 64, p. 71.)

A&B's CPRs indicated that only Raymundo Manuel Gamero worked on the Project on September 30, 2014. (LAUSD Exhibit Nos. 72, pp. 8-9 and 81, p. 24.) However, the Project Inspector indicated two A&B workers worked on the Project on September 30. (LAUSD Exhibit No. 74, pp. 28 -29; Nguyen Testimony, 285:19-25, 286:1-22.) Since A&B acknowledged Raymundo Manuel Gamero worked that day, the other worker is unidentified. (LAUSD Exhibit Nos. 72, pp. 8-9, and 64, p. 71.)

LAUSD assessed one unidentified worker on November 22, 2014 purportedly based on a roofing inspection made on the same date. (LAUSD Exhibit Nos. 64, p. 71 and 51, p. 10.) However, LAUSD did not submit into evidence a Project Inspector's Daily Report for November 22; rather, there is an Inspection Request and this Inspection Request contains no indication of the number of workers working on the Project that date. (LAUSD Exhibit No. 51, p. 10.) Therefore, the assessment of wages and penalties for one unidentified worker on November 22, 2014 is removed from the Notice.¹⁷

¹⁷ A&B argued that LAUSD's reliance on workers' calendars that conflict with the Project Inspector's Daily Reports is inconsistent with its use of the Project Inspector's Daily Reports to count unidentified workers. Without rehashing the problems with A&B's payroll records, which make reliance on workers' calendars a necessity, it is logically

Accordingly, this Decision approves unpaid wages and penalties for one unidentified worker on September 18, 19, and 30, but removes assessed wages and penalties for an unidentified worker on November 22, 2014.

Misclassification

LAUSD made multiple findings of misclassification for the workers. Based on the Project Inspector's Daily Reports, the LAUSD reclassified Payes, Martinez, Raymundo Manuel Gamero, Oscar Reymundo Gamero, and Rene Gamero from Drywall Installer/Lather (Carpenter) to Iron Worker for November 18 through November 20, 2014.¹⁸ (LAUSD Exhibit Nos. 64, pp. 6, 8, 44, and 57, and 64a, p. 6.) In addition, based on the Project Inspector's Daily Reports, the LAUSD reclassified Martinez, Raymundo Manuel Gamero, Oscar Reymundo Gamero, and Rene Gamero from Painter to Drywall Installer/Lather (Carpenter) for January 30 through February 6, 2015. (LAUSD Exhibit Nos. 64, pp. 9-10, 45, and 58-65, and 64a, pp. 7-8.) Further based on A&B's Daily Construction Report, LAUSD reclassified Martinez, Oscar Reymundo Gamero, and Rene Gamero from Carpenter to Drywall Installer/Lather (Carpenter) for September 11, 2015 through March 30, 2016, and made the same reclassification for Raymundo Manuel Gamero for September 11, 2015 through January 7, 2016. (LAUSD Exhibit Nos. 64, pp. 13-18, 50-54, and 63 and 64a, pp. 12-14.) Finally, LAUSD classified Payes as a Roofer on November 22, 2014 and Raymundo Manuel Gamero as a Roofer on September 18 and 19, 2014 and November 21, 2014. (LAUSE Exhibit Nos. 64, p. 6 and 64a, pp. 16-17.) Oscar Reymundo Gamero was reclassified from Painter to Laborer

consistent to regard the Project Inspector's Daily Reports as accurate for those things observed by the inspector without concluding that the inspector observed everything that occurred during the Project.

¹⁸ The LAUSD audit reclassified Payes's work on November 22, 2014, but this Decision removes all penalties and wages for that date from the Notice because the CPRs reported no A&B supervisor on the Project for that day. (LAUSD Exhibit No. 64, p. 6.)

Group 1 for March 24-26, 2015 based on the Project Inspector's Daily Reports. (LAUSD Exhibit No. 64, p. 46.)

The Project Inspector's Daily Reports for November 18 through November 20, 2014 reported work performed installing steel columns in walls for HVAC attachment. (LAUSD Exhibit No. 74, pp. 109-117.) The LAUSD concluded this description matched the scope of work in the PWD for Iron Work and did not match the scope of work in the PWD for Drywall Installer/Lather (Carpenter). (Nguyen's Testimony, 254:2-6; LAUSD Exhibit Nos. 40 and 38.) Berouti explained that the iron posts were attached with screws to wood within the interior walls. (Berouti's Testimony, 807:1-7, 865:8-20.)

The scope of work for Drywall Installer/Lather (Carpenter) includes the installation and erection of all materials and component parts of walls regardless of the wall's material composition, and the scope of work for Iron Work includes erection of structural steel. (LAUSD Exhibit Nos. 38, p. 5 and 40, p. 7.) These scopes of work overlap when steel is used as a component of the wall structure. Hence, A&B was correct to choose one of these classifications and could not be faulted for choosing to apply the PWD for Drywall Installer/Lather (Carpenter).¹⁹ (See *Sheet Metal Workers Internat. Assn., Local Union No. 104 v. Rea* (2007) 153 Cal.App.4th 1071, 1077, as modified (Aug. 29, 2007); LAUSD Exhibit No. 72, pp. 21-22.)

The Project Inspector's Daily Reports for January 30 through February 6, 2015 and A&B's Daily Construction Reports for September 11, 2015 through March 30, 2016 reported that the Project activities included patching walls and ceiling. (LAUSD Exhibit Nos. 74, pp. 247-262, and 81, pp. 285-343.) The LAUSD concluded the description of activity in the Project Inspector's Daily Reports and A&B's Daily Construction Reports matched the scope of work for Drywall Installer/Lather (Carpenter) and did not match

¹⁹ Notwithstanding, wages and penalties remain owed to Payes and Raymundo Manuel Gamero for their work on those days because A&B still underpaid them as Drywall Installer/Lather (Carpenter) workers.

the scope of work for Carpenter or Painter. (Nguyen's Testimony, 264:10-25, 265-268:1-7; LAUSD Exhibit Nos. 33, 38, and 46.)

A&B argues against LAUSD's reclassification of Carpenter and Painter to Drywall Installer/Lather (Carpenter) based on the material composition of the walls and ceilings (i.e., a lack of drywall). (Berouti Testimony, 796:4-25; 797; 798:1-4.) Such an argument is not persuasive because it oversimplifies the extent of the applicable scope of work. A&B's argument is not persuasive because all material or composition parts of walls and ceilings are included in the Drywall Installer/Lather (Carpenter) scope of work. (LAUSD Exhibit No. 38, p. 5.)

A&B's argument regarding reclassification to Carpenter based on days its workers performed blocking and patching is not tenable due to A&B's own documentation. (See, Mehrshahi Testimony, 1053:3-11.) Putting aside which scope of work matches blocking, A&B failed to indicate the days on which both types of work were performed. Thus, it failed to prepare properly its CPRs by distinguishing classifications and rates for blocking and wall work and therefore failed to rebut LAUSD's prima facie case of misclassification. (See Mehrshahi Testimony, 1216, 1217, 1218:1-15; Martinez Testimony, 1127:11-23; Romo Testimony, 1172, 1173:1-9.)

The scope of work for Carpenters and Painters does not describe the work performed by A&B employees. The scope of work for Carpenters contains a provision (i.e., section 105) that allows for only incidental drywall/lathing work thereunder. (LAUSD Exhibit No. 33, p. 9.) The scope of work for Painters describes only patch work performed by spackling and wood dough work, materials for minor wall patches. (LAUSD Exhibit No. 46, p. 4.) While arguably the scope of work for Carpenters allows for incidental patch work and the scope of work for Painters allows for minor patch work, it is self-evident from the duration of the work and the number of workers involved that the wall patching was neither incidental nor minor. (LAUSD Exhibit No. 81, pp. 285-343.)

The LAUSD relies on the Project Inspector's Daily Reports to reclassify workers from Carpenter and Painter to Drywall Installer/Lather (Carpenter) from January 30

through February 6, 2015. (LAUSD Exhibit Nos. 74, pp. 247-262.) Additionally, the LAUSD relied on A&B Daily Construction Reports, at least in part, to reclassify workers from Carpenter and Painter to Drywall Installer/Lather (Carpenter) from September 11, 2015 through March 30, 2016. However, the LAUSD only submitted into evidence A&B Daily Construction Reports through November 30, 2015. (LAUSD Exhibit No. 81, pp. 285-343.) There is no indication of what the LAUSD relied on to reclassify A&B workers after November 30, 2015.²⁰ (LAUSD Exhibit No. 64.) Therefore, LAUSD proved its prima facie case from January 30 through February 6, 2015 and September 11, 2015 through November 30, 2015 with regard to misclassification of workers but failed to establish a prima facie case after November 30, 2015. Accordingly, A&B workers will not be reclassified after November 30, 2015.

The scope of work for a Roofer states that application of any material to the roof as well as removal of any type of roofing, sweeping, vacuuming, and cleanup includes roof work so long as a new roof is to be re-laid. (LAUSD Exhibit No. 49.) The LAUSD reclassified A&B workers as Roofers based on a letter from LAUSD approving A&B's request to self-perform the roofing working and A&B's failure to classify a single worker as a Roofer. (LAUSD Exhibit Nos. 72 and 77.)

The LAUSD classified Payes as a Roofer purportedly based on the Roofing Inspector's Log on November 22, 2014. (LAUSD Exhibit No. 64, p. 6.) However, this Decision removed that date from the Notice because no A&B supervisor was at the jobsite then.²¹

The LAUSD classified Raymundo Manuel Gamero as a Roofer on September 18 and 19, 2014 and November 21, 2014. (LAUSD Exhibit No. 64a, pp. 16 - 17.) The

²⁰ Additionally, the Project Inspector's Daily Reports after November 25, 2015 are unreadable due to their reduced size. (LAUSD Exhibit No. 74, pp. 815-1046.)

²¹ As stated above, LAUSD did not submit into evidence a Roofing Inspector's Log for November 22, 2014, but rather an Inspection Request. (LAUSD Exhibit No. 51, p. 10.) LAUSD only submitted Roofing Inspector's Log for February 13 and 21, 2015. (*Id.* at pp. 11-16.)

Project Inspector's Daily Report for September 18 and 19, 2014 stated roof demolition as the only work performed by A&B workers. (LAUSD Exhibit No. 74, pp. 4 – 8.) However, there is no evidence that A&B workers performed roof work on November 21, 2014. (LAUSD Exhibit No. 74, p. 118, and 81, p. 64.) Therefore, November 21, 2014 is reclassified as Drywall Installer/Lather (Carpenter) based on A&B's Daily Construction Report and Project Inspector's Daily Report, which note wall patching and ceiling demolition performed by A&B workers. (LAUSD Exhibit Nos. 74, p. 118, and 81, p. 64.)

Finally, the LAUSD reclassified Oscar Reymundo Gamero from Painter to Laborer Group 1 for March 24, 2015 through March 26, 2015 based on the Project Inspector's Daily Report work description of demolition. (LAUSD Exhibit No. 64, p. 46.) The Project Inspector's Daily Report for March 26, 2015 notes both demolition and painting were performed. (LAUSD Exhibit No. 74, p. 346.) The scope of work for Laborer categorizes classifications into five groups by particularized work, including demolition under Group 1. (LAUSD Exhibit No. 42, p. 3.) A&B failed to distinguish properly between demolition and painting on its CPRs. Therefore, LAUSD reclassified the worker properly on the March dates.

Accordingly, this Decision reverses LAUSD's Notice reclassifying Payes, Martinez, Raymundo Manuel Gamero, Oscar Reymundo Gamero, and Rene Gamero from Drywall Installer/Lather (Carpenter) to Iron Worker for November 18 through November 20, 2014. This Decision affirms the Notice reclassifying Martinez, Raymundo Manuel Gamero, Oscar Reymundo Gamero, and Rene Gamero from Painter to Drywall Installer/Lather (Carpenter) for January 30 through February 6, 2015. This Decision modifies the Notice so that Martinez, Oscar Reymundo Gamero, Rene Gamero, and Raymundo Manuel Gamero are reclassified from Carpenter to Drywall Installer/Lather (Carpenter) from September 11 through November 30, 2015 and reverses the Notice reclassifying workers after November 30, 2015. This Decision affirms the Notice reclassifying Raymundo Manuel Gamero as a Roofer on September 18 and 19, 2014 and

reverses the Notice reclassifying him as a Roofer on November 21, 2014.²² Finally, this Decision affirms the Notice reclassifying Oscar Reymundo Gamero from Painter to Laborer Group 1 for March 24-26, 2015.

Miscellaneous Wage Violations

To the extent that LAUSD based wage payments owed to A&B workers on A&B's Fringe Benefit Report for the Southern California Painting and Drywall Industries Trust Fund the assessments are not supported. (LAUSD Exhibit No. 85.) Based on this report, the LAUSD found A&B underreported hours on its CPRs for Martinez on February 24, 2015, Raymundo Manuel Gamero on February 20 and 26 2015 and June 9 and 10, 2015, Oscar Reymundo Gamero on February 16 and 17, 2015 and June 5 and 8, 2015, and Rene Gamero on June 8 and 9, 2015. (LAUSD Exhibit Nos. 64, pp. 10, 46, 48, 61 and 64a, pp. 8 and 10.) The LAUSD provided no testimony or other evidence about whether the trust fund reports were more accurate than the CPRs for determining hours worked. Without said evidence, the LAUSD failed in its burden of establishing a prima facie case on this issue. Accordingly, the wages and penalties for February 24, 16, and 17, 2015 and June 5, 8 and 9, 2015 for Martinez, Oscar Reymundo Gamero, and Rene Gamero are removed from the Notice.²³

The LAUSD found A&B underreported workhours for Martinez on July 28, 2015 and Raymundo Manuel Gamero and Oscar Reymundo Gamero on August 3, 2015 based on a site visit on August 3, 2015. (LAUSD Exhibit Nos. 64, pp. 12, 49 and 64a, p. 11.) During the LAUSD's site visit, it presented a Labor Compliance Interview Form to

²² A&B assigned Raymundo Manuel Gamero Drywall Installer/Lather (Carpenter) for the week of November 21, 2014. (LAUSD Exhibit No. 72, p. 23.) The hourly prevailing wage rate for a Roofer is less than the rate for Drywall Installer/Lather (Carpenter). The rate cannot be adjusted upward without offending due process. (LAUSD Exhibit No. 34.)

²³ Regardless of the fringe benefit statement, the wages and penalties assessed in favor of Raymundo Manuel Gamero for February 20, and 26, 2015 and June 9 and 10, 2015 are affirmed and supported by his testimony and calendar. (LAUSD Exhibit No. 17, p. 3.)

Martinez, wherein he indicated that he had worked eight hours on Tuesday, July 28, 2015 of the previous week. (LAUSD Exhibit No. 25, p. 1.) Additionally, Martinez identified Raymundo Manuel Gamero and Oscar Reymundo Gamero as workers on August 3, 2015 to the LAUSD inspector at the site visit. (LAUSD Exhibit No. 24, p. 4.) A&B's CPRs noted that Martinez did not work on July 28, 2015, and Oscar Reymundo Gamero and Raymundo Manuel Gamero did not work on August 3, 2015. (LAUSD Exhibit No. 72, pp. 94-96.) The Notice is affirmed against A&B for its failure to compensate Martinez for work on July 28, 2015 and Raymundo Manuel Gamero and Oscar Reymundo Gamero for work on August 3, 2015.²⁴

The LAUSD found A&B underreported workhours for Rene Gamero on November 3, 4, and 5, and Oscar Reymundo Gamero on November 3, 4, 5, 14, 17, 19, and 20 2014 based on answers provided by Payes in LAUSD's interview with him on May 3, 2016. (LAUSD Exhibit Nos. 64, pp. 44 and 57, and 10, p. 8.) The LAUSD's finding regarding the underreporting of wages for Rene Gamero and Oscar Reymundo Gamero are affirmed because Payes's testimony was credible.

There remain a few assessed wage violations for which A&B failed to pay the proper weekend rates to Martinez for Saturday and Sunday, February 14 and 15, 2015, and Oscar Reymundo Gamero for Saturday, February 21, 2015. (LAUSD Exhibit No. 64, pp. 10 and 46.) A&B also failed to pay the predetermined rate increase effective July 1, 2015 for Rene Gamero on July 2, 8, and 9, 2015. (LAUSD Exhibit No. 64, p. 61.) These assessments are affirmed by this Decision.

Training Fund

The LAUSD found A&B owed training fund contributions in the sum of \$1,820.25. (LAUSD Exhibit No. 64a, p. 4.) The amount of training fund contributes owed by A&B are reduced by this Decision's reversal of the LAUSD's classification of iron work and a

²⁴ Notwithstanding, the evidence garnered from LAUSD's site visit, this Decision already determined that A&B owed wages to Raymundo Manuel Gamero based on his testimony and calendar. (LAUSD Exhibit No. 17, p. 3.)

reversal of a day of roof work for Payes and Raymundo Manuel Gamero. Additionally, training fund contributions owed by A&B are further reduced by this Decision's removal of 123 days of work by Jesus Manuel Gamero. This Decision reduces the training fund contribution by \$621.96. (LAUSD Exhibit Nos. 64, pp. 5, 6, 8, 57, and 66-77 and 64a, pp. 6, 17, and 25.) The total amount of training fund contributions A&B owes is \$1,198.29.

Calculation of Wages Due

LAUSD found that A&B owed back wages of \$137,738.21. (LAUSD Exhibit No. 64a, p. 1.) Applying foregoing determinations to the wages owed A&B workers, results in A&B owing the following wages: \$4,834.32 to Payes, \$84,114.97 Raymundo Manuel Gamero, \$1,616.06 to Martinez, \$1,568.24 to Oscar Reymundo Gamero, \$780.92 to Rene Gamero, \$1,166.24 to Jesus Manuel Gamero, and \$1,211.28 to unidentified workers. This Decision finds that A&B owes a total of \$95,292.03 in back wages. Thus, A&B owes training fund contribution and back wages of \$96,490.32.

A&B Failed to Prove the Labor Commissioner Abused Her Discretion in Assessing Penalties Under Section 1775.

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 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 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 forty dollars (\$40) . . . unless the failure of the contractor . . . 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 . . .
 - (ii) The penalty may not be less than eighty dollars (\$80) . . . if the contractor . . . 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 one hundred twenty dollars (\$120)... if the Labor Commissioner determines that the violation was willful, as defined in subdivision (c) of Section 1777.1.²⁵
- . . .
- (D) The determination of the Labor Commissioner as to the amount of the penalty shall be reviewable only for abuse of discretion.

Abuse of discretion by DLSE is established if the "agency's nonadjudicatory action . . . is inconsistent with the statute, arbitrary, capricious, unlawful or contrary to public policy." (*Pipe Trades v. Aubry* (1996) 41 Cal.App.4th 1457, 1466.) In reviewing for abuse of discretion, however, the Director is not free to substitute his or her own judgment "because in [his or her] own evaluation of the circumstances the punishment appears to be too harsh." (*Pegues v. Civil Service Commission* (1998) 67 Cal.App.4th 95, 107.)

A contractor or subcontractor has the same burden of proof with respect to the penalty determination as to the wage assessment. Specifically, "the Affected Contractor or Subcontractor shall have the burden of proving that the Labor Commissioner abused his or her discretion in determining that a penalty was due or in determining the amount of the penalty." (Cal. Code Regs., tit. 8, § 17250, subd. (c).)

The LAUSD recommended section 1775 penalties at the rate of \$200.00, however, the Labor Commissioner reduced the penalty rate to \$180.00. (LAUSD Exhibit

²⁵ Section 1777.1 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."

Nos. 56, p. 10 and 57, p. 2.) The burden was on A&B to prove that the Labor Commissioner abused her discretion in setting the penalty amount under section 1775.

Although A&B disputed that it had underpaid wages, fringe benefits, and training fund contributions, it provided no compelling or probative evidence establishing evidence of good faith mistakes. For each affirmed violation, A&B either knew or should have known it violated the CPWL because, among other reasons, it was an experienced public works contractor and had previously been cited \$13,296.49 within the last three years by LAUSD. (LAUSD Exhibit No. 57, p. 9.) Thus, A&B provided no evidence of abuse of discretion by the Labor Commissioner in her selection of the penalty rate.

Section 1775, subdivision (a)(2), grants the Labor Commissioner the discretion to mitigate the statutory maximum penalty per day considering prescribed factors, but it does not mandate mitigation in all cases. Further, the Director is not free to substitute her own judgment. A&B has not shown an abuse of discretion in the rate selected by the Labor Commissioner. Accordingly, the assessment of section 1775 penalties at the rate of \$180.00 is affirmed, except that the total amount must be reduced by the section 1775 penalties removed from the Notice. The final revised audit found 709 violations for \$127,620.00 section 1775 penalties. (LAUSD Exhibit No. 64a, p. 4.) This Decision removed 194 violations, leaving 515 violations for \$92,700.00 section 1775 penalties.

A&B Failed to Carry Its Burden of Proof to Show the Notice Was Incorrect as to Three Failures to Pay Overtime Premiums.

Section 1815 states:

[w]ork 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:

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) 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.

Section 1813 prescribes a penalty of \$25.00 per calendar day for each worker found to have worked overtime without having been paid at the applicable hourly overtime wage rate. The LAUSD assessed four such violations by A&B due to Payes allegedly working Saturday November 8, 2014 and Manuel Raymundo Gamero working on Saturday and Sunday, February 14 and 15, 2015, and Saturday, February 21, 2015. (LAUSD Exhibit Nos. 64, p. 6 and 64a, pp. 8 and 19.) Since this Decision removed November 8, 2014 for Payes from the Notice, there are found three violations for \$75.00 section 1813 penalties.

A&B Is Liable for Liquidated Damages.

Section 1742.1, subdivision (a), provides for the imposition of liquidated damages, as follows:

After 60 days following the service of . . . a notice of withholding under subdivision (a) of Section 1771.6, 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 Notice was issued, the statutory scheme regarding liquidated damages provided contractors two alternative means to avert liability for liquidated damages (in addition to prevailing on the case or settling the case with the LAUSD agreeing to waive liquidated damages). Under section 1742.1, subdivision (a), the contractor has 60 days to decide whether to pay the workers all or a portion of the wages assessed in the notice of withholding, and thereby avoid liability for liquidated damages on the amount of wages so paid. Under section 1742.1, subdivision (b), a contractor may entirely avert liability for liquidated damages if, within 60 days from issuance of the notice of withholding, the contractor deposits with the Department of Industrial Relations the full amount of the assessment of unpaid wages, including all statutory penalties.

A&B defends against imposition of liquidated damages based on LAUSD withholding \$387,012.68 for the Project, although the total assessment amount was \$267,278.46. (LAUSD Exhibit Nos. 57, p. 9 and 64a.) LAUSD withholding is authorized by section 1771.6, subdivision (a), as follows:

Any awarding body that enforces this chapter in accordance with Section 1726 or 1771.5 shall provide notice of the withholding of contract payments to the contractor and subcontractor, if applicable. The notice shall be in writing and shall describe the nature of the violation and the amount of wages, penalties, and forfeitures withheld. Service of the notice shall be completed pursuant to Section 1013 of the Code of Civil Procedure by first-class and certified mail to the contractor and subcontractor, if applicable. The notice shall advise the contractor and subcontractor, if applicable, of the procedure for obtaining review of the withholding of contract payments.

The withholding process by the awarding body articulated directly above is distinct and separate from the deposit process to avoid liability for liquidated damages outlined in subdivision (b) of section 1742.1. There exists no provision either in the Labor Code or California Code of Regulations that equates an awarding body withholding to a deposit at the Department of Industrial Relations. In fact, section 1742.1 states in subdivision (a) that affected contractors subject to a notice of withholding are liable for liquidated damages, and section 1742.1 states a method by which to avoid liability is to deposit the full amount of the noticed withholding with the Department of Industrial Relations. There is no indication, reference, or inference that the withholding process authorized by section 1771.6 in any way relieves the affected contractor from liquidated damages.

In this case, A&B neither paid any back wages in response to the Notice, nor deposited with the Department the assessed wages and statutory penalties. Accordingly, A&B is liable for liquidated damages under section 1742.1 for the unpaid prevailing wages found in this Decision in the amount of \$95,292.03.

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

FINDINGS AND ORDER

1. A&B Construction, Inc. failed to pay Jaime Payes, Raymundo Manuel Gamero, Manuel Jesus Gamero, and unidentified workers the prevailing wage rate and all hours worked on the Project.
2. A&B Construction, Inc. misclassified Luis Martinez, Raymundo Manuel Gamero, Oscar Reymundo Gamero, and Rene Gamero as painters and carpenters instead of their correct classifications as drywall installers/lather, roofers, and laborers.
3. A&B Construction, Inc. failed to pay Martinez for work on July 28, 2015 and Raymundo Manuel Gamero and Oscar Reymundo Gamero for work on August 3, 2015.
4. Considering findings one through three above, A&B Construction, Inc. underpaid its employees on the Project in the aggregate amount of \$95,292.03.
5. A&B Construction, Inc. failed to pay \$1,198.29 in required training fund contributions.
6. The Labor Commissioner did not abuse her discretion in assessing penalties under Labor Code section 1775 at the rate of \$180.00 per violation for 515 violations in the aggregate sum of \$92,700.00.
7. On three occasions, A&B Construction, Inc. failed to pay workers the prevailing overtime rate for work performed. Accordingly, statutory penalties under section 1813 are due from A&B Construction, Inc. in the amount of \$75.00.
8. A&B Construction, Inc. did not deposit the full amount of the Notice of Withholding with the Department of Industrial Relations. Therefore, A&B Construction, Inc. is liable for liquidated damages in the amount of unpaid wages determined by this Decision, which is \$95,292.03.

The amounts found due under the Notice of Withholding, as affirmed and modified by this Decision, are as follows:

Basis of the Notice of Withholding	Amount
Wages Due:	\$ 95,292.03
Training Fund Contributions Due:	\$ 1,198.29
Penalties under section 1775:	\$ 92,700.00
Penalties under section 1813:	\$ 75.00
Liquidated damages:	\$ 95,292.03
TOTAL:	\$284,557.35

The Notice of Withholding is affirmed in part, modified in part, and reversed in part, as set forth in the above Findings. The Hearing Officer shall issue a Notice of Findings that shall be served with this Decision on the parties.

Dated: 4-7-25



Katrina S. Hagen, Director
California Department of Industrial Relations