

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

**Antoun Jean Fata doing business as Fata
Construction and Development**

Case No. 18-0248-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected contractor Antoun Jean Fata dba Fata Construction and Development (Fata) submitted a timely request for review of the Civil Wage and Penalty Assessment (Assessment) issued on July 17, 2018, by the Division of Labor Standards Enforcement (DLSE) with respect to the Carr Elementary School Modernization project (Project) for the Torrance Unified School District (District) in Los Angeles County. The Assessment asserted that \$178,460.02 in unpaid prevailing wages and penalties for prevailing wage violations were due under Labor Code section 1775 and Labor Code section 1813, respectively.¹ The Assessment identified Fata as the prime contractor and Naya Services, Inc. (Naya) as the subcontractor on the Project.²

A duly noticed Hearing on the Merits was conducted on February 19, 2020, in Los Angeles, California, before Hearing Officer John J. Korbol. William A. Snyder appeared as counsel for DLSE; there was no appearance by or on behalf of Fata. The Hearing Officer proceeded to conduct the Hearing on the Merits in Fata's absence to formulate a recommended decision as warranted by the evidence, pursuant to California Code of Regulations, title 8, section 17246, subdivision (a).

Deputy Labor Commissioner Alfredo Roman testified in support of the Assessment. DLSE's documentary exhibits were admitted into evidence without objection. The Hearing was concluded but the record was kept open to permit DLSE to

¹ All further section references are to the California Labor Code, unless otherwise specified.

² Naya did not file a Request for Review.

file redacted paper copies of its exhibits. These documents were received by the Hearing Officer, and on March 19, 2020, DLSE filed and served a post-Hearing brief, and the case was deemed submitted as of that date. Fata has not filed a motion seeking relief from its non-appearance, as permitted under California Code of Regulations, title 8, section 17246, subdivision (b).

The issues for decision are:

- Was the Assessment timely served?³
- Were all of the workers directly employed by Naya on the Project paid the required prevailing wages for all of their days and hours worked on the Project?
- Is Fata liable for penalties under section 1775, and did DLSE properly assess such penalties?
- Is Fata liable for penalties under section 1813?
- Is Fata entitled to a waiver of liquidated damages under section 1742.1?

For the reasons set forth below, the Director of Industrial Relations finds that the Assessment was timely served, DLSE carried its initial burden of presenting evidence at the Hearing that provided prima facie support for the Assessment, and that Fata failed to carry its burden of proving that the basis of the Assessment was incorrect. (See Cal. Code Regs., tit. 8, § 17250, subds. (a), (b).) Accordingly, the Director issues this Decision affirming the Assessment, as modified.

FACTS

The facts stated below are based on DLSE Exhibit Numbers 1 through 40, the testimony of Roman, and the contents of the Hearing Officer's file.

//

//

³ DLSE stipulated that Fata's Request for Review was timely.

Failure to Appear.

At the first three Prehearing Conferences conducted by the Hearing Officer, Fata participated through legal counsel. Subsequent to the third Prehearing Conference, Fata notified the Hearing Officer and DLSE that it was no longer being represented by an attorney. Fata did not participate in the duly noticed fourth and final Prehearing Conference on November 18, 2019.

The Hearing Officer was not contacted by a representative of Fata at any time between May 3, 2019, and the Hearing on February 19, 2020. There was no appearance by or on behalf of Fata at the Hearing. Counsel for DLSE informed the Hearing Officer that Antoun Fata is presently in Lebanon and unable to return to the U.S. Counsel for DLSE received an email from Fata on February 7, 2020, inquiring about settling a different case, but with regard to this matter Fata subsequently was unresponsive to DLSE.

The Assessment.

On July 13, 2015, the District advertised for bids on the Project. The District awarded a contract, which Fata and the District entered into on September 9, 2015 (Contract). Pursuant to the Contract, Fata agreed to perform demolition and hazardous material abatement on phase 2 of the Carr Elementary School Modernization Project. As the successful bidder, Fata was required to be, and was, certified for hazardous substances removal. Naya worked as Fata's subcontractor under the Contract, and Naya directly employed all of the workers covered by the Assessment.⁴

Work on the Project commenced February 15, 2016. Nineteen workers employed by Naya performed work on the Project beginning October 15, 2015, and

⁴ DLSE was never furnished with a copy of the subcontract between Fata and Naya and Naya does not appear on any of the daily logs kept by the District's inspector on the Project. However, the District reported that Naya was Fata's subcontractor, the workers covered by the Assessment understood Naya to be their employer, and Naya produced payroll records for work performed on the Project.

ending April 18, 2016.⁵ By motion adopted on January 17, 2017, the District's Board of Education accepted the work on the Project.

According to certified payroll records (CPRs) provided by both Naya and Fata, Naya's workers were classified as asbestos and lead abatement laborers. The prevailing wage determination (PWD) in effect on the bid advertisement date for this classification is embodied in the PWD for Asbestos and Lead Abatement (Laborer) (SC-102-882-1-2015-1).⁶ The PWD set the hourly base pay for Naya's workers at \$29.23, the training fund contribution at 70 cents per hour, and the fringe benefits at the cumulative figure of \$16.95 per hour.

The Assessment asserted that the workers employed on the Project had been underpaid in the collective amount of \$84,010.02.⁷ The Assessment asserted section 1775 penalties were due at the rate of \$200.00 per violation, in the total amount of \$94,200.00 based on 471 instances in which the workers were underpaid prevailing wages. The Assessment also asserted section 1813 penalties were due at the rate of \$25.00 per violation, in the total amount of \$250.00 for 10 instances of failing to pay overtime.

DISCUSSION

The California Prevailing Wage Law (CPWL), set forth at Labor Code sections 1720 et seq., requires the payment of prevailing wages to workers employed on public works construction projects. The purpose of the CPWL was summarized by the California Supreme Court in one case as follows:

⁵ The daily log kept by the Project's inspector reflects that Fata, not Naya, started demolition work as early as October 5, 2015.

⁶ The proper classification of the workers included in the Assessment was not disputed by either party.

⁷ DLSE concedes that there are no unpaid training fund contributions due.

The overall purpose of the prevailing wage law . . . is to benefit and protect employees on public works projects. This general objective subsumes within it a number of specific goals: to protect employees from substandard wages that might be paid if contractors could recruit labor from distant cheap-labor areas; to permit union contractors to compete with nonunion contractors; to benefit the public through the superior efficiency of well-paid employees; and to compensate nonpublic employees with higher wages for the absence of job security and employment benefits enjoyed by public employees.

(Lusardi Construction Co. v. Aubry (1992) 1 Cal.4th 976, 987, citations omitted (*Lusardi*).) DLSE enforces prevailing wage requirements not only for the benefit of workers but also “to protect employers who comply with the law from those who attempt to gain competitive advantage at the expense of their workers by failing to comply with minimum labor standards.” (§ 90.5, subd. (a); see also *Lusardi*, at p. 985.)

Section 1775, subdivision (a), requires, among other provisions, that contractors and subcontractors pay the difference to workers paid less than the prevailing rate and also 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 pursuant to section 1773.1. Section 1775, subdivision (a) (2), grants the Labor Commissioner the discretion to mitigate the statutory maximum penalty per day in light of prescribed factors.

Section 1813 requires that workers are compensated for overtime pay pursuant to section 1815 when they work in excess of eight hours per day or more than 40 hours during a calendar week, and imposes a penalty of \$25.00 per day per worker per violation. Unlike section 1775 above, section 1813 does not give DLSE any discretion to reduce the amount of the penalty, nor does it give the Director any authority to limit or waive the penalty.

When DLSE determines that a violation of the prevailing wage laws has occurred, it may issue a written civil wage and penalty assessment pursuant to section 1741. An

affected contractor or subcontractor may appeal the Assessment by filing a Request for Review under section 1742. The Request for Review is transmitted to the Director of the Department of Industrial Relations, who assigns an impartial hearing officer to conduct a hearing in the matter as necessary. (§ 1742, subd. (b)) At the hearing, DLSE has the burden of producing evidence that “provides prima facie support for the Assessment” (Cal. Code Regs. tit. 8, § 17250, subd. (a).) When that initial burden is met, the contractor or subcontractor “shall have the burden of proving that the basis for the civil wage and penalty assessment is incorrect.” (Cal. Code Regs. tit. 8, § 17250, subd. (a); accord, § 1742, subd. (b).) At the conclusion of the hearing process, the Director issues a written decision affirming, modifying or dismissing the assessment. (§ 1742, subd. (b).)

The Assessment Was Timely.

Section 1741, subdivision (a), provides that an assessment shall be served not later than 18 months after the filing of a notice of completion or after acceptance of the public work, whichever occurs last. Here, the District accepted the Project as of January 17, 2017. The Assessment was served precisely 18 months later, on July 17, 2018.⁸ Therefore, the Assessment was timely served.

Naya Failed to Pay Required Prevailing Wages.

In this case, the record establishes that DLSE presented prima facie support for the Assessment, and Fata failed to prove the basis for the Assessment was incorrect. Roman testified about the content of the Assessment, the underlying audit, his analysis of the CPRs, and the results of his investigation. In the course of conducting his audit and gathering information about Naya’s prevailing wage violations, Roman interviewed some of the workers and asked them to describe the work they did on the Project. These workers provided answers to a questionnaire provided by DLSE. The workers

⁸ No information was provided to the Hearing Officer as to whether, or when, the District may have recorded a notice of completion.

summarized their recollection of the period of time they were employed on the Project as well as the days and hours worked, notably including underreported straight time and overtime hours. All of the workers involved in the investigation asserted that their rate of pay was \$25.00 per hour, and all of them denied ever having received payment for fringe benefits. The workers reported having been paid by personal check, with cash, or both. Roman assisted the workers in the preparation of either declarations or affidavits. He reviewed the Contract and the applicable PWD. He reviewed several sets of CPRs submitted by both Naya and Fata and noted inconsistencies in the number of workers reported on the Project per day, the number of days that Naya was on the Project site, and the number of hours.⁹ Roman also detected discrepancies between the numerous overlapping and inconsistent CPRs and the complaints by the workers he had interviewed, especially as to the underreporting of hours worked and the underpayment of wages due. All of this evidence was unrebutted in light of Fata's failure to participate in the Hearing.

The following prevailing wage violations were detected by Roman and included in the Assessment. These violations are substantiated by the evidence produced by DLSE at the Hearing.

Naya and Fata underreported the days and hours worked on the Project, resulting in underpayment. The unrebutted evidence establishes that most of Naya's workers employed on the Project, as reflected in the audit that supports the Assessment, were not paid for at least some of their hours worked. Either the workers were not paid for all hours worked on any given day, or they were not paid for some of the days they performed work. Given the conflicting information that can be gleaned from the CPRs provided by both Fata and Naya, the dates and numbers of hours worked reported on those CPRs must be augmented by the recollection of the workers themselves, recollection that was reasonably detailed and consistent from worker to

⁹ Many of the CPRs in the record are legally noncompliant.

worker.

Naya failed to pay its workers the required prevailing wage rate. All of the interviewed workers assert that they were paid at the flat rate of \$25.00 per hour, with no additional compensation for fringe benefits. Neither Naya nor Fata ever produced copies of cancelled payroll checks, bank statements, or other evidence that might have served to refute their workers' assertions. In this respect, the CPRs can only be regarded as self-serving and falsified. With no evidence of actual wage payments from either Naya or Fata, the alleged underpayment of the applicable prevailing wage rate and the alleged nonpayment of fringe benefits is credible and un rebutted.

Naya failed to pay one worker at the applicable overtime rate. One of Naya's workers, Eric Urzua, reported that he worked nine hours per day over a period of ten days, but was not paid overtime. The PWD required double time for overtime work. The Assessment properly asserted that this worker was underpaid for ten overtime hours.

Given Fata's failure to appear and participate in the Hearing, Fata has failed to carry its burden to prove the Assessment is incorrect. It must be concluded that the workers employed on the Project by Naya were underpaid in the aggregate amount of \$84,010.02.

Section 1743, subdivision (a), provides, in part, that "The contractor and subcontractor shall be jointly and severally liable for all amounts due pursuant to a final order under this chapter or a judgment thereon." Accordingly, Fata has joint and several liability for unpaid wages in the amount of \$84,010.02

DLSE's Penalty Assessment Under Section 1775 Was Proper.

Section 1775, subdivision (a)(1), provides that the contractor and any subcontractor be penalized a maximum of \$200.00 "for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rates as determined by the

director” Section 1775, subdivision (a)(2)(B)(iii), states that the penalty for failure to pay the required prevailing wage rates may not be less than \$120.00 if the Labor Commissioner determines that the violation was willful, as defined in subdivision (c) of section 1777.1.¹⁰ Section 1775, subdivision (a)(2)(D), provides that the determination of the Labor Commissioner as to the amount of the penalty shall be reviewable only for an abuse of discretion. Abuse of discretion is established if the “agency’s nonadjudicatory action . . . is inconsistent with the statute, arbitrary, capricious, unlawful, or contrary to public policy.” (*Pipe Trades v. Aubry* (1996) 41 Cal.App.4th 1457, 1466.) In reviewing for abuse of discretion, however, the Director is not free to substitute his or her own judgment “because in [his or her] own evaluation of the circumstances the punishment appears to be too harsh.” (*Pegues v. Civil Service Commission* (1998) 67 Cal.App.4th 95, 107.)

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 DLSE abused its discretion in determining that a penalty was due or in determining the amount of the penalty.” (Cal. Code Regs., tit. 8, § 17250, subd.(c).)

DLSE assessed section 1775 penalties at the rate of \$200.00 based on Naya’s underreporting of the size of its workforce, underreporting of days and hours worked, and underpaying Naya’s workers in 471 instances. The maximum penalty rate of \$200.00 per violation was also chosen because Fata was already facing one other assessment for similar violations at the time this one was issued, and because DLSE deemed Naya’s violations to be intentional.

The burden was on Fata to prove that DLSE abused its discretion in setting the

¹⁰ The reference in section 1775, subdivision (a)(2)(B)(iii), to section 1777.1, subdivision (c), is mistaken. The correct reference is to section 1777.1, subdivision (e). According to that subdivision as it existed on the July 13, 2015 date of the bid advertisement, a willful violation is defined 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.”

penalty amount at the rate of \$200.00 per violation and in calculating the number of violations. Fata failed to carry that burden.

Additionally, Fata did not take the necessary actions to avail itself of the safe harbor protection for prime contractors in section 1775, subdivision (b). Having not submitted for the record a copy of the subcontract it had with Naya and having not appeared at the Hearing, Fata did not demonstrate that a copy of the relevant statutes was included in the subcontract. While there are other requirements for the safe harbor protection that Fata has not met, the failure as to the subcontract alone suffices to establish Fata's liability for section 1775 penalties. (§ 1775, subd. (b)(1).)

Accordingly, Fata is liable for section 1775 penalties in the sum of \$94,200.00, calculated at the \$200.00 penalty rate for 471 violations.

DLSE's Penalty Assessment Under Section 1813 Was Proper But Fata Is Not Liable for the Penalty.

Section 1813 provides that a contractor or subcontractor shall pay a flat \$25.00 penalty for each calendar day, per worker, for failure to pay the required overtime premium prescribed by the applicable PWD. In this case, the Assessment found that section 1813 penalties were due at the rate of \$25.00 per violation, in the total amount of \$250.00 for 10 instances of Naya failing to pay overtime rates to its workers.

Fata, however, is not liable under section 1743 for penalties assessed under section 1813 for Naya's failure to pay overtime rates. (See, e.g., pp. 8-16, Director's decision in *W.A. Thomas Company, Inc.*, Case No. 12-0106-PWH, relying on legislative history of section 1743.) *W.A. Thomas Company, Inc.* is posted on the Department's website at: <https://www.dir.ca.gov/oprl/1742decisions/12-0106-PWH.pdf>.¹¹ Since a prime contractor has no joint and several liability for section 1813 penalties assessed

¹¹ An administrative decision may not be expressly relied on as precedent unless so designated by the agency. (Gov. Code, § 11425.60 subd. (a); *Sheet Metal Workers Internat. Ass'n, Local No. 104 v. Rea* (2007) 153 Cal.App.4th 1071, 1086.) *W.A. Thomas, Inc.* was not designated as precedential.

against its subcontractor, Fata is not liable for the \$250.00 in penalties assessed under section 1813.

Fata Is Liable for Liquidated Damages.

Section 1742.1, subdivision (a), provides for the imposition of liquidated damages (essentially a doubling of unpaid wages) if those wages are not paid within 60 days following the service of a civil wage and penalty assessment under section 1741. Under section 1742.1, subdivision (b), a contractor may entirely avert liability for liquidated damages if, within 60 days from issuance of the assessment, the contractor deposits into escrow with the Department the full amount of the assessment of unpaid wages, plus the statutory penalties under section 1775. There is no evidence that either Fata or Naya made such a deposit with the Department, or that any of the assessed wages were paid within 60 days.

In addition, as of July 15, 2018, when the Assessment was issued in this matter, the Director's discretionary power to waive liquidated damages had been deleted from section 1742.1 by Senate Bill 96. (Stats. 2017, ch 28, § 16, eff. June 27, 2017.)

Section 1743, subdivision (a), provides that the prime contractor has joint and severally liable for all amounts found due. In light of the finding that unpaid prevailing wages in the amount of \$84,010.02 are due and owing, Fata is liable for liquidated damages in the same amount.

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

FINDINGS AND ORDER

1. DLSE timely served the Civil Wage and Penalty Assessment on Antoun Jean Fata dba Fata Construction and Development with respect to the Project.
2. Affected contractor Antoun Jean Fata dba Fata Construction and Development

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

3. Naya Services, Inc., a subcontractor of Antoun Jean Fata dba Fata Construction and Development, underpaid the workers in the amount of \$84,010.02 in prevailing wages.

4. Prime contractor Antoun Jean Fata dba Fata Construction and Development is jointly and severally liable for the unpaid wages, and liquidated damages as a result of violations of the prevailing wage law by its subcontractor, Naya Services, Inc.

5. Penalties under Labor Code section 1813 are not due from Antoun Jean Fata dba Fata Construction and Development in the amount of \$250.00 for 10 violations at the rate of \$25.00 per violation.

6. The Labor Commissioner did not abuse her discretion in assessing penalties against Antoun Jean Fata dba Fata Construction and Development under section 1775 at the rate of \$200.00 per violation for 471 violations, for a total amount of \$94,200.00.

7. Because none of the unpaid prevailing wages were paid within 60 days after service of the Assessment, liquidated damages are due from Antoun Jean Fata dba Fata Construction and Development in the amount of \$84,010.02.

8. The amounts asserted in the Assessment to be due from Antoun Jean Fata dba Fata Construction and Development, as modified and affirmed by this Decision, are as follows:

//

//

//

//

Category	Amount Due
Wages	\$84,010.02
Penalties under section 1775, subdivision (a)	\$94,200.00
Liquidated Damages	\$84,010.02
TOTAL	\$262,220.04

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

The Civil Wage and Penalty Assessment is affirmed as modified, as set forth in the above Findings. The Hearing Officer shall issue a Notice of Findings which shall be served with this Decision on the parties.

Dated: 4/24/20



Katrina S. Hagen
Director
Department of Industrial Relations