

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Grant Construction, Inc.

Case No. 20-0229-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected subcontractor Grant Construction, Inc. (Grant) requested review of a Civil Wage and Penalty Assessment (Assessment) issued by the Division of Labor Standards Enforcement (DLSE) on June 23, 2020, with respect to work performed on a project named Wasco 4% Farmworker Housing Project (Project) in Kern County. The Assessment determined that \$707,692.03 was due in unpaid prevailing wages, and \$623,990.00 was due in statutory penalties, resulting in an overall Assessment of \$1,331,682.03.

On May 11 and 13, 2021, a Hearing on the Merits occurred by video and audio conferencing before Hearing Officer Edward Kunnes. David Cross appeared as counsel for DLSE, and Daniel Klingenberger appeared as counsel for Grant. Former Deputy Labor Commissioner Dina Morsi and Grant workers Ramiro Sanchez, Osmar Villegas, and Rodolfo Yuriar testified in support of the Assessment. Grant president, Grant Fraysier, field operations manager Randy Di Francesco, account manager Hugo Montoya, and controller Julio Vega testified for Grant. Following the submission of post-trial briefs, the matter was submitted for decision on June 8, 2021.

Prior to the first day of hearing, the parties stipulated to the following:

- The work at issue in the Assessment was subject to the prevailing wage requirements.
- DLSE served the Assessment timely.
- The Request for Review was filed timely.

- Grant made a deposit for the full amount of the Assessment with the Department of Industrial Relations (DIR) within 60 days after service of the Assessment.¹

The issues for decision are as follows:

- Did the audit correctly list the hours worked?²
- Were the mathematical calculations as set forth in the amended Assessment correct?
- Did the certified payroll records (CPRs) correctly reflect the wages paid to the workers?
- Did workers receive the wages listed in the CPRs from Grant?
- Did Grant fail to pay prevailing wages to workers on Project when an employee cashed and distributed other workers' wages in amounts less than the prevailing wage?
- Were all required training fund contributions paid to an approved plan or fund?
- Did Grant fail to provide contract award information to the applicable apprenticeship committees within ten days from the date of execution of the subcontract?
- Did Grant fail to timely request dispatch of apprentices for all employed crafts?
- Did Grant fail to employ sufficient registered apprentices on the Project?

¹ The deposit of the full amount of the Assessment with the DIR eliminates a contractor's liability for liquidated damages. (Labor Code section 1742.1, subdivision (b).)

² The parties set forth the issue whether the audit used the correct prevailing wage classifications, but there was no disagreement regarding the workers' classifications or the required prevailing wage for those classifications.

- Is Grant liable for penalties under Labor Code section 1775?³
- Is Grant liable for penalties under section 1813?
- Is Grant liable for penalties under section 1777.7?

On the first day of hearing, DLSE made a motion to amend the Assessment downward by removing worker Jose Luis Alvarez from the audit of those employees allegedly owed wages. (Cal. Code Regs., tit. 8, § 17226, subd. (a).) As a result of the amendment, DLSE asserted that \$668,548.85 was due in unpaid prevailing wages, and \$590,990.00 was due in statutory penalties. This amendment resulted in an overall Assessment of \$1,259,538.85. Grant did not object to the motion; thus, it was granted.

For the reasons set forth below, the Director of Industrial Relations finds that DLSE carried its initial evidentiary burden of presenting evidence at the hearing that provided prima facie support for some of the amended Assessment, but thereafter Grant carried its burden of proving that the Assessment was incorrect in part. (See Cal. Code Regs., tit. 8, § 17250, subs. (a), (b).) Accordingly, the Director issues this decision affirming but modifying the amended Assessment.

FACTS

The Project.

On February 1, 2017, the Awarding Body, the Housing Authority of the County of Kern, posted an invitation for bids, advertising the building of farmworker housing, including townhomes, flats, a community building, laundry buildings, daycare center and medical offices. (DLSE Exhibit 7, pp. 156 and 158.) From the bid advertisement date, DLSE identified the correct prevailing wage determination for all classifications worked on the Project.⁴

³ All further section references are to the California Labor Code, unless otherwise indicated.

⁴ The twenty-seven audited workers were Residential Carpenters (Residential Framer & Finisher), with the exception of Raul Lugo Flores, who worked in the classifications of Residential Laborer, Iron Worker,

The prime contractor Wallace and Smith General Contractors signed a contract with the Housing Authority on April 12, 2017. (DLSE Exhibit 8, pp. 161 and 174.) On April 20, 2017, the prime contractor entered a subcontract with Grant to perform work on 66 apartments, a laundry facility and a community building, including framing and siding. (DLSE Exhibit No. 9, pp. 177 and 203.) Grant had 206 workers on the Project for over a year beginning on June 19, 2017 and ending on November 21, 2018. (DLSE Exhibit 27, pp. 437-1328.) On February 28, 2019, a Notice of Completion was recorded in the Kern County Official Records.

The Public Works Complaint, Investigation, and Amended Assessment.

On or about February 13, 2019, DLSE received a worker complaint about the Project. (DLSE Exhibit 19, pp. 275-278.) The complainant, Ramiro Sanchez Ulloa, complained of non-payment / underpayment of wages, and failure to pay travel and subsistence. (*Id.* at p. 275.) In the complaint, Sanchez named Grant and Hector Cervantes as his employer, and Cervantes as the person in charge. (*Ibid.*)

Dina Morsi, a Deputy Labor Commissioner II, investigated the complaint. As part of the investigation, Morsi sent an employee questionnaire to Sanchez (DLSE Exhibit 19, p. 279) and other workers. Sanchez and employees John Anthony Huerta Cortez and Rodolfo Ereasmio Yuriar returned the questionnaires. (DLSE Exhibits 20 and 21.) In addition, Morsi interviewed workers. (DLSE Exhibit 22.) Morsi's investigation revealed that Cervantes cashed workers' paychecks and gave the workers significantly less cash than the pay amount listed on their checks. Following the investigation, Morsi issued the Assessment.

In the original and amended Assessment, DLSE found, in addition to underpayment of wages as described above, that Grant failed to report all workers and

and Residential Carpenter. The basic hourly rate for a Residential Carpenter is \$29.55. When training fund contributions and fringe benefits payments are added, the straight time total is \$46.67 per hour. (DLSE Exhibits 14 and 17.)

hours worked on the CPRs and falsified CPRs, paychecks, and paystubs. Altogether, the amended Assessment found that Grant underpaid the required prevailing wages in the amount of \$666,150.29, excluding training fund contributions, which DLSE found Grant failed to pay in the amount of \$2,398.56. DLSE assessed penalties under section 1775 at the rate of \$200 per violation for 2,918 violations in a total amount of \$583,600.00. In addition, DLSE found Grant failed to pay proper overtime wages, subjecting it to penalties under section 1813 at the rate of \$25 per violation for two violations, totaling \$50.

Finally, DLSE found Grant failed to employ apprentices for the classifications Carpenters, Laborers and Iron Workers in the required 1 to 5 ratio. Thus, DLSE assessed penalties under section 1777.7 at the rate of \$20 per violation for 367 violations in a total amount of \$7,340.00.

The Testimony at Hearing.

The testimony revealed a story of Grant contacting Hector Cervantes to work on the Project and to identify an additional team of workers to place siding on the housing, when Grant began running behind schedule on the Project. Cervantes, who had never previously worked for Grant, brought a crew of siding workers to the Project, many of whom had previously worked with Cervantes. On these prior jobs, Cervantes had established a practice of skimming wages from workers' paychecks. Cervantes continued this practice on the Project. Grant allowed and facilitated Cervantes practice of skimming wages by using Cervantes as a point of contact with the workers he brought to the Project, making Cervantes a crew leader, and giving Cervantes the workers' paychecks for distribution. To these workers, Cervantes was the foreman - the person in charge. Grant did nothing to discourage this belief. At an unspecified time during the Project, a worker, Yovani Perez, complained to Grant about Cervantes cashing his paycheck and giving him less cash than the amount reflected on his paycheck. Thereafter, Grant offered to take the workers by van to its corporate

headquarters for delivery of their weekly paychecks. However, Cervantes's practice continued throughout the duration of the Project, still taking the workers' paychecks, cashing them, skimming off the top, and disbursing proceeds.

Testimony of Former Deputy Labor Commissioner Dina Morsi.

Morsi investigated a prevailing wage complaint against Grant. DLSE classified all audited workers based on the classification Grant used in its CPRs. DLSE and Grant classified all audited workers as Residential Carpenters, with the exception of one worker whom Grant classified as a Residential Carpenter, Residential Laborer, and Iron Worker.

The workers Cervantes brought to the Project whom Morsi interviewed, provided a consistent story of Cervantes taking checks from workers, cashing them, and paying the workers less money than the amount appearing on the paycheck, paystubs, and CPRs. Cervantes paid them less money than the prevailing wage rate for the classification(s) in which they worked. Moreover, the documents, especially the cancelled checks, which contained both the obviously forged endorsements and the deposit stamp from either Discoteca Vallarta or Golden Pacific Bank, supported the workers' contentions. For example, one worker's paychecks were cashed in Yuba City more than 300 miles from his residence in Wasco.

Morsi interviewed seven workers brought to the Project by Cervantes. They were Victor Manuel Escobedo aka Joel Carreon, Ruben Gomez, John Anthony Huerta Cortez, Ramiro Sanchez, Mario Trasvino aka Antonio Guzman, Rodolfo Yurjar and Osmar Villegas aka Jose Alvarez.⁵ Morsi discovered that several of the workers, Victor Manuel Escobedo, Mario Trasvino, and Omar Villegas, used names of other employees who

⁵ The Penalty Review misreports Osmar Villegas's alias as Julian Alvarez, rather than correctly indicating his alias as Jose Alvarez. (DLSE Exhibit 5 at p. 144.)

were also working on the Project. The workers, who used aliases, stated that Cervantes directed them to use the other employees' names.⁶

The workers told Morsi that Cervantes paid them in cash. Ramiro Sanchez informed Morsi that Cervantes paid him \$900-\$950 per week the first month, then two months later, \$1,000 per week thereafter. (DLSE Exhibit 22 p. 367.) Rodolfo Yuriar informed Morsi that Cervantes paid him \$900-\$1,000 per week. (*Id.* at p. 371.) John Anthony Huerta Cortez said Cervantes paid him \$900 weekly. (*Id.* at p. 373.) Victor Manuel Escobedo told Morsi Cervantes paid him \$700 per week throughout. (*Id.* at p. 383.) Two of the workers, Mario Trasvino and Osmar Villegas (aka Jose Luis Alvarez) said that Cervantes paid them \$600 per week to start and that their pay was later raised to \$700. Trasvino said the raise occurred after 7 months. (*Id.* at pp. 380 and 385.) Villegas said the raise occurred when he was more experienced. (*Id.* at p. 385.) Finally, Ruben Gomez indicated that Cervantes paid him \$600 per week throughout. (*Id.* at pp. 376-377.)

Cervantes charged Victor Manuel Escobedo \$200 and Mario Trasvino \$250 a month for rent while working at the Project.⁷ Morsi testified that many of the workers whom she interviewed referred to Cervantes as a foreman and some would carpool with him to the jobsite from Yuba City.

Morsi also interviewed four workers, Alejandro Ceja Castaneda, Scott Gray, Abraham Gutierrez Cruz, and Armando Garcia Herrera, who were not members of Cervantes's crew. Those four individuals all informed Morsi that they were paid by check and were paid in full. (DLSE Exhibit 22, pp. 375, 378, 381, and 387.) Morsi did not include these four workers in the audit because the evidence did not indicate that

⁶ The indication was that Cervantes directed the use of aliases for a wrongful purpose, but DLSE never identified why Cervantes created these aliases.

⁷ The Assessment did not indicate travel and subsistence violations.

anyone tampered with their paychecks. Morsi included in the audit only members of Cervantes's crew, whose paychecks were cashed at the two suspect banking locations, and where the endorsements contained similar handwritten forgeries of the workers' signatures.

In addition to conducting interviews, Morsi reviewed Grant's CPRs, cancelled paychecks, and timesheets. Morsi compiled this information into the Audit Worksheets and the Penalty Review. (DLSE Exhibits 2 and 5.)

Morsi was not able to interview all of the workers whose paychecks were cashed by the same individual at Discoteca Vallarta or Golden Pacific Bank. The audited workers Morsi did not interview were Jose Adan Barragan, Jorge Barreras Vega, Omar Carreon Gonzalez, Joel Carreon Rivera, Luis Coronel Soto, Omar De La Cruz, Pedro Figueroa Ouiroz, Joaquin Garcia Marmolejo, David Garcia, Adrian Herrera Sanchez, David Caesar Infante, Jorge Lopez Hernandez, Luis Lopez Hernandez, Luis Loza Aguilar, Raul Lugo Flores, Daniel Manjares, Yovani Perez, Isai Samuel Quezada Santos, Jose Edgar Salvador Peregrina, and Ricard Sanchez Pineda. Morsi applied a wage rate of \$15.00 an hour for a total of \$600 a week to these twenty workers she was unable to interview. Morsi testified on direct examination that the \$600 a week amount was based on a common rate she found paid to the workers she was able to interview.⁸ Morsi used the work hours stated in Grant's CPRs for these twenty workers or the work hours of similarly situated crewmembers who told her that they worked with one or more of these workers.

Morsi incorporated copies of the workers' cancelled paychecks into the Penalty Review for almost all of the twenty-seven audited workers. The cancelled paychecks evidenced that a single person had cashed the checks at two locations. The purported

⁸ Grant rebutted \$600 as a common rate paid these audited workers but did not present evidence that would support any particular wage rate.

endorsements of the cashed checks at these locations were written in the same handwriting.

Other irregularities Morsi uncovered included CPRs with workers' paychecks misidentified as well as CPRs with underreported work hours. Morsi also found that the CPRs listed workers Joel Carreon Rivera, Raul Lugo Flores, and Ricardo Sanchez Pineda as having received paychecks identified by check numbers on the CPRs that did not correspond to their names on the actual checks. Under cross-examination, Morsi was not able to identify any CPRs listing Ricardo Sanchez Pineda during the periods she indicated Grant had incorrectly attributed check numbers paid him. Furthermore, workers Gomez, Sanchez and Yuriar reported in reconstructed calendars prepared for DLSE having worked more hours than reflected on the CPRs, subjecting Grant to additional unpaid wages and penalty violations.

Based on interviews and the cancelled checks, Morsi found that Grant underpaid prevailing wages to 27 of its 206 workers on the Project because Cervantes cashed paychecks and disbursed a lesser sum than the amounts stated on the paychecks.⁹ Due to the severity and extent of the violations, DLSE assessed a \$200 penalty rate for section 1775 violations, although Grant did not have a history of prior violations.

With respect to apprenticeship requirements, Morsi found that Grant timely submitted DAS 140 and DAS 142 forms for all applicable crafts to all committees in the area. However, the reported journey level hours on the CPRs for the crafts Carpenter, Iron Work ,and Laborer indicated a deficit of hours for the required 1:5 ratio of apprentice to journey-level workers. Morsi stated that this apprenticeship violation arose without including the missing workhours shown on reconstructed work calendars prepared by Gomez, Sanchez and Yuriar.

⁹ DLSE reduced from 28 to 27 affected workers in the amended Assessment, removing Jose Luis Alvarez, as stated *infra*.

Testimony of Worker Ramiro Sanchez.

Sanchez testified that Cervantes, with whom he had previously worked, hired him to perform siding for Grant at the Project's jobsite. Sanchez worked on 68 buildings, using saws, ladders and nail guns. He worked for over a year alongside Rodolfo Yuriar, Mario Trasvino, Osmar Villegas, John Anthony Huerta Cortez, Daniel Manjares, Jorge Barreras, Ruben Gomez, and others, whom Cervantes had identified for hire by Grant. Most of these workers were from Yuba City and a few from Fairfield. Sanchez lived in Las Vegas. Other local Grant employees worked on the Project who were not among Cervantes's hires. Cervantes's title on the Project was crew leader, and Sanchez would assume the duties of crew leader when Cervantes was not on the jobsite.

Sanchez never cashed or deposited a company check for work he performed on the Project. Instead, each Friday Sanchez received from Cervantes \$900 in cash a week at the beginning of the Project and later \$1000 a week. Sanchez was unaware that the Project required payment of prevailing wages, and unaware that he could receive his paycheck directly from Grant.

Grant worker Yovani Perez complained by email to Grant about not receiving his paycheck.¹⁰ In response, Grant directed Cervantes's hires to ride in a van to pick up their paychecks at Grant's office in Bakersfield.¹¹ Cervantes travelled in the van to the office with the workers and collected the paychecks after the workers signed for them.¹²

¹⁰ Yovani Perez was an audited worker. (DLSE Exhibit 2 at pp. 65 - 69 and Exhibit 5 at p. 133.) DLSE referenced the worker as Jovani Perez and Grant referenced the worker as Jovana Perez in their respective posttrial briefs.

¹¹ Perez's email complaint to Grant was not offered as an exhibit by either side.

¹² No specified dates were provided for when Perez complained and when Grant began the van service to pick up paychecks.

After August 2018, Sanchez began working a different job for Grant, on which he was not part of Cervantes's crew; he then received his full paycheck of \$1,300 a week and a separate check for room and board. Sanchez obtained some but not all of his paystubs for his work on the Project after he left Grant.

Deputy Labor Commission Morsi contacted Sanchez and asked him to prepare a calendar on which he marked hours for each day he worked. He had kept contemporaneous notes of the hours worked on the Project and used those notes to prepare the handwritten calendar. The calendar reflected five-day workweeks of 8-hours from Thursday, September 14, 2017 through Friday, August 17, 2018, excluding a week within each of the months of December, January, and March. (DLSE Exhibit 19, pp. 281 – 283.)

Testimony of Worker Osmar Villegas.

Villegas testified that he worked on the Project performing siding, using nail guns, saws, finishing guns, hoses, and ladders, from August 2017 until the Project finalized. Villegas previously worked with Cervantes on one siding job, for which Cervantes paid him cash. When he arrived on the jobsite each morning, Cervantes would assign him to a group of three workers for the day. At Cervantes's direction, Villegas used the name of another Grant worker on the jobsite, Jose Luis Alvarez, and did not tell Grant that his name was Osmar Villegas.

Cervantes paid Villegas \$600 cash each week. Villegas never received a copy of his paycheck nor even reviewed his paycheck. Near the end of the Project, Villegas went to Grant's office where he signed two paychecks that he immediately turned over to Cervantes. He did not understand the payment procedure at Grant, and therefore, did not think to ask for copies of his paychecks or paystubs. Additionally, he had not received a paycheck for previous construction jobs.

Testimony of Worker Rodolfo Yuriar.

Yuriar testified that he worked for Grant performing siding for which Cervantes paid him cash in an amount between \$850 and \$1,000 weekly. He had previously worked with Cervantes on three or four siding jobs within the prior year and worked with him a year following the Project. Cervantes always paid him cash on all jobs. He recalled once receiving a paycheck from Grant but immediately handed it to Cervantes.

Yuriar filled out a questionnaire and calendar at the request of DLSE. (DLSE Exhibit 21.) His calendar showed that he began work on the Project on September 14, 2017 and worked an eight-hour day and a five-day workweek through May 25, 2018, missing two weeks in December, four days in January, and one week in March. (*Id.* at pp. 328 and 329.) Additionally, he worked a five-day workweek for eight-hours a day one week in July, September and October 2018. (*Id.* at p. 330.) For the workweeks in 2018 on which he did not work on the Project, he worked with Cervantes at another project for Grant. Yuriar did not receive a paycheck on the other Grant project.

Testimony of Grant's President Grant Fraysier.

Fraysier testified that he began Grant 27 years prior to the date of hearing. It performed both public work and private contracts, employing 200 – 400 workers. He did not recall any DLSE assessments issued against Grant. He did not personally know of Cervantes's employment with the company, but had he known Cervantes was cashing workers' paychecks, he would not have allowed it.

Testimony of Grant's Construction Manager Randy Di Francesco.

Di Francesco testified that he had worked at Grant for over 20 years as a construction manager. On this Project, he oversaw rough framing and siding for the construction of farmworker housing. Di Francesco looked to hire additional siding workers when he determined that Grant could not keep pace with an accelerated work schedule. Di Francesco met Cervantes to put together an additional team of siding workers. Di Francesco screened the workers Cervantes had suggested to hire for

evaluation of their experience, some siding construction tasks taking less skill than other tasks. Di Francesco did not turn away any of the workers, hiring the majority of those with whom he spoke. During the screening process, Di Francesco stated that he explained to the new hires that Grant paid prevailing wage rates for work on the Project.

Aside from Di Francesco who managed the entire Project for Grant, two foremen supervised workers on the siding portion of the Project. Cervantes was not among them. All work quality issues went through the foremen before consulting Di Francesco. Di Francesco stated that Cervantes worked in a crew that varied in size, performing the same work as the others with no supervising responsibilities. However, when Di Francesco was presented with Grant's timesheets that identified Cervantes as a crew leader, he stated that Cervantes acted as a point of contact to translate from Spanish to English, and vice a versa. (Grant's Exhibit E, at pp. 57 – 178.) Di Francesco noted the time of day that the workers from Northern California arrived and left the jobsite and that some of the workers commuted with Cervantes but was unable to identify any of those workers by name. Generally, the out of town workers left a couple of hours earlier on Friday to avoid traffic. Once Grant completed the siding job on the Project, Cervantes did not continue as an employee.

Testimony of Grant's Accounting Manager Hugo Montoya.

Montoya testified to having worked at Grant for 16 years as an accounting manager whose work overlapped with human resource functions. Montoya testified to providing hiring packets but did not describe their contents. He also provided safety videos and personal protective equipment to the new hires on the Project. Montoya confirmed that Cervantes was not involved with providing these materials to the new hires, and Cervantes had not worked for Grant prior to his hire for the Project. Montoya also testified that Ramiro Sanchez left the Project on or around March 25, 2018, and returned for rehire in August 2018.

On this Project, accounting delivered workers' paychecks to foremen at the jobsite by FedEx delivery, to crew leaders at the office, and employees who came to the office by a van. Occasionally, Cervantes picked up paychecks for workers from Grant's office. Montoya also confirmed receipt of the complaint from Yovani Perez about not receiving his paychecks but stated that the reference within the email to a foreman confused him because Cervantes was not a foreman.¹³ Montoya confirmed that Grant provided a van for workers to collect their paychecks after receipt of Yovani Perez's complaint.

Montoya testified to sending DAS 140 and form DAS 142 to the applicable committees timely. He sent the form DAS 142 to the applicable committees twice, once in June 2017 and again in August 2018 as construction repairs required their resubmittal. Grant employed Carpenter, Laborer and Iron Worker apprentices on the Project. The Carpenter committee representative periodically visited the jobsite and sent apprentices as they became available. Grant employed all the apprentices the Carpenters' union sent to the jobsite. An Iron Worker apprentice came to the jobsite but left the Project after a few days because he preferred working on bridges, and the committee did not send another apprentice. The Laborer committee sent one apprentice and Grant employed that apprentice.

Testimony of Grant's Controller Julio Vega.

Vega testified to having worked at Grant for over 19 years as a controller. Pursuant to Grant's standard practice, the employees in the field maintained their own timesheets. After DLSE served its Assessment, Vega prepared a summary of the hours worked by Ramiro Sanchez, Rodolfo Yuriar, and Anthony Huerta Cortez based on their company timesheets. (Grant's Exhibit J.) He also investigated Victor Manuel Escobedo, Mario Trasvino, and Osmar Villegas, who claimed to have used aliases, and found no

¹³ Montoya specified no date on which Grant received Perez's complaint.

timesheets for them. Vega was able to confirm that the misappropriated names, Joel Carreon, Antonio Guzman and Jose Alvarez, belonged to employees working on the Project. Additionally, Vega found Grant did not hire Ricardo Sanchez Pineda until May 28, 2018, well after the dates on which DLSE alleged the CPRs incorrectly attributed to him paychecks belonging to another worker.

Vegas testified that Cervantes typically recorded eight workhours each day of the workweek, except Friday when he recorded six or fewer working hours. (Grant's Exhibit E.) This followed a pattern of the out of town crew, including Sanchez, Yuriar, and Gomez, leaving early on Fridays. (Grant's Exhibit E, pp. 82–102, 103–114, and 115–156.) The calendars Sanchez, Yuriar, and Gomez created for DLSE reflected more hours worked because they did not account for leaving early on Friday.

During the pendency of the Project, Grant simultaneously worked on a different project in Paseo Robles. Cervantes, Sanchez and Yuriar also worked on the project in Paseo Robles. (Grant's Exhibit G and Exhibit I.) Cervantes did not receive the same benefits that Grant foremen received because he was not a foreman.

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 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 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, supra*, at p. 985.) Section 1775, subdivision (a), requires that contractors and subcontractors pay the difference to workers who were paid less than the prevailing wage rate, and prescribes penalties for failing to pay the prevailing wage rate. Section 1813 provides additional penalties for failure to pay the correct overtime rate. Section 1742.1, subdivision (a), provides for the imposition of liquidated damages (essentially a doubling of the unpaid wages) if the unpaid wages are not paid within 60 days (or the amount of the full assessment deposited with DIR) following service of a civil wage and penalty assessment under section 1741.

When DLSE determines that a violation of the prevailing wage laws has occurred, 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 initial burden of presenting evidence that “provides prima facie support for the Assessment” (Cal. Code Regs., tit. 8, § 17250, subd. (a).) When that burden is met, “the Affected Contractor or Subcontractor has the burden of proving that the basis for the Civil Wage and Penalty Assessment . . . is incorrect.” (Cal. Code Regs., tit. 8, § 17250, subd. (b); accord, § 1742, subd. (b).) At the conclusion of the hearing process, the Director issues a written decision affirming, modifying or dismissing the assessment. (§ 1742, subd. (b).)

DLSE Properly Assessed Unpaid Wages Due to Grant Workers.

The full and prompt payment of an employee's earned wages is a fundamental and well established public policy of this state. (*Smith v. Superior Court* (2006) 39 Cal.4th 77, 82; *Kerr's Catering Service v. The Department of Industrial Relations* (1962) 57 Cal.2d 319, 325-327.) Under the law, an employer has an obligation to deliver wage payment to its employees along with an itemized wage statement. (§ 226, subd. (a).) Payment requires receipt by the employee. (*Sondeno v. Union Commerce Bank* (1977) 71 Cal.App.3d 391, 395 ["[W]hatever is necessarily implied in a statute is as much a part of it as that which is expressed."]; *Blew v. Horner* (1986) 187 Cal.App.3d 1380, 1388; *Rushing v. Powell* (1976) 61 Cal.App.3d 597, 604 ["Where the main purpose of the statute is expressed the courts will construe it so as to effectuate that purpose by reading into it what is necessary or incident to the accomplishment of the object sought."].) On public works projects, prevailing wages are due to the employee, and the duty to pay those prevailing wages is not met by showing certified payroll but by demonstrating the actual receipt by the employee of the wages due.¹⁴

DLSE presented prima facie support for the Assessment that twenty-seven workers on the Project did not actually receive full payment of their wages due from Grant. Someone cashed the twenty-seven workers' paychecks at two locations: Feather River at Discoteca Vallarta in Yuba City, and Golden Pacific Bank in Sacramento. The bank stamp on the back of the checks established those two locations. The same

¹⁴ The legislature's concern for payment to and actual receipt of wages by employees can be seen in other statutory provisions, including the following: section 207 requiring the posting by the employer of the time and place of wage payment; section 208, requiring payment at the place of discharge; and, section 2810.5, requiring written notice to the employee at the time of hiring regarding wages paid and benefits provided. Likewise, section 203 indicates that in-person payment is the standard by relieving an employer of the requirement to pay waiting time penalties if an employee, "secretes or absents themselves to avoid payment to them,..." (See also *Oppenheimer v. Sunkist Growers, Inc.* (1957) 153 Cal.App.2d Supp. 897, 899 [waiting time penalties under section 203 are suspended upon actual receipt by the employee of all wages due with interest].)

person endorsed the checks; there was no attempt at replicating the worker's signature. DLSE made a factual inference that one person was cashing these checks. The fact that one worker lived more than 300 miles from where his checks were cashed supports this inference.

DLSE interviewed as many of Grant's workers on the Project as it could, eleven in all. Four interviewed workers were properly paid. Those four were not among the workers whose checks Cervantes cashed. The remaining seven interviewed workers did not receive the prevailing wage and were among the workers whose checks Cervantes cashed. DLSE relied on the declaration of several of those workers along with the interviews of the seven. Three of the workers, Ramiro Sanchez, Osmar Villegas, and Rodolfo Yuriar, testified at the Hearing on the Merits about payment in cash and their rate of payment. Documentary evidence corroborated the testimony.

DLSE was not able to interview 20 of the workers whose checks were cashed at Discoteca Vallarta in Yuba City and Golden Pacific Bank in Sacramento. It established, however, that those 20 workers also had their checks cashed at the same two locations with the same handwritten endorsement thereon, as the seven workers it was able to interview who said that Cervantes cashed their checks. The testimony of the seven workers, combined with the highly suspicious check cashing practice for the 20 additional audited workers during the pendency of the Project, provided substantial evidence in support of a prima facie case that the 20 workers whom DLSE was unable to interview, along with the seven interviewed workers, did not receive prevailing wages.

For these 20 workers, DLSE estimated that Cervantes paid them \$15 an hour or \$600 cash for a forty-hour workweek. DLSE reported that it based these 20 workers' wages on the most common weekly cash payment described by the seven affected workers it had interviewed. Grant correctly pointed out at the hearing and in its posttrial brief that the average weekly cash disbursement by Cervantes to the affected

interviewed workers was greater than \$600 cash, because the weekly cash payments ranged from \$600 to \$1,000 for the seven workers. Once DLSE met its initial burden of presenting evidence that provided prima facie support for the Assessment, Grant had the burden of proving that the basis for the Assessment was incorrect. (Cal. Code Regs., tit. 8, § 17250, subd. (b); accord, § 1742, subd. (b).)

The cash payments the seven received were considerably less than the prevailing wage rate of \$46.67 per hour. At the Hearing on the Merits, Omar Villegas testified to Cervantes paying him \$600 cash per week, \$15 an hour; Rodolfo Yurjar testified to Cervantes paying him between \$850 each week, \$21.25 an hour, and later \$1,000 cash each week, \$25 per week; and, Ramiro Sanchez testified to Cervantes paying him \$900 cash each week, \$22.50 per hour at first, and a couple months later \$1,000 per week. On the Penalty Review, it was shown that Cervantes paid Ruben Gomez \$600 cash per week; Cervantes paid Mario Trasvino \$600.00 cash per week, and after seven months increased his pay to \$700 cash per week, \$17.50 an hour; Cervantes paid Victor Escobedo \$700.00 cash per week; and Cervantes paid John Anthony Huerta \$900 cash per week. (Exhibit 5, at pp. 117, 120 and 143.) Additionally, Yuria believed that most of the workers on the project were paid between \$600-\$700 cash per week depending upon their experience; and Sanchez thought Cervantes paid him the most because he had the most experience and testified to acting as the alternative crew leader in Cervantes absences. (Exhibit 5, at pp. 137 and 145.)

DLSE's evidence demonstrated a pattern by Cervantes. A couple of workers with experience received \$850-\$1,000 a week in cash. The rest of the workers received \$600-\$700. This is borne out by what the workers told Morsi about how much they were paid, and by what they told her about their understanding of what others were paid. Yuria understood most of Cervantes's crew received \$600-\$700 cash per week. Sanchez's testimony also further supported this testimony that the most common cash payment was \$600-\$700 by confirming that weekly payments of \$900, \$950 and \$1,000

were reserved for the most experienced workers. Grant’s witness, Di Francesco, acknowledged some siding construction tasks took less skill than other tasks.

The evidence, viewed in the light most favorable to Grant, is that Cervantes made weekly cash disbursements to these 20 audited workers at \$700 a week – at the high end of the \$600-\$700 scale, or hourly cash payments of \$17.50. Applying this wage change, the amount owing and unpaid these 20 audited workers is as follows:

Employee	Total hrs. worked	Total wages paid at \$17.50 per hr.	Total wages at \$46.67 per hr.	Amount owing and unpaid
Jorge Barragan	1,847.5 ST hrs.	\$32,331.25	\$86,222.83	\$53,891.58
Omar Carreon	952.5 ST hrs.	\$16,668.75	\$44,453.18	\$27,784.43
Joel Carreon	950.0 ST hrs.	\$16,625.00	\$44,336.50	\$27,115.00
Luis Coronel	228.0 ST hrs.	\$3,990.00	\$10,640.76	\$ 6,650.76
Omar de la Cruz	561.0 ST hrs.	\$9,817.50	\$26,181.87	\$16,364.37
Pedro Figueroa	38.0 ST hrs.	\$ 665.00	\$ 1,773.46	\$ 1,108.46
Joaquin Garcia	69.5 ST hrs.	\$1,216.25	\$ 3,243.57	\$ 2,027.32
David Garcia	143.5 ST hrs.	\$2,511.25	\$ 6,697.15	\$ 4,185.90
Adrian Herrera	283.0 ST hrs.	\$4,952.50	\$13,207.61	\$ 8,255.11
David Infante	341.0 ST hrs.	\$5,967.50	\$15,914.47	\$ 9,946.97
Jorge Hernandez	123.0 ST hrs.	\$2,152.50	\$ 5,740.41	\$ 3,587.91
Luis Hernandez	458 ST hrs.	\$8,015.00	\$21,374.86	\$13,359.86
Luis Loza	364 ST hrs.	\$6,370.00	\$16,987.88	\$10,617.88
Raul Lugo	813 ST hrs.	\$14,227.50	\$39,942.71	\$25,715.21
Daniel Manjares	232 ST hrs.	\$4,060.00	\$10,827.44	\$6,767.44
Yovani Perez	1,544 ST hrs.	\$27,020.00	\$72,058.48	\$45,038.48
Isai Quezada	672 ST hrs.	\$11,760.00	\$31,362.24	\$19,602.24

Employee	Total hrs. worked	Total wages paid at \$17.50 per hr.	Total wages at \$46.67 per hr.	Amount owing and unpaid
Salvador Peregrina	598 ST hrs.	\$10,465.00	\$27,908.66	\$17,443.66
Ricardo Pineda	1,509 ST hrs.	\$26,407.50	\$70,425.03	\$44,017.53
Totals:	11,727 hrs.	\$205,222.50	\$547,299.11	\$342,076.61

Therefore, the portion of the amended Assessment representing prevailing wages unpaid and due these 20 workers is reduced by \$29,317.50, which is 11,727 total hours multiplied by \$2.50 (i.e. the difference of an hourly wage rate of \$17.50 as opposed to an hourly wage rate of \$15.00.)

Grant never argued or submitted evidence that the 27 audited workers actually received payment at the prevailing wage rate. Rather Grant argued unpersuasively that it did not violate the CPWL because it issued paychecks corresponding to the prevailing wage rate for the proper classification. Grant's reliance upon evidence that it had issued paychecks at the prevailing wage rate for these 27 audited workers failed to rebut DLSE's prima facie case that the workers did not receive the prevailing rate. While DLSE did not contest the classification of any Grant worker, it maintained that 27 workers did not receive prevailing wages because Cervantes cashed workers' paychecks and paid those workers less than the prevailing wage. Nowhere in the CPWL is there a statute that provides a safe harbor for employers who issue correct payment in paychecks but deny their workers prevailing wages by failing to ensure their workers actually receive the paychecks.

At each juncture, Grant set the stage for Cervantes to take advantage of these workers. First, Grant asked Cervantes to identify a crew of siding workers. Second, Grant designated Cervantes as crew leader, making him the point person for all communications to his crew of siding workers. Most of the workers did not speak

English and relied on Cervantes vis-à-vis the job. Finally, Grant delivered the paychecks to Cervantes for distribution to these employees. Of the seven workers who reported that Cervantes paid them cash each week they all presumed he was their foreman or crew leader. Some referred to him as the person who hired them.

Di Francesco sought out Cervantes to identify a crew of siding workers and made Cervantes the point of contact for translation between English and Spanish for management to communicate with those workers Cervantes had brought to the jobsite. Di Francesco was unable to identify a single new worker, other than Cervantes, when asked about which of the workers carpooled to the jobsite. That response by Di Francesco was indicative of the remote relationship of these workers to Grant's management. While Grant's reliance on Cervantes to identify a siding crew and to translate were not improper acts, they contributed to Cervantes's overall scheme when Grant handed Cervantes the workers' paychecks. Allowing Cervantes, a mere crew leader, neither a manager nor foreman, access to the workers' paychecks breached Grant's obligations under the CPWL.¹⁵ Common sense dictates that handing paychecks to a recent and untested hire for distribution to other employees creates a situation that is ripe for abuse.

In addition, Grant did not introduce evidence that it complied with Labor Code notices to workers about pay and benefits. (See §§ 207 and 2810.5.) Section 207 requires the posting by the employer of the time and place of wage payment. Section 2810.5, requires written notice to the employee at the time of hiring regarding wages paid and benefits provided. Compliance with the law has the salutary effect of providing workers with knowledge of their rights and inhibiting the ability of others such as Cervantes from taking advantage of them.

¹⁵ Di Francesco adamantly denied that Cervantes was a crew leader although Grant designated him as such on the timesheets and Grant admitted this fact in its posttrial brief. (Grant Exhibit E.)

Grant is also responsible for failing to take effective remedial action once it received Perez's complaint. After Grant received Yovani Perez's complaint regarding Cervantes' check cashing scheme, it took almost no remedial action to protect these workers from Cervantes.¹⁶ Montoya testified that Grant arranged for the workers' to be transported to its office in response to Perez's complaint, directing workers to its office for retrieval of their paychecks. Otherwise, Grant remained silent and allowed Cervantes to continue his scheme. Grant did nothing to prevent Cervantes from travelling in the van headed to the office nor did it investigate and confront Cervantes about his check-cashing scheme. Once Perez revealed to Grant that someone on the jobsite was taking workers' paychecks, Grant should have investigated the matter, determined the culprit, taken reasonable action to recover the misappropriated money and terminated the person. Grant failed to take any of these steps; nor was an explanation provided why Grant failed to take reasonable steps to ensure the workers received their rightful wages. Grant's suggestion in its posttrial brief that DLSE should have reported Cervantes to the police, amounts to a deflection of responsibility and only serves to emphasize that Grant did not report Cervantes to the police while he was working for it.

Imposing a duty of remedial action on Grant following Perez's complaint appears particularly appropriate since the testimony indicated that Grant gave Cervantes the workers' paychecks and only much later began the van service for the employees to come to the office to pick up the checks. However, Grant began the van service to its office without ever providing an explanation of its purpose to the workers. Given the totality of the circumstances, the continuation of Cervantes's check cashing scheme even after Grant stopped handing him workers' paychecks was a predictable result of its

¹⁶ Although Grant argued in its posttrial brief that Sanchez's testimony regarding Perez's complaint was hearsay, Montoya's testimony affirmatively adopted Perez's out-of-court statement when Montoya explained it was the impetuous for Grant setting up the van service to its office, thereby making it admissible hearsay. (Cal. Code Reg., title 8, § 17244.)

previous laissez faire policy with respect to distributing paychecks to its employees without providing the required notices of their rights. The lack of remedial action on Grant's part amounts to a ratification of the wrongful check skimming undertaken by Cervantes. (*Delfino v. Agilent Technologies, Inc.* (2006) 145 Cal.App.4th 790, 810, "An employer may be liable for an employee's willful and malicious actions under principles of ratification.") Thus, Grant may be held liable for wages skimmed by Cervantes even after Grant stopped giving Cervantes workers' paychecks.

Although Grant stated in its posttrial brief that it is customary to use an employee to distribute paychecks at the jobsite, Grant provided no evidence that this is a routine practiced in the construction business. Grant also argued that the workers consented to Cervantes cashing and skimming proceeds from their paychecks. This argument lacks merit since Grant contributed to Cervantes's appearance of authority; workers stated a belief that Cervantes acted under proper authority. Some of the testifying workers were unaware of receiving a paycheck from Grant while others understood that Cervantes cashed their paychecks and paid them from the check proceeds. As Sanchez testified, he thought that he worked for Cervantes, not Grant.

The determination that Grant failed to meet its legal obligations to its employees under the CPWL and wage and hour law so that it is responsible for their wage loss is consistent with principles from the doctrine of respondeat superior that hold an employer responsible for its employee's torts.¹⁷ An employee's willful, malicious and even criminal torts may fall within the scope of employment for the purposes of

¹⁷ Under respondeat superior, an employer is liable for its employee's torts, "if the activities that caused the employee to become an instrument of danger to others were undertaken with the employer's permission and were of some benefit to the employer, or in absence of proof of benefit, the activities constituted a customary incident of employment.[Citation]' [Citation]" (*Perez v. City and County of San Francisco* (2022) 75 Cal.App.5th 826, 833.) Grant handed workers' paychecks to Cervantes in lieu of distributing them itself.

respondeat superior if it may fairly be regarded as typical of or broadly incidental to the enterprise undertaken by the employer. (*Inter Mountain Mortg., Inc. v. Sulimen* (2000) 78 Cal.App.4th 1434, 1440.) Grant's reliance upon *Farmers Insurance Group v. Santa Clara County (Farmers)* (1995) 11 Cal.4th 992 and *Delfino v. Agilent Technologies, Inc. (Delfino)*, *supra*, 145 Cal.App.4th at p. 790, both cases involving malicious and/or criminal misconduct, is misplaced in this case where Grant clearly had an obligation to deliver prevailing wage payment to its employees along with an itemized wage statement. In *Farmers*, sexual harassment could not fairly be regarded as typical of or broadly incidental to the enterprise undertaken by a county jail, and in *Delfino* threatening emails sent to an employee's perceived personal enemies could not fairly be regarded as typical of or broadly incidental to the enterprise undertaken by an interactive computer service.

The difference between the instant case and those cases cited by Grant is that Grant abdicated its responsibility and authorized (gave permission to) its employee, Cervantes, to perform its legal obligation – delivery of the payment of the prevailing wage and relieving itself of that duty. Under respondeat superior, the fact that Cervantes engaged in an elaborate plan of check skimming is not as important as that he simply did not deliver the wage payment to workers for which Grant was legally responsible. In this manner, Grant surrendered its legal obligation of the delivery of payment of prevailing wage to the whim of Cervantes. Payment of prevailing wage on a public work is typical of or broadly incidental to the enterprise undertaken by the contractor employer as well as mandated by law. Therefore, Cervantes's crime falls within the scope of his employment because his actions were incidental to the enterprise undertaken by the employer to deliver prevailing wages to its employees performing construction on a public work.

Grant argued that respondeat superior should not apply because Cervantes's disbursement of cash after depositing workers' paychecks was not within his scope of

work. This argument ignores the fact that Grant, by giving the workers' paychecks to Cervantes, brought disbursement of payment into Cervantes's scope of work. Cervantes failing to perform his duties properly does not change the scope of his work. Moreover, the fact that Grant hired Cervantes to perform siding work does not preclude attribution of liability just because he was not "engaged in the ultimate object of his employment at the time of his wrongful act." (*Delfino v. Agilent Technologies, Inc., supra*, 145 Cal.App.4th at p. 812, quoting *Farmers*.)

As Grant's failure to pay prevailing wage was neither outside the employer's enterprise nor its employee's scope of work, the elements of respondeat superior were met in this case, especially in view of the three ascribed reasons for imposing respondeat superior upon an employer – to prevent recurrence of the tortious conduct, to give greater assurance of compensation for the victim, and to ensure that the victim's losses will be equitably borne by those who benefit from the enterprise that gave rise to the injury. (3 Witkin, Summary 11th Agency § 176 (2021).)

Grant Rebutted Some Assessed Wages.

Grant urged removal from the audit those workers who used aliases. Villegas testified at the Hearing on the Merits that he used, at Cervantes direction, the name of another employee, Jose Luis Alvarez. Morsi obtained statements from Escobedo and Trasvino that substantiated similar evidence showing that they used the names of other workers on the jobsite. (DLSE Exhibit 5, pp. 117–118 and 143– 44.) Grant argued that Escobedo, Trasvino, and Villegas should not be on the audit because their names did not appear on the CPRs. That misses the gist of the workers' statements that they worked off the books. There being no evidence produced by Grant that rebutted DLSE's evidence, the amended Assessment for these workers who used alias names remains unchanged.

Nevertheless, Grant provided evidence of fewer hours worked than those DLSE assessed for Gomez, Sanchez, Yuriar and Pineda.¹⁸ DLSE found wages due for Gomez, Sanchez and Yuriar based on calendars reconstructed by these workers in June 2019, approximately six months after Grant's work ended on the Project. (DLSE Exhibit 5 at p. 136, Exhibit 19 at pp. 280-283, and Exhibit 21 at pp. 327-330.) DLSE also found wages due for Pineda from July 30, 2017 to March 11, 2018 based on alleged unpaid workhours.¹⁹ (DLSE Exhibit 5.)

DLSE found wages due for Gomez, Sanchez and Yuriar based on eight-hour workdays for the entire week. However, Di Francesco and Vega testified that the out-of-town workers generally clocked no more than six hours on Friday to avoid traffic. The time sheets for other workers confirmed this work pattern. (Grant Exhibit E.) DLSE found wages due for Sanchez for April to July 2018, but Montoya testified to his own memory that Sanchez had left employment with Grant during this time. Additionally, DLSE claimed that Grant had attributed payments to Pineda that Grant made to another worker from July 30, 2017 to March 11, 2018. Vega testified that Grant did not hire Pineda until May 28, 2018. The CPRs confirmed this to be true. The CPRs did not show Pineda working from July 2017 to March 2018. Neither Pineda nor any other worker testified to him working on the Project during those months.

The timesheets, CPRs and the testimony brought forth by Grant regarding Gomez, Sanchez, and Yuriar carry greater weight than the later reconstructed calendars. DLSE produced no evidence that anyone destroyed or tampered with timesheets that the workers' had prepared on the jobsite. Moreover, it would have been to Cervantes's disadvantage to reduce the very paychecks from which he was skimming

¹⁸ Although the CPRs use the last name Sanchez to alphabetize Ricardo Sanchez Pineda in the CPRs, this Decision references him as Pineda to distinguish him from Ramiro Sanchez.

¹⁹ DLSE did not provide Gomez's reconstructed calendar in its exhibits.

money. Similarly, the CPRs and Grant's testimony regarding Pineda carry greater weight than DLSE's unsubstantiated allegation of unpaid work hours.

Removing excess hours from the Assessment requires deducting credited payments for those hours. The prevailing wages, \$46.67 for hourly straight time, assessed for additional audited hours reconstructed from subsequently created calendars appear in the audit as amounts due and unpaid by Grant. (DLSE Exhibit 5 at pp. 121, 138, and 145 and Exhibit 2, pp. 75-78.) DLSE credited weekly cash payments ranging between \$600 and \$1,000 from Cervantes to these workers for the additional audited hours. (DLSE Exhibit 2.) The cash payments credited by DLSE appear in the audit as amounts paid by Grant. The cash payments credited by DLSE are less than the prevailing wages DLSE found due for the additional audited hours. The credited cash payments must be subtracted from prevailing wages for additional audited hours before these wages are removed from the Assessment so that Grant does not receive credit for pay for hours it established were not worked.

DLSE assessed 128.5 additional hours for Gomez. (DLSE Exhibit 2 at pp. 42-45.) Therefore, DLSE assessed \$5,997.09 (i.e. \$46.67 x 128.5 hours) for wages due, based on Gomez's reconstructed calendar. DLSE credited \$15.00 per hour for the work performed by Gomez based on a forty-hour workweek, producing a weekly salary of \$600. (DLSE Exhibit 5 at pp. 121-121.) Therefore, DLSE credited Grant presupposed cash payments of \$1,927.50 (i.e. \$15 x 128.5 hours) for the corresponding hour being removed. The amended Assessment is reduced by \$4,069.59 (i.e. \$5,997.09 - \$1,927.50) from Gomez's wages.

DLSE assessed 808 additional hours for Sanchez. (DLSE Exhibit 2 at pp. 80-84.) Therefore, DLSE assessed \$37,709.36 (i.e. \$46.67 x 808 hours) for wages due, based on Sanchez's reconstructed calendar. DLSE credited \$22.50 per hour for work performed by Sanchez based on a forty-hour workweek, producing a weekly salary of \$900. (DLSE Exhibit 5 at pp. 138-142.) Therefore, DLSE credited Grant presupposed

cash payments of \$18,180 (i.e. \$22.50 x 808 hours) for the corresponding hours being removed. The amended Assessment is reduced by \$19,529.36 (i.e. \$37,709.36 - \$18,180) from Sanchez’s wages.

DLSE assessed 344 additional hours for Yuriar. (DLSE Exhibit 2 at pp. 93–96.) Therefore, DLSE assessed \$16,054.48 (i.e. \$46.67 x 344 hours) for wages due, based on Yuria’s reconstructed calendar. DLSE credited \$22.50 per hour for work performed by Yuriar based on a forty-hour workweek, producing a weekly salary of \$900. (DLSE Exhibit 5 at pp. 145– 148.) Therefore, DLSE credited presupposed cash payments of \$7,740 (i.e. \$22.50 x 344 hours) for the corresponding hours being removed. The amended Assessment is reduced by \$8,305.48 (i.e. \$16,054.48 - \$7,749) from Yuria’s wages.

DLSE assessed 525.5 hours for Pineda. (DLSE Exhibit 2 at pp. 75– 79.) Therefore, DLSE assessed \$24,525.08 (i.e. \$46.67 x 525.5 hours) for wages due, based on DLSE’s allegation of Grant incorrectly attributing to Pineda payments made to another worker. DLSE credited \$15 per hour for work performed by Pineda based on a forty-hour workweek, producing a weekly salary of \$600. (DLSE Exhibit 5 at pp. 136– 137.) Therefore, DLSE credited presupposed cash payments of \$7,882.50 (i.e. \$15 x 525.5 hours) for the corresponding hours being removed. The amended Assessment is reduced by \$16,642.58 (i.e. \$24,525.08 - \$7,882.50) from Pineda’s wages.

Worker	Add. Hours	Wages Credited	Wages Alleged	Sum Removed
Gomez	128.5	\$1,927.50	\$5,997.09	\$4,069.59
Sanchez	808.0	\$18,180	\$37,709.36	\$19,529.36
Yuriar	344.0	\$7,740	\$16,054.48	\$8,305.48
Pineda	525.5	\$7,882.50	\$24,525.08	\$16,642.58
Total	1,806.0			\$48,547.01

The amended Assessment that found due unpaid prevailing wages of \$666,150.29 is reduced by \$48,547.01 because of the reduction in hours, and as stated *infra*, is reduced by \$29,317.50 because of an increase in credit to Grant for payments to the 20 workers who were not interviewed. DLSE found training fund contributions due and owing of \$2,398.56. Grant provided no evidence to rebut DLSE's finding of unpaid training fund contributions and therefore DLSE's finding remains undisturbed. Thus, the Assessment is affirmed and modified such that Grant owes \$588,285.78 in unpaid prevailing wages and \$2,398.56 in training fund contributions.

DLSE's Penalty Rate Under Section 1775 Is Affirmed and DLSE's Assessment Under Section 1775 Is Modified For Those Wages Removed From the Assessment.

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 1777.1.8

...

(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).)

DLSE assessed section 1775 penalties at the maximum allowable penalty rate of \$200 per violation. The burden was on Grant to prove that DLSE abused its discretion in setting the penalty amount under section 1775.

Due to the severity and the extent of the violations, DLSE recommended no mitigation of the penalty rate. (Exhibit 5 at p. 152.) Section 1775, subdivision (a)(2), grants the Labor Commissioner the discretion to mitigate the statutory maximum penalty per day in light of prescribed factors, but it does not mandate mitigation in all cases. The Director is not free to substitute his or her own judgment.

Grant did not carry its burden to prove an abuse of discretion as to the \$200 penalty rate under section 1775, especially given that Grant learned Cervantes was cashing workers' paychecks before the end of the Project and took no meaningful corrective action. The corrective action Grant did take was ineffective and failed to address the problem that Grant had helped to create. Additionally, Grant obviously did not adequately inform these workers of their right to receive prevailing wages, as none of the testifying workers was aware of the wage to which they were entitled during the pendency of the Project. Thus, the penalty rate of \$200.00 per violation is affirmed.

DLSE found 2,918 violations for each calendar day or a portion thereof under section 1775. The CPRs indicated that the workday on the Project was generally eight hours. (DLSE Exhibit 27.) As stated *infra*, this Decision reduced audited hours by 1,806, which equals 226 days (i.e. $1,806 \div 8$). Thus, there are 2,692 violations (i.e. $2,918 - 226$). The amended Assessment reflecting \$583,600.00 section 1775 penalties is modified so that there is 2,692 violations at the penalty rate of \$200.00 per violation, resulting in section 1775 penalties of \$538,400.00.

Penalties Assessed Under Section 1813 Are Affirmed.

Section 1815 states:

[w]ork performed by employees of Requesting Parties 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 (\$25.00) for each worker employed in the execution of the contract by the ... contractor ... for each calendar day during which the worker is required or permitted to work more than 8 hours in any one calendar day and 40 hours in any one calendar week in violation of the provisions of this article.

DLSE found two violations of failure to pay the correct overtime wage to a single worker, Raul Lugo Flores. Grant provided no evidence to rebut DLSE's finding, and

therefore, the finding of two violations under section 1813 and penalties at the rate of \$25.00 per violation for a total of \$50 in penalties under section 1813 is affirmed.

Grant Is Not Liable For Penalties Assessed Under Section 1777.7.

DLSE determined that Grant committed violations of section 1777.5 by not hiring apprentices in the 1:5 ratio for the classification of Carpenter, Iron Worker and Laborer. The resulting penalty assessed by DLSE was set for each day on which Grant was not in ratio compliance. There were 367 days of violations multiplied by the penalty rate of \$20.00 to equal \$7,340 section 1777.7 penalties. DLSE found that Grant timely submitted to all applicable committees in the geographic area form DAS 140, providing notification of the Project to the committees, and form DAS 142, requesting apprentices from the committees. Montoya's testimony revealed that the ratio issue arose due to unavailability of apprentices in the geographic area for the applicable crafts. California Code of Regulation, title 8, section 230.1 provides:

If an apprenticeship committee dispatches fewer apprentices than the contractor requested, the contractor shall be considered in compliance if the contractor employs those apprentices who are dispatched, provided that, where there is more than one apprenticeship committee able and willing to unconditionally dispatch apprentices, the contractor has requested dispatch from all committees providing training in the applicable craft or trade whose geographic area of operation include the site of the public work.

Montoya made clear that Grant hired every Carpenter, Iron Worker and Laborer apprentice made available to it for the duration that Grant worked on the Project. DLSE presented no evidence that rebutted Montoya's testimony. Thus, Grant did not violate section 1777.5. No penalties are due under section 1777.7. (Cal. Code Regs., tit. 8, § 230.1.)

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

FINDINGS AND ORDER

1. Grant Construction, Inc. is liable for underpayment of prevailing wages to 27 of its workers in the amount of \$588,285.78.
2. Grant Construction, Inc. is liable for failure to pay \$2,398.56 in training fund contributions.
3. Grant Construction, Inc. is liable under Labor Code section 1775 for 2,692 violations at the penalty rate of \$200.00 per violation for a total of \$538,400.00.
4. No liquidated damages are due as Grant Construction, Inc. made a timely deposit for the full amount of the Civil Wage Penalty Assessment to the Department of Industrial Relation.
5. Grant Construction, Inc. is liable under Labor Code section 1813 for two violations at the penalty rate of \$25.00 per violation for a total of \$50.00.
6. No penalties under Labor Code section 1777.7 are due.

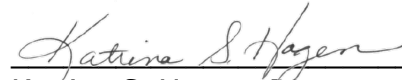
The amounts found due under the Assessment, as affirmed and modified by this Decision, are as follows:

Basis of the Assessment	Amount
Wages Due:	\$588,285.78
Training Fund Contributions Due:	\$2,398.56
Penalties under section 1775:	\$538,400.00
Penalties under section 1813:	\$50.00
TOTAL:	\$1,129,134.34

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 that shall be served with this Decision on the parties.

Dated: 5-25-2022



Katrina S. Hagen
Katrina S. Hagen, Director,
California Department of Industrial Relations