

STATE OF CALIFORNIA  
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

**Minako America Corporation  
dba Minco Construction**

Case No. 15-0275-PWH

From a Civil Wage and Penalty Assessment issued by:

**Division of Labor Standards Enforcement**

**DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS**

Affected prime contractor Minako America Corporation dba Minco Construction (Minako) timely submitted a request for review of a Civil Wage and Penalty Assessment (Assessment) issued on July 28, 2015, by the Division of Labor Standards and Enforcement (DLSE) with respect to work Minako and its subcontractor Y&M Construction, Inc. (Y&M) performed for the County of Los Angeles Department of Public Works (Awarding Body) pursuant to a Job Order Contract for sidewalk maintenance (Project). The Assessment determined that \$265,500.59 in unpaid prevailing wages and penalties under Labor Code sections 1775, 1776, 1777.7, and 1813 were due.<sup>1</sup> For the reasons set forth below, this Decision finds that Minako had substantial grounds for appealing the Assessment, and therefore the undersigned Acting Director exercises his discretion to waive liquidated damages that would otherwise be due. In all respects, this Decision affirms the Assessment.

**FACTS**

The Awarding Body advertised the Project for bid on September 16, 2010, and awarded the Project to Minako on or about April 5, 2011. On April 20, 2011, the Awarding Body and Minako entered a Job Order Contract (JOC) for the performance of work on the Project. The JOC directs Minako to pay the applicable prevailing wage and

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<sup>1</sup>All further section references are to the California Labor Code, unless otherwise indicated.

cites the Labor Code sections containing the applicable prevailing wage provisions. The JOC also advises that the Director's determinations of prevailing wage rates are open to inspection at the Awarding Body, and sets forth the requirements for submitting certified payroll records (CPRs). Minako hired Y&M to perform the sidewalk maintenance and related work that is the subject of the Assessment.

The Assessment.

The Assessment determined that Minako and Y&M owed \$149,356.59 in unpaid prevailing wages, \$32,400.00 in penalties under section 1775, subdivision (a); \$11,075.00 in penalties under section 1813 (for overtime violations); and \$9,060.00 in penalties under section 1777.7, subdivision (a)(1) (for apprenticeship violations). The Assessment also determined that Y&M owed \$63,600.00 in penalties under section 1776, subdivision (h) (for certified payroll records violations)

The Assessment calculated additional liquidated damages potentially due pursuant to Labor Code section 1742.1 at \$149,356.59, and set forth the procedure for making a deposit in order to avoid liquidated damages as follows:

[I]n accordance with Labor Code 1742.1(b), there shall be no liability for liquidated damages if the full amount of the assessment or notice, including penalties, has been deposited with the Department of Industrial Relations, with 60 days following service of the Assessment . . .

The last day to make the deposit described in the Assessment would have been October 1, 2015. Neither Minako nor Y&M made the required deposit.

Minako submitted a timely request for review of the Assessment pursuant to Section 1742. Y&M did not file a request for review or otherwise participate in any of the proceedings.

Preliminary Determination on the Timeliness of the Assessment.

Pursuant to authority under title 8 of the California Code of Regulations, sections 17205 and 17227, *inter alia*, which authorize a hearing officer to determine threshold defenses and to determine that an Assessment was timely, the issue of the timeliness of

the Assessment in this case was the subject of an initial hearing before Hearing Officer Jessica Pirrone, held on November 9, 2016, and submitted for decision on December 16, 2016. At the initial hearing on the issue of timeliness, Thomas Kovacich appeared as counsel for Minako and Max Norris appeared as counsel for DLSE. Minako Exhibit Nos. L and M were admitted into evidence, as were DLSE Exhibit Nos. 1 through 10. Former Deputy Labor Commissioner Alice Okubo and Deputy Labor Commissioner Maria Toletino testified for DLSE; Matt Jerge, administrator of contracts for the Awarding Body, and Bassem Riad, project manager for Minako, testified for Minako. On January 30, 2017, the Hearing Officer issued a decision finding that the Assessment was timely and that the matter would proceed to a Hearing on the Merits.<sup>2</sup>

#### Hearing on Remaining Issues.

The Hearing on the Merits commenced on May 26, 2017, and was submitted for decision on January 30, 2018. Thomas Kovacich appeared as counsel for Minako; Sovitear Sim appeared as counsel for DLSE. Minako Exhibits A through K were admitted into evidence. Minako did not call any witnesses; Deputy Labor Commissioner Talentino and workers Angel Rodriguez and Enio Costellanos testified for DLSE. DLSE Exhibit Nos. 1 through 44 were admitted into evidence.

At the Hearing, the parties stipulated to the following facts, subject to Minako's continuing objection on the threshold issue of timeliness and to Minako's right to seek judicial review on that issue:

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<sup>2</sup> The JOC was comprised of several discrete work orders. Minako argued that the statute of limitations under section 1741, subdivision (a) to issue the Assessment was triggered either by acceptance of each individual work order or by the date all work ceased. As set forth in her January 30, 2017 Order, the Hearing Officer found that the project was not formally accepted and therefore the statute of limitations was not triggered until the Awarding Body issued a February 11, 2014, memorandum accepting all of the work under the contract. (*Madonna v. State of California* (1957) 151 Cal. App. 2d 836,840; Lab. Code §1741, subd. (a).) Effective January 1, 2014, , the applicable statute of limitations was 18 months. (Stats. 2013, ch. 792, § 1.) Therefore, the July 28, 2015 Assessment, issued 17 months and 17 days later, was timely. (*Mudd v. McColgan* (1947) 30 Cal.2d 463[where the legislature extends a period of limitations, any matter not already barred is subject to the new period of limitations].)

1. The work subject to the Assessment was performed on a public work and required the payment of prevailing wages under the California Prevailing Wage Law, Labor Code sections 1720 through 1861.

2. Minako's request for review was timely.

3. The DLSE enforcement file was timely made available.

4. No wages were paid or deposited with the Department of Industrial Relations as a result of the Assessment under section 1742.1.

5. \$149,356.59 in underpaid prevailing wages are due.

6. \$32,400 in penalties under section 1775 are due.

7. \$11,075.00 in penalties under section 1813 are due.

8. \$9,060.00 in penalties under section 1777.7 are due.

9. Statutory interest from July 28, 2015, until the required wages are paid, is due.

10. No stipulations in this matter are to be interpreted as a waiver of Minako's right to challenge the finding that the Assessment was timely.<sup>3</sup>

Thus, the sole disputed issue presented for resolution at the Hearing on the Merits was whether Minako was liable for liquidated damages under section 1742.1, subdivision (a), in the amount of \$149,356.59.

## DISCUSSION

The California Prevailing Wage Law, 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 Prevailing Wage Law was summarized by the California Supreme Court in one case as follows:

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<sup>3</sup> As noted, Minako's stipulations were entered without prejudice to its ability to challenge the ruling as to timeliness of the Assessment on a petition for writ of administrative mandamus.

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

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

Section 1775, subdivision (a) requires, among other provisions, that contractors and subcontractors pay the difference to workers who were paid less than the prevailing wage rate, and also 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 unpaid prevailing wages are not paid within sixty days following service of a civil wage and penalty assessment under section 1741.

Additionally, employers on public works are required to keep accurate payroll records, recording the work classification, straight time and overtime hours worked, and actual per diem wages paid, among other information, for each employee. (§ 1776, subd. (a).) This is consistent with the requirements for construction employers in general, who are required to keep accurate records of the hours employees work and the pay they receive. (Cal. Code Regs., tit. 8, § 11160, subd. 6.) Contractors who fail to provide certified payroll records within ten days of DLSE’s request for such records are subject to penalties. (§ 1776, subd. (h).)

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 may appeal the assessment by filing a request for review under section 1742, which will then be set for hearing before a hearing officer appointed by the Director of Industrial Relations. 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 initial 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).) Section 1743 imposes joint and several liability on public works contractors and their subcontractors for final orders or judgments resulting from the Director’s decision after a hearing conducted under section 1742.

Here, given the parties’ stipulations, the only disputed issue is whether Minako is liable for liquidated damages under section 1742.1.

Minako Is Not Liable for Liquidated Damages.

Section 1742.1, subdivision (a) provides:

After 60 days following the service of a Civil Wage and Penalty Assessment under Section 1741 . . . , the affected contractor, subcontractor, and surety . . . shall be liable for liquidated damages in an amount equal to the wages, or portion thereof that still remain unpaid. If the Assessment . . . subsequently is overturned or modified after administrative or judicial review, liquidated damages shall be payable only on the wages found to be due and unpaid.

As of the date DLSE served the Assessment, July 28, 2015, the statutory scheme regarding liquidated damages provided contractors three ways to avoid liability for liquidated damages. First, under section 1742.1, subdivision (a), within 60 days of service of the civil wage and penalty assessment, the contractor could pay the workers all or a portion of the wages assessed in the civil wage and penalty assessment, and thereby avoid liability for liquidated damages on the amount of wages so paid. Minako did not offer evidence that they availed themselves of this option, and Minako stipulated that the wages are due in full.

Second, under section 1742.1, subdivision (b) a contractor could avoid liability for liquidated damages if, within 60 days from issuance of the civil wage and penalty assessment, the “full amount of the assessment or notice, including penalties has been deposited with the Department of Industrial Relations ....” Sixty days from issuance of the Assessment was October 1, 2015. Neither Minako nor Y&M showed they made the requisite deposit timely or otherwise.

Third, the contractor could choose to rely upon the Director’s discretion to waive liquidated damages under former section 1742.1, subdivision (a), which stated:

Additionally, if the contractor or subcontractor demonstrates to the satisfaction of the director that he or she had substantial grounds for appealing the assessment ... with respect to a portion of the unpaid wages covered by the assessment ..., the director may exercise his or her discretion to waive payment of the liquidated damages with respect to that portion of the unpaid wages.<sup>4</sup>

(§ 1742.1, subd. (a).)

Minako argues that liquidated damages should be waived because it had substantial grounds to argue that the Assessment was time-barred and, if that argument were accepted, no wages would be found due. The parties fully briefed the issue of the timeliness of the Assessment and an initial hearing was held on the issue. Minako argued that in the context of a job order contract, formal acceptance for the purpose of triggering the statute of limitations arises when each individual work order under the contract is accepted. Minako further argued that at the time each individual work order had been

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<sup>4</sup> On June 27, 2017, the Director’s discretionary waiver power was deleted from section 1742.1 by Senate Bill 96 (stats. 2017, ch 28, § 16 (SB 96)). Legislative enactments, however, are to be construed prospectively rather than retroactively, unless the legislature expresses its intent otherwise. (*Elsner v. Uveges* (2004) 34 Cal.4th 915, 936.) Further, “[a] statute is retroactive if it substantially changes the legal effect of past events.” (*Kizer v. Hannah* (1989) 48 Cal.3d 1, 7.) Here, the law in effect at the time the civil wage and penalty assessment was issued (2015) allowed a waiver of liquidated damages in the Director’s discretion, which could have influenced Minako’s decision as to how to respond to the Assessment. Applying the current terms of section 1742.1 as amended by SB 96 in this case would have retroactive effect because it would change the legal effect of past events (i.e., what Minako elected to do in response to the Assessment). Accordingly, this Decision finds that the Director’s discretion to waive liquidated damages in this case under section 1742.1, subdivision (a) is unaffected by SB 96.

accepted, the statute of limitations was 180 days rather than 18 months and therefore the Assessment was clearly time barred. While Minako did not prevail on the timeliness issue, the record reflects that its argument on timeliness was not insubstantial and would have resulted in dismissal of the full Assessment had it been accepted. Accordingly, the record as a whole demonstrates that Minako had substantial grounds for appealing the Assessment, and on that basis, and the Director exercises his discretion to waive liquidated damages.

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

### **FINDINGS**

1. DLSE timely served the Assessment upon affected prime contractor Minako America Corporation dba Minco Construction and affected subcontractor Y&M Corporation, Inc.
2. The following stipulations of DLSE and Minako America Corporation dba Minco Construction are adopted:
  - a. The work subject to the Assessment was performed on a public work and required the payment of prevailing wages under the Prevailing Wage Law, sections 1720 through 1861.
  - b. Affected contractor Minako America Corporation dba Minco Construction filed a timely request for review of the Civil Wage and Penalty Assessment issued by DLSE with respect to the Project.
  - c. The DLSE enforcement file was timely made available.
  - d. No wages were paid or deposited with the Department of Industrial Relations as a result of the Assessment under section 1742.1.
  - e. \$149,356.59 in underpaid prevailing wages are due.
  - f. \$32,400.00 in penalties under section 1775 are due.
  - g. \$11,075.00 in penalties under section 1813 are due.



- h. \$9,060.00 in penalties under section 1777.7 are due.
3. Minako America Corporation dba Minco Construction had substantial grounds to appeal the Assessment to the Hearing on grounds that it was untimely. Accordingly, Minako America Corporation dba Minco Construction is not liable for liquidated damages under section 1742.1.
4. The amounts that remain due under the Assessment as affirmed by this Decision are as follows:


Wages due:	\$149,356.59
Penalties under section 1775, subdivision (a):	\$32,400.00
Penalties under section 1813:	\$11,075.00
Penalties under 1777.7:	\$9,060.00
Penalties under 1776:	\$63,600.00
<b>TOTAL:</b>	<b>\$265,491.59</b>

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

### ORDER

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

Dated: 1/15/19

  
André Schoorl  
Acting Director of Industrial Relations