

STATE OF CALIFORNIA  
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

**Precision Mechanical & Refrigeration  
Services, Inc., dba Precision Mechanical & HVAC**

Case No. 15-0303-PWH

From a Civil Wage and Penalty Assessment issued by:

**Division of Labor Standards Enforcement**

**DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS**

Affected contractor AWI Builders, Inc. (AWI) and subcontractor Precision Mechanical & Refrigeration Services, Inc., dba Precision Mechanical & HVAC (Precision), submitted timely requests for review of an amended Civil Wage and Penalty Assessment (Assessment) issued by the Division of Labor Standards Enforcement (DLSE) on July 7, 2015, with respect to the work of improvement known as the RCMRC Education Building (Project) performed for the County of Riverside Economic Development Agency (County). The Assessment determined that the following amounts were due: \$97,751.07 in unpaid prevailing wages, \$2,261.50 in unpaid training funds, \$54,000.00 in Labor Code section 1775 statutory penalties,<sup>1</sup> \$100.00 in section 1813 statutory penalties, and \$45,000.00 in section 1776 statutory penalties.<sup>2</sup>

By his Order issued on November 5, 2015, the Hearing Officer granted DLSE's motion to amend the Assessment downward under California Code of Regulations, title 8, section

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

<sup>2</sup> DLSE served an initial civil wage and penalty assessment (initial Assessment) on Precision on February 11, 2015, solely stating a section 1776 statutory penalty of \$45,000.00. Although there is no record in this case of Precision filing a request for review of the initial Assessment, DLSE never asserted that Precision failed to timely file a request as to the amended Assessment. AWI's request for review was designated as Case No. 15-0054-PWH. The Hearing Officer consolidated Cases Nos. 15-0303-PWH (this case) and 15-0054-PWH. Thereafter, DLSE and AWI settled the issues in Case No. 15-0054-PWH, and AWI withdrew its request for review. The settlement between DLSE and AWI also addressed the unpaid prevailing wages assessed in this case, leaving for resolution the assessment against Precision for statutory penalties under sections 1775, 1813 and 1776, none of which implicate the liability of AWI.

17226, subdivision (a)(1), as follows: (1) reducing unpaid wages to \$95,465.61; (2) reducing unpaid training funds to \$2,242.02; and (3) reducing section 1775 statutory penalty to \$51,750.00. DLSE did not move to amend the section 1813 and section 1776 statutory penalties, leaving the section 1813 statutory penalty at \$100.00 and the section 1776 statutory penalty at \$45,000.00.

Accordingly, on May 23, 2018, in Los Angeles, California, the Hearing commenced in Case No. 15-0303-PWH before Hearing Officer Howard Wien. Attorney David Cross appeared as counsel for DLSE. No one appeared for Precision. Two witnesses testified on behalf of DLSE: Deputy Labor Commissioner Kari Anderson and worker Jose Daniel Iraheta. The case stood submitted that day.

The issues for decision are:

- Whether the Assessment was timely.
- Whether the Assessment as amended correctly found that Precision failed to pay the required prevailing wage for each day of work performed by each affected worker, constituting 345 violations of section 1775.
- Whether the Labor Commissioner abused her discretion in assessing statutory penalties against Precision under section 1775 at the rate of \$150.00 per violation for 345 violations, totaling \$51,750.00.
- Whether the Assessment as amended correctly found that Precision is liable for a section 1813 statutory penalty in the sum of \$100.00.
- Whether the Assessment as amended correctly found that Precision is liable for a section 1776 statutory penalty in the sum of \$45,000.00.

For the reasons set forth below, the Director of Industrial Relations finds that DLSE carried its initial burden of presenting evidence at the Hearing that provided prima facie support for the Assessment (with one limited exception), and that Precision failed to carry its burden of proving the basis for the Assessment was incorrect. (See Cal. Code Regs., tit. 8, § 17250, subds. (a), (b).)<sup>3</sup> Accordingly, the Director issues this Decision affirming and modifying in part the Assessment.

## FACTS

### Failure to Appear.

Precision's President Movses Anserlian appeared as representative of Precision in noticed telephonic prehearing conferences on October 26, 2015, and January 8, 2016. No one appeared on behalf of Precision at subsequent prehearing conferences, all of which were duly noticed. Also, at the commencement of the subsequent prehearing conferences, the Hearing Officer phoned Anserlian to attempt to have him participate, but an outgoing message stated the phone number was disconnected. Precision failed to appear at all other prehearing conferences and also failed to appear at the duly noticed Hearing on the Merits.

On May 23, 2018, the Hearing Officer conducted the Hearing on the Merits in Precision's absence to formulate a recommended decision as warranted by the evidence, pursuant to California Code of Regulations title 8, section 17246, subdivision (a). DLSE's exhibits were admitted into evidence without objection and the matter was submitted on the evidentiary record, including the testimony of Anderson and Iraheta. Precision filed no motion seeking relief from non-appearance under California Code of Regulations, title 8, section 17246, subdivision (b).

### The Assessment.

The County advertised the Project for bid on September 24, 2012. Precision's work on the Project as subcontractor commenced January 27, 2014. The Assessment's determination of unpaid prevailing wages concerned the sheet metal work performed by four of Precision's nine journeymen workers on the Project – Iraheta, Javier Zimarripa, Luciano Becerra and Pedro Salazar – during the period May 5, 2014, to April 27, 2015. As of the issuance of the Assessment on July 7, 2015, AWI's work on the Project as prime contractor was not yet completed, and the County had neither filed a notice of completion nor accepted work performed in the Project.

In accordance with the bid advertisement date of September 24, 2012, the applicable prevailing wage determination for Sheet Metal Worker was No. RIV-2012-2 (Sheet Metal PWD). The Sheet Metal PWD contains three predetermined increases, with the final increase

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<sup>3</sup> As addressed, *post*, DLSE's evidence showed 340 violations of section 1775 rather than the 345 violations stated in the Assessment.

effective January 1, 2014. With these predetermined increases, the prevailing wage to be paid to the workers was \$63.04 per hour (consisting of a \$40.24 basic hourly rate, and the remainder in fringe benefits). For work on Saturdays, the Sheet Metal PWD specifies that the worker must be paid 1-1/2 times the basic hourly rate, plus the fringe benefits.

DLSE interviewed the four workers during its investigation, and obtained declarations and calendars from them stating the days and hours they worked, the methods by which Precision paid them, and the sums Precision paid them. DLSE's evidence showed the following with respect to each worker:

Iraheta: The evidence demonstrated that he worked 63 days during the period from August 20, 2014, through November 19, 2014, for eight hours per day. Precision paid him solely in cash, at the rate of \$25.00 per hour.

Zimarripa: The evidence demonstrated that he worked 114 days during the period from May 5, 2014, through October 16, 2014, for eight hours per day. During approximately the first month of work, Precision paid Zimarripa solely in cash, at the rate of \$25.00 per hour. At his request, Precision then paid him by check. Although Precision's checks stated the correct prevailing wage rate of \$63.04 per hour, the checks stated fewer hours than Zimarripa actually worked. Zimarripa left the job because the checks were continually bouncing. The funds he actually received by check averaged \$25.00 per hour of work – the same rate as Precision's cash payments.

Becerra: The evidence demonstrated that he worked 103 days during the period from August 13, 2014, through April 27, 2015, for eight hours per day. Precision paid him solely in cash, at the rate of \$30.00 per hour.

Salazar: The evidence demonstrated that he worked 60 days during the period from July 12, 2014, through November 12, 2014. He worked eight hours per day, except for four Saturdays on which he worked seven hours per day (July 12, July 19, August 2, and August 9, 2014). Precision paid him solely in cash, at the rate of \$35.00 per hour (including the four Saturdays).

Although the days for which Precision paid each worker less than the prevailing wage rate totaled 340 days, the Assessment based the section 1775 statutory penalty on 345 violations.

The Labor Commissioner set the penalty rate at \$150.00 per violation. The Assessment thereby set the total section 1775 penalty at \$51,750.00.

Additionally, the Assessment imposed the section 1813 statutory penalty of \$100.00, calculated at the mandatory \$25.00 per violation rate for four violations. The four violations consisted of the four Saturdays Salazar worked on the Project for which Precision failed to pay him the Saturday rate required by the Sheet Metal PWD.

The Assessment also imposed a section 1776 statutory penalty of \$45,000.00. In its investigation, DLSE requested CPRs from Precision on October 1, 2014. Precision did not respond. On December 9, 2014, DLSE issued a second request to Precision for CPRs, to which Precision never responded. DLSE then issued the initial assessment on February 11, 2015. The initial assessment computed the 1776 statutory penalty as \$900.00 per day (i.e., \$100.00 per day for each of Precision's nine journeymen working on the Project) for 50 days, totaling \$45,000.00. This \$45,000.00 penalty remained in the Assessment, as amended by DLSE.

Although Precision never produced CPRs to DLSE, AWI produced to DLSE 23 of Precision's CPRs on March 30, 2015. The CPRs correctly classify the four workers at issue here as Sheet Metal Workers, and they correctly state the Sheet Metal PWD \$63.04 prevailing wage rate. However, 19 of the 23 CPRs were not prepared concurrently with the weeks worked. They report work performed in the period January 27, 2014, through June 27, 2014, but all are dated and certified by Precision's secretary, Nidia M. Parra, on June 25, 2014. The four subsequent CPRs were prepared concurrently with the work performed from June 30, 2014, through July 25, 2014. However there are no CPRs for any work after July 25, 2014, even though the four workers performed work on the Project for many months after that date.

## **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:

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 see *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 rate and prescribes penalties for failing to pay the prevailing rate. Section 1813 prescribes a fixed penalty of \$25.00 for each instance of failure to pay the prevailing overtime rate when due.

Employers on public works must also keep accurate payroll records, recording among other information, the work classification, straight time and overtime hours worked, and actual per diem wages paid for each employee. (§ 1776.) The contractor has ten days (plus five days for mailing) to comply with DLSE’s written request to produce CPRs. (§ 1776, subd. (h).) If a contractor fails to comply within that period, it is subject to a penalty of \$100.00 for each calendar day, or portion thereof, for each worker, “until strict compliance is effectuated.” (*Id.*) The penalty rate provided by the statute is mandatory. Nothing in the statute provides the Labor Commissioner with discretion to reduce the penalty.

When DLSE determines that a violation of the prevailing wage laws has occurred, including any violation of the certified payroll records requirements, a written civil wage and penalty assessment is issued pursuant to section 1741. An affected contractor or subcontractor may appeal that assessment by filing a request for review under section 1742.

Under section 1742, subdivision (b), and California Code of Regulations, title 8, section 17224, the contractor shall be provided with an opportunity to review evidence that DLSE intends to utilize at the hearing. DLSE has the burden of providing 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.” (§1742, subd. (b); Cal. Code Regs. tit. 8, § 17250, subd. (b).)

The Assessment Was Timely.

The limitations period for DLSE to serve an assessment is stated in section 1741, subdivision (a). Section 1741, subdivision (a), has been in effect without amendment since January 1, 2014. (Stats. 2013, ch. 792, § 1, effective Jan. 1, 2014.)<sup>4</sup> It states in relevant part:

The assessment shall be served not later than 18 months after the filing of a valid notice of completion in the office of the county recorder in each county in which the public work or some part thereof was performed, or not later than 18 months after acceptance of the public work, whichever occurs last.

The 18-month limitations period stated above is tolled “for the period of time that a contractor or subcontractor fails to provide in a timely manner certified payroll records pursuant to a request from the Labor Commissioner . . . .” (§ 1741.1, subd. (a).)

The Assessment issued on July 7, 2015, was timely because the 18-month limitations period had not commenced running. As of that date, prime contractor AWI was still working on the Project, and the County had not filed a notice of completion and had not accepted the work performed in the Project. Moreover, the 18-month limitations period was also tolled because Precision had failed to produce any CPRs in response to DLSE’s two requests for CPRs issued on October 1, 2014 and December 9, 2014.

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<sup>4</sup> For most purposes on a public works project, the bid advertisement date determines the applicable Labor Code sections and applicable sections of the California Code of Regulations, title 8. As stated above, the bid advertisement date of this Project was September 24, 2012. The version of section 1741, subdivision (a), in effect on that date provided that an assessment had to be served within 180 days of the filing of a valid notice of completion or acceptance of the public work, whichever occurred later. (Stats. 2000, ch. 954, § 9 [Assem. Bill 646], eff. July 1, 2001.) The limitations period applicable here, however, is the 18 month period under section 1741, subdivision (a), as amended effective January 1, 2014. This is so for two reasons. First, it is well established that when the Legislature extends a limitations period, any matter not already barred is subject to the new period. (See, e.g., *Quarry v. Doe I* (2012) 53 Cal.4th 945, 956, citing *Mudd v. McColgan* (1947) 30 Cal.2nd 463, 466.) And second, the limitations period for an assessment on the Project had not even commenced running, for the reasons addressed above, when the new limitations period went into effect on January 1, 2014. Indeed, Precision’s work on the Project did not even commence until January 27, 2014. Thus, the assessment was not already barred on the effective date of the amendment, and accordingly, the 18-month limitations period applies.

Precision Is Liable for a Modified Penalty Under Section 1775.

DLSE carried its burden of presenting evidence at the Hearing that provided prima facie support for the Assessment's determination that Precision failed to pay the prevailing wage for each day that Iraheta, Zimarripa, Becerra, and Salazar worked on the Project. However, DLSE's evidence showed that the total number of such days of work was 340, rather than the 345 days upon which the Assessment calculated the section 1775 penalty. Accordingly, the total section 1775 penalty is to be calculated for 340 violations, not 345.

As to the penalty rate, section 1775, subdivision (a)(2)(B)(iii), states that the penalty for failure to pay the prevailing wage may not be less than \$120.00 if the Labor Commissioner determines that the violation was willful, as defined in subdivision (d) of section 1777.1.<sup>5</sup> Section 1775, subdivision (a)(2)(D), provides that the determination of 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 her or his own judgment "because in [her/his] 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).)

Here, DLSE assessed the section 1775 penalties at the rate of \$150.00 based on Precision's willfulness in underpaying its workers every day and every hour they worked on the Project. Most of those payments were less than one-half the required \$63.04 prevailing wage

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<sup>5</sup> Section 1777.1, subdivision (d) as it existed from 2012-2014, defines a willful violation as one in which "the contractor or subcontractor knew or reasonably should have known of his or her obligations under the public works law and deliberately fails or refuses to comply with its provisions."



rate. The evidence established that Precision committed these violations with full knowledge of its prevailing wage obligations: all the CPRs correctly classified the four workers at issue here as Sheet Metal Workers; all the CPRs correctly stated the \$63.04 Sheet Metal PWD prevailing wage rate in effect on January 1, 2014, after three predetermined increases; and Precision's paychecks to Zimarripa all stated the correct \$63.04 per hour prevailing wage rate. The burden was on Precision to prove that DLSE abused its discretion in setting the section 1775 penalty rate at \$150.00 per violation. Precision failed to carry that burden.

Accordingly, this Decision modifies but otherwise affirms the section 1775 statutory penalty stated in the Assessment. The penalty is calculated at \$150.00 for 340 violations, totaling \$51,000.00.

Section 1813 Statutory Penalty is Affirmed.

DLSE presented evidence providing prima facie support for the section 1813 statutory penalty in the sum of \$100.00. Precision failed to prove the basis for this penalty was incorrect. Accordingly, the section 1813 statutory penalty of \$100.00 is affirmed.

Section 1776 Statutory Penalty Is Affirmed.

DLSE presented evidence providing prima facie support for the section 1776 statutory penalty in the sum of \$45,000.00. Precision never responded to DLSE's requests for CPRs issued on October 1, 2014, and December 9, 2014. Under section 1776, subdivision (h), Precision was obligated to produce the requested CPRs 10 days from receipt of DLSE's request. As to DLSE's first request, the deadline for response was October 16, 2014. Although section 1776 allowed DLSE to assess a daily penalty commencing on October 16, 2014, DLSE did not do so. Precision's due date for producing the CPRs in response to DLSE's second request was December 24, 2014. When Precision failed to respond to the second request, DLSE issued the initial assessment on February 11, 2015. The initial assessment computed the 1776 statutory penalty as \$900.00 per day (i.e., \$100.00 per day for each of Precision's nine journeymen working on the Project) for 50 days of tardiness, totaling \$45,000.00. Precision failed to prove the basis for this penalty was incorrect. Accordingly, the section 1776 statutory penalty of \$45,000.00 is affirmed.

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

## FINDINGS

1. Affected subcontractor Precision Mechanical & Refrigeration Services, Inc., dba Precision Mechanical & HVAC timely filed a Request for Review of the Civil Wage and Penalty Assessment timely issued by the Division of Labor Standards Enforcement (DLSE).
2. Precision Mechanical & Refrigeration Services, Inc., dba Precision Mechanical & HVAC underpaid prevailing wages for each day of work performed by each of four workers, constituting 340 violations of section 1775.
3. The Labor Commissioner did not abuse her discretion in assessing penalties under section 1775, subdivision (a), at the rate of \$150.00 per violation. Accordingly, statutory penalties under section 1775 in the sum of \$51,000.00 are due from Precision Mechanical & Refrigeration Services, Inc., dba Precision Mechanical & HVAC , calculated at \$150.00 per violation for 340 violations.
4. Precision Mechanical & Refrigeration Services, Inc., dba Precision Mechanical & HVAC failed to pay the overtime prevailing wage rate for work performed by one worker on four Saturdays. Accordingly, statutory penalties under section 1813 in the sum of \$100.00 are due from Precision.
5. Statutory penalties under section 1776 are due from Precision in the sum of \$45,000.00, at the rate of \$100.00 per worker for nine workers, for a period of 50 days.
6. The amounts found due in the Assessment, as affirmed and modified by this Decision, are as follows:<sup>6</sup>

Penalties under section 1775, subdivision (a):	\$51,000.00
Penalties under section 1813:	\$ 100.00
Penalties under section 1776:	\$45,000.00
<b>TOTAL:</b>	<b>\$96,100.00</b>

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<sup>6</sup> As noted above in note 2, a prior settlement with AWI addressed the underpayment of wages, such that none are due under this Decision.

**ORDER**

The Civil Wage and Penalty Assessment is affirmed and 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: April 21, 2019



Victoria Hassid  
Chief Deputy Director<sup>7</sup>  
Department of Industrial Relations

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<sup>7</sup>See Gov. Code, sections 7, 11200.4.