STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

AWI BUILDERS, INC. Case No. 17-0008-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

On December 21, 2016, the Division of Labor Standards Enforcement (DLSE) issued a timely Civil Wage and Penalty Assessment (Assessment) against the prime contractor, AWI Builders, Inc. (AWI), and its subcontractor, AYA Plumbing, Inc. (AYA) with respect to the Pacific Amphitheatre Lobby, Plaza & Festival Fields Phase II in Orange County (Project). AWI submitted a timely Request for Review of the Assessment.[1] On January 15, 2019, DLSE moved to lower the Assessment to credit wage and training fund contribution payments. The motion was granted based on AWI having no objection, thereby setting the final, amended Assessment amounts at $24,156.72 in prevailing wages and $721.04 training fund contributions, $21,120.00 in penalties under Labor Code section 1775 and $200.00 in penalties under Labor Code section 1813.[2]

On July 13, 2019, and August 28, 2019, in Los Angeles, California, at a duly noticed Hearing on the Merits before Hearing Officer John Korbol, David Cross appeared as counsel for DLSE, and Mark Feldman appeared as counsel for AWI. DLSE Deputy Labor Commissioner Norbert Flores testified in support of the

[1] AYA did not request review. The Assessment, as against AYA, became final when AYA did not request review within the 60 days after the Assessment issued. (Lab. Code § 1742, subd. (a); Cal. Code Reg., tit. 8, sec 17222.) As regards to AYA, this Decision does not review the Assessment. The Director makes findings herein as relates to AWI and determines liability solely against AWI.

[2] All subsequent section references are to the California Labor Code, unless otherwise specified.

Assessment. Robert Mekikyan, AWI Senior Project Manager, and Marina Khalatian, AWI Labor Compliance Supervisor, testified on behalf of AWI. DLSE Exhibit Numbers 1 through 24 were identified and admitted into evidence. AWI Exhibit Numbers 50 through 73 were identified but Exhibit Numbers 50, 52, 54, 57, 61, 62, 72 and 73 were not admitted into evidence. AWI Exhibit Numbers 51, 53 and 55 are the declarations of AYA president Moses Anserlian, AYA Plumber apprentice Jason Donathan, and the awarding body California Fairs Finance Authority (CFFA) Construction Manager Bryan Eubanks, respectively. The Hearing Officer sustained DLSE's relevancy objection to AWI Exhibit Numbers 59 and 60, as they related to a civil wage and penalty assessment against AWI regarding wages of its own workers, not AYA workers, albeit on the same project in Orange County. On November 19, 2019, the matter was deemed submitted for decision after the parties filed post-trial briefs.

On December 21, 2018, at a prehearing conference, AWI stipulated that the work on the Project was performed on a public work and required the payment of prevailing wages under the California Prevailing Wage Law (CPLW), sections 1720 through 1861. AWI also stipulated that DLSE served the Assessment timely. Additionally, DLSE stipulated that AWI filed the Request for Review timely.

The issues for decision are:

- Were apprentices at all times working with or under the direct supervision of journeypersons?
- Was DLSE's reclassification of apprentices to journeypersons proper and correct?
- Does DLSE's reclassification of AYA workers require additional wages?
- Does AWI owe training fund contributions for AYA workers?
- Is AWI liable for penalties under section 1775, and did DLSE correctly assess such penalties at a proper penalty rate?

- Is AWI liable for liquidated damages under section 1742.1?
- Is AWI liable for penalties under section 1813, and did DLSE correctly assess such penalties against AWI?

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. The Director also finds that AWI carried its burden of proving that the basis for the Assessment was incorrect, in part. The Director uses her discretion to waive the imposition of liquidated damages. The Director further finds that AWI, a prime contractor, is not jointly or severally liable under section 1813 for overtime violations committed by AYA, its subcontractor. (See Cal. Code Regs., tit. 8, § 17250, subds. (a), (b).) Accordingly, the Director issues this Decision affirming the amended Assessment, except as modified.

FACTS

The Project.

On May 6, 2013, the awarding body, CFFA, advertised the Project for bid. The scope of the project was excavation and construction of a new entrance and lobby through the existing amphitheater berm, and construction of a large circular plaza with a raised stage, seating, walkways, and restrooms, with accompanying landscaping, mechanical, electrical, and plumbing facilities.

On September 3, 2013, AWI entered into the contract (Contract) with the awarding body, which contained terms requiring compliance with CPWL. The Contract also contained an addendum called the Enhanced Worker Safety Program that imposed apprenticeship requirements of workforce staffing different from that required by the CPWL. The Enhanced Worker Safety Program required daily verification of apprentices and journeypersons on the Project, and reporting to the awarding body the names of all workers supplied for the Project. These requirements were in addition to the apprenticeship requirements and

payroll record-keeping requirements as contained in the CPWL. AWI subcontracted with AYA (Subcontract) to construct heating ventilation and air conditioning. The Subcontract contains and incorporates a copy of the sections 1771, 1775, 1777.5, 1813, and 1815 of the CPWL.

Applicable Prevailing Wage Determination.

The final amended audit reclassified five Laborer apprentices to Laborer 3 journeypersons. The prevailing wage determination (PWD) and scope of work for the Laborer 3 journeyperson as of May 6, 2013, are embodied in the PWD denominated SC-23-102-2-2012-1 (Laborer PWD). Laborers were on the Project for the week ending January 26, 2014, until the week ending April 27, 2014. During that timeframe, for Laborer Group 3, the Laborer PWD imposed a total hourly straight time rate (with fixed increases therein) of $48.28, which included training fund contributions of $0.64, and fringe payments of $17.55.

DLSE's final amended audit also reclassified one apprentice to Plumber Industrial and General Pipefitter (Plumber) journeyperson for the last two weeks that the worker was on the Project. He was on the Project for the week ending May 4, 2014, until the week ending July 6, 2014. The PWD and scope of work for Plumber journeyperson as of May 6, 2013, are embodied in the PWD denominated ORA-2013-1 (Plumber PWD). During that timeframe, the Plumber PWD imposed a total hourly straight time rate (with fixed increases therein) for Plumber journeypersons of $64.41, which included training fund contributions of $1.60, and fringe payments of $21.83.

The Amended Assessment.

DLSE found that AYA failed to pay the applicable journey level prevailing wage rate to six workers classified as apprentices, five working as Laborers and one working as a Plumber.[3] DLSE's audit, as amended, found that based on the

[3] DLSE reclassified the six apprentices to journey level for days of work when CPRs did not list a journeyperson also on duty, based on a regulation requiring that apprentices be supervised by

hours of work as listed in the Certified Payroll Records (CPRs) and the Laborer and Plumber PWDs, AYA owed $55,616.59 in prevailing wages to these reclassified workers. The audit found that AYA had paid to these workers wages of $31,766.01. Applying a credit for paid wages, the unpaid wages found by the amended Assessment totaled $23,850.58 for these six workers.[4]

Additionally, DLSE found unpaid training fund contributions of $721.04 for these six workers. DLSE also found that AYA underpaid prevailing wages (into a 401(k) retirement account) of $242.08 to a Plumber apprentice 401(k) and training fund contributions of $41.92 for another Plumber apprentice.

The Assessment, as amended, also found section 1775 penalties were due in the amount of $21,120.00 for two general categories of failure to pay the prevailing wage rate. For the first, DLSE found penalties in the amount of $16,920.00 on account of the six workers for the instances in which training fund contributions were not made to an approved apprenticeship program or the California Apprenticeship Council and for days when the workers should have been paid journey level wages. These penalties were calculated for 141 violations at the rate of $120.00 for each calendar day or portion thereof for each violation. DLSE determined the penalty rate, in part, based on three prior violations by AYA.

For the second category of prevailing wage violations, DLSE found 35 violations also at the rate of $120.00 per day for underpayments of fringe benefits and training fund contributions penalties, totaling $4,200.00, for the two Plumber apprentices.

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journeypersons, as explained more fully, *post.* The original Assessment found 15 workers were owed prevailing wages as being unsupervised. Prehearing negotiations between DLSE and AWI resulted a reduction in the unpaid wages for several of those workers for purposes of the amended Assessment.

[4] A computational error shows AYA owing $22.14 on the amended audit more than it actually owes in wages to a worker. The error is corrected herein.

The amended Assessment further found section 1813 penalties due for unpaid overtime work performed by one of the Plumber apprentices, calculated at the rate of $25.00 for four violations, for a total amount of $200.00.

AWI argues that DLSE should not have reclassified the six apprentices to journey level because DLSE erroneously applied the regulation regarding supervision of apprentices to AYA. AWI Senior Project Manager Mekikyan testified that the Enhanced Worker Safety Program required that 70% of working journeypersons on the Project be graduates from a State-approved apprenticeship program, and AYA had difficulty finding enough journeypersons who met this requirement. Mekikyan testified that the awarding body and unnamed union officials at the Project site agreed to allow supervision of apprentices so long as the supervisors did not perform craftwork or use tools of the trade to avoid violating the Enhanced Worker Safety Program's 70% limitation.

Mekikyan explained that AYA employed non-graduate journeypersons to "watch and supervise" workers on the Project, with the caveat that they not perform construction on Project (non-working journeyperson or non-working supervisors). AYA used its owner, Moses Anserlian, and two other managers, Jose Galdanez and Hector Gutierrez, in an attempt to satisfy the regulatory supervision requirement. Mekikyan testified that these journeypersons "walked the jobsite and watched the apprentices" every day the apprentices worked. Based on their activity, AWI argues that AYA satisfied the regulation regarding apprenticeship supervision.

AWI Labor Compliance Officer Khalatian testified that the awarding body's daily sign-in sheets recorded the names of all who worked on the Project. She identified those, as well as several exhibits that she prepared for DLSE, intended to demonstrate the attendance of Anserlian, Galdanez and Gutierrez on each day that an apprentice was working. The exhibits included supplemental CPRs that

AWI prepared, years after the work was done, adding the names of the three supervisors. AWI argued that these documents demonstrate that AYA properly supervised its workers for purposes of the apprentice regulation. Khalatian also submitted evidence in the form of cancelled checks and a worker's declaration to support its contention that AWI later made the payment into the 401(k) retirement account that AYA failed to make. AWI further provided evidence that AYA had made all required training fund contributions. Finally, Khalatian testified that she closely monitored AYA's compliance with prevailing wage requirements and otherwise took steps on AWI's behalf to comply with a prime contractor's safe harbor protection from penalties on subcontractors for prevailing wage violations.

DISCUSSION

The CPWL, set forth at Labor Code sections 1720 et seq., requires the payment of prevailing wages to workers employed on 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,* at p. 985.)

When DLSE determines that a violation of the prevailing wage laws has occurred, including with respect to any underpayment of wages, it may issue a written civil wage and penalty assessment pursuant to section 1741. An affected contractor may appeal that assessment by filing a request for review. (§ 1742.) The request for review is transmitted to the Director, 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).)

AYA Misclassified Six Workers and and AWI Is Jointly And Severally Liable for AYA's Underpayment.

A contractor and subcontractor shall pay not less than the specified prevailing rates of wages to all workers employed in the execution of a public work. (§1771.) The exception to the prevailing wage rate for journeypersons is the lesser wage rate for apprentices. Contractor's bargain for cheaper labor requires that, in return, the apprentices and programs receive on-the-job training from journeypersons. From all appearances that did not occur here.

Section 1777.5, subdivision (c), requires that apprentices be employed and trained in accordance with the apprenticeship standards and agreements, or,

alternatively, be employed and trained in accordance with the rules and regulations of the California Apprenticeship Council (CAC). AWI submitted no evidence that AYA employed its apprentices under any particular apprenticeship standards and apprentice agreements within the meaning of section 1777.5, subdivision (c). Consequently, the regulations of the CAC apply in this matter.[5]

One such regulation, California Code of Regulations, section 230.1, title 8, subdivision (c), mandates that "apprentices employed on public works must at all times work with or under the direct supervision" of journeypersons. DLSE reclassified the apprentices as journeypersons, because AYA could not classify and pay these workers as apprentices unless properly supervised pursuant to this regulation.

Deputy Labor Commissioner Flores testified that AYA's CPRs reported no journeypersons worked as Laborers and Plumbers on the Project. According to section 1776, subdivision (a), the statute that requires the keeping of CPRs, the employer must record all journeyperson hours. Seeing no workers identified as journeypersons on the CPRs, Flores found that there were no journeypersons working with or supervising the apprentices, as is required by the regulation. DLSE argues, in part, that AYA's failure to report supervisors on the CPRs equates to a failure to provide direct supervision of workers. While the failure to report AYA's supervisors on the original CPRs and AWI's later addition of these supervisors to amended CPRs creates evidentiary questions concerning their accuracy, they do not answer whether the supervision was adequate and sufficient to classify these workers as apprentices.

Neither party contends that the supervisors actually worked side by side with the workers. AWI states that AYA used non-working journeypersons who

[5] AWI argued in its closing brief that AYA complied with the CAC regulations. DLSE assumed AYA employed the apprentices under the rules and regulations of the CAC because AYA did not provide DLSE with a DAS form 140 whereon AYA could have identified an apprenticeship committee. AWI submitted no proof of any particular apprenticeship committees having approved AYA to employ and train apprentices under their standards.

daily walked the Project site and observed the apprentices. However, AWI's evidence does not show that these persons "at all times work[ed] with" the apprentices, as contemplated by the regulation. Walking the Project and observing workers does not constitute "work with" apprentices. AWI presented no evidence to provide examples or descriptions of how they worked with apprentices.

Nor did AWI present evidence that the non-working journeypersons "at all times" provided "direct" supervision. The regulation requires not just supervision, but "*direct* supervision" by journeypersons. (Cal. Code Regs., tit. 8, § 230.1, subd. (c), emphasis added.) When interpreting the drafter's intent of a regulation, words are given their usual and ordinary meaning, and every word is given significance to avoid an interpretation that renders any word surplusage. (*Department of Industrial Relations v. Occupational Safety & Health Appeals Bd.* (2018) 26 Cal.App.5th 93, 101; *In re Espinoza* (2011) 192 Cal.App.4th 97, 104.) Walking the jobsite and watching the workers implies casual observation, but not a level of supervision that suggests advancing workers' training and education in trades or crafts. AWI's evidence lacks any examples of training or education that occurred during the nonworking journeypersons' routine in walking the jobsite and watching the work.

DLSE is charged with presenting evidence that provides prima facie support for the Assessment, and it did so. It is then AWI's burden to prove the basis for Assessment was incorrect. (Cal. Code Regs., tit. 8, § 17250, subds. (a), (b); accord, § 1742, subd. (b).) As Mekikyan testified, AYA's bankruptcy proceedings and lack of involvement in AWI's defense of its case does not absolve AWI of this burden. No worker or journeyperson testified with regard to the supervision, on-the-job training or education provided to the apprentices. Having chosen not to present testimony by Anserlian, Gutierrez, Galvadez or any apprentice, AWI presents little if anything to show that the three managers in

question directly supervised the apprentices. AWI also attempts to shift impermissibly its evidentiary burden concerning the lack of supervision, stating that Flores never visited the worksite to observe AYA's supervision of their workers.

Further, that unnamed representatives of unions associated with AYA's Laborer and Plumber apprentices and representatives of the awarding body agreed that the supervision of the apprentices satisfied the Enhanced Worker Safety Program does not advance AWI's defense. It is DLSE, not the unions and not the awarding body, who is charged with enforcing the CPWL with assessments and applying the law. DLSE need not defer to third party interpretations of the requirements nor does it appear to be a correct interpretation of the CPWL.

It may be, as AWI asserts, that DLSE in another case on the Project, on which AYA worked, agreed to settle the issue of AWI apprentices not receiving proper supervision. Yet, in accordance with the Hearing Officer's evidentiary ruling at the Hearing, many reasons can enter the equation for settlement, and a settlement of one case does not bind DLSE or the Director in another case to a legal interpretation favoring AWI. Additionally, AWI's explanation for why AYA did not use working journeypersons to supervise apprentices is irrelevant to the analysis of whether these workers were properly supervised pursuant to California Code of Regulations, title 8, section 230.1, subdivision (c). AYA may well have had difficulty finding journeypersons who had graduated from State-approved apprenticeship programs for the Project in numbers that met the 70% standard imposed by the prime contract. The difficulty does not excuse AYA from application of the statutory and regulatory requirement.

AWI also argues it would be sufficient for DLSE to reclassify just one of the apprentices to journey level, not all six, for then a journeyperson will have been on the job. However, section 1771 (requiring the payment of prevailing

wage for all workers on a public work) empowers the Labor Commissioner to reclassify the work of all apprentices from an apprenticeship classification to a journeyperson classification for those days on which the apprentices did not work with or received direct supervision from a journeyperson. Additionally, fairness requires that the workers, who did not receive the quid pro quo of training for lesser pay, obtain a journeyperson's prevailing wage. Further, there is no logic behind identifying which journeyperson would be the recipient of a higher wage rate while the remaining workers receive a lower wage rate.

Workers paid an apprentice wage rate who do not receive direct supervision are paid less than the required prevailing wage on the project. In such situations, as here where AYA did not adequately supervise the five Laborer apprentices and one Plumber apprentice, AYA was not entitled to classify them as apprentices to pay them the lower apprentice wage rate. Accordingly, DLSE properly reclassified each of these six workers from apprentice to journeyperson and assessed an underpayment of prevailing wages based on AWI not rebutting DLSE's evidence that the workers were denied the benefit of direct supervision.

Flores testified that the work performed by five of the workers matched the scope of work for a Laborer 3 within the Laborer PWD and that the work performed by one of the workers matched the scope of work for a Plumber within the Plumber PWD. AWI did not rebut DLSE's assertion that the work performed fell within these work classifications. Instead, AWI focused on the propriety of the apprentice classification as opposed to the journeyperson classification.

Section 1743 provides that the "contractor and subcontractor shall be jointly and severally liable for all amounts due under a final order …." By application of section 1743, AWI is jointly and severally liable for payment of prevailing wages in the sum of $23,850.58. Additionally, the reclassification of the six workers resulted in a shortfall of training fund contributions to the CAC or

an approved apprenticeship program in the amount of $721.04, that sum is also due from AWI.

No Wages Owing to Two AYA Workers.

DLSE found that wages were owed to two AYA workers who AYA classified as Plumber apprentices, even though DLSE did not reclassify them. Flores testified that one worker was owed wages of $41.92 for unpaid training fund contributions to the CAC or an approved apprenticeship program. He testified that the other worker was owed $242.08 for wages AYA had promised and did not pay into the worker's 401(k) retirement account. Flores' testimony provides prima facie support for the Assessment as to these two workers.

AWI presented Khalatian's testimony, demonstrative charts and AYA's cancelled checks to an approved training program to prove that the Assessment was incorrect as to DLSE's finding of $41.92 owed for unpaid training fund contributions. AWI's evidence showed that AYA had overpaid the training program in December 2013, and that the training program had credited this overpayment to training fund contributions in February 2014. Accordingly, this Decision finds that sum is not due and owing.

Similarly, AWI successfully carried its burden to disprove DLSE's finding that $242.08 in contributions to the worker's 401(k) retirement account remained owed. AWI proved that it made restitution to the worker as evidenced by Khalatian's testimony, demonstrative charts, the worker's declaration, and AWI's cancelled check for wages of $817.72, a sum sufficient to cover the alleged $242.08 underpayment to the retirement account. AYA is entitled to credit for the later restitution payment against any underpayments. (See § 1773.1 subdivision (c) ["Employer payments are a credit against the obligation to pay the general prevailing rate of per diem wages"].)

Accordingly, the Director removes from the Assessment the underpayment of $284.00 in wages for two Plumber apprentices.

DLSE's Penalty Assessment under Section 1775 Is Affirmed as to Underpayments to the Six Misclassified Workers But Denied for Alleged Underpayments of Fringe Benefits to the Two Plumber Apprentices.

Section 1775, subdivision (a), requires that contractors and subcontractors pay the difference to workers who received less than the prevailing wage rate, and prescribes penalties for failing to pay the prevailing wage rate. The prevailing rate of per diem wage includes travel pay, subsistence pay, and training fund contributions pursuant to section 1773.1. Section 1775, subdivision (a)(2), grants the Labor Commissioner the discretion to mitigate the statutory maximum penalty per day in light of prescribed factors.

Section 1775, subdivision (a)(1), states:

> 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 . . . .

Section 1775, subdivision (b), provides that:

> [T]he prime contractor is not liable for any penalties under subdivision (a), unless the prime contractor had knowledge of that failure of the subcontractor to pay the specified prevailing rate of wages to those workers or unless the prime contractor fails to comply with all of the following requirements:
>
> (1) The contract executed between the contractor and the subcontractor for the performance of work on the public works project shall include a copy of the provisions of this section and Sections 1771, 1776, 1777.5, 1813, and 1815.
>
> (2) The contractor shall monitor the payment of the specified general prevailing rate of per diem wages by the subcontractor to the employees,

by periodic review of the certified payroll records of the subcontractor.
. . . .

Section 1775, subdivision (a)(2)(D), provides that the Labor Commissioner's determination as to the amount of the penalty shall be reviewable only for an abuse of discretion. Abuse of discretion is established if the "agency's nonadjudicatory action … is inconsistent with the statute, arbitrary, capricious, unlawful or contrary to public policy." (*Pipe Trades v. Aubry* (1996) 41 Cal.App.4th 1457, 1466.) In reviewing for abuse of discretion, however, the Director is not free to substitute his or her own judgment "because in [his or her] own evaluation of the circumstances the punishment appears to be too harsh." (*Pegues v. Civil Service Commission* (1998) 67 Cal.App.4th 95, 107.)

A contractor or subcontractor has the same burden of proof with respect to the penalty determination as to the wage Assessment. Specifically, "the Affected Contractor or Subcontractor shall have the burden of proving that 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).)

1. Penalties Are Due for Underpayment to Six Reclassified Workers.

DLSE presented evidence that AYA incurred 141 violations of failing to pay the required prevailing wage and training fund contributions as to six reclassified workers. With that evidence, DLSE sustained its burden of coming forward with evidence that provides prima facie support for DLSE's determination that AYA is liable for penalties under section 1775 in the amount of $16,920.00 for 141 violations, calculated at the rate of $120.00 per violation.

In determining the penalty rate, DLSE mitigated it from the statutory $200.00 level to $120.00 per violation. The DLSE Penalty Review states that the DLSE senior deputy imposed the penalty rate "based on [AYA's] history of prior violations," but made no mention of AWI's history of violations, if any.

Notwithstanding the Penalty Review's attention to AYA's prior violations to the exclusion of AWI's citation history, a level of $120.00 per violation is within the Labor Commissioner's discretion, given both her broad discretion under section 1775 and the nature of this violation. Accordingly, one could not say that the Labor Commissioner's penalty rate was arbitrary, capricious, unlawful, or inconsistent with the statute or public policy.

AWI contends that it is not liable for the section 1775 penalties because it is entitled to the safe harbor protection for prime contractors under section 1775, subdivision (b) because it included a copy of the relevant statutes in the Subcontract and took the other steps to correct the underpayment listed in section 1775, subdivision (b)(1) to (4). Whether the evidence supports a conclusion that AWI complied with the four steps, however, does not entitle AWI to the safe harbor protection because, under the first prong of subdivision (b), AWI is excluded from the safe harbor protection if it "had knowledge of th[e] failure of the subcontractor to pay the specified prevailing rate of wages to those workers." ((§ 1775, subd. (b).) *Id.*) The first prong suffices to deprive AWI of the safe harbor regardless of its compliance with the four steps under the second prong.

AWI's knowledge of AYA's failure to pay prevailing wages is confirmed by Mekikyan's testimony that placed himself among the non-working supervisors monitoring the jobsite. Additionally, AWI cannot claim that it did not know AYA paid the apprentice wage rate because it admits that it monitored the CPRs and was aware the apprentices were paid at apprentice rates. Consequently, the Director determines AWI is jointly and severally liable for $16,290.00 in penalties under section 1775.

2. Analysis of Section 1775 Penalties Related to the Two Plumbers Apprentices.

DLSE imposed a single penalty of $120.00 related to DLSE's finding that AYA owed $41.92 for unpaid training fund contributions associated with a Plumber apprentice. Based on AWI's rebuttal of DLSE's prima facie case, the Director determines that AYA timely paid the amount of $41.92 to an approved training program and removes the amount due from the Assessment. Consequently, no penalties under section 1775 are owed for those alleged unpaid training fund contributions.

DLSE also imposed a penalty of $4,080.00 for 34 violations related to DLSE's finding of wages owed in the amount of $242.08 for unpaid 401(k) retirement account payments associated with one Plumber apprentice. Flores testified that AWI's restitution check for $817.72 was late, being issued on January 18, 2017, to compensate for AYA's failure to make 401(k) contribution payments. Based on the late payment, DLSE imposed the section 1775 penalties.

While late fringe benefit payments are proper bases for section 1775 penalties, that does not answer the question whether AWI is liable for those penalties. The testimony of AWI's Labor Compliance manager Khalatian establishes that, although payment was late, AWI made the restitution payment to the worker as soon as it learned of AYA's failure to make the wage payment into the 401(k) retirement account. Availing itself of the safe harbor protections, AWI undertook and performed each of the requirements in section 1775, subdivision (b)(1) – (4). The Subcontract contained a copy of the prevailing wage statutes, AWI monitored and periodically reviewed AYA's CPRs, upon becoming aware of the violation AWI took corrective action, and AWI obtained the Subcontractor's affidavit that it paid the prevailing wages.

Accordingly, AWI is entitled to the safe harbor protection and does not owe the $4,200.00 in penalties DLSE assessed under section 1775 for unpaid retirement account payments.

AWI Is Not Liable for Liquidated Damages.

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

> After 60 days following the service of a 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.

The statutory scheme regarding liquidated damages, as applicable to this case, provides contractors three alternative means to avert liability for liquidated damages (in addition to prevailing on the case, or settling the case with DLSE and DLSE agreeing to waive liquidated damages). These three alternative means required the contractor to make key decisions within 60 days of the service of the civil wage penalty assessment.

First, the above-quoted portion of section 1742.1, subdivision (a), states that the contractor shall be liable for liquidated damages equal to the portion of the wages "that still remain unpaid" 60 days following service of the Assessment. Accordingly, the contractor had 60 days to decide whether to pay to the workers all or a portion of the wages assessed in the Assessment, and thereby avoid liability for liquidated damages on the amount of wages so paid.

Under section 1742.1, subdivision (b), a contractor would entirely avert liability for liquidated damages if, within 60 days from issuance of the Assessment, the contractor deposited into escrow with the Department of Industrial Relations (DIR) the full amount of the wages and statutory penalties

under sections 1775. Section 1742.1, subdivision (b), stated in this regard:

> [T]here shall be no liability for liquidated damages if the full amount of the assessment…, including penalties, has been deposited with the Department of Industrial Relations, within 60 days of the service of the assessment…, for the department to hold in escrow pending administrative and judicial review.

Alternatively, the contractor could choose not to deposit with DIR the full amount of assessed wages and penalties, and instead rely on the Director's discretion to waive liquidated damages under the following portion of former section 1742.1:

> 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.

Here, AWI did not deposit with the DIR the assessed wages and statutory penalties. Nor did it pay the workers all or a portion of the wages assessed in the Assessment. That leaves the question whether AWI has demonstrated to the Director's satisfaction it had substantial grounds for appealing the Assessment as a basis for the Director's discretionary waiver of liquidated damages.[6]

[6] On June 27, 2017, the Director's discretionary waiver ability was deleted from section 1742.1 by statutes 2017, chapter 28, section 16 (Senate Bill No. 96) (SB 96). Legislative enactments 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 (December 21, 2016) allowed a waiver of liquidated damages in the Director's discretion, as specified, which could have influenced the contractor'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 the contractor 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.

AWI argues that liquidated damages are not proper because, after the initial Assessment that reclassified 15 apprentices to journeyperson, it negotiated with DLSE to reduce the number to six apprentices. AWI further argues that the local district attorney seized its records in 2015 or 2016, well before the issuance of the Assessment, and while the criminal investigation brought no charges, the lack of access to its records impeded its ability to make decisions about what defense to present. These arguments are not persuasive. Liquidated damages only are applicable to the aspects of the Assessment that *are* affirmed, and in this case, the affirmed aspects of the Assessment lacked any documentary rebuttal evidence.

Notwithstanding, the Director exercises her discretion by waiving liquidated damages because AWI demonstrated that it had substantial grounds for appealing those aspects of the Assessment affirmed herein. The Director exercises her discretionary based on two factors: 1) the novelty of the issue presented; and, 2) the awarding body's acceptance of AYA's workaround for its staffing requirements as per the Enhanced Worker Safety Program that resulted in non-working supervisors observing workers. Prior Director's decisions had not previously elaborated on the legal requirement that supervisors provide training and/or education to apprentices working on a public works project as consideration for the payment of lower apprentice wages. To the degree that AYA, and consequently AWI, may have relied upon the awarding body for guidance in maneuvering both the awarding body's specific staffing requirements and the statutory apprenticeship requirements, AWI could reasonably have mistakenly confused its prevailing wage obligations.

Based on the foregoing, the undersigned exercises her discretion to waive liquidated damages with respect to the prevailing wages found due in this Decision. Accordingly, no liquidated damages are due from AWI, as provided in the Findings, *post.*

AWI Is Neither Jointly Nor Severally Liable for the Penalties Assessed Against AYA under Section 1813.

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

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 assessed $200.00 of penalties under section 1813 against AYA for violations under section 1815 for $242.08 of wages owed for unpaid 401(k) retirement contributions associated with a Plumber apprentice. However, AWI, as the prime contractor, is not liable under section 1743 for penalties assessed under section 1813 against AYA. (See, e.g., Director's decision in *W.A. Thomas Company*, Inc., Case No. 12-0106-PWH, posted at https://www.dir.ca.gov/oprl/1742decisions/12-0106-PWH.pdf.) Since a prime

contractor has no joint and several liability for a subcontractor's liability under section 1813 penalties, the Director will not review the underlying facts supporting the Assessment for section 1813 penalties.

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

FINDINGS AND ORDER

1. AWI Builders, Inc. is jointly and severally liable for AYA Plumbing Inc.'s underpayment of prevailing wages to its workers in the amount of $23,850.58.
2. AWI Builders, Inc. is jointly and severally liable for AYA Plumbing Inc.'s failure to pay $721.04 in training fund contributions.
3. AWI Builders, Inc. does not qualify for the safe harbor provisions for prime contractors under section 1775, and therefore is liable for penalties arising from AYA Plumbing Inc.'s failure to pay prevailing wages to six workers, including training fund contributions.
4. Penalties under section 1775 are due from AWI Builders, Inc. in the amount of $16,920.00 for 141 violations at the rate of $120.00 per violation.
5. Liquidated damages are waived.
6. AWI Builders, Inc.is not jointly and severally liable for penalties under section 1813.

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

Basis of the Assessment	**Amount**
Wage Due:	$23,850.58
Training Fund Contributions:	$721.04
Penalties under section 1775, subdivision (a):	$16,920.00
TOTAL:	$41,491.62

In addition, interest is due from AWI Builders, Inc. and shall accrue on unpaid wages in accordance with Labor Code section 1741, subdivision (b).

The Civil Wage and Penalty Assessment, as amended, is modified and affirmed 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: __6/22/20_____

/s/ Katrina S. Hagen
Katrina S. Hagen, Director
Department of Industrial Relations