

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

M.V.C. Enterprises, Inc., a CA Corporation

Case No. 21-0066-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 M.V.C. Enterprises, Inc. (M.V.C.) submitted a request for review of a Civil Wage and Penalty Assessment (Assessment) issued on January 29, 2021 by the Division of Labor Standards Enforcement (DLSE), with respect to work performed on the Monte Vista Event Center/Student Services Building Multi Prime CN-1550 Concrete (Project), for the Grossmont Union High School District (District or Awarding Body). The Assessment determined that \$40,800.00 was due in penalties under Labor Code section 1776, subdivision (h).¹

On April 26, 2022, a duly noticed Hearing on the Merits was held in Los Angeles, California, before Hearing Officer Mirna Solís. Lance Grucela appeared as counsel for DLSE. There was no appearance by M.V.C. Pursuant to California Code of Regulations, title 8, section 17246, subdivision (a), the Hearing on the Merits proceeded in M.V.C.'s absence. Deputy Labor Commissioner Jessica Santiesteban testified in support of the Assessment. DLSE Exhibit Numbers 1 through 16 were admitted into evidence. The matter was submitted for decision on April 26, 2022. To date, M.V.C has not sought relief from its non-appearance, as permitted under California Code of Regulations, title 8, section 17246, subdivision (b).

At a Prehearing Conference on December 6, 2021, the parties stipulated to the following:

- The work subject to the Assessment was performed on a public work and

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

required the payment of prevailing wages under the California Prevailing Wage Law, Labor Code sections 1720 through 1861.

- The Assessment was served timely.
- The Request for Review was filed timely.
- The enforcement file was requested and produced in a timely fashion.

The sole issue for decision is whether M.V.C. is liable for section 1776 penalties for its failure to provide certified payroll records (CPRs) timely upon DLSE's request.

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. (See Cal. Code Regs., tit. 8, § 17250, subd. (a).) This evidence stood un rebutted, as M.V.C. did not appear for hearing. Accordingly, the Director issues this Decision affirming the Assessment.

FACTS

Failure to Appear.

M.V.C. filed its Request for Review on March 25, 2021. Michael McCoy with Public Works Compliance Advisors, Inc. appeared on behalf of M.V.C. at Prehearing Conferences held on July 26, 2021 and August 23, 2021.² At a Prehearing Conference held on December 6, 2021, the parties agreed to set the matter for a Hearing on the Merits on April 26, 2022. On February 8, 2022, McCoy advised the Hearing Officer that he and Public Works Compliance Advisors, Inc. had terminated their representation of M.V.C. as of January 17, 2022.

On April 26, 2022, the day of the Hearing on the Merits, there was no appearance by M.V.C.³ As M.V.C. was duly notified of the scheduled Hearing on the

² As a non-attorney representative, McCoy signed a Notice of Representation of M.V.C. on August 13, 2021. (Cal. Code Regs., tit. 8, § 17209.) However, the Notice of Representation was not provided to the Hearing Officer until after the August 23, 2021 Prehearing Conference.

³ On April 5, 2022, DLSE served its Exhibit List and Witness List on M.V.C. by email and overnight delivery. DLSE's Exhibit List and Witness List included the scheduled date of the Hearing on the Merits.

Merits when its representative agreed to the April 26, 2022 hearing date, the matter proceeded as scheduled.

DLSE's Efforts to Obtain Certified Payroll Records.

Santiesteban testified that on May 22, 2020, DLSE received a complaint by the Cement Masons Labor Management Cooperation Committee (LMCC). (DLSE Exhibit No. 2, pp. 11-64.) The complaint alleged that M.V.C. violated apprenticeship standards by failing to employ apprentices. (*Id.* at p. 11.) Santiesteban was assigned to investigate the complaint.

As part of her investigation, on November 18, 2020, Santiesteban had the following documents served on both the Awarding Body and M.V.C.: (1) Notice of Investigation; (2) Request for Information, Awarding Body; (3) Request for Payroll Records; (4) Statement of Employer Payments; (5) Public Works Payroll Reporting Form A1-131; and, (6) Notice of Apprenticeship Compliance. (DLSE Exhibit No. 3, pp. 65-76; DLSE Exhibit No. 16, p. 519.) The documents were served by first class mail and by certified mail with returned receipt requested.⁴ (DLSE Exhibit No. 3, pp. 65-76.)

M.V.C. received the DLSE documents, including the Request for Payroll Records, on November 23, 2020. The U.S. Post Office provided DLSE with the signed, return receipt. (DLSE Exhibit No. 3, p. 76; DLSE Exhibit No. 16, p. 519.) The Request for Payroll Records stated:

This letter constitutes a written, statutory request from the Division of Labor Standards Enforcement (the "Division") for public works payroll information as authorized by Labor Code section 1776. Under that law, and the regulations thereunder found at Title 8 of the California Code of Regulations (hereafter, "8 CCR") sections 16400 and 16401, contractors and subcontractors are required to keep accurate payroll records and to furnish a certified copy of such records to a representative of the Division upon written request.

...

⁴ M.V.C. was served at 27250 Via Industria, Temecula, California 92590. (DLSE Exhibit No. 3, pp. 73, 74, 76.) This is the address listed for M.V.C. on the websites of the California Secretary of State and the California Contractors State License Board. (DLSE Exhibit No. 14, pp. 507-511; DLSE Exhibit No. 15, pp. 512-518.)

Within ten (10) working dates from the date of receipt of this request, please submit certified payroll information as described on Form 1-A-131 for all workers who were employed by M.V.C. ENTERPRISES, INC. on the above-identified public works project during the period from the beginning of the project to the end of the project. The information requested must be timely submitted to the address found in the upper left hand corner of this request and to the attention of the Division's representative whose name appears below.

Failure to provide this certified payroll information to the Division within ten working days from the date of receipt of this request will subject the contractor or subcontractor identified above to forfeiture of a penalty of \$100.00 for each calendar day, or portion thereof, for each worker, until strict compliance is effectuated, in accordance with Labor Code section 1776(h).

. . .

Please be aware that contractors and subcontractors on public works projects may also be required to electronically furnish payroll records directly to the Labor Commissioner, either monthly or more frequently, pursuant to Labor Code section 1771.4. Note that any such obligation to electronically furnish such records directly to the Labor Commissioner is separate and distinct from the obligation to timely comply with this written request, even if the same or similar records may have already been electronically furnished directly to the Labor Commissioner.

(DLSE Exhibit No. 3, p. 67 (emphasis in original).)⁵ Santiesteban testified that M.V.C. did not respond to DLSE's Request for Payroll Records within the required timeframe.

On December 7, 2020, in response to the Request for Information directed to the Awarding Body, the District provided contract information, the Acceptance of Work and Notice of Completion recorded December 15, 2020, and M.V.C.'s electronic payroll records from March 4, 2019 through May 19, 2020. (DLSE Exhibit No. 4, pp. 77-78; DLSE Exhibit No. 5, pp. 79-83; DLSE Exhibit No. 6, p. 84; DLSE Exhibit No. 7, pp. 85-247; DLSE Exhibit No. 16, p. 519.) The District accepted the Project on October 19, 2020. (DLSE Exhibit No. 6, p. 84; DLSE Exhibit No. 16, p. 519.) Since the last payroll record the District provided was for May 19, 2020, and the Project was not accepted as

⁵ The Form A-1-131 is the Public Works Payroll Reporting Form, and was enclosed with the Request for Payroll Records. (DLSE Exhibit No. 3, pp. 67-68.)

complete until October 19, 2020, Santiesteban testified she believed the payroll records from the Awarding Body were incomplete.

On January 6, 2021, DLSE served M.V.C. a Notice of Impending Debarment, and attached to it a copy of the November 18, 2020 Request for Payroll Records. (DLSE Exhibit No. 8, pp. 248-255; DLSE Exhibit No. 16, p. 519.) The Notice of Impending Debarment and attachment were served by first class mail and by certified mail with returned receipt requested. (DLSE Exhibit No. 8, pp. 248-255.) M.V.C. received the Notice of Impending Debarment and attached copy of Request for Payroll Records on January 11, 2021. The U.S. Post Office provided DLSE with the signed, return receipt. (DLSE Exhibit No. 8, pp. 248-255; DLSE Exhibit No. 16, p. 519.) Again, M.V.C. failed to respond.

The Assessment.

On January 29, 2021, DLSE issued the Assessment for section 1776 penalties in the amount of \$40,800.00. (DLSE Exhibit No. 1, pp. 1-10.) Santiesteban testified that from the partial payroll records provided by the District, she ascertained there were 24 workers on the job. (DLSE Exhibit No. 16, p. 520.) She calculated the penalty amount by multiplying \$100.00 per day for 24 workers, which amounted to a daily penalty rate of \$2,400.00 per day. (*Ibid.*) She then multiplied the daily penalty rate of \$2,400.00 by 17 calendar days to obtain \$40,800.00. (*Ibid.*) Santiesteban testified she counted 17 calendar days from the day after M.V.C. received the Notice of Impending Debarment, January 12, 2021, through January 28, 2021, the day before the Assessment was issued. (*Ibid.*) The Assessment was served by first class and certified mail with return receipt requested. (DLSE Exhibit No. 1, pp. 1-10.) M.V.C. received the Assessment on February 1, 2021. (*Ibid.*)

M.V.C. Provided CPRs after Issuance of the Assessment.

On February 4, 2021, M.V.C.'s Payroll Administrator, Yojayra Hernandez, emailed Santiesteban stating she did not understand why the Assessment was issued. (DLSE Exhibit No. 10, pp. 259-260.) After Santiesteban explained that M.V.C. failed to provide CPRs per section 1776 in response to the Request for Payroll Records served on November 18, 2020 and January 6, 2021, Hernandez stated she misunderstood M.V.C.'s

obligation to provide DLSE with CPRs. (DLSE Exhibit No. 10, pp. 258-259.) Specifically, Hernandez stated: "It was my misunderstanding that if I entered everything into LCP tracker and DIR you would see it."⁶ (DLSE Exhibit No. 10, p. 258.) On February 4, 2021, M.V.C. produced CPRs by email. (DLSE Exhibit No. 9, pp. 256-257; DLSE Exhibit No. 11, pp. 261-500.) The CPRs showed 41 workers were on the Project from March 4, 2019 through November 24, 2020.⁷ (DLSE Exhibit No. 11, pp. 261-500.)

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 projects. The purpose of the CPWL was summarized by the California Supreme Court 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

⁶ The District used LCPTTracker software for contractors to electronically submit certified payrolls and labor compliance documentation to it. (DLSE Exhibit No. 5, p. 82.) M.V.C. was a user of LCPTTracker. (*Id.* at pp. 82-83.) Santiesteban testified that use of LCPTTracker is a separate requirement between the awarding body and the contractor, and that DLSE does not have access to LCPTTracker. Contractors on public works projects are required to electronically submit CPRs to the Labor Commissioner using the Department of Industrial Relations (DIR) Electronic Certified Payroll Reporting system. (See <https://www.dir.ca.gov/public-works/certified-payroll-reporting.html>.) Santiesteban explained that electronic CPRs (eCPRs) do not contain all of the information reflected on CPRs, such as check dates or the itemization of fringe benefit payments.

⁷ Based on her review of the complete CPRs, Santiesteban determined that M.V.C. had violated prevailing wage law on the Project and a separate Civil Wage and Penalty Assessment was issued for those claimed violations.

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.)

Employers on public works must keep accurate payroll records and make them available for inspection. Contractors must record, among other information, the work classification, straight time and overtime hours worked, and actual per diem wages paid for each employee. (§ 1776, subd. (a).) The records must be certified under penalty of perjury and must be made available for inspection and furnished upon request to a representative of DLSE. (§ 1776, subd. (b)(2).) Section 1776, subdivision (h) specifies in relevant part that:

The contractor or subcontractor has 10 days in which to comply subsequent to receipt of a written notice requesting the [CPRs]. In the event that the contractor or subcontractor fails to comply within the 10-day period, the contractor or subcontractor *shall*, as a penalty to the state...forfeit one hundred dollars (\$100) for each calendar day or portion thereof, for each worker, until strict compliance is effectuated.

(Emphasis added.) The use of the term shall indicates that the penalty is mandatory. (§ 15.)

When DLSE determines that a violation of prevailing wage laws has occurred, including a failure to produce CPRs when requested, it may issue a written civil wage and penalty assessment pursuant to section 1741. An affected contractor or subcontractor may appeal the civil wage and penalty assessment by filing a request for review under section 1742. The request for review is transmitted to the Director of the Department of Industrial Relations, who assigns an impartial hearing officer to conduct a hearing in the matter as necessary. (§ 1742, subd. (b).) At the hearing, DLSE has the burden of producing evidence that “provides prima facie support for the Assessment” (Cal. Code Regs. tit. 8, § 17250, subd. (a).) When that initial burden is met, the contractor or subcontractor “shall have the burden of proving that the basis for the civil wage and penalty assessment is incorrect.” (Cal. Code Regs. tit. 8, § 17250, subd. (a); accord, § 1742, subd. (b).) At the conclusion of the hearing process, the Director issues a written decision affirming, modifying or dismissing the assessment. (§ 1742, subd. (b).)

DLSE's Penalty Assessment under Section 1776 was Appropriate.

DLSE presented evidence providing prima facie support for the section 1776 statutory penalties assessed in the sum of \$40,800.00. DLSE showed that it served M.V.C with the request for CPRs twice, as well as the Assessment. In addition, DLSE demonstrated that M.V.C. received the requests. DLSE's November 18, 2020 Request for Payroll Records was received on November 23, 2020. M.V.C. had 10 days, until December 3, 2020, to produce the requested CPRs, but failed to do so. On January 6, 2021, DLSE sent M.V.C. a Notice of Impending Debarment along with another copy of the November 18, 2020 Request for Payroll Records. M.V.C. received the second copy of the Request for Payroll Records on January 11, 2021. M.V.C had not responded for 17 days when DLSE prepared the Assessment. DLSE assessed section 1776 penalties at \$100.00 per day for the 24 workers listed on the partial CPRs provided by the District, for the 17 days following M.V.C.'s receipt of the second copy of the November 18, 2020 Request for Payroll Records on January 11, 2021, through January 28, 2021, the day before the Assessment was issued.⁸ Therefore, DLSE met its burden under the rules. (See Cal. Code Regs., tit. 8, §§ 17220, subd. (a), and 17250, subd. (a).)

DLSE having met its burden, M.V.C. had the burden of proving the basis for the Assessment was incorrect. (Cal. Code Regs., tit. 8, § 17250, subd. (b).) M.V.C. failed to do so. It did not appear at the duly noticed Hearing on the Merits to explain how the penalty DLSE assessed pursuant to section 1776 was incorrect.

Moreover, the evidence of record indicates that M.V.C. would not be able to meet its burden. M.V.C. received the Request for Payroll Records twice, on November 23, 2020 and January 11, 2021. The Request for Payroll Records explicitly stated that failure to provide certified payroll information would subject M.V.C. to penalties for each

⁸ It should be noted that while DLSE only assessed section 1776 penalties for 17 days after January 11, 2021, it could have assessed penalties from December 3, 2020, 10 days following M.V.C.'s receipt of the November 18, 2020 Request for Payroll Records on November 23, 2020. In addition, DLSE could have amended the Assessment upwards based on when strict compliance with section 1776, subdivision (h), which was achieved on February 4, 2021. (See Cal. Code Regs. tit. 8, § 17226, subd. (a)(3).) Moreover, the CPRs provided on February 4, 2021 showed 41 workers on the site, instead of the previously believed 24 workers. Therefore, DLSE also could have amended the Assessment upwards based on a daily penalty rate of \$4,100.00 for 41 workers, for a total penalty of \$69,700.00.

calendar day for each worker until strict compliance was effectuated. Moreover, the request stated that the obligation to electronically furnish payroll records to the Labor Commissioner was separate and distinct from the obligation to timely comply with the written request for public works payroll information under section 1776. M.V.C. did not provide the requested CPRs to DLSE until after it received the Assessment.

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

FINDINGS AND ORDER

1. The Project was a public work subject to the payment of prevailing wages and the employment of apprentices.
2. The Civil Wage and Penalty Assessment was served timely by DLSE in accordance with section 1741.
3. Affected contractor, M.V.C. Enterprises, Inc., a California corporation, filed a timely Request for Review of the Assessment issued by DLSE with respect to the Project.
4. DLSE made available its enforcement file timely.
5. On November 18, 2020, DLSE served M.V.C. Enterprises, Inc., a California corporation, with a request for certified payroll records to be produced within 10 days or be subject to penalties under section 1776, subdivision (h) of \$100.00 a day per worker on the Project until the records were received. M.V.C. Enterprises, Inc., received the request on November 23, 2020. DLSE served a request for certified payroll records again on January 6, 2021, which M.V.C. Enterprises, Inc. received on January 11, 2021.
6. M.V.C. Enterprises, Inc., a California corporation, failed to submit certified payroll records to DLSE timely as required by section 1776. The records were not received by DLSE until February 4, 2021.
7. DLSE assessed penalties against M.V.C. Enterprises, Inc., a California corporation, under section 1776, subdivision (h) properly, at the rate of \$100.00 a day for each of 24 workers for 17 days from January 12 through

and including January 28, 2021, for the failure to provide certified payroll records within 10 days of November 23, 2020.

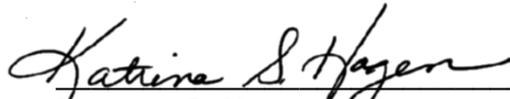
8. In light of findings 5-7 above, M.V.C. Enterprises, Inc., a California corporation, is liable for penalties assessed under Labor Code section 1776 subdivision (h) in the total amount of \$40,800.00.

The amount found due under the Assessment is as follows:

Basis of the Assessment	Amount
Penalties under section 1776:	\$40,800.00
TOTAL:	\$40,800.00

The Civil Wage and Penalty Assessment is 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: 03-16-2023



Katrina S. Hagen, Director
California Department of Industrial Relations