

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

**Trinidad Manuel Canales, an individual
doing business as Del Norte Construction**

Case No. 14-0587-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

ORDER DENYING RECONSIDERATION

I have read the Request for Reconsideration filed on April 29, 2016, by affected contractor, Trinidad Manuel Canales, an individual doing business as Del Norte Construction, and the Division of Labor Standards Enforcement's response thereto. Based on my review of both parties' arguments and relevant parts of the record, I find no grounds for reconsideration of the Decision of the Director issued on April 15, 2016. Accordingly, the Request for Reconsideration is denied.

Dated: 4/30/2016

Chris Jagard for
Christine Baker
Director of Industrial Relations

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Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected contractor Trinidad Manuel Canales, an individual doing business as Del Norte Construction (Canales) submitted a request for review of a Civil Wage and Penalty Assessment (Assessment) issued by the Division of Labor Standards Enforcement (DLSE) on October 7, 2014, with respect to work performed by Canales on the project of the Ventura County Public Works Agency (Ventura County) designated "Bus Pullout on Hwy 33 South of Loma Drive" (Project). The Assessment found that eight workers had been underpaid prevailing wages by Canales, \$5,347.25 was due in unpaid prevailing wages (consisting of \$5,040.92 in unpaid wages and \$306.33 in unpaid training funds), \$19,800.00 was due in penalties under Labor Code section 1775¹ (computed at \$200.00 per violation for 99 alleged violations), and \$25.00 was due in penalties under section 1813 (computed at \$25.00 for one alleged violation).

A Hearing on the Merits was conducted on July 31, 2015 in Los Angeles, California, before Hearing Officer Howard Wien. Canales appeared in pro per, and counsel Max D. Norris appeared for DLSE. DLSE moved to amend the Assessment, based upon its amended audit, to make the following reductions: a reduction in unpaid wages from \$5,040.92 to \$3,446.37; a reduction in unpaid training funds from \$306.33 to \$294.81, and a reduction in penalties under section 1775 from \$19,800.00 to \$19,400.00 (computed as \$200.00 per violation for 97 alleged violations). During the course of the hearing, DLSE made a further motion to amend the Assessment by reducing the penalties under section 1775 an additional \$600.00 to \$18,800.00

¹ All further statutory references are to the Labor Code unless otherwise indicated.

(computed as \$200.00 per violation for 94 violations). Under these amendments, DLSE asserted that Canales had underpaid prevailing wages to seven workers: M. Gomez (Gomez), J. Jacquez aka J. Jacques (Jacques), S. Romero (Romero), H. Hernandez (Hernandez), J. Ramos (Ramos), J. Contreras (Contreras), and a worker designated as "John Doe" (John Doe). Canales did not object to the proposed amendments, and the Hearing Officer granted DLSE's motions to amend the Assessment.

DLSE presented its case, with testimony given by DLSE's witness Fabian Cazares, Industrial Relations Representative. Canales then presented his case, with testimony given by Canales and also by his assistant Ms. Gabriela Canales (Ms. Canales). Both parties gave rebuttal testimony.

The issues for decision are as follows:

- Was the Assessment issued timely?
- Were the correct prevailing wage classifications used?
- Were the hours worked as listed in DLSE's amended audit correct?
- What wages were paid to the individuals who worked on the Project?
- Were all of the hours of individuals who worked on the Project listed correctly on the certified payroll records?
- Was the correct overtime prevailing wage rate paid for all overtime hours worked?
- Were the required training fund contributions paid to an approved plan or fund?
- Is Canales liable for penalties under section 1775?
- Is Canales liable for penalties under section 1813?
- Is Canales liable for liquidated damages under section 1742.1, subdivision (a)?

In this Decision, the Director finds that the Assessment was issued timely. On the merits of the case, this Decision affirms the amended Assessment on all issues except the following: (1) as to worker Ramos, the amended Assessment failed to credit Canales for late payment of back wages in the sum of \$89.61; (2) as to worker E. Arroyo (Arroyo), both the original assessment and amended assessment showed that he was paid his full prevailing wage, and the record did not contradict that fact; accordingly, the amended Assessment incorrectly assessed section 1775 penalties of \$400.00; and (3) the record did not establish the existence of the worker designated by DLSE as John Doe, nor any failure to pay him prevailing wages.

Accordingly, the amended Assessment incorrectly assessed back wages of \$363.32, training funds of \$5.12 and section 1775 penalties of \$200.00. Therefore the Director of Industrial Relations issues this Decision affirming and modifying the amended Assessment.

FACTS

Bid Date, Period of Work, Notice of Completion:

The Project was advertised for bid on September 25, 2012. Canales's workers worked on the Project in Ventura County from December 10, 2012, to March 13, 2013. On August 13, 2013, a Notice of Completion was filed with the Ventura County Recorder stating that work on the Project was completed on that date.

Applicable Employee Classifications And Prevailing Wage Determinations:

Canales employed four employee classifications on the Project, each with the following applicable Prevailing Wage Determinations: (1) Carpenter and Related Trades, Determination SC-23-31-2-2012-1; (2) Laborer and Related Classifications Group 1 and Group 4, Determination SC-23-102-2-2012-1; (3) Operating Engineer Group 8, Determination SC-23-63-2-2012-1; and (4) Cement Mason, Determination SC-23-203-2-2012-1.

Errors on the Face of Canales's Certified Payroll Records:

For Canales's work on the Project, the certified payroll records (CPRs) were prepared and sworn to under penalty of perjury by Canales's Office Manager Julian Michael Contreras. The CPRs show on their face numerous significant errors. Canales paid its workers in accordance with the information contained in these erroneous CPR's, so each of these errors (except one)² resulted in Canales underpaying wages to its workers:

1. CPR for week ending December 23, 2012: The CPR for Saturday December 22, 2012 showed that Romero worked six hours that day, but he was paid the standard hourly rate of \$45.29 rather than the Saturday rate of \$59.97.

² The one error that resulted in an overpayment of wages was on the CPR for week ending January 20, 2015. For the worker Hernandez, the CPR states six hours January 30 and two hours January 31 – but it states a total of 10 hours rather than eight hours, resulting in an overpayment for two hours.

2. CPR for week ending January 20, 2013:

a. Worker B. Carrillo (Carrillo): The CPR reported one hour on January 15 and six hours on January 16 – but it stated only six hours total, and it shows that Carrillo was paid only for six hours.

b. Worker A. Rosas (Rosas): The CPR reported one hour January 15, six hours January 16 and six hours January 17 – but it stated only six hours total, and it fails to show any payment to Rosas.

c. Workers Jacques and Contreras: The CPR reported that each of these workers worked two hours on January 15 and six hours on January 16 – but all further information required on the CPR is missing, i.e., there are no entries for total hours, rate of pay, gross amounts earned, deductions, contributions and payments, net payment, and check amount.

3. CPR for week ending February 24, 2013:

a. Worker Gomez: The CPR states four hours February 19, three hours February 20, three hours February 21 and two hours February 22 – but it totals those hours as 10 rather than 12, and it shows payment to Gomez for only 10 hours.

b. Worker Ramos: The CPR states six hours each day for February 19, 20 and 21, and two hours for February 22 – but it totals those hours as 18 rather than 20, and it shows payment to Ramos for only 18 hours.

DLSE's Investigation:

Cazares testified that when DLSE received a complaint regarding the wages paid on the Project, DLSE commenced an investigation. This investigation was closed on September 24, 2013, and on that date DLSE sent a written notice to Canales entitled "Notice of Complaint Closed" and stating that Canales had satisfactorily paid all prevailing wages and/or penalties found due." However, DLSE reopened its investigation, and on October 9, 2013 Cazares spoke by telephone with Canales regarding the investigation; the content of their conversation made clear that DLSE was now continuing the investigation.

Cazares further testified that as part of this investigation, DLSE obtained the Inspector's Daily Reports for each day of work on the project, issued by Turner Clark, the inspector for Ventura County. The inspector's daily reports showed a conscientious attention to detail,

reporting for each day: (1) the name of each worker at the work site; (2) the total daily hours worked by each worker -- classified by the type of work performed (e.g., "demolition," "PCC side walk," "wood rail fence"); (3) for some workers, the report stated a worker category, such as "laborer," "finisher," "foreman"; (4) major equipment located at the work site, such as "backhoe" and "dump truck"; and (5) the reports also contained brief "Remarks" plus a detailed narrative statement by the inspector describing the work done each day.

Cazares compared the inspector's daily reports with the CPRs to assess whether Canales underpaid wages, and if so, the amount.

Failure to Report and Pay for All Hours Worked:

The Assessment found that of the 14 weekly CPRs for the Project, Canales had failed to report all hours worked on seven CPRs. This failure occurred as to eight workers -- Gomez, Rosas, Jacques, John Doe, Carrillo, Hernandez, Contreras and Ramos -- resulting in underpayment of prevailing wages to those workers. This determination was made by (1) reviewing the errors shown on the face of the CPRs as stated above; and (2) comparing the CPRs with the inspector's daily reports. The assessed failure to report hours was as follows:

1. CPR for Week Ending December 16, 2012:
 - Gomez - 5 unreported hours
 - Rosas - 8 unreported hours
 - Jacques - 5 unreported hours
 - John Doe - 8 unreported hours
2. CPR for Week Ending January 12, 2013:
 - Gomez - 8.5 unreported hours
 - Jacques - 7.5 unreported hours
3. CPR for Week Ending January 20, 2013:
 - Rosas - 6 unreported hours
4. CPR for Week Ending February 3, 2013:
 - Rosas - 2 unreported hours
 - Carrillo - 2 unreported hours
 - Hernandez - 6 unreported hours

5. CPR for Week Ending February 17, 2013:

Gomez - 10 unreported hours
Rosas - 11 unreported hours
Carrillo - 11 unreported hours
Contreras - 16 unreported hours

6. CPR for Week Ending February 24, 2013:

Gomez - 7 unreported hours

7. CPR for Week Ending March 16, 2013:

Carrillo - 4 unreported hours
Ramos - 6 unreported hours

However, the record failed to establish the existence of the alleged "John Doe" worker, and so the Assessment of unpaid wages based on eight unreported hours for John Doe, totaling \$363.32, was erroneous.

Reclassification of Misclassified Workers:

The amended Assessment found that Canales had misclassified two workers³, as follows:

1. Carrillo on January 3, 2014: The CPR stated that Carrillo worked three hours as an operating engineer and three hours as a laborer on this day. However, the inspector's daily report showed that Carrillo worked all six hours as an operating engineer. As a result of this misclassification, Carrillo was paid at the lower laborer rate for three hours rather than the higher operating engineer rate.

2. Ramos on February 20 and 22, 2013: The CPR stated Ramos was a cement mason apprentice, and he was paid at the apprentice rate. Cazares testified that he checked with Division of Apprenticeship Standards (DAS) on whether Ramos was a registered cement mason apprentice, and DAS confirmed that he was. However, the CPR for these dates showed no journeyman cement mason working with him on those days. This violated the requirement of California Code of Regulations, title 8, section 230.1, subdivision (c): "Where an employer

³ The original Assessment and audit asserted that Canales had misclassified a third worker, J. Tenorio (Tenorio), as an apprentice when he should have been classified as a journeyman, and that he was paid the lesser apprentice wage. The amended audit and amended Assessment concluded that Canales had correctly classified Tenorio as an apprentice and therefore correctly paid the apprentice rate. This resulted in a \$330.48 reduction of the assessed back wages, an \$11.52 reduction in training funds due, and a \$600.00 reduction in section 1775 penalties.

employs apprentices under the rules and regulations of the California Apprenticeship Council, as set forth in Labor Code Section 1777.5(c)(2), apprentices employed on public works must at all times work with or under the direct supervision of journeyman/men.” So DLSE correctly reclassified Ramos as a journeyman, and Ramos should have been paid the higher journeyman prevailing wage on those two days.

Failure to Pay Overtime Rate:

The Assessment assessed wages and a section 1813 penalty against Canales based on the CPR for Saturday December 22, 2012. This CPR showed that Romero worked six hours that day as a laborer, but he was paid the laborer standard hourly rate of \$45.29 rather than the laborer Saturday rate of \$59.97.

Failure to Pay Training Fund Contributions:

Cazares testified that he checked with the California Apprenticeship Counsel (CAC) to see if training fund contributions had been paid. He received a report from the CAC stating that Canales paid a total of \$313.38 in training funds on the Project. Based on the unreported hours of work performed on the Project by the different crafts addressed above, this left a balance of \$294.81 in training funds that were unpaid and due. (The original assessment assessed the training funds due as \$306.33, but these were reduced in the amended audit and amended Assessment to \$294.81.)

However, the amended audit and amended Assessment overstated the training funds due: \$5.12 was assessed for the worker designated John Doe, but the record did not establish the existence of any such worker.

Section 1775 Penalties:

As stated above, after DLSE made two motions in the Hearing on the Merits to amend the Assessment downward. The final amended Assessment assessed section 1775 penalties in the sum of \$18,800.00. However, this sum was incorrect. It included \$400.00 assessed as to worker Arroyo. Both the original and amended Assessments showed that Arroyo was fully paid the required prevailing wages, and the record did not contradict that fact. Accordingly, there was no ground to assess this \$400.00 penalty. Further, as stated above, the record failed to establish

the existence of the worker designated “John Doe” or any failure to pay prevailing wages as to any such worker; accordingly, there was no ground to assess a \$200.00 penalty under section 1775 as to “John Doe.”

No Deposit of Wages with the Department, and No Payment of Back Wages to Workers Within 60 Days of the Assessment; No Substantial Grounds for Appealing the Assessment:

Canales did not deposit the full amount of the Assessment (or any part thereof) with the Department of Industrial Relations within 60 days following service of the Assessment, for the department to hold in escrow pending administrative and judicial review of this matter. Canales did not pay any back wages to workers within 60 days following service of the Assessment.

Canales testified that he had grounds for appealing the assessment because he had received the notice from DLSE dated September 24, 2013, stating that the complaint was closed and stating Canales had “... satisfactorily paid all prevailing wages and/or penalties found due.” However, the record established that Canales subsequently spoke with Cazares by telephone on October 9, 2013, and the communication from Cazares reasonably made clear that DLSE was further investigating this matter. Moreover, the Assessment that DLSE served upon Canales on October 7, 2014, was clear and unambiguous that DLSE had further investigated this matter and had determined that Canales had violated the Labor Code by failing to report all hours on the CPRs, misclassified workers, failed to pay overtime on at least one occasion, and did not pay all training funds due – and DLSE was now assessing Canales substantial back wages and penalties.

In June 2013, Canales untimely paid back wages to three workers for work they had performed on the Project sometime during the period December 10, 2012, to March 13, 2013: Rosas, Carrillo and Ramos. Canales did so as restitution in response to an audit conducted on the Project by Ventura County. DLSE’s amended audit and the amended Assessment credited to Canales these late payments to Rosas and Carrillo: the back wages for those two workers originally assessed at a total of \$1,594.55 was reassessed at \$0.00. The total assessed wages for all the workers was thereby reduced from \$5,040.92 to \$3,446.37. However, DLSE’s amended audit and amended Assessment failed to credit to Canales the late payment made to Ramos in the sum of \$89.61. As to all three workers, DLSE did not reduce the penalties assessed under

section 1775 because such penalties are not reduced when prevailing wages are paid late as restitution.

DISCUSSION

Labor Code Sections 1720 and following set forth a scheme for determining and requiring the payment of prevailing wages to workers employed on public works construction projects. Specifically:

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 [internal citations omitted].)
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, supra.*)

Section 1775, subdivision (a) requires, among other things, that contractors and subcontractors pay the difference to workers who were paid less than the prevailing rate, and section 1775, subdivision (a) also prescribes penalties for failing to pay the prevailing rate. Section 1742.1, subdivision (a) provides for the imposition of liquidated damages, essentially a doubling of the unpaid wages, if those wages are not paid within sixty days following service of a Civil Wage and Penalty Assessment under section 1741.

When DLSE determines that a violation of the prevailing wage laws has occurred, a written Civil Wage and Penalty Assessment is issued pursuant to section 1741. An affected contractor or subcontractor may appeal the Assessment by filing a Request for Review under section 1742. Subdivision (b) of section 1742 provides in part that “[t]he contractor or subcontractor shall have the burden of proving that the basis for the Civil Wage and Penalty Assessment is incorrect.”

The Assessment Was Issued Timely.

In determining whether the Assessment was issued timely, we must first consider which of two limitations periods applies, given the change in the limitations period effective January 1, 2014. The work performed by Canales occurred entirely before January 1, 2014: from December 10, 2012, to March 13, 2013. For this pre-January 1, 2014 period, the limitations period was 180 days. Prior to January 1, 2014, section 1741, subdivision (a) stated in relevant part:

[T]he assessment shall be served not later than 180 days 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 180 days after acceptance of the public work, whichever occurs last.

Effective January 1, 2014, section 1741, subdivision (a) was revised to change the limitations period from 180 days to 18 months. This revision, however, did not alter the start date of the running of the limitations period: the limitations period commenced with the filing of a valid notice of completion in the office of the county recorder, or acceptance of the public work, whichever occurs last. Here, the limitations period commenced running on August 13, 2013, when a valid Notice of Completion was filed with the Ventura County Recorder stating that work on the project was completed on that date.

The California Supreme Court has provided us the answer as to whether the 180-day period applies, or instead the 18-month period, in *Quarry v. Doe I* (2012), 53 Cal.4th 945, 955-960 (*Quarry*). Although *Quarry* addressed a different statute of limitations than the one in the present case, the Supreme Court's analysis is directly on point, and establishes that the 18-month period applies in this case:

As long as the former limitations period *has not expired*, an enlarged limitations period ordinarily applies and is said to apply prospectively to govern cases that are pending when, or instituted after, the enactment took effect. This is true even though the underlying conduct that is the subject of the litigation occurred prior to the new enactment. . . .

[¶] . . . [¶]

However, when it comes to applying amendments that enlarge the limitations period to claims as to which the limitations period *has expired before the amendment became law* – that is, claims that *have lapsed* – the analysis is different. Once a claim has lapsed (under the formerly applicable statute of limitations), revival of the claim is seen as a retroactive application of the law under an enlarged statute of limitations. Lapsed claims will not be considered revived without express language of revival. . . .

(*Id.* at 955-957, first and second italics added, third italics in original.)

In the present case, when the 18-month limitations period became effective on January 1, 2014, the prior 180-day limitations period had not expired: the limitations period commenced running only 140 days earlier on August 13, 2013 when the Notice of Completion was recorded. So under *Quarry*, the enlarged 18-month limitations period governs this case. The Assessment was served on October 7, 2014, less than 14 months after the Notice of Completion was recorded. Accordingly, the Assessment was served timely.

Canales Failed to Pay Prevailing Wages by Failing to Report All Hours Worked and by Misclassifying Workers.

Cazares testified credibly that in determining the underpayments and penalties applicable to the Project, he used the CPRs prepared by Canales and the inspector's daily reports prepared by the inspector of the Ventura County.

First, the CPRs show on their face that Canales failed to pay prevailing wages due because they contained numerous errors – including under-reporting the total hours worked for the week, and showing that the wages paid were calculated upon the under-reported hours. Section 1776 requires that contractors keep accurate payroll records, and that each payroll record be signed under penalty of perjury that the information contained in it is true and correct. Canales's CPRs were signed under penalty of perjury by Canales's Office Manager Julian Michael Contreras and therefore constitute admissions under the Evidence Code.

Second, the credible Ventura County inspector's daily reports establish that Canales's CPRs failed to report all hours worked, and therefore the workers were underpaid. Wherever there was conflict between Canales's CPRs versus the inspector's daily reports, the credibility of the detailed and conscientious inspector's daily reports were entitled to far greater weight than Canales's error-ridden CPRs.

Thus the record established that Canales failed to pay prevailing wages in the sum of \$2,993.44. This is computed as the sum of \$3,446.37 stated in the amended Assessment, reduced by \$89.61 for the back wages Canales paid to worker Ramos on June 10, 2013, and further reduced by \$363.32 assessed for the alleged "John Doe" worker who DLSE has not proven to exist.

Canales Failed to Pay Training Fund Contributions.

The CAC report stated that Canales paid a total of \$313.38 in training funds on the Project. Based on the unreported hours of work performed on the Project by the different crafts addressed above -- as stated in DLSE's amended audit, and as reflected in the amended Assessment, and as established by Cazares credible testimony -- this left a balance of \$294.81 in training funds that were unpaid and due. However, this must be reduced by \$5.12, which was assessed for the non-existent worker "John Doe." Accordingly, the record established that Canales failed to pay training funds in the sum of \$289.69. Canales failed to meet his burden to disprove that such training funds were unpaid and due.

DLSE's Penalty Assessment Under Section 1775.

The amended Assessment assessed section 1775 penalties in the sum of \$18,800.00, computed at \$200.00 per violation for 94 violations. However, this assessment must be reduced by \$400.00 assessed as to worker Arroyo (i.e., two violations at \$200.00 per violation): both the original and amended Assessment stated that Arroyo was paid his full prevailing wage, so there was no basis to assess the \$400.00 penalty. The assessment must be further reduced by \$200.00 assessed for one violation as to the non-existent worker designated John Doe. Therefore the section 1775 penalties total \$18,200.00, computed as \$200.00 per violation for 91 violations.

As to the assessment of the maximum penalty of \$200.00 per violation, section 1775, subdivision (a) states in relevant part:

(1) The contractor and any subcontractor under the contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than two hundred dollars (\$200) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by the contractor or, except as provided in subdivision (b), by any subcontractor under the contractor.

(2)(A) The amount of the penalty shall be determined by the Labor Commissioner based on consideration of both of the following:

(i) Whether the failure of the contractor or subcontractor to pay the correct rate of per diem wages was a good faith mistake and, if so, the error was promptly and voluntarily corrected when brought to the attention

of the contractor or subcontractor.

(ii) Whether the contractor or subcontractor has a prior record of failing to meet its prevailing wage obligations.

(B)(i) The penalty may not be less than forty dollars (\$40) . . . unless the failure of the . . . subcontractor to pay the correct rate of per diem wages was a good faith mistake and, if so, the error was promptly and voluntarily corrected when brought to the attention of the . . . subcontractor.

(ii) The penalty may not be less than eighty dollars (\$80) . . . if the . . . subcontractor has been assessed penalties within the previous three years for failing to meet its prevailing wage obligations on a separate contract, unless those penalties were subsequently withdrawn or overturned.

(iii) The penalty may not be less than one hundred twenty dollars (\$120) . . . if the Labor Commissioner determines that the violation was willful, as defined in subdivision (c) of Section 1777.1.^[4]

The Labor Commissioner's determination of the penalty amount is reviewable only for abuse of discretion. (§ 1775, subd. (a)(2)(D).) The contractor has the burden of proving that the Labor Commissioner abused his or her discretion in determining that a penalty was due or in determining the penalty amount. (Rule 50, subd. (c) [Cal. Code Regs., tit. 8, § 17250, subd. (c)].) Abuse of discretion by DLSE is established if the "agency's nonadjudicatory action . . . is inconsistent with the statute, arbitrary, capricious, unlawful or contrary to public policy." (*Pipe Trades v. Aubry* (1996) 41 Cal.App.4th 1457, 1466.) In reviewing for abuse of discretion, however, the Director is not free to substitute her own judgment "because in [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.)

Here, DLSE assessed section 1775 penalties at the rate of \$200.00 because Canales's CPR's and other evidence – including but not limited to the inspector's daily reports – established that the underpayment of prevailing wages on the Project was pervasive and willful. The number and variety of prevailing wage violations committed by Canales, and Canales's lack

⁴ The reference to subdivision (c) of section 1777.1 is a typographical error in the statute. The correct subdivision is (e), which 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."

of reasonable defense to the vast majority of violations, support a finding that Canales's violations were willful.

Section 1775, subdivision (a)(2) grants the Labor Commissioner the discretion to mitigate the statutory maximum penalty per day in light of prescribed factors, but it does not mandate mitigation in all cases. The Director is not free to substitute her own judgment. Canales has not shown an abuse of discretion. Accordingly, section 1775 penalties in the sum of \$18,200.00, computed at the maximum rate of \$200.00 for 91 violations, are affirmed as modified above.

An Overtime Penalty of Is Due For The Worker Who Was Underpaid For Overtime Hours Worked On The Project.

Section 1815 states in full as follows:

Notwithstanding the provisions of Sections 1810 to 1814, inclusive, of this code, and notwithstanding any stipulation inserted in any contract pursuant to the requirements of said sections, work performed by employees of contractors 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 further provides:

The contractor or 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. ...

Here, Canales's CPR for Saturday December 22, 2012, established that Canales violated section 1815: worker Romero worked six hours that Saturday, but he was paid the standard hourly rate of \$45.29 rather than the Saturday rate of \$59.97. Accordingly, Canales is liable for the \$25.00 penalty under section 1813.

Canales Is Liable For Liquidated Damages:

Section 1742.1, subdivision (a) provides in pertinent part 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. 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, Canales testified that his ground for appealing the Assessment was that he had received a Notice from DLSE dated September 24, 2013, stating that the complaint was closed and that he had "... satisfactorily paid all prevailing wages and/or penalties found due." However, Canales failed to demonstrate that DLSE's Notice was a substantial ground for the appeal. First, the record established that Canales spoke with Cazares by telephone on October 9, 2013, and the communication from Cazares reasonably made clear that DLSE was further investigating this matter despite DLSE's Notice on September 24 2013. Second, DLSE issued the Assessment on October 7, 2014, over one year after DLSE's Notice on September 24, 2013; this reasonably indicated that the Assessment superseded DLSE's year-old Notice. The Assessment on October 7, 2014, with its attached summary audit, was clear and unambiguous that DLSE had further investigated this matter and had determined that Canales had violated the Labor Code by failing to report all hours and workers on the CPRs, misclassified workers, failed to pay overtime on one occasion, and did not pay all training funds due, and was now assessing back wages and penalties. Accordingly, Canales failed to demonstrate he had substantial grounds for appealing the Assessment.

Further as to liquidated damages, section 1742.1, subdivision (b) provides:

... 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 within 60 days following service of the assessment or notice, for the department to hold in escrow pending administrative and judicial review.

This provision is inapplicable here because Canales made no such deposit with the Department of Industrial Relations.

Because the assessed back wages remained due more than 60 days after service of the Assessment, and Canales did not demonstrate grounds for waiver, Canales is liable for liquidated damages in an amount equal to the unpaid wages.

FINDINGS

1. Affected contractor Trinidad Manual Canales, an individual doing business as Del Norte Construction (Canales) filed a timely Request for Review from a Civil Wage and Penalty Assessment issued by the Division of Labor Standards Enforcement.
2. Canales underpaid the prevailing wages owed to his employees on the Project in the aggregate amount of \$2,993.44. None of these wages were paid or deposited in escrow with the Department within 60 days after service of the Assessment and Canales has not established any basis for waiver of liquidated damages under section 1742.1, subdivision (a). Accordingly, liquidated damages are due in the sum of \$2,993.44 under section 1742.1, subdivision (a).
3. Canales did not make the required contributions to the applicable training funds on the Project in the aggregate amount of \$289.69.
4. The Labor Commissioner did not abuse her discretion in approving penalties under section 1775, subdivision (a), at the maximum rate of \$200.00 per violation. Penalties under section 1775, subdivision (a), are due in the aggregate amount of \$18,200.00 for 91 violations.
5. A penalty under section 1813 is due the amount of \$25.00.
6. The amounts found due in the Assessment, as affirmed and modified by this Decision, are as follows:

Wages:	\$ 2,993.44
Liquidated damages under section 1742.1, subdivision (a):	\$ 2,993.44
Training Fund Contributions:	\$ 289.69
Penalties under section 1775, subdivision (a):	\$ 18,200.00
Penalty under section 1813:	\$ 25.00
TOTAL:	\$ 24,501.57

In addition, interest is due and shall continue to accrue on all unpaid wages as provided in section 1741, subdivision (b).

ORDER

The Civil Wage and Penalty Assessment is affirmed in part and modified in part 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: 4/14/2016



Christine Baker
Director of Industrial Relations