STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Evan Patterson Construction, Inc. Case No. 08-0170-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected subcontractor Evan Patterson Construction, Inc. ("Patterson") submitted a request for review of a Civil Wage and Penalty Assessment ("Assessment") issued by the Division of Labor Standards Enforcement ("DLSE") on July 21, 2008, with respect to drywall work performed by Patterson on the Clovis Fire Station No. 1 Reconstruction ("Project") in Fresno County. The Assessment determined that $5,962.00 in unpaid prevailing wages and statutory penalties was due. A Hearing on the Merits occurred on April 3, 2009, in Sacramento, California, before Hearing Officer Nathan D. Schmidt. Myron Smith, appeared for Patterson, and Ramon Yuen-Garcia appeared for DLSE. Robert Fried assumed representation of Patterson post hearing on May 13, 2009.

The primary issues for decision are:

- Whether the Assessment correctly reclassified Eleuterio Avila, Obduleo Avila, Russell Deatherage, Vincent Deatherage, Noe Garcia and Santos Herrera (collectively "the six affected workers") from the drywall patcher and taper classifications to drywall installer/lather (Carpenter) ("drywall installer") for all drywall taping and texturing work they performed on the Project.
- If it is found that the Assessment did not correctly reclassify the six affected workers, whether Patterson paid them less than the prevailing wages required for the drywall patcher and taper classifications in Fresno County.

- Whether the Assessment correctly found that Patterson paid Christopher Conley, Matthew Davidson and Kenny Loy less than the prevailing wages required for the drywall installer classification in Fresno County.
- Whether the Assessment correctly found that Patterson paid registered apprentice Rodger Langley less than the prevailing wages required for a third period drywall installer apprentice in Fresno County.
- Whether Patterson is liable for penalties and whether Patterson has demonstrated substantial grounds for believing the Assessment to be in error, entitling it to a waiver of liquidated damages.

In this Decision, the Director finds that Patterson could reasonably rely on the published prevailing wage determinations in effect at the time of bid that the drywall taping and texturing work on this project fell within either the drywall installer scope of work or the Painter scope of work applicable to the drywall patcher and taper classifications. Patterson, however paid the six affected workers paid less than the prevailing wages due for their reported classifications. On the remaining prevailing wage issues, the decision finds that Conley, Davidson, Loy and Langley were fully paid for all of their work on the Project. Therefore, the Director of Industrial Relations issues this decision modifying the Assessment.

FACTS

The City of Clovis published a Notice Inviting Bids for the Project on or about April 19, 2006. Durham Construction Company, Inc., the general contractor for the Project, subcontracted with Patterson to perform drywall work effective September 29, 2006. Patterson employed 19 workers on the Project, as reported on its certified payroll records ("CPRs"), from approximately April 2, 2007, to November 28, 2007: 11 drywall installers, two apprentice drywall installers and six drywall patchers or tapers. Patterson employees worked on the Project installing, taping and texturing drywall.

Applicable Prevailing Wage Determinations ("PWDs"): The following Prevailing Wage Determinations ("PWDs") and scopes of work were in effect on the bid advertisement date:

Drywall Installer/Lather (Carpenter) for Northern California (NC-31-X-16-2005-1): This is the rate DLSE used in the Assessment for the drywall work performed on the Project by Patterson workers. Predetermined increases were required for drywall installers during the relevant period. The applicable scope of work provides in pertinent part:

> (1) Work Covered
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> The work covered by this Agreement shall include but not be limited to the following described work at the construction job site:
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> * * *
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> B. All work in connection with the installation, erection, and/or application, carrying, transportation, handling, stocking and scrapping, of all material and component parts of walls and partitions regardless of their material composition or manner of their installation, attachment or connection, including but not limited to . . . gypsum drywall materials . . .
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> F. (1) All work operations after the initial unloading of the drywall finisher's material on the job site, including distribution to the point of application.
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> (2) Work or services pertaining to the preparation, pointing, detailing, taping, flushing, sanding and finishing of interior and/or exterior gypsum drywall, thinwall, concrete, steel, wood and plaster surfaces.
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> (3) Work or services pertaining to the application of all finish or flushing materials regardless of method of application or type of surface on which materials are applied, including, but not limited to, texture and simulated acoustic materials of all types . . .
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> (5) The operation and care of all taping tools and texturing equipment used in the finishing and texturing of drywall and other surfaces including brushes, rollers, spray texturing equipment, miscellaneous hand mechanical and power tools, and the operation and maintenance of compressors required in the finishing and texturing of such surfaces.
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> The Union understands and recognizes that the Association and its members are signatory to a collective bargaining agreement with the painters covering drywall finishing work. The parties agree that Article 1, F shall apply only to

those signatory employers who are not signatory to collective bargaining agreement with the painters covering drywall finishing work as described in Article 1, F of the agreement and who choose to assign that work to the painters. The Union agrees not to invoke or enforce Article 1, F or to create any jurisdictional dispute concerning the work described in that section against any signatory employer that is also signatory to an agreement with the painters covering the drywall finishing work and who chooses to assign that work to the painters.[1]

General Prevailing Wage Determination for Fresno County (FRE-2006-1):[2] This PWD includes the classifications of drywall patcher and of taper within the craft of Painter ("Painter's rates"). These are the classifications Patterson used as the basis of the rate it paid for all drywall taping and texturing work on the Project. Predetermined increases were required for both classifications during the Project. The applicable scope of work provides in pertinent part as follows:

> Employer's [*sic*] signatory to this Agreement shall be those who are permitted by State License Law to perform work as painting and decorating contractors, and others covered by this Agreement, utilizing in their work any of the following:
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> * * *
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> A. Paints, pigments, oils, turpentine, japan driers, thinners, varnishes, lacquers, shellacs, stains, filler, waxes, cement, joint cement, water and other vehicles; mediums that may be mixed, used and applied to the surfaces of materials and of buildings, edifices, structures, monuments, and the appurtenances thereto, of every type and description in their natural state or condition, or constructed or fabricated of any material or materials whatsoever, and who provide:

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[1] The drywall installer scope of work incorporates the relevant provisions of the Northern California Drywall/Lathing Master Agreement between Northern California Drywall Contractors Association and Carpenters 46 Northern California Counties Board of the United Brotherhood of Carpenters and Joiners of America AFL-CIO, effective August 1, 1999 to July 31, 2004, and the amendments and modifications effective December 31, 2003 through July 31, 2008.

[2] Patterson erroneously relied on FRE-2006-2 which was issued on August 22, 2006, for the craft of Painter; before Patterson's subcontract was executed, but after the Project was bid. The applicable scope of work did not change, however, thus the only difference would be that Patterson could have paid a higher than necessary prevailing wage to some workers.

B. Work or services pertaining to the application of texture materials of all types on all surfaces.

C. Work or services pertaining to the painting, flushing and taping of drywall surfaces.[3]

The Assessment found that Patterson incorrectly paid the six affected workers at the Painter's rates rather than the higher drywall installer rate. In addition, the Assessment found that Patterson had paid less than the required prevailing wages to drywall installer Conley and third period apprentice drywall installer Langley. The Assessment found a total of $5,057 in underpaid prevailing wages. Penalties were assessed under Labor Code section 1775 in the mitigated amount of $10.00 per violation based on DLSE's finding that Patterson had no prior prevailing wage violations.[4] In addition, a penalty was assessed under section 1813, for a single overtime violation, in the amount of $25.00. DLSE stated at hearing that it would give credit for all wages reported on four weeks of amended CPRs that Patterson presented at hearing. As part of its post-hearing briefing, DLSE submitted a revised audit prepared to conform to the evidence.[5] The revised audit eliminated the assessment for the single overtime violation and associated penalty under section 1813, but added new findings of underpayment of prevailing wages to drywall installers Davidson and Loy. The revised audit calculated a $39.43 increase in total unpaid wages to $5,096.43. Patterson did not object to the revised audit as an improper amendment under California Code of Regulation, title 8, section 17226.

Reclassification from Drywall Patcher and Taper to Drywall Installer: Patterson is a signatory with the Carpenters Union and holds a C-9 Drywall Contractor License.[6] Patterson is not

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[3] The Painter scope of work incorporates the relevant provisions of The Painters' & Tapers Master Agreement between Painters' Local Union 294 and The Fresno FCA, effective July 1, 2000 through June 30, 2005.

[4] All further statutory references are to the California Labor Code, unless otherwise indicated.

[5] DLSE's revised audit conformed to the hours reported on the amended CPRs as presented by Patterson at hearing except that the revised audit did not deduct eight hours of work by Herrera on June 14, 2007, which had been reported on the original CPR but deleted from the amended CPR for that week presented at hearing. See discussion of this factual dispute below.

[6] The Contractors State Licensing Board defines the work of a C-9 licensee as: "[a] drywall contractor lays out and installs gypsum wall board and gypsum wall board assemblies including nonstructural metal framing members, and performs the taping and texturing operations including the application of compounds that adhere to wall board to

a signatory with the Painters Union. Over the course of its work on the Project, Patterson employed the six affected workers, who exclusively performed drywall taping and texturing work. From the beginning of its work on the Project on April 2, 2007, through July 13, 2007, Patterson paid the six affected workers as drywall patchers, at a total hourly rate of $34.25. O. Avila and N. Garcia were paid at the total hourly rate of $31.72 during the week ending July 1, 2007, only. The total hourly prevailing wage rates for the drywall patcher classification during that period were $34.45 per hour until June 30, 2007, and $35.45 per hour thereafter.[7]

With the exception of a few hours of work by one drywall installer, Patterson employees did not perform any work on the Project between July 14 and September 3, 2007. From September 4, through the end of Patterson's work on the Project, on or about December 2, 2007, E. Avila, O. Avila, R. Deatherage and Garcia, were paid using the taper prevailing wage rate, also from the Painter's PWD.[8] Patterson paid those workers at three total hourly rates $35.25 from September 4 through October 28, 2007; $36.25 from October 29 through November 11, 2007; and $37.66 from November 12 through December 2, 2007. The total prevailing hourly wage rate due for the taper prevailing wage rate during the whole of that period was $37.20 per hour.

Evan Patterson, Patterson's owner, testified that he initially classified the workers performing taping and texturing work on the Project as drywall patchers, as he had done on all of his previous Northern California drywall projects, at the advice of the Carpenters Union, because drywall taping and texturing work is not performed by Carpenters in Northern California. Patterson stated that he was approached by a representative of the Painters Union in August 2007 who urged him to become a signatory with the union and told him that his taping and texturing workers should be paid the taper rate rather than the drywall patcher rate. Pursuant to this advice, Patterson reported those workers as tapers for the remainder of its work on this Project, although he elected not to sign with the Painters Union. Patterson testified that none of the taping and texturing workers on the Project was a Carpenter and that four or five of the workers were,

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produce a continuous smooth or textured surface." (Cal. Code Regs., tit. 16, § 823.09.)

[7] The full payment of training fund contributions by Patterson is not in dispute.

[8] Neither V. Deatherage nor Herrera worked on the Project after July 13, 2007.

or had been, members of the Painters Union.

The Assessment reclassified all six affected workers from the drywall patcher and taper classifications to drywall installer for all of their work on the Project on the basis that Patterson was not a licensed painting contractor and was thus barred from using any of the Painter classifications on the Project.

Hours Reported Worked by Herrera on June 14, 2007: Patterson's original CPRs reported Herrera as working on the Project from April 19 through June 14, 2007, during which he worked a total of 55.5 hours over seven work days. The amended CPRs submitted by Patterson at hearing, however, deleted eight hours of work by Herrera originally reported on June 14, 2007, reducing the total hours he was reported as working on the Project to 47.5 over six work days. DLSE's revised audit credited the hours and payment amounts reported on Patterson's amended CPRs for all other drywall patcher and taper work, but retained the assessment for the eight hours of work originally reported for Herrera on June 14, 2007. The evidence supports a finding that Herrera did not work on the Project on June 14, 2007, as reported by Patterson's amended CPR. The City of Clovis Engineering Division's Daily Log for the Project for June 14, 2007, records 16 hours of work by two Patterson employees and reports the "General Work Performed" as "Hang apparatus bay wall." This coincides exactly with Patterson's amended CPR which reports 16 hours of work by two drywall installers on that day.

Underpayment of Prevailing Rate to Drywall Installers: The revised audit found that Conley was underpaid in the amount of $7.92 for work performed on April 16, 2007, and that Davidson and Loy were underpaid as drywall installers in the respective amounts of $138.18 and $116.36 for work performed during the week ending June 17, 2007. The total prevailing wage rate due for the drywall installer classification during that period was $42.535 per hour, exclusive of training fund contributions. The evidence shows that all three workers were paid in excess of the required prevailing wages owing for the dates in question.

- Conley worked on the Project for eight hours on April 16, 2007, for which the revised audit finds he was owed $343.96 in prevailing wages. The revised audit finds that Patterson paid Conley $336.04 for those hours, $7.92 less than required. Patterson's

CPRs, however, which DLSE stated that it accepted for the purpose of the revised audit, establish that Conley was actually paid $353.64 for those hours, $9.68 in excess of the required prevailing wages.

- Davidson worked on the Project for 33.5 hours on five days during the week ending June 17, 2007, for which the revised audit finds he was owed $1,440.33 in prevailing wages. The revised audit finds that Patterson paid Davidson $1,302.16 for those hours, $138.18 less than required. Patterson's CPRs, however, establish that Davidson was actually paid $1,525.28 for those hours, $84.95 in excess of the required prevailing wages.

- Loy worked on the Project for 32 hours on four days during the week ending June 17, 2007, for which the revised audit finds he was owed $1,375.84 in prevailing wages. The revised audit finds that Patterson paid Loy $1,259.48 for those hours, $116.36 less than required. Patterson's CPRs, however, establish that Loy was actually paid $1,460.09 for those hours, $84.25 in excess of the required prevailing wages.

Underpayment of Prevailing Rate to Third Period Drywall Installer Apprentice Langley: Langley worked on the Project from April 5 through September 10, 2007, during which he worked a total of 82 hours over 14 work days as a third period drywall installer apprentice. According to the revised audit, Langley was underpaid in the amounts of: $121.93 for 51.5 hours worked on eight days during the weeks ending April 8 through April 22, 2007, for which he was owed a total of $1,581.47; and $14.21 for six hours worked on June 15, 2007, for which he was owed a total of $184.25. The total prevailing wage rate due for a third period drywall installer apprentice during that period was $30.525 per hour, exclusive of training fund contributions. The evidence shows that Langley was paid in excess of the required prevailing wages owing for the dates in question. Patterson's CPRs establish that Langley was actually paid $1,952.93 for those hours, $187.21 in excess of the required prevailing wages.

DISCUSSION

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 [*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." (Section 90.5, subdivision (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 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."

Patterson Was Not Required To Pay The Prevailing Rate For Drywall Installer For Drywall Taping And Texturing Work Performed On The Project In Light Of The Information Publicly Available From DIR.

The prevailing rate of pay for a given craft, classification, or type of work is determined by the Director of Industrial Relations in accordance with the standards set forth in section 1773. It is the rate paid to the majority of workers; if there is no single rate payable to the majority of workers, it is the single rate paid to most workers (the modal rate). On occasion, the modal rate may be determined with reference to collective bargaining agreements, rates determined for federal public works projects, or a survey of rates paid in the labor market area. (Sections 1773, 1773.9, and *see California Slurry Seal Association v. Department of Industrial Relations* (2002) 98 Cal.App.4th 651.) The Director determines these rates and publishes general wage determinations, such as NC-31-X-16-2005-1 and FRE- 2006-1, to inform all interested parties and the public of the applicable wage rates for the "craft, classification and type of work" that might be employed in public works. (Section 1773.) Contractors and subcontractors are deemed to have constructive notice of the applicable prevailing wage rates. (*Division of Labor Standards Enforcement v. Ericsson Information Systems* (1990) 221 Cal.App.3d 114, 125.)

The applicable prevailing wage rates are the ones in effect on the date the public works contract is advertised for bid. (*See* section 1773.2 and *Ericsson, supra.*) Section 1773.2 requires the body that awards the contract to specify the prevailing wage rates in the call for bids or alternatively to inform prospective bidders that the rates are on file in the body's principal office and to post the determinations at each job site.

Section 1773.4 and related regulations set forth procedures through which any prospective bidder, labor representative, or awarding body may petition the Director to review the applicable prevailing wage rates for a project, within 20 days after the advertisement for bids. (*See Hoffman v. Pedley School District* (1962) 210 Cal.App.2d 72 [rate challenge by union representative subject to procedure and time limit prescribed by section 1773.4].) In the absence of a timely petition under section 1773.4, the contractors and subcontractors were bound to pay the prevailing rate of pay, as determined and published by the Director, as of the bid advertisement date. (*Sheet Metal Workers Intern. Ass'n, Local Union No. 104 v. Rea* (2007) 153 Cal.App.4th

1071, 1084-1085.)

There is no dispute either that the work performed on the Project by the six affected workers consisted exclusively of drywall taping and texturing or that drywall taping and texturing work fell under both the Painter and Carpenter scopes of work on the bid advertisement date. What is in dispute, however, is the meaning of the language from the drywall installer scope of work stating:

> The Union understands and recognizes that the Association and its members are signatory to a collective bargaining agreement with the painters covering drywall finishing work. The parties agree that Article 1, F shall apply only to those signatory employers who are not signatory to collective bargaining agreement with the painters covering drywall finishing work as described in Article 1, F of the agreement and who choose to assign that work to the painters. The Union agrees not to invoke or enforce Article 1, F or to create any jurisdictional dispute concerning the work described in that section against any signatory employer that is also signatory to an agreement with the painters covering the drywall finishing work and who chooses to assign that work to the painters.

DLSE argues that this language shows that the carpenters and the painters unions had agreed to allocate drywall finishing work between them in order to avoid a jurisdictional dispute and that allowing Patterson to use the Painter rates would create the very jurisdictional dispute that the unions were attempting to avoid. The Director's role in setting prevailing wage rates is not to mediate union jurisdictional fights. (*Pipe Trades District Council No. 51 v. Aubry* (1996) 41 Cal.App.4th 1457, 1473-1474.) Acknowledging that the prevailing wage law applies to union and non-union contractors alike, however, DLSE contends that the language "members are signatory to a collective bargaining agreement with the painters" should be interpreted as a licensing requirement for prevailing wage purposes and that only a contractor who possesses a specialty contractor's painter's license from Contractor's State License Board and who is performing painting work may use the Painter rates for *any* drywall work. On this basis, DLSE contends that Patterson is precluded from using the Painter rates for any of its work on the Project because Patterson is not a licensed painting contractor. Rather, because Patterson is a licensed drywall contractor, it must pay the drywall installer rate for all work on the Project. To find otherwise, DLSE argues, would leave no drywall finishing work under the drywall installer wage classifica-

tion and would make the jurisdictional provision of the drywall installer scope of work void, contrary to the agreement between carpenters and painters unions.

While it is the Director's responsibility to define scopes of work and set prevailing wages for crafts, classifications and types of work that might be employed in public works, DLSE's argument is the "sort of delicate line-drawing [that] goes far beyond the task of determining 'general prevailing wages' by 'craft, classification or type of workman.'" (*Pipe Trades District Council No. 51 v. Aubry* (1996) 41 Cal.App.4th 1457, 1473.) The issue here is whether Patterson is precluded from using the Painter wage rates whose scope of work unquestionably covers the work performed based solely on the nature of Patterson's contractor's license. I find that it is not.

As the court explained in *Pipe Trades*, the Director's responsibility in setting prevailing wage rates and scopes of work for public works projects can be summarized "by saying that it involve[s] determining 'what the prevailing wage for that category of worker should be.'" (*Pipe Trades, supra,* at p. 1473.) The focus is therefore on the worker and the specific work performed. The aim of enforcement is to guarantee that every individual performing the same work on public work projects receives the same pay. It is not within the Director's authority to enforce CSLB's licensing requirements or union jurisdictional disputes absent a petition under section 1773.4, especially where, as here, Patterson's work was clearly within its CSLB specialty license. DLSE's argument is therefore rejected.

Because drywall taping and texturing work is explicitly included in both the drywall installer and Painter scopes of work that were in effect at the time of bid, the project specifications for the drywall taping and texturing work on the Project properly allowed for payment of Painter's rates.[9] Patterson has therefore satisfied its burden to disprove the basis of the Assessment's reclassification of workers from drywall patcher and taper to drywall installer.

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[9] DLSE argues in the alternative that the drywall patcher classification cannot apply to Patterson's work on the Project because drywall patchers do not normally perform work involving new construction, but rather only do repair work on damaged drywall in conjunction with painting. The applicable Painter scope of work does not detail any such distinction, however, and, in the absence of any evidence to support this assertion, DLSE's argument is not compelling.

However, the record shows that Patterson still underpaid the prevailing wages due to the six affected workers applying the reported Painter rates. The total prevailing wage rate for dry-wall patcher was $34.45 per hour, from April 2 to June 30, 2007, and $35.45 per hour, from July 1 through July 13, 2007. Patterson paid the six workers at a total hourly rate of $34.25 for the whole of that period, between $0.20 and $1.20 less than the required amounts.[10] Patterson continued to underpay the four workers that were reclassified as tapers commencing in September 2007.

The total prevailing wage rate due for taper from July 1, 2007, through the end of Patterson's work on the Project was $37.20 per hour. During that time, however, Patterson paid the four workers reported as tapers at the rate of $35.25 per hour from September 4 through October 28, 2007; $36.25 per hour from October 29 through November 11, 2007; and $37.66 per hour from November 12 through December 2, 2007, ranging from $1.95 below to $0.46 above the required rate.[11] The resulting underpayments, by affected worker, are as follows:

Worker	Wages Owed	Wages Paid	Wages Due
E. Avila	$3,730.60	$3,669.89	$60.71
O. Avila	$1,762.60	$1,697.67	$64.93
R. Deatherage	$6,297.93	$6,230.38	$67.55
V. Deatherage	$1,274.65	$1,267.25	$7.40
N. Garcia	$3,180.00	$3,083.02	$96.98
S. Herrera	$1,636.38	$1,626.88	$9.50
TOTALS			**$307.07**

The Assessment is therefore modified to eliminate the reclassifications and reduce the unpaid prevailing wages due for the affected workers to $307.07.

DLSE's Penalty Assessment Under Section 1775 Is Appropriate.

Section 1775, subdivision (a) states in relevant part:

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[10] As found above, O. Avila and N. Garcia were paid at the lower total hourly rate of $31.72 during the week ending July 1, 2007, only, between $2.53 and $3.53 less than the required amounts.

[11] E. and O. Avila, the only tapers who worked on the Project after November 11, 2007, were fully paid at the taper rate for 2.5 hours of work performed on November 28, 2007.

(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 fifty dollars ($50) 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 ten dollars ($10) . . . 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 twenty dollars ($20) . . . 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 thirty dollars ($30) . . . if the Labor Commissioner determines that the violation was willful, as defined in subdivision (c) of Section 1777.1.[12]

Abuse of discretion is established if the Labor Commissioner "has not proceeded in the manner required by law, the [determination] is not supported by the findings, or the findings are not supported by the evidence." (Code of Civil Procedure section 1094.5, subdivision (b).) In reviewing for abuse of discretion, however, the Director is not free to substitute his own judg-

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[12] Section 1777.1, subd. (c) 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."

ment "because in [his] own evaluation of the circumstances the punishment appears to be too harsh." *Pegues v. Civil Service Commission* (1998) 67 Cal.App.4th 95, 107.

A contractor or subcontractor has the same burden of proof with respect to the penalty determination as to the wage Assessment. Specifically, "the Affected Contractor or Subcontractor shall have the burden of proving that the Labor Commissioner abused his or her discretion in determining that a penalty was due or in determining the amount of the penalty." (Rule 50(c) [Cal. Code Reg. tit. 8 §17250, subd. (c)].)

Section 1775, subdivision (a)(2) grants the Labor Commissioner the discretion to mitigate the statutory maximum penalty per day in light of prescribed factors, and, in this case, DLSE has mitigated the penalty amount under section 1775 to $10.00 per violation based on the fact that Patterson had no prior prevailing wage violations. While Patterson has prevailed on all legal and the majority of factual disputes presented by this matter, resulting in a substantial reduction in the total assessment, the evidence establishes that, even without reclassification, Patterson underpaid the six affected workers for nearly all of the work that they performed on the Project. The proof for the underpayment comes directly from Patterson's records. Patterson has introduced no evidence of abuse of discretion by DLSE and, accordingly, the assessment of penalties at the rate of $10.00 per violation is affirmed.

The Assessment found a total of 95 prevailing wage violations subject to penalties under section 1775. Patterson has disproved the basis of the Assessment for 22 of the assessed violations, showing that: Conley, Davidson, Loy and Langley were fully paid for all of their work on the Project, E. Avila and O. Avila were fully paid for their work as tapers on November 28, 2007, and Herrera did not work on the Project on June 14, 2007. This decision therefore reduces the total assessed violations subject to penalties under section 1775 by 22, to 73. At the $10.00 rate determined by DLSE, the total penalties are $730.00.

Patterson Is Liable For Liquidated Damages.

At all times relevant to this Decision, section 1742.1, subdivision (a) provided in pertinent part as follows:

> After 60 days following the service of . . . a notice of withholding under subdivision (a) of Section 1771.6, 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 . . . notice 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. If the contractor or subcontractor demonstrates to the satisfaction of the director that he or she had substantial grounds for believing the . . . notice to be in error, the director shall waive payment of the liquidated damages.
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> Rule 51, subdivision (b) [Cal.Code Reg. *tit. 8* §17251, subd. (b)] states as follows:
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> To demonstrate "substantial grounds for believing the Assessment . . . to be in error," the Affected Contractor or Subcontractor must establish (1) that it had a reasonable subjective belief that the Assessment . . . was in error; (2) that there is an objective basis in law and fact for the claimed error; and (3) that the claimed error is one that would have substantially reduced or eliminated any duty to pay additional wages under the Assessment . . .

Absent waiver by the Director, Patterson is liable for liquidated damages in an amount equal to any wages that remained unpaid sixty days following service of the Assessment, as modified by this Decision, or a total of $307.07. Entitlement to a waiver of liquidated damages in this case is closely tied to Patterson's position on the merits and specifically whether there was an "objective basis in law and fact" for contending that the assessment was in error.

As discussed above, although Patterson has prevailed on all legal and the majority of factual disputes presented by this matter, Patterson's own records establish that, even without reclassification, it underpaid the six affected workers for nearly all of the work that they performed on the Project. Patterson's success on the other issues has resulted in a substantial reduction of the total Assessment, but cannot constitute an "objective basis in law and fact" for contending that the Assessment was in error with regard to the remaining underpayments. Because the assessed back wages as modified remained due more than sixty days after service of the Assessment, and Patterson has not demonstrated grounds for waiver, it is also liable for liquidated damages in an amount equal to the unpaid wages.

FINDINGS

1. Affected subcontractor Evan Patterson Construction, Inc. filed a timely Request for Review of the Civil Wage and Penalty Assessment issued by DLSE with respect to the Project.

2. Patterson properly relied on the published determination that the applicable prevailing wage rate for drywall taping and texturing work on the Project was either drywall patcher or taper as set forth under the craft of Painter in prevailing wage determination FRE-2006-1. The portion of the Assessment reclassifying the workers performing that work on the Project from drywall patcher and taper to drywall installer is therefore dismissed.

3. Patterson fully paid Conley, Davidson and Loy for all of their work as drywall installers on the Project. The Assessment is therefore dismissed as to these workers.

4. Patterson fully paid Langley for all of his work as a third period drywall installer apprentice on the Project. The Assessment is therefore dismissed as to this worker.

5. Patterson underpaid E. Avila, O. Avila, R. Deatherage, V. Deatherage, Garcia and Herrera for their work on the Project in the drywall patcher and taper classifications in the aggregate amount of $307.07, as detailed above, comprising 73 violations.

6. In light of Findings 3 through 5, above, Patterson underpaid its employees on the Project in the aggregate amount of $307.07.

7. DLSE did not abuse its discretion in setting section 1775, subdivision (a) penalties at the rate of $10 per violation, and the resulting total penalty of $730.00, as modified, for 73 violations is affirmed.

8. Patterson has not demonstrated that it had substantial grounds for believing the Assessment to be in error as to its underpayment of the six affected workers, thereby entitling it to a waiver of liquidated damages under section 1742.1, subdivision (a).

9. The amounts found remaining due in the Assessment as modified and affirmed by this Decision are as follows:

Wages Due:	$307.07
Penalties under section 1775, subdivision (a):	$730.00
Liquidated Damages:	$307.07
TOTAL:	**$1,344.14**

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

The Civil Wage and Penalty Assessment is dismissed 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: 10/6/10

John C. Duncan
Director of Industrial Relations