

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Aya Plumbing, Inc.

Case No. 15-0441-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement.

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected subcontractor Aya Plumbing, Inc. (Aya Plumbing) submitted a timely Request for Review of a Civil Wage and Penalty Assessment (Assessment) issued by the Division of Labor Standards Enforcement (DLSE) with respect to the work of improvement known as the Riverside County Regional Medical Center Nursing and Allied Health Education Building (Project) performed for the County of Riverside (County). Before the Hearing on the Merits, the affected prime contractor, A.W.I. Builders (A.W.I.), paid the unpaid prevailing wages and entered into a settlement agreement with DLSE as to a Request for Review that it had filed, thus resolving all issues in the Assessment, except for penalties under Labor Code section 1775 in the amount of \$9,200.00 for failure to pay one worker prevailing wages,¹ and penalties under section 1776 in the amount of \$463,500.00 for Aya Plumbing's failure to meet its obligations to produce certified payroll records upon request.

A Hearing on the Merits was held on August 1, 2018, in Los Angeles, California, before Hearing Officer Jessica L. Pirrone. David D. Cross appeared as counsel for DLSE. There was no appearance by or on behalf of Aya Plumbing.

The issues presented for decision are:

- Whether Aya Plumbing is liable for penalties under section 1775 for failure to pay prevailing wages;

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

- Whether Aya Plumbing is liable for penalties under section 1776 for failure to produce certified payroll records to DLSE.

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. Given that it did not appear, Aya Plumbing failed to carry its burden of proving the basis for the Assessment was incorrect. (See Cal. Code Regs., tit. 8, § 17250, subds. (a), (b).) Accordingly, the Director issues this Decision affirming the Assessment as to section 1775 and 1776 penalties against Aya Plumbing.

FACTS

The Project was advertised for bid on September 24, 2012. On December 17, 2012, prime contractor A.W.I. entered into a public works contract with the County.² On September 25, 2015, DLSE issued the Assessment jointly against A.W.I. and Aya Plumbing. The Assessment determined that \$63,803.42 in unpaid prevailing wages and training funds were due to fifteen workers, and \$600,025.00 in statutory penalties under sections 1775, 1813, 1776, and 1777.7 were due. In July 2016, A.W.I. paid the unpaid prevailing wages in full.

Settlement with A.W.I.

At the request of A.W.I. and DLSE, the morning session of the duly noticed August 1, 2018, Hearing on the Merits was converted into a settlement conference. At noon on the hearing date, A.W.I. and DLSE advised the Hearing Officer that there was no appearance by Aya Plumbing, and that A.W.I. and DLSE had settled all of the issues for which A.W.I. had liability. A.W.I. thereafter withdrew its Request for Review and the case was dismissed as to A.W.I.

Aya Plumbing's Failure to Appear.

Prior to the Hearing on the Merits, the Hearing Officer held four duly noticed telephonic Prehearing Conferences. All of the notices for Prehearing Conferences were served at the addresses the parties had provided in their Requests for Review. Aya Plumbing did not appear at any of the Prehearing Conferences; nor did it appear at the Hearing on the Merits.

² No evidence was presented regarding the date of the subcontract between A.W.I. and Aya.

The Hearing.

The Hearing Officer conducted the Hearing in Aya Plumbing's absence for the purpose of formulating a recommended decision as warranted by the evidence pursuant to California Code of Regulations, title 8, section 17246, subdivision (a). DLSE Exhibits 1-5, 8-11, 18, 21 and 22 were admitted into evidence without objection. Cross called one witness, Deputy Labor Commissioner Kari Anderson, and the matter was submitted on the evidentiary record.

The Assessment.

Robert Perez, Jr. filed a complaint with DLSE alleging that he was not paid the prevailing wage for all of the hours he worked on the Project as a Plumber (Industrial and General Pipefitter), and Plumber (Sewer and Storm Drain Pipelayer) from December 30, 2013, through August 17, 2014. Following Perez's complaint, DLSE conducted an investigation.

On November 7, 2014, DLSE sent to Aya Plumbing via certified mail a request for certified payroll records (CPRs). The request states:

Within ten (10) days from receipt of this request, please submit certified copies of time and payroll information for all workers who were employed by Aya Plumbing, Inc., on the above identified public works job during the period from the beginning of the project to the completion of the project. Failure to provide these certified payroll records to the Division of Labor Standards Enforcement within ten (10) working days of receipt of this request will subject the contractor to a penalty of one hundred dollars (\$100) per calendar day or portion thereof for each worker until the records are received . . .

DLSE received a signed, returned receipt for the request for records reflecting Aya Plumbing's receipt of the DLSE request, but Aya Plumbing never provided DLSE with any CPRs.

In July 2015, A.W.I. emailed Aya Plumbing's CPRs to DLSE. DLSE concluded that the CPRs were intentionally fraudulent based on information it obtained from workers and from the County's labor compliance company, Alliant Consulting, Inc. (Alliant). For example, some workers advised DLSE that they were not paid fringe benefits. Another worker advised DLSE that he worked more hours than those reflected on the CPRs. Alliant advised DLSE it had observed Aya Plumbing workers on the Project who were not listed on the CPRs, and that it had observed Aya Plumbing workers who were listed on the CPRs, but who worked more hours than

were indicated on the CPRs. Alliant further advised that Aya Plumbing workers would try to hide from Alliant and would evade Alliant's questions.

DLSE issued the Assessment, which found, in relevant part, that penalties for underpayment of prevailing wages to Perez were due under section 1775 in the amount of \$9,200.00, based on 46 instances of underpayment at the maximum penalty rate of \$200 per violation. The Assessment further found that penalties under section 1776 were due in the amount of \$463,500.00 based on Aya Plumbing's failure to provide CPRs as requested over a period of 309 days, assessed at the rate of \$100.00 per calendar day per each of the 15 workers on the Project. DLSE's penalty review form, which outlines the bases for penalties found in the Assessment, reflects that the Labor Commissioner imposed the maximum per violation penalty under section 1775 based on its conclusion that Aya's CPRs were fraudulent.

DISCUSSION

The California Prevailing Wage Law, set forth at Labor Code sections 1720 et seq., requires the payment of prevailing wages and hiring of apprentices on public works construction projects. 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 Construction Co. v. Aubry* (1992) 1 Cal.4th 976.)

Section 1775 requires, among other provisions, that contractors and subcontractors pay the difference to workers who received less than the prevailing rate and also prescribes penalties for failing to pay the prevailing wage rate. Under the version of section 1775 in effect on September 34, 2012, the date of the bid advertisement for the Project, the penalty under section 1775 for failure to pay prevailing wages is a maximum of \$200.00 for each calendar day for each worker paid less than the prevailing wage.

Section 1775, subdivision (a)(2)(D), states, "The determination of the Labor Commissioner as to the amount of the penalty shall be reviewable only for abuse of discretion." Further, "the Affected Contractor or Subcontractor shall have the burden of proving that the Labor Commissioner abused his or her discretion in determining that a penalty was due or in determining the amount of the penalty." (Cal. Code Regs. tit. 8, §17250, subd. (c).) Abuse of discretion is established if the "agency's nonadjudicatory action ... is inconsistent with the

statute, arbitrary, capricious, unlawful or contrary to public policy.” (*Pipe Trades v. Aubry* (1996) 41 Cal.App.4th 1457, 1466.) In reviewing for abuse of discretion, however, the Director is not free to substitute his or her own judgment “because in [his/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.)

Additionally, employers on public works are required to keep accurate payroll records, recording, among other things, the work classification, straight time and overtime hours worked, and actual per diem wages paid for each employee. (§ 1776, subd. (a).) This is consistent with the requirements for construction employers in general, who are required to keep accurate records of the hours employees work and the pay they receive. (Cal. Code Regs., tit. 8, § 11160, subd. 6.) Contractors who fail to provide payroll records within ten days of DLSE’s request for such records are subject to penalties. (§ 1776, subd. (h).) Penalties are calculated by multiplying the number of workers on the project, by the number of days of noncompliance, by the penalty rate of \$100.00 (*Ibid.*)

When DLSE determines that a violation of the prevailing wage requirements has occurred, it may issue a written civil wage and penalty assessment. (§ 1741.) An affected contractor may appeal that assessment by filing a Request for Review. (§ 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 initial burden of presenting evidence that “provides prima facie support for the Assessment” (Cal. Code Regs., tit. 8, § 17250, subd. (a).) When that initial burden is met, “the Affected Contractor or Subcontractor has the burden of proving that the basis for the Civil Wage and Penalty Assessment is incorrect.” (Cal. Code Regs., tit. 8, § 17250, subd. (b); accord, § 1742, subd. (b).) At the conclusion of the hearing process, the Director issues a written decision affirming, modifying or dismissing the assessment. (§ 1742, subd. (b).)

In this case, the record establishes that DLSE met its initial burden of presenting prima facie support for the assessment of section 1775 penalties against Aya Plumbing at the maximum rate for willful failure to pay the required prevailing wage, and for section 1776 penalties against Aya Plumbing for failure to provide certified payroll records upon request. Further, failing to appear, Aya Plumbing presented no evidence to disprove the basis for the Assessment.

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

FINDINGS AND ORDER

1. Affected subcontractor Aya Plumbing, Inc. filed a timely Request for Review from a timely Civil Wage and Penalty Assessment issued by the Division of Labor Standards Enforcement.

2. Following a settlement agreement between affected prime contractor A.W.I, Inc., and the Division of Labor Standards Enforcement, all of the issues in the Civil Wage and Penalty Assessment were resolved, except for penalties against Aya Plumbing, Inc. under Labor Code section 1775, subdivision (a), as to one worker and Labor Code section 1776 penalties.

3. Penalties under Labor Code section 1775, subdivision (a), are due in the amount of \$9,200.00 for 46 instances of failure to pay the applicable prevailing wages.

4. Penalties under Labor Code section 1776 are due in the amount of \$463,500.00 for 309 days of failing to produce certified payroll records on a Project with 15 workers.

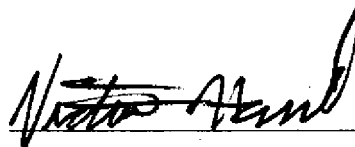
5. The amounts found remaining due in the Assessment as affirmed by this Decision are as follows:

Penalties under section 1775, subdivision (a):	\$9,200.00
Penalties under section 1776:	\$463,500.00
TOTAL:	\$472,700.00

ORDER

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: 7/25/19



Victoria Hassid
Chief Deputy Director³
Department of Industrial Relations

³ See Government Code, sections 7, 11200.4.