STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Strain and Sons, Inc. d/b/a AAA Water Trucks	Case No. 19-0470-PWH
Atkinson/Walsh Joint Venture	Case No. 19-0500-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected subcontractor Strain and Sons, Inc., doing business as AAA Water Trucks (AAA), and affected prime contractor Atkinson/Walsh Joint Venture (Atkinson/Walsh), each submitted a request for review of a Civil Wage and Penalty Assessment (CWPA or Assessment) issued by the Division of Labor Standards Enforcement (DLSE) on September 30, 2019, with respect to work performed on the State Route 91 Corridor Improvement Project (Project) for the County of Riverside—Riverside County Transportation Commission (Awarding Body) in Riverside County. The Assessment determined that $341,813.06 was due in unpaid wages and training fund contributions, and $264,235 was due in statutory penalties. Subsequently, on August 21, 2020, DLSE filed a Motion to Amend the CWPA Downward pursuant to California Code of Regulations, title 8, section 17226, subdivision (a)(1). The Amended CWPA, dated August 19, 2020, determined that $339,555.06 was due in unpaid wages and training fund contributions, and $264,235 was due in statutory penalties. Thereafter, the Hearing Officer granted the motion pursuant to California Code of Regulations, title 8, section 17226, subdivision (b).

A Hearing on the Merits occurred over two days, December 13, 2022, and December 12, 2023, before Hearing Officer Steven A. McGinty. Thomas W. Kovacich appeared as counsel for the Requesting Party Strain and Sons. Ryan Crosner appeared as counsel for the prime contractor and Requesting Party Atkinson Walsh. William Arthur Snyder appeared as counsel for DLSE. Deputy Labor Commissioner Jeffrey Pich

(Pich) testified in support of the Assessment. Susan Powers (Powers) and Rick Strain (Strain) testified for Atkinson/Walsh. The Hearing Officer submitted the matter for decision on February 13, 2024, following the submission of written closing argument.[1]

Prior to the first day of hearing, the parties stipulated to the following:

- The work subject to the CWPA was performed on a public work;
- The Requests for Review were timely;
- DLSE made its enforcement file available timely; and,
- No back wages were paid nor deposit made with the Department of Industrial Relations as a result of the CWPA.

The issues for decision are as follows:

- Whether DLSE served the CWPA timely.
- Whether the individuals named in the DLSE audit and underlying Amended CWPA are due back wages from Strain and Sons and/or Atkinson/Walsh.
- Whether DLSE accurately set forth the hours worked and monies paid to the individuals claimed to be due wages as set for in the amended CWPA.
- Whether Strain and Sons and/or Atkinson/Walsh are liable for penalties assessed pursuant to Labor Code sections 1775 and 1813.[2]
- Whether Atkinson/Walsh employed the water truck drivers.
- Whether the Labor Commissioner abused discretion in assessing section 1775 penalties.

[1] Atkinson/Walsh filed a Request for Judicial Notice with its closing brief requesting that the Director take judicial notice of several documents including condensed transcripts of the two days of hearing. DLSE submitted a copy of the full size transcript of the hearing with its closing brief. Pursuant to Rule 45, the Hearing Officer took Official Notice of the full size transcript submitted by DLSE.

[2] All further section references are to the Labor Code, unless otherwise indicated.

- Whether Strain and Sons and/or Atkinson Walsh are liable for liquidated damages under section 1742.1 on wages found due and owing.[3]

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 some of the Assessment, that AAA and Atkinson/Walsh failed to prove that the basis for the entire Assessment was incorrect, but that portions of the Assessment must be modified to conform to proof. (See Cal. Code Regs., tit. 8, § 17250, subds. (a) and (b).) Accordingly, the Director issues this decision affirming but modifying the Assessment.

FACTS

Work on the Project.

The Project was, "the design and construction of approximately eight miles of tolled express lanes and related improvements within State Route 91 (SR 91) between the Riverside/Orange County line and the Interstate 15 interchange,..." (DLSE Exhibit No. 14, p. 1085.) The Awarding Body published a Request for Proposals on July 26, 2012. (DLSE Exhibit No. 5, p. 16.) Thereafter, the Awarding Body entered in a contract with Atkinson/Walsh, the prime contractor, on May 8, 2013. (DLSE Exhibit No. 6, p. 254.) The initial contract price was $632,572,050.00. (*Id.* at p. 134.) The contract included provisions requiring Atkinson/Walsh, "to strictly adhere to the provisions of the [California] Labor Code and implementing regulations, including requirements with respect to prevailing wages," as well as to, "comply with all applicable requirements of

[3] Both the CWPA and the Amended CWPA included allegations that Strain and Sons, Inc., failed to submit contract award information to applicable apprenticeship programs that could supply apprentices to the site of the public work and failed to comply with the requirement to employ apprentices on the Project in the minimum ratio of apprentices to journeypersons found in section 1777.5. Strain and Sons, Inc., was assessed $75,420 in section 1777.7 penalties. However, DLSE neither raised the alleged apprenticeship violations as issues for decision nor offered any testimony from Pich on the issues. Thus, DLSE failed to present a prima facie case with respect to apprenticeship violations. (Cal. Code Regs., tit. 8, § 17250, subd. (a).)

Division 2, Part 7, Chapter 1 [section 1720 et eq.] of the Labor Code…respecting prevailing wages, including those more specifically set forth in Appendices 2, 14 and 16."[4] (*Id.* at pp. 106, and 108 (emphasis in original).) The Awarding Body indicated that the Project began on May 10, 2013. (DLSE Exhibit No. 5, p. 16.) The Project was completed and the Awarding Body accepted the Project on March 15, 2018. (DLSE Exhibit No. 14, p. 1085.)

Atkinson/Walsh contracted with AAA, to perform dust control and soil compaction on the Project. AAA used workers who drove water trucks, who were properly classified as Teamster, Group V. (DLSE Exhibit No. 21, p. 1768.)

Public Works Complaint Investigation.

The original complaint in this matter came from Patrick Gonzalez (Gonzalez), a water truck driver. (Atkinson/Walsh Exhibit P, pp. 1-2.) Gonzalez complained that AAA failed to pay or underpaid wages, failed to pay overtime, failed to pay fringe benefits, failed to pay travel and subsistence, misclassified him, and otherwise violated various labor laws. (*Id.* at p. 1.) DLSE received the complaint on July 3, 2017. (*Ibid.*) In the complaint, Gonzalez indicated that he was a water truck driver who drove a three axle 4,000 gallon water truck. Further, Gonzalez indicated that AAA paid him by check weekly, without a check stub, and that AAA paid him $25 per hour and did not pay overtime, Saturday, holiday, or double time rates. (*Id.* at p. 2.) According to Gonzalez, co-workers on the Project, who were also water truck drivers, were Rockne Lee, Dirk Allen, and Jerry Cotter. (*Ibid.*) On August 18, 2017, DLSE assigned Pich to investigate the complaint, and staff mailed out initial packets to AAA, Atkinson/Walsh, and the

[4] Appendix 2, Modified Standard Specifications, included a provision that, "[w]ork on the job site must comply with Labor Code §§ 1727 and 1770-1815….[and] Contractor shall strictly adhere to Contract Section 7.4 and Contract Appendix 16." (DLSE Exhibit No. 6, p. 338.) Appendix 14, Federal Requirements. (*Id.* at p. 559.) Appendix 16, Labor Code Requirements, included notice that the Awarding Body had obtained the prevailing wage rates, that they were on file in the Awarding Body's offices, and would be provided upon request. (*Id.* at p. 685.) In addition, the following specific Labor Code provisions where reproduced in their entirety in the appendix: sections 1171, 1775, 1776, 1777.5, 1810, 1811, 1812, 1813, and 1815. (*Id.* at pp. 886-895.)

Awarding Body notifying them of the investigation and requesting various records. (DLSE Exhibit No. 3, p. 7; DLSE Exhibit No. 4, pp. 9-15.)

Just over a year later, on August 15, 2018, DLSE received a second complaint from Rockne Lee (Lee), a water truck driver. Lee complained that AAA failed to pay or underpaid wages, failed to pay overtime, and misclassified him. (Atkinson/Walsh Exhibit Q, pp. 1-3.) In the complaint, Lee indicated that he was a water truck driver who operated a water truck for compaction, dust control, and to support other equipment where water was needed. Further, Lee indicated that AAA paid him by check weekly, without a check stub, and that AAA paid him $22, $26, and $31 per hour and did not pay overtime, Saturday, holiday, or double time rates. (*Id.* at p. 2.) According to Lee, co-workers on the Project, who were also water truck drivers, included Patrick Gonzalez, Dirk Allen, and Richard Carlson. (*Ibid.*)

In response to a Request for Payroll Records addressed to AAA (DLSE Exhibit No. 4, pp. 11 and 15), the attorney for AAA advised Pich there were no certified payroll records (CPRs). The attorney offered to provide Pich with Owner-Operating Listing records (OOLRs). (DLSE Exhibit No. 3, p. 7.) Subsequently, Pich requested the OOLRs for water truck drivers on the Project from AAA's attorney who provided them to Pich. (*Id.* at pp. 7-8.) The OOLRs indicated that AAA paid water truck drivers who worked on the Project from July 21, 2014 through and including August 15, 2017. (DLSE Exhibit No. 10, pp 750-1071.)[5]

On or about September 18, 2017, DLSE received from the Awarding Body documents requested in the initial packet. (DLSE Exhibit No. 3, p. 7.) The Awarding

[5] The OOLR appears to be a form developed by Caltrans for use by contractors employing owner operators on public works projects to document among other things: name; work classification; description of equipment; day, date, and hours of work; total weekly hours; the rate of pay; and the gross payment earned. Page two of the form consists of a statement of compliance by the contractor that the persons listed on the first page, "have been paid the full weekly sums earned, that no rebates have been or will be made either directly or indirectly [to the contractor]… and that no deductions have been made either directly or indirectly from all sums earned…" (DLSE Exhibit No. 10, pp. 750-751.)

Body indicated that the Project was not complete. (DLSE Exhibit No. 5, p. 16.) No notice of completion was provided and no completion date was listed; instead the Awarding Body indicated N/A for both of those requests for information. *(Ibid.*) Over two years later, on or about September 27, 2019, DLSE received a second batch of documents requested from the Awarding Body. (DLSE Exhibit No. 3, pp. 7-8.)

As part of his investigation, Pich spoke with several water truck drivers. Gonzalez, Lee, and Dirk Allen each told Pich that they were making $25 an hour on the Project. Each told Pich they were paid by check without a pay stub. Further, each told Pich they drove a company truck that they had to lease from AAA, paid for the gas for the truck, and were told to get a small business license. Finally, Rich Carlson told Pich that he was an owner-operator, drove his own truck on the Project, and was paid $80 an hour.

Subsequently, on September 30, 2019, Pich issued an Assessment naming Atkinson/Walsh and AAA as the prime and subcontractors on the Project respectively, and alleging among other things underpayment of prevailing wages, including overtime, and failure to pay training fund contributions.[6] Pich alleged that three employees in the classification of Teamster Group V were underpaid wages: Rockne Lee, Patrick Gonzalez, and Dirk Allen.

Applicable Prevailing Wage Determination.

The Prevailing Wage Determination for the craft of Teamster that was in effect on the bid date, July 26, 2012, was Teamster for Southern California (SC-23-261-2-

[6] The Assessment alleged the misclassification of workers as independent contractors resulting in the underpayment of prevailing wages. On August 21, 2020, DLSE filed and served a motion to amend the Assessment downward and to clarify the reason for the alleged violations; the Amended Assessment was attached as an exhibit to the motion (Exhibit 4). The Amended Assessment clarified that the subcontractor (AAA) classified the workers as water truck drivers and did not pay them the appropriate prevailing wages for Teamster, Group V. The Hearing Officer granted the Motion on October 19, 2020. The gravamen of the Assessment and the Amended Assessment was the failure to pay proper prevailing wages. Moreover, as discussed below, DLSE served the Amended Assessment timely. (See footnote no. 14 *post*.)

2011-1) (Teamster PWD), which had a predetermined increase effective July 1, 2012. The predetermined increase resulted in the following rate to be paid: the basic hourly rate for Teamster, Group V,[7] was $27.79, the combined fringe benefits were $20.97 per hour, and the training fund contribution was $1.52 per hour,[8] for a total of $50.28 for each straight time hour. (DLSE Exhibit No. 21, pp. 1767-1769.)[9]

Assessment of Wages and Training Fund Contributions.

Pich performed an audit of the wages due and owing the workers. He took the dates and hours of work listed by AAA for the workers from the OOLRs provided by AAA, and used the payments—$25 an hour—the workers told him they received. He compared the $25 an hour to the required prevailing wage rates from the Teamster PWD. The Public Works Audit Worksheet (summary audit) prepared by Pich and attached to the Assessment, indicated that AAA underpaid three workers, Rockne Lee, Patrick Gonzalez, and Dirk Allen in the total sum of $322,938.92. (Atkinson/Walsh Exhibit D.)[10] Specifically, between August 31, 2014, and April 23, 2017, Lee worked 3676.7 straight time hours, 450.5 overtime hours, and 36.5 double time hours, and AAA underpaid him $106,203.54. Between October 12, 2014, and April 2, 2017, Gonzalez worked 4063 straight time hours, 1139 overtime hours, and 113 double time hours, and

[7] The Group V classification included "Water Truck 3 or more axles." (DLSE Exhibit No. 21, p. 1768.)

[8] The Teamster PWD indicates that the craft of Teamster is an apprenticeable craft. (DLSE Exhibit No 21, p. 1767.)

[9] As noted in the DLSE Penalty Review, the combination of the basic hourly rate of 27.79 and the total fringe benefits per hour of 20.97, equaled an hourly rate of $48.76, not including the $1.52 hourly training fund contribution rate. (AAA Exhibit II.)

[10] While DLSE did not stipulate to the admission of Atkinson/Walsh Exhibit D, DLSE utilized Exhibit D in presenting their case and Exhibit D was a document prepared by DLSE's witness Pich. Atkinson/Walsh Exhibit D is admitted into evidence. Similarly, DLSE did not stipulate to the admission of Atkinson/Walsh Exhibit E (which was also their Exhibit No. 20) but DLSE utilized Exhibit E in presenting their case and Exhibit E—Individual Worker Audit Worksheets—was a document prepared by DLSE's witness Pich. Atkinson/Walsh Exhibit E is admitted into evidence.

AAA underpaid him $145,232.25.[11] Finally, between August 9, 2015 and January 29, 2017, Allen worked 2896 straight time hours and 43 overtime hours, and AAA underpaid him $71,503.13. (Atkinson/Walsh Exhibit D.)

Pich determined that AAA did not pay training fund contributions. He checked with the California Apprenticeship Council for training fund payments and found AAA did not pay training funds. (AAA Exhibit II.) As a result, because Lee worked a total of 4,163.7 hours, AAA owed $6,328.82 in training fund contributions.[12] Because Gonzalez worked a total of 5,315 hours, AAA owed an additional $8,078.04 in training fund contributions.[13] Finally, because Allen worked a total of 2,939 hours, AAA owed an additional $4,467.28 in training fund contributions.[14] In sum, AAA owed $18,874.14 in training fund contributions. (Atkinson/Walsh Exhibit D.)

Assessment of Penalties.

Pich recommended that section 1775 and section 1813 penalties be assessed against AAA. The Senior Deputy imposed a penalty rate of $120 for each calendar day of violation of section 1775. Pich determined that each day the workers were paid less than the prevailing wage rate resulted in a penalty. Because AAA paid less than the prevailing wage rate to all three workers each day they worked, section 1775 penalties were imposed as follows: for failure to pay Lee the prevailing wage rate, $62,160; for failure to pay Gonzalez the prevailing wage rate $70,440; and for failure to pay Allen the prevailing wage rate, $43,440. In sum, DLSE imposed $176,040 in section 1775 penalties against AAA.

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[11] The Amended Assessment reduced the alleged underpayment to Patrick Gonzales by $2,258 to $142,974.25.

[12] 4163.7 hours x $1.52 = $6,328.82.

[13] 5315 hours x $1.52 = $8078.80. (There appears to be a difference of 0.76 in AAA's favor in the calculation performed by Pich.)

[14] 2939 hours x $1.52 = $4,467.28

With respect to section 1813 penalties, Pich determined that Lee worked 487 hours of overtime or double time at less than the required rate, which resulted in a penalty of $25 per day for each calendar day of overtime violation, totaling $3,675. Gonzalez worked 1,252 hours of overtime or double time at less than the required rate, which resulted in a penalty of $25 per day for each calendar day of overtime violation, totaling $8,850. Finally, Allen worked 43 hours of overtime at less than the required wage rate, which resulted in a penalty of $25 per day for each calendar of overtime violation, totaling $250. In sum, AAA owed $12,775 in section 1813 penalties.

Post Assessment

After the investigation was done, Pich had a conversation with Strain. According to Pich, Strain called Pich on August 29, 2022, and said that the only thing he—Strain—had done wrong was he was taking deductions out of the workers' pay for the lease of the truck and for fuel costs, and not paying them the full rate and letting the workers pay back Strain for the rental of the truck and for gas.

At the Hearing on the Mertis, Atkinson Walsh called Strain as a witness. Strain testified he was the President of AAA, worked on the Project driving a 4,000 gallon water truck, and leased 4,000 gallon water trucks to Gonzalez and Lee for the Project. Further, Allen never worked for AAA on the Project.[15] Strain testified that the water truck used at least 20 gallons of fuel a day, that he paid $9,500 a year for insurance for the trucks that he leased, and that there were five trucks on the insurance policy.

Strain admitted that the Project was a public work. In addition, Strain understood that because the Project was a public work it required the payment of prevailing wages as determined by the Director. Further, he believed the prevailing wage rate for water truck drivers to be around $48. Strain testified that he had worked on public works projects as a water truck driver for 15 to 16 years prior to working on the Project. Also, Strain was aware that when he drove the water truck on public works projects he was required to be paid a prevailing wage rate. Strain testified that he was unaware of the

[15] Strain was shown DLSE Exhibit 10, p. 856, and testified that Allen never did perform services for AAA on the Project.

obligation to pay training fund contributions at the time of the Project, and acknowledged not making any training fund contributions to the California Apprenticeship Council for the work on the Project.

Strain testified that no one from Atkinson/Walsh brought to Strain's attention any concerns about payments he made to the workers. Strain stated he paid the workers from payments made to him by Atkinson/Walsh for invoices he submitted to them. Strain acknowledged that Atkinson/Walsh never provided him with a prevailing wage determination that applied to him and the other drivers, that Atkinson/Walsh never raised with him the failure to distinguish straight time versus overtime, and that Atkinson/Walsh never brought to his attention or question whether he was paying the drivers the appropriate overtime rates.

Atkinson/Walsh also called Powers as a witness. Powers was a regional business manager for Atkinson/Walsh responsible for overseeing among other things accounts payable and labor compliance for the Project. She testified that the accounts payable staff processed vendor invoices and subcontractor progress payments. According to Powers, a subcontractor was a contractor licensed by the Contractors State License Board performing onsite installation work by furnishing materials, equipment, and labor. A vendor was any type of business partner from whom Atkinson/Walsh purchased office and material supplies. With respect to labor compliance, Powers and a labor specialist who worked under her reviewed documents submitted for craft workers. For owner operators, they required OOLRs and truck owner operator ownership certification forms.[16] They used the Caltrans process to verify that owner operators were indeed owner operators. They would collect documents, including the weekly OOLRs, and make sure they were complete.

For owner operators, Power and her assistant took an additional step. The Atkinson/Walsh foreman or other representative provided daily tickets to owner operators listing the drivers and the hours that they worked for the owner operators on the Project. Day-to-day supervision of the water trucks was done by the Atkinson/Walsh

[16] A Caltrans form CEM-2510.

foreman in the field. That person coordinated where and when the water truck drivers worked. The water truck drivers worked as a team with heavy equipment operators and laborers. The owner operators would attach the daily time tickets provided by the foreman to the invoices they submitted to Atkinson/Walsh. Powers and her assistant would take the OOLRs and compare the hours indicated on them to the daily time tickets to make sure that they matched.

Powers testified that Atkinson/Walsh used somewhere between 20 and 30 water truck drivers on the Project. Atkinson/Walsh contracted directly with approximately half of them. Water truck drivers were considered vendors.

Powers was familiar with Strain. His company, AAA, was a vendor on the Project providing owner operator water trucks. According to Powers, AAA had owner operators that drove water trucks and they referred them to Atkinson/Walsh for the Project. AAA would then invoice Atkinson/Walsh for the work the owner operators did and Atkinson/Walsh would pay AAA. Powers understood an owner operator to be someone who owned their own piece of equipment and operated it themselves. Atkinson/Walsh paid AAA $80 an hour for work on the Project.

DISCUSSION

The California Prevailing Wage Law (CPWL), set forth at Labor Code section 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 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,* 1 Cal.4th at p. 985.)

The prevailing rate of pay for a given craft, classification, or type of worker is determined by the Director of Industrial Relations in accordance with the standards set forth in section 1773. The Director determines the rate for each locality in which public work is performed (as defined in section 1724) and publishes a general Prevailing Wage Determination (PWD) for a craft, to inform all interested parties and the public of the applicable prevailing wage rates. (§ 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.)

Section 1775, subdivision (a), requires that contractors and subcontractors pay the difference to workers paid less than the prevailing rate, and prescribes penalties for failing to pay the prevailing rate. Section 1775, subdivision (a)(2) grants the Labor Commissioner the discretion to mitigate the statutory maximum penalty per day based on specified factors. Section 1813 prescribes penalties for failing to pay the overtime rate as required in the applicable PWDs.

When DLSE determines that a violation of the prevailing wage laws has occurred, DLSE issues a written civil wage and penalty assessment pursuant to section 1741. 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 60 days following service of the assessment. The assessment must be served within 18 months of the filing of a valid notice of completion. An affected contractor may appeal the assessment by filing a request for review under section 1742. DLSE transmits the

request for review 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 producing evidence that "provides prima facie support for the Assessment …." (Rule 50, subd. (a).) When that burden is met, "the Affected Contractor or Subcontractor has the burden of proving that the basis for the Civil Wage and Penalty Assessment … is incorrect." (Rule 50, 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).)

DLSE Served the CWPA Timely.

The Awarding Body filed a Notice of Completion with the County of Riverside, Assessor-County Clerk-Recorder on March 29, 2018. (DLSE Exhibit No. 14, p. 1085.) The Notice of Completion indicated that the Project was completed and the Awarding Body accepted the Project on March 15, 2018. (*Ibid.*) Thus, the Notice of Completion was valid.[17] Eighteen (18) months *after* the filing of the valid notice of completion was September 30, 2019. DLSE served the Assessment on September 30, 2019. Thus, DSLE served the Assessment timely.[18]

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[17] A notice of completion is valid if filed within 15 days after the date of completion. (Civ. Code, § 9204.)

[18] In addition, the 18-month period for service of the Assessment is tolled if the Awarding Body fails to timely furnish the Labor Commissioner, after written request, a valid notice of completion or a document evidencing the Awarding Body's acceptance of the Project on a particular date, whichever occurs later. (Lab. Code, § 1741.1, subd. (b).)

The law puts responsibility on the awarding body to notify DLSE of the status of a public works project under investigation. The awarding body is supposed to respond to a written inquiry for a copy of the valid notice of completion or document evidencing acceptance of the public work within 10 days. (§ 1741.1, subd. (b)(1).) If the awarding body has not filed a valid notice of completion and there is no document evidencing its acceptance of the public work on a particular date, the awarding body is required to notify DLSE of those facts. (*Ibid.*) "Thereafter, the awarding body shall furnish copies of the applicable document within 10 days after filing a valid notice of completion with the

DLSE Presented Prima Facie Evidence that AAA Failed to Pay Prevailing Wages and Training Fund Contributions on the Project.

According to the OOLRs prepared by AAA admitted into evidence, Rockne Lee, Patrick Gonzalez, and Dirk Allen were employed by AAA on the Project as water truck drivers. Because the Project was a public work, the law required Lee, Gonzalez, and Allen be paid prevailing wages. The basic hourly rate for Teamster, Group V was $27.79; with the addition of the combined fringe benefits of $20.97 per hour, the workers were required to be paid $48.76 per hour. Pich testified that Lee, Gonzalez, and Allen told him they were paid $25 an hour, as AAA required them to pay for lease of the truck and gas. Pich testified that Strain admitted to him taking out the cost of the lease of the truck and the cost of fuel out of each payment to each worker.[19] Thus, Pich

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county recorder's office,…" (*Ibid.*) Further, "[i]f the awarding body fails to timely furnish the Labor Commissioner with the document described in paragraph (1) the period for service of assessments under Section 1741 shall be tolled until the Labor Commissioner's actual receipt of the valid notice of completion…" (§ 1741.1, subd. (b)(2).)

DLSE first inquired with the Awarding Body about the completion date of the Project by Request for Information, Awarding Body, dated August 18, 2017. (DLSE Exhibit No. 4, pp. 10 and 15, and DLSE Exhibit No. 3, p. 7.) In a reply, received by DLSE on or about September 18, 2017, the Awarding Body indicated the Project was not complete. (DLSE Exhibit No. 3, p. 7, and DLSE Exhibit No. 5, p. 16.) Indeed, the Project was not completed until March 15, 2018. According to DLSE's file notes (900 Notes), the next time DLSE received documents requested from the Awarding Body was September 27, 2019. (DLSE Exhibit No. 3, pp. 7-8.) From these facts, in can be inferred that DLSE received the Notice of Completion from the Awarding Body on September 27, 2019. Further, until receipt of the Notice of Completion, the period for service of the Assessment was tolled. (§ 1741.1, subd. (b)(2).) The length of the period of tolling was from April 9, 2018 (10 days after the valid notice of completion was filed with the county recorder's office) until September 27, 2019 (a period of 17 months and 19 days). Thus, as a second, separate ground, DLSE served the Assessment timely because the 18-month period was tolled. Indeed, DLSE served the Amended Assessment on August 21, 2020, within 11 months of receipt of the valid notice of completion. Thus, DLSE served the Amended Assessment timely.

[19] In closing argument, Atkinson/Walsh noted lease and fuel payments for the trucks exceeded $55 an hour, with the lease payments between $55-$57 an hour, and

credited AAA for paying the workers $25 an hour and determined AAA owed the workers the difference between the required straight-time total hourly rate or overtime hourly rate—minus the training fund contribution—and the $25 actually paid.[20]

Pich testified that he determined that AAA failed to pay training fund contributions.[21] At the Hearing on the Merits, Strain admitted that AAA did not pay training fund contributions for the workers on the Project.

Once DLSE met its initial burden through testimonial and documentary evidence, AAA and Atkinson/Walsh had the burden to prove the basis for the Assessment was incorrect. (§ 1742, subd. (b); Rule 50, subd. (b).) Neither AAA nor Atkinson/Walsh met their burden of proving that the basis for the Assessment of unpaid wages and training fund contributions was incorrect. In addition to Strain's admissions, Strain failed to explain his admission about taking out costs from the workers' pay, nor did he deny paying the workers $25 an hour after deductions, nor requiring them to set up sham businesses.

The Evidence Code provides that the fact finder may draw negative inferences from failure of a party to explain or deny evidence. Evidence Code section 413 states, "In determining what inferences to draw from the evidence or facts in the case against a party, the trier of fact may consider, among other things, the party's failure to explain or deny by his testimony such evidence or facts in the case against him…." DLSE alleged that AAA had underpaid workers by not paying the correct wages, by deducting

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the average fuel payment amounting to $7.55 an hour. (Atkinson/Walsh Post-Hearing Brief, p. 11.) Thus, Strain's admission that he was deducting those costs from the $80 an hour payment to the workers listed on the OOLRs corroborated the workers' statements to Pich that they were paid $25 an hour.

[20] For straight time hours, the workers were underpaid $23.76 per hour ($48.76 - $25 = $23.76).

[21] Section 1777.5 subdivision (m) requires contractors employing journeypersons on a project in an apprenticeable craft to make contributions to the California Apprenticeship Council in the amount the Director determines is the prevailing amount of apprenticeship training contributions in the area of the public work site. The training fund contribution listed on the Teamster PWD was $1.52 per hour.

costs from their pay, and by requiring them to set up sham businesses. Also, DLSE alleged AAA failed to pay training fund contributions. In doing so, DLSE relied on AAA's OOLRs admitted into evidence, statements made by workers to Pich and Strain's admissions, and Pich's own investigation results as documented in the penalty review and 900 Notes admitted into evidence. AAA did not specifically deny any of those assertions. The inference to draw by the failure to refute specifically those assertions is that the evidence supported the allegations.

In addition, AAA falsified the OOLRs in several ways. First, in the statement of compliance on page two of each report, AAA's payor stated that no deductions had been made from the sums earned by any person. However, Strain admitted making deductions for the lease and for the fuel. Second, in using the OOLRs, AAA claimed the persons listed on the first page of the form—including Lee, Gonzalez, and Allen—were owner operators. However, AAA listed the workers' individual names and not their alleged businesses until the third year into the Project. Payroll No. 103, for the week ending July 10, 2016, was the first time the alleged business name of the alleged owner operator is listed on the OOLR. (DLSE Exhibit No. 10, p. 954.)[22] The veracity of AAA's claim of employing owner operators is further called into question by the manipulation of the naming in the OOLRs. In any event, whether the workers were owner operators or not, they were not paid the correct prevailing wages on the Project that was indisputably a public work.

[22] Payroll No. 1, for the week ending July 27, 2014, through payroll No. 59, for the week ending September 6, 2015, the individual's name is used along with the work classification "Trucking." Starting with Payroll No. 60, for the week ending September 13, 2015, the individual's name is used along the with work classification "Trucking [/] Owner Operator." (DLSE Exhibit No. 10, pp. 750-953.) Subsequently, fictitious business name statements for Gonzalez, Lee, and Allen were filed with the County of Riverside County Clerk minutes apart on April 13, 2016: Gonzalez at 3:44 PM, Lee at 3:51 PM, and Allen at 3:54 PM. (See Atkinson/Walsh Exhibits V, U and T respectively.) The Hearing Officer took Official Notice of the County Clerk's recordation of the filing of each Fictitious Business Name Statement. (Cal. Code Regs., tit. 8, § 17245.) Thereafter, in July 2016, AAA began using the fictitious business names when completing the OOLRs.

DLSE Did Not Establish that Allen was Underpaid to the Extent Alleged.

Pich's audit indicated that Allen worked on the Project from August 9, 2015, through January 29, 2017. During that time, the audit indicated Allen worked 2896 straight time hours and 43 overtime hours. Further, AAA underpaid Allen $71,503.13 for his work on the Project. At the Hearing on the Merits, Pich testified that he obtained the hours of work for the workers from the OOLRs prepared by AAA. However, the OOLRs indicate Allen worked only one week on the Project, the week ending August 9, 2015. (DLSE Exhibit No. 10, pp. 750-1071.) For that week, the OOLR, identified as payroll no. 55, indicates that Allen worked 9 hours on Monday, and 8.5 hours the next four days, Tuesday through Friday, for a total of 43 hours. (*Id.* at p. 856.) DLSE offered no other proof of the hours worked by Allen on the Project. Thus, the underpayment to Allen must be reduced to conform to the hours AAA admitted employing Allen on the Project. The resulting underpayment was $1,138.37. The associated section 1775 and 1813 penalties are $600 and $125 respectively, and the required training fund contribution $65.36. (Atkinson/Walsh Exhibit E, p. 1.) Thus, the amount of penalties and training fund contributions alleged to be owed must be reduced by the difference between what DLSE originally alleged was owed and the amounts owed for the one week that Allen worked according to the OOLRs.[23]

Atkinson/Walsh Is Jointly and Severally Liable with AAA.

While Atkinson/Walsh claimed that AAA was a vendor, the relationship between the two entities more closely resembled that between a prime contractor and a subcontractor on a public works project. A vendor is "[a] merchant; a retail dealer; a supplier; one who buys to sell." (Black's Law Dict. (5th ed. 1979) p. 1395, col. 1.) None of those descriptions properly described AAA, which furnished a particular type of equipment and labor on the site of the Project, and was not just a material supplier. Atkinson/Walsh through its foreman provided day-to-day supervision of the water

[23] The resulting unpaid wages are as follows: $106,203.54 for Lee, $142,974.25 for Gonzalez, and $1,138.37 for Allen, totaling $250,316.16. The resulting unpaid training fund contributions are as follows: $6,328.82 on behalf of Lee, $8,078.04 on behalf of Gonzalez, and $65.36 on behalf of Allen, totaling $14,472.22.

trucks coordinating where and when the water truck drivers worked. The water truck drivers were an integral part of a team consisting also of heavy equipment operators and laborers performing work on the Project. Moreover, Atkinson/Walsh performed labor compliance with respect to AAA, including tracking the hours worked, and they paid an hourly wage. As such AAA performed as a subcontractor under prime contractor Atkinson/Walsh.

The prime contractor and the subcontractor are jointly and severally liable for all amounts due under an Assessment issued to the subcontractor. (§ 1743, subd. (a).)[24] Thus, Atkinson/Walsh is jointly and severally liable with AAA.

Section 1775 Penalties.

Where, as here, a contractor fails to pay the prevailing wage, penalties are imposed pursuant to section 1775, subdivision (a). 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 amount of the penalty." (Rule 50, 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 his or her own judgment "because in [his or her] own evaluation of the circumstances the punishment appears to be too harsh." (*Pegues v. Civil Service Commission* (1998) 67 Cal.App.4th 95, 107.)

Section 1775, subdivision (a) states the following regarding the amount of the penalty:

> (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

[24] With the exception of section 1813 penalties.

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 contractor . . . 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 . . .

(ii) The penalty may not be less than eighty dollars ($80) . . . if the contractor . . . 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.

. . .

(D) The determination of the Labor Commissioner as to the amount of the penalty shall be reviewable only for abuse of discretion.

Whether a violation is "willful" within the meaning of section 1775 is set forth in subdivision (e) of section 1777.1, which states that a violation is willful if the contractor "knew or reasonably should have known of his or her obligations under the public works law and deliberately fails or deliberately refuses to comply with its provisions."

Here, AAA "knew or reasonably should have known" of its obligations under the public works law. Strain testified that he knew the Project was a public work and that he had worked on public works for 15 to 16 years prior to working on the Project. In addition, the contract documents specified strict adherence to California prevailing wage laws. DLSE mitigated the penalty down from $200 per violation, and assessed the minimum penalty under section 1775 where the violation was willful. The burden was on AAA and Atkinson/Walsh to prove that DLSE abused its discretion in setting the penalty amount. Neither provided evidence of abuse of discretion by DLSE in its selection of the penalty rate. Therefore, the rate of $120 per violation is affirmed. The aggregate penalty, as modified for the reduction of violations as a result of Allen working just one week on the Project, is $133,200.

Atkinson/Walsh Is Jointly and Severally Liable for Section 1775 Penalties.

The prime contractor and the subcontractor are jointly and severally liable for penalties under section 1775. (See § 1743, subd. (a); *Violante v. Southwest Communities Dev't and Constr. Co.* (2006) 138 Cal.App.4th 972, 979.) The prime contractor can avoid liability if it proves it was ignorant of the subcontractor's failure to pay the specified prevailing rate of wages to its workers on the Project, and that it met all of the following four specific requirements:

> (1) The contract executed between the contractor and the subcontractor for the performance of work on the public works project shall include a copy of the provisions of this section and sections 1771, 1776, 1777.5, 1813 and 1815.
>
> (2) The contractor shall monitor the payment of the specified general prevailing rate of per diem wages by the subcontractor to the employees, by periodic review of the certified payroll records of the subcontractor.
>
> (3) Upon becoming aware of the failure of the subcontractor to pay his or her workers the specified prevailing wage rate of wages, the contractor shall diligently take corrective action to halt or rectify the failure, including, but not limited to, retaining sufficient funds due the subcontractor for work performed on the public works project.

(4) Prior to making final payment to the subcontractor for work performed on the public work project, the contractor shall obtain an affidavit signed under penalty of perjury from the subcontractor that the subcontractor has paid the specified general prevailing rate of per diem wages to his or her employees on the public works project and any amounts due pursuant to section 1813.

(§ 1775, subd. (b); see § 1742, subd. (b) [contractor bears burden to prove basis for assessment is incorrect]; Cal. Code Regs., tit. 8, §17250, subd. (c).) Essentially, section 1775, subdivision (b), creates what is euphemistically referred to as a "safe harbor" for the prime contractor. In order to qualify for the safe harbor, the prime contractor must strictly comply with the requirements of the subdivision. The prime contractor's knowledge of the subcontractor's failure to pay prevailing wage rates, or the failure on the part of the prime contractor to establish all of those four specific requirements, results in the prime contractor's liability. Atkinson/Walsh failed to meet the first requirement. It did not produce evidence that it executed a contract with AAA for the performance of work on the Project that included copies of the requisite Labor Code sections enumerated in subdivision (b)(1) of section 1775. Because Atkinson/Walsh did not establish that it complied with all four requirements of section 1775, subdivision (b), it is not entitled to relief from the obligation to pay the penalties imposed under section 1775, subdivision (a). Consequently, Atkinson/Walsh is jointly and severally liable with AAA for the penalties assessed under section 1775 of $133,200.

Section 1813 Penalties.

Section 1813 provides in pertinent part:

> 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) for each worker employed in the execution of the contract by the respective contractor or subcontractor 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 provision of this article.

Based on Pich's investigation, the three workers at issue worked overtime on 511 days, AAA did not pay them the prevailing rate for those overtime hours, and therefore AAA was liable for $12,775 in section 1813 penalties.[25] Because DLSE failed to establish that Allen worked 10 days of overtime rather than the five days indicated on the AAA OOLR, the overall amount of penalties must be reduced by $125. The resulting sum of total section 1813 penalties is $12,650. AAA did not offer any evidence to the contrary and therefore has not met its burden of proving that the Assessment amount, modified to consider the reduced hours for Allen, was otherwise incorrect as to section 1813 penalties. Accordingly, the Assessment is affirmed as modified.

AAA Is Liable for Liquidated Damages.

Section 1742.1, subdivision (a), provides for the imposition of liquidated damages upon the contractor, essentially a doubling of the unpaid wages. It provides in part:

> After 60 days following the service of a Civil Wage and Penalty Assessment under Section 1741 . . . , the affected contractor, subcontractor, and surety . . . shall be liable for liquidated damages in an amount equal to the wages, or portion thereof, that still remain unpaid. If the Assessment . . . subsequently is overturned or modified after administrative or judicial review, liquidated damages shall be payable only on the wages found to be due and unpaid.

The statutory scheme regarding liquidated damages provides contractors two alternative means to avert liability for liquidated damages (in addition to prevailing on the case, or settling the case with DLSE and DLSE agreeing to waive liquidated damages). These require the contractor to make key decisions within 60 days of the service of the CWPA on the contractor.

First, the above-quoted portion of section 1742.1, subdivision (a), states that the contractor shall be liable for liquidated damages equal to the portion of the wages "that still remain unpaid" 60 days following service of the Assessment. Accordingly, the

[25] Atkinson/Walsh Exhibits D and E.

contractor had 60 days to decide whether to pay to the workers all or a portion of the wages assessed, and thereby avoid liability for liquidated damages on the amount of wages so paid.

Under section 1742.1, subdivision (b), a contractor would entirely avert liability for liquidated damages if, within 60 days from issuance of the Assessment, the contractor deposited into escrow with DIR the full amount of the assessment of unpaid wages, plus the statutory penalties under sections 1775. Section 1742.1, subdivision (b), states in this regard:

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

In this case, AAA did not pay any back wages to the workers in response to the Assessment or deposit with the Department the assessed wages and statutory penalties. Therefore, under the express language of section 1742.1, AAA is liable for liquidated damages in the full amount of the unpaid wages found herein. Accordingly, liquidated damages are due in the aggregate amount of $250,316.16, as provided in the Findings, *post*.

FINDINGS AND ORDER

1. The Project was a public work subject to the payment of prevailing wages and the employment of apprentices.
2. DLSE served the Civil Wage and Penalty Assessment timely in accordance with section 1741. The Amended Civil Wage and Penalty Assessment was also timely.
3. Both Strain and Sons, Inc. and Atkinson/Walsh Joint Venture each filed a timely Request for Review of the Civil Wage and Penalty Assessment issued by DLSE with respect to the Project.
4. DLSE made available its enforcement file timely.

5. No back wages were paid nor deposit made with the Department of Industrial Relations following issuance of the Civil Wage and Penalty Assessment.
6. Strain and Sons, Inc. underpaid workers $250,316.16 in prevailing wages on the Project.
7. Strain and Sons, Inc. is liable for $14,472.22 in unpaid training fund contributions.
8. The Labor Commissioner did not abuse her discretion in assessing penalties against under Labor Code section 1775 at $120 per violation for 1,110 violations of failure to pay prevailing wages in the aggregate sum of $133,200.
9. Strain and Sons, Inc. is liable for penalties assessed under Labor Code section 1813 in the amount of $12,650.
10. Strain and Sons, Inc. is liable for liquated damages in the full amount of the unpaid wages, which is $250,316.16.
11. Atkinson/Walsh Joint Venture is jointly and severally liable with Strain and Sons, Inc. for the unpaid prevailing wages found due in Finding No. 6, for the unpaid training fund contributions found due in Finding No. 7, for the Labor Code section 1775 penalties found due in Finding No. 8, and for the liquidated damages found due in Finding No. 10.

The amounts found due under the Amended Civil Wage and Penalty Assessment, as affirmed and modified by this Decision, are as follows

Basis of the Assessment	Amount
Wages Due:	$250,316.16
Training Fund Contributions Due:	$ 14,472.22
Penalties under section 1775:	$133,200.00
Penalties under section 1813:	$ 12,650.00
Liquidated damages:	$250,316.16
TOTAL:	**$660,954.54**

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

The Amended 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 that shall be served with this Decision on the parties.

Dated: 5/6/26

Jennifer Osborn, Director
California Department of Industrial Relations