COMMONWEALTH OF MASSACHUSETTS

Middlesex, ss. **Division of Administrative Law Appeals**

Joseph Barber and **Barber Drywall Inc.**,
Petitioners,

v.

Office of the Attorney General, Fair Labor Division,
Respondent.

No. LB-25-0374

Dated: March 4, 2026

MEMORANDUM AND ORDER ON MOTION FOR PARTIAL SUMMARY DECISION

This is an appeal from three civil citations issued to petitioners Joseph Barber and Barber Drywall Inc. (together Barber) by respondent the Office of the Attorney General, Fair Labor Division (division). The division moves for summary decision with respect to certain portions of citation 001 and all of citation 003. *See* 801 C.M.R. § 1.01(7)(h).

I

A

A close question is presented with respect to the precise amount of restitution owing under citation 001, which alleges that Barber failed to pay prevailing wages to its employees on a public works project in Concord. The division's evidentiary presentation is limited. A spreadsheet compiles an investigator's updated or mostly updated audit calculations. The investigator avers that the spreadsheet draws on Barber's own payroll documents. But he does not detail his methodology, and the payroll documents themselves are not in the record.

Barber's contrary evidence consists of an attorney's averment that, upon reviewing the division's audit, he "found certain . . . errors . . . includ[ing] misclassification of workers

and . . . incorrect prevailing wage rates." The attorney does not name any examples. He does not add up the amount of the division's errors. Barber offers no alternative computation or estimate of its liability. On balance, its attorney's affidavit is too "vague, non-specific and general" to place the accuracy of the division's work in genuine dispute. *See Benson v. Massachusetts Gen. Hosp.*, 49 Mass. App. Ct. 530, 533 n.3 (2000). *See also Ng Bros. Const., Inc. v. Cranney*, 436 Mass. 638, 648 (2002). *See generally* G.L. c. 149, § 27C(b)(4).

B

Prevailing wage schedules are required to be updated "[e]ach year after the awarding of the contract." G.L. c. 149, § 27. The updated schedule must be prepared by the commissioner (i.e., the Department of Labor Standards), requested from the commissioner by the awarding authority, and requested from the awarding authority by the general contractor. *Id.*

The commissioner updated the pertinent wage schedule in March 2024 and June 2024. Barber did not revise its pay rates until October 2024 (effective one month earlier). The large part of citation 001 arises from this issue.

Barber's theory on appeal is that it was not at fault: A representative of the project's general contractor told Barber to disregard the March 2024 update. And the general contractor sent Barber the June 2024 update four months late. On these points of fact, at least some documentary evidence supports Barber's positions.

Focusing on the restitution element of citation 001, Barber's theory is incapable of entitling it to relief. The commissioner's schedules set "minimum . . . wages." G.L. c. 149, § 27. The obligation to pay those wages is shared by every "cont[r]actor or subcontractor." *Id.* The statute imposes "strict liability" on each employer, meaning that the "reason for the violation is

irrelevant." *Lighthouse Masonry, Inc. v. Division of Admin. L. Appeals*, 466 Mass. 692, 699 (2013).

The obligation to pay prevailing wages persists even in more extreme situations than the one potentially presented here: i.e., where the awarding authority never obtained a rate schedule, or where the schedule was omitted from the project-governing contract. *See Donis v. American Waste Servs., LLC*, 95 Mass. App. Ct. 317, 324 (2019), *S.C.*, 485 Mass. 257 (2020). The courts have refused to allow the burden of such errors to fall on the employees. Restitution is due whenever "the workers were paid at a rate below the prevailing wage established for [them] by the commissioner." *Rego v. Allied Waste Servs. of Massachusetts, LLC*, 100 Mass. App. Ct. 750, 755 (2022). Civil restitution of this nature does not implicate the "fair notice" concerns presented by criminal or punitive sanctions. *See, e.g.*, *ExxonMobil Pipeline Co. v. United States Dep't of Transportation*, 867 F.3d 564, 578 (5th Cir. 2017).

C

The additional "penalty" that citation 001 imposes on Barber stands on a different footing. The division argues that Barber has not stated "the grounds for any challenge to the penalty." DALA Standing Order 23-001 ¶ 1. That argument undersells Barber's claim that it was justifiably ignorant of the updates to its wage schedules. The facts underlying that claim were not among those that the division accepted and considered when it selected a penalty amount, *see id.* ¶ 2: after all, the division continues to maintain in its papers that Barber "did, in fact, receive notice of the updated rates." And while an employer's fault and intent are irrelevant with respect to restitution, they are important determinants of the proper penalty. *See* G.L.

c. 149, § 27C(b)(2). *See also Boston Best Construction, LLC v. Attorney Gen.*, No. LB-24-16, 2024 WL 3718279, at *5 (Div. Admin. Law App. Aug. 2, 2024). *Cf. ExxonMobil*, 867 F.3d at 578.

As a matter of ultimate fact, Barber may or may not have lacked reasonable notice of the updated wage schedules applicable to its work. But this aspect of the case presents a genuine dispute, and with respect to the amount of the penalty, the dispute is material.

D

Citation 003 alleges that Barber "fail[ed] to furnish true and accurate . . . records" to the division upon request. Barber reads this phrasing as implicated only where an employer gives the division untrue or inaccurate records. The division's competing view is that a failure to produce any responsive records is a species of a failure to produce true and accurate ones. Perhaps the citation itself is ambiguous: but it prominently cites the applicable statute, G.L. c. 151, § 19(3). The statute is violated, among other situations, when an employer "fails to keep the true and accurate records required under [chapter 151]." *Id.* Barber does not deny that it failed to "keep" the records that the division requested.

Section 19(3) is concerned only with the "records required under [chapter 151]." The division fairly and forthrightly identifies an uncertainty about whether its records request sought records that chapter 151 requires. Roughly speaking, the request asked for documents memorializing Barber's "sick leave policies" and its communications to employees about those policies.

Chapter 151 obligates employers to keep records about each employee's identity, working hours, and wages, plus "such other information as the commissioner or the attorney general in their discretion shall deem material and necessary." G.L. c. 151, § 15. Through

published regulations, the attorney general has deemed it material and necessary for employers to keep "true and accurate records of the accrual and use of earned sick time." 940 C.M.R. 33.09(1).

On balance, the division's records request went beyond § 33.09(1)'s requirements. Reasonably read, the regulation refers to numerical data, namely the amounts of sick time that each employee has accrued and used. It does not call for written "policies" or for descriptions of efforts to disseminate policies to employees. The division may be right that these types of documents are "material and necessary," G.L. c. 151, § 15, such that the Attorney General could require employers to maintain them: but she has not done so. For purposes of the current case, the at-issue documents were not among the "required" records that employer must keep and produce for purposes of § 19(3).

//

In view of the foregoing, it is ORDERED as follows:

1. The motion for partial summary decision is ALLOWED with respect to $40,480.59 of the restitution imposed in citation 001, i.e., the sum that the division calculates as owing to Barber's employees due to its belated implementation of updates to its wage schedules.

2. The remainder of the motion is DENIED.

/s/ Yakov Malkiel
Yakov Malkiel
Administrative Magistrate
Division of Administrative Law Appeals