

STATE OF CALIFORNIA  
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

**Superior Stucco & Plastering, Inc.**

Case No. 11-0047-PWH

From a Civil Wage and Penalty Assessment issued by:

**Division of Labor Standards Enforcement**

**DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS**

Affected subcontractor Superior Stucco & Plastering, Inc. (Superior Stucco) submitted a timely request for review of the Civil Wage and Penalty Assessment (Assessment) issued by the Division of Labor Standards Enforcement (DLSE) with respect to the Pierce College Stadium Services Building (Project) in Los Angeles County. The Assessment determined that \$144,034.66 in unpaid prevailing wages and statutory penalties was due. A Hearing on the Merits was conducted on September 8, 2011, November 10, 2011, November 17, 2011, November 28, 2011, February 9, 2012, and February 23, 2012, in Los Angeles, California, before Hearing Officer Makiko I. Meyers. David D. Cross appeared for DLSE and Edward L. Esposito appeared for Superior Stucco. The matter was submitted for decision after the parties submitted closing briefs.

The issues for decision are:

- Whether the Assessment correctly found that Superior Stucco had failed to report and pay the required prevailing wages for all hours worked on the Project by the affected workers.
- Whether the Assessment correctly found that Superior Stucco demanded cash “kickbacks” from the affected workers.
- Whether DLSE abused its discretion in assessing penalties under Labor Code

section 1775<sup>1</sup> at the maximum rate of \$50.00 per violation.

- Whether Superior Stucco failed to pay the required prevailing wage rates for overtime work and is therefore liable for penalties under section 1813.
- Whether Superior Stucco has demonstrated substantial grounds for appealing the Assessment, entitling it to a waiver of liquidated damages.

The Director finds that Superior Stucco has disproven the basis of the Assessment as to the issues of alleged unreported hours and cash kickbacks. However, the Director finds that Superior Stucco failed to pay the affected workers the correct prevailing wage rate for their work on the Project. Therefore, the Director issues this Decision affirming and modifying the Assessment and remanding the matter to DLSE for further calculation and determination consistent with this Decision.

### FACTS

The Los Angeles Community College District (LACCD) advertised the Project for bid on May 18, 2007, and awarded the contract to AKG Construction, Inc. (AKG). AKG subcontracted with Superior Stucco to do outside wall, stucco related work. Superior Stucco's employees worked on the Project from approximately September 2008 through June 2009.

It is undisputed that the Drywall Installer/Lather (Carpenter) (SC-31-X-41-2007-1) prevailing wage determination (PWD) is applicable to all of the work subject to the Assessment. This PWD provides that the prevailing wage rate for Drywall Installer/Lather (Lather) is \$47.03 per hour, plus training fund of \$0.42, for regular time and \$65.705 per hour, plus training fund of \$0.42, for overtime. However, Superior Stucco paid its lathers and plasterers at the lower rate of \$37.35 per hour according to its Certified Payroll Records (CPRs).

The Assessment: DLSE served the Assessment on November 29, 2010. The Assessment found that Superior Stucco failed to pay prevailing wages both by failing to report all of the hours worked on the Project by the affected workers and by demanding cash kickbacks from the affected workers. The Assessment found a total of \$106,209.66

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<sup>1</sup> All further statutory references are to the California Labor Code, unless otherwise indicated.

in underpaid prevailing wages, including \$1,927.04 in unpaid training fund contributions. Penalties were assessed under section 1775 at the maximum rate of \$50.00 per violation for 559 violations, totaling \$27,950.00. DLSE determined that the maximum penalty was warranted by its finding that "Superior Stucco & Plastering was not paying the workers for the correct number of hours they worked." In addition, penalties were assessed under section 1813 for 395 overtime violations, at the statutory rate of \$25.00 per violation, totaling \$9,875.00.

DLSE's investigative file shows that questionnaires were sent to all of the workers listed on Superior Stucco's CPRs for the Project, but only some workers, namely a group of the plasterers and lathers, who worked on the Project returned completed questionnaires to DLSE.<sup>2</sup> The Assessment was based on these workers' statements that they were asked to and did give cash kickbacks to Superior Stucco and that Superior Stucco shorted their hours when they refused to give any more money back. In addition to the completed questionnaires, some of the affected workers also submitted copies of their paycheck stubs with handwritten notes stating the amount of the cash kickbacks they claimed to have given to Superior Stucco or the number of hours they claimed to have been shorted when they didn't give kickbacks. Several of the workers who completed questionnaires testified in support of the Assessment at the hearing.<sup>3</sup> These workers all testified to substantially the same facts, stating that they were asked to kickback \$300 to \$500 per week from their paychecks to Superior Stucco and that some of them had complied with the request at the beginning. Ricardo Lopez testified that he gave Superior Stucco \$300 to \$500 in kickbacks per week in cash after he cashed his weekly paychecks, and Guillermo Perez Diaz testified that he gave Superior Stucco \$500 per week in cash after he received his weekly paychecks. Hugo Portillo and Pedro Bucio Cruz stated that Superior Stucco demanded weekly kickbacks but that they did not comply with the demand. The workers also testified that when they refused to give

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<sup>2</sup> Completed questionnaires were returned by Ricardo Lopez, Guillermo Perez Diaz, Hugo Portillo, Pedro Bucio Cruz, Jose Alberto Gonzalez, Victor Antonio Anguiano Gonzalez, Gilberto Flores, and Hector Flores.

<sup>3</sup> Workers who testified were Ricardo Lopez, Jose Gonzalez, Guillermo Perez Diaz, Hugo Portillo, and Pedro Bucio Cruz.

money back, Superior Stucco started to short the hours on their pay checks. The workers further testified that they had performed regular and overtime work on the Project, including work on many Saturdays.

In rebuttal to the workers' testimony, Superior Stucco presented testimony by Hussam Yacoub, AKG's project manager who oversaw the project, Carlos Caballos, AKG's foreman who supervised both AKG's and its subcontractors' workers, Juan Del Angel, Superior Stucco's former employee who worked on the Project as a drywall installer, and Sergio and Zanabia Delgado, Superior Stucco's principals.

Sergio and Zanabia Delgado testified that they kept accurate contemporaneous records of the hours each worker worked on the Project, as well as their work on concurrent private jobs, and paid them accordingly. They testified that they did not demand any kickbacks from their workers. The Delgados also testified that no overtime or Saturday work was performed on the Project by Superior Stucco workers. In support of their testimony, Superior Stucco produced a notebook kept by Zanabia Delgado in which she recorded each worker's daily hours and the location of the project where the work had been performed. Zanabia Delgado stated that she made the notes contemporaneously and then transferred the information from the notebook to Superior Stucco's CPRs. Superior Stucco also produced signed "Timesheet: IN/OUT LOGs" (Timesheets) which document the hours that each worker worked on every day of work on the Project. The Timesheets were kept at the job site at the request of the Contractor, and each Superior Stucco worker noted the hours they worked each day and signed off as to the accuracy of those hours each week. None of the affected workers who testified denied having signed the weekly Timesheets.

Sergio Delgado also testified that Superior Stucco worked on several private jobs concurrently with the Project and that he assigned workers, including the complaining workers, to different jobs each day depending on the availability of work and each worker's experience. He also testified that there were a number of days that Superior Stucco workers were sent to private jobs because other work on the Project needed to be completed before stucco work could be done. Sergio Delgado further testified that there had been conflicts between the complaining workers and himself over those assignments,

because the private jobs paid much less than the Project and all of the workers wanted to work on the Project as much and as long as possible.

Both Zanabia and Sergio Delgado testified that, none of the currently complaining workers complained to them about kickbacks or shorted hours while work on the Project was on-going.

AKG's employees Yacoub and Caballos both testified that the work hours were set by the LACCD and neither AKG's workers nor its subcontractors' workers worked any overtime on the Project. Nor did any of the subcontractors' workers work on Saturdays. Yacoub and Caballos's testimony is consistent with both Sergio and Zanabia Delgado's testimony and the Timesheets.

Review of the Timesheets and Superior Stucco's CPRs for the Project reveal that Superior Stucco employed far more workers on the Project than the number that submitted questionnaires complaining of kickbacks and underpayment. Juan Del Angel, one of the workers who apparently did not complete a questionnaire, testified that he worked for Superior Stucco as a drywall installer for the Project and that he never worked overtime or on Saturdays. Nor was he ever asked to give kickbacks from his paychecks to Superior Stucco. Del Angel further testified that he was "paid well" for the work he did on the Project, but that he heard complaints from some plasterers and lathers that they were not getting paid well for their work.

## 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] (“*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 *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 wage rate, and prescribes penalties for failing to pay the prevailing wage rate. Section 1742.1, subdivision (a) provides for the imposition of liquidated damages, essentially a doubling of the unpaid wages, if those wages are not paid within sixty days following service of a Civil Wage and Penalty Assessment under section 1741.

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

The Affected Workers Are Entitled To Receive Prevailing Wages For Their Documented Work On The Project.

Employers on public works must 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.) When an employer fails to maintain accurate time records, a claim for unpaid wages may be based on credible estimates from other sources sufficient to allow the decision maker to determine the amount by a just and reasonable from the evidence as a whole. In such cases, the employer has the burden to come forward with evidence of the precise amount of work performed to rebut the reasonable estimate. (*Anderson v. Mt. Clemens Pottery Co.* (1945) 328 U.S. 680, 687-688 [rule for estimate-based overtime

claims under the federal Fair Labor Standards Act, 29 U.S.C. §§201 et seq.]; *Hernandez v. Mendoza* (1988) 199 Cal.App.3d 721, 726-727 [applying same rule to state overtime wage claims]; and *In re Gooden Construction Corp.* (USDOL Wage Appeals Board 1986) 28 WH Cases 45 [applying same rule to prevailing wage claims under the federal Davis-Bacon Act, 40 U.S.C. §§3141 et seq.].) This burden is consistent with an affected contractor's burden under section 1742 to prove that the basis for an Assessment is incorrect.

In this case, Superior Stucco insists that it kept accurate records of the hours that each of its workers worked on the Project and denies asking for kickbacks. On the other hand, the affected workers state that they were asked to give money back from their paychecks and claim that their hours were shorted if they refused to do so. Therefore, a credibility determination is necessary. For the following reasons, I find Superior Stucco's witnesses to be more credible.

Evidence Code section 780 provides in pertinent part:

Except as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to any of the following:

(a) His demeanor while testifying and the manner in which he testifies.

(b) The character of his testimony.

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(f) The existence or nonexistence of a bias, interest, or other motive.

(g) A statement previously made by him that is consistent with his testimony at hearing.

(h) A statement made by him that is inconsistent with any part of his testimony at the hearing.

(i) The existence or nonexistence of any fact testified to by him.

(j) His attitude toward the action in which he testifies or toward the giving of testimony.

(k) His admission of untruthfulness.

First, the affected workers' testimony and statements are contradicted by the

contemporaneous Timesheets, jointly kept by AKG and Superior Stucco, which the affected workers signed off on during each week that they worked on the Project. Although the affected workers who testified stated that they kept contemporaneous records of the actual hours they worked on their calendars or pay check stubs, they do not deny signing the contemporaneously created Timesheets which are consistent with the hours reported on Superior Stucco's CPRs. Thus, the affected workers' signed Timesheets must be considered as constituting prior statements that are inconsistent with their testimony at the hearing. Not only are the affected workers' statements not corroborated by any other evidence, they are further contradicted both by the credible testimony of Yacoub and Caballos who testified that no subcontractors ever worked overtime or on weekends on the Project and by the testimony of, and additional contemporaneous time records produced by, Sergio and Zanabia Delgado.

Second, the record as a whole establishes that the complaining workers had another motive for alleging kickback demands and underpayments by Superior Stucco. The testimony shows that Superior Stucco was concurrently working on private jobs for which the affected workers were paid substantially less than the prevailing wages required for their work on the Project. Friction arose between Superior Stucco and the affected complaining workers over which of them would be sent to work on the private jobs and how often. The evidence of friction between the complaining workers and Superior Stucco over work assignments; the testimony of Del Angel, who affirmatively denied working Saturdays or overtime on the Project or having been asked to give kickbacks from his paychecks to Superior Stucco; and the fact that the majority of Superior Stucco's workers on the Project did not complain of kickback demands or underpayments combine to undermine the credibility of the complaining workers who testified at hearing. It is also worthy of note that DLSE did not find violations for any of the other Superior Stucco workers on the Project.

The fact that the only workers who complained of misconduct by Superior Stucco are those who had conflicts with Superior Stucco over their assignment to work on less lucrative private projects, along with the fact that those workers' statements contradict the contemporaneously created Timesheets, which they signed, and are uncorroborated by any objective evidence casts doubts on their credibility. Based on the record as a



whole, I find that Superior Stucco maintained and produced accurate time and payroll records and the facial accuracy of those records is not undermined by the testimony of the affected workers.

Although Superior Stucco kept accurate records of the hours worked by each of its workers, and paid the workers for those hours, the record nonetheless establishes that Superior Stucco failed to pay the affected workers at the required prevailing wage rate. Superior Stucco's CPRs show that the affected workers who were lathers and plasterers were paid at a lower rate of \$37.35 per hour, rather than correct prevailing wage rate of \$47.45 per hour (including training funds). Accordingly, the affected workers are entitled to receive the difference between the required prevailing wage rate and the actual wages they were paid. There is insufficient evidence in the record, however, upon which to make a final determination of the amounts owing to each worker. Accordingly, the matter is remanded to DLSE with instructions to prepare a new audit in accord with this decision. DLSE shall present its new audit to Superior Stucco within 30 days of the date of service of this decision. Superior Stucco shall then have 30 days from service in which to request a hearing before the Hearing Officer, who shall retain jurisdiction for that purpose.

DLSE's Penalty Assessment Under Section 1775 Constituted Abuse of Discretion.

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

(1) The contractor and any subcontractor under the contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than 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.<sup>[4]</sup>

The Director's review of the Labor Commissioner's determination is limited to an inquiry into whether the action was "arbitrary, capricious or entirely lacking in evidentiary support . . ." (*City of Arcadia v. State Water Resources Control Bd.* (2010) 191 Cal.App.4th 156, 170.) In reviewing for abuse of discretion, however, the Director is not free to substitute her own judgment "because in [her] own evaluation of the circumstances the punishment appears to be too harsh." (*Pegues v. Civil Service Commission* (1998) 67 Cal.App.4th 95, 107.)

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 Regs., tit. 8, §17250, subd. (c)].)

DLSE applied the maximum penalty rate of \$50.00 per violation based on a simple finding that "Superior Stucco & Plastering was not paying the workers for the correct number of hours they worked." This Decision finds that Superior Stucco did pay its workers based on the correct number of hours but at the wrong wage rate. Therefore,

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<sup>4</sup> Section 1777.1, subdivision (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."

DLSE's sole basis for assessing penalties at the maximum rate has been disproven by Superior Stucco.

Thus, Superior Stucco has shown that DLSE abused its discretion by relying on incorrect facts to assess penalties under section 1775 at \$50.00 per violation. Because the discretion to set penalties under that section is committed to the Labor Commissioner, this part of the Assessment must be vacated and remanded for redetermination of the penalties in light of the appropriate factors and the other findings in this Decision.

Overtime Penalties Are Moot.

As this Decision find that the affected workers did not work overtime, overtime penalties are not applicable. Accordingly, the penalties assessed under section 1813 are dismissed.

Superior Stucco Is Liable For Liquidated Damages.

Section 1742.1, subdivision (a) provides in pertinent part as follows:

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

Additionally, if the contractor or subcontractor demonstrates to the satisfaction of the director that he or she had substantial grounds for appealing the assessment . . . with respect to a portion of the unpaid wages covered by the assessment . . . , the director may exercise his or her discretion to waive payment of the liquidated damages with respect to that portion of the unpaid wages.

Absent waiver by the Director, Superior Stucco is liable for liquidated damages in an amount equal to any wages that remained unpaid sixty days following service of the Assessment. Entitlement to a waiver of liquidated damages in this case is partially tied to Superior Stucco's position on the merits and specifically whether, within the 60 day period after service of the Assessment, it had "substantial grounds for appealing the assessment . . . with respect to a portion of the unpaid wages covered by the assessment."

Superior Stucco stipulates both to the accuracy of the number of hours of work reported by its CPRs and the proper classification of the affected workers as lathers and plasterers. It also stipulates that the applicable prevailing wage rate for this classification is \$47.45 per hour (including training fund), i.e. \$10.10 more than the \$37.35 per hour that Superior Stucco actually paid these workers per its CPRs. Superior Stucco has provided no explanation of why it failed to pay the affected workers at the correct prevailing wage rate. Thus, Superior Stucco has failed to meet its burden of proof for waiver of liquidated damages.

Because the assessed unpaid wages remained due more than sixty days after service of the Assessment, and Superior Stucco has not demonstrated grounds for waiver, Superior Stucco is also liable for liquidated damages in an amount equal to the unpaid wages.

### FINDINGS

1. Affected subcontractor Superior Stucco & Plastering, Inc. filed a timely Request for Review of the Civil Wage and Penalty Assessment issued by DLSE with respect to the Project.
2. Superior Stucco kept accurate records of the hours of work performed by the affected workers and paid these workers accordingly.
3. Superior Stucco failed to pay its workers at least the applicable prevailing wage for the work subject to the Assessment, as it paid the affected workers at the rate of \$37.35 per hour, \$10.10 per hour less than the applicable prevailing wage rate of \$47.45 per hour (including training fund).
4. In light of Findings 2 and 3, above, Superior Stucco underpaid its employees on the Project. Determination of the exact amount of the underpayments owing to the affected workers is remanded to DLSE for recalculation in accordance with these Findings.
5. DLSE abused its discretion in setting section 1775, subdivision (a) penalties at the maximum rate of \$50.00 per violation. The Assessment of \$27,950.00 in

penalties under section 1775, subdivision (a) must therefore be vacated and remanded to DLSE for redetermination in light of appropriate factors and the other findings in this Decision

6. No penalties under section 1813 are due as Superior Stucco has disproved the basis of the Assessment with regard to unpaid overtime work.

7. The unpaid wages remained due and owing more than sixty days following issuance of the Assessment; thus, Superior Stucco is therefore liable for an additional award of liquidated damages under section 1742.1 in the amount to be determined by DLSE on remand.

### **ORDER**

The Civil Wage and Penalty Assessment is affirmed in part and vacated and remanded 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.

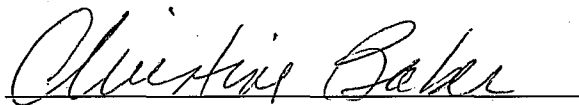
Remand Order: The matter is remanded to DLSE to recalculate the unpaid prevailing wages owed to the affected workers and redetermine the assessment of penalties under section 1775 as follows:

a. DLSE shall present its new audit to Superior Stucco within 30 days of the date of service of the Notice of Findings. Superior Stucco shall have 30 days from service in which to request a hearing before the Hearing Officer, who shall retain jurisdiction for that purpose. All other issues are final. The burden to show error shall remain on Superior Stucco. If no hearing is requested within 30 days, the revised audit and penalty assessment shall become final.

b. In complying with the remand order, DLSE shall only rely on those documents admitted into evidence. If DLSE requires the use of other documents for its audit, it shall provide them to Superior Stucco at the time it presents the audit. Superior Stucco shall be provided an opportunity to supplement the record as well should it request a hearing.

The Hearing Officer shall issue a Notice of Findings which shall be served with this Decision on the parties.

Dated: 7/31/2012

A handwritten signature in cursive script, reading "Christine Baker", written over a horizontal line.

Christine Baker  
Director of Industrial Relations