STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Shamrock Structures, Inc. **Case No. 12-0165-PWH**

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

ORDER GRANTING RECONSIDERATION AND AMENDING DECISION AND FINDINGS AND ORDER

The Decision of the Director (Decision) affirming Civil Wage and Penalty Assessment (Assessment) issued by the Division of Labor Standards Enforcement (DLSE), was issued on January 4, 2017. DLSE seeks correction of clerical errors in the Decision of the Director, wherein the Branch Library Improvement Program-Visitation case was inadvertently assigned case number 12-0167-PHW instead of the correct case number, 12-0165-PHW; and on page 9, at paragraph 7 under Findings and Order the reference to "Ornelas Enterprises, Inc." should read "Shamrock Structures, Inc."

Additionally, the Director on her own motion modifies the Findings and Order as to the amounts owed for liquidated damages and wages to deduct the amount for training fund contributions, so that liquidated damages are due in the sum of $64,142.85 instead of $65,500.07, the amount due for wages is identified as $64,142.85 instead of $65,500.07, and the training fund contributions due are separately identified as $1,357.22, as per the discussion in the Decision.

IT IS THEREFORE ORDERED that the Decision and Findings and Order of the Director in the Branch Library Improvement Program-Visitation matter issued on January 4, 2017, are affirmed in all respects, except for correcting clerical errors so that the case number of the Decision is 12-0165-PHW and the reference to Ornelas Enterprises, Inc. on page 9 at

paragraph 7 under Findings and Order is deleted and replaced with Shamrock Structures, Inc.; and

IT IS FURTHER ORDERED that the Findings and Order in the Branch Library Improvement Program-Visitation Decision of the Director issued on January 4, 2017, is amended to correct clerical errors so that wages and liquidated damages are reduced by the amount of training fund contributions and those training fund contributions are stated separately, as follows:

"7. The amounts found due in the Amended Assessment against Shamrock Structures, Inc. and as affirmed by this Decision are as follows:

Wages Due:	$64,142.85
Training Fund Contributions due	$1,357.22
Penalties under section 1775, subdivision (a):	$19,550.00
Penalties under section 1813:	$1,375.00
Liquidated Damages:	$64,142.85
TOTAL:	**$150,567.92**

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

Dated: 1/13/2017

Christine Baker
Director of Industrial Relations

STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Shamrock Structures, Inc.

Case No. 12-0165-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected subcontractor, Shamrock Structures, Inc. (Shamrock), submitted a timely request for review of a Civil Wage and Penalty Assessment (Assessment) issued by the Division of Labor Standards Enforcement (DLSE) on April 12, 2012, with respect to construction work performed for awarding body City and County of San Francisco Department of Public Works on the Merced Branch Library (Project) located in San Francisco County. The Assessment determined that Shamrock owed $94,552.66 in unpaid prevailing wages, $823.01 in unpaid training fund contributions, and $13,575.00 in penalties under Labor Code sections 1775 and 1813.[1]

The hearing on the merits took place in Oakland, California before Hearing Officer Roger Jeanson on February 5, 2013. Michael Scally, president, appeared for Shamrock, David Cross, counsel, appeared for DLSE, and Robert Fried, counsel, appeared for CLW Builders, Inc. (CLW), the prime contractor on the Project. CLW participated as an Interested Person at the Hearing on Merits, pursuant to Rule 8, subd. (d) [Cal. Code Reg., tit. 8, §17208, subd. (d)], but CLW did not request review of the Assessment. The Hearing Officer denied the requests by CLW to transfer the matter to the Director for further review and to continue the matter.

DLSE moved into evidence a revised audit prepared in August 7, 2012, that adjusted amounts downward to $54,520.75 in unpaid prevailing wages (excluding a minor adjustment upward of $824.37 in unpaid training fund contributions), and $13,250.00 in penalties under

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

sections 1775 and 1813. DLSE moved to amend the Assessment to correspond with the revised audit and the Hearing Officer granted that motion.

Thereafter, the Hearing Officer scheduled a post-trial exchange of exhibits (i.e. payroll checks) between the parties causing DLSE to revise its audit downward a second time. DLSE mailed the revised audit to the Hearing Officer on April 11, 2013, thereby indicating that it had reviewed and appropriately credited the subsequently delivered Shamrock payroll checks. DLSE's newly revised audit adjusted amounts further downward to $37,209.27 in unpaid prevailing wages (excluding the unrevised unpaid training fund contributions of $824.37) and $13,125.00 for penalties under sections 1775 and 1813.

DLSE issued the Assessment on April 12, 2012, made a revised audit dated August 7, 2012, and ultimately made a revised audit dated April 5, 2013.

At trial, the parties stipulated to the issues for decision as follows:

- Whether Shamrock paid the correct prevailing wage classifications.
- Whether Shamrock correctly reported and paid all hours worked on the Project.
- Whether Shamrock paid the correct overtime wages to its workers.
- Whether Shamrock paid all training fund contributions.
- Whether DLSE abused its discretion in assessing penalties under section 1775 at the rate of $50.00 per violation.
- Whether Shamrock is liable for penalties under section 1813.
- Whether Shamrock has demonstrated substantial grounds for appealing the Assessment, entitling it to a waiver of liquidated damages under section 1742.1.

The Director finds that Shamrock has failed to carry its burden of proving that the basis of the revised audit dated April 5, 2013, (April 5, 2013 audit) was incorrect.

Additionally, Shamrock has not proven the existence of grounds for a waiver of liquidated damages for the prevailing wages found owed. Therefore, the Director issues this Decision affirming the April 5, 2013 audit.

SUMMARY OF FACTS

The San Francisco Department of Public Works published a notice for bids for the Project in 2009. CLW entered into the contract with the awarding body for the Project on July 29, 2009.

Shamrock entered into a subcontract with CLW to perform scopes of work classified as carpenter and laborer. Shamrock employed 19 workers on the Project from December 4, 2009, to April 1, 2011.

The following applicable prevailing wage determinations (PWDs) and scopes of work for these workers were in effect on the bid advertisement date:

Laborer Prevailing Wage Determination for San Francisco (NC-23-102-1-2009-1): The basic hourly rate for Laborer Group 1(A) (Area 1) was $26.36 (the fringe benefits were $13.79, the training fund contribution was $0.34, and other payments were $0.13), and the total straight-time hourly rate was $40.62. After June 29, 2009, the prevailing wage increased $1.80 as follows: $1.00 to basic hourly rate and $0.80 to pension.

Shamrock classified some laborers as working in the scope of Laborer Group 3. DLSE reclassified these workers as working in the scope of Laborer Group 1(A) so that all 14 laborers worked in the same classification.

Carpenter Prevailing Wage Determination for San Francisco (NC-23-31-1-2009-1): The basic hourly rate for Carpenter (Area 1) was $34.75 (the fringe benefits were $17.25, the training fund contribution was $ 0.48, and other payments were $2.19), and the total straight-time hourly rate was $54.67. After July 1, 2009, the prevailing wage increased $2.98 as follows: $1.75 to basic hourly rate, $1.13 to fringe benefits, $0.05 to training fund contribution, and $0.05 to other payments. After July 1, 2010, the prevailing wage increased $3.18 as follows: $1.00 to basic hourly rate, $2.03 to fringe benefits, $0.05 to training fund

contribution and $0.10 to other payments.

DLSE classified 5 workers as carpenters.

Amie Bergin, former Deputy Labor Commissioner, prepared the Assessment and the April 5, 2013 audit against Shamrock. Bergin testified at the Hearing on the Merits that she discovered violations of underpayment of wages, unpaid overtime, unpaid training fund contributions, and misclassification of workers.

Bergin testified to the total amounts of wages and penalties she found owed within her audit from August 7, 2012, and identified DLSE's exhibits. Bergin confirmed that the contract between CLW and the awarding body required contractors pay prevailing wages. Bergin also confirmed that she used prevailing wage determinations based on the bid advertisement date and that the bid advertisement date dictated the proper prevailing wage determination. Bergin testified that CLW provided Shamrock's Certified Payroll Records (CPRs) and provided Shamrock's payroll checks to DLSE. Bergin explained that she prepared her audit by comparing the CPRs and checks and crediting those checks that matched the CPRs. Additionally, DLSE reclassified workers from Laborer Group 3 to Laborer Group 1(A).

DLSE assessed penalties under section 1775 at the maximum rate of $50.00 per violation. The 257 violations assessed by DLSE remained unchanged between the audit made on August 7, 2012, and the audit made April 5, 2013. Lola Beaver, Senior Deputy Labor Commissioner, testified that she set the rate of $50 per violation based on history of assessments, including one in which the prime contractor made restitution and a couple of other cases that were in the process of prosecution or investigation.

Shamrock questioned whether DLSE had considered all Shamrock's payroll checks submitted by CLW. The Hearing Officer addressed this issue by allowing an exchange of exhibits post-trial and allowing DLSE again to revise its audit. Ultimately, DLSE produced the April 5, 2013 audit, crediting Shamrock's payment of wages not previously acknowledged by DLSE.

DISCUSSION

Sections 1720 and following statutes set forth a scheme for determining and requiring

the payment of prevailing wages to workers employed on public works construction projects. DLSE enforces prevailing wage requirements, for the benefit of not only 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). See, also, *Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 985.)

Section 1775, subdivision (a), requires, among other things, that contractors and subcontractors pay the difference to workers who received less than the prevailing rate and prescribes penalties for failing to pay the prevailing rate. Section 1742.1, subdivision (a) provides for the imposition of liquidated damages, essentially a doubling of unpaid wages, if those wages are not paid within sixty days following the service of a civil wage and penalty assessment.

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 may appeal that assessment by filing a request for review under section 1742. Subdivision (b) of section 1742 provides, among other things, that the contractor shall be provided with an opportunity to review evidence that DLSE intends to utilize at the hearing. At the hearing, the contractor "shall have the burden of proving that the basis for the civil wage and penalty assessment is incorrect." (§ 1742, subd. (b).) If the contractor "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." (§ 1742.1, subd. (a).) Furthermore, as to unpaid wages, DLSE's determination "as to the amount of the penalty shall be reviewable only for abuse of discretion." (§ 1775, subd. (a)(2)(D).)

Shamrock Underpaid Wages, Including Fringe Benefits and Training Fund Contributions.

Shamrock underpaid wages due to misclassifying laborers as Laborer Group 3. Shamrock did not rebut this evidence. But Shamrock also underpaid wages where there was no classification problem and its failure to properly compensate its workers extended to fringe

benefits and training fund contributions. Total underpaid wages equaled $38,033.64, including unpaid training fund contributions at $824.37. Underpaid wages, unpaid fringe benefits and unpaid training fund contributions collectively comprised the basis for penalties under section 1775.

DLSE Did Not Abuse Its Discretion by Assessing Penalties Under Section 1775 at the Maximum Rate.

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 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, subd. (c) [Cal. Code Reg., tit. 8 §17250, subd. (c)].)

Section 1775, subdivision (a)(2) grants the Labor Commissioner the discretion to mitigate the statutory maximum penalty per day in light of prescribed factors, but it neither mandates mitigation in all cases nor requires mitigation in a specific amount when the Labor Commissioner determines that mitigation is appropriate. The record shows that DLSE's bases for selecting the section 1775 penalty rate of $50.00 per worker on the prior history of the contractor and previous complaints by workers in other cases. In the previous cases, workers reported that Shamrock underreported hours and failed to pay the prevailing wage rate. Shamrock's argument does not aim to exonerate itself from its violations but merely to mitigate the wages and penalties owed. Shamrock has not shown an abuse of discretion and, accordingly, the assessment of penalties at the rate of $50.00 is affirmed at 257 violations.

Overtime Penalty Is Due for 11 Occasions Where Overtime Was Not Paid.

Section 1813 states, in pertinent part, as follows:

> The contractor or any subcontractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit twenty-five

dollars ($25.00) for each worker employed in the execution of the contract by the ... contractor ... 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 provisions of this article.

Section 1815 states in full as follows:

Notwithstanding the provisions of Sections 1810 to 1814, inclusive, of this code, and notwithstanding any stipulation inserted in any contract pursuant to the requirements of said sections, work performed by employees of contractors in excess of 8 hours per day, and 40 hours during any one week, shall be permitted upon public work upon compensation for all hours worked in excess of 8 hours per day and not less than 1½ times the basic rate of pay.

The April 5, 2013 audit establishes that Shamrock violated section 1815 by paying less than the required prevailing overtime wage rate on 11 occasions. No testimony refuted DLSE's contention of unpaid overtime. Unlike section 1775 above, section 1813 does not give DLSE any discretion to reduce the amount of the penalty, nor does it give the Director any authority to limit or waive the penalty. Accordingly, the assessment of the penalty under section 1813 is affirmed for 11 violations at $25.00 per violations for a total penalty of $275.00.

There Are No Grounds for a Waiver of 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, Shamrock 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 Shamrock's position on the merits and specifically whether, within the sixty 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. . . ." (§ 1742.1, subd. (a).) Shamrock only made an effort to mitigate the wages and penalties owed through CLW presentation of Shamrock's checks to DLSE. Shamrock did nothing to rebut either DLSE's reclassification of workers or DLSE's evidence of underpayment of fringe benefits and training fund contributions. That is, Shamrock has presented no evidence or argument as to why liquidated damages should be waived as to those prevailing wages that remain unpaid to the workers. Therefore, Shamrock is also liable for liquidated damages in an amount of $38,033.64.

FINDINGS AND ORDER

1. Affected subcontractor, Shamrock Structures, Inc., timely requested review of a Civil Wage and Penalty Assessment issued by the Division of Labor Standards Enforcement with respect to the Merced Library project located in San Francisco City and County.

2. The Assessment was issued timely.

3. Shamrock Structures, Inc. failed to pay all its workers the required prevailing wages. DLSE found errors in the Certified Payroll Records aud DLSE was required to reclassify some of the workers. The associated penalties assessed under section 1775 are therefore affirmed. Shamrock Structures, Inc. underpaid its workers for their work on the Project in the aggregate amount of $38,033.64, including $824.37 for unpaid training fund contributions.

4. DLSE did not abuse its discretion by setting the penalty for these violations under section 1775, subdivision (a) at the maximum rate of $50.00 per violation for 257 violations on the Project by Shamrock Structures, Inc., totaling $12,850.00.

5. Penalties under section 1813 at the rate of $25.00 per violation are due for 11 violations on the Project by Shamrock Structures, Inc., totaling $275.00 in penalties.

6. Shamrock Structures, Inc. is therefore liable for liquidated damages on the Project under Labor Code section 1742.1, subdivision (a) in the amount of $38,033.64.

7. The amounts found due in the Amended Assessment against Ornelas Enterprises, Inc. and as affirmed by this Decision are as follows:

Wages Due:	$38,033.64
Penalties under section 1775, subdivision (a):	$12,850.00

Penalties under section 1813:	$275.00
Liquidated Damages:	$38,033.64
TOTAL:	**$89,192.28**

The revised audit dated April 5, 2013, is affirmed in full 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: 11/7/2017

Christine Baker
Director of Industrial Relations