STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Requests for Review of:

Vector Resources, Inc.
TEK EF & I Solutions, LP
Outsource Telecom, Inc.

Case Nos. 11-0102-PWH;
11-0103-PWH;
11-0104-PWH

From Notices of Withholding issued by:

San Diego Unified School District

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Affected contractor Vector Resources, Inc. (Vector) submitted a timely request for review of three consolidated Notices of Withholding (Notices)[1] issued by the San Diego Unified School District (District) with respect to the CMAS Certified Systems Integrated 21st Century (i21) Interactive Classrooms Project (Project) in San Diego County. One of the Notices was against Vector, one was against Vector and subcontractor Outsource Telecom, Inc. (Outsource) and one was against Vector and subcontractor TEK E&I Solutions, LP (TEK). Because Vector sought review on behalf of itself and both affected subcontractors, all requesting parties will be referred to as "Vector." The Notices determined that $128,394.69 in unpaid prevailing wages and statutory penalties were due. A Hearing on the Merits was conducted on October 17, 2011, in Los Angeles, California, before Hearing Officer Douglas Elliott. Richard M. Freeman appeared for Vector and Tyrce K. Dorwood appeared for the District. In lieu of testimony, the parties presented a stipulated record of exhibits and stipulations of fact.

The issues for decision are:

- Whether the Notices correctly found that the workers were entitled to shift differential pay when they worked a single shift in one day.
- Whether the Notices correctly found that the second shift began

[1] The Requests for Approval of Forfeitures and Notices are attached as Exhibits F, G, H, I, J and K to the District's Opening Brief and are admitted into Evidence.

immediately after 10:00 a.m.

- Whether the District abused its discretion in assessing penalties under Labor Code section 1775[2] at the mitigated rate of $30.00 per violation.
- Whether Vector failed to pay the required prevailing wage rates for overtime work and is therefore liable for penalties under section 1813.

For the reasons stated below, Vector has not proven that shift differential pay was never owed for work on the Project. However, Vector has met its burden of proving that the District improperly assessed shift differential pay for work shifts that started before 12:00 noon. Vector has not proven that the District abused its discretion in mitigating section 1775 penalties to $30.00 per violation. Vector has not proven that the District abused its discretion in assessing section 1813 penalties. The amount of wages owed as a result, and the amount of section 1775 and 1813 penalties cannot be determined based on the current record because the record does not include the starting and ending times of work for each worker on each day of work on the Project.[3] Vector deposited the full amounts of the Notices in escrow with the Department of Industrial Relations (DIR) within 60 days after service of the Notices pursuant to section 1742.1, subdivision (b). Vector therefore has no liability for liquidated damages under section 1742.1, subdivision (a). Therefore, the Notices are modified and affirmed in part. The matter is remanded to the District solely to recalculate the wages and penalties due in conformity with this Decision.

FACTS

The District advertised the Project for bid on April 14, 2009. Vector submitted its bid proposal on or about May 9, 2009. The District awarded the contract to Vector pursuant to a written Agreement (Agreement) on or about June 23, 2009. The scope of

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

[3] The Stipulated Exhibits include charts for Vector, Outsource and Tek which set forth stipulated wages and penalties depending on the applicability of shift differential and the start time of the second shift. As to Outsource and Tek, the charts have a section entitled: "This is the stipulated amount of the back pay award if the 2nd shift is determined to begin to [sic] after 10:00 a.m., but where the employee started his work day off the job site prior to 10:00 a.m. (Vector's argument)". As Vector does not make an argument in the briefs regarding a start time based on work off the job site and there is no related evidence in the record, this issue will not be addressed in this Decision.

Vector's work included the installation of integrated i21 Interactive Classroom technology in multiple District school sites, which required the design and installation of various mobile, audio, and visual components.

Because the Project involved work at functioning school sites with students present, the District's Request for Proposals and Agreement both stated that the work would have to occur during non-school hours, which were anticipated to be between the hours of 3:00 p.m. and 10:00 p.m. on weekdays during the school year. In fact, workers commenced shifts at various times during the day. The District estimates that 5% of start times were between 8:00 a.m. and 10:00 a.m., 5% of start times were between 10:01 a.m. and 11:59 a.m., and 90% of start times were between 12:00 noon and 4:00 p.m. Neither party submitted precise figures for which workers started work at what hours on specific days.

Applicable Prevailing Wage Determinations (PWDs): The parties agree that the applicable DIR Prevailing Wage Determination (PWD) is No. SDI-2009-1 and the applicable classifications are Inside Wireman and Sound & Signal Technician.

The shift provisions contained in the PWD for the Inside Wireman and Sound & Signal Technician classifications are nearly identical and substantively the same. The shift provision for Inside Wireman reads:

> Section 3.13 SHIFT WORK. When so elected by the contractor, multiple shifts of eight (8) hours for at least five (5) days' duration may be worked. When two (2) or three (3) shifts are worked:
>
> The first shift (day shift) shall be [sic] consist of eight (8) consecutive hours worked between the hours of 8:00 a.m. and 4:30 p.m. "Workmen" on the "dayshift" shall be paid at the regular hourly rate of pay for all hours worked.
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> The second shift (swing shift) shall consist of eight (8) hours between the hours of 4:30 p.m. and 1:00 a.m. "Workmen" on the "swing shift" shall be paid at the regular hourly rate of pay plus 17.3% for all hours worked.
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> The third shift (graveyard shift) shall consist of eight (8) hours between the hours of 12:30 a.m. and 8:00 a.m. "Workmen" on the "graveyard shift" shall be paid at the regular hourly rate of pay plus 31.4% for all hours worked.

The Employer shall be permitted to adjust the starting hours of the shift by up to two (2) hours in order to meet the needs of the customer.

If the parties to the Agreement mutually agree, the shift week may commence with the third shift (graveyard shift) at 12:30 a.m. Monday to coordinate the work with the customer's work schedule. However, any such adjustment shall last for at least a five (5) consecutive day duration unless mutually changed by the parties to this Agreement.

An unpaid lunch period of thirty (30 [sic] minutes shall be allowed on each shift. All overtime work required before the established start time and after the completion of eight (8) hours of any shift shall be paid at one and one-half times the "shift" hourly rate.

There shall be no pyramiding of overtime rates and double the straight-time rate shall be the maximum compensation for any hour worked.

There shall be no requirement for a day shift when either the second or third shift is worked.

The cover page of the applicable PWDs each has the following note (Note):

> The shift provisions provided in the following pages provide guidance on the work hours that are applicable to each shift. Shift differential pay is required and will be enforced during each applicable shift where shift differential pay is in the determinations. Any shift provision restricting the work hours for a particular shift for a type of work will not be enforced on public works. However, if work is performed during hours typically associated with a 2nd or 3rd shift the appropriate shift rate of pay is required. Shift differential pay shall not apply to work during traditional shift hour (swing or grave) if the determination includes a footnote that indicates that the non-shift rate maybe paid for a special single shift.

The parties' stipulated facts are set forth verbatim:

"A. It is stipulated that the following correspondence (Exhibits A1 through A19) are admitted, are authentic in that such exhibits were written at the times and by the authors so indicated, and that the documents were sent on or about the times so indicated

on them.[4]

"B. Relative to the following Exhibits B1 though B29,[5] all documents are stipulated to be admitted, are authentic, are judicially noticed, and are or have been posted on the DIR website as part of the prevailing wage. (These are Various Provisions Pertaining To Shift Provisions For Electricians That have Been Posed [sic] On DIR's Website)[6]

"C. Relative to the following Exhibit C, it is stipulated to be authentic and admitted for the purpose of being judicially noticed. This document is the decision of Superior Court in the case of *Gilbert Fernandez, et al. v. Helix Electric*, Case No. 06 AS 04211.[7]

"D. Relative to the following Exhibit D, this deposition transcript of Charles Cake is stipulated to be admitted, authentic and this deposition testimony is admitted as if Mr. Cake were testifying at the hearing. All evidentiary objections to any part of the testimony of Mr. Cake are reserved and any party to the current proceeding may assert any objection to any part just as if Mr. Cake were testifying at the current hearing.[8]

"E. Relative to the following Cal. State Fullerton report Exhibit E,[9] this document is stipulated to be admitted, prepared in the regular course of business and judicially noticed.[10]

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[4] Exhibits A1 – A19 are listed in the original, but are not listed here. The Exhibits are allowed into evidence.

[5] The Exhibits offered are actually B1- B30.

[6] Exhibits B1 – B30 are listed in the original, but are not listed here. The Exhibits are allowed into evidence.

[7] The District objects to this Exhibit on the grounds that it is irrelevant because it does not involve the applicable PWD and is misleading because it is not a decision and has no precedential value. The Director will take judicial notice of the Exhibit. In light of the liberal rules of evidence in these proceedings, the Director will allow it into evidence, giving it the appropriate weight given its limited probative value.

[8] The District objects to this Exhibit as "completely irrelevant because taken in a totally unrelated matter." In light of the liberal rules of evidence in these proceedings, the Director will allow it into evidence, giving it the appropriate weight given its limited probative value.

[9] Exhibits E1 – E4 are listed in the original, but are not listed here. The Exhibits are allowed into evidence.

"F. The following spreadsheet marked at [sic] Exhibit F, sets forth the stipulated and admitted amounts that are dropped from the Notice to Withhold for each employer (Vector Resources, Inc., Outsource Telecom, and Tek Systems, Inc.) relative to all issues EXCEPT shift premium pay.

"G. The following spreadsheets (Exhibit G1) set forth the stipulated and admitted amounts owed for each employer, by employee, relative the shift premium issues under various scenarios if shift premium is determined to be owed. It is stipulated that the three employers worked only one shift per day and week (Sound and Signal Technicians may have worked one shift and electrician/inside wireman may have worked another on the same jobsite and same occasions), as directed by San Diego USD. [The parties' respective arguments are included in the stipulation but not repeated here.] (Exhibit G2 are stipulated spreadsheets showing various scenarios if penalties are applied at particular rates.)

"H. It is stipulated that all work by employees in dispute herein was for work done under contract PS-89-334-02 (the "Contract"). It is stipulated that Vector Resources was the prime contractor and that Outsource Telecom and Tek Systems were subcontractors of Vector Resources. It is stipulated that at all times relevant herein (from approximately August 2009, into March 2010): 1) the three employers all performed the following type of work pursuant to the contract. Supply and installation of "smart boards" coupled with laptops and projectors related to technology based learning. The smart boards were provided with electricity and/or dot connectivity. The network was low voltage. The energy was high voltage. Some of the work was in the classification of inside wiremen electrician and some of the work was sound and signal technician. The appropriate amounts have been stipulated by the parties in the shift premium spreadsheet exhibits agreed to by both parties.

"I. It is stipulated by the parties' exhibits [sic] that objections as to relevance are reserved as to any stipulated documents except for the stipulated spreadsheet exhibits.

[10] The District objects to this Exhibit on the grounds that it is irrelevant because it does not involve the applicable PWD and is misleading because it is not a decision and has no precedential value. The Director will take judicial notice of the Exhibit. In light of the liberal rules of evidence in these proceedings, the Director will allow it into evidence, giving it the appropriate weight given its limited probative value.

"J. It is stipulated that Vector Resources has made this Request for Review, as the prime contractor, relative to its two subcontractors. It is also stipulated that all monies deposited in the escrow account total $128,395.09 [respectively, Vector Resources, Inc. ($14,738.25); Tek EF & I Solutions systems LP ($45,570.61); and Outsource Telecom ($68,086.23)] were paid by Vector Resources and any monies dropped from the claims are to be returned to Vector Resources, Inc."

Correspondence Relating to the Shift Differential Pay Issue: In a July 27, 2009, letter from Vector to the District, Vector purports to "confirm and clarify" a July 10, 2009, meeting. According to Vector, the District informed it that shift differential pay was required regardless of whether only one shift was worked. Vector disagreed, arguing that there would be only one shift beginning at 2:00 p.m., which should not be subject to the shift differential.

In a September 24, 2009, letter from the District to DIR, the District "seeks a coverage determination whether a contractor needs to pay the second shift differential for Sound and Signal Technicians and Inside Wireman if the contractor establishes a single work schedule of 2 p.m. – 10:30 p.m."[11]

In a March 3, 2010, email from Vector to the District, Vector did not dispute that shift differential pay applied. Instead, it simply asked for "guidance" regarding how shift differential should be paid and what time the second shift started. The District responded in a March 4, 2010, email attaching a letter inadvertently dated May 4, 2010[12], providing the shift differential language from the PWD. In a March 8, 2010 email, Vector again did not dispute that shift differential pay was due on the Project but instead sought clarification regarding when the second shift started. This time, Vector made the following suggestion regarding when shift differential should be due: "For any work starting from 10:01 AM to 2:29 PM . . . the shift rate will be determined based on which shift the majority of hours worked fall in."

[11] This letter was not a stipulated exhibit. It was attached as Exhibit B to the District's Opening Brief. There being no objection, it is entered into evidence as District's Exhibit B.

[12] It appears that the letter should have been dated March 4, 2010, rather than May 4, 2010. First, it was attached to a March 4, 2010 email. Second, Lee's March 8, 2010, letter says she thinks that the letter was misdated May 4, instead of March 4. Third, Vector's reply brief at page 4, paragraph 5 refers to the letter as "March 4, 2010 (incorrectly dated as May 4, 2010)" and there is no response from the District on that point.

On October 27, 2010, the District again sought guidance from DIR regarding when the second shift starts where workers were starting at 10:00 a.m. or 12:00 p.m. and working until 10:00 p.m.[13] On November 15, 2010, the Division of Labor Standards and Research (DLSR) responded via facsimile, attaching a copy of the 2002 Important Notice. The DLSR summarized it as follows:

> when a worker is required to work a shift outside of normal working hours, he/she must be paid the shift differential pay if one exists for the craft/classification, according to the shift he/she is working.

DLSR then directed the District to the general note on the shift provisions cover page which it paraphrased as follows:

> the Department of Industrial Relations does not follow the specific time of day requirements in the shift provisions, but the more general concept of hours typically associated with a day[8:00 a.m. – 4:30 p.m.], swing[4:30 – 1:00], and graveyard shift[12:30 a.m. – 9:00 a.m.].

The DLSR goes on to state:

> Please note that the above referenced classification includes provisions for adjusting the starting hours of the shift by up to two (2) hours in order to meet the needs of the customer. Please refer to Section 7.02 (e) in the Sound and Signal Technician Shift Provisions. These provisions, in conjunction with the above information, would indicate that day shift rates would apply for work starting at 10:00 am.[sic] Second shift rates would be reasonably appropriate for work beginning at 12:00pm.[sic][14]

In a March 21, 2011, letter in another case, the Department of Industrial Relations (DIR) unequivocally stated to Vector's counsel that a contractor is obligated to pay shift premium regardless of whether more than one shift is worked.[15]

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[13] This letter was not a stipulated exhibit. It was attached as Exhibit C to the District's Opening Brief. There being no objection, it is entered into evidence as District's Exhibit C.

[14] Vector states in its Opening Brief that it did not receive a copy of the November 15, 2010, correspondence until February 17, 2011 -- a month before the Notices of Withholding were served. Additionally, in Vector's Reply Brief, it confuses the author and recipient of the fax. It states that the author is Dora Sanchez. In fact, Ms. Sanchez was DLSR's contact at the District's outside consultant on this issue. The author was Evan Kung, a research Analyst for DLSR.

[15] This letter was not a stipulated exhibit. It was attached as Exhibit O to the District's Opening Brief. In Vector's Reply Brief it objects to this Exhibit as follows: "First, it is irrelevant because the letter was

In a July 21, 2011, letter from the District to the DLSR the District states it is "in desperate and immediate need of clarification" as to whether second shift rates are applicable for Inside Wireman and Communication and Systems Installers who begin work between 10:01 a.m. and 11:59 a.m.[16] On September 28, 2011, DLSR responded to the District's request for clarification, in relevant part, as follows: "the general note on the shift provisions cover page indicates that the DIR does not follow the specific time of day requirements in the shift provisions, but the more general concept of hours typically associated with a day, swing, and graveyard shift."[17]

The Notices: The District served the Notices on March 29, 2011. The Notices found "[Vector had] unreported and/or underreported hours/days and employees," "underpayment of wages," and "failure to pay second and third shift wages." The Notices found a total of $128,395.09 in underpaid prevailing wages, unpaid training fund contributions, and section 1775 and 1813 penalties. Penalties were assessed under section 1775 at the mitigated rate of $30.00 per violation. In addition, penalties were assessed under section 1813 for overtime violations, at the statutory rate of $25.00 per violation.

Vector argues that shift differential pay should not be due where, as here, workers only worked one shift. Vector further argues that, if shift differential pay applies here, then the second shift should not begin until 4:30 p.m. As to penalties, Vector argues that they should not be awarded here because: (1) there is "conflicting legal authority" as to

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written approximately two years after the advertisement for bids and approximately one year after the work was completed. Second, the letter is only a slice of correspondence that was obviously taking place between Mr. Mischel and Mr. Freeman. Third, Mr. Freeman was representing a different client in the correspondence, not Vector. And, fourth, since the correspondence was not posted on the DIR website as part of the prevailing wage determination at the time of the bid in 2009, it is relevant [sic] as a matter of law." In light of the liberal rules of evidence in these proceedings, the Director will allow it into evidence, giving it the appropriate weight given its limited probative value.

[16] This letter was not a stipulated exhibit. It was attached as Exhibit D to the District's Opening Brief. In Vector's Reply Brief it states: "Vector also objects to District's proposed Exhibit D, a letter from the District dated July 21, 2011, which Vector has never seen before, is hearsay, without foundation and irrelevant." . In light of the liberal rules of evidence in these proceedings, the Director will allow it into evidence, giving it the appropriate weight given its limited probative value.

[17] This letter was not a stipulated exhibit. It was attached as Exhibit E to the District's Opening Brief. There being no objection, it is entered into evidence as District's Exhibit E.

whether shift differential pay applies when a single shift is worked, (2) there is "great confusion" regarding when the second shift commences under the PWD, and (3) Vector did not receive "timely guidance" from the District on the applicability of shift differential pay and when the second shift commences.

At the hearing, the District "dropped" amounts from the Notices, reducing the total underpaid prevailing wages to $30,213.53 and section 1775 and 1813 penalties to $36,390.00 without explanation. The District did not file a motion to amend the Notices in accordance with California Code of Regulations Title 8, section 17226, nor did it file Amended Notices. Given that Vector did not object to the District's failure to comply with Rule 26, nor is it prejudiced by the reduction in assessed unpaid wages and penalties, the stipulation regarding the "dropped" amounts will be allowed in these proceedings. But, the District is on notice to follow the rules regulating these proceedings going forward. Here, the District's failure to follow the rules regarding amendment of Notices of Withholdings has left the record unclear as to the basis for the Notices.

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*).) An enforcing agency, like the District, 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 Notice of Withholding under section 1776.1.

When the enforcing agency determines that a violation of the prevailing wage laws has occurred, a written Notice of Withholding is issued pursuant to section 1776.1. An affected contractor or subcontractor may appeal the Notice of Withholding 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."

Vector Failed to Pay the Required Second Shift Differential to Inside Wireman and Sound and Signal Technicians.

The prevailing rate of pay for a given craft, classification, or type of work is determined by the Director of Industrial Relations in accordance with the standards set forth in section 1773. It is the rate paid to the majority of workers; if there is no single rate payable to the majority of workers, it is the single rate paid to most workers (the modal rate). On occasion, the modal rate may be determined with reference to collective bargaining agreements, rates determined for federal public works projects, or a survey of rates paid in the labor market area. (§§ 1773, 1773.9, and *California Slurry Seal Association v. Department of Industrial Relations* (2002) 98 Cal.App.4th 651.) The Director determines these rates and publishes general wage determinations, such as No. SDI-2009-1, to inform all interested parties and the public of the applicable wage rates for the "craft, classification and type of work" that might be employed in public works. (§ 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 (*Ericsson*).)

The applicable prevailing wage rate is the one in effect on the date the public works contract is advertised for bid. (§ 1773.2 and *Ericsson, supra.*) Section 1773.2 requires the body that awards the contract to specify the prevailing wage rates in the call for bids or alternatively to inform prospective bidders that the rates are on file in the body's principal office and to post the determinations at each job site.

Section 1773.4 and related regulations set forth procedures through which any prospective bidder, labor representative, or awarding body may petition the Director to review the applicable prevailing wage rates for a project, within 20 days after the advertisement for bids. (*See Hoffman v. Pedley School District* (1962) 210 Cal.App.2d 72 [rate challenge by union representative subject to procedure and time limit prescribed by § 1773.4].) In the absence of a timely petition under section 1773.4, Vector was bound to pay the prevailing rate of pay, as determined and published by the Director, as of the bid advertisement date. (*Sheet Metal Workers Intern. Ass'n, Local Union No. 104 v. Rea* (2007) 153 Cal.App.4th 1071, 1084-1085.)]

"[A]ll parties and the public have a right to rely on the general determinations published by the Director on the DLSR website. Contractors and subcontractors are deemed to have constructive knowledge of those determinations." (*Ericsson,* 221 Cal. App. 3d at 125.) This means the Director has to enforce the determinations based on their plain meaning, not the private agreements between third parties.

The Notices found that the workers are entitled to differential shift pay even when only one shift is worked. In support of the Notices, the District relies on several DIR publications. First, the District relies on DLSR's published shift provisions for Inside Wireman and Sound Signal Technician, which provide: "there shall be no requirement for a day shift when either the second or third shift is worked." Second, it relies on the March 4, 2002, Important Notice, which provides: "if only one shift is utilized for the day, and the work being performed is during the hours typically considered to be a swing (second) shift or graveyard (third shift)" the worker "must be paid the shift differential pay for the shift he/she is working." Third, it relies on the Notes, which are quoted above. Finally, the District relies on the November 15, 2010, and September 28, 2011, correspondence summarized above in which DIR confirms that there is no requirement

for a regular day shift to trigger second shift pay.

Vector argues: (1) the District does not correctly interpret the applicable PWDs, (2) the March 4, 2002, Important Notice is an unenforceable underground regulation, and (3) the Notes and correspondence on which the District relies are based on the Important Notice and thus likewise unenforceable. Vector goes on to argue that the Director should consider two other matters arising from different PWDs; namely, a Superior Court Judge's ruling on a motion for summary judgment in litigation involving Helix Electric and the decision of Cal State's Labor Compliance Program in an unrelated matter.

Interpretation of the Applicable PWDs: Both parties agree that the plain language of the shift provisions must be read in their entirety as a whole in order to determine their meaning. The relevant shift differential language is quoted above. After the first sentence, there is the following phrase: "When two or three shifts are worked: . . ." There are seven sentences that follow that phrase which discuss the application of shift differential pay. Following those seven sentences is the final sentence, which reads: "There shall be no requirement for a day shift when either the second or third shift is worked."

Vector argues that the above-quoted phrase makes clear that shift differential pay only applies when more than one shift is worked. That is, by use of the colon, it is made clear that all of the language that follows applies when two or three shifts are worked. Vector argues that the last sentence simply clarifies that a contractor is not required to work a first shift in order to be allowed to work a second or third. It does not mean that shift differential pay is due when only one shift is worked.

The District disagrees, arguing that Vector's interpretation would render meaningless the last sentence and the Notes. Additionally, it "would lead to an illogical and absurd result by allowing Vector to require its workers to work graveyard shifts in the middle of the night, yet only pay such workers first shift wages so long as only a single shift is worked in a given day." The District further points out that in situations where it is intended that a single rate apply regardless of the shift, the PWDs explicitly state that intent.

The Director agrees with the District's analysis. In the absence of explicit language stating that workers may be required to work second or third shifts without shift differential pay, the last sentence can only be read to require shift differential pay even when only one shift is worked.

The March 4, 2002, Important Notice: The Important Notice provides:

> This notice is to clarify the worker's eligibility to receive the shift differential pay when working on a public works project. Please note that not all crafts have shift differential pay published in the Director's General Prevailing Wage Determinations.
>
> When a worker is required to work a regular shift, he/she must be paid the applicable craft rate from the Director's General Prevailing Wage Determinations for the construction activity he/she is performing. However, when a worker is required to work a shift outside of normal working hours, he/she must be paid the shift differential pay according to the shift he/she is working. For example, if only one shift is utilized for the day, and the work being performed is during the hours typically considered to be a swing (second) shift or graveyard (third) shift, the worker employed during the hours typically considered to be a swing shift or graveyard shift must be paid the shift differential pay for the shift he/she is working. If multiple shifts are used for the day, the worker working on the second or third shift must be paid according to the shift he/she is working.

The District relies on the plain language of the Important Notice as further support for its position that shift differential pay is required even when only one shift is worked. Vector does not argue that the Important Notice is subject to a different interpretation. Instead, Vector argues that the Important Notice is an unenforceable underground regulation under *Tidewater Marine, Inc., v. Bradshaw* (1996) 14 Cal.4th 557. The District responds by adopting DIR's response to this argument in the Director's Decision in FEI Enterprises, Inc. , Case no. 06-0142-PWH and a March 9, 2011, letter from DIR to Vector's counsel in another matter.

Although the FEI decision and March 9, 2011, letter are not precedential, the Director agrees with the reasoning and authority cited in those documents and adopts it here. Specifically, prevailing wage determinations include more than just wage scales; they include classification determinations, which necessarily include scopes of work and

shift differential provisions. (*Winzler & Kelly v. Department of Industrial Relations* (1981) 121 Cal.App.3d 120.) It would be impossible to accurately determine the prevailing wage without shift differential language, where appropriate, in labor markets where the wage rates typically include such differentials. (See Lab. Code §1773.9)

As the *Winzler* court recognized, regulations that set rates are exempt from the rulemaking requirements of the Administrative Procedures Act (APA). (Gov. Code, § 11340.9, subd. (i).) Nothing in *Tidewater*, or cases decided since *Tidewater*, call into question the holding in *Winzler*. Accordingly, the Director finds that the Important Notice constituted rate making which is not subject to the APA and therefore, by definition, is not an underground regulation.

The Notes: The Notes provide that work during periods that are traditionally swing or graveyard should be paid the differential rate, *unless* the determination includes a footnote that indicates otherwise. There is no such footnote here. The District argues that the plain language of the Notes requires that the differential rate be paid. Vector argues that the Notes, like the Important Notice, are unenforceable underground regulations. The Director finds that the Notes constitute an appropriate exercise of DLSR's rate making authority.

Clarifying Correspondence From DIR: As set forth above, during the course of the Project, the District asked DLSR for guidance regarding whether more than one shift had to be worked to trigger shift differential pay. DLSR responded once in November 2010, and once in September 2011, both times attaching a copy of and paraphrasing the Important Notice. The September 2011, letter also referred to the Notes. The District relies on this correspondence for the proposition that it correctly interpreted the PWDs as requiring shift differential pay even when only one shift is worked. Vector argues that the correspondence is irrelevant as it is not part of the PWD, was generated years after the bid date, and is based on the Important Notice, which itself is an unenforceable underground regulation.

The Director does not need to reach the issue of the relevance of this correspondence on the issue of whether more than one shift had to be worked to trigger shift differential pay. As set forth above, the Director has already determined that the

Important Notice is not an underground regulation and that the plain language of the PWD, which includes the Notes and the Important Notice make clear that more than one shift does not have to be worked to trigger shift differential pay.

The Helix Electric Litigation:

In support of its contention that more than one shift must be worked to trigger shift differential pay, Vector sites the Helix litigation in Sacramento Superior Court in which the trial judge denied the plaintiffs' motion for summary judgment. The District argues that the Helix litigation is irrelevant because (1) "it involved the prevailing wage determination for Butte County, which is entirely different than the Imperial and San Diego counties' PWD at issue here," (2) "it is merely the denial of a motion for summary judgment, meaning the only finding of the court was that a factual dispute existed which must be decided by the trier of fact," and (3) in Helix, the shift provision "actually contained express language allowing payment for first shift wage rates for a single shift started during second and/or third shift time periods."

The Director agrees with the District that the Helix litigation is not on point with the current facts and is therefore not instructive here.

The Cal State Conclusion: Vector argues that the Director should rely on the conclusion reached by the California State University Labor Compliance Program (CSU LCP's Conclusion) on the issue of "whether electrician and sound and signal work performed on a single shift, during graveyard hours, was subject to shift premium rate," in an unrelated matter in another jurisdiction, where the Manager concluded that the "clear language . . . makes shift differential pay applicable only where there are multiple shifts of electrical workers employed."

The District argues that the CSU LCP's Conclusion is irrelevant here because (1) "it does not involve any interpretation of the Imperial and San Diego counties PWD shift differential provisions at issue here," (2) the conclusion "has not been endorsed or approved by DIR in any way that would make it applicable to the entirely different and distinct PWD shift differential provisions at issue here," and (3) "[i]t is not a rule of law, nor is it even an actual wage determination by the Director . . . the CSU LCP even states

that it received very little clarification from DIR."

The Director finds that the CSU LCP's interpretation of a different prevailing wage determination in a different jurisdiction is irrelevant.

For the reasons set forth above, Vector is liable for shift differential pay for work performed during hours typically considered to be included in the second or third shift even if only one shift is worked.

The Second Shift Did Not Begin Promptly after 10:00 a.m.

Vector argues that if the Director were to find that shift differential pay is due, the second shift began at 4:30 p.m.:

> the 'industry,' as represented by the numerous posted IBEW shift provisions in the stipulated record (Exhibits B1 – B30), believes that second shift 'typically' starts at 4:30 p.m. There is no logic behind financially punishing an employer if it starts the shift's work at 2:30 p.m. (much less 10:00 a.m.) The two hour flexibility start time in shift provision is for the benefit of the employer; it is not intended for the financial detriment of the employer. Moreover, as the FEI I and II decisions indicate, DIR and LAUSD agreed with this reasoning because they implicitly used 3:00 p.m. as the start time benchmark.

The District argues that the second shift began at 10:01 a.m.:

> The applicable PWD clearly states that 'first shift (day shift) shall consist of eight (8) consecutive hours worked between the hours of 8:00 A.M. and 4:30 P.M.' and that '[t]he Employer shall be permitted to adjust the starting hours of the shift by up to two (2) hours in order to meet the needs of the customer.' . . . This language is explicit and clear – the first shift is only applicable to work commenced within a two hour window of 8:00 A.M. therefore, any work commenced after the expiration of the two hour window, i.e. after 10:00 A.M. is subject to second shift pay.

Vector and the District both got it wrong. The PWD clearly provides for a two hour window for starting times. The problem is that it leaves a gap between 10:01 a.m. and 2:30 p.m. This gap is accounted for by the language in the Notes, which is that the time frames in the PWDs are "guidance" and we look to "the hours typically associated with a 2nd or 3rd shift." Vector's Contracts Manager understood this in her March 8,

2010, email and DLSR explained this in its November 15, 2010, letter. Nonetheless, the parties chose to ignore their good advice.

The Notes make clear that the hours stated in the PWD for shift differentials are only "guidance." DLSR's November 15, 2010, facsimile states that the more general concept of hours typically associated with a day (8:00 a.m. – 4:30 p.m.), swing (4:30 – 1:00), and graveyard shift (12:30 a.m. – 9:00 a.m.) apply. DLSR also referred to the applicable PWD and the two hour window for start times. Taking all of that information and applying it to the situation here, DLSR concluded that the second shift rates would be appropriate for work commencing after 12:00 noon.

The DLSR's conclusion comports with the plain language of the PWDs, logic and fairness. If the second shift were to begin at 10:00 a.m. as the District urges, then only two of the eight hours in the shift would be worked during the hours typically associated with the second shift. If the second shift were to begin after 12:00 p.m., a majority of the hours in the shift would be worked during the hours "typically associated" with the second shift. The logic and fairness of this did not escape Vector's Contracts Manager, when she suggested in her March 8, 2010, email that second shift differential should be paid when the majority of the hours worked fell within the typical second shift.

As a result, Vector is liable for unpaid shift differential pay for each shift that began after 12:00 noon. Consequently, the Notices were incorrect to the extent they found the shift differential rate to be due for all shifts commencing after 10:00 a.m. The Notices were correct to the extent they found the shift differential rate to be due for all shifts that started after 12:00 noon. The stipulated facts do not include sufficient details as to the exact starting and ending times of each worker on each day at issue. The calculation of unpaid shift differential is therefore remanded to the District to determine the wages owed in conformity with the above analysis.

<u>The District's Penalty Assessment Under Section 1775 Is Not An Abuse of Discretion, But Is Remanded for Recalculation In Light of This Decision.</u>

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 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) The penalty may not be less than twenty dollars ($20) . . . if the contractor or 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.[18]

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*

[18] 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."

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)].)

Vector contends it should not be held liable for penalties because it had a good faith belief that no wages were due. Vector has not carried its burden of showing the penalty assessment is arbitrary, capricious or entirely lacking in evidentiary support.

Vector claims its good faith belief is based on the Helix Litigation, the CSU LCP Conclusion, its contention that the Important Notice was an unenforceable underground regulation, and general confusion regarding the applicable law. None of these form the basis of a good faith belief. Vector knew the applicable PWDs provided for shift differential pay. Vector knew DIR repeatedly stated that shift differential pay is due even if only one shift is worked. Vector knew DIR rejected its contention that the Important Notice was an unenforceable underground regulation. Finally, if Vector thought the applicable law was confusing, it could have exercised its right to petition DIR for review of applicable prevailing wage rates before submitting a bid on the Project. It failed to do so and therefore failed to exhaust its administrative remedies.

In the alternative, Vector argues the District abused its discretion by only mitigating the penalties to $30.00 from the statutory maximum of $50.00. Section 1775, subdivision (a)(2) grants the District 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 District determines that mitigation is appropriate. The record shows that the District considered the prescribed factors for mitigation and determined that a penalty of $30.00 per violation was warranted in this case. The Director is not free to substitute her own judgment. Vector has not shown an abuse of discretion and, accordingly, the assessment of penalties at the rate of $30.00 is affirmed. As the number of violations depends on the number of workers who were not paid the shift differential for work commencing after 12:00 noon,

and the record does not provide that information, the calculation of the specific number of violations is remanded to the District.

<u>Overtime Penalties Are Due For The Workers Who Were Underpaid For Overtime Hours Worked On The Project.</u>

Section 1813 states, in pertinent part, as follows:

> 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 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.

Unlike section 1775 above, section 1813 does not give the District any discretion to reduce the amount of the penalty, nor does it give the Director any authority to limit or waive the penalty.

The PWDs provide that overtime work is to be paid at one and one-half times the shift hourly rate, there shall be no pyramiding of overtime rates, and double the straight-time rate shall be the maximum compensation for any hour worked.

The stipulated exhibits reflect overtime violation penalties assuming the second shift began at 10:00 a.m., 2:30 p.m., or 4:30 p.m. But, they do not reflect the overtime violation penalties assuming the second shift started at 12:00 noon. Nor do they provide the starting and ending times of each worker. Accordingly, on the issue of penalties under section 1813, the Notices are remanded to the District for recalculation in accordance with this Decision.

Vector Is Not Liable For Liquidated Damages.

Normally, absent waiver by the Director, Vector would be liable for liquidated damages in an amount equal to any wages that remained unpaid sixty days following service of the Assessment under section 1742.1, subdivision (a). Section 1742.1, subdivision (b), however, provides a safe harbor from liquidated damages when the full amount of the assessment is deposited with the Department, providing:

> Notwithstanding subdivision (a), there 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 following service of the assessment . . ., for the department to hold in escrow pending administrative and judicial review. The department shall release such funds, plus any interest earned, at the conclusion of all administrative and judicial review to the persons or entities who are found to be entitled to such funds.

The record shows that Vector made a timely deposit of the full amounts of the Notices pursuant to section 1742.1, subdivision (b). Accordingly, Vector has no liability for liquidated damages on the Project.

FINDINGS

1. Vector filed a timely Request for Review of the Notices of Withholding issued by the District with respect to the Project.

2. The Employers failed to pay the workers the shift differential rate for work commencing after 12:00 p.m., which the parties stipulated comprised 90% of the work on the Project.

3. In light of Finding 2 above, the Employers underpaid their employees on the Project. The amount, however, cannot be calculated on the current record.

6. The District did not abuse its discretion in setting section 1775, subdivision (a) penalties at the rate of $30.00 per violation. The total amount of penalties, however, cannot be calculated on the current record.

8. Penalties under section 1813 at the rate of $25.00 per violation are due for violations on the Project. The number of violations, however, cannot be calculated on the

current record.

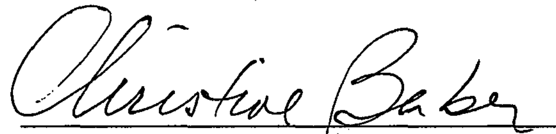
9. Vector deposited the full amounts of the Notices in escrow with the Department of Industrial Relations within 60 days after service of the Notice pursuant to section 1742.1, subdivision (b). Vector therefore has no liability for liquidated damages under section 1742.1, subdivision (a).

ORDER

The Notices are remanded to the enforcing agency for redetermination 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.

The District shall have 60 days from the date of service of this Decision to issue amended Notices of Withholding under section 1775, subdivision (a). Should the District issue amended Notices of Withholding, Vector shall have the right to request review in accordance with section 1742, and may request such review directly with the Hearing Officer, who shall retain jurisdiction for that purpose.

Dated: 3/21/2012



Christine Baker
Director of Industrial Relations