

STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

**Debbou Mendo and Sami Oshana,
a partnership, doing business as
Crown Carpet Outlet**

Case No. 06-0119-PWH

From an Assessment issued by:

Division of Labor Standards Enforcement.

DECISION OF THE DIRECTOR OF INDUSTRIAL RELATIONS

Crown Carpet Outlet (“Crown Carpet”)¹ requested review of a civil wage and penalty assessment (“Assessment”) issued by the Division of Labor Standards Enforcement (“Division”) with respect to the Aileen Colburn Elementary School Modernization Project (“Project”) in Atwater, California. A hearing on the merits was held on November 28, 2006, in Modesto, California, before appointed hearing officer John Cumming. Company manager Debbou (George) Mendo appeared on behalf of Crown Carpet, and attorney Ramon Yuen-Garcia appeared for the Division of Labor Standards Enforcement. This matter was reopened on April 11, 2007, and again on December 13, 2007, to obtain additional evidence on the proper classification and prevailing wage entitlements for the work performed by Crown Carpet’s workers on the Project as well as a recalculation of the wages due based on the proper classification. Now, for the reasons set forth below, the Director of Industrial Relations issues this decision modifying and affirming the Assessment.

FACTS

On June 14, 2006, the Division determined the wages due based on the requirements of

¹ The civil wage and penalty assessment identified four entities as the affected subcontractor: the partnership of Debbou Mendo and Sami Oshana, as set forth in the case caption above, Crown Carpet Outlet, Inc., Assad Naser Radwan Mohamad, an individual doing business as M & N Custom Carpet, and M & N Custom Carpets, Inc. According to Mr. Mendo and the attorney who represented Crown Carpet at the initial prehearing conference, the liable contracting entity was the partnership rather than the corporation, although the Subcontract Agreement identified the subcontractor only as “Crown Carpet Outlet.”

General Prevailing Wage Determination MER-2004-2 for the specific craft and classification of carpet/soft floor layer. There was no evidence that any back wages had been paid in the 60 days following the issuance of the Assessment.

Following the hearing on the merits, the hearing officer reopened the record to ascertain whether the Division had correctly applied Determination MER-2004-2 in light of notations indicating that the carpet/soft floor layer prevailing wage rates and travel and subsistence requirements applied only in that part of Merced County west of the San Joaquin River, while the Project was located east of the San Joaquin River. In response to a question from the hearing officer, Jane Ham of the Division of Labor Statistics & Research, stated that the prevailing rate for Carpet, Linoleum, Resilient Tile Layer in Determination MER-2004-2 applied to the work subject to the Assessment because of the project's location.

Thereafter, the Hearing Officer reopened the record again to request the Division to recalculate the prevailing wages that would be due for the classification and craft of Carpet, Linoleum, Resilient Tile Layer in Determination MER-2004-2. The Division filed an Amended Audit, showing those calculations, on January 9, 2008. Crown Carpet did not submit a recalculation of its own, and neither party requested an opportunity to submit further argument or evidence with respect to the recalculation. The recalculated figures found that Crown Carpet was liable for \$7,695.15 in unpaid prevailing wages, \$1,400.00 in penalties under section 1775, and \$550.00 in penalties under section 1813.

Crown Carpet is engaged in retail sales and installation of floor covering. Crown Carpet entered into a subcontract to install carpet and other flooring materials on the Project. Crown Carpet has its own installation workers but borrowed a crew from M & N Custom Carpet in Fresno ("M & N") to perform Crown Carpet's installation work on the Project. They agreed that M & N owner Nick Assad would supervise the work and that the M & N employees would be on Crown Carpet's payroll.

There is no dispute that at least five employees worked two or more days on the Project, that the employees were required to travel from Fresno to Atwater to work on the Project, and that they were entitled to prevailing wages, including travel pay, for their work. However, the parties dispute how many hours the employees worked on the Project and the extent to which

they were paid for that work.

The Assessment found that the following workers worked hours not reported on the certified payroll records ("CPR") and were paid the following amounts:

Name	Division Hours	CPR Hours	Payment
John Silvey	64 (ST), 32 (OT), 3 (DT)	46	509.00
Nick Cortez	46.5 (ST), 12.3 (OT), 3 (DT)	29	1230.34
Steven Cortez	48 (ST), 6 (OT)	20	1117.31
Michael Ferris	32 (ST), 12 (OT), 8 (DT)	34	995.68
Saturno Regalado	14 (ST)	14	0.00

Hours Worked:

The Division based its Assessment on written estimates of hours worked provided by four of the five workers plus the hours reported for a fifth worker on Crown Carpet's certified payroll records ("CPRs"). These hours totaled 280.8 hours, mostly in August 2005. All of the workers' estimates were sworn under penalty of perjury. The estimates provided by Nicholas Cortez and John Silvey included starting and stopping times for each day of work. Silvey also testified at the hearing to corroborate his written statements and time estimates. Silvey noted that each worker's hours varied, that no one told the workers when to stop for the day, and that he worked with the blue prints and usually was present the longest. Crown did not have the workers keep contemporaneous time cards.

Assad estimated each worker's hours each day and supplied the figures to Crown Carpet. Sometimes Assad would get corrected information from a worker the following day and then pass on that information. The information was recorded on individual weekly time sheets, but it is not clear by whom. For most weeks there are two weekly time sheets for each worker. The forms were identical and the writing similar, but the recorded number of hours and other entries were different.

Crown Carpet's CPRs appear to have been based on the time sheets with the lowest estimated totals. Altogether, the CPRs showed five different employees working a combined total

of 144 hours on the Project over a two week period. Crown Carpet disputed the workers' estimates and the Assessment primarily on the basis of Mendo's belief that the work should have been accomplished in fewer hours.

Mendo claimed that the claimed hours were inflated and that the workers could not have worked the hours they claimed. He spent three to four hours at the Project each day, usually arriving in the afternoon and staying until the end of the workday at 3:30 to 4:00 p.m. Mendo disputed that the employees worked past this time, and they would have been able to stay overnight in an empty room, as Silvey and Farris said they had done due to having no transportation back to Fresno.

Assad testified that he was on the site all but one of the days his employees were there, and he estimated that they were on the Project a total of six or seven days over a two to three week period. Assad and Michael Farris would drive the other employees to or from Fresno to Atwater. However, Assad did not keep the same schedule as the workers. Assad paid part of the cost for the employees to stay in a motel room after the first day of work and acknowledged that employees stayed over a second night due to concerns over Farris's truck.

Payments:

The Division credited Crown Carpet for gross wage payments to Silvey totaling \$509.00. The Division also credited Crown Carpet for payments to Nick Cortez, Steve Cortez, and Farris of \$1230.34, 1117.31, and \$995.68, respectively. Mendo offered Silvey one further payment that Silvey refused because he was required to accept it as payment in full. In response to Division subpoenas, Crown Carpet and Assad produced all canceled checks and wage stubs covering every payment to the employees for work on the Project. The Division credited Crown Carpet with every documented payment as well as additional undocumented payments, including cash payments, that the workers acknowledged receiving. However, these payments fell far short of the wages due even for the 144 hours of work reported on Crown Carpet's CPRs.²

² The wage stubs produced by Crown Carpet showed substantial deductions for "advance pay" to four of the workers during the first week of work. However, there were no documented advance payments.

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.

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). The Division 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." (Lab. Code, §90.5(a), and *see Lusardi, supra.*)

Section 1775(a) requires, among other things, that contractors and subcontractors pay the difference to workers who received less than the prevailing rate, and section 1775(a) also prescribes penalties for failing to pay the prevailing rate. Section 1742.1(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 the service of a civil wage and penalty assessment.

When the Division 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 that assessment by filing a Request for Review under section 1742. In that appeal the contractor or subcontractor "ha[s] the burden of proving that the basis for the civil wage and penalty assessment is incorrect." (Lab. Code, §1742(b).)

Crown Carpet is Liable for Unpaid Wages as set Forth in the Amended Audit.

Crown Carpet contends that all required wages were paid and that the Division's determination is based on exaggerated claims about the number of hours worked on the project. The Division based its determination of hours worked on estimates provided by the workers. Courts

recognize that when an employer fails to maintain accurate and contemporaneous time records, a wage claim may be sustained based on a worker's credible estimate. In such cases, the employer has the burden to come forward with evidence of the precise amount of work performed to rebut the worker's reasonable estimate. *Anderson v. Mt. Clemens Pottery Co.* (1945) 328 U.S. 680 [enunciating 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, 726-7 [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 or subcontractor's burden under section 1742 to prove that the basis for an Assessment is incorrect.

The estimates upon which the Division relied in this case were prepared shortly after the work was performed, and they provided more detail, including starting and stopping times, than the employer's time sheets. The estimates were made under penalty of perjury and are reasonable and credible in light of the sworn testimony of Silvey and other witnesses. Mendo's belief that the work should have been accomplished in far fewer hours is not persuasive evidence that the employees did not in fact work the estimated number of hours.

Crown Carpet's time and pay records lack credibility because of the inconsistencies without explanation between the two sets Crown Carpet maintained. Assad's own testimony is that he estimated the hours he reported, and no one testified how the other set of records were prepared. Crown Carpet's clearly inaccurate pay records with substantial but unpaid "advances" shows that it similarly did not keep accurate pay records, and the Division's estimates can be the basis for the Assessment. In light of Crown Carpet's failure to maintain accurate records, the Division's estimates derived from the workers' estimates and other available information can be accepted unless Crown Carpet meets its burden to prove the estimate is incorrect. Therefore, Crown Carpet has failed to meet its burden to prove the Assessment is incorrect.

In summary, Crown Carpet is liable for the underpayment of prevailing wages for all hours of work shown in the Assessment, including liability to pay overtime rates for all hours of overtime work reflected in the Division's audit and for appropriate travel and subsistence pay

consistent with the Division's findings as to the numbers of days worked. The Assessment is modified to reflect the correct pay classification (including the applicable travel and subsistence benefits) for work east of the San Joaquin River.

Crown Carpet is Liable for All Penalties Assessed Under Sections 1775.

Section 1775(a) provides in relevant part as follows:

(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.

* * *

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

Abuse of discretion is established if the Labor Commissioner "has not proceeded in the manner required by law, the [determination] is not supported by the findings, or the findings are not supported by the evidence." (Code of Civ. Proc., §1094.5(b).) In reviewing for abuse of discretion, however, the Director is not free to substitute his own judgment "because in [his] own evaluation of the circumstances the punishment appears to be too harsh." (*Pegues v. Civil Service Commission* (1998) 67 Cal.App.4th 95 at 107.)

The Division determined that Crown Carpet committed 28 prevailing wage violations. Though the back wages have been recalculated using different hourly rates and different travel and subsistence requirements, the record still establishes these violations occurred because

Crown Carpet substantially underpaid each of its workers for every hour of work performed.³

The Division further determined that the violations were willful, and on that basis assessed section 1775 penalties at the maximum rate of \$50 per violation. (§ 1775(a)(2)(B)(iii).) “A willful violation occurs when the ... subcontractor should have known his or her obligations under the public works law and deliberately fails or refuses to comply with its provisions.” (Lab. Code, §1777.1(c).)

Crown Carpet had prior experience with public works projects and understood that this was a prevailing wage job. Nevertheless, Crown Carpet not only underreported the number of hours but also failed to make payments required for those underreported hours. Crown Carpet offered no valid defense for these actions. There is no abuse of discretion, and thus the assessment of penalties under section 1775 must be affirmed.

Crown Carpet is Liable for All Penalties Assessed Under Sections 1813.

Section 1813 prescribes an additional penalty of \$25 “for each calendar day during which [a] worker is required or permitted to work more than 8 hours in any one calendar day and 40 hours in any one calendar week” without receiving the prescribed overtime rates. Unlike section 1775 penalties, the Division has no discretion to modify the amount of the penalty assessed per violation under section 1813. The record here fully supports the Division’s determination that there were 22 instances of undercompensated overtime work, yielding a total of \$550.00 in penalties. Accordingly, the assessment of penalties under section 1813 also is affirmed.

Crown Carpet is Liable for Liquidated Damages.

Section 1742.1(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. If the contractor or subcontractor demonstrates to the satisfaction of the director that he or she had sub-

³ The maximum amount of payments made by Crown Carpet in aggregate total \$3,224.66, which is substantially less than the wages that would be due even for the total of 144 hours reported on Crown Carpet’s CPRs.

stantial grounds for believing the assessment ... to be in error, the director shall waive payment of the liquidated damages.

Rule 51(b) [Cal.Code Reg., tit. 8, §17251(b)] states as follows:

To demonstrate "substantial grounds for believing the Assessment ... to be in error," the Affected Contractor or Subcontractor must establish (1) that it had a reasonable subjective belief that the Assessment ... was in error; (2) that there is an objective basis in law and fact for the claimed error; and (3) that the claimed error is one that would have substantially reduced or eliminated any duty to pay additional wages under the Assessment

Crown Carpet is liable for liquidated damages only on the wages found due in the Assessment, which as modified above, is \$7,695.15. There is no evidence of any wage payments by Crown Carpet since service of the Assessment, and consequently Crown Carpet is liable for liquidated damages in this same amount, unless damages can be waived under section 1742.1(a) and Rule 51(b). There are no grounds for waiver, inasmuch as Crown Carpet had no reasonable basis in fact or in law for challenging the Assessment. Notably, Crown Carpet did not challenge the use of the Carpet Layer classification to calculate the original Assessment (the error was identified by the Hearing Officer), and consequently Crown Carpet did not have the required subjective belief that the Assessment was in error on the one issue that led to a reduction in back wages. Accordingly, Crown Carpet remains liable for liquidated damages in the amount of \$7,695.15.

FINDINGS

1. Affected subcontractor Debbou Mendo and Sami Oshana, a partnership, doing business as Crown Carpet Outlet filed a timely Request for Review from a Civil Wage and Penalty Assessment issued by the Division of Labor Standards Enforcement with respect to the Aileen Colburn Elementary School Modernization project in Atwater, in Merced County, California.
2. Crown Carpet's workers were entitled to the prevailing wage for the classification of Carpet, Linoleum/Resilient Tile Layer in General Prevailing Wage Determination MER-2004-02, including travel and subsistence, for all hours worked as determined by the Division.

3. Based on the correct classification, the total back wages and training fund contributions due under the Assessment are \$7,695.15. Interest is also due on all unpaid wages pursuant to section 1741(b).

4. The record establishes 28 violations under section 1775. The Division did not abuse its discretion in setting the penalty for these violations at the rate of \$50 per violation, and consequently Crown Carpet is liable for penalties under section 1775 in the total amount of \$1,400.00.

5. Crown Carpet is liable for \$550.00 in penalties under section 1813.

6. No back wages have been paid since the issuance of the Assessment, and Crown Carpet has not demonstrated that it had substantial grounds for believing the Assessment to be in error. Accordingly, Crown Carpet is liable for liquidated damages in the amount of \$7,695.15.

7. The amount found due in the Assessment as modified and affirmed by this Decision is as follows:

Wages Due:	\$ 7,695.15
Penalties under section 1775	\$ 1,400.00
Penalties under section 1813	\$ 550.00
Liquidated Damages under section 1742.1	<u>\$ 7,695.15</u>
TOTAL	\$17,340.30*

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

ORDER

The Civil Wage and Penalty Assessment is modified and affirmed 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: 8/15/08



John C. Duncan
Director of Industrial Relations