

**STATE OF CALIFORNIA
DEPARTMENT OF INDUSTRIAL RELATIONS**

In the Matter of the Request For Review of
Unite Steel Industries, Inc.

Case No. 09-0217-PWH

From a Civil Wage and Penalty Assessment issued by:
Division of Labor Standards Enforcement

DECISION OF THE DIRECTOR

INTRODUCTION

Affected subcontractor Unite Steel Industries, Inc. (“Unite”), filed a timely request for review of a Civil Wage and Penalty Assessment (“Assessment”) issued by the Division of Labor Standards Enforcement (“Division”) with respect to work performed on the City of Santa Monica, Housing Department, Step Up on Fifth Street Apartments project (“Step Up”) in Santa Monica, California.¹ A hearing on the merits was held Thursday, May 20, 2010, before hearing officer, Christine Harwell. David D. Cross appeared for the Division; and Roy Kim and Song Kim appeared on behalf of Unite. After allowing time for Unite to submit an additional exhibit, the matter was submitted June 15, 2010.

The issues for decision are:

- Whether Jerry Chu (Chu) was entitled to be paid prevailing wages as an iron worker while employed by Unite at Step-Up, or whether his services to Unite at Step Up were solely as a supervising “consultant” to Unite pursuant to a contract agreement.
- If Chu performed iron work subject to prevailing wage requirements, were his regular and overtime work hours accurate as claimed by the Division.
- Whether the imposition of penalties and liquidated damages was proper.

¹ The prime contractor, Ruiz Brothers Construction Co., did not request review of the Assessment.

This decision modifies and affirms the Assessment.

FACTS

Unite, a subcontractor of prime contractor, Ruiz Brothers Construction Company (“Ruiz”), installed metal stairs, handrails, landings and risers at Step Up for the period September 2, 2008 through September 29, 2008. The applicable prevailing wage determination (“PWD”) is the General PWD C-20-X-1-2005-1, which includes the classification of Iron Worker (Ornamental, Reinforcing, and Structural). The hourly straight-time prevailing wage rate is \$47.67 and the overtime prevailing wage rate is \$61,975. Unite employed approximately 15 workers most of whom were reported to have been paid as iron workers. The Assessment did not claim any of these 15 workers were underpaid. Chu was not listed on Unite’s Certified Payroll Records (“CPR’s”), and the Assessment concerns only him.

On October 6, 2009, the Division served Unite with the Assessment for unpaid prevailing wages and penalties for Chu. Based on the CPRs, the logs and Chu’s own records and description of his work, the Assessment calculated that Chu worked 164.5 hours at regular wages and 49 hours at the overtime rate for work performed from September 1, 2008, through September 29, 2008. After deducting \$4,700.00 for money Unite had paid Chu, the Assessment found that Chu was underpaid \$6,428.93. The Division assessed penalties under Labor Code section 1775(a) at \$50.00 per day for paying Chu less than prevailing wage for 21 days for a total of \$1,050.00, and also assessed penalties under Labor Code section 1813 for Chu’s work in excess of eight hours in a day on 19 days for a total of \$475.00.² Training fund payments to the California Apprenticeship Council were assessed in the amount of \$121.30. Because none of the back wages were paid within sixty days following service of the Assessment, Unite’s potential liability includes an additional \$6,424.93 in liquidated damages

Unite presented a Contract Agreement, signed by Chu and Unite’s Office Manager James Yoo on August 29, 2009, that purports to hire Chu as a “Consultant” Contractor for which Chu was to be paid \$2,150.00 biweekly as an independent contractor who actually owns and operates as a self employed firm. Unite contends that

² All further statutory references are to the Labor Code unless otherwise specified.

Chu's only task at Step Up was as a manager to review blue-prints and direct the work of the foremen of the workers, Christopher Galvan and Herman Jurado.³ Chu was to hire two workers of his own. However, Unite never identified who these workers were nor what their function was. Chu's job location was at the Unite offices in Los Angeles and the jobsite in Santa Monica. Song Kim ("Kim"), Unite's president, testified that he inspected the jobsite in Santa Monica on September 8, 2008 and found that Chu was not present. He telephoned Chu, who had gone home and ordered Chu to return, which Chu did later that morning. Chu agreed he was called by Kim and told to appear.

Chu testified that he signed a consulting agreement but was actually hired to perform tasks including installation, erection and fabrication of stairs, handrails and landings. He performed iron work daily attaching mounts, skill welding and fixing prior welds by re-welding, painting, grinding and culling of the iron and steel parts. His normal schedule was to be at jobsite in Santa Monica commencing at 8:00 AM, He also reported to the Division that he was required by Kim to report at 6:00 AM to Unite's shop each day to attend safety meetings and pick up parts and tools. For the first 15 days, Chu would return to the shop for an additional hour; but he rarely did that after September 15, 2008. Chu provided a written report to the Division that included a daily calendar of work hours for the period Monday, September 1, 2008, through Monday, September 29, 2008.⁴ At the hearing, Chu was advised that September 1 was Labor Day and that Unite did not report any work for that day. Chu acknowledged that the September 1 entry may not be accurate. He explained that his calendar was prepared nearly daily; some of the entries were from memory, which could be faulty.

³ There was no further testimony about Galvan's or Jurado's work.

⁴ For the first two weeks, the days Chu reported he worked that were different than 6:00 AM to 6:00 PM as follows:

Monday, September 8 : 11:00 AM to 6:00 PM;
Tuesday, September 9: 6:00 AM to 2:30 PM;
Friday, September 12, 6:00 AM to 5:00 PM, and,
Monday, September 15: 6AM only, no hours from 8:00 AM to 5:00 PM (with an annotation "painting job.")
From Tuesday, September 16 through Monday, September 29, Chu reported that he started work at 6:00 AM in the Unite shop, and then from 8:00 AM to 5:00 PM at Step Up and did not return to the Unite' shop, except on Friday, September 19, 2008 and Friday, September 26. Additionally, on Monday, September 29, he worked 7:00 AM to 5:00 PM, during which he was at Step Up from 9:30 AM to 4:00 PM.

Chu denied that he was the supervisor at Step Up. He did not hire any workers nor did he have the authority to fire any workers. He recalled that the foreman on the job when he began was Geraldo Lopez. Lopez prepared daily logs of workers for the first two weeks that Chu worked; Chu prepared daily logs for the period September 16 through September 29, after Lopez left the job.⁵ At hearing, Unite produced logs prepared by Chu (that part of Exhibit 4 that was admitted) that listed the nature of Chu's daily work as follows:

- September 15, 2008: Trash Room Steel Bumber (sic) Make table, mesh fence and paint;
- September 16, 2008: #3, #2 Stair Single Hand Rail Repair;
- September 17, 2008: #1 Stair Fix Landing & Install Step;
- September 18, 2008: Stair #1 Landing Deck
- September 19, 2008 (Chu and 3 other employees who had been reported as iron workers on Unite's CPRs): Stair #1 Guard Rail install;
- September 20, 2008: Stair #1 Fix Guard Rail;
- September 21, 2008: Stair #1 Guard Rail Fix #2;
- September 24, 2008: Stair #1 Guard Rail Fix;
- September 25, 2008: Stair #1 Guard Rail Fix
- September 26, 2008 (Chu and 4 other employees who had been reported as iron workers on Unite's Exhibit CPRs): Fix Stair #1 Guard Rail Fix, Fix stair #1, Guard Rail & Trash Room, Tresh (sic) room Guard Bumper.
- September 28, 2008 (Chu and 2 other employees who had been reported as iron workers on Unite's Exhibit CPRs): Guard Rail Repair.

The workers Chu listed were recorded on Unite's CPRs for 8 hours per day.

Kim testified that Unite used time cards for its workers but never produced them. Kim testified that he thought that Chu never did any iron work; and, if Chu did perform iron work, it was not part of his job. Kim did not ask Chu to do iron work and speculated that because Chu had no City certificate, the City inspector would not have allowed Chu

⁵ Unite was given a chance to authenticate Lopez's daily logs but did not offer evidence to do so. Based on objection of the Division, that portion of Unite's Exhibit 4 that were based on Lopez's logs (September 2 to September 12) were not admitted.

to work at Step Up. Unite did not produce any witnesses to refute Chu's work records of September 15 through 29, nor to establish that the City required workers to possess a welding certificate or to establish that inspections had been made of the certification of any Unite workers on Step Up.

DISCUSSION

Section 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, as noted earlier, 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 at 987 [citations omitted]).

The Division enforces the statutory 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(a); see *Lusardi, supra*, 1 Cal. 4th at 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 section 1775, subdivision (a) also 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 the civil wage and penalty assessment.

After investigation, if the Labor Commissioner determines that a violation of the prevailing rate has occurred, the Division will issue a Civil Wage and Penalty Assessment pursuant to section 1741. An affected contractor or subcontractor may appeal the assessment by filing a Request for Review under section 1742. Subdivision

(b) of section 1742 provides in part that “the contractor or subcontractor shall have the burden of proving that the basis for the civil wage and penalty assessment is incorrect.”

Unite is obligated to pay Chu Prevailing Wages

Unite contends that Chu was not entitled to be paid prevailing wages for the work he performed because of his consulting contract to assume management of the project. However, at the very least Chu performed work as both supervisor and as iron worker at Step Up. He is entitled to prevailing wages for the iron work he performed. The prevailing wage law does not distinguish who is eligible for prevailing wages based on their status in a business that contracted to do work. The Labor Code states that a “Worker” includes laborer, worker or mechanic.” (§ 1723.) All workers employed by a contractor in the execution of a public works contract are employed on the public work; a contractor or subcontractor may not subcontract work to another to avoid the requirements of paying prevailing wages. (§ 1722.) Any iron work done on a public works job must be paid at the prevailing wage under the appropriate prevailing wage determination. (§ 1774.) Without evidence to support its contention that Chu did not perform iron work, Unite’s reliance on the consulting agreement is unavailing.

Thus, Chu was entitled to prevailing wages for the hours he worked as a “worker” at Step-Up. Unite has not claimed that a rate other than Iron Worker applies in this case. Therefore, the Assessment’s use of that rate for Chu’s hours is affirmed. The only remaining issue is the number of hours for which Chu is entitled to this pay rate.

The Labor Code requires an employer on a public work for which prevailing wages are required to be paid to prepare and maintain contemporaneous records of the hours an employee works. (§1776, subd. (a); see, also, Cal. Code Regs., tit. 8, §11160(6)(a)(1).) Where, as here, the employer did not keep a record, or otherwise report every employee’s hours, the employee may demonstrate his hours by producing sufficient evidence to show the amount and extent of that work as a matter of just and reasonable inference. (*Hernandez v. Mendoza*, (1988) 199 Cal App.3d 721 citing with approval *Anderson v. Mt. Clemens Pottery Co* (1945) 328 U.S. 680.) This shifts the burden to the employer to produce evidence of the precise number of hours worked or with evidence to negate the reasonableness of the inference to be drawn from the

employee's evidence. *Hernandez, supra*. If the employer fails to produce such evidence, a court may then award wages to the employee, even though the result may be imprecise. While Unite claimed to have maintained time cards, it did not claim that Chu kept time cards, nor did it produce time cards during the hearing proceedings. For this reason, the burden shifting is appropriate and Chu's estimates of his work hours may be relied on in determining his hours.

Chu reported and testified to the hours and tasks he performed each day at Step Up. Unite attempted to refute his estimated hours based solely on Kim's September 8 visit. However, Chu's calendar for that date shows he did not start work until 11:00 AM, and he testified why he was away from the worksite. Both Kim and Chu agreed that Chu was required to be at the worksite all day. Chu's contemporaneous logs for September 15 to 29 as well as his reconstruction for the prior two weeks, lead to the reasonable inference that he has correctly estimated the hours he worked, with the exception of September 1, 2008, which he conceded was incorrectly claimed as a work day, and for September 15, 2008, where his testimony was equivocal about the work he performed at Unite on a "painting job" and did not go to the Step up site that day.

Unite was required to keep specific records of hours worked by any employees subject to federal and state overtime laws (29 U.S.C. § 211, subd. (c), and § 1174, subd. (d)), irrespective of whether those employees are engaged in prevailing wage work. Since Unite did not produce any records of who actually worked on the job or when, the rule in *Anderson v. Mr. Clemens Pottery* applies, particularly in light of Unite's burden of proof under section 1742 to show that the basis for the Assessment was incorrect.

Unite has not proven that the days and hours that the Division assessed, based on Chu's journals, were incorrect, and has therefore failed to carry its burden of disproving the basis of the Assessment with the exception of September 1. Except for September 8, when Chu was required to return to the Step Up site by Kim, there is no evidence that Kim had personal knowledge of which workers were or were not present when work was performed. Except for the daily logs, half of which were prepared by Chu, Unite has produced no evidence that refutes Chu's claim of performing iron work at Step Up. Moreover, Kim admitted knowing that Chu could have performed iron work. The failure

to list Chu on Unite's CPRs has no effect as Kim admitted Chu was not included because of Kim's erroneous belief that Chu was exempt from prevailing wages as a consultant. Hence, Unite's reliance on omissions in both the logs and the CPRs as evidence that iron work was not performed by Chu is not substantial evidence.

Chu was entitled to be paid prevailing wages for the iron work he performed at Step Up, even though he was not a certified iron worker. Chu testified that only one of the 15 workers at Step Up was a certified iron worker. Unite provided no substantiation that the City required that all workers possess a license or that any inspections for license requirements had taken place.

For these reasons, Unite has failed to meet its burden of proving that Chu did not perform work on the Step Up project as claimed. Chu is therefore entitled to be paid prevailing wages. The hours claimed on the Assessment are affirmed as modified by the information in footnote 4. This eliminates work assessed for Labor Day, September 1, 2008, and September 15 ("when Chu listed "painting" all day not at Step Up), and the cessation of the 5:00 PM to 6:00 PM work at the Unite shop commencing September 12, (the 2 claimed overtime hours for September 19 and 26 are eliminated because Chu was equivocal about whether he had actually worked them as listed). This reduces the unpaid prevailing wages from 164.5 to 150.5 hours at \$ 47.67 regular pay and 36 hours (instead of 49 hours) at \$ 61.975 for overtime.

Penalties For Underpaid Prevailing Wages.

Section 1775, subdivision (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 Civil Procedure section 1094.5, subdivision (b). The Division’s deputy labor commissioner, Yoon-mi Jo, testified that the maximum of \$50.00 was assessed because Unite had a prior record for prevailing wage violation in 2002 and 2007. Unite did not refute the Division’s evidence that it had prior prevailing wage violation assessments, which addresses the issue in 1775(2)(A)(ii).

In reviewing for abuse of discretion, 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*, 67 Cal.App.4th 95 at 107 (1998). For this reason, Unite has failed to carry its burden of proving an abuse of discretion.

Penalties For Failure To Pay Prevailing Overtime Wages.

Section 1813 states 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 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.”

The Assessment assessed section 1813 penalties in the amount of \$475.00, representing 19 overtime violations. Unite denies that any overtime violations occurred, and Chu admitted that he did not work on September 1, 2008. Chu further admitted he did not go to Unite’s office after work starting on September 12, and that he did not go to Step Up on September 15, when he did a painting job at Unite’s site. The record established that some overtime work was performed by Chu in the first two weeks between September 2, 2008, and September 12, 2008 by counting the morning hours prior to the regular hours at Step Up on September 2, 4, 5, 9, 10, 11 and 12, that includes the one hour at Unite on September 2, 4, 5, 10 and 11 (7 days), and for September 16 to 28 (9 days) for the morning hours for work-days from 6:00 AM to 5:00 PM, except on September 29 when he was at Unite at 7:00 AM instead of 6:00 AM to 4:00 PM at Step Up.

The record thus establishes that Unite violated section 1815 by paying less than the required prevailing overtime rate to Chu on a total of 16 occasions for a total of \$400.00 in penalties under section 1813 (eliminating September 1, 8 and 15 from 19 days Chu reported he worked overtime). Unlike section 1775 above, section 1813 does not give the Division 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 penalties under section 1813 as modified is affirmed.

Liquidated Damages.

Section 1742.1, subdivision (a) provides for the imposition of liquidated damages, essentially a doubling of the unpaid wages, upon the failure to pay the back wages due within sixty days following service of a civil wage and penalty assessment under section 1741. 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 or notice 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 substantial grounds for believing the assessment or notice to be in error, the director shall waive payment of the liquidated damages.⁶

Rule 51, subdivision (b) [Cal.Code Reg. tit. 8, section 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...

Unite is liable for liquidated damages only on any wages that remained unpaid sixty days following service of the Assessment. Entitlement to a waiver of liquidated damages in this case is closely tied to Unite’s position on the merits and specifically whether there was an “objective basis in law and fact” for contending that the Assessment was in error.

As discussed above, Unite disputes the Assessment on the basis that Chu was an independent contractor, not subject to prevailing wages and that Chu had no proof beyond his own records that he had performed iron work. Neither assertion is supported by the facts and therefore cannot constitute an “objective basis in law and fact” for contending that the Assessment was in error. Because the assessed back wages remained due more than sixty days after service of the Notice, and Unite has not demonstrated grounds for waiver, Unite is liable for liquidated damages in an amount equal to the unpaid wages by operation of law.

FINDINGS

1. Affected contractor, Unite, filed a timely Request for Review from a Civil Wage and Penalty Assessment issued by the Division of Labor Standards Enforcement.
2. Chu was entitled to be paid the applicable prevailing wage rate for iron worker: 150.5 hours straight time, and 36 hours overtime for the days of work covered by the

⁶ Section 17542.1, subdivision (a) was amended effective January 1, 2009. [Stats 2008 ch 402 § 3 (SB 1352).] Because the 60 day time after service of the Notice for payment of unpaid prevailing wages had run prior to the amendment’s effective date, however, the version in effect at that time remains applicable to this case.

Division's audit and Assessment. The Division's assessment of Chu's wages at \$6,426.93 is reduced by \$1,505.50 to \$ 4,921.43.

4. No training fund contributions and wage differentials were challenged, except by way of the challenge to wages generally. Training fund contributions at the rate of \$.52 per hour for 186.5 hours, are due in the total amount of \$96.98.

5. The net amount of wages due under the Assessment is \$5,018.41.

6. The record establishes 19 violations under Labor Code section 1775. The Division did not abuse its discretion in not reducing the maximum \$50.00 penalty, and consequently Unite is liable for the total remaining penalties of \$950.00.

7. Unite is liable for penalties for not paying Chu overtime on 16 separate days, at the correct prevailing rate pursuant to Labor Code section 1813 at \$25.00 per violation in the amount of \$400.00.

8. The unpaid wages found due in Finding No. 5 remained due and owing more than sixty days following issuance of the Assessment. Unite has failed to prove a basis for waiver of the statutory damages in the amount of \$5,018.41.

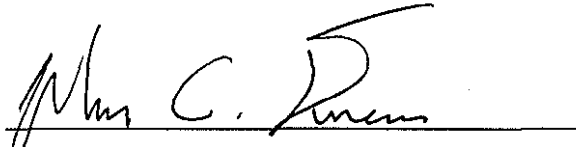
9. The amount found due in the Assessment as modified and affirmed by this Decision, including the imposition of liquidated damages by operation of law, is as follows:

Wages Due:	\$ 5,018.41
Penalties under Labor Code section 1775 (a)	\$ 950.00
Penalties under Labor Code section 1813	\$ 400.00
Liquidated Damages	\$ 5,018.41
TOTAL:	<u>\$ 11,386.82</u>

ORDER

The Civil Wage and Penalty Assessment is affirmed and modified as set forth in the foregoing Findings. The Hearing Officer shall issue a Notice of the Findings which shall be served with the Decision on the parties.

Dated: 7/26/10

A handwritten signature in black ink, appearing to read "John C. Duncan", is written over a horizontal line.

JOHN C. DUNCAN

Director of Industrial Relations