STATE OF CALIFORNIA

DEPARTMENT OF INDUSTRIAL RELATIONS

In the Matter of the Request for Review of:

Cinray Construction Case No. 10-0122-PWH

From a Civil Wage and Penalty Assessment issued by:

Division of Labor Standards Enforcement

DECISION OF THE ACTING DIRECTOR OF INDUSTRIAL RELATIONS

Affected contractor Reynaldo Candelario Tagle doing business as Cinray Construction ("Cinray") submitted a timely request for review of a Civil Wage and Penalty Assessment ("Assessment") issued by the Division of Labor Standards Enforcement ("DLSE") with respect to work performed by Cinray on the Stanley Boulevard and Warner Court Intersection Safety Project ("Project") for the City of Lafayette ("City") in Contra Costa County. The Assessment determined that $76,230.29 in unpaid prevailing wages and statutory penalties was due. A Hearing on the Merits occurred on September 23, 2010, in San Francisco, California, before Hearing Officer Nathan D. Schmidt. Tagle appeared on his own behalf and Ramon Yuen-Garcia appeared for DLSE.

The issues for decision are:

- Whether the Assessment correctly found that Cinray failed to pay the 11 Laborers reported on its certified payroll records ("CPRs") the prevailing wages required for their work on the Project.
- Whether the Assessment correctly found that Cinray failed to report, and pay the prevailing wages required for, work performed on the Project by Laborers Karl Schneider and Vincent Flores and Cement Masons Alfonso Contreras and Jorge Bera.

- Whether DLSE abused its discretion by assessing penalties under Labor Code section 1775[1] at the maximum rate of $50.00 per violation.
- Whether Cinray is liable for penalties under section 1813.
- Whether Cinray has demonstrated substantial grounds for appealing the Assessment, entitling it to a waiver of liquidated damages.

The Director finds that Cinray has failed to carry its burden of proving that the basis of the Assessment is incorrect. Therefore, the Director issues this Decision affirming the Assessment in full. Cinray has not proven the existence of grounds for a waiver of liquidated damages.

FACTS

The City advertised the Project for bid on March 24, 2009, and awarded the contract to Cinray effective April 30, 2009. As detailed in the contract, work on the Project included:

> mobilization; traffic control and construction signage; clearing and grubbing; tree protection; excavation and backfill; removal and disposal of existing pavement, curb and gutter, driveway and valley gutter; construction of catch basins, storm drain, PCC curb and gutter, valley gutter, median improvements, curb ramps, traffic stripes, markers and markings . . .

With the exception of traffic striping, all work on the Project was performed by Cinray employees. It is undisputed that Cinray's work on the Project included pouring and finishing cement. Cinray employees worked on the Project from May 27 to August 11, 2009.

The applicable prevailing wage rates for all work subject to the Assessment are the Cement Mason rate under prevailing wage determination ("PWD") NC-23-203-1-2008-1 (Cement Mason for Northern California) and the Area 1 Laborer rates under PWD NC-23-102-1-2009-1 (Laborer and Related Classifications for Northern California).[2]

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

[2] The applicable Laborer PWD contains a predetermined increase that went into effect on June 29, 2009.

Deputy Labor Commissioner Jessica Kaiser conducted an investigation after DLSE received a complaint that Cinray was paying less than the applicable Cement Mason prevailing wage rate to the workers performing cement work on the Project. The investigation concluded, based on Cinray's CPRs for the Project, that all of Cinray's workers were reported as Laborers and paid at rates below the applicable Cement Mason prevailing wage rate of $43.61 per hour. Cinray's CPRs also failed to report the payment of training fund contributions for any of the workers and indicated that Cinray failed to implement the predetermined increase that went into effect under the Laborer PWD on June 29, 2009. Kaiser contacted Tagle and asked him for the names of the workers who had done the cement work on the Project and documentation of the hours that they had worked. Tagle told her he did not remember and that he did not have that information because there were no timecards. Kaiser also asked Tagle to provide documentation of the wages paid to Cinray's workers on the Project. Tagle provided Kaiser with copies of handwritten payroll checks for six of the 11 workers reported on Cinray's CPRs. The checks that were provided were purportedly endorsed by the affected workers but showed no evidence they were negotiated by a bank. Tagle was unable to produce bank statements for the time period of the Project.

The City provided DLSE with copies of the Daily Construction Inspection Reports ("inspection reports") prepared each day by the City's inspector, Charlie Kosak. The inspection reports contain a detailed summary of the work performed on the Project each day, including a listing of the names, job classifications and hours worked by each of Cinray's workers that day and notes of Kosak's observations of and interactions with Tagle and his workers. The inspection reports show that a total of 15 workers worked for Cinray on the Project. In addition to the 11 workers reported on Cinray's CPRs, the inspection reports also record hours worked on the Project for Cinray by Contreras and Bera as Cement Masons and Schneider and Flores as Laborers.

The inspection reports also record that Cinray workers worked in excess of eight hours on five days of the Project when cement was poured. According to the inspection reports, Cinray workers worked ten hours on four of the days and nine hours on the fifth day. Each worker

worked from one to nine hours of overtime over the course of the Project. No overtime hours were reported on Cinray's CPRs. Kosak's notes on the inspection reports show that on June 30, July 21 and July 24, 2009, Contreras, Henry Halaliku and Peni Tupou complained that they had not been paid by Cinray for their work on the Project.

Kaiser tried to contact the workers by telephone but was only able to speak to two of them, Halaliku and Tupou. The others either did not answer the telephone or failed to return Kaiser's calls when she left messages. Tupou submitted an affidavit under penalty of perjury, dated June 22, 2010, stating that he had been paid $20.00 per hour for his work on the Project and that he had not been paid overtime for work over eight hours per day. He was paid through a combination of cash and checks. Cinray's CPRs report that Tupou was classified as a Laborer Group 1 and was paid $40.47 per hour for his work on the Project. The applicable prevailing wage rate for Laborer Group 1 was $41.10 per hour through June 28, 2009, and $42.90 per hour for the remainder of the Project. None of the affected workers testified at the hearing.

DLSE issued the Assessment on April 19, 2010. The Assessment found that Cinray had failed to pay the required prevailing wages to 15 workers in the total amount of $65,605.29, including $551.03 in unpaid training fund contributions. Because there was no evidence that the payroll checks Cinray produced for six of the workers had ever been cashed, DLSE did not give Cinray any credit for those payments in its audit. Penalties were assessed under section 1775 at the maximum rate of $50.00 per violation for 200 total violations totaling $10,000.00. DLSE determined that the $50.00 per violation rate was warranted by its findings that Cinray had intentionally failed to report four workers on its CPRs and had failed to submit valid documentation of payment for any of its workers. In addition, penalties were assessed under section 1813 for 25 overtime violations, at the statutory rate of $25.00 per violation, totaling $625.00.

Tagle made a blanket denial that any overtime had been worked on the Project, testifying that work hours on the Project were from 8:00 a.m. to 4:00 or 4:30 p.m. each day because he was required to stop work no later than 4:30 p.m. to avoid inconvenience to the residents living near the Project work site. He did not, however, give specific testimony or provide any other

evidence regarding the five days on which the inspection reports record work in excess of eight hours by Cinray workers. Tagle testified that he had paid his workers the base hourly rate without fringe benefits. He admitted that he had not paid the required fringe benefits or made training fund contributions because he did not believe that he was required to do so for probationary employees. Tagle admitted that Contreras and Bera had worked on the Project; Contreras had only worked for half of one day and had been sent home. He could not explain why Contreras was reported in the inspection reports as working for 109 hours over 13 days, including seven hours of overtime. Tagle testified that Bera and Leyva, that latter of whom was reported on Cinray's CPRs, were the same person. He did not explain why the 100 hours that the inspection reports recorded Bera working as a Cement Mason on the Project were not reported under either name on Cinray's CPRs. He neither admitted nor denied the accuracy of the Assessment with regard to Schneider and Flores, the two Laborers reported as working for Cinray on the inspection reports but not on Cinray's CPRs.

Tagle insisted that he had paid the affected workers everything the workers were owed. His practice was to advance the workers cash over the course of the week. At the end of each week, he would write each worker a check for the net amount of the worker's pay after deductions. Because the worker would already have received at least that amount as cash advances, the worker would endorse and date the check and return it to Tagle rather than depositing it in the bank. Tagle only produced checks for six of the 15 affected workers and did not produce any records of the purported cash advances.

DISCUSSION

Sections 1720 and following set forth a scheme for determining and requiring the payment of prevailing wages to workers employed on public works construction projects. Specifically:

> The overall purpose of the prevailing wage law . . . is to benefit and protect employees on public works projects. This general objective subsumes within it a number of specific goals: to protect employees from substandard wages that might be paid if contractors could recruit labor from distant cheap-labor areas; to permit union contractors to compete with nonunion contractors; to benefit the

> public through the superior efficiency of well-paid employees; and to compensate nonpublic employees with higher wages for the absence of job security and employment benefits enjoyed by public employees.

(*Lusardi Construction Co. v. Aubry* (1992) 1 Cal.4th 976, 987 [*citations omitted*] ("*Lusardi*").) DLSE enforces prevailing wage requirements not only for the benefit of workers but also "to protect employers who comply with the law from those who attempt to gain competitive advantage at the expense of their workers by failing to comply with minimum labor standards." (§ 90.5, subd. (a), and *see Lusardi, supra.*)

Section 1775, subdivision (a) requires, among other things, that contractors and subcontractors pay the difference to workers who were paid less than the prevailing wage rate, and prescribes penalties for failing to pay the prevailing wage rate. Section 1742.1, subdivision (a) provides for the imposition of liquidated damages, essentially a doubling of the unpaid wages, if those wages are not paid within sixty days following service of a Civil Wage and Penalty Assessment under section 1741.

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

Cinray Has Failed To Prove That The Basis Of The Assessment Is Incorrect.

Consideration of the record as a whole shows that Cinray has failed to carry its burden of proving that the basis of the Assessment was incorrect on the issues of whether Cinray failed to report work performed by four of the affected workers on its CPRs and has failed to pay any of the affected workers the required prevailing wages.

Tagle admits that Contreras and Bera performed cement work on the Project that was not reported on Cinray's CPRs, that Cinray failed to pay the required fringe benefits or training fund contributions for any of its workers and that Cinray failed to implement the predetermined

increase under the Laborer PWD that took effect during the Project. These admissions, in conjunction with the City's daily inspection reports and Tupou's affidavit under penalty of perjury contradicting the hourly rate reported for his work on Cinray's CPRs and stating that he had not been paid for overtime work on the Project, establish that Cinray's CPRs for the Project are incomplete and inaccurate.

When an employer fails to maintain accurate time records, a claim for wages may be sustained based on credible estimates from other sources. (*Anderson* v. *Mt. Clemens Pottery Co.* (1945) 328 U.S. 680, 687-88; *Hernandez* v. *Mendoza* (1988) 199 Cal.App.3d 721,726-7.) In the absence of any contemporaneous time records from Cinray, the City's daily inspection reports that were prepared by the City's inspector documenting each day of work on the Project provide the only reliable record of the days and hours worked on the Project by the affected workers.

The inspection reports establish that work was performed on the Project by four workers who were not reported on Cinray's CPRs. Tagle admits that cement work was performed on the Project by Bera and Contreras, though he denies that Contreras worked more than half of one day, and he neither affirmed nor denied that work was performed on the Project by Schneider and Flores as Laborers. Tagle stated that Cinray had no time records other than its CPRs for the Project and told Kaiser in the course of her investigations that he could not remember specifics, such as who had performed cement work on the Project, without such records.

With regard to overtime work, the inspection reports establish that ten of the affected workers worked in excess of eight hours per day on one of more days of work on the Project, recording ten hour work days on four days, and nine hours on one day, when concrete was poured on the Project. Tagle made only a blanket denial that any overtime was worked on the Project without any reference to the specific days of work for which the inspection reports recorded overtime work.

Cinray has likewise failed to disprove the Assessment's finding that it failed to pay to the affected workers for their work on the Project. While Tagle insists that he paid the affected workers at least the base hourly rate required for their work in cash, Cinray only produced endorsed but uncancelled checks for six of the 15 affected workers and has produced no concrete

documentation that any of the affected workers received any pay for their work on the Project.

For the above reasons, Cinray has failed to carry its burden of proving that the basis of the Assessment is incorrect. The assessed unpaid wages are therefore affirmed in their entirety.

DLSE's Penalty Assessment Under Section 1775 Is Appropriate.

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

> (1) The contractor and any subcontractor under the contractor shall, as a penalty to the state or political subdivision on whose behalf the contract is made or awarded, forfeit not more than fifty dollars ($50) for each calendar day, or portion thereof, for each worker paid less than the prevailing wage rates as determined by the director for the work or craft in which the worker is employed for any public work done under the contract by the contractor or, except as provided in subdivision (b), by any subcontractor under the contractor.
>
> (2)(A) The amount of the penalty shall be determined by the Labor Commissioner based on consideration of both of the following:
>
> (i) Whether the failure of the contractor or subcontractor to pay the correct rate of per diem wages was a good faith mistake and, if so, the error was promptly and voluntarily corrected when brought to the attention of the contractor or subcontractor.
>
> (ii) Whether the contractor or subcontractor has a prior record of failing to meet its prevailing wage obligations.
>
> (B)(i) The penalty may not be less than ten dollars ($10) . . . unless the failure of the . . . subcontractor to pay the correct rate of per diem wages was a good faith mistake and, if so, the error was promptly and voluntarily corrected when brought to the attention of the . . . subcontractor.
>
> (ii) The penalty may not be less than twenty dollars ($20) . . . if the . . . subcontractor has been assessed penalties within the previous three years for failing to meet its prevailing wage obligations on a separate contract, unless those penalties were subsequently withdrawn or overturned.
>
> (iii) The penalty may not be less than thirty dollars ($30) . . . if the Labor Commissioner determines that the violation was willful, as defined in subdivision

(c) of Section 1777.1.[3]

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 Civ. Proc. § 1094.5, subd. (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, 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)].)

In this case, substantial evidence establishes that Cinray knowingly failed to pay the required prevailing wages to all of its workers and failed to report or pay any of the hours worked by the four workers who were not listed on Cinray's CPRs. Moreover, Cinray admits that it failed to pay the fringe benefits and training fund contributions required by the applicable PWDs and failed to implement the predetermined increase for Laborers that went into effect on June 29, 2009.

Section 1775, subdivision (a)(2) grants the Labor Commissioner the discretion to mitigate the statutory maximum penalty per day in light of prescribed factors, but it does not mandate mitigation in all cases. The Director is not free to substitute his own judgment. Cinray has not shown an abuse of discretion and, accordingly, the assessment of penalties at the maximum rate of $50.00 is affirmed for 200 violations.

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[3] 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."

Overtime Penalties Are Due For The Workers Who Were Underpaid For Overtime Hours Worked On The Project.

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 ... contractor ... for each calendar day during which the worker is required or permitted to work more than 8 hours in any one calendar day and 40 hours in any one calendar week in violation of the provisions of this article." ...

Section 1815 states in full as follows:

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

The record establishes that Cinray violated section 1815 by failing to pay the required prevailing overtime wage rate to ten of the affected workers for hours they worked in excess of eight hours per day; a total of 25 violations. Unlike section 1775 above, section 1813 does not give DLSE any discretion to reduce the amount of the penalty, nor does it give the Director any authority to limit or waive the penalty. Accordingly, the assessment of penalties under section 1813, as assessed, is affirmed.

Cinray Is Liable For Liquidated Damages.

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

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

Additionally, if the contractor or subcontractor demonstrates to the satisfaction of the director that he or she had substantial grounds for appealing the assessment . .

. with respect to a portion of the unpaid wages covered by the assessment . . . , the director may exercise his or her discretion to waive payment of the liquidated damages with respect to that portion of the unpaid wages.

Absent waiver by the Director, Cinray is liable for liquidated damages in an amount equal to any wages that remained unpaid 60 days following service of the Assessment. Entitlement to a waiver of liquidated damages in this case is closely tied to Cinray's position on the merits and specifically whether there were substantial grounds for appealing the Assessment. The parties stipulate that no portion of the unpaid wages were paid within 60 days following service of the Assessment.

As discussed above, Cinray's arguments on the merits are unsupported by either the law or the facts of this case. Such arguments cannot be found to constitute substantial grounds for appealing the Assessment. Because the unpaid prevailing wages remained due more than sixty days after service of the Assessment, and Cinray has not demonstrated grounds for waiver, Cinray is liable for liquidated damages under Labor Code section 1742.1, subdivision (a) in the amount of $65,054.26.

FINDINGS

1. Affected contractor Cinray Construction filed a timely Request for Review from a Civil Wage and Penalty Assessment issued by the Division of Labor Standards Enforcement.

2. Unpaid prevailing wages are due in the amount of $65,054.26.

3. Unpaid training fund contributions are due in the amount of $551.03.

4. In light of Findings 2 and 3, above, Cinray underpaid its employees on the Contract in the aggregate amount of $65,605.29.

5. DLSE did not abuse its discretion in setting section 1775, subdivision (a) penalties at the maximum rate of $50 per violation, and the resulting total penalty of $10,000.00 for 200 violations is affirmed.

6. Penalties under section 1813 are due in the amount of $625.00 for 25 violations.

7. The unpaid wages found due in Finding No. 4 remained due and owing more than sixty days following issuance of the Assessment. Cinray is therefore liable for an additional award of liquidated damages under section 1742.1 in the amount of $65,054.26, and there are no grounds to waive payment of these damages.

8. The amounts found remaining due in the Assessment as affirmed by this Decision are as follows:

Wages Due:	$65,054.26
Training Fund Contributions Due:	$551.03
Penalties under section 1775, subdivision (a):	$10,000.00
Penalties under section 1813:	$625.00
Liquidated damages:	$65,054.26
TOTAL:	**$141,284.55**

Interest shall accrue on all unpaid wages in accordance with section 1741, subdivision (b).

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

Dated: May 4, 2011

Christine Baker

Christine Baker
Acting Director of Industrial Relations